

The High Court of Australia's Obiter Dicta and Decision-Making in Lower Courts

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Abstract

This article explores the effect of the High Court of Australia's obiter dicta on decision-making in lower courts around Australia. First, we consider in what sense, and to what extent, the High Court's decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah*') represents what Keith Mason has called a 'profound shift in the rules of judicial engagement' when it comes to the precedential effect of High Court dicta. We argue that, since *Farah* was decided, lower courts have tended to regard themselves (in certain circumstances) as under a duty of obedience to High Court dicta, a tendency which was not present in the case law before *Farah*. We also argue that *Farah* has generated ambiguities concerning the scope of this duty of obedience to High Court dicta. In our view, these developments vindicate Mason's assessment of the impact of *Farah*. Second, we argue that the High Court may forestall anxiety and uncertainty around the treatment of its dicta in a post-*Farah* world in at least two ways: by issuing general guidance to lower courts on the precedential effect of its obiter dicta, especially on the circumstances in which lower courts should regard its dicta as 'seriously considered'; and by making more explicit its views regarding the scope, weight and relevance of the dicta that it issues from case to case. We conclude by arguing that the High Court ought to guide lower courts in these ways, in light of the value of its dicta, the circumstances that surround its decision-making, and its unique position as the ultimate judicial authority in the Australian legal system.

I Introduction

The decision of the High Court of Australia in the case of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹ has been much studied and debated since it was handed down in 2007. In a way, it is surprising that such a case should attract so much attention: it was a dispute between joint venture partners, raising the sorts of questions about breach of fiduciary obligation and liability for knowing receipt under the first limb of *Barnes v Addy* that are the 'bread and butter' of commercial litigation in Australia. Nonetheless, the case stands out for one reason: when it was before the New South Wales Court of Appeal in 2005,

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¹ (2007) 230 CLR 89 ('*Farah*').

before it went to the High Court, the case was decided, in part, on the basis of a new cause of action against a third party recipient of misapplied trust or fiduciary-managed assets, a cause of action based on the unjust enrichment of the recipient.² Much of the scholarship that has followed *Farah* has considered the arguments for and against this unjust enrichment-based cause of action, which was vehemently rejected by a unanimous High Court at the final stage of the litigation.³

Much, but not all. Among the reasons why the High Court rejected an unjust enrichment-based cause of action in *Farah* was that it represented a departure from traditional Australian approaches to liability for receipt of misapplied trust or fiduciary-managed assets, and an embrace of ‘new’ thinking propounded more by English academics than Australian judges.⁴ In making this broad point, the Court referred in its judgment to some aspects of the doctrine of precedent in Australia: in particular, the question of when an intermediate appellate court should follow the decisions of intermediate appellate courts in other Australian jurisdictions, the question of what intermediate appellate courts should do with old High Court precedents, and the effect of the High Court’s obiter dicta on decision-making in lower courts in the Australian court hierarchy.⁵ And these precedential questions, as well as the pros and cons of unjust enrichment-based liability in *Barnes v Addy* cases, have been the subject of scholarly and judicial attention in the wake of *Farah*. Most notably, in 2008, in a speech at an event marking his retirement as President of the New South Wales Court of Appeal, Keith Mason argued that the High Court’s remarks about precedent in *Farah* represented a ‘profound shift in the rules of judicial engagement’ and amounted to an ‘assertion of a High Court monopoly in the essential developmental aspect of the common law’ in Australia.⁶

² *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 (15 September 2005).

³ (2007) 230 CLR 89, 159. For a taste of post-*Farah* literature discussing how to conceptualise the case: Hugh Atkin, “‘Knowing Receipt’ Following *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*” (2007) 29 *Sydney Law Review* 713; Rob Chambers, ‘Knowing Receipt: Frozen in Australia’ (2007) 2 *Journal of Equity* 40; Michael Bryan, ‘Recipient Liability under the Torrens System: Some Category Errors’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law* (Hart, 2008) 339; Joachim Dietrich and Pauline Ridge, ‘The Receipt of What? Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment’ (2007) 31 *Melbourne University Law Review* 47; Pauline Ridge and Joachim Dietrich, ‘Equitable Third Party Liability’ (2008) 124 *Law Quarterly Review* 26; Justice Michael Kirby, ‘Equity’s Australian Isolationism’ (2008) 8 *Queensland University of Technology Law Journal* 444; P A Keane, ‘The Conscience of Equity’ (2010) 84 *Australian Law Journal* 92; Andrew Burrows, ‘The Australian Law of Restitution: Has the High Court Lost Its Way?’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 67, esp 77–82; Timothy Boyle, ‘Never “Say-Dee”: The Ongoing Relevance of the “First Limb” of *Barnes v Addy* in Modern Australian Law’ (2011) 5 *Journal of Equity* 123.

⁴ (2007) 230 CLR 89, 152–9.

⁵ *Ibid* 151–2.

⁶ Justice Keith Mason, ‘President Mason’s Farewell Speech’ (2008) 82 *Australian Law Journal* 768, 769. Other literature touching on precedential aspects of *Farah* includes: Lee Aitken, ‘Unforgiven: Some Thoughts on *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*’ (2007) 29 *Australian Bar Review* 195; Norman O’Byrne and Chris Young, ‘A View from outside the Vortex on Keith Mason’s Retirement Speech and the Australian Doctrine of Judicial Precedent’ (2008) 82 *Australian Law Journal* 771; Justice Steven Rares, ‘The Role of the Intermediate Appellate Court after *Farah Constructions*’ (Speech delivered at the 4th Appellate Judges Conference of the

In this article, we take up just one of the precedential questions touched on by the High Court in *Farah*: the effect of its obiter dicta on decision-making in lower courts. The High Court's thinking on this question in *Farah* was revealed in a series of statements criticising the New South Wales Court of Appeal's recognition of an unjust enrichment-based cause of action, on the basis that it '[flew] in the face' of 'seriously considered' dicta of a majority of the High Court and constituted an 'inappropriate step' for an intermediate appellate court to take, '[l]eaving aside any technical question about whether the doctrine of stare decisis strictly applied'.⁷ (The dicta in question had been issued in 1975 by a majority of the Court in deciding *Consul Development Pty Ltd v DPC Estates Pty Ltd*,⁸ a case about knowing assistance in a breach of fiduciary obligation but in which members of the Court took the opportunity to consider in depth the basis of liability under the first limb of *Barnes v Addy* as well.) In *Farah*, the Court's view was most clearly expressed when it said simply that the recognition of an unjust enrichment-based cause of action was 'not a step which an intermediate court of appeal should take in the face of long-established authority and seriously considered dicta of a majority of this Court'.⁹

These statements about the effect of the High Court's obiter dicta on decision-making in lower courts conveyed an idea that the Court has reiterated, in different forms, in cases since *Farah*, and in our view they may be taken fairly to express an opinion that the Court continues to hold.¹⁰ In light of that opinion, our article has two aims. The first, which we pursue in Part II, is to consider in what sense, and to what extent, it might be said — as Keith Mason has said — that *Farah* represents a 'profound shift in the rules of judicial engagement' in Australia when it comes to the effect of the High Court's obiter dicta on decision-making in lower courts. To this end, we consider how lower courts around Australia have dealt with High Court dicta in cases both before and after *Farah* was decided; our analysis is based on a review of a large number of pre-*Farah* cases in which the precedential effect of High Court dicta was discussed in lower courts, as well as (to our knowledge) every case in which that question was addressed, decided in a

Australian Institute of Judicial Administration, 7 November 2008) <http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_rasesj8.html>; Kirby, above n 3, 462; Keith Mason, 'Do Top-Down and Bottom-Up Reasoning Ever Meet?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 19, esp 33–4.

⁷ (2007) 230 CLR 89, 151, 159.

⁸ (1975) 132 CLR 373 ('*Consul Development*').

⁹ (2007) 230 CLR 89, 151.

¹⁰ *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 139 (Gleeson CJ, Gummow, Heydon and Crennan JJ); *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 161 (Heydon J). See, however, the ambiguous statement of Kirby J in *R v Keenan* (2009) 236 CLR 397, 409 (citations omitted):

'*Obedience to the Court's authority*: In recent years, this Court has repeatedly reminded judges at trial and intermediate courts of their duty to conform to the rulings of this Court in matters submitted to it for its decision. It has instructed them to observe 'seriously considered dicta uttered by a majority of this Court'. Although, respectfully, I question whether the legal duty of obedience extends beyond obedience to the *rationes decidendi* of earlier decisions, I certainly agree that, where such decisions exist, the legal principles for which they stand must be applied by judicial officers subject to this Court's authority as an aspect of the rule of obedience to doctrine of judicial precedent that applies throughout the Judicature of this country.

lower court between the date when *Farah* was handed down and November 2011. We argue that the case law shows that since *Farah*, lower courts have tended to regard themselves as under a duty of obedience to High Court dicta, at least in certain circumstances, a tendency which was not present in the case law before *Farah*. Moreover, we argue that ambiguities arise from the High Court's remarks on its obiter dicta in *Farah*: these ambiguities concern the scope of the duty of obedience to High Court dicta. We conclude that Mason's assessment that *Farah* has changed the rules of judicial engagement is vindicated by developments since *Farah*.

The second aim of our article is pursued in Part III, where we suggest that the changes to the rules of engagement brought about by *Farah* have the potential to generate anxiety and uncertainty around the treatment of High Court dicta in the adjudication of disputes in lower courts. We argue that the High Court may forestall that anxiety and uncertainty in at least two ways. First, the Court may issue clearer guidance to lower courts on what it requires of them when working with its obiter dicta. In particular, the Court may, and indeed should, state clearly that its obiter dicta are never binding on lower courts in the Australian court hierarchy in the same way as are its rationes decidendi, and it may clarify the circumstances in which lower courts should regard its dicta as 'seriously considered'. Second, within limits the Court may make more explicit its views regarding the scope, weight and relevance of the dicta that it issues from case to case. We conclude by arguing that not only is the High Court able to forestall anxiety and uncertainty by being more explicit about the precedential effect of its obiter dicta, it ought to do so, in light of the value of its dicta, the circumstances that surround High Court decision-making, and the Court's unique position as the ultimate judicial authority in the Australian legal system.

II *Farah*: A Profound Shift?

In considering whether or not *Farah* has brought about the 'profound shift' that Keith Mason referred to in his retirement speech, this Part considers what judges in lower courts have said both before and after *Farah* about the precedential effects of High Court dicta. Our analysis of the case law reveals that Mason's assessment of the impact of *Farah* was prescient. Most notably, in the pre-*Farah* cases, lower courts tended to take the view that they ought to treat High Court dicta with the utmost respect, but that they had no duty of obedience to such dicta; in the post-*Farah* world, the tendency appears to be to accept that a duty of obedience to High Court dicta arises, at least in some circumstances. Moreover, ambiguities arise from the text of the judgment in *Farah* concerning the scope of the duty of obedience to High Court dicta.

A A Duty of Obedience to High Court Dicta?

1 Pre-Farah

A review of the case law reveals that in most of the cases decided prior to the decision in *Farah* in which the precedential effect of High Court dicta was discussed, lower courts tended to refer to High Court dicta as potentially highly persuasive, but insisted on their freedom to depart from such dicta. In what follows, we call this the ‘traditional’ or ‘orthodox’ view on account of its consistency with the traditional understanding of the rule of *stare decisis* as a rule that attaches only to the rationes decidendi of previous decisions. The traditional view was endorsed in the High Court as early as 1909 in *The Federated Saw Mill, Timber Yard and General Woodworkers Employees’ Association of Australasia; James Moore and Sons Pty Ltd*, where Griffith CJ noted that in respect of ‘questions...of an abstract character’ or ‘hypothetical...questions of law’, ‘[a]ny opinions expressed by the [High] Court...can only be obiter dicta of more or less weight, but having no binding authority.’¹¹ More recently, in *Garcia v National Australia Bank Ltd*, Kirby J reiterated the traditional view, stating that ‘courts are not bound in law by...obiter dicta or analysis that is not essential to the holding of the Court sustaining its orders.’¹² In the United Kingdom, the traditional view has been endorsed in the House of Lords: for example, in *Cassell & Co Ltd v Broome*, Viscount Dilhorne pointed out that the English Court of Appeal may ‘justifiably refuse to follow’ an obiter statement of the House of Lords.¹³

Evidence of the traditional view in lower courts may be found in a large number of the pre-*Farah* cases. For example, in *Spasoff v Burgazoff*, Bryson J of the New South Wales Supreme Court pointed out that High Court dicta were not binding on him even if ‘entitled to great weight’.¹⁴ In *Mid-City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak*, Campbell J of the New South Wales Supreme Court indicated that High Court dicta were not ‘binding on me as a matter of law’.¹⁵ In the cases of *Sharah v Healey* and *Appleton Papers Inc v Tomasetti Paper Pty Ltd*, McLelland J of the New South Wales Supreme Court articulated similar views,¹⁶ as did King J of the South Australian Supreme Court in *Maple v Kerrison*.¹⁷ In the Victorian case of *Grey v Harrison*, members of the Victorian Court of Appeal adhered to an orthodox view, Tadgell JA suggesting that it was inappropriate that a tentative High Court dictum should be ‘regarded as binding to

¹¹ (1909) 8 CLR 465, 485.

¹² (1998) 194 CLR 395, 418.

¹³ [1972] AC 1027, 1107.

¹⁴ (1995) 18 Fam LR 719, 722.

¹⁵ (2006) 67 NSWLR 569, 614–15.

¹⁶ *Sharah v Healey* [1982] 2 NSWLR 223, 227: ‘It is the duty of this Court to apply the law as (rightly or wrongly) it finds it to be, not as another court states it to be in a manner by which this Court is not bound’; *Appleton Papers Inc v Tomasetti Paper Pty Ltd* [1983] 3 NSWLR 208, 218: ‘My duty in these circumstances, as I conceive it, is to decide for myself, invidious task as that may be, what the relevant principles are or should be, obtaining such assistance as I can from the persuasive authorities to which I have referred.’

¹⁷ (1978) 18 SASR 513, 527.

the extent of displacing what was thought to be well-settled law',¹⁸ and Callaway JA refusing to give effect to the dictum in question notwithstanding his recognition that the dictum deserved 'careful consideration'.¹⁹ In another Victorian case, *Brott v Almatrah*, Batt J of the Victorian Supreme Court refused to follow considered High Court dicta that had called into question older authorities.²⁰ As President of the New South Wales Court of Appeal, Kirby P took the view that High Court dicta are only ever persuasive, lining up with judgments of single High Court judges and courts in foreign jurisdictions as potential 'building blocks' in judicial law-making.²¹ And in the 2006 case of *Botany Bay City Council v Minister for Planning [No 2]*, Lloyd J of the NSW Land and Environment Court said simply, 'I am not, of course, bound by obiter dicta of the High Court.'²²

As should already be clear, lower courts in pre-*Farah* cases regarded themselves as under a duty to take very seriously at least some types of High Court dicta, on account of the weight of those dicta combined with the circumstances in which they were uttered. And so, in *Kelly v Sweeney*, Hutley JA of the New South Wales Court of Appeal noted that a 'considered dictum' of the High Court 'must carry great weight',²³ and in *Eslea Holdings Ltd v Butts*, Samuels JA of the same court remarked on the need 'to pay the very greatest respect and attention' to High Court dicta.²⁴ The same view was expressed by another judge of the New South Wales Court of Appeal in *Forgeard v Shanahan*; there, Meagher JA stated that a lower court should not 'lightly decline' to follow 'considered dicta of a very distinguished High Court'.²⁵ In *Anaesthetic Supplies Pty Ltd v Rescare Ltd*, Wilcox J of the Federal Court acknowledged that High Court dicta 'command profound respect' and 'will generally be followed by lower courts', even if they are 'not technically binding'.²⁶ In *R v Holmes*, King CJ of the South Australian Supreme Court observed that, although the 'considered dicta' or pronouncements of the High Court cannot bind, they can be of 'such persuasive authority as to constitute a formidable obstacle' to one of the party's submissions in the case.²⁷ Likewise, Sheppard J of the Federal Court noted in *McGale v Glad* that, although dicta of Dixon CJ, Fullagar, Menzies and Windeyer JJ were 'not ... strictly binding', nonetheless he 'would not lightly depart from them'.²⁸ And in *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd*, McDougall J of the Federal Court cited a leading text in support of the proposition that: '[i]t is not easy for the courts below the High Court legitimately to depart from the considered dicta of three High Court justices.'²⁹ This last case is a reminder that the view that High

¹⁸ [1997] 2 VR 359, 361.

¹⁹ *Ibid* 365.

²⁰ [1998] 2 VR 83, 86–7.

²¹ *Warburton v Whiteley* (1989) 5 BPR 11,628, 11,632–4. See also *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24, 27–8 (Kirby P).

²² [2006] NSWLEC 718 (17 November 2006) [13].

²³ [1975] 2 NSWLR 720, 724.

²⁴ (1986) 6 NSWLR 175, 186.

²⁵ (1994) 35 NSWLR 206, 226.

²⁶ (1994) 50 FCR 1, 44.

²⁷ (1988) 38 A Crim R 245, 247–8.

²⁸ (1981) 36 ALR 81, 85.

²⁹ (2004) 220 ALR 267, 281, quoting R P Meagher, J D Heydon and M L Leeming, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 281.

Court dicta are to be treated with the utmost respect is consistent with the view that there is no duty to obey such dicta: having alluded to the difficulty of departing from considered dicta of a majority of the High Court, McDougall J went on to do just that.³⁰ Taking High Court dicta seriously and having a duty to obey them are two different things; this distinction is at the heart of the traditional view of the precedential effect of such dicta.

Notwithstanding the prevalence of the traditional view before *Farah* was handed down, in a small group of pre-*Farah* cases, judges in lower courts appear to have dealt with High Court dicta on the basis that those dicta were binding, implying either that the rule of *stare decisis* extends to High Court dicta in at least some circumstances, or that some analogous rule generates a duty of obedience to such dicta. For example, in *Haylen v New South Wales Rugby Union Ltd*, Einstein J of the New South Wales Supreme Court stated:

When six members of the High Court have expressed close reasons for denying a duty of care, a judge of first instance should proceed on the basis that those reasons are pervasive and binding. Even if the remarks of the High Court may in certain instances be regarded as only obiter dicta, they are not dicta of a character which it is open to a first instance judge now to refuse to apply.³¹

Similarly, in *Horan v James*, Hutley JA of the New South Wales Court of Appeal considered that '[t]here being a uniformity of relevant dicta...it appears to me that this Court is bound'.³² In *Pullen v Gutteridge Haskins and Davey Pty Ltd*, Brooking, Tadgell and Hayne JJA of the Victorian Court of Appeal expressed the view that when presented with considered dicta from at least three members of the High Court 'our duty is to give effect to them'.³³ And more recently, even though Simpson J of the New South Wales Supreme Court in *R v Swansson* acknowledged that High Court statements in an earlier case, *Munday v Gill*, were obiter dicta, and 'not, strictly speaking, binding upon this Court',³⁴ she also asserted that '[t]his Court is obliged to accept that the rule [described in the dicta] is a rule of law, that it admits of no departure'.³⁵ In *Chief Executive Officer of Customs v Tony Longo Pty Ltd*, Heydon J (with whom Mason P and Rolfe AJA agreed) stated, referring to dicta issued (seriatim) by Knox CJ, Isaacs J, Higgins J, Rich J and Starke J in the 1926 case of *Wilson v Chambers and Co Pty Ltd*:

[e]ven if, contrary to my opinion, the remarks of the justices were only obiter dicta, they were nonetheless propounded in a case where the precise point now under debate was isolated by counsel for decision. They are not dicta of a

³⁰ (2004) 220 ALR 267, 282.

³¹ [2002] NSWSC 114 (15 March 2002) [44]. This echoes the well-known statement of Cairn J in *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850, 857:

When five members of the House of Lords have all said, after close examination of the authorities, that a certain type of tort exists, I think that a judge of first instance should proceed on the basis that it does exist without pausing to embark on an investigation of whether what was said was necessary to the ultimate decision.

³² [1982] 2 NSWLR 376, 381.

³³ [1993] 1 VR 27, 66.

³⁴ (2007) 69 NSWLR 406, 429–31.

³⁵ *Ibid* 430.

character which it is open to an intermediate appellate court now to refuse to apply unless either a later High Court has departed from them or a relevant statutory change has taken place: neither of these events has happened.³⁶

To our minds, these remarks imply a duty of obedience to High Court dicta on the part of lower courts except in the circumstances to which his Honour alludes.

Compared with the pre-*Farah* cases in which lower courts expressed the traditional view of the precedential effect of High Court dicta, the cases in which lower courts appear to have considered themselves under a duty of obedience to High Court dicta are not numerous. In our view, these cases were ‘outliers’ in the pre-*Farah* world. As we discuss below, in a post-*Farah* world, it is no longer accurate to describe such cases in this way.

The traditional view may be ascertained in another group of cases in the pre-*Farah* world: cases dealing with the precedential effect of dicta issued by only one or two members of the High Court, as opposed to a majority or a unanimous bench. In these cases, the traditional view has often been reflected in discussion about what counts as an ‘appellate decision’ of the High Court and what flows from that. So, in *Businessworld Computers Pty Ltd v Australian Telecommunications Commission*, Gummow J of the Federal Court stated that ‘[s]tare decisis involves courts being bound by appellate decisions of courts standing above them and in the same hierarchy. A decision of a single justice of the High Court is not such a decision.’³⁷ In *King v The Queen*, the Full Court of the Federal Court (Sheppard, Neaves and Spender JJ) adhered to the fundamental proposition that although the dictum of a single High Court judge is ‘relevant and helpful’, it is not ‘determinative’.³⁸ In *R v Riscuta*, Heydon JA of the New South Wales Court of Appeal considered that a dictum issued by Gaudron and Hayne JJ in the case of *Dyers v The Queen*, ‘though it is entitled to the greatest respect and though it is of persuasive value, is not an “appellate decision” of the High Court. It is a statement of principle, no doubt a considered one, offered as a dictum.’³⁹ Similarly, in *Broadwater Action Group v Richmond Valley Council [No 2]*, Lloyd J of the NSW Land and Environment Court said that dicta issued by Gaudron and Gummow JJ in the case of *Oshlack v Richmond River Council* were of ‘persuasive value’ and to be accorded ‘the greatest respect’, but nonetheless did not constitute an ‘appellate decision’ and therefore were not binding.⁴⁰ And finally, in *Rundle v State Rail Authority of New South Wales*, Heydon JA stated:

While the remarks of Dixon and McTiernan JJ [in *Henwood v Municipal Tramways Trust*] are not part of any ratio decidendi, they have never been doubted. ...The considered dicta of High Court judges, while not strictly binding on this Court, are ‘entitled to the greatest respect’ and are ‘of the greatest persuasive authority’, particularly when one of them is Dixon J. ... The remarks of Dixon and McTiernan JJ should be followed by this Court

³⁶ (2001) 52 NSWLR 458, 468, citing *Wilson v Chambers and Co Pty Ltd* (1926) 38 CLR 131.

³⁷ (1988) 82 ALR 499, 504. See also *Bone v Commissioner of Stamp Duties* [1972] 2 NSWLR 651, 654 (Jacobs P).

³⁸ (1986) 15 FCR 427, 437.

³⁹ [2003] NSWCCA 6 (6 February 2003) [101], referring to *Dyers v The Queen* (2002) 192 ALR 191.

⁴⁰ (2003) 129 LGERA 401, 413, citing (1998) 193 CLR 72.

unless plainly wrong. The plaintiff has not pointed to any case disagreeing with what they said, nor to any error of principle in what they said. Hence what they said should be applied.⁴¹

This statement came close to implying a duty of obedience, but it too fell short of recognising such a duty. In the matter of the precedential effect of minority dicta, as with the broader question whether or not lower courts have a duty of obedience to High Court dicta, the tendency in the pre-*Farah* cases was to adhere to the traditional view.

2 Post-*Farah*

An analysis of cases decided in lower courts since *Farah* reveals that lower courts appear more reluctant than before to adhere to the traditional view of the precedential effect of High Court dicta because they believe that in *Farah* the High Court has told them that they have a duty of obedience to its dicta, at least in certain circumstances. Arguably, the traditional view of the precedential effect of High Court dicta has been replaced by a new orthodoxy in the wake of *Farah*; post-*Farah* cases in which lower courts have persisted in the traditional view might now be described as ‘outliers’.

Turning first to post-*Farah* cases in which lower courts have regarded themselves as bound, obligated or required to follow High Court dicta, none are clearer than *Zotti v Australian Associated Motor Insurers Ltd*, a decision of the NSW Court of Appeal from 2009.⁴² The case turned on whether an injury that the appellant had incurred as a result of a bicycle accident was sustained ‘during...a collision’ within the meaning of the *Motor Accidents Compensation Act 1999* (NSW). In the case of *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*, a majority of the High Court had issued dicta touching on this question.⁴³ According to Spigelman CJ, *Farah* stood for the proposition that ‘this court is obliged to follow...the clearly expressed dicta of the High Court even if not part of the ratio decidendi.’⁴⁴ Allsop P agreed. Allsop P would have preferred to decide the case in accordance with principles at odds with the dicta issued in *Allianz*. However, he did not regard himself as free to decide the case ‘[u]nconstrained by authority’, and therefore followed the dicta in question.⁴⁵ And Campbell JA took a similar view, indicating that his preference would have been to depart from the dicta from *Allianz*, ‘[h]ad we been unconstrained by authority’.⁴⁶ *Zotti* was a decision of five experienced and highly regarded judges of the NSW Court of Appeal.⁴⁷ The fact that the three judges who considered whether nor not to follow the dicta from *Allianz* felt duty-bound, in light of *Farah*, to defer to High Court dicta with which they expressed misgivings in the circumstances of the case is strong evidence of

⁴¹ [2002] Aust Torts Reports 81-678, 69,345, referring to *Henwood v Municipal Tramways Trust* (1938) 60 CLR 438.

⁴² (2009) 54 MVR 111 (*‘Zotti’*).

⁴³ (2005) 221 CLR 568 (*‘Allianz’*).

⁴⁴ *Zotti* (2009) 54 MVR 111, 116.

⁴⁵ *Ibid* 119.

⁴⁶ *Ibid* 129.

⁴⁷ The other two judges were McColl JA and Hodgson JA, neither of whom explicitly addressed the question whether or not to follow the dicta from *Allianz*.

the effect that *Farah* is having on lower courts. That the judges deferred to the dicta from *Allianz* invoking the language of ‘obligation’, ‘constraint’ and ‘authority’ reinforces this point.

Zotti is not alone. In *Hall v Poolman*, having cited observations from a High Court decision, Palmer J (of the New South Wales Supreme Court) took a wide view of what *Farah* demands, stating that ‘[i]t is true that these observations are obiter dicta, the case having been decided on another point. However, being the considered observations of a majority of the High Court, they must be accorded obedience.’⁴⁸ As in *Zotti*, there were indications in Palmer J’s judgment in *Hall v Poolman* that he would have preferred not to follow the High Court dicta in question. However, he felt compelled to decide the case in the way that he did because of *Farah*.⁴⁹ Similarly, in *R v Cavkic [No 2]*, Vincent, Nettle and Vickery JJA of the Victorian Court of Appeal intimated that their preference was to decide the case one way, but because of their perception of a requirement to follow a dictum of Dixon CJ as well as “‘seriously considered statements” of other judges of the High Court in a number [of] subsequent cases’, they concluded that it would be a ‘grave error’ to depart from those statements.⁵⁰ And in the District Court of NSW, in the case of *Lassanah v State of New South Wales*, Gibson DCJ said of a passage in the High Court decision in *Mann v O’Neill*,⁵¹ ‘[e]ven if, rather than forming a part of the *ratio decidendi*, this [passage] amounts to “considered *obiter dicta*”, I am still bound by this decision for the reasons explained by the High Court in *Farah*.’⁵² In the Federal Court, in *ACCC v MSY Technology Pty Ltd [No 2]*, Perram J decided that a proposition stated in the judgment of Gibbs J (with whom McTiernan, Stephen and Mason JJ agreed) in *Forster v Jododex Australia Pty Ltd* was not to be regarded as the *ratio decidendi* as it was ‘not essential to the reasoning’ in that case; nonetheless, Perram J noted that ‘as a considered dictum of a majority of the High Court, I am bound to apply it unless some later development in the High Court qualifies that conclusion or unless statute intervenes’.⁵³ Perram J took a similar stance in *Telstra Corporation Ltd v Phone Directories Co Pty Ltd*, where he held that a previous decision of the Full Court of the Federal Court of Australia ought to be overruled to the extent that it conflicted with subsequent dicta of the High Court.⁵⁴

In *Net Parts International Pty Ltd v Kenoss Pty Ltd*,⁵⁵ MacFarlan JA of the New South Wales Court of Appeal (with whom Bell JA and Handley AJA agreed) stated, citing *Farah*, that the court was ‘required to apply’ a dictum issued by the High Court in 1918 in *Lion White Lead Ltd v Rogers*; his Honour’s precise words were as follows:

⁴⁸ (2007) 65 ACSR 123, 206

⁴⁹ *Ibid* 208.

⁵⁰ (2009) 28 VR 341, 356. For Nettle JA’s views on other precedential effects of *Farah*, see *Narain v Euroasia (Pacific) Pty Ltd* (2009) 26 VR 387, 396.

⁵¹ (1997) 191 CLR 204.

⁵² [2009] NSWDC 73, [25].

⁵³ (2011) 279 ALR 609, 616, citing *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421.

⁵⁴ (2010) 273 ALR 725, 757.

⁵⁵ [2008] NSWCA 324 (4 December 2008) (‘*Net Parts International*’).

Whilst...the statement of principle in *Lion White* is strictly an obiter dictum, the statement is one which this Court is in my view required to apply unless and until the High Court opines further on the question, the statement of principle having stood without contradiction for some 90 years and the statement being a well-considered one[.]⁵⁶

Arguably, this passage reveals that MacFarlan JA regarded himself as required to apply High Court dicta only in circumstances where those dicta were well-considered and had gone unchallenged over a long period of time.⁵⁷ As we alluded to above in our discussion of the pre-*Farah* case law, it is entirely in keeping with the traditional view of High Court dicta to treat them with the utmost seriousness where they are the product of careful consideration and have stood the test of time. What to our minds represents a departure from the traditional approach in *Net Parts International* is the notion that a lower court should be ‘required to apply’ dicta of the High Court, however well-considered and longstanding. It is also worth noting that in at least two decisions in the post-*Farah* world, Perram J in the Federal Court has declined to follow dicta, but only because the dicta were of such a nature that his perceived duty of obedience was not triggered; implicit in these decisions is the proposition that in appropriate cases, such a duty of obedience would indeed be owed. In *ACT v Queanbeyan City Council*, Perram J declined to follow dicta of a unanimous High Court bench but only because he thought they were neither long-established nor seriously considered within the meaning of *Farah*.⁵⁸ And in *Mercedes Holdings Pty Ltd v Waters (No 3)*, Perram J cited *Farah* in reaching the conclusion that a High Court statement was ‘not a considered dictum otherwise binding on [the court]’.⁵⁹

The impact of *Farah* may be seen not only in decision-making in lower courts, but also in the way in which appeals are now argued. In the unusual case of *R v P, GA*, the Full Court of the South Australian Supreme Court had to consider the question whether or not spousal rape was an offence known to the law of South Australia in 1963.⁶⁰ In 1991, in *R v L*, a majority of the High Court had issued statements — obiter dicta — to the effect that the common law no longer recognised the irrevocable consent of a wife to sexual intercourse with her lawful husband.⁶¹ Among the many legal issues before the Full Court in *R v P, GA* was the effect of these dicta from *R v L* in light of *Farah*. Doyle CJ, with whom White J agreed, referred to *Farah*, stating that the Full Court ‘should apply’ the

⁵⁶ [2008] NSWCA 324 (4 December 2008) [28], citing *Lion White Lead Ltd v Rogers* (1918) 25 CLR 533.

⁵⁷ See also *Bayblu Holdings Pty Ltd v Capital Finance Australia Ltd* (2011) 279 ALR 166, 180, Campbell JA regarding himself as bound to follow High Court dicta because it stated a ‘general rule’ and not because it was seriously considered dicta as such.

⁵⁸ (2010) 188 FCR 541, 586. The case was subsequently appealed to the High Court. In the application for special leave to appeal, the applicant drew attention to ‘the inconsistency ... of the Full Federal Court majority decision with clear and concise dicta expressed by three members of this Court.’ See Transcript of Proceedings, *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCATrans 83 (8 April 2011) 31–3 (Mr Kirk). For the High Court’s decision, see *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 281 ALR 671.

⁵⁹ [2011] FCA 236, [115]–[121]. See also *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [(2010) 14 BPR 27,605 (Barrett J)].

⁶⁰ (2010) 109 SASR 1.

⁶¹ (1991) 174 CLR 379.

‘considered statements of the common law’ from *R v L*.⁶² Taken on its own, this statement does not necessarily imply that Doyle CJ thought he had a duty of obedience to High Court dicta in the circumstances of the case; as we discussed above, treating High Court dicta with the utmost respect is consistent with the traditional view. However, Doyle CJ went on to say that ‘[i]t is for the High Court, not this Court, to decide that...the statements in *R v L* should not be applied’.⁶³ This act of deference to the High Court reveals that Doyle CJ almost certainly thought that he owed a duty to obey the dicta in question until told otherwise by the High Court.

R v P, GA is currently before the High Court itself, under the name *PGA v The Queen*. To our minds, the way in which the High Court appeal was argued in *PGA v The Queen* is revealing. The appeal transcript shows that counsel made frequent references to *Farah* in arguing the appeal, and appeared to assume that the proposition that seriously considered dicta of the High Court are binding was not open to challenge. For example, M G Hinton QC, for the Crown, argued that because the statements from *R v L* were seriously considered dicta, the South Australian courts were ‘not at liberty to ignore [them]’;⁶⁴ in Hinton’s submission, the statements were ‘binding’ and ‘decisive’.⁶⁵ Hinton went on to assert:

I cannot say ... it [sic] is not dicta, it is. But our essential submission is it is seriously considered dicta ... [T]he only inference is that their Honours were well aware and intended that hereafter it would be applied as the law.⁶⁶

S J Gageler QC, intervening for the Commonwealth, argued that because the statements in question were seriously considered dicta, they demanded to be followed by lower courts.⁶⁷ Most notably, the opposing counsel, D M J Bennett QC, for the appellant, did not contest the proposition that seriously considered dicta could bind lower courts, preferring to take issue with what the obiter dicta from *R v L* stood for;⁶⁸ this, notwithstanding that contesting that proposition might have aided the appellant’s case. All seven High Court justices heard the appeal; with one possible exception,⁶⁹ none asked to hear argument on the precedential effect of the obiter statements in *R v L*. The fact that in *PGA v The Queen*, an appeal before the full bench of the High Court was conducted on the shared assumption that the Court’s dicta can be binding on lower courts suggests, to our minds, the ‘profound shift’ in the rules of engagement to which Keith Mason alluded in his retirement speech.

In our discussion of the cases decided in lower courts prior to *Farah*, we referred to decisions in which lower courts thought themselves under a duty of obedience to High Court dicta as outliers. As the cases in the post-*Farah* environment indicate, the incidence with which lower courts regard themselves as

⁶² (2010) 109 SASR 1, 17.

⁶³ *Ibid.*

⁶⁴ Transcript of Proceedings, *PGA v The Queen* [2011] HCA Trans 267 (27 September 2011), [2430].

⁶⁵ *Ibid* [2800].

⁶⁶ *Ibid* [2740]–[2745].

⁶⁷ *Ibid* [3390].

⁶⁸ *Ibid* [3570].

⁶⁹ *Ibid* [2750] (Gummow J).

bound, required or obligated to follow High Court dicta has increased markedly since *Farah* was handed down. Arguably, the new outliers in the post-*Farah* world are cases in which lower courts adhere to the traditional view that High Court dicta, while deserving of great respect, are not binding. One such outlier is *Whyked Pty Ltd v Yahoo!7 Pty Ltd*, in which McDougall J of the New South Wales Supreme Court was faced with dicta from the High Court's decision in *Poulton v Commonwealth* to the effect that a cause of action in tort cannot be assigned.⁷⁰ Referring to his pre-*Farah* decision in *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd*, in which the question of the assignability of tortious causes of action had arisen,⁷¹ he stated that:

I accept that courts of first instance should not generally regard themselves as at liberty to depart from the considered dicta of a majority of the High Court of Australia.... That having been said, things have moved on since 1953. I reviewed the situation...in *Rickard Constructions*...I concluded, on a review of the authorities to that time, that I could and should depart from the dicta in *Poulton*. An appeal of my decision was dismissed...although the Court of Appeal did not consider what I had said in relation to the assignability of causes of action...I acknowledge that, since I gave my judgment in *Rickard Constructions*, the High Court of Australia has reinforced the point that it is not appropriate for an intermediate court of appeal to depart from 'seriously considered dicta of a majority of' the High Court. I acknowledge that the point made by their Honours applies a fortiori to judges of first instance. Nonetheless, I think, the development I traced in *Rickard Constructions*... justify what, otherwise, must be an unacceptable course.⁷²

Similarly, in *R v Aidid*, Ashley JA of the Victorian Court of Appeal commented on High Court dicta that were relevant to the case before him, saying 'the opinions of the majority — whilst seriously considered — were nonetheless obiter', implying that they need not be followed.⁷³

To our minds, another outlier in the post-*Farah* world is the decision of Ward J of the New South Wales Supreme Court in *Ying v Song*, a decision that incorporates the most thorough analysis to date of the High Court's remarks in *Farah* on the precedential effect of its obiter dicta.⁷⁴ In *Ying v Song*, Ward J had to decide what effect to give to dicta of a majority of the High Court in circumstances where those dicta conflicted with the ratio decidendi of a decision of the Full Family Court. She noted the post-*Farah* cases in which '[i]t has been suggested that, following the judgment in *Farah*, the doctrine of precedent may have been modified', but she expressed doubts that the High Court truly intended *Farah* to have such an effect.⁷⁵ She also canvassed cases in which the weight to be attached to considered High Court dicta had been addressed prior to *Farah*, as well as some secondary literature on the same point, and stated:

⁷⁰ [2008] NSWSC 477 (2 June 2008), citing *Poulton v The Commonwealth* (1953) 89 CLR 540.

⁷¹ (2004) 220 ALR 267, 281. See our discussion of that decision above, 244.

⁷² [2008] NSWSC 477 (2 June 2008), [135]–[136].

⁷³ (2010) 25 VR 593, 610.

⁷⁴ [2009] NSWSC 1344 (3 December 2009).

⁷⁵ *Ibid* [18]–[19].

it has long been the case that the weight accorded to obiter dicta will vary depending on the circumstances in which those dicta fell and that considered dicta of appellate courts, though not strictly binding on courts in a lower or equal position within the judicial hierarchy, must be afforded great weight and should be departed from only with the greatest of caution.⁷⁶

This statement is a clear expression of the traditional view that prevailed before *Farah*. Ward J has on several occasions since *Ying v Song* returned to the topic of the precedential effect of High Court dicta; on each of these occasions, she has reiterated a traditional view. In *Hinkley v Star City Pty Ltd*, she decided the case on the basis of the ‘weight of dicta’ before her.⁷⁷ In *Lahoud v Lahoud*, she considered herself bound to follow a decision of the New South Wales Court of Appeal even though it conflicted with ‘seriously considered dicta’ of two High Court judges.⁷⁸ And in *Traderight Pty Ltd v Bank of Queensland*, Ward J echoed her decision in *Ying v Song*, stating that High Court dicta are to be accorded a weight that varies ‘depending on the circumstances in which such dicta fell’.⁷⁹

Cases like *Ying v Song* show that, even in light of *Farah*, a small number of courts continue to adhere to a traditional or orthodox view on the question of a duty of obedience to High Court dicta. However, to our minds, a review of the post-*Farah* case law yields ample support for an argument that the incidence with which lower courts decide cases on the basis that they are bound, required or obligated to follow High Court dicta has increased in the wake of *Farah*, and that the incidence with which courts espouse the traditional view has decreased. In this sense, there has been a ‘profound shift in the rules of judicial engagement’ in the way described by Keith Mason. The shift that is evident in the approach of lower courts to the question of a duty of obedience to High Court dicta has occurred whether or not the High Court intended to change the rules of engagement when it handed down its decision in *Farah*. If, as Ward J suggested in *Ying v Song*, the High Court intended in *Farah* to say nothing inconsistent with the traditional view of the question of a duty of obedience to its obiter dicta, then it is all the more important that the court now take the steps we describe in Part III to ensure that lower courts understand that *Farah* has not changed the rules of engagement after all.

B *Ambiguities Arising from Farah*

In *Zotti*, one of the post-*Farah* cases we discussed above, Campbell JA of the New South Wales Court of Appeal considered that *Farah* might be interpreted in at least three different ways: (a) as stating that it is wrong for a lower court to depart from seriously considered dicta of a majority of the High Court; (b) as stating that lower courts must follow seriously considered dicta of a majority of the High Court concerning a topic on which there is a long-established line of authority; and (c) that the New South Wales Court of Appeal was wrong to depart from High Court dicta in the case of *Farah* itself.⁸⁰ Campbell JA therefore

⁷⁶ Ibid [19].

⁷⁷ [2010] NSWSC 1389 (2 December 2010), [39], [196].

⁷⁸ [2010] NSWSC 1297 (10 November 2010), [148].

⁷⁹ (2010) 266 ALR 503, 506, 518–21.

⁸⁰ (2009) 54 MVR 111, 130.

viewed the High Court's remarks in *Farah* as ambiguous; his Honour stated 'I have some doubt about the proper way of reading *Farah*'.⁸¹ As we showed in Part IIA above, most lower courts in the post-*Farah* world — including the New South Wales Court of Appeal in *Zotti* — have read *Farah* as telling them that they have a duty of obedience to High Court dicta in at least some circumstances. As to the basic question whether or not such a duty of obedience is owed, then, *Farah* does not appear to have generated ambiguities. However, some of the ambiguities that Campbell JA detected in *Farah* are concerned not with ascertaining whether or not a duty of obedience to High Court dicta can be owed, but rather with ascertaining the circumstances in which such a duty might be triggered; they are ambiguities as to the scope of lower courts' duty of obedience (assuming that they owe such a duty in at least some circumstances). Two possible sources of such ambiguity are evident in the critical passage from the High Court's judgment in *Farah* where the Court stated that recognising a new cause of action was 'not a step which an intermediate court of appeal should take in the face of long-established authority and seriously considered dicta of a majority of this Court'.⁸²

One area of ambiguity involves the meaning and effect of the phrase 'long-established authority'. On one reading of the relevant passage from *Farah*, the Court sought to identify two separate considerations that must be taken into account by lower courts when deciding precedential questions, either of which might be decisive in any given case: one is whether or not 'long-established authority', including old High Court precedents, bear on the case;⁸³ and the other is whether 'seriously considered dicta' of the Court bear on the case. But other readings of the passage are also plausible. In *Pape v Federal Commissioner of Taxation*, Heydon J (in his dissenting judgment) pointed out that certain dicta were 'seriously considered dicta, but they could not be described as conforming with long-established authority'.⁸⁴ Arguably, it is this reading of the relevant passage from *Farah* that Campbell JA had in mind when he posited interpretation (b) described above, referring to dicta on a topic on which there is long-established authority. This reading takes a narrower view of what the Court said in *Farah*, suggesting that instead of two considerations either of which might be decisive, there are two considerations which are decisive only in a cumulative way. On this narrower reading, seriously considered dicta taken on their own can never be binding, but might come to be binding against a backdrop of long-established authority.⁸⁵ And another relatively narrow reading might also be available: in some

⁸¹ *Ibid.*

⁸² (2007) 230 CLR 89, 151. Another source of ambiguity arises, not from the text of the judgment in *Farah*, but instead from the fact that there are appellate courts in Australia other than the High Court: thus, lower courts must now determine whether the High Court's remarks about obiter dicta in *Farah* apply to the dicta of intermediate appellate courts as well as to dicta of the High Court itself: see *Nowicka v Superannuation Complaints Tribunal* [2008] FCA 939 (20 June 2008) (Sundberg J); *Gable v Nardini* (2010) 56 MVR 551 (Heenan J); *NV Sumatra Tobacco Trading Co v British American Tobacco Australia Services Ltd* (2011) 198 FCR 435 (Greenwood J).

⁸³ On the question of how intermediate appellate courts should treat old High Court precedents, see *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604.

⁸⁴ (2009) 238 CLR 1, 161.

⁸⁵ Presumably, this means long-established authority other than *rationes decidendi* of the High Court; in a case where a lower court is faced with longstanding *rationes decidendi* of the High Court, the

cases decided in lower courts since *Farah*, judges appear to have formed the view that a duty of obedience to High Court dicta is triggered only by dicta that themselves are both ‘long-established’ and ‘seriously considered’. For example, in *CGU Workers Compensation (NSW) Ltd v Garcia*, Mason P of the New South Wales Court of Appeal stated that ‘[t]he High Court has recently issued stern warnings against intermediate courts of appeal stepping beyond long-established authority derived from...considered dicta of the High Court itself’.⁸⁶ And, as we discussed above, in *Net Parts International*⁸⁷ and *ACT v Queanbeyan City Council*,⁸⁸ lower courts regarded the vintage of High Court dicta as a decisive factor, along with whether or not the dicta concerned were seriously considered.

The second area of ambiguity concerning the scope of the duty of obedience to High Court dicta arises because of the High Court’s use, in *Farah*, of the qualifier ‘seriously considered’. By using this qualifier, the Court signalled clearly enough that it did not intend its remarks about lower courts adhering to its dicta to apply with respect to every dictum that it utters. The distinction that the Court was reaching for is neither new nor remarkable.⁸⁹ For instance, in *Richard West and Partners (Inverness) Ltd v Dick*, Megarry J distinguished between ‘dicta and dicta’, contrasting ‘mere passing remarks’, ‘considered enunciations of the judge’s opinion’, and a ‘third type of dictum’ in which a judge invokes cases supporting his or her opinion.⁹⁰ In the well-known case of *Brunner v Greenslade*, Megarry J returned to the topic of obiter dicta, distinguishing between the persuasiveness of different types of dicta in the following passage:

A mere passing remark or a statement or assumption on some matter that has not been argued is one thing, a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed part of the ratio.⁹¹

In Australia, in the pre-*Farah* case law, in *Union Shipping New Zealand Ltd v Morgan*,⁹² Heydon JA of the New South Wales Court of Appeal drew a distinction between ‘passing dicta’, ‘considered dicta’, and ‘rationes decidendi’, and referred to ‘the difference between statements proceeding from highly experienced lawyers of good reputation in ultimate appellate courts and statements proceeding from other persons’.⁹³ These are the sorts of distinctions that Heydon has explored extensively in his extra-judicial writings, which we discuss further in

lower court is bound by those rationes decidendi and the question of seriously considered dicta does not arise. This interpretation of the second reading of the passage from *Farah* is consistent with the background to *Farah* itself: there, the long-established authority was in the form of English cases on knowing receipt: see (2007) 230 CLR 89, 151.

⁸⁶ (2007) 69 NSWLR 680, 693.

⁸⁷ [2008] NSWCA 324 (4 December 2008).

⁸⁸ (2011) 281 ALR 671.

⁸⁹ Although note *Ashdown v The Queen* [2011] VSCA 408 (7 December 2011), [157] (Ashley JA) (‘It is at least not clear that the concept of seriously considered dicta is part of the common law in Australia’).

⁹⁰ [1969] 2 Ch 424, 431–2.

⁹¹ [1971] Ch 993, 1002–3. See also *Ex parte Cox* (1887) 20 QBD 1, 19 (Lord Esher MR); *Jacobs v London County Council [No 2]* [1950] 1 AC 361, 369 (Lord Simonds).

⁹² (2002) 54 NSWLR 690.

⁹³ *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690, 734. See also *Chief Executive Officer of Customs v Tony Longo Pty Ltd* (2001) 52 NSWLR 458, 472 (Heydon JA).

Part III. They are also the sorts of distinctions that underpin many of the pre-*Farah* cases that we referred to above, in which lower courts adhered to the traditional view.

To reiterate, courts have always had to draw distinctions between different types of dicta in order to know what weight to attribute to them in seeking assistance from judicial authorities when adjudicating disputes. And, unsurprisingly, this continues in the post-*Farah* environment. For example, in the 2010 case of *Traderight Pty Ltd v Bank of Queensland*, Ward J of the New South Wales Supreme Court considered different kinds of dicta and the range of circumstances that could be said to affect the weight accorded to dicta, such as ‘whether the point was argued before the court in which such dicta was uttered’.⁹⁴ And in another case decided in the Victorian Court of Appeal in 2010, *Doughty v Martino Developments Pty Ltd*, Nettle JA said of a statement that was not the product of a consideration of relevant authorities or substantial argument that it ‘does not rise to the level of considered dicta in the sense identified in *Farah*’.⁹⁵ The ambiguity arising from *Farah* around the meaning of ‘seriously considered dicta’ is noteworthy not because it makes it more difficult than it used to be for lower courts to distinguish between different types of dicta. It is noteworthy because, given that lower courts now regard themselves increasingly as having a duty of obedience to ‘seriously considered dicta’, it has become more important than it was before to know when dicta are ‘seriously considered’ and when they are not. In distinguishing different types of dicta, the stakes are now higher. Given that the stakes were raised by *Farah*, one might have expected the Court in that case to spell out at least some of the considerations that, in its view, go to characterising dicta as ‘seriously considered’ (or not, as the case may be). We take up this point in Part III.

C *In Summary*

In Part II we have argued that a review of the case law both before and after *Farah* reveals that Keith Mason was right to assert that *Farah* represents a ‘profound shift in the rules of judicial engagement’ in Australia. The cases show that the tendency before *Farah* was handed down was for lower courts to take what we have called a ‘traditional’ or ‘orthodox’ view according to which High Court dicta are to be treated with the utmost respect but lower courts do not have a duty of obedience to such dicta; by contrast, the post-*Farah* cases show a trend towards lower courts regarding themselves as bound, required or obligated to adhere to High Court dicta, at least in certain circumstances. Moreover, the text of the High Court’s judgment in *Farah* gives rise to ambiguities about the relation between ‘long-established authority’ and ‘seriously considered dicta’, and about the circumstances in which dicta are to be regarded as ‘seriously considered’. In relation to the first source of ambiguity, the post-*Farah* cases reveal several possible interpretations; in relation to the second source, the

⁹⁴ *Traderight Pty Ltd v Bank of Queensland* (2010) 266 ALR 503, 522. See also *Lift Capital Partners Pty Ltd v Merrill Lynch International* (2009) 73 NSWLR 404, 427–8 (Barrett J).

⁹⁵ (2010) 27 VR 499, 510.

ambiguity has always been present in cases where dicta are in play, but *Farah* has raised the stakes associated with that ambiguity.

III The Way Forward

Given that *Farah* has changed the rules of judicial engagement in Australia, we do not think it is unreasonable to suggest that the case has the potential to generate anxiety and uncertainty in lower courts, and more widely, about the precedential effect of High Court dicta. And anxiety and uncertainty about *Farah* is already detectable in the case law: in cases like *Zotti* and *Ying v Song* much attention has been given by judges in lower courts to questions about High Court dicta; in the pre-*Farah* case law, this sort of explicit sustained worrying over such questions was almost non-existent. Anxiety and uncertainty about matters of judicial precedent is clearly of concern, given the significant contribution that legal stability and predictability make to the rule of law. In Part III, we argue that the High Court could adopt at least two strategies to forestall undesirable effects arising from *Farah*: first, it could issue clearer general guidance to lower courts as to what it requires of them when working with its dicta; and second, it could issue more specific guidance to lower courts as to when it regards its dicta as ‘seriously considered’, and therefore to be followed, from case to case. We then argue that not only can the High Court forestall anxiety and uncertainty in this way; it ought to do so.⁹⁶

A Clearer Guidance

There can be little doubt that the High Court would forestall anxiety and uncertainty about *Farah* if it were now to state explicitly that lower courts are bound only by the *rationes decidendi* of its decisions and never by its *obiter dicta*, and that lower courts do not have a duty of obedience to High Court dicta under any circumstances. Aside from the question whether such a clarification of the operation of the doctrine of precedent in Australian law would be effective, a question of particular importance is whether it would be justified. In our view, the most straightforward justification for drawing a sharp distinction between the precedential authority of *rationes decidendi* and that of *obiter dicta* takes the form of an argument with a formal and a normative component. The formal component of the argument points out that the rule of *stare decisis* has what Joseph Raz has described as an ‘exclusionary’ character: the rule operates as a second-order reason for courts to exclude from their practical reasoning when adjudicating cases otherwise pertinent first-order reasons weighing in favour of departing from a precedent.⁹⁷ The normative component of the argument points out that the rule of *stare decisis* only attaches to that part of a precedent that

⁹⁶ We leave to one side the important question of the constitutional implications of the High Court issuing directives and/or guidance to lower courts on matters of precedent. This question is explored in Keith Mason, ‘The Distinctiveness and Independence of Intermediate Courts of Appeal’ (2012) 86 *Australian Law Journal* 308.

⁹⁷ Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) ch 1; Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) ch 1.

carries authority, that the authority of a court attaches only to reasons that it is necessary for the court to appeal to in the discharge of that court's institutional function, and that the institutional function of any court (with exceptions that for present purposes are irrelevant)⁹⁸ is limited to the resolution of disputes in accordance with law.⁹⁹ Drawing the formal and the normative components of the argument together, then, it may be concluded that the exclusionary rule of *stare decisis* attaches only to that part of a precedent that is constituted by rationes decidendi, because only rationes decidendi are necessary to the discharge of a court's institutional function.

This is not a complete account of the authority of precedent; for example it ignores the fundamental question of the justification of the authority of a precedent-issuing court.¹⁰⁰ But, turning to the case of the High Court of Australia and assuming (as we must) that the High Court is a legitimate authority within the Australian political system, the argument to which we have just alluded provides what to our minds is a powerful justification for distinguishing sharply between the precedential effect of rationes decidendi of High Court decisions on the one hand, and that of its obiter dicta on the other. Specifically, the argument supports the conclusion that the Court should now state in no uncertain terms that the rationes decidendi of its decisions, because of their authoritative character, bind lower courts in the sense of triggering the exclusionary rule of *stare decisis*, but that its obiter dicta never have this effect, no matter how compelling they are.

The argument is a strong one, but it is not beyond objection. For one thing, even if theoretically it is possible to draw a formal and normative distinction between rationes decidendi and obiter dicta, practically that distinction may be extremely difficult if not impossible to discern. The practical difficulties arise because of the conventions that surround judicial decision-making and especially the issuing of written reasons for decisions.¹⁰¹ Precedent-issuing courts do not package their judgments into clearly identified sections marked 'ratio decidendi' and 'obiter dicta'.¹⁰² Nor do courts approach precedents in ways that depend on keeping in view the distinction between rationes decidendi and obiter dicta; rather, courts (and advocates, for that matter) tend to focus on what one judge (writing extra-judicially) has called the 'general analytic approaches',¹⁰³ taken in earlier cases, highlighting distinctions between rationes decidendi and obiter dicta only sometimes and usually for specific purposes. Sometimes what looks at first glance like the ratio decidendi of a case turns out on closer inspection to be susceptible to being interpreted broadly or narrowly, leaving open the question of its scope. And

⁹⁸ See, eg. *Supreme Court Act*, RSC 1985, c S-26, s 53.

⁹⁹ Lionel Smith, 'The Rationality of Tradition' in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 297, 306.

¹⁰⁰ Raz's account of the justification of political authority may be found in Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) chs 2-4; Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003.

¹⁰¹ Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) ch 3.

¹⁰² A W B Simpson, 'The Ratio Decidendi of a Case and the Doctrine of Binding Precedent' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 148, 166, 168-9; Michael Abramowicz and Maxwell Stearns, 'Defining Dicta' (2005) 57 *Stanford Law Review* 953, 955.

¹⁰³ J D Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1, 31.

when judgments are delivered *seriatim*, there is sometimes no discernable shared reasoning, only the decision itself which, according to some theorists, constitutes a *ratio decidendi* of the narrowest possible scope.¹⁰⁴ The picture is one of complexity and indeterminacy, so much so that it has led one leading theorist of precedent, Stephen Perry, to reject the Razian notion of *stare decisis* as an exclusionary rule and propose instead a theory of precedent according to which the rule of *stare decisis* is a second-order reason that varies the weight of first-order reasons rather than excluding such reasons altogether.¹⁰⁵ Perry's 'strong Burkean' account of precedent retains the ordinal form of precedential reasons that Raz highlights, and is consistent with the normative argument for treating precedent as authoritative that we introduced above, but it accommodates the realities of what courts do when deciding cases as well.

Even if these observations about the complexity of precedent issuing and use are accepted, there is, as Perry acknowledges, room for *stare decisis* to operate as an exclusionary rule in cases where lower courts are presented with the precedent decisions of superior courts. Perry states that 'it is clear that...lower courts [are] exclusionarily bound not to overrule the decisions of higher courts',¹⁰⁶ which suggests that he endorses a Razian view of the effect of precedent to this extent. At the very least, Perry here is saying that when lower courts confront precedent decisions of superior courts, the effect of *stare decisis* is not to exclude relevant first order reasons but rather to attribute to those reasons a weight of nil, achieving the same effect as if they had been excluded. We are content to remain undecided as to which meaning Perry intends. For present purposes it is not necessary to decide: on either meaning, a distinction between *rationes decidendi* which bind lower courts, and *obiter dicta* which do not, may be asserted.¹⁰⁷

To reiterate, then, whether one accepts a Razian view of *stare decisis* as an exclusionary rule, or a strong Burkean conception of precedent, the proposition that *rationes decidendi* are binding on lower courts in a way that *obiter dicta* are not may be sustained. Cases like *Farah* suggest strongly that the High Court of Australia adheres to a Razian view of *stare decisis* when it comes to the question of the precedential effect of its decisions in lower courts, and to the extent that the Court takes a more relaxed approach to precedent, for example in the matter of overruling itself, its tendency is to adhere to a strong Burkean conception.¹⁰⁸ Given that at the very least a strong Burkean conception of precedent prevails in

¹⁰⁴ Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 24–5; Simpson, above n 102, 164.

¹⁰⁵ Stephen R Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 *Oxford Journal of Legal Studies* 215, esp 221–3.

¹⁰⁶ *Ibid* 257.

¹⁰⁷ It might be thought that, according to the logic of the strong Burkean conception of precedent, we should not speak of even the *rationes decidendi* of precedent decisions being binding on lower courts. We would not go that far and, as we explain in the text, we do not think that Perry does either. If, however, it were necessary to go so far, the subsequent collapse of the distinction between *rationes decidendi* and *obiter dicta* could hardly be said to support the proposition that *obiter dicta* are binding on lower courts. It would mean that neither *rationes decidendi* nor *obiter dicta* were binding on lower courts.

¹⁰⁸ Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34 *Melbourne University Law Review* 519, esp 528–9.

Australia, and given that, according to that conception of precedent — and, a fortiori, the Razian conception — a distinction between the precedential effect of *rationes decidendi* and that of *obiter dicta* should be drawn clearly, there is a strong case for the High Court to assert just such a distinction at the earliest possible opportunity, so as to clarify the operation of the doctrine of precedent in Australian law and reduce uncertainty in lower courts. In reflections on *Farah*, delivered at a judges' conference in 2008, Justice Steven Rares of the Federal Court stated that:

[i]t would be wrong for a [lower] court to defer simply to dicta, however seriously considered, even in the High Court, in substitution for its own view of the decisive question to be determined in the case before it where the matter has been the subject of full argument and consideration. That is because the dicta do not lay down rules of law, and cannot have that function. The High Court cannot issue advisory opinions.¹⁰⁹

The High Court would be hard pressed to find a better way of expressing the precedential effect of its *obiter dicta* than that.

As we noted in Part II, it seems clear enough that the High Court's remarks in *Farah* on the precedential effect of its *obiter dicta* were confined to what the Court described as 'seriously considered' dicta. In Part II, we argued that lower courts have always drawn distinctions between different types of dicta but that, in the wake of *Farah*, the stakes in drawing such distinctions are higher than they used to be. This has the potential to generate anxiety and uncertainty, but the Court could alleviate that anxiety and uncertainty by issuing more precise guidance to lower courts as to the circumstances in which its dicta are to be regarded as 'seriously considered'. This sort of guidance would be necessary even in a world where, as we have recommended above, the Court stated clearly that its *obiter dicta* can never be binding on lower courts. This is because in that world *obiter dicta* would still carry weight even if they would not be strictly binding, and their weight would vary according to a range of factors in light of which it would be possible to classify dicta as 'seriously considered' or not. In other words, in a world where *obiter dicta* are not binding on lower courts, to describe dicta as 'seriously considered' is to point to reasons for following those dicta even though the rule of *stare decisis* does not apply to them, and the words 'seriously considered' simply function as a reminder that the reasons are present: other descriptions might function equally well, as is evidenced in the various ways in which such dicta are referred to.¹¹⁰ If the High Court wishes lower courts to respond to the reasons for following its *obiter dicta* in their decision-making, then the High Court should do more to explain those reasons to lower courts: given that the Court has chosen to refer to the reasons for following its dicta using the language of 'seriously considered' dicta, this guidance should be given in the form of a description of the circumstances in which High Court dicta should be regarded by lower courts as 'seriously considered'.

¹⁰⁹ Rares, above n 6, [7].

¹¹⁰ Karl Llewellyn, *The Case Law System in America* (University of Chicago Press, 1989) 14 ('well-considered'); Rupert Cross and JW Harris, *Precedent in English Law* (Clarendon Press, 4th ed, 1991) 77 ('[d]icta of the highest degree of persuasiveness'); Richard H S Tur, 'Time and Law' (2002) 22 *Oxford Journal of Legal Studies* 463, 482–3 ('gross *obiter dicta*'); Duxbury, above n 101, 70 ('[t]he most compelling' dicta); Heydon, above n 103, 30 ('seriously considered').

A review of the scholarly literature and judicial statements on precedent reveals that a number of factors are typically regarded as bearing on the question whether or not lower courts should follow (non-binding) obiter dicta of superior courts. Chief among these factors is the question whether or not the dicta address a point of law that was the subject of full argument before the superior court;¹¹¹ whether or not they are the product of a careful consideration of those arguments and relevant authorities by that court;¹¹² whether or not they would have formed part of the ratio decidendi of the case had the facts been otherwise or had an alternative point of law not been available that led to the determination of the case;¹¹³ and whether or not they address a question on which the superior court has issued rationes decidendi or obiter dicta in the past.¹¹⁴ Also relevant are the intentions of the superior court: does it explicitly intend its dicta to be applied by lower courts in the future or not or (what might amount to the same thing) to signal that it (the superior court) will, at some point in the not-too-distant future, move the law in a new direction?¹¹⁵ And (perhaps more controversially), the composition of the superior court may be relevant: were the dicta issued by a unanimous bench,¹¹⁶ or a majority of the court,¹¹⁷ or a single judge? If a single judge, was the judge one of such stature that her or his dicta should be accorded particular weight?¹¹⁸ In light of factors such as these, it will sometimes be possible to categorise dicta as ‘seriously considered’ or not with a relatively high degree of confidence. However, difficult cases will remain: dicta may be issued in a qualified or tentative way, not to be followed, but rather to provide some guidance to lower courts grappling with particular legal issues in future cases;¹¹⁹ more problematically, dicta may also be issued in a way that leaves unclear their true scope, relevance or weight (a matter we take up again below). And it is also important to emphasise that whether or not obiter dicta should be followed depends, as is ultimately the case with all non-binding authority, on the cogency of the reasoning that they reflect.¹²⁰ Dicta may be issued by a unanimous bench, on a

¹¹¹ *Brunner v Greenslade* [1971] Ch 993, 1002–3 (Megarry J); Rares, above n 6, [4]; Heydon, above n 103, 33.

¹¹² Tur, above n 110, 482–3.

¹¹³ *Brunner v Greenslade* [1971] Ch 993, 1002–3 (Megarry J); Cross and Harris, above n 110, 77–80; Heydon, above n 103, 33.

¹¹⁴ An example of a case where a relevant consideration was that a previous High Court decision on point failed to yield a ratio decidendi is *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 (‘CAL’). We discuss CAL below 263.

¹¹⁵ Lord Devlin, ‘Judges and Lawmakers’ (1976) 39 *Modern Law Review* 1, 10; Heydon, above n 103, 30 and 32.

¹¹⁶ Tur, above n 110, 482–3.

¹¹⁷ *Farah* (2007) 230 CLR 89, 151.

¹¹⁸ *R v Keenan* (2009) 236 CLR 397, 413 Kirby J (‘[a]ll of the participants in this Court’s joint majority reasons...were greatly respected exponents of the criminal law. In particular, Brennan and Toohey JJ were each highly knowledgeable practitioners of the [Criminal] Code’); Sir Anthony Mason, ‘The Use and Abuse of Precedent’ (1988) 4 *Australian Bar Review* 93, 109 (‘[Sir Owen Dixon’s] discussion of any legal topic invariably contained nuances of thought not previously revealed to those who had studied the topic closely’); *Brunner v Greenslade* [1971] 1 Ch 993, 1003 (Megarry J) (anything uttered by Simonds J has its ‘own intrinsic authority’).

¹¹⁹ Heydon, above n 103, 33.

¹²⁰ As Sir Owen Dixon put it in 1957 (referring to the authority of decisions of the Supreme Court of the United States of America in the High Court of Australia), ‘always the degree of persuasiveness possessed by persuasive authority is intrinsic’: Sir Owen Dixon, ‘The Honourable Mr Justice Felix Frankfurter: A Tribute from Australia’ (1957) 67 *Yale Law Journal* 179, 181.

matter fully argued, with every intention of demanding adherence by lower courts, but if they are founded on error, they should not be followed no matter how ‘seriously considered’ they are. To perpetuate error, where one is not bound to do so by a rule of law, is irrational.¹²¹

In issuing guidance to lower courts on the circumstances in which they should regard its obiter dicta as ‘seriously considered’, the High Court should refer to the reasons that bear on the question whether or not its dicta should be followed. This does not require the Court to engage in new thinking: the reasons bearing on the precedential effect of obiter dicta have been well canvassed in the literature (including in the scholarly writings of members of the Court)¹²² and, from time to time, in case law as well. Instead, it is a matter of spelling out those reasons at the earliest possible opportunity. The High Court is uniquely placed to guide lower courts in the correct application of that doctrine, a point to which we return below. In our view, the High Court spelling out the reasons bearing on the precedential effect of its dicta will not yield any precise definition of ‘seriously considered’ dicta that lower courts can then apply with a high degree of certainty. But nor should it: given that lower courts are not bound by High Court dicta, they are free to — indeed they have a duty to — assess the reasons for and against adhering to such dicta. The most that the High Court can do is to explicate these reasons; beyond that it is up to lower courts to decide how the balance of reasons plays out in individual cases.

B *More Explicit Reasoning*

As we noted above, the conventions that surround judicial decision-making in the common law world do not entail courts identifying parts of their reasoning as ‘ratio decidendi’ and other parts as ‘obiter dicta’; nor do those conventions entail courts drawing explicitly the distinction, within a given set of written reasons for decision, between ‘seriously considered’ dicta and all other dicta. In our view, these conventions are appropriate and should not be interfered with. They reflect an understanding of judicial decision-making according to which a court, qua precedent-issuer, is focused on applying the law to the facts and determining the dispute before it, not on questions of legal classification that might arise in the future. Given that the institutional responsibility of a court is primarily the resolution of disputes, and not the classification of legal materials for future purposes, this focus is entirely correct. It is for a court qua precedent-user to ascertain the effects of precedent, in light of *stare decisis* and relevant guidance from superior courts. Indeed, it is arguable that for a court qua precedent-issuer to pre-empt courts qua precedent-users from discharging their function of ascertaining the effects of precedent in this way is to manifest a lack of trust in those latter courts that has the potential to undermine the rule of law. In light of the appropriateness of conventions that entail courts declining to dictate the precedential effects of their individual decisions, there is limited opportunity for

¹²¹ Of course, the logic of *stare decisis* depends on the truth of the proposition that it can be rational to perpetuate error when one *is* bound by a rule of law to do so: see Smith, above n 99, for an especially compelling account.

¹²² Heydon, above n 103.

the High Court to forestall anxiety and uncertainty, and enhance predictability, around lower courts' treatment of its obiter dicta by engaging in more explicit reasoning about the scope, relevance and weight of the dicta that it issues from case to case. However, within those limits, some advances can be made.

For example, the Court could, from case to case, make clear the considerations that it has taken into account in issuing dicta that it wishes lower courts to follow. Convention does not, and should not, allow that this be achieved simply by marking out certain dicta as 'seriously considered'. Such a heavy-handed approach misunderstands the proper division of labour between courts qua precedent-issuers and courts qua precedent-users that we referred to above. Instead, the Court should spell out the considerations in question, so that lower courts in future cases can take them into account in making an assessment as to whether or not the dicta are to be regarded as 'seriously considered' in light of the Court's general guidance on the question. Obviously, if the Court intends its dicta in any given case to be treated as 'seriously considered' by lower courts in future cases, it should ensure that the considerations it explicitly takes into account are sufficient to justify a lower court forming the view that the dicta concerned are indeed 'seriously considered'.

Arguably, the High Court's judgment in *Farah* itself contains an example of how this should not be done. The Court determined the appeal in that case on the basis that there had not been a breach of fiduciary obligation,¹²³ which meant that all of its remarks about liability under the first and second limbs of *Barnes v Addy* were obiter dicta. The Court explained at great length the reasons why it thought that the New South Wales Court of Appeal was wrong to recognise an unjust enrichment-based cause of action in the *Barnes v Addy* setting.¹²⁴ These dicta were extensive, referred to a range of relevant authorities, and were the product of careful deliberation. They were clearly intended by a unanimous Court to be followed by lower courts. To this extent, the Court gave lower courts plenty of reasons to think that its dicta on the first limb of *Barnes v Addy* should be followed. However, in one respect the Court could have done more. At a crucial juncture in its written reasons for decision, having referred to an essay by Lord Nicholls that is widely regarded as offering an especially powerful critique of a fault-based cause of action against a third party recipient in the *Barnes v Addy* setting, the Court stated:

It is not proposed to examine that critique in view of the fact that neither the Court of Appeal nor the respondent described or explicitly adopted the reasoning. Nor, for the same reason, is it proposed to examine other legal writing which might offer support for the Court of Appeal.¹²⁵

By refusing to engage with important scholarly literature putting the case against fault-based liability or for unjust enrichment-based liability, the Court in *Farah* left open the possibility that its dicta on the first limb of *Barnes v Addy* need not be regarded as 'seriously considered' to the extent that they relate to the

¹²³ (2007) 230 CLR 89, 136–9.

¹²⁴ *Ibid* 148–59.

¹²⁵ *Ibid* 155. The essay is Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in W R Cornish et al (eds), *Restitution Past, Present and Future — Essays in Honour of Gareth Jones* (Hart, 1998) 231.

arguments in that literature. It is worth remembering that there is no binding authority from the High Court of Australia on the basis of liability under the first limb of *Barnes v Addy*; there are only the dicta from *Farah* and those from the 1975 case of *Consul Development*.¹²⁶ In these circumstances, if a lower court in a *Barnes v Addy* case is asked to consider the arguments against fault-based liability in Lord Nicholls' seminal essay, what reasons will that lower court have for following dicta from *Farah*? Insofar as they relate to Lord Nicholls' arguments, they appear not to be 'seriously considered' after all.¹²⁷

By contrast with *Farah*, a textbook example of how 'seriously considered' dicta should be issued so as to provide appropriate guidance to lower courts may be found in the High Court's 2009 decision in the case of *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*.¹²⁸ There, the Court found that a publican had not acted negligently in allowing an intoxicated customer to ride his motorcycle home, a ride which ended in an accident causing the death of the customer. The ratio decidendi was narrow, turning on the question whether a duty of care had arisen requiring the publican to telephone the customer's wife to request that she come and collect him from the hotel.¹²⁹ But a majority of the Court nonetheless issued extensive dicta on the broader question of the general common law duty of care owed by publicans to their customers with respect to the service of alcohol. In their joint judgment, Gummow, Heydon and Crennan JJ (with whom Hayne J separately agreed) stated that in their view publicans owe no general duty, and discussed in detail the various reasons for that view.¹³⁰ They also compared the position in Canada, where a general duty is thought to be owed, distinguishing the case in which the Canadian Supreme Court recognised the publican's general duty and pointing out the weaknesses of the Supreme Court's reasoning in that case.¹³¹ Perhaps most significantly, the majority noted that a previous High Court decision on the question of the publican's general duty, *Cole v South Tweed Heads Rugby League Football Club Ltd*,¹³² had yielded no discernable ratio decidendi.¹³³ The majority indicated that in such circumstances of uncertainty it was concerned about

¹²⁶ (1975) 132 CLR 373.

¹²⁷ Perhaps it could be argued that the Court's remarks about the impermissibility of 'top-down' legal reasoning apply to the arguments in Lord Nicholls' essay and other scholarly writings, and that these dicta should be followed by lower courts in future cases: see *Farah* (2007) 230 CLR 89, 151; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 543–5 (Gummow J). In our view, there are two responses to this argument. First, the Court's remarks in *Farah* about 'top-down' legal reasoning were not in response to argument or the product of sustained deliberation, and were in many ways peripheral to the determination of the case: to this extent they should not be regarded as 'seriously considered'. Second, the Court's remarks about 'top-down' legal reasoning were almost certainly founded on error and lack persuasive force: see Mason, 'President Mason's Farewell Speech', above n 6; Burrows, above n 3, for some arguments that lend support to that proposition.

¹²⁸ (2009) 239 CLR 390.

¹²⁹ *Ibid* 396 (French CJ), 404–11 (Gummow, Heydon and Crennan JJ), 417 (Hayne J). The Court also found that even if there was a duty, it was not breached, and that even if there was a breach, it did not cause the customer's death: see 396, 399–404, 417.

¹³⁰ *Ibid* 411–15. French CJ declined to join in the dicta: at 396. The majority also stated that the question of a publican's duty of care to third parties with respect to the service of alcohol to customers should be left open: at 416.

¹³¹ *Ibid* 415, citing *Jordan House Ltd v Menow* (1973) 38 DLR (3d) 105.

¹³² (2004) 217 CLR 469.

¹³³ (2009) 239 CLR 390, 411–12.

the possibility of ‘baseless and ultimately doomed litigation’¹³⁴ around the question of the publican’s general duty, and it issued its dicta on that question in light of that concern, with the aim of ‘avoid[ing] repetition in future of what happened in this case’.¹³⁵ *CAL* reveals the Court signalling as strongly as it can (within the bounds of convention) its desire that lower courts follow its dicta, by setting out exhaustively the considerations it has taken into account in issuing them. It is difficult to imagine a basis on which a lower court faced in a future case with arguments that publicans do owe a general common law duty of care to their customers in respect of alcohol service might now reasonably form the view that the dicta of the majority in *CAL* were not ‘seriously considered’ and need not be followed for that reason.¹³⁶

C *Why the High Court Ought to Issue Guidance Regarding Its Dicta*

In Part III, we have sought to show what the High Court may now do to forestall anxiety and uncertainty with respect to the precedential effect of its obiter dicta in the wake of *Farah*. We have indicated the formal and normative dimensions of an argument as to why the Court’s dicta never bind lower courts in the same way as its rationes decidendi do. In light of that argument, in our view the Court has a duty to state clearly the true precedential distinction between its rationes decidendi and its obiter dicta. This duty is grounded in the requirements of the rule of law.¹³⁷ However, beyond pointing to this duty to clarify the operation of the doctrine of precedent in Australian law, we have not yet said anything about why the Court should issue general and particular guidance to lower courts as to how to work with its obiter dicta. In the remainder of the paper, we argue that not only may the Court forestall anxiety and uncertainty by being more explicit about the precedential effect of its dicta; it ought to do so, in light of the value of its dicta, the circumstances that surround High Court decision-making, and the Court’s position as the ultimate judicial authority in the Australian legal system.¹³⁸

¹³⁴ Ibid 413.

¹³⁵ Ibid 413. To be more precise, the majority said that the ratio decidendi of the decision of the New South Wales Court of Appeal in *Cole*, which included the proposition that a publican owes no general common law duty of care to a customer in respect of the service of alcohol (with certain exceptions), is (in the absence of relevant High Court authority) binding on all intermediate appellate courts in Australia except where those courts form the view that the New South Wales Court of Appeal decision was ‘plainly wrong’: at 411–13. (See also *Farah* (2007) 230 CLR 89, 151–2.) In *CAL*, given that the majority thought that all state courts were bound by the ratio decidendi of the New South Wales Court of Appeal’s decision in *Cole*, dicta endorsing that ratio decidendi seem to have been designed to put the matter beyond all doubt by signalling clearly that any future High Court challenge to the New South Wales Court of Appeal’s decision in *Cole* would be fruitless.

¹³⁶ Of course, it is worth remembering that a lower court might form the view that it should follow High Court dicta because those dicta were ‘seriously considered’ and thus constitute weighty reasons for deciding a case a certain way, notwithstanding that the lower court has no duty of obedience to the dicta. This approach to High Court dicta characterises the traditional view that we discussed in Part II.

¹³⁷ Rares, above n 6, [8].

¹³⁸ Of course, the extent to which the Court ought to issue guidance regarding its dicta depends, in part, on practicalities such as the resources it has available to it. However, we note that the resource implications of our recommendations are likely to be modest, given that those recommendations do not require the Court to depart from longstanding practices when giving reasons for decisions.

Judge-made law is the product of multiple instances of practical reasoning by individual minds over the course of time, taking into consideration social and economic change, responding to the intricacies and nuances of particular human interactions, and entailing the interpretation of an ever-increasing volume of factual and legal information. It is the product of an immensely complex endeavour. At the heart of the endeavour are the competing demands of certainty and predictability on the one hand, and change on the other: neither set of demands can ever be ignored or dismissed in an act of judicial law-making. The value of obiter dicta is to be found in the distinctive contribution that they make to negotiating a response to the competing demands of certainty and change in the setting of judge-made law. Obiter dicta enable courts to signal the possibility or even the likelihood of legal change, while respecting the demands of certainty, in a variety of more or less sophisticated ways: for example, by questioning an area of doctrine long thought to be uncontroversial, thus paving the way for a future departure from that doctrine without actually committing to such a departure; or by suggesting a new way of understanding a legal problem, thus inviting further consideration of that problem and further refinement of the legal understanding of it, again without committing to one or another understanding. As Lord Devlin famously put it:

A judge-made change in the law rarely comes out of a blue sky. Rumbblings from Olympus in the form of obiter dicta will give warning of unsettled weather. Unsettled weather is itself of course bound to cause uncertainty, but inevitably it precedes the solution of every difficult question of law.¹³⁹

By facilitating a fine balancing of the demands of certainty and change, obiter dicta play an absolutely indispensable role in the system of judge-made law. Without them, courts would lack a variety of options when fashioning sensitive and sophisticated responses to the competing values underpinning the practice of judicial law-making.

When thinking about why the High Court ought to clarify the precedential effect of its obiter dicta, it is helpful to have in view not only the value of obiter dicta in a system of judge-made law, but also the circumstances that surround High Court decision-making. Broadly, these circumstances are as follows. The High Court hears relatively few appeals each year when compared with the intermediate appellate courts in the various states and territories of Australia.¹⁴⁰ Moreover, putting aside constitutional and certain other matters,¹⁴¹ the High Court exercises control through the special leave process over the appeals that it hears, and the result of this is that not all cases that parties wish to take to the Court will end up there. Consequently, many legal questions, including fundamental ones, have only ever been before the Court once or twice (if at all) since Federation, and in the case of many of those questions, the Court last considered them many years ago. There is no reason to think that this situation is likely to change any time soon. At the

¹³⁹ Devlin, above n 115, 10.

¹⁴⁰ As Keith Mason, 'President Mason's Farewell Speech', above n 6, 768 points out, in 2007 the New South Wales Court of Appeal delivered 377 judgments. By contrast, in the same year the High Court delivered 61 judgments: AustLII, *2007 High Court of Australia Decisions* <<http://www.austlii.edu.au/au/cases/cth/HCA/2007/>>.

¹⁴¹ See, eg, *Commonwealth Electoral Act 1918* (Cth), s 354.

same time, the relatively infrequent appeals that the Court considers raise difficult, significant and often multi-dimensional legal questions. So much is indicated by the criteria under which special leave will be granted: those criteria are met only where a case is of 'public importance', or entails conflicting opinions in lower courts, or implicates the 'interests of the administration of justice'.¹⁴² The overall picture, then, is one in which the High Court relatively rarely issues dicta because it decides so few cases, but nonetheless always issues dicta in circumstances of importance to Australian law because the cases it decides are of such significance.

Given the value of obiter dicta in a system of judge-made law, and the circumstances that attend decision-making in the High Court, in our view the Court ought to issue both general and specific guidance to lower courts as to the precedential effect of its dicta. The Court is uniquely placed as the ultimate judicial authority in the Australian legal system: as the ultimate judicial authority the Court's function goes beyond the correction of errors in lower courts; it also includes supervising lower courts in the development of judge-made law.¹⁴³ In its supervisory role, the Court is a custodian of the doctrine of precedent in Australian law and has a responsibility to ensure that that doctrine is properly understood and applied by those who use it.¹⁴⁴ Discharging this responsibility entails the Court issuing the sort of general guidance as to the circumstances in which lower courts should regard its dicta as 'seriously considered' that we referred to above. And it also entails the Court deploying dicta appropriately from case to case, in a way that is sensitive to the value of obiter dicta and to the circumstances of the Court's decision-making. In concluding, we wish to make some brief remarks on this latter point.

Writing extra-judicially, John Dyson Heydon has suggested that, in light of the circumstances that attend decision-making in the High Court, one of two strategies might be adopted in that Court with regard to the issuing of dicta from case to case.¹⁴⁵ First, the Court might refrain from issuing dicta, deciding cases on narrow rules and leaving lower courts unfettered to develop the law in suitable cases.¹⁴⁶ Secondly, the Court might determine cases according to broadly-drawn 'rules' which, though strictly obiter dicta in some of their dimensions, are capable of functioning as *rationes decidendi* in lower courts so long as the lower courts approach them in the spirit in which they were issued. In our view, neither of these strategies should be accepted without qualification. The first strategy is certainly sensitive to the relative rarity of High Court decision-making and the consequent possibility of stultification in the law, but it pays insufficient attention to the valuable role that obiter dicta play in the development of judge-made law. The

¹⁴² *Judiciary Act 1903* (Cth), s 35A.

¹⁴³ Gavin Drewry and Louis Blom-Cooper, 'The House of Lords and the English Court of Appeal' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press, 2009) 48, 51–2.

¹⁴⁴ But only in ways that are allowed by the doctrine of precedent and relevant institutional settings. As we argued above, the High Court should affirm the formal and normative distinction between *ratio decidendi* and obiter dicta, and it should respect the institutional division of labour between precedent-issuing and precedent-using courts.

¹⁴⁵ Heydon, above n 103, 38–9.

¹⁴⁶ From time to time Heydon J adopts this approach in his own judicial work: see, eg, *Imbree v McNeilly* (2008) 236 CLR 510, 564–5 and *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 557–64 for two examples.

second strategy — a strategy that sits well with the High Court’s general guidance that lower courts should not depart from its ‘seriously considered’ dicta — is sensitive to the value of obiter dicta but in our view it may not be sufficiently sensitive to the circumstances in which the High Court issues its dicta. Heydon seems to endorse a framework for responding to dicta according to which both strategies are deployed from time to time but neither prevails.¹⁴⁷ There can be no doubt that each of these strategies has its place in the High Court’s overall approach to issuing dicta from case to case. However, the Court should be prepared to deploy other strategies as well where other strategies are better attuned to the value of obiter dicta and the circumstances of High Court decision-making.¹⁴⁸ In our view, given that each of Heydon’s strategies taken on its own fails to respond appropriately to one or another relevant consideration, it is at least arguable that other strategies in the deployment of dicta are to be preferred most of the time. If this is the case, then Heydon’s two strategies are properly understood as being marginal, in light of what the Court ought to do when issuing dicta from case to case.

IV Conclusion

In this article, we have explored the effect of the High Court of Australia’s obiter dicta on decision-making in lower courts around Australia. We have argued that the Court’s 2007 decision in *Farah* has brought about what Keith Mason described in 2008 as a ‘profound shift in the rules of judicial engagement’ in Australia: the tendency of lower courts post-*Farah* has been to regard themselves as having a duty of obedience to High Court dicta, a tendency that was not present in the pre-*Farah* case law; moreover, *Farah* has generated ambiguities concerning the scope of a duty of obedience to High Court dicta. We have also argued that the increasing recognition of a duty of obedience, and the ambiguities arising from *Farah*, have the potential to create anxiety and uncertainty on the part of lower courts and others, and that the High Court may forestall this anxiety and uncertainty in at least two ways: first, by issuing general guidance to lower courts on what it expects of them when working with its dicta; and second, by issuing specific guidance to lower courts on the scope, weight and relevance of the dicta that it issues from case to case. And we have argued that the High Court not only may address the possible adverse effects of *Farah* by giving more guidance to lower courts; it ought to do so. In our view, it is now incumbent upon the Court to take the steps necessary to ensure that the doctrine of precedent that is central to judicial decision-making in Australia continues to strike the appropriate balance between the imperatives of certainty, predictability and change in the service of the rule of law.

¹⁴⁷ Heydon, above n 103, 38–9.

¹⁴⁸ See Sir Robert Megarry, ‘Temptations of the Bench’ (1980) 54 *Australian Law Journal* 61, 66 for a reference to what is arguably a third strategy: refraining from issuing dicta except where there is ‘good cause’.

