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On Chief Justice Robert French's retirement from the High Court of Australia, it is appropriate to reflect on his impact and legacy. In this article we first revisit the circumstances of Chief Justice French's appointment, before offering an overview of the dynamics of the French Court, noting the patterns of decision-making that emerged during his tenure. We then examine the French Court's constitutional law jurisprudence, focusing on the three dominant and most contentious areas of its activity: cases on the executive power of the Commonwealth; the Ch III restrictions on State legislative power; and the legal problems raised by Australia's asylum seeker policies.

INTRODUCTION

Robert Shenton French AC assumed office as the 12th Chief Justice of the High Court of Australia on 1 September 2008. He resigned on 29 January 2017, a few weeks shy of his 70th birthday, the mandatory retirement age set by the Australian *Constitution*. Chief Justice French will have presided over the Court for the best part of a decade.

As his term ends, it is time to take stock of his period in office, and the Court's record under his leadership. This article does so from a number of perspectives. We examine the circumstances of his appointment, and the decision-making record of the Court. We also examine the Court's judgments in the field of constitutional law. We adopt three discrete areas as our focus, taking account of their importance and the controversy they engendered: the executive power of the Commonwealth, Ch III of the *Constitution* insofar as it restricts State legislatures, and long-running questions about the exercise of public power in respect of asylum seekers. These were particularly active areas of decision-making by the French Court.

In offering a consolidated appraisal of the Court's work in these areas, we pose, and suggest answers to, a number of questions. French may not have been appointed by the Rudd Government with the ambition that he would effectuate change, but has this nevertheless occurred? In particular, to what extent has the reinvigoration of federalism as a constraint upon Commonwealth power been a consequence of appointing a Chief Justice with such a clearly stated commitment to federalist principles? In what other ways has the High Court struck out in new directions? And has adventurism in some areas existed in tension with the attempt to maintain judicial restraint in others?

THE CHIEF JUSTICE AND THE FRENCH COURT

Appointment of French CJ

In announcing the appointment, Prime Minister Kevin Rudd was keen to draw attention to the fact that French was the first Western Australian appointed to the office of Chief Justice of the High Court.[1] Indeed, French was only the third person from that State appointed to the High Court in its 113-year history. The appointment was also notable in other ways: although French was the fifth person appointed as Chief Justice from outside the Court, excluding Sir Samuel Griffith as the inaugural holder of that office, he is the only Chief Justice so appointed by the Australian Labor Party. The other

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[1] Joint Press Conference with Attorney General, Robert McClelland, Prime Ministers Courtyard, Parliament House, 30 July 2008 (Kevin Rudd) <https://pmtranscripts.dpmc.gov.au/release/transcript-16036>.

three Chief Justices that Labor has appointed were elevations from the ranks of those already serving on the Court. Interestingly, just one of those, Frank Gavan Duffy, had been appointed to the Court by a Labor government in the first place. French was thus only the second Chief Justice whose appointment to the High Court was a consequence of his selection by a Labor government.

As the Rudd Government's first appointment to the High Court, French was selected in line with new procedures adopted by Attorney-General Robert McClelland. These involved a commitment to more extensive consultation on federal judicial appointments,[2] with the views of around 200 individuals and organisations sought as to who should succeed Chief Justice Murray Gleeson.[3] McClelland revealed that this elicited 24 nominations and, while "any one of those persons would have performed admirably", the government was "convinced, however, that we have the outstanding candidate at this point in time".[4]

At first glance, French seems a most unlikely figure to have attracted favour from the recently elected Rudd Government – especially when compared to the strong favourite for the post, Chief Justice James Spigelman of New South Wales.[5] Chief Justice Spigelman was only a year older than French, possessed a similarly stellar reputation as a jurist, and also had significant Labor connections established early in his career as Principal Private Secretary to Prime Minister Gough Whitlam. By contrast, French had been active in Liberal party politics during his university days and when he was 22 stood unsuccessfully as the Liberal candidate for the federal seat of Fremantle.

It was with this background in mind, quite aside from his State of origin, that the media reported French's appointment as "a surprise choice".[6] Certainly, French's youthful political affiliations must have been expected to cement bipartisan support for his appointment, although this hardly required shoring up; there was plenty about French that made him a strong candidate. Foremost, was the depth of his judicial experience, having served 22 years as a judge of the Federal Court of Australia, since his appointment by the Labor Government of Prime Minister Hawke in 1986. Second was his particular areas of expertise and the government's appreciation of his professional qualities, summarised by the Attorney General stating that he is regarded:

> as a leading jurist … He is regarded universally as a fair minded judge who gives the right of fair hearing to those who appear before him. He is respected for the clarity of his reasons and his ability to express the law in clear and concise terms.[7]

French's involvement in Aboriginal legal affairs undoubtedly was part of his appeal;[8] he was a founder of the Aboriginal Legal Service of Western Australia in the mid-1970s and was later appointed the first President of the National Native Title Tribunal. French was described by a former State Supreme Court judge as "someone who sees the need for reform and recognises some of the deficiencies in our system of government, particularly as they related to vulnerable groups like Aboriginal people".[9] Endorsements of this kind, as well as the role French J had played in upholding the detention of asylum seekers on board the Norwegian freighter *MV Tampa* in 2001[10] and, in *Evans v New South Wales*,[11] striking down a New South Wales law that would have inhibited the free speech of protesters at the Catholic World Youth Day event in 2007, confounded the media's attempt to get a

[2] R McClelland, "Judicial Appointments Forum" (Speech delivered at Bar Association of Queensland Annual Conference, Gold Coast, 17 February 2008) [68].

[3] Joint Press Conference, n 1 (Robert McClelland).

[4] Joint Press Conference, n 1 (Robert McClelland).

[5] R Ackland, "Here comes the judge – but which one will it be?", *Sydney Morning Herald*, 25 July 2008.

[6] M Metherell, "Rudd names new chief justice", *Sydney Morning Herald*, 30 July 2008.

[7] Joint Press Conference, n 1 (Robert McClelland).

[8] Editorial, "A Worthy Chief Justice", *The Australian*, 31 July 2008.

[9] K Kissane and S Collins, "Surprise choice in judicial top post", *The Age*, 31 July 2008.

[10] *Ruddock v Vadarlis* (2001) 110 FCR 491.

[11] *Evans v New South Wales* (2008) 168 FCR 576.

handle on the new Chief Justice; he was "hard to pigeonhole".[12] When asked by the press whether he expected French to be "an activist judge or a black letter judge", McClelland responded with the oddly equivocal summation of the new Chief Justice as "a fair minded jurist who is most certainly a black letter lawyer but who has shown an interest in the evolution of the law".[13]

Reflecting on Chief Justice French's appointment at the time, Anika Gauja doubted it could "be interpreted as an overt strategic attempt by the Rudd Government to change the direction of the Court away from the originalist, technical and orthodox approach and outlook that has characterised the Gleeson era".[14] Despite the novelty of a Labor Government bringing in an outsider to the Court's leadership position, that assessment appears correct. Although the work of the Court over the Gleeson era had included some high-profile decisions that thwarted political positions adopted by Labor in opposition,[15] the Court's methodology had produced a remarkably consistent and unimpeded vision of the constitutional powers enjoyed by the Commonwealth. The contrast with the High Court's decisions in the early to mid-1990s, particularly the willingness at that time to impose constitutional limitations on the legislature, was marked.[16] The Gleeson Court's lack of constitutional adventurism actually saw a significant decline in challenges to the validity of Commonwealth activity over this period.[17] In such circumstances, no Commonwealth Government would likely have sought to "change the direction" of the Court. It is also possible that the Court's generally accommodating approach to the Commonwealth over the preceding decade led the Rudd Cabinet to be unduly complacent about the institution's latent power of judicial review in considering potential successors to Chief Justice Gleeson.

The notion that the government did not see the selection of the new Chief Justice as a matter with particularly high stakes is further supported by the fact that French was on record with views about federalism that, in an earlier era, would have assuredly earnt him that now rather outdated label, "states righter".[18] That would have made any Commonwealth administration, but especially a Labor one, decidedly chary of appointing him. True, French's extra-curial writings tended to explore the constitutional footholds of co-operative federalism and this had an obvious synergy with the Rudd Government's ultimately ill-fated attempt to refashion the Australian federal system around that concept.[19] But it was simplistic to assert, as *The Australian* newspaper did, that: "His views on co-operative federalism should also suit the Government."[20] French's engagement with co-operative federalism was geared towards "consensual arrangements [that] leave room for the pluralism and diversity that can be a benefit of federation".[21] This was not, whatever the political rhetoric suggested, where Rudd's drafting of the Council of Australian Governments as the "workhorse of the nation"[22] was headed.

In commenting on the announcement of French's appointment, Professor John Williams not only described him as a "bold and imaginative spirit" but foresaw the potential for this quality to find

[12] M Davis, "The New Chief Justice Who can't be Judged", *Sydney Morning Herald*, 31 July 2008.

[13] Joint Press Conference, n 1 (Robert McClelland).

[14] A Gauja, "High Court Review 2007-08: A Changing Bench, But Business as Usual?" (2009) 44 AJPS 697, 700.

[15] *Combet v Commonwealth* (2005) 224 CLR 494; *New South Wales v Commonwealth* (2006) 229 CLR 1.

[16] H Patapan, *Judging Democracy – The New Politics of the High Court of Australia* (CUP, 2000); J Pierce, *Inside the Mason Court Revolution – The High Court of Australia Transformed* (Carolina Academic Press, 2006).

[17] A Lynch and G Williams, "The High Court on Constitutional Law: The 2008 Statistics" (2009) 32 UNSWLJ 181, 183.

[18] See R French, "The Referral of State Powers – Cooperative Federalism Lives?" (2003) 31 UWALR 19; R French, "Co-operative federalism – A constitutional reality or a political slogan" [2004] FedJSchol 21, <http://www.austlii.edu.au/au/journals/FedJSchol/2004/21.html>; see also R French, "Horizontal Arrangements: Competition Law and Cooperative Federalism" (Speech delivered at the Competition Law Conference, Sydney, 5 May 2007).

[19] M McQuestin, "Federalism under the Rudd and Gillard Governments" in P Kildea, A Lynch and G Williams (eds), *Tomorrow's Federation – Reforming Australian Government* (Federation Press, 2012) 6, 7-20.

[20] Editorial, n 8.

[21] French, "Co-operative federalism – A constitutional reality or a political slogan", n 18.

[22] McQuestin, n 19, 17.

expression on federal questions when he said that "being from Western Australia he will have views on how federalism works in a continent this size".[23] Indeed, French's closing remark in a 2003 speech signalled just how deep his federalist commitment ran:

> Western Australia, which has sometimes had a reputation for being brought in as the last joiner in cooperative arrangements, as it was the last joiner in the Commonwealth *Constitution*, has the expertise to be in the forefront of the development of cooperative federalism in a way that preserves its own legitimate State interests.[24]

The Rudd Government's sanguinity about French's evident federalism needs to be seen in the context of the Gleeson Court's decision in *New South Wales v Commonwealth* (*Work Choices*).[25] The breadth of the majority's interpretation of the corporations power in s 51(xx) was widely appreciated as having brought about a decisive end to constitutional litigation over the distribution of legislative power between the Commonwealth and the States. The battles of an earlier time – having reached a zenith in the 1970s and 1980s – were history, and the Commonwealth was the clear victor. That the federal character of the Commonwealth *Constitution* might separately limit the executive powers of the national government was a matter confined to occasional academic speculation, not otherwise seriously contemplated.

The French Court

Chief Justice French assumed the leadership of a court in transition. The most obvious manifestation of this was the rapid progress towards a near equal gender presence on the Bench between 2006 and 2009, as Crennan, Kiefel and Bell JJ were appointed.[26] The last of those appointments was made after the retirement of Kirby J – whose time on the Court was marked by the high frequency of his disagreement with the majority. The new Chief Justice sat with Kirby J in just a handful of cases; and it was Heydon J who was destined to become the "Great Dissenter" on the French Court.

Although not entirely unheralded, the speed and emphatic nature of this development was surprising given the regularity with which Heydon J had been a member of the Gleeson Court's majority in the years immediately following his appointment in 2003. Exactly whether it was Heydon J who had shifted or the Court around him may be a matter of dispute. In any case, it was more than simply an increase in dissent as to the outcomes reached; Heydon J ultimately declined to join with any of his colleagues in giving reasons even when he shared their view as to the orders to be made. An extensive justification for this stance was given by Heydon J in lectures in the United Kingdom a year before he retired in early 2013,[27] stimulating an unprecedented public "debate" between serving Justices who addressed the collaborative-individualist tensions on a multi-member court.[28] While French CJ presided over a court whose members were unusually candid about the institution's decision-making practices and their personal approach to the same, this was not a topic ever broached by the Chief Justice.

The spectrum of attitudes towards judicial decision-making as a collective enterprise produced notable patterns in the way cases were decided. For the first six years of the tenure of the Chief Justice, the Court alternated between high levels of unanimity and explicit disagreement in a two-year

[23] Professor John Williams quoted in Davis, n 12.

[24] French, "Co-operative federalism – A constitutional reality or a political slogan", n 18.

[25] *New South Wales v Commonwealth* (2006) 229 CLR 1.

[26] Albeit a highly significant development, the consensus is that the impact of gender on judicial reasoning on the High Court has not been strongly perceptible: A Gauja and K Gelber, "The French Court" in R Dixon and G Williams, *The High Court, the Constitution and Australian Politics* (CUP, 2014) 311, 312; K McLoughlin, "'A Particular Disappointment?' Judging Women and the High Court of Australia" (2015) 23 Fem Legal Stud 273.

[27] JD Heydon, "Threats to Judicial Independence: The Enemy Within" (2013) 129 LQR 205.

[28] S Kiefel, "The Individual Judge" (2014) 88 ALJ 554; S Gageler, "Why Write Judgments?" (2014) 36 Syd LR 189; P Keane, "The Idea of the Professional Judge: The Challenges of Communication" (Speech delivered at Judicial Conference of Australia Colloquium, Noosa, 11 October 2014). For discussion, see A Lynch, "Keep Your Distance: Independence, Individualism and Decision-making on Multi-Member Courts" in R Ananian-Welsh and J Crowe (eds), *Judicial Independence in Australia – Contemporary Challenges, Future Directions* (Federation Press, 2016) 156.

cycle. In 2009 and 2010, very high rates of unanimous decisions were recorded (44% in 2009 and 50% of all cases in 2010) while, following Kirby J's departure, those featuring a dissent contracted.[29] But in the next two year period, 2011 and 2012, unanimous opinions plummeted as a consequence of Heydon J's decision to act on his concerns about judicial independence within the Court by not joining in any opinions with colleagues.[30] The frequency with which the Court divided rose – to half of all cases in 2011. After Heydon J's retirement, in 2013 and 2014 unanimous opinions became possible once more and increased, while dissent correspondingly diminished in frequency, falling back to only a quarter of the matters tallied.[31] It was only in 2015 that the French Court broke free of the see-saw between unanimity and disagreement that had characterised its decision-making over the previous six years: in that year the number of cases decided in either way simultaneously came down from earlier heights.

The Chief Justice has rarely contributed a minority opinion throughout his tenure. In all, French CJ dissented from the Court's final orders in just nine out of 371 matters, five of which involved constitutional issues to some degree.[32] Even this, however, is to overstate things, for in two of the constitutional cases less than half of the seven Justices made orders that were in full concurrence with the orders of the Court; thus French CJ was hardly in a conventional minority on those occasions.[33] Additionally, in the third case classified as constitutional, he was in dissent with Crennan J but the constitutional issues were notably peripheral.[34] In just two squarely constitutional law cases did the Chief Justice dissent alone – *Tajjour v New South Wales*[35] and *Alqudsi v The Queen*.[36]

At the same time, it is possible to say that French CJ has hardly been reluctant to follow his own path in giving his reasons for reaching the result favoured by the majority in all the other cases on which he has sat. Until 2015, he was not the judge with whom a majority, or in some years any, of the other Justices joined more than any other in giving reasons. French CJ does not appear to have evinced a marked preference for stating his own reasons, unlike, among the current members of the Court, Gageler J.[37] It is perhaps more a matter of the Chief Justice not appearing to have formed a reliably regular partnership of joint judgment writing with particular Justices. It is worth noting that in constitutional cases, others have joined with French CJ less frequently than they have tended to in cases overall.

Both the unusual features of French CJ's appointment and also the statistical profile of the Court during his tenure and his individual record, present interesting questions about his leadership of the High Court – as well as what "leadership" as the so-called "first among equals" means. French CJ has only rarely disagreed with his colleagues on the Court, but it is simplistic to conclude as a result that he has been central in shaping majority opinion. While he has not been especially reluctant to join with others in stating his reasons, the data suggests that French CJ has been a distinctive voice on the

[29] A Lynch and G Williams, "The High Court on Constitutional Law: The 2009 Statistics" (2010) 33 UNSWLJ 267; A Lynch and G Williams, "The High Court on Constitutional Law: The 2010 Statistics" (2011) 34 UNSWLJ 1030.

[30] A Lynch and G Williams, "The High Court on Constitutional Law: The 2011 Statistics" (2012) 35 UNSWLJ 846; A Lynch and G Williams, "The High Court on Constitutional Law: The 2012 Statistics" (2013) 36 UNSWLJ 514.

[31] A Lynch and G Williams, "The High Court on Constitutional Law: The 2013 Statistics" (2014) 37 UNSWLJ 544; A Lynch and G Williams, "The High Court on Constitutional Law: The 2014 Statistics" (2015) 38 UNSWLJ 1078.

[32] The four cases absent any constitutional dimension are *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 (in minority with Gummow J in a 3:2 decision), *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 (joint dissent with Gummow J in a 3:2 decision), *BBH v The Queen* (2012) 245 CLR 499 (in minority with Gummow and Hayne JJ in a 4:3 decision), and *Australian Competition & Consumer Commission v Flight Centre Travel Group Ltd* [2016] HCA 49 (in lone dissent in a 4:1 decision).

[33] *Momcilovic v The Queen* (2011) 245 CLR 1; *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 243.

[34] *X7 v Australian Crime Commission* (2013) 248 CLR 92; see Lynch and Williams, "The 2013 Statistics", n 31, 556.

[35] *Tajjour v New South Wales* (2014) 254 CLR 508.

[36] *Alqudsi v The Queen* (2016) 90 ALJR 711.

[37] Lynch and Williams, "The 2014 Statistics", n 31, 1090-1.

Bench. We turn now to examine just how significant his particular contribution has been in the context of the three areas that have dominated the High Court's constitutional law jurisprudence under his tenure.

EXECUTIVE SPENDING

The signature development in the High Court's constitutional jurisprudence under French CJ has been the emergence of constraints upon the power of the Commonwealth Executive to contract and spend public money. The source of this power had received substantial consideration in just two earlier cases, but on both occasions the focus was upon s 81 of the *Constitution*, under which revenue raised by the Commonwealth may "be appropriated for the purposes of the Commonwealth in the manner … imposed by the *Constitution*". Section 83 also relevantly provides that "no money shall be drawn … except under appropriation made by law". Both earlier decisions were highly inconclusive, revealing a range of views as to the scope of the "purposes of the Commonwealth" and how these were to be ascertained.[38] This did not, perhaps surprisingly, lead to caution – on the contrary, successive Commonwealth governments from the 1970s increasingly relied on the so-called "appropriations power" to spend funds directly on schemes which had little or no obvious connection to those areas of responsibility conferred upon the national legislature by the *Constitution*. In 2005, Bryan Pape, a barrister and academic from New England, lamented that the "abuse of the appropriations power to bypass the States has effectively destroyed the federal union".[39]

The Rudd Government's response to the Global Financial Crisis in 2008 presented Pape with the means to challenge this state of affairs before the High Court. In order to inject a massive economic stimulus to the Australian economy, the Commonwealth enacted the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth). The Act provided for a "fiscal stimulus package" ranging from $250 to $900 to be distributed among 8.7 million taxpayers.[40] Pape was eligible to receive $250 and it was on this basis that he was recognised as having sufficient standing to challenge the validity of the Commonwealth's spending, which he did as a self-represented litigant.

Although Pape narrowly lost his case on the facts, he unquestionably succeeded in his broader purpose of insisting upon limits to Commonwealth spending. For in *Pape v Federal Commissioner of Taxation*, the Court was unanimous in resolving that ss 81 and 83 "do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the *Constitution* or the laws of the Commonwealth".[41] As French CJ put it, the process of appropriation set down by those provisions was no more than a "condition" of parliamentary control of public moneys – their expenditure by the Executive must depend for its validity on some other source of authority.[42] In respect of the tax bonus, a bare majority of the Court found the necessary power as that conferred upon the Executive in s 61 to spend money on its responsibilities arising "from the existence and character of the Commonwealth as a national government".[43] This appeal to "nationhood" drew most directly on the *obiter* of Mason J in *Victoria v Commonwealth* (*AAP Case*),[44] but the joint judgment of Gummow, Crennan and Bell JJ directly cited French CJ's earlier opinion on the scope of Commonwealth executive capacity in *Ruddock v Vadarlis* (*Tampa Case*)[45] to explain their view of the power as encompassing action taken for "the protection of the body politic or nation of Australia".[46]

[38] *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237; *Victoria v Commonwealth* (1975) 134 CLR 338.

[39] B Pape, "The Use and Abuse of the Commonwealth Finance Power" in Proceedings of the Sir Samuel Griffith Society (2005) 17 *Upholding the Australian Constitution* 132, 141.

[40] *Tax Bonus for Working Australians Bill (No 2) 2009* (Cth), Explanatory Memorandum 5.

[41] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [41] (French CJ, Gummow and Crennan JJ).

[42] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [80] (French CJ).

[43] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [95], [129] (French CJ).

[44] *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J).

[45] *Ruddock v Vadarlis* (2001) 110 FCR 491.

[46] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [215].

The legislation was, accordingly, a valid enactment pursuant to the express incidental power under s 51(xxxix) in support of use of the executive power.

The Chief Justice was decisive in shaping the outcome, with Cheryl Saunders describing him as occupying the "middle ground" between the joint majority opinion of Gummow, Crennan and Bell JJ and the dissenting views of Hayne and Kiefel JJ and Heydon J.[47] The minority invoked federal considerations to explain their rejection of the argument that the Commonwealth Executive was empowered to make what French CJ called "short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole".[48] French CJ, signalled a similar concern that the limits on the scope of the executive power more generally respect the federal structure of the *Constitution* by insisting that:

> the exigencies of "national government" cannot be invoked to set aside the distribution of powers between Commonwealth and States and between the three branches of government for which this *Constitution* provides, nor to abrogate constitutional prohibitions.[49]

This emphasis stood in contrast to the "more radical suggestions"[50] by the other members of the majority that there was some value in analogising between the power in s 61 and that of the Government of the United Kingdom, or that the spending capacity took its measure from the breadth of the Commonwealth's power to tax.[51]

French CJ offered an assurance that many instances of Commonwealth expenditure "which may well have relied upon ss 81 and 83 of the *Constitution* as a source of substantive spending power" would be able to be sustained "by reference to the executive power".[52] Nonetheless, the effect of the *Pape* decision was to throw into doubt many programs run by the national Government.

In *Williams v Commonwealth* (*Williams* (No 1)),[53] the High Court unanimously reaffirmed the decision in *Pape*, and fully confronted its consequences by invalidating a Commonwealth spending program for which the specific constitutional support was unable to be found. The significance of the federal character of the *Constitution* in limiting the exercise and scope of the Commonwealth's executive power was a striking aspect of the majority's reasoning, and one most explicitly emphasised by French CJ, who commenced his reasons by quoting Andrew Inglis Clark's conception of "a truly federal government".[54]

The case concerned a challenge to the non-statutory National School Chaplaincy Program (NSCP), under which the Commonwealth had contracted to pay Scripture Union Queensland for the provision of chaplaincy services at government schools in Queensland. In the aftermath of *Pape*, the Government sought to defend the NSCP under its executive power. It did so through two distinct arguments – first, that the Executive enjoyed capacities similar to those of other legal persons and thus its power to spend was essentially unlimited, and secondly, and alternatively, that Commonwealth executive power essentially mapped the contours of the Commonwealth's legislative capacity, including those matters that are "peculiarly adapted" to the national Government. This second and narrower argument rested upon a longstanding "common assumption" that the Commonwealth Government could enter contracts and spend money without the need for actual statutory authorisation. Six members of the Court rejected the first argument, with Heydon J not deciding it, while a majority of four (with Hayne and Kiefel JJ not deciding, and Heydon J in dissent) rejected the

[47] C Saunders, *The Constitution of Australia – A Contextual Analysis* (Hart Publishing, 2011) 180.

[48] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [133] (French CJ); see also [230] (Gummow, Crennan and Bell JJ characterised it as "a financial and economic crisis"); see further [346] (Hayne and Kiefel JJ), [522] (Heydon J).

[49] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [127] (French CJ).

[50] Saunders, n 47, 243.

[51] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [232]-[236] (Gummow, Crennan and Bell JJ).

[52] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [9].

[53] *Williams v Commonwealth* (2012) 248 CLR 156.

[54] *Williams v Commonwealth* (2012) 248 CLR 156, [1].

second by exploding the common assumption and finding that s 61 does not empower the Commonwealth to enter into contracts and spend public money in the absence of statutory authority.

At the start of his judgment, French CJ cited Alfred Deakin's suggestion that "wherever the executive power of the Commonwealth extends, that of the States is correspondingly reduced".[55] He went on to explain:

> There are consequences for the federation which flow from attributing to the Commonwealth a wide executive power to expend moneys, whether or not referable to a head of Commonwealth legislative power, and subject only to the requirement of a parliamentary appropriation. Those consequences are not to be minimised by the absence of any legal effect upon the laws of the States. Expenditure by the executive government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the States has, and always has had, the potential, in a practical way of which the court can take notice, to diminish the authority of the States in their fields of operation.[56]

Only Crennan J appeared to share the Chief Justice's concern about Commonwealth executive intrusion into "areas of responsibility within the legislative and executive competence of the States in the absence of statutory authority". She was particularly worried about the impact on citizens of possible inconsistency that could not be resolved through the mechanism of s 109 of the *Constitution*.[57] But otherwise both Crennan J and Gummow and Bell JJ focused their federal concerns about executive spending upon the potential for the bypassing of the grants power in s 96, noting the "consensual aspect" of that provision emphasised by Barwick CJ in the *AAP Case*.[58] Beyond that point, in requiring statutory authorisation for executive spending, these judges drew decisively on the principle of responsible government to reject the "common assumption".

By contrast, French CJ maintained his reliance on federal considerations to arrive at this result:

> A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate.[59]

The limited powers of the Senate in respect of appropriation Bills under s 53 of the *Constitution* was seized on by French CJ as supporting the need for an additional form of statutory authorisation. The fact that the Senate's function as "a chamber designed to protect the interests of the States may now be vestigial" did not destabilise his argument; nor did the practical capacity of the Executive in modern times to dominate the legislature.[60] French CJ insisted that those political developments had:

> not resulted in any constitutional inflation of the scope of executive power, which must still be understood by reference to the "truly federal government" of which Inglis Clark wrote in 1901 and which, along with responsible government, is central to the *Constitution*.[61]

The decision in *Williams* (No 1) cast doubt on a substantial number of federal programs (estimated between 5-10% of all federal government expenditure)[62] that lacked supporting legislation and were not administered by a grant under s 96. The Parliament's response was to enact a broad legislative authority for the Executive to enter into contracts and spend money on programs that were specified in regulations. In this way the NSCP was maintained – but it was then challenged once more, though this time on the ground that the Commonwealth lacked legislative power. That argument

[55] *Williams v Commonwealth* (2012) 248 CLR 156, [1].

[56] *Williams v Commonwealth* (2012) 248 CLR 156, [37].

[57] *Williams v Commonwealth* (2012) 248 CLR 156, [522].

[58] *Victoria v Commonwealth* (1975) 134 CLR 338, 357, cited in *Williams v Commonwealth* (2012) 248 CLR 156, [148] (Gummow and Bell JJ); [501] (Crennan J).

[59] *Williams v Commonwealth* (2012) 248 CLR 156, [60].

[60] *Williams v Commonwealth* (2012) 248 CLR 156, [61].

[61] *Williams v Commonwealth* (2012) 248 CLR 156, [61].

[62] J Kelly and N Berkovic, "Urgent Move to Close Loophole and Keep Chaplains in Schools", *The Australian*, 26 June 2012, 4.

succeeded unanimously. The decision in *Williams v Commonwealth [No 2]* (*Williams* (No 2)),[63] presented an opportunity for a consolidated affirmation of the reasoning in the earlier cases of *Pape* and *Williams* (No 1). The Commonwealth sought to have *Williams* (No 1) overturned as essentially an unfortunate error, but was sternly rebuffed by the French Court. Further, the submission by the Commonwealth that the scope of executive power should be determined through analogy to the British Government was rejected as an inappropriate starting point. In words that echoed French CJ's reflections in *Williams* (No 1)[64] regarding the "impact of Commonwealth executive power on the executive power of the States", the joint judgment in *Williams* (No 2) instead emphasised Australia's federal character and that "independent governments exist in the one area and exercise powers in different fields of action carefully defined by law".[65]

The consequences of the *Williams* litigation are still only beginning to make themselves felt upon the way in which the Commonwealth Government contracts and spends money – and develops policy more generally. There remain a number of Commonwealth spending programs of highly tenuous connection to constitutional power, despite the deficiency of statutory authorisation having been "cured" by legislative response to the French Court's decisions. Many of those schemes are just in want of a challenger possessed of sufficient standing. There are also other, broader uncertainties about the effect of a more limited conception of executive power – including upon holding royal commissions and making intergovernmental agreements.[66]

In the meantime, astonishment at the Court's swift demolition of long-standing assumptions underpinning executive power is only matched by surprise that federal considerations played such a substantial role. Although the High Court under French CJ did engage with federalism in other, more familiar contexts (most notably the State immunity doctrine,[67] to the formulation of which French CJ made a distinctive but not radical contribution), it is undoubtedly the executive power cases that will be its significant legacy – both generally and also in terms of a reinvigorated jurisprudence around the *Constitution's* federal character. This is not diminished by the fact that French CJ was the singularly prominent adherent to such a view; the fact that he was in the majority in all three cases, plus also the obvious emphasis on federalism in the consolidation offered by the Court in *Williams* (No 2), ensures that French CJ's reasoning will continue to be regarded as highly influential, even if not simply emblematic of the Court's collective approach.

JUDICIAL POWER

The resurgence of federalism as a constitutional constraint on Commonwealth executive spending may be said to have had a parallel significance for State legislatures in a different constitutional area that arose often for the attention of the French Court. In a series of cases,[68] the Court rehabilitated the *Kable* principle,[69] drawing on the text and structure of Ch III of the Commonwealth *Constitution*,

[63] *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, [67] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[64] *Williams v Commonwealth* (2012) 248 CLR 156, [38].

[65] *Williams v Commonwealth [No 2]* (2014) 252 CLR 416, [83] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[66] See respectively N Aroney, "A Power 'Singular and Eccentrical' – Royal Commissions and Executive Power after Williams" (2014) 25 PLR 99; S Chordia, A Lynch and G Williams, "Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism" (2013) 37 MULR 189, 218-230.

[67] *Clarke v Commissioner of Taxation (Cth)* (2009) 240 CLR 272; *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.

[68] *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393; *Kuczborksi v Queensland* (2014) 254 CLR 51; *Pollentine v Bleijie* (2014) 253 CLR 629; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569.

[69] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

which postulates "an integrated Australian court system",[70] to place constitutional limitations on State legislative power. This line of cases distinguishes the French Court from the Gleeson period, which in this and related fields was marked by an "often overly cautious approach to the development of constitutional doctrine".[71]

In *Kable v Director of Public Prosecutions (NSW)*,[72] the High Court derived limits on State legislative power from the federal structure of the *Constitution*, holding that State legislation that purports to invest a Ch III State court with a non-judicial function that undermines the institutional integrity of the court is invalid. In doing so, it held that Ch III entrenches the Supreme Court of each State as part of an integrated national court system.[73]

Despite the potential significance of *Kable*, the Gleeson Court proved unresponsive to attempts to rely on the principle to invalidate State legislation. In *Baker v The Queen*,[74] and *Fardon v Attorney-General (Qld)*,[75] the Court accepted the *Kable* principle, but dismissed challenges to State legislation that restricted the rights of certain prisoners serving indefinite life imprisonment to obtain a determination of their sentence and authorised the continued detention of a prisoner on community protection grounds. In dissent in both *Baker* and *Fardon*, Kirby J lamented that the *Kable* principle had proven "a weak protection"[76] and "a constitutional guard dog that would bark but once".[77] In two further cases, Kirby J's concerns proved correct, as the Gleeson Court maintained its "cautious and restrained"[78] attitude towards the *Kable* principle, accepting its status but rejecting challenges to the system of appointing acting judges in New South Wales, in *Forge v ASIC*,[79] and limitations on procedural fairness relating to secrecy and non-disclosure, in *Gypsy Jokers Motorcycle Club v Commissioner of Police*.[80]

Reviving Kable

The French Court first engaged with the *Kable* principle in two cases where legislation empowered courts to consider confidential information provided by the Executive and not disclosed to the affected party. Although the appeal in *K-Generation v Liquor Licensing Court*, was dismissed, the Court held that inferior State courts and tribunals can be regarded as a "Court of a State" for the purposes of receiving federal jurisdiction under Ch III of the *Constitution*.[81] In *International Finance Trust Co v NSW Crime Commission*,[82] a majority of the Court then applied *Kable* to strike down a State law, finding that requiring a court to hear and determine an application *ex parte* "direct[s] the court as to the manner in which it exercises its jurisdiction and in so doing … deprive[s] the court of an important characteristic of judicial power … the power to ensure, so far as practicable, fairness between the

[70] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 101 (Gaudron J), 114 (McHugh J), 138-143 (Gummow J). See, eg *South Australia v Totani* (2010) 242 CLR 1, [69] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [44] (French CJ and Kiefel J).

[71] Lynch and Williams, "The 2009 Statistics", n 29, 282.

[72] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[73] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 96 (Toohey J), 102-103 (Gaudron J), 114-116 (McHugh J), 127-128 (Gummow J).

[74] *Baker v The Queen* (2004) 223 CLR 513.

[75] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

[76] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [134].

[77] *Baker v The Queen* (2004) 223 CLR 513, [54].

[78] F Wheeler, "The Kable Doctrine and State Legislative Power Over State Courts" (2005) 20 APR 15, 16.

[79] *Forge v ASIC* (2006) 228 CLR 45.

[80] *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2008) 234 CLR 532.

[81] *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501, [80]-[86] (French CJ).

[82] *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319, [55] (French CJ).

parties". In reaching this result, French CJ highlighted the "federal constitutional context", holding that judicial power exercised pursuant to Ch III must be procedurally fair.[83]

The successful invocation of the *Kable* principle in *International Finance Trust* was repeated in two cases challenging State anti-bikie legislation. In *South Australia v Totani* and *Wainohu v New South Wales*, the French Court again emphasised the "national integrated judicial system for which Ch III of the *Constitution* provides".[84] *Totani* concerned provisions of the *Serious Organised Crime (Control) Act 2008* (SA) that directed the Magistrates Court to grant a control order on a person who was a member of an organisation declared by the Attorney-General to be involved in "serious criminal activity". French CJ was firm in holding that the Act "represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process" giving the "neutral colour of a judicial decision to … the result of executive action".[85] In *Wainohu*, the Court upheld a challenge to New South Wales anti-bikie legislation drafted after the decision in *Totani*. While the Act preserved decisional independence it did not require judges give reasons for their decisions, an "essential incident of the judicial function".[86]

Gabrielle Appleby has observed a tension in the French Court's invocation of the *Kable* principle, noting that although it "has the capacity to allow for State diversity in theory, diversity in practice has been greatly reduced as an *indirect* result of the High Court's approach" (original emphasis).[87] Wary of constitutional challenges, State legislatures have exercised "prudence in involving courts in innovative schemes".[88] This conflict has also been explored by Brendan Lim, who has argued that *Wainohu* expressed "a vision of the integrated judicial system that is closer to the unitary than to the federal ideal-type".[89] French CJ has met such concerns by highlighting the limitations of the *Kable* principle. In *Totani*, French CJ quoted approvingly from a decision by Gummow, Hayne and Crennan JJ in *Forge*, where they explained that: "The provisions of Ch III do not give power to the federal Parliament to affect or alter the constitution or organisation of State courts."[90] Drawing on this statement, French CJ noted that the limitation on State legislative power derived from Ch III "makes ample allowance for diversity in the constitution and organisation of courts".[91] Likewise, in *Wainohu*, French CJ and Kiefel J cautioned that the *Kable* principle "does not apply so as to infringe the freedom that State legislatures enjoy with respect to the organisation and arrangements of their courts".[92]

Such flexibility though has its limits, as was asserted strongly by the Court in *Kirk v Industrial Court (NSW)*.[93] The case concerned a prosecution under the *Occupational Health and Safety Act 1983* (NSW), which was found to be tainted by two jurisdictional errors. Section 179 of the *Industrial Relations Act 1996* (NSW) purported to oust review of the conviction by stating that a decision of the Industrial Court "is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal", denying supervisory jurisdiction to the Supreme Court of New South Wales. The use of privative clauses to oust judicial review had been accepted by the High Court in *R v*

[83] *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319, [54].

[84] *South Australia v Totani* (2010) 242 CLR 1, [69] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [3] (French CJ and Kiefel J).

[85] *South Australia v Totani* (2010) 242 CLR 1, [82].

[86] *Wainohu v New South Wales* (2011) 243 CLR 181, [58] (French CJ and Kiefel J).

[87] G Appleby, "The High Court and Kable: A Study in Federalism and Rights Protection" (2014) 40 Mon LR 673, 686.

[88] Appleby, n 87, 686.

[89] B Lim, "Attributes and Attribution of State Courts – Federalism and the Kable Principle" (2012) 40 FLR 31, 59; see also B Lim, "Laboratory Federalism and the 'Kable' Principle" (2014) 42 FLR 519.

[90] *Forge v ASIC* (2006) 228 CLR 45, [61].

[91] *South Australia v Totani* (2010) 242 CLR 1, [68].

[92] *Wainohu v New South Wales* (2011) 243 CLR 181, [52].

[93] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

Hickman; Ex parte Fox,[94] provided the clause met a number of tests. In *Plaintiff S157/2002 v Commonealth* the Court overturned this position at the Commonwealth level,[95] and in *Kirk*, the Court extended this reasoning to the States.

The Court held that Ch III of the Commonwealth *Constitution* requires there be a body fitting the description "the Supreme Court of a State" and that supervisory jurisdiction is a "defining characteristic" of a State supreme court.[96] Privative clauses that purport to deny supervisory jurisdiction by ousting judicial review of the limits of State legislative and executive power would "create islands of power immune from supervision and restraint",[97] incompatible with the "integrated system" of Australian courts as established by Ch III.[98] Although the underlying reasoning in *Kirk* has been derided as "perfunctory",[99] "very implausible"[100] and as "not supported by either the text or history of the *Constitution*",[101] its result – in extending the constitutional protection of federal courts to the State level – has "met with unqualified approval".[102] The High Court reiterated its decision, and the importance of the supervisory jurisdiction of State Supreme Courts, in *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (*PSA*), extending jurisdictional error to cases of wrongful refusal to exercise jurisdiction.[103]

Diversity and Statutory Drafting

In retrospect, *Kirk*, *Totani*, *Wainohu* and *PSA*, represent the high-water mark of the French Court's judicial adventurism and robust defence of the judicial sphere. More recent Ch III decisions have dismissed *Kable* challenges to State legislation. Consistent with French CJ's judicial philosophy, however, federal concerns have remained central. In cases such as *Assistant Commissioner Condon v Pompano Pty Ltd*,[104] where the Court dismissed a challenge to a Queensland anti-bikie statute that imposed requirements for closed hearings and the use of secret evidence, the Court tacked back towards the values of diversity and experimentation. Nevertheless, the Court maintained that the *Kable* principle sets the outer-edges of State legislative power.

Although not determinative, *Kable* played an important role in *Pompano*. In other cases, the Court has exercised greater judicial restraint, narrowly construing statutory provisions to avoid constitutional invalidity. This shift is identifiable in a range of cases, including *Attorney-General (NT) v Emmerson*,[105] *Kuczborksi v Queensland*,[106] and *Pollentine v Bleijie*,[107] but is illustrated most clearly in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*,[108] which concerned

[94] *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 617 (Dixon J). See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ): "a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle".

[95] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[96] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [96], [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[97] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[98] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [121] (Heydon J).

[99] J Goldsworthy, "Kable, Kirk and Judicial Statesmanship" (2014) 40 Mon LR 75, 94.

[100] J Goldsworthy, "The Limits of Judicial Fidelity to Law: The Coxford Lecture" (2011) 24 Can J Law & Juris 305, 305.

[101] M Groves and J Boughey, "Administrative Law in the Australian Environment" in M Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP, 2014) 3, 21.

[102] J Basten, "The Supervisory Jurisdiction of the Supreme Courts" (2011) 85 ALJ 273, 273.

[103] *Public Service Association (SA) Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, [35] (French CJ), [66] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[104] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

[105] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393.

[106] *Kuczborksi v Queensland* (2014) 254 CLR 51.

[107] *Pollentine v Bleijie* (2014) 253 CLR 629.

[108] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569.

legislation that permitted a police officer to arrest and detain a person without warrant for up to four hours. In two joint judgments, French CJ, Kiefel and Bell JJ and Nettle and Gordon JJ sidestepped the constitutional question of the validity of executive detention without judicial warrant by relying on the principle of legality to hold that the provision was subject to an overarching statutory and common law requirement to bring a person in custody before a justice of the peace or a court as soon as practicable, and that detention was not punitive.[109] In dissent, Gageler J sketched an alternative approach, emphasising the restrained and cautious decision of the majority. He warned that the Court should not depart from "ordinary principles of statutory construction in pursuit of constitutional validity", declaring the principle of legality of little relevance to statutory provisions that authorise deprivation of liberty.[110] Properly construed, Gageler J found that the provision made the Northern Territory courts "support players in a scheme the purpose of which is to facilitate punitive executive detention", which is "antithetical to their status as institutions established for the administration of justice".[111]

In contrast to its earlier decisions in this area, the French Court's later Ch III decisions reflect a more restrained judicial philosophy. After setting the outer limits on State legislative power, the Court has permitted the States to adapt and develop legislation close to the constitutional line. Where that line has arguably been crossed, the Court has retreated into statutory interpretation, reading down the impugned provisions and avoiding the constitutional question altogether.[112] In this regard, the French Court has settled into an approach that is perhaps not so very different to that of the Gleeson Court.

Looking forward, it is difficult to predict how the Court will explore and elaborate the *Kable* principle in the coming years. This apparently goes with the terrain; the Court itself has emphasised that the notions of repugnancy, incompatibility and institutional integrity are "not readily susceptible of definition",[113] and that, therefore, questions of validity:

> cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration.[114]

Nevertheless, the Court's more recent decisions suggest two possible paths. If the Court's reluctance to uphold *Kable*-based challenges to State legislative power reflects prudential legislative drafting by the States,[115] it is likely that the *Kable* principle will lose steam. As in *Pompano*, it will remain an important constitutional limitation on State legislative power, but its bark may prove worse than its bite. If, however, the shift reflects resurgence in federal considerations encouraging experimentation and diversity among the States,[116] the future of the principle will turn on the significance that a future Court places in federalism.

Alqudsi may be an early preview of this future contest. The Court considered in *Alqudsi* whether s 80 of the *Constitution* precludes State laws that allow an accused charged on a Commonwealth indictment, to choose trial by judge alone where the prosecutor agrees or the court considers it to be in

[109] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [28], [36], [43] (French CJ, Kiefel and Bell JJ), [214]-[219] (Nettle and Gordon JJ).

[110] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [76], [81].

[111] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [134].

[112] On this form of statutory interpretation see: *Attorney General (Vic) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J); see also R French, "The Courts and Parliament" (Queensland Supreme Court Seminar, 4 August 2012, Brisbane) 13-14; *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319, [41] (French CJ).

[113] *Kuczborski v Queensland* (2014) 254 CLR 51, [103] (French CJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [124] (Hayne, Crennan, Kiefel and Bell JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [104] (Gummow J).

[114] *Kuczborski v Queensland* (2014) 254 CLR 51, [106] (French CJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [137] (Hayne, Crennan, Kiefel and Bell JJ).

[115] As suggested in Gauja and Gelber, n 26, 320, in reference to *South Australia v Totani* (2010) 242 CLR 1 and *Wainohu v New South Wales* (2011) 243 CLR 181.

[116] Lim, "Laboratory Federalism and the 'Kable' Principle", n 89.

the interests of justice. By 6:1 a majority held that it does. In an extremely rare, lone dissent, French CJ highlighted the diversity of State and Territory laws, and criticised the "rigidity" of present doctrine, which may "defeat the interests of justice".[117] In French CJ's final year on the Court, there may already be a shift back towards an appreciation of the federal structure of the *Constitution* as mandating an integrated Australian court system.[118]

Examination of the Court's Ch III cases exposes an interesting schism. Despite striking down five State laws[119] as impermissibly infringing limitations drawn from Ch III, the French Court has not struck down any Commonwealth legislation on similar grounds. This contrast may be best explored by surveying the Court's tentative and restrained approach to asylum seeker cases.

CHALLENGES TO AUSTRALIA'S ASYLUM SEEKER POLICIES

The judicial adventurism that has marked the French Court in cases on the executive power of the Commonwealth and Ch III restrictions on State legislatures has not been so evident in challenges to Australia's asylum seeker policies. In this domain the French Court has adopted a restrained approach, overturning executive action on statutory grounds (where available) but not imposing constitutional constraints. In this regard, the Court has relied on, and assisted in the transformation of, the principle of legality into a "quasi-constitutional common law bill of rights",[120] albeit one that is capable of being displaced by clear legislative intent.

Two key cases concerning the constitutional validity of executive detention of asylum seekers were handed down prior to the French Court. In *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs*,[121] the Court held that, as an incident of the executive power, the *Constitution* authorises detention of non-citizens for specific purposes. However, as involuntary detention generally only exists "as an incident of the exclusively judicial function of adjudging and punishing criminal guilt",[122] Ch III restricts executive detention of non-citizens to what is "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".[123] Twelve years later in *Al-Kateb v Godwin*,[124] the Court adopted a different approach, focusing on the characterisation of the power of immigration detention under the aliens power in s 51(xix). By 4:3 the Court held that the *Migration Act 1958* (Cth) authorises executive detention even if the detainee has no reasonable prospects of being removed from Australia. As Hayne J explained, "even if, as in this case, it is found that 'there is no real likelihood or prospect of [the non-citizen's] removal in the reasonably foreseeable future', that does not mean that continued detention is not for the purpose of subsequent removal".[125] In dissent, Gleeson CJ highlighted the principle of legality to invalidate the detention.[126]

[117] *Alqudsi v The Queen* (2016) 90 ALJR 711, [2], [74]. The third author to this article appeared for the applicant in this matter.

[118] *Alqudsi v The Queen* (2016) 90 ALJR 711, [167]-[172] (Nettle and Gordon JJ).

[119] See *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Wainohu v New South Wales* (2011) 243 CLR 181; *Public Service Association (SA) Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398.

[120] D Meagher, "The Principle of Legality as Clear Statement Rule: Significance and Problems" (2014) 36 Syd LR 413, 442.

[121] *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1.

[122] *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

[123] *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ).

[124] *Al-Kateb v Godwin* (2004) 219 CLR 562.

[125] *Al-Kateb v Godwin* (2004) 219 CLR 562, [231].

[126] *Al-Kateb v Godwin* (2004) 219 CLR 562, [22].

Challenges to Executive Detention

The French Court has been presented with two opportunities to overrule *Al-Kateb*. However, in both *Plaintiff M47/2012 v Director General of Security*,[127] and *Plaintiff M76/2013 v Minister of Immigration, Multicultural Affairs & Citizenship*,[128] the Court struck a narrow approach, upholding appeals against the government on statutory grounds and refusing to consider the constitutional validity of indefinite executive detention.

In *Plaintiff M47*, the Court considered a regulation made under the *Migration Act 1958* (Cth), which required the Minister for Immigration and Citizenship to refuse to grant a refugee a protection visa if ASIO had assessed the refugee to be a risk to Australian security. The plaintiff was found to be a person to whom Australia owed protection obligations, but was issued with an adverse security clearance. As a result, the plaintiff was effectively indefinitely detained until a third country could be found to which he could be removed to, a situation the Court accepted was "unlikely … within the foreseeable future".[129] Despite the similarity to *Al-Kateb*, a majority of the Court avoided the constitutional question. In particular French CJ did not even cite *Al-Kateb*, holding instead that the regulation was *ultra vires*. As the decision to deny the plaintiff's application for a protection visa was affected by jurisdictional error, French CJ considered that it was not necessary to determine whether his detention "can lawfully be continued if his application … is refused".[130] In contrast to this restrained approach, the three judges in minority held that the clause was not *ultra vires* and therefore considered the issue of indefinite detention: Gummow J and Bell J held that *Al-Kateb* should be revisited.[131]

French CJ adopted the same approach in *Plaintiff M76*. As with *Plaintiff M47*, in this case the plaintiff had been assessed as a refugee and was issued with an adverse security clearance. On the basis of ASIO's assessment, the Department of Immigration refused to refer the plaintiff's case to the Minister for Immigration for consideration of whether to grant a protection visa. The plaintiff was thus indefinitely detained while the Department sought to expel her to a third country for resettlement. A majority of the Court, French CJ included, held that the Department's conduct constituted an error of law, as the decision to grant a protection visa must be exercised by the Minister personally. Once again the broader question of the legality of indefinite executive detention was avoided, as the Minister was held to have not yet made a determination whether or not to allow the plaintiff to apply for a visa.[132] Nevertheless, Crennan, Bell and Gageler JJ held that Ch III imposes temporal and purposive limits on executive detention,[133] a question that French CJ did not consider.

For those challenging indefinite executive detention of asylum seekers, *Plaintiff M47* and *Plaintiff M76* were pyrrhic victories, with the French Court's restrained approach enabling the government to close off future successful claims via prudent legislative redrafting. The Court has adopted a similar approach in challenges to Australia's offshore processing regime.

Challenges to Offshore Processing

The French Court has considered a number of challenges to Australia's offshore processing regime. Of most significance are *Plaintiff M61/2010E v Commonwealth*,[134] *Plaintiff M70/2011 v Minister for Immigration & Citizenship* (*Malaysian Solution Case*),[135] *Plaintiff S156/2013 v Minister of*

[127] *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1.

[128] *Plaintiff M76/2013 v Minister of Immigration, Multicultural Affairs & Citizenship* (2013) 251 CLR 322.

[129] *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [8] (French CJ).

[130] *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [72].

[131] *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [120] (Gummow J), [533] (Bell J).

[132] *Plaintiff M76/2013 v Minister of Immigration, Multicultural Affairs & Citizenship* (2013) 251 CLR 322, [4] (French CJ).

[133] *Plaintiff M76/2013 v Minister of Immigration, Multicultural Affairs & Citizenship* (2013) 251 CLR 322, [139].

[134] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

[135] *Plaintiff M70/2011 v Minister for Immigration & Citizenship* (2011) 244 CLR 144.

Immigration & Border Protection (*PNG Solution Case*)[136] and *Plaintiff M68/2015 v Minister for Immigration & Border Protection*.[137] Examining these four cases shines further light on the Court's restrained approach towards executive power and asylum seekers. Against this broad trend, the *Malaysian Solution Case* appears an aberration, while Gordon J's dissent in *Plaintiff M68* is useful for demonstrating a potential alternative path.

Plaintiff M61 neatly encapsulates the French Court's approach to asylum seeker cases. Here, the Court unanimously held that asylum seekers detained on territories excised from Australia's migration zone are, nevertheless, detained under the powers of the *Migration Act 1958* (Cth). As such, the processing of these asylum seekers must be conducted according to the Act, as well as the rules of procedural fairness. While the decision was undoubtedly significant in upholding the capacity of the judiciary to act as a check on the exercise of executive power, particularly in what was intended to be a migration law-free zone,[138] it did strengthen the hand of the Executive. As the Court did not find the offshore processing regime unconstitutional, the plaintiffs' success rested on interpretation of the *Migration Act*. Therefore, legislative amendment could strip asylum seekers of procedural and other rights (as indeed it since has).[139] Academic commentary on *Plaintiff M61* noted this, categorising the decision as a cautious win for the rule of law.[140]

Offshore detention was challenged again in the *Malaysian Solution Case*, where the Court considered a challenge to the Gillard Government brokered Malaysia Solution, in which the Australian Government proposed to transfer 800 asylum seekers held in Australian detention centres for 4,000 refugees waiting in Malaysia for resettlement. Under s 198A of the *Migration Act* an "offshore entry person" could be taken to a country declared by the Minister under s 198A(3). In making a declaration, the Minister had to declare that the country met four characteristics, including that it provided protection to people granted refugee status. In a highly charged environment, by 6:1 the Court upheld the challenge. The majority held that properly construed, the Minister could not make a declaration under s 198A unless the specified country was *legally* bound to provide asylum seekers with access to processing facilities and to protect those granted refugee status.[141] As Malaysia was not a signatory to the Refugees Convention, the declaration was unlawful.

In grounding its decision on statutory interpretation, the *Malaysian Solution Case* sits within the general approach of the French Court to asylum seeker cases. However, it also appears to be a significant aberration. In upholding this challenge the Court stepped into a febrile political atmosphere. Newspapers across the country announced that the Government had "lost control",[142] was "in disarray",[143] with its refugee policy "in tatters",[144] and that Prime Minister Gillard had "lost her authority",[145] and was "on notice".[146] Weakened,[147] the Government struck out at the Court and

[136] *Plaintiff S156/2013 v Minister of Immigration & Border Protection* (2014) 254 CLR 28.

[137] *Plaintiff M68/2015 v Minister for Immigration & Border Protection* (2016) 257 CLR 42.

[138] G Williams and A Lynch, "The High Court on Constitutional Law: The 2010 Term" (2011) 34 UNSWLJ 1006, 1026.

[139] See, eg *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

[140] See, eg Williams and Lynch, n 138, 1026; A Gauja and K Gelber, "High Court Review 2010: The Resurgence of Rights?" (2011) 46 AJPS 683, 692; M Foster and J Pobjoy, "A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's 'Excised' Territory" (2011) 23 IJRL 583, 615-617; H Stewart-Weeks, "Out of sight but not out of mind: Plaintiff M61/2010E v Commonwealth" (2011) 33 Syd LR 831.

[141] *Plaintiff M70/2011 v Minister for Immigration & Citizenship* (2011) 244 CLR 144, [109], [116] (French CJ).

[142] "Lost Control", *Courier Mail*, 2 September 2011.

[143] "No solution: Labor in disarray", *The Age*, 2 September 2011.

[144] J Thompson, "High Court scuttles Malaysia swap deal", *ABC News*, 31 August 2011 <http://www.abc.net.au/news/2011-08-31/high-court-rules-on-asylum-seeker-challenge/2864218>.

[145] "Tick Tick Tick", *Herald Sun*, 2 September 2011.

[146] "Gillard on Notice", *Daily Telegraph*, 2 September 2011.

[147] A Jamieson, "High Court battle fuels leadership speculation", *Crikey*, 2 September 2011, <https://www.crikey.com.au/2011/09/02/high-court-battle-turns-into-a-leadership-one/>.

French CJ personally, accusing him of inconsistency. Immigration Minister Chis Bowen noted the result was "profoundly disappointing" intimating the Court had applied a new test.[148] Prime Minister Julia Gillard went further, noting that the decision "basically turns on its head the understanding of the law in this country" arguing that French CJ "considered comparable legal questions when he was a judge of the Federal Court and made different decisions to the one that the High Court made yesterday".[149]

Prime Minister Gillard may have been referring to *Patto v Minister for Immigration & Multicultural Affairs*,[150] and the *Tampa Case*.[151] In *Patto* French J found that a person could obtain effective protection in a third country even if that country was not a signatory to the Refugees Convention;[152] while in the *Tampa Case*, French J held that, absent statutory authority, the executive power of the Commonwealth extends to the expulsion of aliens and detention for that purpose.[153] Central to French J's decision in the *Tampa Case*, however, was his finding that the *Migration Act 1958* (Cth) had not displaced the prerogative power. Likewise, crucial to *Patto* was the absence of statutory authority limiting the power of the Executive. In the *Malaysian Solution Case*, French CJ considered s 198A of the *Migration Act*, a provision inserted on 27 September 2001,[154] (and therefore not previously considered by him) in response to North J's decision at first instance ordering the Immigration Minister to bring asylum seekers on board *MV Tampa* to Australia to process their claims.[155] Thus, French CJ consistently applied his judicial philosophy in asylum seeker cases, accommodating executive power unless action is taken contrary to statute. Where no statute governs the area, it is not surprising that French J decided as he did in *Patto*, nor that he upheld the Government's appeal in the *Tampa Case*.

Putting aside the political implications, the legal problems raised by the *Malaysian Solution Case* were easily resolved. Parliament responded by amending the *Migration Act 1958* (Cth) to authorise the Minister to declare a country as a "regional processing country" to which "unauthorised maritime arrivals" must be taken as soon as practicable on the sole criteria that the Minister considers the declaration in the "national interest" (s 198AB(2)).[156] In considering this, the Minister must have regard to assurances made by the country that the country will protect the person and will permit an assessment of whether the person is a refugee (s 198AB(3)). However, under s 198AB(4), these assurances need not be legally binding. These provisions were challenged in the *PNG Solution Case*. In an unanimous decision, the Court dismissed the challenge, holding that: laws providing for the deportation or expulsion of aliens from Australia fall within the aliens power under s 51(xix); the decision whether the declaration of a country is in the national interest is "largely a political question"; and the factors the Minister must have regard to were not jurisdictional facts.[157] The unanimous decision in the *PNG Solution Case* and the broad bases on which it rested illustrated the generous scope provided to Parliament to legislate in this area, including in respect of the powers granted to the Executive.[158]

[148] "Immigration swap ruling reaction", *Sydney Morning Herald*, 31 August 2011, <http://www.smh.com.au/national/immigration-swap-ruling-reaction-20110831-1jlgv.html>.

[149] M Franklin, "Julia Gillard versus the High Court as the PM takes aim at Chief Justice Robert French", *The Australian*, 2 September 2011 <http://www.theaustralian.com.au/national-affairs/julia-gillard-versus-the-high-court-as-the-pm-takes-aim-at-chief-justice-robert-french/story-fn59niix-1226127707674>.

[150] *Patto v Minister for Immigration & Multicultural Affairs* (2000) 106 FCR 119.

[151] *Ruddock v Vadarlis* (2001) 110 FCR 491.

[152] *Patto v Minister for Immigration & Multicultural Affairs* (2000) 106 FCR 119, [37].

[153] *Ruddock v Vadarlis* (2001) 110 FCR 491, [193].

[154] *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth), Item. 6.

[155] *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs* 110 FCR 452.

[156] *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

[157] *Plaintiff S156/2013 v Minister of Immigration & Border Protection* (2014) 254 CLR 28, [22]-[28], [40], [46].

[158] In *Namah v Pato* [2016] PGSC 13 (26 April 2016), the PNG Supreme Court declared the arrangement unconstitutional.

The French Court's most recent decision on offshore processing has further increased the Executive's policy latitude. In *Plaintiff M68*, the validity of detention of non-citizens on Nauru for processing of asylum seeker claims was considered. At issue was the question whether Ch III of the *Constitution* prevents executive detention outside Australia. By 6:1, the Court held that the detention arrangement with, and in, Nauru is a constitutionally valid exercise of the aliens power.[159]

Critical to the decision and of most significance for future challenges to Australia's offshore processing regime is the question of who is responsible for the detention. A majority of the Court (French CJ, Kiefel and Nettle JJ, and Keane J) held that the Commonwealth did not directly detain asylum seekers on Nauru but only participated in the detention. They reasoned that as the Commonwealth "could not compel or authorise Nauru to make or enforce" laws necessary for the detention it could not be said that the Commonwealth detained the plaintiff.[160] Therefore, the limitations in *Lim* did not apply because *Lim* only concerns detention by Commonwealth officers (and not Commonwealth officers participating in detention in another sovereign state).[161]

The majority's reasoning stands in contrast to Gordon J's dissent.[162] Gordon J took a substantive approach, examining the "acts and conduct" of the Commonwealth, to hold that the plaintiff's detention was "facilitated, organised, caused, imposed [or] procured" by the Commonwealth.[163] While the *Lim* principle contains an exception allowing executive detention for deportation and expulsion, no exception permitting detention after leaving Australia exists and there is no basis as a matter of fundamental principle to craft a new exception.[164] Section 198AHA, which purported to authorise the detention, was thus invalid under Ch III of the *Constitution*.

The French Court's approach to asylum seeker cases has been marked by constitutional restraint. Of course, where possible, courts should construe legislation in a manner that would "place the statute within the limits of constitutional power",[165] and the Court's approach to these issues reflects French CJ's prudent and consistent judicial philosophy.[166] Nevertheless, the French Court's steady move towards accommodation has left the Commonwealth largely unencumbered by constitutional limitations. Where asylum seekers met success in the High Court, it has instead been via statutory interpretation and administrative law remedies.

CONCLUSION

The French Court marks a notable era in the High Court's history when it comes to the development of constitutional law principles. The Court developed for the first time a considered and robust set of limitations on the scope of executive power, especially in regard to the expenditure of money. These limitations foreshadow a greater body of jurisprudence that will no doubt be developed over the years

[159] *Plaintiff M68 v Minister for Immigration & Border Protection* (2016) 257 CLR 42, [45] (French CJ, Kiefel and Nettle JJ), [98]-[102] (Bell J), [176]-[185] (Gageler J), [259] (Keane J).

[160] *Plaintiff M68 v Minister for Immigration & Border Protection* (2016) 257 CLR 42, [29]-[37].

[161] *Plaintiff M68 v Minister for Immigration & Border Protection* (2016) 257 CLR 42, [38]-[41].

[162] As well as the majority's reasoning in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171, [28] (French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ).

[163] *Plaintiff M68 v Minister for Immigration & Border Protection* (2016) 257 CLR 42, [353]-[357].

[164] *Plaintiff M68 v Minister for Immigration & Border Protection* (2016) 257 CLR 42, [401].

[165] *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319, 349 (French CJ). See also *D'Emden v Pedder* (1904) 1 CLR 91, 119, 120 (Griffith CJ for the Court); *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 161 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[166] See, eg French, n 112, 13-14; *Evans v New South Wales* (2008) 168 FCR 576, 597; *K-Generation* (2009) 237 CLR 501, 519 (French CJ).

and decades to come. They amount to a very significant contrast to the traditional approach taken by the Court towards legislative power, particularly in how the limitations on executive power are infused with federal considerations.[167]

The High Court's conception of the Australian Federation is also evident in its decisions on Ch III of the *Constitution* as applied to State legislative power. Once thought a dead letter, the *Kable* decision has been reinvigorated by the High Court as a meaningful and substantive restriction upon State power. This has impacted upon State organised crime legislation aimed at bikies, but the implications are again much larger. The Court has established a new set of constitutional parameters that have had a very real effect upon the drafting of State laws in many areas. This has been furthered by the Court's decision in *Kirk*.[168] One of the most adventurous and surprising decisions of the French court, it imposed a major, and thus far undiscovered, new limit upon power by safeguarding the role of State courts to exercise judicial review.

There have otherwise been clear limits to the willingness of the French Court to develop legal doctrine. Its invocation of the *Kable* doctrine became less frequent over time, perhaps due to a reluctance of the Court to venture further down this path, and States adopting more prudential drafting techniques. The exercise of restraint has been especially pronounced in challenges by asylum seekers to national laws and policies. A number of constitutional cases have been mounted, but none has succeeded. Instead, the Court has been willing to interpret statutes in a manner protective of the interests of applicants, including by way of applying the principle of legality. This though has marked the limits of the Court's approach. The effect has been to grant asylum seekers a number of pyrrhic victories that in turn have been overcome by way of legislative drafting and offshore solutions.

In developing the law in these areas, the influence of French CJ is apparent. A similar mixture of doctrinal development and judicial caution, combined with a willingness to develop statutory principles such as legality, can be found in earlier decisions by French J in cases such as the *Tampa Case*,[169] and *Evans*.[170] His impact can also be discerned when it comes to the Court's willingness to apply federal principles; as noted earlier, this was a matter on which French came to the Court with pronounced sympathies. Unusually for the High Court, federal considerations have played a large and overt role in a number of key decisions. This is true not only in the judgments of French CJ, but also in those of other judges. French CJ may often have written separately to other members of the majority, but nonetheless the influence of his ideas and perspectives is clear. As a result, describing the era as the "French Court" is a fair reflection of his leadership, at least in the field of constitutional law.

[167] See D Hume, A Lynch and G Williams, "Heresy in the High Court? Federalism as a Constraint on Commonwealth Power" (2013) 41 Fed L Rev 71.

[168] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

[169] *Ruddock v Vadarlis* (2001) 110 FCR 491.

[170] *Evans v New South Wales* (2008) 168 FCR 576.