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Have the High Court of Australia's Directions in *Farah Constructions* Regarding "Seriously Considered Dicta" Needlessly Undermined the Doctrine of Precedent and Legal Certainty?

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Abstract

In the 2007 decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the High Court of Australia criticized the New South Wales Court of Appeal's recognition of a new cause of action as inappropriate since it departed from "long-established authority and seriously considered dicta of a majority of" the High Court. The High Court's statement concerning "seriously considered dicta" apparently introduced a new rule of precedent that a species of judicial dicta could be binding on lower courts. This article analyses the impact of the statement on the doctrine of precedent and legal certainty. It argues that the statement undermines the doctrine's function in maintaining the legitimacy of judge-made law and the balance achieved by the doctrine between certainty and flexibility. The statement also introduces considerable uncertainty. It is unclear what constitutes a 'seriously considered' dictum and its relationship to 'long-established authority'. Given the negative effect of the statement, the High Court should clarify the doctrine of precedent by declaring that dicta cannot be binding.

Key words: The doctrine of precedent; High Court of Australia; Seriously considered dicta

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INTRODUCTION

The High Court of Australia in 2007 in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (*Farah*) touched on an aspect of the doctrine of precedent. In exercising its functions of declaring the common law and correcting error, the High Court criticized that the recognition by the New South Wales Court of Appeal (NSW Court of Appeal) of a new cause of action was "not an appropriate step" since it departed from "long-established authority and seriously considered dicta of a majority of" the High Court (p. 151). The High Court's statement concerning "seriously considered dicta" (*Farah* statement) appears to differ from the traditional view that obiter dicta need not be followed (*Waller v Waller* [2009] WASCA 61). It was described by Justice Keith Mason (2008) as one of the "new and now binding rules of precedent" (p. 769).

This article aims at evaluating the *Farah* statement's impact on the doctrine of precedent and legal certainty. It argues that the *Farah* statement undermined the doctrine of precedent needlessly and led to unnecessary uncertainty in the law.

Part 1 compares the understanding of the doctrine of precedent, especially the precedential effect of High Court dicta, before and after *Farah*. It concludes that *Farah* has changed the previous understanding that High Court dicta were not binding. Most lower courts following *Farah* have perceived a new rule that the binding force of precedent extends to the High Court's seriously considered dicta.

Part 2 contends that the rule of binding dicta undermines the doctrine of precedent needlessly and creates unnecessary uncertainty in the law. Specifically, the rule undermines the doctrine's function in maintaining the legitimacy of judge-made law and the balance achieved by it between certainty and flexibility. Moreover, the rule's operation has introduced considerable

uncertainty. For example, it is unclear what constitutes a 'seriously considered' dictum and its relationship to 'long-established authority'. This will frustrate a potential benefit of the rule, namely, facilitating the resolution of disputed areas of law by the High Court seriously considered dicta.

1. THE DOCTRINE OF PRECEDENT AND THE NEW BINDING DICTA RULE

1.1 The Pre-*Farah* Doctrine of Precedent

The doctrine of precedent lies at the core of the Australian legal system (Kirby, 2007, p. 243). It has been described by Sir Anthony Mason (1988) as the "hallmark of the common law" (p. 93). Essentially, the doctrine of precedent expresses a proposition that courts should follow past decisions in judicial decision-making (Schauer, 2009, p. 37). In its narrow sense, precedent signifies a duty of obedience of a court to decisions of another court in the same judicial hierarchy, which hears appeals directly or indirectly from the former court's decision (Rares, 2008, para. [28]). Accordingly, all Australian courts below must adhere to the decisions of the High Court, since it is the final appellate court in the judicial hierarchy.

However, not everything in the High Court's decision is binding. Rather, only the ratio of a case is traditionally considered a binding precedent (*Bristol-Myers Squibb Co v F H Faulding & Co Ltd* (2000) 97 FCR 524, 570). In the High Court's decision *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, Kirby J stated that the binding rule of a decision should be derived from the reasons of the majority of the judges upon an issue in contention that was necessary to be decided to reach the court's order (p. 56). A ratio is the part of the decision necessary for the outcome (Smith, 2006). Meanwhile, it is majoritarian and precise (Kirby, 2007, p. 244). Therefore, the ratio of a decision activates the doctrine of precedent.

By comparison, obiter dicta are often general observations of a court on tangential points not essential to the decision (Schauer, 2009, p. 56). They are not strictly necessary for a court to decide a case. Therefore, an obiter dictum, even one issued by the High Court, was not binding before *Farah* (*Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 418). Nevertheless, lower courts might still reach decisions consistent with a High Court dictum even if it is not binding (Schauer, 2009). This is not because their decisions are dictated by the existence of the dictum. Instead, they do so because they are persuaded by that dictum after evaluating its merits (pp. 38-40). It demonstrates the capacity of humans to learn from others and from the past (pp. 40-41).

In cases decided before *Farah*, lower courts generally believed they had no duty to obey High Court dicta (Harding & Malkin, 2012). Meanwhile, they usually viewed High Court dicta as worth attention and highly persuasive (p. 243). In *Appleton Papers Inc v Tomasetti Paper Pty Ltd* [1983] 3 NSWLR 208, for example, McLelland J of the Supreme Court of New South Wales stated that he was "not bound by obiter dicta of the High Court" that are "persuasive authorities", despite recognizing that "such dicta are entitled to great weight and respect" and provide "assistance" (p. 218). Bryson J of the same court, in *Spassof v Burgazoff* (1995) 18 Fam LR 719, expressed a similar opinion that although High Court dicta "are entitled to great weight", they are "not in a formal sense binding" on him (p. 722). In *Grey v Harrison* [1997] 2 VR 359, Callaway JA of the Victorian Court of Appeal considered that "a recent and considered dictum by three members of the High Court" deserves "careful consideration", but refused to adopt the relevant dictum (p. 365). Likewise, in the Supreme Court of South Australia case *Maple v Kerrison* (1978) 18 SASR 513, King J stated that although the "dicta of eminent judges of the High Court possess great persuasive weight", such dicta, even though issued by Dixon J, are not "binding authority" (p. 527). Aside from the above examples, there is substantial evidence from case law that the view prevalent before *Farah* was that High Court dicta do not constitute binding precedent (Harding & Malkin, 2012, p. 244).

In conclusion, the pre-*Farah* understanding of the doctrine of precedent was that the binding force of precedent attaches to the High Court's ratio rather than its dicta (Harding & Malkin, 2012, p. 245).

1.2 The Binding Dicta Rule Perceived by Lower Courts after *Farah*

In the wake of *Farah*, a question has arisen as to whether lower courts are, at least in certain circumstances, bound by seriously considered dicta of the High Court. In the Supreme Court of New South Wales case *Ying v Song* [2009] NSWSC 1344, Ward J doubted that the High Court intended to modify the doctrine of precedent in *Farah* (paras. [18]-[19]).

Since *Farah*, the High Court has rarely explored the precedential effect of seriously considered dicta expressly, and its position remains ambiguous (Lee, 2013). In the High Court case *R v Keenan* (2009) 236 CLR 397, Kirby J in his dissenting judgment questioned whether the lower court's duty of obedience extends beyond the ratio of the High Court's previous decisions to seriously considered dicta (p. 409). By comparison, in the dissent of *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, Heydon J declined to attribute weight to the seriously considered dicta on which the defendant relied only because they were not consistent with "long-established authority" (p. 161). One plausible reading is that a seriously considered dictum is binding if it conforms to "long-established authority" (Harding & Malkin, 2012, p. 253).

On the other hand, most lower courts in cases following *Farah* perceive a duty to obey the High Court's seriously considered dicta, as demonstrated by a 2019 survey (Chen, 2019) and a further study in this article. For example, in *Deutsch v Trumble* (2016) 52 VR 108, Hargrave J of the Supreme Court of Victoria considered himself unable "to depart from the seriously considered dicta of the High Court" (p. 125). In *Sun North Investments Pty Ltd v Dale* [2014] 1 Qd R 369, Henry J of the Supreme Court of Queensland considered that "the seriously considered dicta … should be followed by courts below the High Court" (p. 391). Likewise, in the NSW Court of Appeal case *Day v Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335, Leeming JA, with whom Meagher and Emmett JJA agreed, stated that the proposition that amounts to seriously considered dicta "should be followed" (p. 346). In *Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150, Bromberg J of the Full Court of the Federal Court took a similar view that the reasoning characterized as "seriously considered dicta … should be followed" (p. 182). The wording "should be followed", as employed by other judges in the cases above, indicates that he perceived an obligation to obey seriously considered dicta.

Overall, while the High Court's position remained unclear, most lower courts have regarded seriously considered dicta as binding on them since *Farah*. It is reasonable to conclude that a new binding dicta rule has been introduced in practice.

2. EVALUATION OF THE IMPACT OF BINDING SERIOUSLY CONSIDERED DICTA

In the earlier part, this article contends that a rule of binding dicta has been introduced since *Farah*. In the remainder, the impact of this new rule on the doctrine of precedent and legal certainty will be evaluated from the perspective of judicial decision-making at both the High Court and lower courts.

2.1 On the Doctrine of Precedent

The binding dicta rule may adversely affect the doctrine of precedent in the following two ways.

Firstly, extending the binding force of precedent to seriously considered dicta may undermine the function of the doctrine of precedent in maintaining the legitimacy of judicial lawmaking.

Judicial lawmaking is part of a court's function and judges are necessarily engaged in this creative function (Kirby, 2006, p. 577). Nevertheless, this creative function is not without limitations. Judges who make laws simultaneously decide not to defer to lawmakers in other branches of government (Schauer, 1989, p. 458). Every act of judicial lawmaking must address the question of legitimacy.

Sections 75-6 of the *Australian Constitution* define the High Court's jurisdiction. These sections would not be engaged unless there is an immediate right or duty to be established by the determination of the High Court (*Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265). Therefore, the High Court lacks jurisdiction to determine abstract questions of law that do not involve a determination of the right or duty of a body or individual (p. 267). As a result, the judicial lawmaking power of the High Court is confined to the actual controversy before it about a legal right or duty.

In *Clubb v Edwards* (2019) 267 CLR 171, Gageler J stated that the primary function of a court is the settlement of controversies (p. 216). It was also said that the exposition of legal principles is best carried out when and to the extent necessary for the determination of a disputed legal right or duty. Therefore, the function of dispute resolution defines the parameter of judicial lawmaking.

By attaching the coercive force of precedent to the ratio of a decision, the original doctrine of precedent limited judicial lawmaking power to the extent necessary to quell disputes and thus maintained the legitimacy of judicial lawmaking. This is because a ratio is the part of a decision that is essential to the resolution of a dispute.

In contrast, a dictum does not quell the actual dispute before the court since it does not involve the determination of any right or duty of the parties (Rares, 2008, para. [6]). Accordingly, extending the coercive power of precedent to the High Court's seriously considered dicta means that the Court can lay down the rules on abstract questions of law. This allows the High Court's judicial lawmaking power to exceed its constitutional empowerment, which constitutes "a usurpation of the rule of law" (Rares, 2008, para. [8]). In this regard, the rule of binding seriously considered dicta undermines the original doctrine of precedent which preserved judicial lawmaking legitimacy by limiting judicial power.

Secondly, the rule of binding seriously considered dicta may undermine the balance achieved by the doctrine of precedent between certainty and flexibility.

Judge-made law is the result of a complex endeavor driven by demands for predictability and change (Harding & Malkin, 2012, p. 265). These competing demands reflect the values of certainty and flexibility of a legal system, respectively.

A system of law of certainty allows members of society to arrange their business and make decisions. Nevertheless, citizens' confidence and reliance on the legal system can be lost if the risk of constant change in the relevant legal rules is too substantial (Schauer, 2009, p. 43). Therefore, a legal system with certainty requires the

courts to apply uniformly rules and principles that can be ascertained in advance (A. Mason, 1988, p. 93). Likewise, the doctrine of precedent mandates that decisions in similar cases are alike. As such, the doctrine enhances the certainty of a legal system.

On the other hand, the law cannot stand still in a continuously changing society. The radically changing circumstances call for a flexible and elastic doctrine to allow courts to take a more active part in updating the law (A. Mason, 1988, p. 95). Before *Farah*, lower courts were only bound by the ratio of a High Court decision. Meanwhile, they could distinguish previous High Court decisions by using legitimate legal reasoning techniques. These enabled them to participate actively in law development.

Taken as a whole, the original doctrine of precedent worked well in balancing the competing values, providing the law with considerable certainty while giving due weight to flexibility (Kirby, 2007, p. 248).

In contrast, lower courts may have little flexibility to develop the law within the post-*Farah* doctrine of precedent. For one thing, the binding part of the High Court's decision extends to seriously considered dicta. The lower courts are not bound only by the ratio, but also by the seriously considered dicta in the High Court's decision. For another, legitimate legal reasoning techniques for distinguishing a ratio may not apply to seriously considered dicta. A decision's ratio can be determined by combining the outcome and the material facts (Schauer, 2009, p. 55). By comparison, the determination of a seriously considered dictum may focus on the process by which it was made (Chen, 2019, p. 199). For example, whether the dicta were "uttered by a majority of" the High Court. This may make it difficult for lower courts to narrowly define a seriously considered dictum and thus distinguish it. Their decision-making will be hindered unnecessarily and oxygen to their fresh ideas will be cut off (K. Mason, p. 769). As such, the previous balance between certainty and flexibility may have been disturbed.

2.2 On Legal Certainty

If "seriously considered dicta" are binding, there is at least one possible benefit, which is to facilitate the High Court to settle disputed areas of law.

Social and economic change encourages the emergence of new areas of law that present contentious legal issues. It may also challenge answers to legal questions grounded in bygone values, making existing areas of law controversial.

Before *Farah*, the High Court may have had difficulty adequately responding to the desire to settle these contested areas in its decision-making environment. Each year, the High Court decides a relatively small number of cases (High Court of Australia, 2022, p. 21). This low caseload is not only a result of the High Court's case management through the special leave process, but also of the parties' choices. Therefore, the circumstances will not change anytime soon. As a result, many legal issues have been considered only once or twice (Harding & Malkin, 2012, p. 265). Moreover, it takes years for the same issue to be heard again, if at all. When only ratio can lay down the law, the High Court might have difficulty finding suitable vehicles due to the low caseload.

By comparison, a binding seriously considered dictum allows the High Court to decide legal questions using a general and authoritative statement if submissions have been made to those questions. It might help the High Court settle disputed areas of law and thus contribute to certainty (*CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390).

On the other hand, the binding dicta rule has already created considerable uncertainty in the law. There are substantial ambiguities in the application of the rule. Chief among these ambiguities are, for example, the criteria for determining "seriously considered dicta" and their relation to "long-established authority" (Harding & Malkin, 2012, pp. 253-4).

The concept of "seriously considered dicta" was newly introduced in *Farah* and the criteria for its determination were not explained (Rares, 2008, para. [3]). One might argue that dicta, as reserved in judgment, are necessarily the result of serious consideration. In contrast, the other may consider that the modifier "seriously considered" suggests that the High Court in *Farah* did not intend lower courts to follow every dictum it issued (Harding & Malkin, 2012, p. 254). This seems more reasonable given the understanding that lower courts are not bound by everything in a High Court judgment (Kirby, 2007, p. 244). Moreover, the practice of distinguishing different dicta predates *Farah* (Harding & Malkin, 2012, p. 255). For lower courts to evaluate the persuasiveness of dicta, it was always necessary to distinguish various types of dicta. For example, in *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690 decided by the NSW Court of Appeal, Heydon JA distinguished "passing dicta" from "considered dicta" (p. 734).

The question presented by *Farah* is which "considered dicta" cross the threshold of being "seriously" considered and should be elevated to being of binding force? The pre-*Farah* authorities regarding "considered dicta" do not provide clear guidance as to the threshold established in *Farah* (Chen, 2019, p. 188). There are a number of factors that may indicate the level of consideration. For example, whether the dicta deal with a matter of law that was "the subject of serious debate" on both sides (Rares, 2008, para. [3]). Nevertheless, there is no authority in Australia that provide a comprehensive statement of these factors (Chen, 2019, p. 188). Moreover, the vast

majority of lower courts in cases after *Farah* failed to provide reasons for their conclusions in determining whether a dictum was seriously considered. For example, in *Leybourne v Habkouk* [2012] NSWCA 212, the NSW Court of Appeal simply regarded a particular dictum as "clearly seriously considered" without explanation (para. [21]). In summary, it is unclear what constitutes "seriously considered dicta".

Another uncertainty lies in the relationship between "seriously considered dicta" and the phrase "long-established authority" (Harding & Malkin, 2012, p. 253). One interpretation is that "seriously considered" is the only factor that determines whether a dictum is binding (*Zotti v Australian Associated Motor Insurers Ltd* (2009) 54 MVR 111, 130). Another interpretation is that "long-established authority" and "seriously considered" work cumulatively to decide the precedential effect of certain dicta (Harding & Malkin, 2012, p. 253).

Under the second interpretation, there are two possible readings of how "long-established authority" qualifies a binding dictum. One reading suggests that a seriously considered dictum is binding only if it is in line with long-established authority. For example, in *Lowe v The Queen* (2015) 249 A Crim R 362, Davies J of the New South Wales Court of Criminal Appeal asserted that the relevant dicta in *Postiglione v The Queen* (1997) 189 CLR 295 are seriously considered and supported by the observations of Dixon J in *Grierson v The King* (1938) 60 CLR 431, so such dicta are binding. The other reading argues that the binding seriously considered dicta themselves should be long-established. For example, in *Australian Capital Territory v Queanbeyan City Council* (2014) 87 NSWLR 159, Leeming JA of the NSW Court of appeal stated that the applicant cannot challenge the dicta that "are *both* long-established and seriously considered". In sum, on the basis of original and current research, this article argues that lower courts have not reached a consensus on the relationship between seriously considered dicta and long-established authority.

Notably, the uncertainty that besets the operation of the binding dicta rule is more than that discussed above. Unsettled issues such as the scope of the rule and the meaning of "long-established" also create much uncertainty (Chen, 2019, p.187). Making law through seriously considered dicta by the High Court is one thing, applying the law by lower courts under the post-*Farah* doctrine of precedent is another. If the application of the binding dicta rule is considerably uncertain, the potential benefit of the rule will not be materialized. As such, the rule is more likely to create unnecessary legal uncertainty.

CONCLUSION

The practical effect of the *Farah* statement is that, most lower courts following *Farah* have viewed their duty of obedience to the High Court's decisions as including seriously considered dicta. This new binding dicta rule undermines the doctrine of precedent in two ways: firstly, by undermining the doctrine's function of maintaining the legitimacy of judge-made law by limiting judicial lawmaking power; secondly, by disrupting the balance between flexibility and certainty achieved by the doctrine. Further, the binding dicta rule has the potential to provide certainty, but this benefit cannot be realized because of the uncertainty surrounding the operation of the rule. Given the negative effect of the binding dicta rule, the High Court should repeal the rule by declaring that dicta cannot be binding.

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