Book Reviews

Editor: Nicholas Felstead

COMMON LAW, EQUITY AND STATUTE: A COMPLEX ENTANGLED SYSTEM

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Common Law, Equity and Statute: A Complex Entangled System, by Mark Leeming, Federation Press, 2023, 352 pages: ISBN 9781760024574. Hardcover. AU$180.00

Rare it is that Gödel's Incompleteness Theorems meet Russell's Paradox, synthetic truths, and an exploration of the nature of a singular common law within the Australian constitutional framework, discussed dialogically, all set against the backdrop of an assumption of familiarity with quantum entanglement. In a mere two pages, at 215–216 of *Common Law, Equity and Statute: A Complex Entangled System*, these concepts intersect.[1] Fittingly, with respect to its title and subject matter, this book is complex; but that is not to say that it is inaccessible and, indeed, I commend that it be accessed.

Justice Leeming aptly observes that "[n]either human language, nor legal language is like the 'language' of a computer program, which inevitably bears a single meaning, unaffected by context".[2] It is no surprise that Wittgenstein's language-game is footnoted some two pages later. This is a book about systemic meaning – or, rather, the conundrum of meaning within a complex system – as much as it is about law, which is the particular system through which this idea is explored.

To outsiders to the study and practice of the law and, indeed, to many insiders, it may seem odd that a system which is meant to provide an objective set of standards according to, and through, which all social and political rights and obligations are distributed should be the subject of internal incoherence, tension (sometimes contradiction), and ambiguity. Perhaps this semblance of oddness is a function of confusing a legal system's claim to *authority over* its subjects as an objective first principle of political and social organisation[3] with the idea that the *precise contents* of that legal system's norms are themselves objectively derivable?

This was my first key takeaway from Justice Leeming's work. When one steps back and views the legal system through a broad lens, how could one ever expect for its content to be absolutely certain and coherent or its functioning to be concretely predictable?

In terms of its content, any known legal system is a linguistic system, which is necessarily subject to ambiguity given the wooliness of words at the margins and the differential nature of what they symbolise dependent upon context. Even when it comes to technical legal concepts like "the common law", the domain occupied by such concepts may be unclear, as Justice Leeming is at pains to point out. But more on that later. Further, where, as in the case of the Australian legal system, multiple sources of law co-exist – the *Constitution*, statutes, the common law, equity, *lex et consuetudo parliamenti* – and those sources influence one another and are influenced by the history of this country, its States and Territories, its former colonies, and the history of 'common law systems' within a broader Imperial context, we may be missing the point by looking for strict coherence and incontrovertible logic in light of multi-faceted complexity. As Justice Leeming's character, the Teacher, points out, drawing on Oliver Wendell Holmes, "the law cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics".[4]

* My sincerest of thanks to Graeme Uren KC for stimulating conversations in relation to Justice Leeming's book and the subjects covered by this review. Any opinions expressed in this article are mine and mine alone and the usual disclaimer applies.

[1] Perhaps they were always entangled?

[2] M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023), 32.

[3] For a discussion of the concept of claims to legitimate authority made by legal or political systems, see generally J Raz, *The Morality of Freedom* (OUP, 1986).

[4] Leeming, n 2, 149.

I interpolate to explain the Teacher. Justice Leeming's book is largely comprised by an exposition of particular topics – such as "The Entangled Complexity of Statute Law and Judge-made Law" and "Equity and Judicature Legislation" – which proceed according to a familiar academic style of commentary upon case law, legislation, academic writings, etc, as they relate to the specific topic at hand. However, four of the chapters of the book adopt a different form in which the author imagines a dialogue between three individuals, a Teacher and two students, Esther and Richard, in the style of an Oxbridge tutorial,[5] in which the individuals engage in a critical discussion of a certain topic, such as whether there truly is but one common law in Australia.

While I must admit to some original scepticism upon hearing that such a style would be utilised throughout the book, I must also admit to being pleasantly surprised by the results of such adoption. The employment of the imagined dialogue is no gimmick. It proves to be a most useful device for demonstrating that issues are often more complex than they first appear.

Take, for example, the, at first blush, alluring proposition that there could be no distinctively Australian common law while a right of appeal still lay to the Privy Council.[6] The Teacher is quick to quip that "there is more to it" than that pithy proposition denotes and that "most things are more complicated than any simple answer can convey".[7] This is because of the landmark decision in *Parker v The Queen*[8] in which the Dixon Court refused to follow the House of Lords authority in *Director of Public Prosecutions v Smith*.[9] Pithy propositions, where seeking to capture truths about complex systems, may well be apt to mislead. Nuance pervades all in such systems and should not be overlooked. As Lord Steyn once put it – albeit perhaps in the sense of the idea that the outcome of legal cases should be a function of a close attention to their facts within the relevant legal framework though, nonetheless, the statement holds in respect of analysing the complex system *of law* independent of its engagement with any particular case – "[i]n law context is everything".[10] This was my second key takeaway from Justice Leeming's work; and the adoption of the dialogical form permits the achievement of an iterative process, revealing of the value of the many and varied minute particulars.[11]

So far, I have spoken at the level of the system. But the system, while entangled and complex, is comprised of constituent parts. While concerned with their interactions at the systemic level, the author does not eschew discussion of such components within their own vacuums (albeit always with an awareness to their place *within* the system and noting that their entanglement renders atomised treatment within discrete vacuums a conceptual impossibility). Chapter 6, "Equity and Judicature Legislation", and Chapter 7, "Equity's Distinctiveness after the Judicature Legislation", should be read by any law student before embarking on the arduous journey of trying to understand what equity is as opposed to the common law and how they fit together, yet remain distinct, since fusion.

As Justice Leeming notes, the common law might be thought to be more concerned with "strict, bright-line rules of property and obligation",[12] whereas equity focuses on broader thematic guiding principles sensitive to context and results in individual cases. These are the vacuums to which I referred in the

[5] At vii, Justice Leeming notes that he largely wrote *Common Law, Equity and Statute: A Complex Entangled System* while a visiting academic at the University of Cambridge in 2019 and at the University of Oxford in 2022. Perhaps his Honour drew inspiration from those experiences in terms of the structure of the work?

[6] And putting aside, for the moment, that an appeal (albeit not as a matter of right) *theoretically* still lies to the Privy Council pursuant to *Constitution* s 74 if regarding the limits *inter se* of the constitutional powers of the Commonwealth and those any State or any of the States or as to the limits of the constitutional powers of the States, *inter se*, with leave of the High Court of Australia.

[7] Leeming, n 2, 218.

[8] *Parker v The Queen* (1963) 111 CLR 610.

[9] *Director of Public Prosecutions v Smith* [1961] AC 290.

[10] *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] 2 AC 532, [28]; [2001] UKHL 26; see also *Rathner v Runner Investment Ltd* [2023] FCA 754, [242] (McEvoy J): "In this area of law, as in the law generally, context is everything."

[11] "Labour well the Minute Particulars: attend to the Little Ones": W Blake, *Jerusalem: The Emanation of the Giant Albion*, plate 55, line 51.

[12] Leeming, n 2, 200.

previous paragraph. The entanglement of those vacuums is in part that "[e]quitable *principles* tend to presuppose a body of common law rules",[13] such that equity might be thought to perform partially a responsive function within the system in which it co-exists with the common law, softening the rough edges of the blunt instrument of the common law in more particularised factual scenarios. Truly a complex system it is in which, simultaneously, there are "two bodies of judge-made law … significantly distinct in questions of doctrine, technique, reasoning, and … remedies".[14] Yet, Justice Leeming's discussion in the aforementioned chapters assists the reader to understand that different problems require different tools, as do the same problems when viewed over a larger or smaller set or from increasing levels of granularity. This was my third key takeaway.

Law students, academics, and practitioners alike would also be enriched by the aforementioned chapters' discussion of the anomalous position of New South Wales, regarding its much later adoption of the Judicature legislation reforms, which is a historical fact, with lasting implications, increasingly less-appreciated.

The importance of legal history, upon many axes, was my fourth key takeaway. Legal history is always a fundamental ingredient of understanding or analysing the system. This is so even if only so as to avoid situations in which reliance is placed upon a statute or decision from the distant past without a proper comprehension of the context germane to the relevant source, which lack of comprehension may tend towards generalisation of rules or principles, as the case may be, expressed therein which, upon nuanced analysis, may have been intended to be far more strictly limited.[15] In a related sense, attention to the particulars of legal history can prevent us from inaccuracy as to the genesis of legal principle as, for example, seems to be the case with respect to the "rule" in *Saunders v Vautier*,[16] which Justice Leeming points out[17] was not, in fact, formulated in terms by that case but, rather, over a century earlier in *Love v L'Estrange*.[18] In a complex system, such observations are not pedantic. Attention to detail is important and unintended ripple-effects easily may abound without such precision.

Legal history is, among other things, of value for three further reasons. First, it allows us to map the contours of the law to determine whether there is a developmental trend towards a particular end. Second, if such a trend is ascertainable, it allows us to critique that trend and if no such trend is ascertainable, it allows us to consider whether we should cast the first node of deviation, remembering all the while that "[i]t is even possible that we are not wiser than our ancestors".[19] Third, and noting the "symbiotic relationship"[20] between statutes and judge-made law, an understanding of history can help to elucidate *how* the two sources of law interact in a particular case. On the one hand, the primary force of statutes, relative to judge-made law,[21] may be such that, where significant inroads have been made into a particular area of law by way of statute, such inroads may displace judge-made law's previously presumptive and historical regulatory landscape.[22] On the other hand, technical terms of legal art employed consistently throughout history in judge-made law, and later inserted into statutes, may indicate that the statutory meaning of such terms is intended to correspond with the meaning in judge-made law. Justice Leeming's discussion of the greater-than-generally-thought interplay of, and interdependence between, statute and the common law is far more detailed and sophisticated than I have portrayed and my exemplifications do

[13] Leeming, n 2, 200.

[14] Leeming, n 2, 211.

[15] Leeming, n 2, 100.

[16] *Saunders v Vautier* [1841] EWHC J82.

[17] Leeming, n 2, 213.

[18] *Love v L'Estrange* (1727) 5 Bro PC 59; 2 ER 532.

[19] *Chapman v Chapman* [1954] AC 429, 444 (Lord Simonds), cited in Leeming, n 2, 187.

[20] *Brodie v Singleton Shire Council* (2001) 206 CLR 512, [31] (Gleeson CJ); [2001] HCA 29, cited in Leeming, n 2, 126.

[21] Absent any constitutional invalidity on the behalf of any relevant statute.

[22] Leeming, n 2, 126.

not do that discussion justice. Nonetheless, I commend the author's sentiment that closer focus should be drawn to the "variety of ways in which those two bodies of law interact".[23]

Earlier, I intimated that there would be more later on the lack of clarity as to the realm denoted by the, prima facie, seemingly uncontentious and well-known phrase "the common law". Now is that time.

It is accepted doctrine of the High Court of Australia that "[t]here is but one common law of Australia"[24] That is in contradistinction to the United States, for example, in which each State has its own discrete system of common law. But in the Australian federal system, the State and Territory Parliaments nonetheless possess their own legislative capacities. So what happens where, for example, State X and State Y each pass a statute abrogating a particular rule of judge-made law previously uniform across all the States and Territories, while the remaining States and Territories do not abrogate that common law rule? Can the (presumed) continuation of the judge-made rule within four States and two Territories be said to maintain a common law rule for the "but one common law of Australia"? Thinking of a further, and stronger, example, where a particular rule of judge-made law is closely related to the functioning of a particular State statute (albeit that it could be generalisable as a matter of logic to a statute of another state where the two statutes are not part of a uniform national scheme of statutes), is that rule of judge-made law part of the "but one common law rule of Australia"? These are the sorts of questions with which Chapter 9 and Chapter 10 are concerned.

I caution the reader against thinking that this is a purely academic exercise in the semantics of arbitrary boundaries to be drawn in some metaphysical realm.[25] From the conclusion that there is a singular common law in Australia, the High Court has further reasoned that:[26]

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. *Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law*. [Emphasis added]

The rule dictates the where there is a uniform system of rules applying across the country – whether as a function of an all-governing piece of Commonwealth legislation, a piecemeal uniform scheme of State and Territory legislation, or the operation of a common law which is itself singular across the nation – first instance judges will necessarily be bound by decisions of intermediate appellate courts from other jurisdictions on the same point and intermediate appellate courts will also be so-bound unless convinced that any such prior decision is plainly wrong.[27] Such a rule makes sense for the purposes of systemic coherence, consistency, and predictability within the Australian legal order. But, harking back to the first key takeaway, to expect absolute coherence and certainty, within a complex system, may be closer to Cloud Cuckoo Land than reality. For, to apply the rule, we still need to grapple with the question: "What is the 'common law'?"

Given that the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (*Farah*) was considering recipient liability under *Barnes v Addy*,[28] it is clear that the singular common law of Australia extends

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[23] Leeming, n 2, 127.

[24] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 563; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [99]; [2010] HCA 1. Albeit that, as the author notes, it may well be that to blindly locate the genesis of the formation of the view as to a singular common law of Australia in these cases, or in the earlier abolition of appeals to the Privy Council by way of right, is not to engage in stringent enough delving into history. Instead, it might rightly be said that the nascence of Australia's single system of common law is to be found in the decisions of *Parker v The Queen* (1963) 111 CLR 610, *Skelton v Collins* (1966) 115 CLR 94, *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, and *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 in the first three of which cases the High Court asserted that it could depart from decisions of the House of Lords and in the last of which cases, the Privy Council agreed that the High Court was so entitled.

[25] If it is not absurd to suggest that without time and without space there may be such thing as a "realm".

[26] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] 230 CLR 89, [135]; [2007] HCA 22.

[27] This statement of the rule is maintained, as Justice Leeming notes at 280–282, in spite of some looseness of language by the High Court in its obiter restatement of the rule in *R v Falzon* (2018) 264 CLR 361, [49]; [2018] HCA 29 in light of the later, and more precise, formulation in *Hill v Zuda Pty Ltd* (2022) 275 CLR 24, [25]; [2022] HCA 21.

[28] *Barnes v Addy* (1870) B 92; (1874) LR 9 Ch App 244.

to equitable doctrines. So, we might think of there being but one non-statutory law in Australia. But how far does that get us? Where State or Territory statutes enter the picture and begin to interact with non-statutory sources of law such that the contours of such intervention are no longer uniform across the country, where is it to be said that the singular common law of Australia begins and ends for the purpose of the rule in *Farah* which is instrumentally justified by ensuring uniformity? How are intermediate appellate courts, and trial judges, across the various jurisdictions of the country to apply that rule? Are some decisions related to State or Territory legislation which is not part of a uniform scheme, which decisions are to be found in the reasons reported in the law reports, nonetheless so tied to the operation of particular statutes that they are to be characterised as statutory decisions and therefore, outside of the realm of the "common law" for the purposes of the rule in *Farah* where it is said that those decisions should be applied in a "purely" non-statutory setting elsewhere? These are difficult questions with no easy answers and where the "distinctions … are fine".[29]

Similarly, where a decision has been made about the interpretation of a provision of non-uniform State or Territory legislation in one State by an intermediate appellate court and an identical (or near-identical) piece of legislation exists in another State which is before its intermediate appellate court for interpretation with respect to the same provision interpreted by the first court, what is to occur? Justice Leeming's answer is that "the [first] decision is a guide but cannot control the meaning to be given" in the second instance of interpretation.[30] I am inclined to think that the invocation of the concept of guidance, in such a circumstance, is apt. Some judicial statements seem to go further and use the principle of "judicial comity" as a backdoor means by which to expand the rule in *Farah* beyond its terms such that it would apply *whenever* a decision has been made as to the interpretation of a particular statutory provision and an identical (or near-identical) second provision, from a different jurisdiction (albeit not part of a uniform national scheme of legislation) is before a court for interpretation.[31] Such an extension may be too far, although I express no concluded view. I note that the Full Court of the Federal Court of Australia recently, and similarly, left the question in a state of superposition in relation to how the rule is to operate where a previous interpretation of a provision of state legislation which was not part of a uniform national scheme is invoked in a case involving the interpretation of a substantially similar provision in Commonwealth legislation.[32]

To distil the long-winded train of musings just gone, Chapters 9 and 10 of Justice Leeming's book were extremely thought-provoking and conclude the work with a quiet invitation for new scholarship into another axis of complexity within the Australian legal system: how are claims of legal uniformity to operate within a federal system and to what extent can claims to uniformity extend within such a system, given that federalism permits degrees of pluralism?

This really is a marvellous, challenging, and stimulating book. Its author's more than 10 years of efforts in penning it[33] are well and truly justified. I look forward to second, and further, visits.

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[29] Leeming, n 2, 282.

[30] Leeming, n 2, 282.

[31] See, eg, *Gett v Tabet* (2009) 109 NSWLR 1, [273]; [2009] NSWCA 76 (speaking in the context of a determination of the circumstances in which an intermediate appellate court may overrule its own previous decisions; but noting that the underpinning rationale and considerations are equally applicable "whether with respect to decisions of courts of coordinate jurisdiction within the national system, or in relation to its own earlier decisions") and [286]; *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757, [76] (French J); and *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* (2021) 287 FCR 181, [13] (Allsop CJ); [2021] FCAFC 153. I note, also, in this context, that Justice Leeming has written about the relationship between the rule in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] 230 CLR 89; [2007] HCA 22 and the principle of judicial comity elsewhere: M Leeming, "Farah and Its Progeny: Comity among Intermediate Appellate Courts" (2015) 12 *The Judicial Review* 165.

[32] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v LPSP* (2023) 296 FCR 16, [87]; [2023] FCAFC 24.

[33] Leeming, n 2, ix.