

Farah and its progeny: comity among intermediate appellate courts*

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*This paper explores the complexities associated with the statements in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 and subsequent decisions about when intermediate appellate courts should depart from each others' decisions on "common law". First, it considers aspects of the notion of there being a "single" "common law" of Australia. Secondly, it collects and considers the passages in *Farah* and subsequent decisions bearing on the question. Thirdly, it identifies occasions when the principles in *Farah* do not apply. Its conclusion is that what was said in *Farah* may not add much to traditional considerations of comity within the Australian legal system.*

Introduction

The following two passages are well-known. First, in *Australian Securities Commission v Marlborough Gold Mines Ltd*,¹ a unanimous High Court said:

Although the considerations applying are somewhat different from those applying in the case of Commonwealth legislation, uniformity of decision in the interpretation of uniform national legislation such as the Law is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.²

Secondly, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,³ another unanimous High Court said:

Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national

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1 (1993) 177 CLR 485.

2 *ibid* at 492.

3 (2007) 230 CLR 89.

legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.⁴ [citations omitted]

Farah's expressly syllogistic reasoning might, on its face, represent an expansion of the operation of *Marlborough Gold Mines* comity, a natural incremental development following the recognition that, by reason of the general grant of appellate jurisdiction in s 73 of the Constitution, there was a "single common law" in Australia⁵ (in contrast to the position in North America).⁶ That is not so. The reasons why are complex. The principal point of this paper is to draw out those complexities (see the final section below). The paper begins by addressing three preliminary matters and then collects the decisions of the High Court subsequent to *Farah* which bear on the issue.

Three aspects of a "single" "common law" of Australia

That there is a single common law of Australia is settled law. That is not to say that its operation for practical purposes is identical throughout Australia. Nor is it a necessary consequence of appeals to the High Court lying from all Australian courts (in contrast to the position in the US). More subtly, it is important to appreciate what is meant in this context by "common law". Each of these matters is elaborated below.

Divergent operation of the common law in practice

First, accepting as one must that there is a single common law of Australia, it is an ideal not always reflected in the practical operation of litigation (and, therefore, legal advice). As McHugh J observed in *Kable v DPP (NSW)*,⁷

4 *ibid* at [135].

5 Notably, by *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 and *Lipohar v The Queen* (1999) 200 CLR 485 at [50]. In *Re Wakim; ex p McNally* (1999) 198 CLR 511 at [110], Gummow and Hayne JJ said that what was meant by there being an "integrated" or "unified" judicial system in Australia, "is that all avenues of appeal lead ultimately to this Court and there is a single common law throughout the country. This Court, as the final appellate court for the country, is the means by which that unity in the common law is ensured".

6 In the US, there is, as is well known, a separate common law of each State, and "enclaves" of federal common law. In Canada, putting to one side the civil law, there is said to be a single common law of Canada despite the different modes of its reception in different provinces. However, there are suggestions that there is a federal common law (see eg *Bisailon v Keable* [1983] 2 SCR 60 at 108). See M Leeming, "Common law within three federations" (2007) 18(3) *PLR* 186.

7 (1996) 189 CLR 51 at 112.

divergent decisions by intermediate appellate courts create, at the practical level, divergent common law principles throughout different Australian States and Territories.

One example is the test for so-called second limb *Barnes v Addy*⁸ liability, which is mentioned in the final section below. Another is the question whether a former solicitor owes a duty of loyalty to his or her former client, breach of which sustains an injunction preventing him or her from acting against the former client. In Victoria there has been held to be such a duty, in NSW such a duty has been denied.⁹ It is quite difficult, in practical terms, to contemplate when a case will arise that could reach the High Court to resolve the divergence.

The importance of statute within the modern Australian legal system has meant that most divergence at the intermediate appellate court level has occurred on the construction of federal or uniform State legislation, in particular, the law of evidence in its application to criminal trials.¹⁰ I will return below to the significance of the fact that these disputes tend to arise, to use Dixon J's words, not as a matter of substantive law, but "part of the law adjective",¹¹ in areas which are, arguably, not part of the "common law" for the purposes of *Farah*.

The short point is that whenever one intermediate court of appeal accedes to a submission to depart from a decision of another intermediate court of appeal, the applicable law at first instance, at the practical level of binding precedent, will be different. Thus, at present, a first instance judge in Western Australia is presently bound to apply a wider notion of *Barnes v Addy* liability than

8 (1874) 9 LR Ch App 244.

9 The authorities are reviewed in *Watson v Ebsworth & Ebsworth* (2010) 31 VR 123 at [149]–[150] ("It would seem that the 'divergence' referred to by Brooking JA can now be found in the Australian cases as well ...") and *Ismail-Zai v WA* (2007) 34 WAR 379 at [20]–[23] ("There is conflicting authority concerning the question whether a duty of loyalty survives the termination of the retainer ...").

10 One is the dispute between *R v Shamouil* (2006) 66 NSWLR 228 and its progeny, on the one hand, which a five-member Victorian Court of Appeal regarded in *Dupas v R* (2012) 218 A Crim R 507 as manifestly wrong and not to be followed, which led last year to the analyses in *R v XY* (2013) 84 NSWLR 363. Another is the dispute best identified by the decisions of *Velkoski v R* [2014] VSCA 121 at [34] ("Currently there are undoubted differences between the decisions of this Court and the New South Wales Court of Criminal Appeal as to whether similarity of features need be present in order for evidence to be admissible as tendency evidence") and touched on in *Saoud v R* [2014] NSWCCA 136, where it was not necessary to deal with the issue. The foregoing is not intended to be exhaustive.

11 *Wright v Wright* (1948) 77 CLR 191 at 211.

his or her counterpart in NSW.¹² None of this is to gainsay the importance of the notion of a single common law of Australia as an element in legal reasoning.¹³ Nevertheless, here too it is important to observe that “there is no general requirement in the Constitution that a federal law such as s 80 of the *Judiciary Act* have a uniform operation throughout the Commonwealth”¹⁴ and that “s 118 of the Constitution does not require certainty and uniformity of legal outcomes in federal jurisdiction or otherwise”.¹⁵

Divergent common law in the British Commonwealth

Secondly, the recognition of a “single common law” of Australia is, as it happens, a very recent development. Although plainly it is the position today, it was not an inevitable development.¹⁶ When appeals lay as of right to the Privy Council, there was the possibility for a much tighter control over the development of the common law throughout the British Empire and Commonwealth. But even so, there was not a *single* common law, in the sense that now obtains throughout Australia.

A revealing example is *Australian Consolidated Press Ltd v Uren*.¹⁷ Lord Morris, giving the advice of the Privy Council, referred to the divergent common laws in jurisdictions all of which were subject to an appeal to it: “in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling”.¹⁸ A measure of deference and discretion was thereby *expressly* given to Australian law, even if it diverged from the position in England, at least in some areas. The question was not whether the principle of law was right or wrong, but whether it was within the legitimate leeways of choice open to a national court *notwithstanding the presence of an appeal as of right*. The advice concluded:

12 Compare *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 with *Hasler v Singtel Optus Pty Ltd* (2014) 311 ALR 494, considered in the final section of this paper.

13 Primarily by the High Court: eg, in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [15] and *CSR Ltd v Eddy* (2005) 226 CLR 1 at [54].

14 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [20], and the decisions cited there.

15 *ibid*.

16 As has been shown by L.J. Priestley, “A federal common law in Australia?” (1995) 6(3) *PLR* 221. See also Callinan J’s reasons in *Lipohar v The Queen* (1999) 200 CLR 485 at [231]–[261].

17 (1967) 117 CLR 221, which may be seen as the Privy Council’s response to (and acceptance of) the separation of English and Australian common law announced in *Parker v The Queen* (1963) 111 CLR 610 at 632–633.

18 *ibid* at 238.

The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning, or had it been founded upon misconceptions, it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision, and where its policy in a particular country is fashioned so largely by judicial opinion, it became a question for the High Court to decide whether the decision in *Rookes v Barnard* [1964] AC 1129 compelled a change in what was a well-settled judicial approach in the law of libel in Australia. *Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.* Accordingly their Lordships will humbly advise Her Majesty that the appeal be dismissed.¹⁹ [emphasis added]

The double negative and the similarity with detecting *House v The King*²⁰ error in the exercise of a discretion in the passage emphasised above will be noted, as will the contrast with the approach adopted more recently by the High Court.

Common law and its relationship with statute

Thirdly, it is useful immediately to say something about “common law” and the different modes of reasoning in the Privy Council and in the High Court from which the appeal in *Uren* was brought. As may be seen from the passage reproduced above, the Privy Council referred to “the law of libel in Australia”, and the whole of Lord Morris’ advice was couched in the language of generality: are exemplary damages available outside the categories identified in *Rookes v Barnard*?

The reasons of Windeyer J in the High Court²¹ engage with a radically different conception of “the law of libel in Australia”. He noted three things. First, that the law of defamation in four States including NSW, but not in Victoria and South Australia, had been codified. Secondly, that in NSW, since 1847, the distinction between slander and libel had for most purposes been abolished (reflecting the adoption by the colonial legislature of the whole

19 *ibid* at 241.

20 (1936) 55 CLR 599.

21 One of the five separate judgments delivered in *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185.

of Lord Campbell's proposal for reform, only partly enacted in England as Lord Campbell's Libel Act 1843).²² Thirdly, when it came to the defence of qualified privilege in s 17 of the 1958 NSW Act, this too had been codified, albeit with some changes ("a few verbal alterations"²³) from Griffith's 1889 Queensland law; as it happens, those "verbal alterations" were central to one issue in the appeal.²⁴

It was in those circumstances that Windeyer J came to say:

The questions that arise are peculiar to New South Wales and those States which inherited the law of New South Wales (as Queensland did) and did not alter it (as Victoria did), or which have adopted a similar rule (as Western Australia and Tasmania have). They are not questions that can be answered by the application of common-law rules.²⁵

When dealing with qualified privilege (and the reliance on a "verbal alteration" from the Queensland statute), Windeyer J said:

First: section 17(h) has no direct common-law ancestor, although its several phrases recall various statements of common-law principle. It is not a statutory counterpart of the common-law defence of fair comment.²⁶

22 (1966) 117 CLR 185 at 204.

23 *ibid* at 206.

24 *ibid* at 206–208. All this was said against the backdrop that this was an appeal from a trial of an action before a jury on issues identified by a plaintiff's replication. The dispute arose because, immediately after Evatt QC's opening, Larkins QC (for the publisher) complained that the opening had gone beyond the issues raised by the pleadings and asked for the jury to be discharged. This was (yet another) occasion where a NSW common law appeal required the Privy Council to resort to the third edition of *Bullen & Leake* in order to understand a mode of procedure which had been replaced in England 90 years previously by the amended rules contained in the Schedule to the *Judicature Act 1875* and their successors. See Lord Diplock's complaint in *Mutual Life and Citizens' Assurance Company Limited v Evatt* (1970) 122 CLR 628 at 629 ("New South Wales still preserves the system of pleading current in England a hundred years ago between the passing of the *Common Law Procedure Acts, 1852–1862* and the passing of the *Judicature Act, 1875*, and expounded in the famous third edition of *Bullen & Leake Precedents of Pleading*"). A similar complaint was made by Griffith CJ in *Turner v NSW Mont de Piete Deposit & Investment Co Ltd* (1910) 10 CLR 539 at 541 ("The defendants' case rests upon some supposed ancient technicalities of the law, which are said still to linger in New South Wales, after they have been abolished in, I believe, all the rest of His Majesty's dominions").

25 (1966) 117 CLR 185 at 205.

26 *ibid* at 207.

It is, perhaps, ironic that it was another NSW defamation action in which a defence of qualified privilege was propounded, *Lange v Australian Broadcasting Corporation*,²⁷ in which the strong notion of a *single* common law of Australia was first²⁸ formulated. Even there, the court observed that:

[T]he critical question in the present case is whether the common law of defamation as it has traditionally been understood, and the *New South Wales law of defamation in its statutory form*, are reasonably appropriate and adapted to serving the legitimate end of protecting personal reputation without unnecessarily or unreasonably impairing the freedom of communication about government and political matters protected by the Constitution.²⁹ [emphasis added]

Of course, it remains possible to ask whether, subject to any statutory abrogation or modification, “the common law” admits of exemplary damages for a particular tort. However, asking such a narrow question runs the risk of overlooking or under-appreciating the importance of the historical nature of “common law” and the influence of statute, to which I return in the final section below. Much the same point was made by Windeyer J in *Gammage v The Queen*:³⁰ “[I]t is misleading to speak glibly of the common law in order to compare and contrast it with a statute”.³¹

High Court decisions after Farah

The burden of this paper is that applying the principles of comity or precedent (if that is what they are) stated in *Farah* is less straightforward than might appear. To explain why, it is necessary to turn to what the High Court has itself said about the issue.

27 (1997) 189 CLR 520.

28 In *Mabo v Qld (No 2)* (1992) 175 CLR 1 at 15, all members of the court associated themselves with the statement that “the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland”. In *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 there are references to the common law of Australia not recognising a privilege against self-incrimination claimable by a corporation (at 508, 543 and 556). Those statements appear to fall short of a proposition that there is a single (and uniform) common law throughout Australia, something which was stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563 (“There is but one common law in Australia”), and relied on in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [15].

29 (1997) 189 CLR 520 at 568.

30 (1969) 122 CLR 444.

31 *ibid* at 462.

Farah was decided in 2007. In 2008, 2009 and 2010, the High Court returned to the subject, and, at least arguably, did so with different emphases. The High Court touched on the question in 2011 and 2012 as well. For the purposes of this paper, the most important decisions are those in 2008 and 2009: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*³² and *CAL No 14 v Motor Accidents Insurance Board*.³³

Marshall v Director-General, Department of Transport

In order to explain what the High Court has said, the starting point is McHugh J's judgment in *Marshall v Director-General, Department of Transport*,³⁴ which preceded *Farah*. McHugh J had said of identically-worded terms in cognate State legislation:

But that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on *similar or identical legislation in other jurisdictions* are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.³⁵ [emphasis added]

The context in which McHugh J wrote was the meaning in compulsory land acquisition legislation of "injuriously affecting", which precise words (or their cognates) had appeared in English, colonial and State legislation deriving from the *Land Clauses Consolidation Act 1845* (UK).

Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority

That passage from *Marshall* was applied with evident approval by a unanimous court, after *Farah*, in another valuation case, *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*.³⁶ In the preceding paragraphs,

32 (2008) 233 CLR 259.

33 (2009) 239 CLR 390.

34 (2001) 205 CLR 603.

35 *ibid* at [62].

36 (2008) 233 CLR 259 at [31].

reference had been made to “common law” in the sense of “a body of case law which may be built up in various jurisdictions where there are in force statutes in the same terms or, at least, in relevantly similar terms”.³⁷ Since 1845, such legislation had turned on “the value of land”, but had been subject to a series of judicial glosses.³⁸ That was “the body of case law” which in turn was reflected (following a series of inquiries and law reform commission reports) in the current *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) considered in *Walker Corporation*.

How should *Farah* and *Walker Corporation* be reconciled? One possibility is that “not slavishly follow” is merely the converse of what was said in *Farah* as to being convinced of plain error. Another, which I think more fairly reflects the change in emphasis and recognises the varying denotation of the term “common law”, is that where (as was the case in *Walker Corporation*) “common law” is more directly seen to be the product of the construction of colonial and State statutes, then a lesser measure of deference than was stated in *Farah* applies.

CAL No 14 Pty Ltd v Motor Accidents Insurance Board

That analysis is made problematic by the High Court’s decision the following year in *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*. The question was whether a proprietor or licensee of a hotel owed a duty to take reasonable care to prevent an intoxicated patron from riding a motorcycle as he left. The matter arose before the *Civil Liability Act 2002* (Tas) came into force. The NSW Court of Appeal had held that there could be no such duty, save in exceptional circumstances.³⁹ An appeal had been dismissed, but in circumstances which fell well short of creating a binding precedent: the six-member court divided evenly three ways: Gleeson CJ and Callinan J affirmed the proposition,⁴⁰ McHugh and Kirby JJ denied it,⁴¹ and Gummow and Hayne JJ declined to decide it.⁴² On its face, that is an unlikely occasion for an important decision on the deference to be given to intermediate appellate courts.

37 *ibid* at [30].

38 Initially, regarding it as meaning “the value to the owner”, and then including concepts such as severance and disturbance.

39 *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113.

40 *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at [17]–[18] and [131].

41 *ibid* at [32] and [93].

42 *ibid* at [73].

The High Court in *CAL No 14* was critical of the approach taken by the majority of the Full Court of the Supreme Court of Tasmania when dealing with the same issue. The joint judgment of Gummow, Heydon and Crennan JJ expressly referred to the difficulties of accommodating a duty of care with the statutory regime, the *Liquor and Accommodation Act 1990* (Tas). Their Honours observed that:

As this case is dealing with the common law of negligence across Australia, not just in Tasmania, it should be noted that all jurisdictions have legislation raising similar problems of legal coherence to those which are raised by the Tasmanian legislation.⁴³

Gummow, Heydon and Crennan JJ said, in a passage with which French CJ and Hayne J expressly agreed:

In contrast, the Full Court majority did not say whether it thought the decision of the New South Wales Court of Appeal in *Cole's* case was plainly wrong, but it did not follow it. It distinguished it. This was a legitimate course to take, and consistent with the New South Wales Court of Appeal's approach, if the Full Court majority regarded the present case as "exceptional" ... The Full Court majority did not in terms describe the case as exceptional. Unless the Full Court majority had concluded, giving reasons, either that the present case was exceptional, or that the New South Wales Court of Appeal was plainly wrong, it was its duty to follow the New South Wales Court of Appeal. The Full Court majority did not conclude that the present case was exceptional or that the New South Wales Court of Appeal was plainly wrong. Hence it did not carry out its duty to follow the New South Wales Court of Appeal. If these appeals had not been brought, there would have been an undesirable disconformity between the view of the New South Wales Court of Appeal as to the common law of Australia and the view of the Tasmanian Full Court majority. At best the Full Court decision would have generated confusion. At worst it would have encouraged the commencement of baseless and ultimately doomed litigation, to the detriment both of the unsuccessful plaintiffs and of the wrongly vexed defendants.⁴⁴ [citations omitted]

The business conducted by the defendants was as heavily regulated by statute as any. However, in contrast to the position in *Uren and Walker Corporation*, there was and is a degree of commonality in the statutory regimes, as was noted.⁴⁵ Further, French CJ limited his concurrence to the particular facts, noting that: "The resolution of these questions in future will be likely to require consideration of the liquor licensing laws and the civil liability statutes of the relevant State or Territory".⁴⁶

43 (2009) 239 CLR 390 at [41].

44 *ibid* at [51].

45 *ibid* at [41].

46 *ibid* at [1].

The trio of decisions *Farah*, *Walker Corporation* and *CAL No 14* therefore reflect the varying nature of what may be called “common law”. The first concerns an area relatively unaffected by statute; the second concerns an area with a long history of statutory regulation and common law exegesis, while the third concerns the application of common law principles of liability in an area heavily regulated by statute. It may come as no great surprise that a principle based on the proposition that there is a “single common law” throughout Australia is worked out differently in each of those three circumstances.

Subsequent decisions

The remaining decisions of the High Court may be addressed more concisely. In *Hili v The Queen*,⁴⁷ six members of the High Court applied these principles to federal sentencing,⁴⁸ attracting a dissent from Heydon J who saw the majority’s reasoning as conflating the identification of legal principle (which attracted precedential deference) and the discretionary judgments as to the facts inevitable in every sentencing appeal (which do not).⁴⁹ In *Green*

47 (2010) 242 CLR 520.

48 *ibid* at [57] (“In dealing with appeals against sentences passed on federal offenders, whether the appeal is brought by the offender or by the prosecution, the need for consistency of decision throughout Australia is self-evident. It is plain, of course, that intermediate courts of appeal should not depart from an interpretation placed on Commonwealth legislation by another Australian intermediate appellate court, unless convinced that that interpretation is plainly wrong. So, too, in considering the sufficiency of sentences passed on federal offenders at first instance, intermediate appellate courts should not depart from what is decided by other Australian intermediate appellate courts, unless convinced that the decision is plainly wrong” [citation omitted]).

49 *ibid* at [78] (“[T]wo courts may arrive at different sentences because the later court considers the first to have erred, not in relation to the identification of legal principle, but in relation to factual reasoning or in relation to the exercise of discretionary judgment. It is open to a later court (whether an intermediate appellate court or a trial court) to depart from the sentencing conclusion of an earlier intermediate appellate court or trial court even though the circumstances seem indistinguishable. It is open for the later court to do this simply because the later court thinks that the earlier court erred in fact: in that event the circumstances become distinguishable. It is also open for the later court to do this merely because it thinks the earlier court erred in the exercise of discretionary judgment — that is, arrived at a sentence which the later court, accepting the correctness of the legal principles stated, the facts found and the considerations taken or not taken into account by the earlier court, considers nonetheless to be too high or too low. The later court’s liberty to differ from the sentencing conclusion reached by the earlier court does not exist only where it thinks the earlier court to be plainly wrong. It exists where the later court thinks the earlier court’s conclusion to be merely wrong. Indeed it exists even where the later court does not think the earlier court’s conclusion to be ‘wrong’, but just disagrees with it. The liberty of the later court continues even if more than one earlier court has reached a conclusion with which the later court disagrees. Even after a court carrying out the difficult obligation of sentencing has identified the correct legal principles, found the facts correctly, taken into account all relevant considerations and excluded all irrelevant considerations, the court is left with a field in which to exercise a discretionary judgment”).

and *Quinn v The Queen*,⁵⁰ Heydon J considered the related question, when should an intermediate appellate court revisit its own decisions, and limited the application of *Farah*.⁵¹ Finally, the principle has been mentioned (but not discussed) in relation to State legislation deriving from the *Law Reform (Married Women and Tortfeasors) Act 1935* (UK) in place in NSW, Queensland, Western Australia and the Northern Territory (and not elsewhere) in *Newcrest Mining Limited v Thornton*.⁵² A consideration of the consequences of these more recent decisions is beyond the scope of this paper.

Four aspects of *Farah* deference

For present purposes I put to one side the important issue (raised in discussion after this paper was presented) of the nature of the rule stated by the High Court in *Marlborough Gold Mines* that a judge ought to apply a construction of a federal law which he or she considers to be wrong, so long as he or she falls short of being convinced that it is clearly wrong. The present focus is on the consequences of the working out of the syllogistic reasoning in *Farah*, one of whose premises is the rule in *Marlborough Gold Mines* applying such a process to the “common law”.

I also put to one side the question that arises when an intermediate appellate court is asked to overrule one of its *own* decisions. On any view of the matter, that is something that will, at least in part, turn on the particular circumstances of the court, any practice notes or practice decisions which have issued, and important distinctions between the position in Australia

50 (2011) 244 CLR 462.

51 *ibid* at [87] (“In *Attorney-General (St Christopher, Nevis and Anguilla) v Reynolds* Lord Salmon repeated his contention in *Gallie v Lee* that what an ultimate appellate court says about the rules of precedent which an intermediate appellate court applies in relation to its own prior decisions can only be ‘of persuasive authority’ (ie *obiter dicta*). That is because the point could never come before the ultimate appellate court as a material issue for decision. The material issue for decision would be the correctness in fact or law of the intermediate appellate court’s order. On that question the ultimate appellate court would be free to depart from the intermediate appellate court’s view whether or not the intermediate appellate court had correctly applied the rules of precedent governing it. Even if Lord Salmon is correct, a perception by an ultimate appellate court that an intermediate court had erred in applying the rules of precedent would be a ready passport to the grant of leave to appeal, or, in the case of Australia, special leave. Further, the rules of precedent in the Court of Criminal Appeal are not rules which rest only on authorities in that Court: they rest also on statements in this Court. The good sense of those rules is a matter which goes beyond the Court of Criminal Appeal itself” [citations omitted]).

52 (2012) 248 CLR 555 at [13] (French CJ) and [68] (Crennan and Kiefel JJ).

(where courts were never regarded as bound by their own decisions) and the UK. If what Heydon J said in *Green and Quinn* is right,⁵³ it is ultimately a matter for that court, and there is no reason why each intermediate appellate court should adopt the same approach (or indeed why, say, in NSW, the Court of Appeal and the Court of Criminal Appeal should adopt the same approach, or, indeed, that the same approach ought to be adopted in all classes of case).

Farah as explained by CAL No 14

The High Court has said, unequivocally, that it is wrong to regard *Farah* as an expansion of *Malborough Gold Mines*. In *CAL No 14*, Gummow, Heydon and Crennan JJ said:

It was said by the New South Wales Court of Appeal in *Gett v Tabet* that *Farah Constructions* “expanded” the principle applied to the construction of national legislation and explained in *Australian Securities Commission v Marlborough Gold Mines Ltd*. But that is not correct. The principle has been recognised in relation to decisions on the common law for a long time in numerous cases before the *Farah Constructions* case. It was also recognised in Blow J’s judgment in this very case. The principle simply reflects, for the operation of the common law of Australia within Australia, the approach which this Court took before 1986 in relation to English Court of Appeal and House of Lords decisions, as stated in *Wright v Wright*.⁵⁴ [citations omitted]

The passage in *Wright v Wright*⁵⁵ to which reference was made was a passage in the reasons of Dixon J:

For myself, I have in the past regarded it as better that this Court should conform to English decisions which we think have settled the general law in that jurisdiction than that we should be insistent on adhering to reasoning which we believe to be right but which will create diversity in the development of legal principle. Diversity in the development of the common law (using that expression not in the historical but in the very widest sense) seems to me to be an evil. Its avoidance is more desirable than a preservation here of what we regard as sounder principle.⁵⁶

53 It is consistent with *Nguyen v Nguyen* (1990) 169 CLR 265 at 251 and 268, and has attracted the support of K Mason, “The distinctiveness and independence of intermediate courts of appeal” (2012) 86(5) *ALJ* 308 at 322–324.

54 (2009) 239 CLR 390 at [50].

55 (1948) 77 CLR 191.

56 *ibid* at 210.

However, *Wright v Wright* is a case where the High Court chose *not* to follow the English Court of Appeal. The question was whether the High Court should follow the *ex tempore* decision in *Ginesi v Ginesi*⁵⁷ and require adultery to be proved to the criminal standard. Dixon J declined to do so, instead following *Briginshaw*⁵⁸ (as did two other members of the court),⁵⁹ and concluding:

On this occasion I am prepared to concur with the opinion that we ought to adhere to our own decision and not abandon it in favour of that of the Court of Appeal in *Ginesi v Ginesi* [1948] P 179.

...

Of late years English courts have from time to time dealt in almost an unconsidered fashion with the standard of persuasion in reference to issues in civil proceedings involving crime, fraud or moral turpitude, that is, without going back to earlier case law inconsistent with assertions that have been casually made. Needless to say the assertions have been made without a study of the learning collected in *Wigmore on Evidence*: cf *Helton v Allen* (1940) 63 CLR 691 at 713. A “full-dress” examination of the question would, I am sure, lead to some revision of the statements made in *Ginesi v Ginesi* [1948] P 179. Further, it is after all a matter of practice and procedure and not of substantive law, part of the law adjective.

Some other decision, more particularly of the House of Lords, may make it necessary for us to reconsider *Briginshaw v Briginshaw* (1938) 60 CLR 336, but I do not think *Ginesi v Ginesi* [1948] P 179 does so.⁶⁰

Four matters may be noted from this passage. First, it is a world away from the wartime unity reflected in Dixon’s address given in the US in “Sources of Legal Authority”:

[W]e treat it as the duty of all courts to recognize that it is one system which should receive a uniform interpretation and application, not only throughout Australia but in every jurisdiction of the British Commonwealth where the common law runs.⁶¹

57 [1948] P 179.

58 (1938) 60 CLR 336.

59 Latham CJ relied as well on the differences in statute between England and South Australia (at 203). Rich J too adhered to *Briginshaw*, but found that adultery had not been established on that standard. Only McTiernan J was prepared to follow the English Court of Appeal in preference to *Briginshaw*. The court being evenly divided, the wife’s appeal was dismissed.

60 (1948) 77 CLR 191 at 211.

61 In S Woinarski (ed), *Jesting Pilate*, Law Book Company Ltd, 1965, p 198 at p 199.

Secondly, the statement in *CAL No 14* confirming the equivalence of *Farah* and *Wright v Wright* and denying that there had been any expansion of principle therefore suggests that “convinced” that another court is “plainly wrong” takes the matter no further than was previously the case.

Thirdly, Dixon J’s statement about a lesser standard applying to adjectival law as opposed to substantive law is also of interest, since the unresolved conflicts between NSW and Victorian appellate courts seem most commonly to occur in the area of evidence (no differently from *Wright v Wright*). I would respectfully suggest there is scope for further analysis of these strands of reasoning, in a case where *Farah* deference is said to apply. Indeed, more important than the subject matter of the dispute determined by the other intermediate appellate court will be whether the court was unanimous or there was a dissent, and whether it has been followed by a body of first instance decisions or alternatively has been doubted or criticised subsequently or attracted a grant of special leave.⁶²

Finally, it is worth pausing to note the strength of Dixon J’s language criticising the English Court of Appeal, in particular the words “almost an unconsidered fashion” and “needless to say” and “I am sure” and “casually made”. To my eyes at least, it is stronger censorious language than appeared in *Farah* itself, a matter to which I return at the end of this paper. But it is plain that the underlying *concept* expressed by Dixon J was the same as that expressed in *Farah* by the language of being “convinced” that the decision was “plainly wrong”.

Where *Farah* does not apply at all

To the extent that the deference required by *Farah* as explained by *CAL No 14* reflects an approach going beyond ordinary principles of comity, then I suggest that it does not always apply where one intermediate appellate court is asked not to follow the decision of another. I give two examples (there may be others).

The first example is straightforward. Where a court is applying the law of another jurisdiction (because choice of law rules direct it to do so), then so far as I can see, questions of *Farah* deference have no application.⁶³

62 See *AB v NSW* [2014] NSWCA 243 at [13]–[16] and *Hasler v Singtel Optus Pty Ltd* (2014) 311 ALR 494.

63 A view also advanced in K Greenawalt, *Statutory and common law interpretation*, Oxford University Press, 2013, p 199.

For example, in *Ayres v Ollerenshaw*⁶⁴ the NSW Court of Appeal had to deal with a defendant's application for leave to appeal from the decision of the District Court extending time to sue for personal injury damages arising out of negligence in South Australia, where the plaintiff claimed to have been injured. It was common ground that s 48 of the *Limitation of Actions Act* 1936 (SA) applied, that there was a discretion to extend the three-year time limit imposed by that section, and that the discretion was only enlivened if the court was satisfied in elaborately defined circumstances,⁶⁵ markedly different from the extension of time provisions in NSW legislation.

Both NSW courts applied the construction of s 48 decided by the South Australian Full Court in *Ireland v Wightman*.⁶⁶ There was no question in *Ayres v Ollerenshaw* that the South Australian Full Court was wrong, let alone "clearly wrong". The point of mentioning the case is that I doubt that there *could* be circumstances where it was said that it was clearly wrong. Where a NSW court is applying South Australian statute as part of the *lex loci delicti*, it is very much to be doubted that any question of comity applies at all. This is a question of choice of law, and it would seem to follow that the choice of law rules directly make construction of the South Australian legislation applicable to, and binding on, the NSW court (the position resembles a US federal court applying State law).

The second example of cases where, in my opinion, *Farah* deference has no application are more common, and perhaps more controversial. It arises where the argument in an intermediate court of appeal is not couched in terms that that court itself alter the law, but to the effect that it should find that an existing decision of the High Court has already done so.

In *Farah* itself, the High Court reformulated some of the principles governing "second limb *Barnes v Addy* liability" — the species of liability formulated by Lord Selborne rendering third parties liable where there is knowledge of a "dishonest and fraudulent design". The Privy Council had reformulated that head of liability in *Royal Brunei Airlines Sdn Bhd v Tan*,⁶⁷ to the effect

64 [2014] NSWCA 320.

65 Namely, that "facts material to the plaintiff's case were not ascertained by him until some point of time occurring within twelve months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff": s 48(3)(b)(i). What amounted to a "material fact" is also elaborately defined.

66 (2014) 119 SASR 266.

67 [1995] 2 AC 378.

that “second limb” liability attached to *any* breach of fiduciary duty so long as the third party were objectively dishonest. In *Farah*, the High Court said that that was *not* the law of Australia, and that it was for the High Court and the High Court alone to determine whether that step should be taken.

Subsequently, in *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)*,⁶⁸ two members of a specially constituted Court of Appeal held that nevertheless the High Court in *Farah* had relaxed the test for “dishonest and fraudulent design”.⁶⁹ Importantly, this was *not* an intermediate court of appeal *itself* developing the law. This was an intermediate court of appeal *explaining* what it regarded *the High Court* as having done.

In *Hasler v Singtel Optus Pty Ltd*,⁷⁰ the respondent in the NSW Court of Appeal relied on *Bell*, the appellant said it was wrong, and the respondent invoked the syllogism in *Farah* reproduced at the beginning of this paper. That submission was rejected, including, relevantly for present purposes:

[C]ontrary to Optus’ submission, I do not consider that the passage in [135] of *Farah* applies to the reasoning in *Bell*. *Bell* did not identify a new principle of the common law of Australia. Instead, *Bell* concluded that when the High Court held that second limb *Barnes v Addy* liability required a breach which was a “dishonest and fraudulent design”, the High Court also held that those words bore a different meaning from what had previously been assumed. *Bell* held that it was “established” by *Farah* that a breach of fiduciary duty which is incapable of being excused is sufficient to answer the description of “dishonest and fraudulent”, and that the common law of Australia does not require the conduct of the fiduciary to be morally reprehensible.

This Court is bound by what the High Court said in *Farah* as to second limb *Barnes v Addy* liability. It is bound directly. Ultimately, it is bound by reason of s 73 of the Constitution. This Court is not bound indirectly by another court’s interpretation of what the High Court said. To paraphrase

68 (2012) 44 WAR 1.

69 *ibid* at [2112]–[2125]. “A trivial breach or a breach of trust or fiduciary duty of the kind that would be excusable under provisions such as s 75 of the *Trustees Act* and s 1318 of the *Corporations Act* will not be sufficient to show ‘dishonest and fraudulent’ conduct on the part of the trustee or fiduciary for the purposes of the second limb but that conduct by a trustee or fiduciary that involves a breach of duty more serious than that will be sufficient to constitute ‘dishonest and fraudulent’ conduct. The court in *Farah* cannot I think be understood as requiring behaviour on the part of the trustee or fiduciary so egregious as to be described as ‘morally reprehensible’, even if not criminally dishonest”: at [2123].

70 (2014) 311 ALR 494.

the words of McHugh J in *Marshall*, the primary guide to understanding the law as stated by the High Court is the language of that Court's reasons, and a judicial decision as to what those reasons mean is at best a guide to, but cannot control, the meaning of that language.

Naturally, considerations of comity require regard to be had to decisions of other Australian courts, especially intermediate appellate courts, in applying and developing the common law of Australia. But either *Farah* has changed the meaning of "dishonest and fraudulent design" in second limb *Barnes v Addy* liability or it has not. The fact that a majority of the Western Australian Court of Appeal considered that the phrase has been diluted by *Farah* does not absolve this Court from its obligation to apply the law which binds it as stated by the High Court.

In short, the decision of the Western Australian Court of Appeal as to the meaning to be attributed to the reasons of the High Court in *Farah* has a very different precedential status from a decision of the same court as to the meaning to be attributed to the words of a federal statute.⁷¹

A final suite of examples is even more notorious. Contrary to what has been held elsewhere, including in New Zealand,⁷² Australian courts have struggled with the role played by surrounding circumstances in the construction of a written commercial contract, and whether it is first necessary to identify "ambiguity" before resort is had to them. At the level of the High Court, there are:

- a series of decisions to the effect that it was necessary to have regard to context in the first instance⁷³
- a strongly worded statement when special leave was refused in *Western Export Services Inc v Jireh International Pty Ltd*⁷⁴ to the effect that it was necessary first to identify ambiguity
- a statement by a majority of the High Court in *Electricity Generation Corporation v Woodside Energy Ltd*⁷⁵ that the approach "will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract" [citations omitted; emphasis added].⁷⁶

71 *ibid* at [97]–[100] (the reasons are mine, with which Gleeson JA agreed).

72 In light of *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444.

73 Including *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8].

74 (2011) 86 ALJR 1.

75 (2014) 251 CLR 640.

76 *ibid* at [35].

The footnotes in *Woodside* referred to the series of decisions in the first bullet point above and to similar English authority, but did not mention *Jireh*. Yet the controversy was very well known.⁷⁷ The failure to be explicit gives rise to an important and recurring question: what is the rule applicable to the construction of a written commercial contract in the absence of ambiguity? Do the general and unqualified words in *Woodside* displace the specific language in *Jireh*?⁷⁸

To date, three intermediate appellate courts have said that *Woodside* displaces any effect of *Jireh*, but the contrary position has also been expressed.⁷⁹ My purpose today is not to express any view on the issue, but to observe that once again, and in my view correctly, there has been no question of *Farah* deference to the question whether one intermediate appellate court ought to follow the reasons given by another for construing what the High Court has said.

The difference between statute and common law

A statute has a single legal meaning, to be determined by a court. The High Court in *Corporation of the City of Enfield v Development Assessment Corporation*⁸⁰ made it clear that there was no operation, in this country, of *Chevron* deference⁸¹ whereby a court will defer to the reasonably held view of a federal agency as to the proper construction of a statute administered by it. To the contrary, although the task of giving legal meaning to statutes is (in the cases that come to be litigated) notoriously contestable, the existence of a unique, correct, legal meaning carries with it the conclusion that error is disclosed if the court below adopts a different meaning, and (largely for historical reasons) that has been held to be error of law.⁸²

77 In *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [107], McLure P referred to the “heated controversy” created by *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1. See also K Lindgren, “The ambiguity of ‘ambiguity’ in the construction of contracts” (2014) 38 *Aust Bar Rev* 153 at 161–167.

78 Assuming that reasons given on the refusal of special leave have precedential effect, a subject outside the scope of this paper.

79 *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113 at [69]–[85]; *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166 at [36]–[41]; *Newey v Westpac Banking Corporation* [2014] NSWCA 319 at [88]–[91], but cf *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164 at [33]–[45] and [145]–[217].

80 (2000) 199 CLR 135.

81 Named after *Chevron USA Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984).

82 See *Branir v Owston Nominees (No 2)* (2001) 117 FCR 424 at [25].

The High Court's repeated statements that there is a "single common law" must mean that at least in areas relatively unaffected by statute, propositions of common law resemble the legal meaning of a statute in the sense that there is no room for differences in different Australian law areas, in contrast to the position in the British Commonwealth as may be seen in *Uren*.

Even so, "common law" remains very different from statute.

First, as is plain from what was said by Windeyer J in *Uren* and *Gammage*, and by French CJ in *CAL No 14*, it would often be overly simplistic to distinguish common law from statute. In most cases, there is an amalgam of both. Statutory construction is part of the common law,⁸³ and is itself affected by statute (not least, by interpretation legislation). On the other hand, the "common law" very often reflects the intrusion or influence of statute.⁸⁴ I have elsewhere sought to explain, at length, why "[c]ommon law" is a deeply attractive, but also a deeply misleading concept".⁸⁵

Secondly, extracting a legal rule from the reasons of a court is very different from extracting a legal rule from a statutory text (judgments are, emphatically, *not* to be construed as if they were statutes). HLA Hart once said that:

Unlike an authoritative text or statute book, judgments may not be couched in general terms and their use as authoritative guides to the rules depends on a somewhat shaky inference from particular decisions, and the reliability of this must fluctuate both with the skill of the interpreter and the consistency of the judges.⁸⁶

Or, as was said in *McNamara v Consumer Trader and Tenancy Tribunal*:⁸⁷

It would be an error to treat what was said in construing one statute as necessarily controlling the construction of another; the judicial task in statutory construction differs from that in distilling the common law from past decisions.⁸⁸

83 See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [97].

84 As Kirby J said, "legislation may include common themes that apply throughout the nation. In such cases, the common law principle may itself adapt to such legislative provisions": *Imbree v McNeilly* (2008) 236 CLR 510 at [129].

85 M Leeming, "Theories and principles underlying the development of the common law: the statutory elephant in the room" (2013) 36(3) *UNSWLJ* 1002 at 1004.

86 *The concept of law*, 3rd edn, Oxford University Press, 2012, p 97.

87 (2005) 221 CLR 646.

88 *ibid* at [40].

One of the passages cited in support, and which more recently has been applied in *Comcare v PVYW*,⁸⁹ was from *Brennan v Comcare*,⁹⁰ where Gummow J had said:

The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.⁹¹

One has therefore to guard against what has been described as the “textualisation of precedent”⁹² — the tendency to treat decisions, especially decisions widely regarded as authoritative, as authoritative in the same way as if the reasons were statutory. As one commentator puts it, “Language quoted from earlier cases tends to be ‘snippets’ of rules, not conceptual analysis, so that precedents now carry a textual authority that more nearly resembles statutory language than they once did”.⁹³

Thirdly, it is one thing to acknowledge that there is a range of potentially available legal meanings to be given to legislation, and to insist on a heightened deference to the decision of an intermediate appellate court which has selected one of those legal meanings. It is another when the question is whether a particular principle is or is not part of the common law of Australia. In the latter case, the leeways of choice turn on different and in some ways broader considerations (including questions of coherence with the rest of the law, the extent to which the change departs from the previous position, and the extent to which such change has been presaged in earlier decisions).

Those considerations, coupled with what was said in *Walker Corporation* and *CAL No 14*, suggest that *Farah* deference, despite the strictness of its formulation, may not much add to the comity which Australian courts have long since entertained for each other’s decisions.

89 (2013) 250 CLR 246 at [15]–[16].

90 (1994) 50 FCR 555.

91 *ibid* at 572.

92 See P Tiersma, “The textualisation of precedent” (2007) 82(3) *Notre Dame Law Review* 1187.

93 Greenawalt, above n 63, p 179.

Final observations about politeness and semantics

First, the necessary focus on *concept* as opposed to its *expression* will be especially important in any case where one intermediate court of appeal is asked not to follow the decision of another. As Basten JA has said, with the agreement of Fullerton and RA Hulme JJ, in *Saoud v R*:⁹⁴

[T]o be sure that a real difference of approach has been identified, rather than a difference in semantics, it will be necessary to decide whether comparable cases would be decided differently in each State.⁹⁵

Secondly, to be “convinced” that a conclusion is “plainly wrong” may tend to convey a personal attack, wholly out of line with the probable truth that every judicial officer has been doing his or her best to resolve the (perhaps less than perfectly argued) controversy before the court. As the passages from *Brennan v Comcare*, *McNamara v Consumer Trader and Tenancy Tribunal* and *Comcare v PVYW* show, there is no necessary reason for that precise language to be used. Indeed, *CAL No 14* itself emphasises that the *concept* underlying the different expressions of disapproval in *Farah* and *Wright v Wright* is identical.

Finally, the form of expression of a judge’s reasons is, axiomatically, a matter for the individual judge, but for my part it seems preferable to use the language adopted by Nettle JA in the Victorian Court of Appeal and pose the question in terms of not departing from an interpretation without there being a compelling reason to do so.⁹⁶

94 [2014] NSWCCA 136.

95 *ibid* at [36].

96 *RJE v Secretary to the Department of Justice* (2008) 21 VR 526 at [104]; *Gett v Tabet* (2009) 254 ALR 504 at [301]; *R v XY* (2013) 84 NSWLR 363 at [30]; *Hasler v Singtel Optus Pty Ltd* (2014) 311 ALR 494 at [102], and see the Honourable Justice J Allsop, “*Farah Constructions v Say-Dee Pty Ltd*: some reflections for intermediate courts of appeal”, paper presented at the AIJA Appellate Judges’ Conference, 7 November 2008, and K Mason, “Throwing stones: a cost-benefit analysis of judges being offensive to each other” (2008) 82(4) *ALJ* 260; (2008) 9(1) *TJR* 63.