

**ADDRESS ON THE OCCASION OF THE  
SUPREME AND FEDERAL COURTS JUDGES' CONFERENCE  
RETIREMENT FUNCTION FOR  
THE HON ROBERT FRENCH, CHIEF JUSTICE OF AUSTRALIA**

**Perth, Western Australia  
Monday 23 January 2017**

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## **Introduction**

[1] It is an honour to provide a neighbour's perspective of the contribution Robert French has made to the law of our region and to the wider world legal order. It is also a personal pleasure because of my very great admiration for the man, judge and judicial leader.

[2] Now I have learned from past experience that there are some real traps when a New Zealand lawyer speaks on any legal topic on this side of the Tasman. After delivering one paper I was once told by a friend, an Australian judge, "You New Zealanders just don't understand Australian public law". Well, fair cop. Concepts such as the matter of "matter", the rather racy cross-vesting and accrued jurisdictions, and the interplay between the sections of the Constitution dealing with the judicial power of the Commonwealth (not to mention the provisions of the Judiciary Act 1903) are not particularly easy for those used to a simple unitary system. And although we do watch the decisions of the High Court, it is from a safe distance and intermittently and without the immersion in its doctrine which makes it mother's milk to you. We don't have the insight or the stamina to read the auguries in the entrails of the decisions, or the passion that spurs such effort in this country.

[3] I am envious. It is apparent to any visitor that the decisions of the High Court actually get read and with an appreciation of how they fit with the pre-existing jurisprudence of the Court. I am not sure that anyone much reads the decisions of the New Zealand Supreme Court – at least unless they absolutely have to. And because we are such a recent institution, it is difficult to get any sense of a developed body of doctrine against which to measure a novel point or to assess the latest developments in London or Canberra.

[4] I think the organisers of this conference may have had some thoughts of saving me the embarrassment of any review of the jurisprudence of the French court when they suggested that I should speak of the contribution Chief Justice French has made "internationally". And I do want to speak

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about the generosity and effectiveness of the direct international contributions made by the Chief Justice. But it is not possible to see these spheres as distinct. The standing of the Chief Justice of a Court of the international stature of the High Court cannot be seen in isolation from the impact of the work of the Court and the perceptions of the way in which it is led.

[5] We are also used to learning from each other in the different common law jurisdictions. Generally speaking we treat it as a good thing if the common law is relatively consistent, though it may speak with different accents. That is at least in matters of methodology and principle if not always as to outcomes in particular cases. And because final appellate courts in the common law world tend to have similar methods of operation and similar frictions, the international influence a judicial leader has includes the example he or she sets, at least to the extent to which it can be observed by outsiders. So part of the international influence Robert French has had has been in the way the Court is seen to have operated under him.

[6] Realising that I might not be able to avoid touching on the work of the High Court under Chief Justice French, I asked my critical friend for advice about what cases in the past eight years particularly stood out. I must have expressed myself very badly because he said he would have to think about it, which seemed to suggest that nothing much stood out. Some days later I received by email references to a number of cases in the High Court in the last eight years about state immunity, registration of foreign judgments, Sino-Australian contracts and other cases with an international dimension. They were, it has to be said, rather dense. Assembling the references will I think have taken quite a bit of work. I don't have the heart to let him know that this wasn't the international impact I was after.

### **The judicial leader**

[7] It is not necessary to subscribe to a "big man" theory of law to allow that the direction and tone adopted by a final appellate court will be influenced, for better or worse, by the style of the Chief Justice and the sense of purpose and identity he or she fosters in the Court. Robert French's style of appellate leadership and vision for the Court and for the judiciary more generally is something able to be observed not only through his judgments but also because he has been so open in his many extra-judicial writings about judicial method and function.<sup>2</sup> It seems safe

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<sup>2</sup> See, for example, Robert French "Judicial Activists – Mythical Monsters?" (2008) 12 S Cross U L Rev 59; "Essential and defining characteristics of courts in an age of institutional change" (2013) 23 JJA 3; "Judges and academics: Dialogue of the hard of hearing" (2013) 87 ALJ 96; and "The courts and the Parliament" (2013) 87 ALJ 820. See also the speeches and papers available at <[www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac](http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac)>.

to suggest that some of the values that can be observed in his work were formed long before he was appointed Chief Justice.

[8] One of the strengths Robert French brought to the office was vast experience over more than two decades as a trial and appellate judge in a number of different courts and tribunals and all over Australia, with occasional forays into the Pacific. In the Pacific he sat with the New Zealand judges Peter Blanchard and Kenneth Keith, gaining firm admirers. His wide-ranging experiences seem to have prompted an appreciation of the Australian legal order as a whole. And Fiji was an exercise in practical comparative law in the region.

[9] It is striking that Robert French wasn't someone who was immediately grabbed by law. It isn't law as a dusty subject or mental puzzle that he enjoyed. The Chief Justice said in a recent interview<sup>3</sup> that it was only when he began legal practice and became engaged with real people with real problems and realised they could be helped by law that he became hooked and found his life's work. He described the experience as "transformative".

[10] In the same interview, Robert French also spoke about what he had gained from his study of science, before he turned to law. He said "it introduced me to a methodology, to a culture, to a way of reasoning which has its own inherent value in approaching legal problems".

[11] Both these thoughts – that law is a force for good in the lives of real people and that the culture of scientific inquiry helps in reasoning to legal solutions – seem to me to give some insight into the work and style of the Chief Justice.

[12] The first suggests an optimism about law and a vision that the ends it serves are good. It is not surprising then that in his judicial work and in extrajudicial speeches and writings Chief Justice French has promoted accessibility, not only to achieve justice but also to de-mystify law and to make it understandable and valued by all. He thinks it is important that the principles of law are explained in an accessible "taxonomy" so that they "are capable of being broadly understood by a wider audience than lawyers or judges, in terms of widely accepted community values".<sup>4</sup> His own role in providing a bridge to understanding is helped by the fact that he is a great communicator, with a knowledge of popular culture that in anyone else might be taken as an indication of arrested adolescence and which provides an apparently inexhaustible supply of snappy titles and jokes for speeches.

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<sup>3</sup> Interview with Retiring Chief Justice Robert French (Damien Carrick, The Law Report, ABC Radio National, 13 December 2016), transcript available at <[www.abc.net.au](http://www.abc.net.au)>.

<sup>4</sup> Robert French "The Rule of Law as a Many Coloured Dream Coat" (Singapore Academy of Law 20th Annual Lecture, Singapore, 18 September 2013) at 19.

[13] Chief Justice French's background in science has been useful in expressing ideas. He has suggested that identifying elements of administrative justice is "a little like the identification of 'fundamental' particles in physics. When pressed, they can transform one into another or cascade into one or more of the traditional grounds of review developed at common law".<sup>5</sup> It has also come in handy when cases before the Court have dealt with scientific concerns, such as *D'Arcy v Myriad Genetics Inc*, a case about the patentability of DNA.<sup>6</sup> But I wonder whether the real insight to be obtained from what his scientific background has brought to the Chief Justice's work is to be picked up from his reference to his gratitude that he was exposed to a "culture" of science. That may give some insight into a style of leadership that, to an outside view, seems more collaborative and cooperative, less competitive than is sometime encountered in appellate courts, perhaps because their members are often drawn from a section of the profession with a very different, more competitive culture.

[14] The Chief Justice himself has been conscious of the importance of culture. Although he has thought it a responsibility of the Court to try to state the law clearly in joint or at least joint majority judgments, he has emphasised that the important thing is not so much whether that is always achieved but whether there is "an essentially collegial and cooperative approach".<sup>7</sup> And that, he says is "a matter of culture". So the responsibility of a Chief Justice is to promote a culture of collegiality and cooperation even though it is inevitable that the hard cases that come before a final court will produce disagreements, some of them strongly held.

[15] Some years ago I was present when a view was expressed by someone with inside form that the High Court of Australia is a tough Court and that the Chief Justice has to be a "hard man" to cope. The next Chief Justice of Australia is an answer to the gendered slant to that opinion. But indeed, I do not think that it is a view that is sound on any level.

[16] One of the most difficult but also the most talented of final courts was the Supreme Court of the United States which included both Holmes and Harlan. Felix Frankfurter described Holmes as someone who wielded a rapier while Harlan wielded a battle axe.<sup>8</sup> They were also imposing big men. As Frankfurter said: "A rapier and a battle-axe locked in combat are likely to beget difficulties for innocent bystanders."<sup>9</sup> Holmes, who told the tale against himself, described how he had lost his temper and interrupted Harlan in conference (something that was never done in the Supreme Court). Tempers flared and things might have got out of hand, but Chief Justice Fuller – "silvery-haired, gentle, small"<sup>10</sup> – defused it with self-deprecating

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<sup>5</sup> At 18.

<sup>6</sup> *D'Arcy v Myriad Genetics Inc* [2015] HCA 35, (2015) 325 ALR 100.

<sup>7</sup> Interview with Retiring Chief Justice Robert French (Damien Carrick, The Law Report, ABC Radio National, 13 December 2016).

<sup>8</sup> Felix Frankfurter "Chief Justices I Have Known" (1953) 39 Va L Rev 883 at 888.

<sup>9</sup> At 888.

<sup>10</sup> At 889.

humour. Fuller was someone who used humour and courtesy to great effect. As Frankfurter said: “You couldn’t but catch his own mood of courtesy.”<sup>11</sup>

[17] Stand out qualities Robert French has brought to the office have been quick good humour and unfailing courtesy. I can’t of course speak about how that has worked within the Court. Although it is significant that he describes the Chief Justice not as “first among equals”, but “one among equals”.<sup>12</sup> But I have had occasion to see the good humour and courtesy in operation in the meetings of the Council of Chief Justices and in many international legal forums and gatherings. I don’t suppose anyone can become Chief Justice of Australia or indeed attain any high office without having a developed sense of self, but Chief Justice French’s style is self-effacing and inclusive and modest. And it is highly effective. When he speaks, he is listened to. And his views are always sought.

### **And a good judge too**

[18] I must dispel any misimpression I may have created with references to the little, unimposing, grey Chief Justice Fuller and his attempts to keep the peace in the United States Supreme Court between Holmes and Harlan. Chief Justice French has not been in that physical mould at all. He is an athletic and energetic presence, and sports a mane of colourful hair. He is also a jurist of high standing whose judgments are widely admired and quoted. And, although he may not wield a battle axe like Justice Harlan, he is pretty handy with a rapier, like Justice Holmes, when the occasion warrants it.

[19] Occasion for the rapier arose recently when Lords Neuberger and Sumption offered the provocation in *Cavendish Square Holdings BV v Makdessi* that in *Andrews v Australia and New Zealand Banking Group Ltd*<sup>13</sup> the High Court’s reasoning, although “entirely historical” was “not in fact consistent with the equitable rule as it developed historically” and was a “radical departure from the previous understanding of the law”.<sup>14</sup> What is more, the Judges of the UK Supreme Court said that the jurisdiction recognised by the High Court had “left no trace in the authorities since the fusion of law and equity in 1873”.<sup>15</sup> They said it was judicial law-making by the High Court.

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<sup>11</sup> At 889.

<sup>12</sup> Phillip Hudson “Judge Dredd? More one among equals” Sydney Morning Herald (Sydney, 6 September 2008) at 34.

<sup>13</sup> *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, (2012) 247 CLR 205.

<sup>14</sup> *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172 at [40]–[43].

<sup>15</sup> At [42]. They swatted away three possible instances without effort.

[20] The acknowledgement that “[a]ny decision of the High Court of Australia has strong persuasive force in this court” before the ominous “But” could not dilute this D-fail report card from London.<sup>16</sup>

[21] In *Paciocco v Australia and New Zealand Banking Group Ltd*<sup>17</sup> the Chief Justice left the heavy lifting of spelling out the weakness of the position taken by Neuberger and Sumption to Justice Gageler. In his own, more lofty, judgment he pointed out that it was not necessary for the purposes of the case to engage with their characterisation of the High Court position.<sup>18</sup> He contented himself with saying that similar plain-speaking in the past had been employed by Australian judges when disagreeing with the House of Lords. Such disagreements had not “heralded the coming of winters of mutual exceptionalism” in the common law.<sup>19</sup> In a footnote (a classy touch I thought to put it in a footnote) Chief Justice French pointed out that the point of disagreement (the scope of the rule against penalties) did not arise any more than it had in the case before the UK Supreme Court in which the critical remarks were made.<sup>20</sup> Now that was a nice lesson for observers in judicial leadership. It preserved civility while delivering an unmistakable rebuke.

## Comparative law

[22] This exchange was made in the context of the sort of comparative law borrowings that are a source of considerable strength in the common law tradition. The comparative law influence of the High Court of Australia is unmatched in the common law world except by the influence of the United Kingdom. Andrew Burrows has shown in a recent survey that for the past 25 years the High Court was the most frequently cited Court in civil cases (at least those pertaining to contract, tort and unjust enrichment) in the House of Lords and Supreme Court.<sup>21</sup> And the scale of references to cases from other common law jurisdictions was also higher than had been expected. Burrows comments that should not really be surprising. As he says:<sup>22</sup>

... it perhaps ought to be more obvious than it is that our top judges may seek assistance and inspiration, especially in developing the law, from comparative law ... . [W]hile there are some pitfalls to be avoided in terms of superficiality and misunderstanding, what could possibly be more helpful to an appellate judge than the experience of

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<sup>16</sup> At [42].

<sup>17</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28, (2016) 333 ALR 569.

<sup>18</sup> At [7].

<sup>19</sup> At [10].

<sup>20</sup> At [7], n 19.

<sup>21</sup> Andrew Burrows “The Influence of Comparative Law on the English Law of Obligations” in Andrew Robertson and Michael Tilbury (eds) *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, Oxford, 2016) 15 at 32.

<sup>22</sup> At 35.

other jurisdictions in which the judges have had to deal with the same or similar issues?

[23] The common law has of course developed differently in different jurisdictions because of legal history, legislative directions, and social conditions. The value obtained from comparative law in such circumstances depends less on the outcomes in particular cases but in similarity of methodology and understanding of the reasons for difference as well as for agreement. Chief Justice French pays close attention to the methods of the common law and the reasons for divergence as well as congruence.

[24] Robert French has made the point that the value of comparative law is in the *ideas* it throws up.<sup>23</sup> And if they are to be helpful in another jurisdiction, judges need to understand their own legal tradition well. So in the judgments and extra-judicial writings of the Chief Justice it is striking to observe close attention to Australian context and in particular to legal history.<sup>24</sup> Differences between jurisdictions sometimes arise because of what has been termed “judicial preference”, but more often they arise because of the different context in which the law comes to be applied.<sup>25</sup>

[25] It helps then that the High Court is very conscious of its own jurisprudence and the themes played out in it. As I have touched on already, I think that in my own jurisdiction when seizing on the latest English decision (or even decisions made from the late 19th century) we are sometimes inattentive to our own earlier home-grown case-law. Much of it was prompted by differences in legislative context. In New Zealand as well it was often stimulated by Australian or United States case law. Paul Finn has been absolutely right to remind us that some of the principles developed to meet the circumstances of the newer common law jurisdictions in fact developed ahead of such doctrine in England. That is particularly true of the equitable doctrines with which his article is concerned but can also be seen for example in the development of the principles of modern criminal justice. One of the leads the High Court has taken in the common law world, and which

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<sup>23</sup> Robert French “The Globalisation of Public Law — A Quilting of Legalities” (Cambridge Public Law Conference, Cambridge, 12 September 2016) at 6.

<sup>24</sup> In *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1 French CJ said that foreign judgments “should be consulted with discrimination and care”, and that caution is required as “[s]uch judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them” (at [18]–[20]). See further *Commonwealth Bank of Australia v Barker* [2014] HCA 32, (2014) 253 CLR 169 at [18].

<sup>25</sup> Brennan J (dissenting) said in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 131: “Leave to reopen will be given from time to time not only to correct an error which has become manifest in an earlier decision but also to permit a review of doctrines which were the product of and suited to an earlier age but which work injustice or inconvenience in contemporary conditions. It is a jurisdiction to be exercised sparingly, for contemporary conditions may themselves be moulded by existing doctrines. Judicial preference for a more elegant or logically satisfying jurisprudence is insufficient to warrant a change in settled doctrine which works satisfactorily in conjunction with other legal principles.”

Robert French has continued, is to pay close attention to how legal principles have developed.

[26] Such exposition demonstrates legitimacy in the exercise of judicial authority but it also aids the use of comparative law. It explains the choices made and allows the courts of other jurisdictions to avoid the pitfalls of superficiality and misunderstanding, mentioned by Burrows.<sup>26</sup> It is of advantage too that the effort of the Court is matched by a first rate academic community which stimulates discussion about the work of the Court and further explains the context in which its decisions are given. Without such mediation, for example, Australian public law would be very difficult for outsiders to follow and would be too easily treated as exceptional.

[27] The ideas discussed in the work of the High Court are usually helpful, even if different statutory or regulatory or constitutional arrangements lead to different results. In some recent cases in the Supreme Court of New Zealand, not directly in point because of the different legislative schemes in play, we have cited for example discussion on litigation funding,<sup>27</sup> the need for concepts such as “property” in family legislation to be read “widely and conformably with the purposes [of the legislation]”,<sup>28</sup> and (in the context of suppression of information referred to in Court) the Chief Justice’s explanation of the importance of public sittings of courts not as an end in themselves but because open courts mean court proceedings are subject to public and professional scrutiny and because they are “critical to the maintenance of public confidence in the courts”.<sup>29</sup> Reminding a New Zealand audience for our judgments that the principles we apply are not something dreamed up by the judges sitting on the particular case but are treated as fundamental in other common law jurisdictions we respect and by institutions we admire is part of our obligation to explain the exercise of judicial authority.

[28] In his own methodology, it may be fair to say that the Chief Justice prefers to hug the coast. He has spoken extrajudicially of the way the common law develops step-by-step in a way that invokes the words of Alfred Deakin’s expectations that the High Court would “[move] by gradual, often indirect, cautious, well considered steps”, to “enable the past to join the future, without undue collision and strife in the present”.<sup>30</sup>

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<sup>26</sup> See above at [22].

<sup>27</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 and *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75, discussed in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

<sup>28</sup> *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [64], cited in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [37].

<sup>29</sup> *Hogan v Hinch* [2011] HCA 4, (2011) 243 CLR 506 at [20], cited in *Erceg v Erceg* [2016] NZSC 135 at [2].

<sup>30</sup> This comment was made as part of the debate on the second reading of the Judiciary Bill: see Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967–10968 (Alfred Deakin, Attorney-General).

## **Outreach to other jurisdictions**

[29] Jurisdictions learn from each other not only by reading judgments. In avoiding the risks of misunderstanding and superficiality in borrowing from other jurisdictions, it helps that in the common law world there are opportunities for contact and exchanges. Exchanges between the High Court and other final courts of appeal (such as those of Canada, New Zealand, Hong Kong and Singapore) are described in the Annual Report of the High Court.<sup>31</sup> As well as the papers contributed by the Chief Justice and other members of the judiciary, conferences expose you to different ideas and help in understanding when they are applicable. They function, as Chief Justice Gleeson once said, as a form of “peer review”. This effort too assists in developing the influence of the Court and the Chief Justice in international circles.

[30] No jurisdiction is an island – not even an island continent like this. As Chief Justice, Robert French has taken very seriously the obligation of the Australian judiciary to engage with the judiciaries of other countries in the region and beyond. The reasons for exchanges are to improve the discharge of our own domestic responsibilities – because there is always something to learn from other jurisdictions. That is not only in the law applied but in the ideas and information that help us to work more effectively and justly.

[31] Chief Justice French has singled out the exchange of ideas and information “relevant to the conduct of litigation, the use of information technology, ways of measuring court performance, co-operation between courts in relation to transnational litigation, particularly transnational insolvency, judicial education and court administration”.<sup>32</sup>

[32] Direct contact is also practical support we can give in turn to other jurisdictions in our region, some of them struggling with challenges we do not face and who draw comfort and practical help from our engagement with them. In many areas, Australia has long experience with laws which have been more recently introduced in other jurisdictions and in which the expertise developed here is of great help if shared.

## **The benefit of connections**

[33] The Chief Justice has spoken publicly of the benefits of an outward looking judiciary. It can draw on “the rich sources of comparative law”, of particular importance in areas of law with a “transnational character” such as

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<sup>31</sup> Available online at <[www.hcourt.gov.au/publications/annual-reports/annual-reports](http://www.hcourt.gov.au/publications/annual-reports/annual-reports)>.

<sup>32</sup> Robert French “Beyond our Borders: A Judiciary and Profession Looking Outwards” (Australian Bar Association/Victorian Bar National Conference, Melbourne, 27 October 2016) at 4–5.

intellectual property, counterterrorism and international human rights.<sup>33</sup> He continues:<sup>34</sup>

The careful and discriminating use of comparative law material may suggest answers to particular legal questions, or lines of development of common law principle or modes of reasoning which can be adopted in or adapted to the Australian context.

[34] Throughout, the Chief Justice has made it clear that his view is that the quality of Australia's legal system is enhanced by its willingness to be outward looking. This preparedness to look at reasoning which can be adopted in Australia or adapted to the Australian context is illustrated by *McCloy v New South Wales*.<sup>35</sup> Here, the High Court drew on German law when explaining the use of proportionality analysis in Australian authority when determining the validity of a New South Wales law prohibiting certain political donations. Yet as noted before, the French court has in other cases declined to follow comparative law solutions because the Australian context is different.<sup>36</sup>

[35] Outside the work of the Court, Robert French has worked to support international institutions such as the Asian Business Law Institute which promotes the convergence of commercial law in the region and includes on its Board of Governors judges, lawyers and academics from Australia, China, India and Singapore. With the Chief Justice's support, the High Court supports the Asia Pacific Judicial Reform forum. Last year the Chief Justice led a delegation to the Supreme People's Court of China. These are practical steps to promote opportunities for greater cooperation within the region on matters such as enforcement of judgments.

[36] There is no doubt that the personality of the Chief Justice and the evident respect and liking for him that his counterparts have has been highly instrumental in the success of these initiatives. There is also no doubt about his commitment to strengthening the links between jurisdictions. It is interesting to note that in his last State of the Judicature address Chief Justice French chose to echo the verdict of Sir Gerard Brennan that the Australian judiciary is one:<sup>37</sup>

... that is seen to be impartial, independent and fearless in applying the law, a competent judicature with judges and practitioners who know the law and its purposes and who are alive to the connection between abstract legal principle and its practical effect and who

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<sup>33</sup> At 5.

<sup>34</sup> At 5–6.

<sup>35</sup> *McCloy v New South Wales* [2015] HCA 34, (2015) 325 ALR 15.

<sup>36</sup> See for example *Commonwealth Bank of Australia v Barker* [2014] HCA 32, (2014) 253 CLR 169 refusing to follow the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 (HL) on the basis that the implication of a term of mutual trust and confidence in employment contracts was contrary to the regulatory history of the employment relationship and industrial relations in Australia.

<sup>37</sup> Robert French "The state of the Australian judicature" (2016) 90 ALJ 400.

accept and observe the limitations on judicial power and within those limitations develop or assist in developing the law to answer the needs of society from time to time. It is a judicature that, generally speaking, has the confidence of the people and endeavours, within the limits of its resources, to be reasonably accessible to those who have a genuine need for its remedies.

To that list, Chief Justice French, tellingly, added a further reference point in “effective engagement with the international legal order”, indicating his commitment to international connections as a measure of the effectiveness of the Australian judiciary.

### **The international influence of the work of the Court**

[37] The period of Chief Justice French’s tenure has been marked by significant repositioning around the areas of institutional competence marked by the division of powers within the Constitution between the legislative, executive and judicial branches. It has also been notable for close attention to what is essential for the institutional integrity of those who exercise the judicial power of the Commonwealth and the conscious development of a single common law of Australia.

[38] These were not new matters for the Court. But under Chief Justice French the Court has coalesced around strong protection of judicial function and a single common law (carrying with it greater integration of the judiciary). These themes, not yet perhaps entirely played out are of great interest to other jurisdictions and are likely to be influential. The recent decisions of the Court on these matters has been grounded in the structure and text of the Constitution rather than the common law doctrine of the separation of powers. This, as Robert French has suggested in a lecture, is “capital C” Constitutionalism as opposed to “small c” constitutionalism.<sup>38</sup>

[39] The increased national focus and the accompanying explanations of judicial and executive functions have been explained by the Chief Justice not only in judgments but also in speeches and in practical reinforcement through chairmanship of the Council of Chief Justices. I do not, here, discuss the important cases dealing with executive function.<sup>39</sup> But I want to say a few words about the constitutional focus, the unified common law of Australia and the discussion of the characteristics of judicial function because of their likely international impact.

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<sup>38</sup> Robert French “Law Making in a Representative Democracy: The Durability of Enduring Values” (Catherine Branson Lecture Series, Adelaide, 14 October 2016) at 4. See also Robert French “Essential and defining characteristics of courts in an age of institutional change” (2013) 23 JJA 3 at 5.

<sup>39</sup> For example, *Pape v Federal Commissioner of Taxation* [2009] HCA 23, (2009) 238 CLR 1; *Williams v Commonwealth* [2012] HCA 23, (2012) 248 CLR 156 [*Williams (No 1)*]; and *Williams v Commonwealth* [2014] HCA 23, (2014) 252 CLR 416 [*Williams (No 2)*].

[40] In his first State of the Judicature address, French CJ emphasised the distinct constitutional character of the courts:<sup>40</sup>

The separation of powers, constitutionally entrenched for federal courts and conventionally respected for State and Territory courts, marks the Australian judicature out as the third branch of government. The courts are not executive agencies. Indeed, contrary to some current usage, it is inappropriate to regard them as “agencies” at all. They are not at the command of the Executive. It may be accepted that, in the area of public law, their institutional independence and the exercise of judicial review of administrative action can sometimes frustrate the implementation of a particular government policy. That is the price for the rule of law which binds government as much as it binds the subject.

[41] In an address in 2013, Chief Justice French referred to the pressures faced by courts to change the way they do things and to do things which they have not done before.<sup>41</sup> The Chief Justice referred to the risks to institutional integrity of changes which have been judicially promoted as well as those that have been foisted on the judiciary by the executive or the legislature:<sup>42</sup>

Courts are not and should not be seen to be providers of a spectrum of consensual and non-consensual dispute resolution services. Nor should they be seen as providers of a range of social services. To the extent that they evolve in those directions there is a risk that they will be regarded, particularly by the executive branch of government, as just another kind of administrative agency.

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... There are important issues of principle and the practical delivery of justice involved. Professor Owen Fiss made the point in a paper published in the *Yale Law Journal* in 1984 entitled “Against Settlement” when he described the task of courts in adjudication:

Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and Statutes: to interpret those values and to bring reality into accord with them.

The point which Fiss made about the special character of public adjudication rewards reflection and indicates a need for careful consideration of the long-term consequences of devaluing that function.

There is a practical dimension to adjudication by courts which flows from Professor Fiss’ comment and was pointed out by former Chief Justice Murray Gleeson in a paper delivered in 1998. As the former Chief Justice observed in the imperative that is now attached to

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<sup>40</sup> Robert French “State of the Australian judicature” (2010) 84 ALJ 310 at 315.

<sup>41</sup> Robert French “Essential and defining characteristics of courts in an age of institutional change” (2013) 23 JJA 3.

<sup>42</sup> At 5 (footnotes omitted).

dispute resolution, the significance of dispute prevention is sometimes overlooked:

Especially in the area of commercial law, there is utility in both parties to a potential dispute receiving similar advice as to what the outcome of a dispute, if litigation results, is likely to be. That is the most common and effective form of dispute prevention.

...

As one United States academic [RL Abel] observed two years before Professor Fiss:

informal institutions deprive a grievant of substantive rights. They are antinormative and urge the parties to compromise; ... although this appears even handed, it works to the detriment of the party who is advancing a claim – typically the individual grievant.

[42] No jurisdiction has been immune from these sorts of pressures. So the thinking of the High Court of Australia and its Chief Justice on matters such as the direction of registry officers exercising judicial power, the judicial role in granting interception warrants and control orders, the distinction between institutions exercising judicial and administrative functions, and trends such as the movement to establish therapeutic courts, are all of intense interest to other common law jurisdictions, including New Zealand. New Zealand's constitutional arrangements are such that, as Professor de Smith said, there is no established constitutional impediment to the devolution by Parliament of legislative and judicial powers to the Executive.<sup>43</sup> Much rides on habits and traditions including the rule of law and the separation of powers recognised in the common law.

[43] In recent years the High Court has had to consider the extent to which some executive and legislative initiatives compromise the "essential and defining characteristics for courts". It is important work which, as Robert French noted in his 2013 lecture, "has not been informed by any complete theory of what are the things that make a court a court".<sup>44</sup> Lacking such a complete theory, the Court has had to start to construct one on the foundations established for the federal judiciary in *R v Kirby, ex parte Boilermakers' Society of Australia*<sup>45</sup> and *Forge v Australian Securities and Investments Commission*.<sup>46</sup> Its important work, surely defining of the French years, has thrown the mantle of constitutional protection around the State courts.

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<sup>43</sup> SA de Smith "Delegated Legislation in England" (1940) 2 West Pol Q 514 at 514.

<sup>44</sup> Robert French "Essential and defining characteristics of courts in an age of institutional change" (2013) 23 JJA 3 at 3.

<sup>45</sup> *R v Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>46</sup> *Forge v Australian Securities and Investments Commission* [2006] HCA 44, (2006) 228 CLR 45.

[44] The significance of *Kirk v Industrial Court (NSW)*<sup>47</sup> as a “seminal case” in Australian constitutional law was recognised immediately.<sup>48</sup> Chief Justice Spigelman of New South Wales remarked:<sup>49</sup>

It is not always the case that, when the High Court overturns one of my own decisions, I respond with unmitigated admiration. That is, however, the case with *Kirk*.

He also saw the case as marking a shift in approach:<sup>50</sup>

In the Mason Court, such an analysis may have been characterised in terms of implications of the *Constitution*. However, the contemporary jurisprudence of the Court exhibits a proclivity to clearly anchor significant constitutional developments in the text and structure of the *Constitution*.

Since then, the decisions in *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment*<sup>51</sup> and *South Australia v Totani*<sup>52</sup> have consolidated the position and added further explanation of the essential characteristics of courts.

[45] This emphasis on the text and structure of the Constitution is not entirely welcome to those of us who have to contend with a common law constitution. More frank reliance upon separation of powers as an assumption of the constitution directly applicable to the superior courts would have been more useful to us rather than maintenance of the twilight status of “conventionally respected”, as the Chief Justice accurately described “small c” separation of powers. But you can’t have everything. And better explanation of the role of the judiciary in the legal order and its essential attributes is comparative law thinking that will be extremely influential far beyond Australia, even when allowances are made for differences in constitutional context.

[46] Here, it is perhaps not entirely clear whether the shift to emphasise constitutional text and structure rather than the constitution as more-than-the-text will be permanent. It may over time require some re-calibration to allow more space for a wider constitutional tradition, although it is perhaps a little impertinent for me to speculate in this way. On any view, however, the work is the significant (and maybe the defining) achievement of the French-led Court. And, even if it is clear there have been other champions for the

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<sup>47</sup> *Kirk v Industrial Court (NSW)* [2010] HCA 1, (2010) 239 CLR 531.

<sup>48</sup> See for example Joshua P Knackstredt “Judicial Review after *Kirk v Industrial Court (NSW)*” (2011) 18 AJ Admin L 203.

<sup>49</sup> JJ Spigelman “The centrality of jurisdictional error” (2010) 21 PLR 77 at 77.

<sup>50</sup> At 80.

<sup>51</sup> *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58, (2012) 250 CLR 343.

<sup>52</sup> *South Australia v Totani* [2010] HCA 39, (2010) 242 CLR 1.

repositioning,<sup>53</sup> it is also clear that the Chief Justice has been at the forefront in this and in the strong defence of judicial function both in judgments and in extra-judicial contributions. His personal commitment to protection of judicial function has been demonstrated time and again. The Guidelines for Communications and Relationships with the Legislative and Executive adopted by the Council of Chief Justices<sup>54</sup> is practical demonstration of the values to which the Chief Justice has been committed and is work that will be extremely influential not only in Australia but in other jurisdictions.

[47] I wonder whether in the hands of a Chief Justice less committed to reaching out to and learning from other jurisdictions, concentration on the Constitutional text and apparent retreat from reliance on common law and rule of law values may set up conditions of exceptionalism which will make sharing ideas across jurisdictions more difficult. It is also possible that the push to unification of the common law of Australia may perpetuate a thin version of the rule of law that over time may not accord with the values of other legal systems. We should expect changes. The common law we share is, as Benjamin Cardozo identified, not a body of rules but a method of change.<sup>55</sup> There are always ebbs and flows in the influences on legal thought. One of the very great contributions made by Chief Justice French has been to insist on confronting, understanding and explaining the influences that shape our legal orders.

## Conclusion

[48] I hope my remarks have not seemed to the Chief Justice to be in the nature of a eulogy. In fact I have been wondering why this retirement (which has seemed to have elements of a triumphal progress) has seemed such a happy event. I have known some Chief Justices who have been furious that time cut them down. I think this retirement is happy because Chief Justice French has given a very good impression of a man who has made being Chief Justice seem fulfilling and productive and complete. And who has other things to do. It has been a great pleasure to reflect on his international stature and to say to his face how much he has done for law in our region and how much I have learned from him and enjoyed his company.

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<sup>53</sup> See in particular the comments of Gummow J in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and other cases.

<sup>54</sup> *Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches Adopted by the Council of Chief Justices of Australia and New Zealand on 23 April 2014*, available at <[www.jca.asn.au](http://www.jca.asn.au)>.

<sup>55</sup> Benjamin Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924) at 73 (“We may frame our conclusions for convenience as universal propositions. We are to remember that in truth they are working hypotheses.”). See also Lord Goff “The Wilberforce Lecture: The Future of the Common Law” (1997) 46 Intl & Comp LQ 745 at 753 (“common lawyers worship at the shrine of the working hypothesis”).

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