

Review Essay

Sorting Sources

Common Law, Equity and Statute: A Complex Entangled System by Mark Leeming (2023)
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Abstract

Using Judge of Appeal Mark Leeming's fascinating work on sources of law as a springboard, this review essay makes three sweeping claims about the different sources of law in Australia that that work analyses. First, that judge-made law without statutory foundation, our law in common, has a different nature that may justify its continuing existence in uncodified form. Second, that equitable rules have a different formal structure that explains why they often differ from those at common law. Third, that although a common law of Australia is possible, it is still too soon to say whether that has been achieved.

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I Introduction

Even at this distance, under the dull, drizzly skies of Oxford, it is easy to admire the judgments given by Judge of Appeal Mark Leeming in the warm, bright sunshine of Sydney. A personal favourite, amongst dozens that could be selected, is *Mainteck Services v Stein Heurtey SA*¹ on contractual interpretation, the critics of which seemingly not having grasped when they have decisively lost an argument. Not content with his day job, however, he produces high-quality academic legal texts, of which this is the latest. The work² has the hallmarks of having grown from the more than 20 years of teaching the author has undertaken at the University of Sydney Law School.

This is a work on sources of law, their differences and interaction. It is written, inevitably, from the perspective of an Australian judge: how are these different legal sources to be used in reaching a result? It seeks to defend the historical importance of the separation of ‘equity’ and the ‘common law’ (chapter 2), explain the impact of the judicature legislation (chapters 5 and 6) and defend equity’s distinctiveness from the dark forces of fusionism (chapter 7). A variety of different forms of statute are distinguished (chapter 3) and how statute law is entangled with judge-made law so as to form a patchwork explained (chapter 4). Finally, the distinctive features of judge-made law in the Australian context are considered (chapters 9 and 10) and the proposition that there is ‘but one common law of Australia’ defended (chapter 8). Primarily, the examples come from commercial or private law, unsurprisingly given the author’s expertise, but public and criminal law also feature.³

Although an ‘advocacy checklist’ for counsel in making use of the different forms of judge-made and statutory law is presented,⁴ this book is best understood as a guide for other judges. The perspective is that of resolving disputes, so that we are told that many statutes ‘do not greatly matter because they are almost never litigated’,⁵ when of course they may matter a great deal in the real world in guiding how people behave.

Books and articles produced by judges often display a caution that writers who draw their pay solely from universities do not always adopt. Grand claims are not the mode in which the stronger members of the judiciary operate, and without skilful handling this can lead to dull, crabbed writing. Here, however, the book clips along, if not quite with the excitement of a fast-paced novel, then at least with a great deal more than that of the standard textbook. We are told that the ‘book is designed to be read’,⁶ and some chapters are quirkily interspersed with modern-day dialogues between a teacher and two students, clearly intended to be a contemporary recreation

¹ *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633.

² Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023).

³ See, eg, *ibid* 84.

⁴ *Ibid* x–xi.

⁵ *Ibid* 57.

⁶ *Ibid* vii.

of St Germain's *Doctor and Student* dialogues. (The students are, alas, too able and quick to be plausible, but then Socrates' interlocutors were probably considerably duller than Plato portrayed them.)

I have the freedom of being neither a judge nor an Australian, and so here are three incautious, unqualified reflections stimulated by this work.

II What Makes the Common Law Different from Statutory Law?

It is not only false that judges simply declare the positive law to be what it always was, a conception famously described as a fairy tale by Lord Reid;⁷ it is rather that the judiciary cannot stop themselves from making law, even when they try. Leeming JA, although agreeing with Reid, claims there is much less lawmaking going on by judges than is often supposed,⁸ but that may be too modest.

Common law systems operate on the basis of *stare decisis*. Whenever a case is decided, the reasons given for the result will have weight in deciding future cases. The reasons given by appellate courts for the result in a case bind future judges in like cases. It is very rare to find an appellate court decision that simply says: 'The facts are X, the applicable rule is Y, the result is Z.' Rules will begin to form whenever reasons are given, however much the judges may disclaim any intention to create them. Over time, what crystallises is a body of law with a granularity that would be impossible for a legislature alone to create.

What then could a jurist as fine as Blackstone or a judge as great as Sir George Jessel have meant when they appeared to endorse some variety of the 'declaratory' theory of law, if it is such pure hokum?

There are many reasons why we should, in principle, prefer our posited law to be set down in legislation. Today, legislation has a democratic legitimacy that judge-made law does not. Outside of cases construing modern legislation, our foundational judge-made rules were originally set down by unelected white men of the distant past who had different attitudes in many respects from most of us today. In common law jurisdictions outside of England, those long-dead men are now foreigners.

The common law is also inaccessible to non-lawyers. It is ridiculous that someone who wishes to know, say, what the rules on causation in the English law of torts are, or when a duty to take care not to inflict 'pure' economic loss will be owed in Australia, is required to read dozens of decisions of enormous length by judges saying mutually inconsistent things that somehow must be reconciled. How can such 'law' be used as a guiding rule for conduct? By contrast, Google gives me access to all of the legislation in Australia, the United Kingdom and elsewhere in an instant.

⁷ Lord Reid, 'The Judge as Law Maker' (1972–73) 12 *Journal of the Society of Public Teachers of the Law* 22, 22, cited in Leeming (n 2) 182.

⁸ Leeming (n 2) 24.

Any judge-made rule can, in principle, be overturned, with retrospective effect, by our ultimate appellate courts. This means it is inherently uncertain, as is illustrated by the recent, radical attempt of the Supreme Court of the United Kingdom ('UK') to re-write the entire UK law on illegality in private law, creating a rule that differs not only from the past, but also from the law that prevails in every other common law system in the world. Bentham, not someone for whom I usually have much time, was correct to think that there is a significant rule of law problem with judge-made law that legislation does not possess. If judge-made law is only different from statutory law by virtue of its source, we should seek to replace it as soon as possible.

However, it is at least plausible that the common law, our judge-made law freestanding of the legislature, is not only a different source but a different sort of law.

At one point in the past, the judges were appointed by a sovereign to do justice. If we go back far enough, they were presented with a blank page. What kind of rules will be created in that situation?

One view is that the judges were, and are, mini-legislators, able to take into account the full range of considerations as to how society ought to be organised. What kind of competition is efficient? Should we encourage innovation through patent law, or will that just put up prices? What is the optimal speed limit in an urban area? And so on. The judg(e)ments of long-dead Englishmen of the 17th century are unlikely to be trustworthy in modern Australia for determining what is best for society now. Those judges were untrained in economics, did not have the advantage of Brandeis briefs, and were operating in an entirely different context.

If the common law still has legitimacy, it is because it is not and was not created in this way. The rights that the judges recognised at common law were necessarily minimalist, or basic, because they were judge created. That basic set, required so that we are able to lead lives that are not subject to the choices of others, is relatively small. Others must not interfere with our bodies, burn down our crops, tell us lies we believe, damage the reputations we need in order to interact with our communities, enter our homes without permission, break the promises they make in our agreements.

The role of the judges, for centuries, has been to give *determinatio* to this basic set in cases of uncertainty (eg, Who has title to the house? What counts as an agreement?) Of course, the judges made and make law; that is central to their role; but the foundations upon which they are building the common law were, and are, not made by anyone but exist independently of the positive law in any particular time and place. It is in this sense that the declaratory account is not simply a lie.

It is also for this reason, and not just tradition, that modern legal education places such priority on the understanding of the common law of contract, torts and property. This can have a distorting effect, as Leeming JA shows, by both creating the misleading impression that, in modern litigation, legislation is less important than it is, and failing to train in its use.

It is no accident, however, that — in private law — intellectual property rights, company law, limitation rules, consumer and employment protections and the Torrens system are the creation of legislation. More generally, the modern regulatory states in which we live were not, in the main, the creation of the judges but of legislatures. This does not mean that the legislature cannot reshape the common law rules, as the diverse civil liability statutes did across Australia 20 years ago. It does, however, mean that great care needs to be taken in determining the interaction between our (statutory) regulatory rules and the common law. The two are not oil and water, but the principal difference is not simply one of pedigree within the legal order.

III What Distinguishes the Common Law from Equity?

Perhaps unsurprisingly, given our different backgrounds, it is in relation to the distinctiveness of the body of rules that is the product of the Court of Chancery that my strongest disagreement with this work occurs. Mark Leeming is an editor of the equity bible, *Meagher, Gummow & Lehane*,⁹ whereas I learned my law at the feet of the archetypal fusionists Peter Birks and Andrew Burrows.¹⁰

‘Why is it then sensible in the 21st century still to divide judge-made law between common law and equity?’¹¹ Four answers are given. The first is an appeal to the history of the legal system, and the considerable transaction costs there would be in smoothing out the anomalies created by having two independent sources. Second, equity, unlike the common law, was supplemental to other rules, including statutory rules. Third, the separate body of equitable rules has been recognised by legislation, most obviously the Judicature Acts. Fourth, equity relies upon principles as opposed to rules, has a distinctive approach to the evaluation of all the facts, and in the field of court orders allows for more discretion, relief on terms, and a range of different forms of remedies.

Of these four answers, the first and the third will never satisfy the fusionist. Of course, our law as it is can only be understood in terms of its history. Their claim is that we should not be its prisoners. Where there are differences, these should be eliminated, unless justifiable, because ‘like cases should be treated alike’. This may not be achievable in one big bang reform, but the fusionist case is that the judges and legislature should, over time, eliminate the differences and create a unified system.

As to the fourth, it is true that equity seems to be more reliant upon homely maxims than is the common law, but this is not altogether to its credit. Those maxims need considerable unpacking if they are to make sense. So, we are told that ‘equity will not assist a volunteer’, but if I declare myself a trustee of my title to land in your

⁹ JD Heydon, Justice MJ Leeming and PG Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies* (LexisNexis, 5th ed, 2014).

¹⁰ Their most important fusionist works are Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 (July) *University of Western Australia Law Review* 1; Andrew Burrows, ‘We Do This at Common Law but That in Equity’ (2002) 22(1) *Oxford Journal of Legal Studies* 1.

¹¹ Leeming (n 2) 181.

favour, you are a volunteer, but equity will assist you when the common law would not. We all also know that ‘equity looks on as done that which ought to have been done’. But why? Without more, that seems a very odd fiction to adopt as a general principle.

Further, it is simply untrue to claim that equity is distinguished by the application of principles instead of rules. As the Court of Chancery and its successors operated on the basis of *stare decisis*, it would be impossible, over time, for that to be so. As students of the law of trusts quickly learn, that field employs rules as sharp and bright as any that the common law possesses. Conversely, the common law is no enemy of general principles, and at many points employs the black box of reasonableness rather than any fixed rule.

The second answer, and the part of the fourth concerning court orders, are much more promising lines of defence against the fusionist, at least in demarcating some areas of equity as conceptually distinct.¹² We are rightly told:

Equity never regarded itself as a self-sufficient system. Instead, an important premise of equity was that there were other rules which called for softening, or adjustment, or supplementation.¹³

But not, notice, contradiction or overturning. As Maitland said:

It’s of no use for Equity to say that A is the trustee of [title to] Blackacre for B, unless there be some court that can say that A is the owner of Blackacre. Equity without common law would have been a castle in the air, an impossibility.¹⁴

A nice illustration of equity’s second-order role is the law of assignment of debts.¹⁵ Why did the common law not permit the assignment of contractual debts? The straightforward explanation is that assignees of contractual debts do not satisfy the conditions for acquiring a contractual right against the promisor. The promisor has not promised the assignee anything, is not party to any agreement with them, and the assignee provided the promisor with no consideration. We do not generally have standing to enforce the rights of other people, and so any assignment was wholly ineffectual at common law.¹⁶

Statutory assignment proceeds by creating a blunt exception to this rule.¹⁷ Equitable assignment of a contractual right, despite its name and by contrast, did not involve the transfer of the contractual right, but rather the creation of a *new* right in the ‘assignee’, the subject matter of which was the assignor’s contractual right against the promisor. It is a close cousin of the trust. It involves no contradiction of,

¹² Cf Lionel Smith, ‘Equity Is Not a Single Thing’ in Dennis Klimchuck, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) 145.

¹³ Leeming (n 2) 189. See also Chief Justice James Allsop, ‘The Intersection of Companies and Trusts’ (2020) 43(3) *Melbourne University Law Review* 1128, 1135.

¹⁴ FW Maitland, *Equity and The Forms of Action at Common Law: Two Courses of Lectures* ed AH Chaytor and WJ Whittaker (Cambridge University Press, 1910) 19.

¹⁵ Cf Leeming (n 2) 39 for a different account.

¹⁶ Even the hard-hearted common law allowed for exceptions where the purpose was to create a transferable right, such as bills of exchange.

¹⁷ *Judicature Act 1873* (UK) s 25(6), now *Conveyancing Act 1919* (NSW) s 12 and *Law of Property Act 1925* (UK) s 136.

or even any exception to, the common law rule on the (non-)transferability of contractual rights.

The different rules applicable to equitable and statutory assignment are then explicable because the latter involves a transfer whilst the former involves the creation of a new right in relation to another right. Statutory assignment (as a transfer) requires formality to be used (signed writing); equitable assignment does not. Statutory assignment requires notice to be given to the debtor as it involves a change in the party to whom the debtor owes their obligation; equitable assignment does not. Statutory assignment, because a transfer, cannot be used to assign debts not yet in existence; equitable assignment has no such restriction. Statutory assignment does not permit the debt to be partially assigned (if it did, the debtor could be prejudiced by having multiple different creditors instead of one); equitable assignment has no such restriction because it involves no change in the identity of the creditor. If an equitable assignee wishes to enforce the underlying debt, the assignor must be a party to the action, because the assignor is still the creditor and there are in fact two actions (assignee *v* assignor; assignor/creditor *v* debtor) not one. Statutory assignment requires no joinder, because it is a transfer. Equitable assignment requires consideration to have been provided by the assignee because the assignor must be both obliged and compellable to hold the right for them. Statutory assignment, as a transfer, has no such condition.

Commercially, equitable assignment has many of the desired effects of a transfer (most importantly, protection against the assignor's bankruptcy) but this should not blind us to its different legal form. Seeking to defend equity's distinctiveness based upon its history downplays how *clever* it is. The crude fusionist, by contrast, cannot account for why the rules for the different forms of assignment are so different, nor explain why equity is not simply contradicting the common law rules on the acquisition of contractual rights.

This then makes sense of Sir George Jessel's remark:

[I]t must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time — altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them.¹⁸

The equitable rules are supplemental to, or parasitic upon, the common law. They are not themselves part of our basic set of entitlements against one another.

As Leeming JA argues, this 'supplementary' approach then led to a distinctive attitude to the interaction with statute. A startling example, only made less so by familiarity, is the doctrine of part performance. Section 4 of the *Statute of Frauds* stated that 'noe action shall be brought' on a contract for the sale of an interest in land unless there is a written memorandum and signature.¹⁹ In apparent contradiction of these words, equity would permit enforcement of such an agreement in the absence of writing where one party had done certain acts by way of part

¹⁸ *Re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696, 710.

¹⁹ 29 Car 2, c 3 (1677).

performance. In England, the doctrine of part performance was (foolishly) abolished by the *Law of Property (Miscellaneous Provisions) Act 1989* (UK). In effect, however, it has now been reintroduced by equity under the peculiar label of ‘proprietary estoppel’ (*sic*), which does not concern estopping the assertion of anything.²⁰ Humble common lawyers may be perplexed by such boldness.

The second major difference between the common law and equity is apt to be lost sight of if our perspective is that of a judge. Judges are inevitably prone to overestimate their importance in a system of law. The most extreme example of this was Holmes’ claim that the ‘prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law’.²¹ If, however, we closed all the courts, most of what we mean by law would still be in operation. The law would still tell us which side of the road to drive on, to stop at red lights, to keep our contracts, and not to trespass on one another’s land. Within our legal system as it is, contractual obligations that are unenforceable or tortious obligations to pay damages after the expiry of the applicable limitation period are not a nullity and continue to have important legal effects.

Equity appears different. It is meaningless to speak of an ‘unenforceable’ trust or to conceive of rectification or rescission in equity or equitable relief against forfeiture as operating outside of the courtroom. Equity is a subset of our law of court orders, and unlike our common law rules would not survive if civil recourse were abolished.

When orders are made by judges, a much wider range of considerations can be brought into play than is true for rules that are expected to operate outside of a courtroom. An illustration is the contrast between common law and equitable rescission of a contract. At common law, rescission is relatively restricted, roughly confined to cases of duress and fraud, and easily lost: if it is not possible to return what was received, rescission is barred. By contrast, rescission in equity is much broader, including for example rescission for undue influence and innocent misrepresentation, and more robust: if what was received cannot precisely be returned, a monetary allowance is possible. One of the reasons for these differences is that the equitable rules are expected to be applied by a judge, who can determine terms that may be impossible to set down as bright line rules in advance.

Because of the wide range of considerations that can, and should, be taken into account in determining a court order — when compared with determining the rights of the parties *inter se* before they enter the court — equity can often, but not always, appear more ‘discretionary’ than the common law. This is not, however, simply a matter of the history of the two areas, but rather of to whom the rules are addressed.

²⁰ *Guest v Guest* [2022] 3 WLR 911.

²¹ Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10(8) *Harvard Law Review* 457, 361.

IV Is an 'Australian Common Law' Possible?

An English (but not British) common law is possible because of a unified court structure. Although the UK Supreme Court sometimes (pointlessly) sits in England outside of London, including in Manchester,²² legally this is of no significance. There is but one tier at each stage in the legal system, and the rules of precedent entail one common law rule (where there is a rule at all).

The Commonwealth of Australia, by contrast, is made up of six states, and two self-governing territories. Decisions by the intermediate appellate courts of those states and territories are binding upon the lower courts of those states and territories. What if intermediate appellate courts reach inconsistent decisions? In time, this conflict may be subsequently resolved by an appeal to the High Court, binding on all courts below, but what is the position in Australia in the interim?

Leeming JA describes the position as follows:

[T]here is on this point a uniform rule throughout Australia although, like Schrödinger's cat, one cannot presently say what that rule is right now ...²³

This is unpersuasive. As a matter of the positive law there are different rules in these jurisdictions, and no Australian rule at all unless and until the High Court (or possibly the federal Parliament) resolves the issue, and so no common law of Australia.

What if an intermediate appellate court in a state decides an issue that has not yet been authoritatively resolved by the High Court or other intermediate appellate courts? Is that the 'common law of Australia' or is its effect limited to the state in which it is decided? This depends upon whether courts outside of that state are bound by that decision or not. What are the rules of precedent in this regard?

Here there is an interesting parallel between the judicial rebellion of Lord Denning MR in England in the 1970s, and the attempt by the High Court of Australia in *Farah Constructions v Say-Dee*²⁴ to impose discipline upon intermediate appellate courts.

At one time, the judicial House of Lords was bound by its own decisions. Even where a decision was plainly wrong, only legislative intervention could overturn it. This position was reversed by the Practice Statement 1966 (which the UK Supreme Court adopts).²⁵ In the Court of Appeal, however, the rule has long been that (subject to exceptions) that Court must follow its own decisions.²⁶ The justification for the difference is that if the Court of Appeal gets it wrong, there is still another tier of appeal left to correct any mistake.

²² 'UK Supreme Court Sits in Manchester for First Time', *BBC News* (online, 6 March 2023) <<https://www.bbc.co.uk/news/uk-england-manchester-64833684>>.

²³ Leeming (n 2) 232.

²⁴ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ('*Farah Constructions v Say-Dee*').

²⁵ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

²⁶ *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.

Lord Denning, the most significant member of the Court of Appeal almost from the day of his appointment in 1948 until his retirement in 1982 (with an interregnum in the House of Lords from 1957 to 1962) always opposed this rule. From there he led what Lord Diplock described as a ‘one man crusade’²⁷ to try to overturn it. This culminated in *Davis v Johnson* where, sitting in the House of Lords, Lord Diplock stated that that Court should ‘expressly, unequivocally and unanimously’²⁸ affirm that the Court of Appeal was bound by its own decisions.

But what is the legal effect of such a statement? It is necessarily *obiter dicta*. The rules of precedent applicable in the Court of Appeal can never form a sufficient reason for the disposition of a case before the ultimate appellate court, because that court is not bound by decisions of the Court of Appeal. Before the ultimate appellate court, the only rules of precedent that can be relevant to the disposition of the case before it, and on which it can effectively rule as part of the *ratio* of its decision, are the rules binding on it.

Lord Salmon expressed himself in rather different terms from Lord Diplock:

In the nature of things however, the point [of precedent] could never come before your Lordships’ House for decision or form part of its *ratio decidendi*. This House decides every case that comes before it according to the law. If, as in the instant case, the Court of Appeal decides an appeal contrary to one of its previous decisions, this House, much as it may deprecate the Court of Appeal’s departure from the rule, will nevertheless dismiss the appeal if it comes to the conclusion that the decision appealed against was right in law.

... I would also point out that [the Practice Statement 1966] was made with the unanimous approval of all the Law Lords: and that, by contrast, the overwhelming majority of the present Lords Justices have expressed the view that the principle of *stare decisis* still prevails and should continue to prevail in the Court of Appeal. I do not understand how, in these circumstances, it is even arguable that it does not.²⁹

Lord Salmon’s point is that the rules of precedent for the Court of Appeal were (and are) necessarily a matter for that Court; as Lord Denning was in a minority of one in that tier in his view of the matter, the Court of Appeal remained bound by its own decisions.³⁰

Thirty years later, in *Farah Constructions v Say-Dee*, the High Court of Australia criticised the New South Wales Court of Appeal in the following terms:

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 legislation unless they are convinced that the interpretation is plainly wrong. Since there

²⁷ *Davis v Johnson* [1979] AC 264, 328.

²⁸ *Ibid* 328.

²⁹ *Ibid* 344.

³⁰ Cf *Willers v Joyce [No 2]* [2018] AC 843 on whether the Court of Appeal should follow decisions of the Privy Council. This is the only decision I am aware of that is entirely *obiter dicta*.

is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.³¹

Again, this is necessarily *obiter dicta* and could not sensibly have formed part of the argument before the High Court. This statement does not therefore sit comfortably with the High Court's criticism of the Court of Appeal for reaching its decision on a basis never argued.³² If lower courts are bound by 'seriously considered dicta'³³ of a majority of the High Court, as that Court also suggested (in *obiter dicta*), then the High Court could potentially alter the rules of precedent for lower courts in this way. However, in order for a statement to count as 'seriously considered', it must at a minimum have been subject to argument by counsel, in the end proving unnecessary for the result reached, rather than a statement expressing a view that has not been subject to any such scrutiny. It is, again, of the nature of things that it is unnecessary for the outcome of a case before the High Court what the rules of precedent for other courts may be, and so they will not be subject to such argument.

Therefore, whether we have a 'common law of Australia' is not for the High Court to determine, as it is not a matter on which the Court can authoritatively rule. Rather, it is a matter for the various intermediate appellate courts to decide — in New South Wales, for Leeming JA and his colleagues.

A more rebellious New South Wales Court of Appeal, composed of Australian Dennings, might have responded to the High Court's decision in *Farah Constructions v Say-Dee* in the following way:

Thank you for your interesting *obiter* statements on our rules of precedent. If we accept them in their entirety, we are bound by the decisions of intermediate appellate courts of other jurisdictions. *A fortiori* we are bound by our own decisions. Our previous decision in *Say-Dee v Farah Constructions* depended upon our being free to depart from other intermediate appellate courts. That decision on our rules of precedent, unlike your statement, was necessarily part of the *ratio* of that case. Which we accept we are bound by. Therefore, we are henceforth free to depart from the decisions of intermediate appellate courts of other jurisdictions.

No court with Leeming JA as a member will ever say anything so injudicious. But it would be great fun if they did.

³¹ *Farah Constructions v Say-Dee* (n 24) 151–2 [135], citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) (this too was *obiter dicta*).

³² *Farah Constructions v Say-Dee* (n 24) 149 [132].

³³ *Ibid* 151 [134]. It is surprising to learn that some *dicta* are not seriously considered.