SOME CONSTITUTIONAL AND PUBLIC LAW DECISIONS DURING THE TIME OF CHIEF JUSTICE FRENCH

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Late last year a series of papers was presented and an evening dinner held to mark the retirement of Chief Justice French, at which various speakers spoke of the 'French Court'. However, the Chief Justice himself said that it is a little misleading to speak of the French Court because during his time there were at least six changes in the composition of membership of that Court, and that inevitably changed the Court dynamics which influenced both the collective and individual approach. Nonetheless, French CJ's self-effacing comment does not take account of some noticeable features of the Court's decision-making during his time, which bore the stamp of his personal judicial approach noticeable from earlier days when he had been a long-serving Federal Court judge. I will refer to some of his Honour's earlier judicial views in relation to the *Migration Act 1958* (Cth) and how it seems to me they became discernible in the time when he was Chief Justice. While making due allowance for the doctrine of precedent, the imposition of statutory imperatives and a need to accommodate diversity of views within a court of seven, any individual judge's approach and reasoning is likely to be heavily influenced, in the words of Cardozo J, by the 'inarticulated major premises' which shape a judge's reasoning processes.

The evolution may be discussed under five heads: separation of powers; privative clauses and jurisdictional error; judicial review in the state courts; the status of legitimate expectations; and, finally, proportionality. These were all, of course, topics discussed by the High Court prior to the time of French CJ, but judicial scrutiny of privative clauses, analysis of jurisdictional error and the application of judicial review principles in the state courts have all had significant further development during his time. Conversely, only time will tell how far legitimate expectation and proportionality can be seen as taking root.

The 'tectonic shifts' which have occurred in public law, particularly in England, during the last 30 years have had their counterpart here, but with the significant difference that Australia's public law structure rests upon defined constitutional imperatives set out below.

The separation of powers and Chapter III

As Gummow J has said, 'the subject of administrative law cannot be understood or taught without attention to its Constitutional foundation'.

His Honour has also said that, at the federal level, public administration essentially concerns the execution and maintenance of the *Constitution* and the laws of the Commonwealth. Administrative law, or public law, is a subset of constitutional law.[1]

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Section 75(v) of the *Constitution* confers original jurisdiction on the High Court in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. So, too, s 75(iii) confers original jurisdiction on the High Court in matters in which the Commonwealth or a person suing, or being sued on behalf of the Commonwealth, is a party. As Sir Owen Dixon stated, the common law is the ultimate constitutional foundation[2] — that is to say, the provisions of the *Constitution* are framed in the language of the common law and the *Constitution* operates and is to be understood and interpreted by reference to the common law. It is accepted that the duty and the jurisdiction of the courts is, to use the words of Marshall CJ in *Marbury v Madison*,[3] 'to say what the law is'. That means the courts are to declare and enforce the law subject to such specific provisions as are made under the *Constitution* and by statute with respect to the exercise of jurisdiction, the vesting of the federal judicial power in ch III courts, and the courts' separation from the legislature and executive powers.

The consequence of the constitutional separation of powers and the concept propounded of judicial power, as set out in ch III of the *Constitution*, results in a distinction between judicial review and merits review and is a central feature of Australian administrative law. Sir Anthony Mason has pointed out that the reasoning in *R v Kirby; Ex parte Boilermakers' Society of Australia* (*Boilermakers' case*), both in the High Court and the Privy Council, is by no means compelling.[4] It was not accepted in the *Boilermakers' case* that a ch III court could perform administrative as well as judicial functions. Yet, if the dissenting judgment of Williams J had prevailed so as to allow administrative functions compatible with the courts' judicial function to be applied in the exercise of federal judicial power, this would have avoided, at least to some degree, the troublesome distinction between judicial and administrative functions. The majority approach means that judicial review, in the absence of statutory provision or manifest legal error, does not allow a court to enter upon the province of the executive decision-maker's determination of the merits. However, the majority view in the *Boilermakers' case* is now deeply embedded and has had a large part in defining the scope of judicial review and shaping the application of principle to the various subheadings which form the subject matter of this article.

During the long judicial life of French CJ, the application of the *Boilermakers'* principle has remained undisturbed, but his time as Chief Justice has been marked by a far more rigorous application of principle to avoid legislative encroachment upon the Court's conduct in exercising judicial review, as is shown in the development of the law relating to privative clauses.

Privative clauses and jurisdictional error

It is convenient to consider privative clauses in relation to Commonwealth and state legislation separately, although the decision of the French High Court in 2010 of *Kirk v Industrial Relations Commission*[5] (*Kirk*) has made this bifurcation less meaningful. Prior to the time of French CJ, the approach to privative clauses rested in part upon recognition that, although there is a defined separation of powers under the Commonwealth *Constitution*, that separation is not to be found in the various state constitutional Acts.

Commonwealth legislation: the* Hickman *case

Before the time of French CJ, the most quoted Australian authority about privative clauses was that of *R v Hickman*[6] (*Hickman*). An order nisi for a writ of prohibition under s 75(v) of the Commonwealth *Constitution* was sought by haulage contractor employers that haulage contractors, who carted coal as well as other things, were not required to grant their lorry driver employees minimum rates of wage specified under a Coal Mining Award. The board had ruled that the employers had to give their employees the minimum rates under the

award. The Commonwealth regulations provided that such regulations 'shall apply to industrial matters in relation to the coal mining industry'. Regulation 17 stated that a decision of the board 'shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any Court on any account whatever'. In ordering that the rule nisi should be made absolute, the High Court held the employees, who carried on the business of carriers, were not in any real sense part of the coal mining industry; therefore, the prescribed minimum wage rates under the award did not apply, so the privative clause did not protect against the order. However, Dixon J said:

> [Decisions of the board] should not be considered invalid if they do not upon their face exceed the board's authority and if they do amount to a bona fide attempt to exercise the powers of the board and relate to the subject matter of the regulations.[7]

The migration legislation

In 2002, a Federal Full Court, sitting five judges, decided in *NAAV & Others v Minister for Immigration & Multicultural & Indigenous* Affairs[8] (*NAAV*) that the privative clause introduced by the Howard government immunised, to a large degree, a tribunal decision-maker's legal errors against review. Justice French, as he then was, together with Wilcox J, dissented in *NAAV*, stating that the limited *Hickman* principles were not exhaustive as to the grounds upon which a protective clause may fail to immunise the decision-maker. Nor did French J consider that a privative clause meant that the initial decision-maker's jurisdiction was enlarged by reason of the privative clause providing protection against challenge. His Honour's approach foreshadowed not only the approach adopted in *Plaintiff S157/2002 v Commonwealth*[9] (*Plaintiff S157*) by the High Court the following year but also the approach further elaborated once he had become Chief Justice in both state and Commonwealth cases which contained privative clauses.

His Honour also said in *NAAV,* with some prescience, that narrowing grounds of review does not reduce the number of desperate people with hopeless cases who apply for review of their decisions. If instead legislation provided a requirement for leave or, in the case of prerogative writs, a grant of an order nisi, able to be determined by judges on the papers, this would go a long way toward enabling hopeless applications to be rejected at the outset[10] and thus avoid the Federal Court being overwhelmed with a tide of futile appeals.

However, this was not the approach adopted by the Howard government. In *Abebe v The Commonwealth*,[11] by four to three, the High Court had found that introduction by Parliament of constrictive grounds of review under the migration legislation would not be unconstitutional. Perhaps emboldened by this decision, as well as concerns over the flood of poorly framed applications to the Federal Court for review by failed asylum seekers, the Howard government decided to prohibit any appeals from decisions made by the Refugee Review Tribunal, Migration Review Tribunal and Administrative Appeals Tribunal to the Federal Court and the High Court. The *Migration Act 1958* (Cth) now prohibited such appeals from decisions described as 'privative clause' decisions, and *NAAV* in 2002 was the first authoritative Federal Court decision under the new prohibitory regime.

Then in 2003, in *Plaintiff S157*,[12] the High Court under Gleeson CJ rendered nugatory the privative clause and, as Gleeson CJ himself explained, a privative clause may involve a conclusion that a decision or purported decision is not a 'decision ... under this Act'.[13] The joint judgment in the same case said that a privative clause cannot protect against a failure to make a decision required by the legislature, which decision on its face exceeds jurisdiction error. In so saying, their Honours substantially adopted the dissenting approach of French and Wilcox JJ earlier indicated in *NAAV*.[14]

Judicial method of construing privative clauses

In *Plaintiff S157*, in commenting upon the Commonwealth Government's argument that, where the three *Hickman* provisos quoted by Dixon J cited above were met, the decision was protected, the High Court denied that this was so; rather, it said that any protection which the privative clause affords will be inapplicable unless those provisos are satisfied.[15] To ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause. It is inaccurate to describe the *Hickman* provisos as expanding or extending the powers of the decision-maker. The legal process is not one which can place a construction on the privative clause as a single provision and assert that all other provisions may be disregarded.[16] If a privative clause conflicts with another provision, pursuant to which some action has been taken or decision made, its effect will depend upon the outcome of its reconciliation with that other provision.[17] There can be no general rule as to the meaning or effect of a privative clause. A specific intention in legislation as to the duties and obligations of the decision-maker 'cannot give way to the general intention indicated by a privative clause' to prevent review of the decision.[18]

Their Honours said that the expression 'decisions ... made under this Act' must be made so as to refer to claims which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction. An administrative decision which involves jurisdictional error is 'regarded in law as no decision at all'.[19] Section 474(2) of the *Migration Act 1958* (Cth) required that the decision in question be 'made under [the] Act' and, where the decision made involved jurisdictional error, such a decision was held not to be 'made under the Act' so as to be protected against judicial review.

In *Plaintiff S157* it was said, with reference to s 75(v) of the *Constitution*, which authorised prerogative relief against a Commonwealth officer:

> First, the jurisdiction of this Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with chapter III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.[20]

In the following year, in *Minister for Immigration v SGLB,*[21] the Gleeson Court reaffirmed what had been said in *Plaintiff S157*, citing earlier authority that jurisdictional error negating a privative clause decision may arise where there has been a failure to discharge what has been called 'imperative duties' or to observe 'inviolable limitations or restraints' found in the *Migration Act 1958* (Cth). As Gummow and Hayne JJ said, the three *Hickman* provisos render a privative clause inapplicable unless they are satisfied, but *Plaintiff S157* also rejected the proposition that those provisos would always be sufficient, so that the satisfaction of them necessarily takes effect as 'an expansion' or 'extension' of the power of the decision-maker in question.[22]

Privative clause cases under state legislation: the* Kirk *decision

Six years before *Plaintiff S157*, in *Darling Casino Ltd v NSW Casino Control Authority*,[23] the Brennan Court had said that, provided the intention is clear, 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.

This approach was to alter in 2010. In *Kirk*,[24] the French Court said that at federation each of the state Supreme Courts had a jurisdiction akin to that of the Court of Queen's Bench in England and, whilst statutory privative provisions had been enacted by colonial legislatures

which had sought to cut down the availability of certiorari in *Colonial Bank of Australasia v Willan,*[25] the Privy Council had said of such provisions:

> It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, *except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it*.[26]

However, prior to *Kirk*, state courts had not given the scope of 'manifest defect of jurisdiction' a particularly generous construction.

The Industrial Relations Act (NSW)

Under s 179(1) of the *Industrial Relations Act 1996* (NSW) a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called in question by any Court of Tribunal'. The High Court said, 'more particularly, although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decision of an inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework for the Australian Judicial System'.[27] Mr Kirk had been charged with offences that inadequately particularised the nature of the offence alleged under the *Occupational Health and Safety Act 1983* (NSW), and this failure was found to constitute jurisdictional error against which the privative clause afforded no protection.

Where a privative clause is found, the question also arises whether there is 'jurisdictional error' of such a kind that the privative clause will not protect against a superior court intervening to review the findings of the decision-maker. As the French Court said in *Kirk*, 'the principles of jurisdictional error (and its related concept of jurisdictional fact) are used in connection with the control of tribunals of limited jurisdiction on the basis that a tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction'.[28]

In *Kirk* the Court referred to *Craig v South Australia*,[29] decided 15 years earlier, where it had been said:

> if … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[30]

It was reiterated again in *Kirk* that the above reasoning was not to be 'a rigid taxonomy of jurisdictional error'.[31] For example, it has been recognised in some cases failure to give reasons may constitute a failure to exercise jurisdiction,[32] where there has been procedural unfairness, fraud, bad faith, mistaken denial of jurisdiction, failure to discharge a statutory duty, improper purpose, failing to address the claim made, absence of any evidence to support a finding, acting under dictation, unreasonableness, irrationality or illogicality may all give rise to jurisdictional error.[33]

The crimes legislation in New South Wales

The approach in *Kirk* was followed in *Wainohu v New South Wales*[34] (*Wainohu*), where the *Crimes (Criminal Organisations Control) Act 2009* (NSW) provided that the Attorney-General may, with the consent of a judge, declare a judge of the Supreme Court to be an 'eligible judge', for the purposes of the Act. The Commissioner of Police may apply to an 'eligible judge' for a declaration that a particular organisation is a 'declared organisation', and the judge may make a declaration that this is so if satisfied members of a particular organisation are engaged in serious criminal activity and that the organisation 'represents a risk to public safety and order'. The Act said that the eligible judge is not required to provide any grounds or reasons for making a declaration and, once a declaration is made, the Supreme Court may on the application of the Commissioner of Police make a control order against individual members of the organisation. The French Court held the Act to be unconstitutional in that it impaired the institutional integrity of the Supreme Court.

Mr Wainohu was a member of the Hells Angels Motorcycle Club. Under the Act there was no appeal from the Judge's decision, and a broadly expressed privative clause purported to prevent a decision by an eligible judge from being challenged in any proceedings, although it was acknowledged by counsel that this would not protect the decision against jurisdictional error in light of the earlier *Kirk* decision.[35] Chief Justice French and Kiefel J said:

> A state legislature cannot, consistent with Ch III, enact a law which purports to abolish the Supreme Court of a State or which excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State.[36]

Justices Gummow, Hayne, Crennan and Bell adopted what Gaudron J had earlier said — that confidence reposed in judicial officers 'depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matters in issue'.[37]

It can be seen, therefore, that the French Court looks at the exercise of judicial power with emphasis upon the need for procedural fairness, manifested in an obligation to provide a fair hearing to a party, and observance of a requirement for reasons to be given, and that failure in this regard may manifest jurisdictional error against which a privative clause would not afford protection.

State building and construction legislation

The decisions of the French Court in *Kirk* and *Wainohu* have facilitated review in many areas apart from migration — for example, in building and construction adjudication. In *Chase Oyster Bar v Hamo Industries*[38] the New South Wales Court of Appeal said:

> to the extent that the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport*[39] decided that the Supreme Court of NSW was not required to consider and determine the existence of jurisdictional error by an adjudicator making a determination under the Building and Construction Industry Security of Payment Act, that an order in the nature of certiorari was available to quash or set aside a decision of an adjudicator, and that their legislation expressly or implied a limit to the Court's power to deal with jurisdictional error, it was in error …[40]

It seems likely that there is now scope for a similar argument that a determination under s 41 of the *Construction Contracts Act 2004* (WA) is not final if jurisdictional error is discovered. If on the adjudication of a payment dispute the appointed adjudicator makes a determination:

(a) the adjudicator cannot subsequently amend or cancel the determination; and
(b) a party to the dispute may not apply subsequently for adjournment of the dispute.

The outcome of *Kirk* has influenced another case decided by Edelman J, who has now filled the seventh seat on the High Court vacated by French CJ. In *Seddon v Medical Assessment Panel*,[41] Mr Seddon applied for an order nisi for a writ of certiorari and writ of mandamus arising out of an injury received in 2001 at work. He subsequently lodged with the dispute resolution directorate a claim that his injuries were not less than the 30 per cent threshold for the purposes of a common law claim. The matter was referred to a Medical Assessment Panel by the directorate, as the employer contended that the permanent disability was less than 30 per cent. In September 2010 the panel determined that the permanent disability was 27 per cent and, in doing so, gave Mr Seddon a nil percentage permanent degree of loss of use of the right arm. The panel indicated that, although there were right shoulder symptoms, this injury was unrelated to the accident. The solicitors for Mr Seddon requested that the panel reconsider this question because the panel's jurisdiction under the relevant Act was limited to assessing the degree of disability and not how the degree of disability arose. Nonetheless, in December 2010 the panel reaffirmed its determination that there was a nil loss of permanent function in relation to the right shoulder.

Prior to November 2005, the *Workers' Compensation and Injury Management Act 1981* (WA) said that determinations of the Medical Assessment Panel were 'final and binding' but did not exclude judicial review.[42] However, in November 2005 a privative clause was introduced by the *Workers' Compensation Reform Act 2004* (WA), which said, 'a decision of a Medical Assessment Panel or anything done under this Act in the process of coming to a decision of a Medical Assessment Panel is not amenable to judicial review'.

Justice Edelman said that, in seeking certiorari and mandamus, Mr Seddon argued: first, that the privative clause does not apply since it was only introduced in November 2005 and the injury had occurred in 2001; and, second, if it did apply and notwithstanding that the provisions of the Act also said that a determination of a panel is 'final and binding', these provisions did not exclude judicial review where there has been jurisdictional error. A 'decision' should be read as meaning 'a decision within jurisdiction' and not a decision made without jurisdiction. Furthermore, the words 'anything done under this Act' should be read to mean anything validly done under this Act; and the words 'not amenable to judicial review' should be read as 'not amenable to judicial review for non-jurisdictional error'. Finally, it was argued that, if the Court considered that the privative clause excluded judicial review for jurisdictional error in the light of the obiter dictum in *Kirk* (that is, 'legislation which would take from the Supreme Court power to grant relief on account of jurisdictional error is beyond State Legislative power'), it would mean that the privative clause was unconstitutional.[43]

It was argued that for three reasons there had been jurisdictional error. First, the panel had not analysed the various conflicting medical reports and thus had failed to take into consideration jurisdictional facts necessary to their decision. Second, on both occasions that the panel had made a determination, it had regard to whether it considered the injuries were work related. In doing so, it had stepped outside its jurisdiction. Third, the determination did not properly disclose the underlying reasoning process upon which the finding of nil loss of use of the right arm had been made.

In 2015, a differently constituted Medical Assessment Panel repeated many of the errors of its predecessor, whose determination had been quashed for jurisdictional error. Justice Mitchell agreed that the privative clause would not protect against jurisdictional error and that the panel had misconceived the boundaries of its jurisdiction. However, his Honour did not find, as Edelman J was inclined to do, that under the Act a failure to give adequate reasons would amount to jurisdictional error.[44]

Judicial review in the state jurisdiction

Justice Basten of the New South Wales Appeal Court, who appeared as counsel in many Commonwealth migration cases, said when he first studied administrative law there was no Australian text book on the subject. In Australia, the development of administrative law took shape in the Federal Court, and most practitioners who were at home in the Federal Court rarely appeared in the state courts.[45]

That, indeed, was very much the experience here in Western Australia as well. The flood of Sino-Vietnamese boat arrivals off Ashmore Reef in the early 1990s resulted in much asylum seeker adjudication in the West by French J and his three brother judges. Tribunals, Federal Circuit Courts and even people smugglers came later. There was little case law authority to assist counsel and the courts, and one was heavily reliant for authority on the textbooks of Professor Hathaway, Goodwin Gill and Grahl Madsen,[46] for at that time there were few Australian academics in this field. However, opening a textbook of Professor Hathaway today, which is co-authored with Professor Foster,[47] shows how extensive the jurisprudence on every aspect of asylum law has now become, not only in Australia but also in Canada, the United States and Britain.

Indeed, Martin CJ of the Supreme Court of Western Australia candidly acknowledged he was put off from studying administrative law as a student when he read the English Professor de Smith's book on the subject of administrative law, as it described judicial review as 'inevitably sporadic and peripheral'.[48] However, by the 1990s it had become far from peripheral in the Federal Court. Professor de Smith's contribution to constitution building is to be found in his *New Commonwealth and its Constitutions*.[49] The advice he gave has been heavily influential, not only in developing judicial review but also in defining the governmental power relationships in new Commonwealth constitutions, and he advised some of those countries on how to formulate the constitutional pillars of democracy necessary to withstand executive or other incursions. There could hardly have been a more vital responsibility for any jurist.[50]

The numerous and frequent amendments to the migration legislation make any academic analysis by judges or writers today short-lived here in Australia. But in the 1990s French J, together with other Federal Court judges, did much to develop migration law as Sino-Vietnamese, Burmese and other boat arrivals were boarded off Ashmore Reef.

Legitimate expectation

In *Attorney General (NSW) v Quin*,[51] Brennan J said that expectation is seen merely as indicating 'the factors and kind of factors which are relevant to any consideration of what are the things which must be done or afforded' to accord procedural fairness to an applicant for the exercise of administrative power, but for a time under the Mason Court legitimate expectation implied a more prominent status.

In *Teoh v Minister for Immigration and Ethnic Affairs*[52] (*Teoh*), French J, sitting as a single judge, had affirmed a deportation order in regard to a drug offender who had children born in Australia to an Australian mother. The Full Court and the High Court, by a bare majority, stayed the deportation order. The legitimate expectation was of a controversial nature. The majority in the High Court held that the best interests of the children would be a primary consideration in decisions affecting children, based upon wording of an article in the *Convention on the Rights of the Child*, to which Australia is a signatory. In stating that a Convention could assist in the proper construction of a statute in which the language is ambiguous, the majority was merely adopting what had previously been said in *Lim v Minister of Immigration*,[53] but Mason CJ and Deane J said such a Convention could also

guide the development of the common law, even though a legitimate expectation does not bind the decision-maker. Chief Justice Mason and Deane J stated that:

> Legitimate expectations are not to be equated with the rules or principles of law … the existence of legitimate expectation does not control the decision maker to act in a particular way. That is the difference between a legitimate expectation and a binding rule of law.[54]

Nonetheless, their Honours said that an unincorporated treaty or convention was 'not to be dismissed as any platitudinous or ineffectual act',[55] and procedural fairness required that such a legitimate expectation should be considered by the decision-maker. This had not been the view of the primary judge, French J or McHugh J, who dissented in *Teoh*.

Eight years later, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[56] (*Lam*), the Gleeson High Court granted leave, by which time McHugh J was the only surviving sitting member of the High Court judges who had heard *Teoh*. *Lam* may be seen as standing for three principal propositions:[57]

1. Legitimate expectation is not a freestanding administrative doctrine but simply an aspect of procedural fairness. McHugh and Gummow JJ said, 'the notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in a particular case'.[58]
2. There is a requirement for an expectation or, at least, there is a basis for a reasonable inference that an expectation is being created. Mr Teoh himself would have had no expectation. Prior to *Teoh*, no-one had reason to suppose a general ratification of an incorporated treaty would give rise to an expectation. On the other hand, it was conceded that it was not merely those expectations for which there was a natural conscious appreciation that a benefit or privilege was to be conferred, and that the applicant had turned his mind to the matter, that would be considered.[59] Contrary to the majority view in *Teoh*, McHugh and Gummow JJ did not see ratification of any Convention as a 'positive statement' made to 'the Australian people' requiring an executive government to act in accordance with the convention.[60]
3. *Lam* reiterated previous Australian case law which held that the concept of legitimate expectations is directed to procedure and not the outcome. To put it another way, expectation is with the decision-making process and not the decision itself.[61] Legitimate expectation, as a facet of procedural fairness, is precisely that: procedural fairness and not a source of substantive rights.

In *Lam*, the department had advised the applicant that his visa was liable to cancellation and that he would have an opportunity to comment. The applicant was told that the matters to be taken into account would include 'the best interests of any children' with whom he might have an involvement. A departmental officer later wrote to the applicant requesting contact details of his children's carers and advised that they wished to contact the carers to assess the applicant's relationship with the children. Although contact details were provided, no further steps were taken to contact the children. Justices McHugh and Gummow found that, although an expectation arose from the conduct of the person proposing to make recommendations to the Minister, the failure to meet that expectation did not reasonably found a case of denial of natural justice; that the applicant had no vested right to oblige the department to act as it indicated it would; and that it did not result in the applicant failing to put to the department any material that he might have otherwise urged upon it. Also, the carers would not have supplemented in any significant way what had been supplied by the applicant.

One cannot help but suspect that special leave was granted in *Lam* to enable review of *Teoh* following the departure of the three members of the High Court who formed the majority in

Teoh. Mr Lam's argument for special leave was hardly a strong one. Justices McHugh and Gummow stated that the law of Australia should be as expressed by McHugh J in his dissenting *Teoh* judgment, at least in so far as there is no need for any distinct doctrine of legitimate expectation.[62] It is only where natural justice conditions the exercise of legitimate expectation that it has any role to play.

In an address last year at Cambridge University, French CJ explained that Australian courts since *Lam* have not accepted that the concept of legitimate expectation can underpin substantive entitlements, as distinct from informing the content of procedural fairness, which, indeed, was the view upon which he had proceeded as a single judge in *Teoh*.[63]

Procedural fairness as against substantive protection: the English position

Unsurprisingly, the view that prevails in *Lam* in respect of legitimate expectations has not been altered in any way by the French Court and no substantive protection is discernible. The formal and defined constitutional separation of powers and, most notably, *Lam*, militate against a development towards substantive protection. This approach may also have implications for likely development of public law estoppel, abuse of power and proportionality as doctrines likely to be accepted in Australia.

In *Lam*, McHugh and Gummow JJ (with whom Callinan J agreed) emphatically affirmed earlier decisions of the High Court that there should be nothing 'to disturb [substantive protection] by adoption of recent developments in English law with respect to substantive benefits or outcomes'.[64] In contrast to the Australian position, in *R v North and East Devon Health Authority*; *Ex parte Coughlan*[65] (*Coughlan*) the English Court of Appeal has held that legitimate expectations can be enforced as substantive rights. In that case, the relevant decision-maker had promised a disabled person that premises to which she was being shifted would be her 'own for life'. Later it was decided to close those premises. It was held that the disabled person should have been afforded a fair hearing before that decision was taken. However, the Court of Appeal went further: it held that a legitimate expectation could be the source of substantive rights. It based this upon the view that the failure of the decision-maker to meet the expectation would involve an 'abuse of power'. Lord Woolf MR also referred to an earlier decision of the English Court of Appeal in which it had been said that, in its application to substantive benefits, the doctrine of legitimate expectations is 'akin to an estoppel'.

In *R v Inland Revenue Commissioners; Ex parte Preston*,[66] Lord Templeman had placed 'abuse of power' in conjunction with breach of the rules of natural justice as remedies for judicial review. In *R v Secretary of State for Education and Employment; Ex parte Begbie*[67] Laws LJ had spoken of 'abuse of power' as the rationale for the general principles of public law.

Private law estoppel

In *R v East Sussex County Council; Ex parte Reprotech (Pebshan) Ltd*[68] Lord Hoffman, in a speech concurred in by the other Law Lords, approved *Coughlan* and said:

> There is, of course, an analogy between a private law estoppel and the public law concept of the legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote … it seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.[69]

As Sir Anthony Mason points out, these remarks indicate how the substantive protection of legitimate expectations has occupied the space in public law which is occupied in private law by estoppel.[70]

In England, the common law requires that a legitimate expectation be considered by the decision-maker; that effect should be given to the expectation unless there are legal reasons for not doing so; and that, if effect is not given to the expectation, fairness requires the decision-maker to give reasons for the conclusion. If there are policy considerations which militate against giving effect to the expectation, the decision-maker must make the decision in the light of the legitimate expectation, and failure to do so will vitiate the decision. In *R v London Borough of Newham and Bibi*[71] the Housing Authority made a promise to the applicants that it would provide legally secure housing accommodation within 18 months. The Authority did not honour its promise. The English Court of Appeal held that, in coming to its decision, the Authority failed to take account of the legitimate expectation and that therefore the decision was vitiated. The Court declined to make the decision itself, but it was for the Authority to consider the matter afresh. The Court made a declaration that the Authority was under a duty to consider the applications for suitable housing on the basis that the applicants had a legitimate expectation that the Authority would provide them with suitable accommodation in a secure tenancy.

Proportionality in Australia

Although the French Court has given no support to a legitimate expectation as a substantive right, French CJ has emphasised the importance of the common law doctrine of legality, which is a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language.[72]

However, thus far the High Court has given no endorsement to proportionality — at least not in the sense of recognising it as a potential form of jurisdictional error. It has been characterised as a European import to the English system which would have no application in the context of the separation of powers under the Australian constitutional arrangements. Some commentators view it as bordering on merits review. It was discussed by Kiefel J in *Rowe v Electoral Commission*.[73] Her Honour said that, in the Australian constitutional context, proportionality is said to involve considerations of the relationship between legislative means and constitutionally legitimate ends. It was also discussed by Crennan and Kiefel JJ in *Momcilovic v The Queen*[74] (*Momcilovic*) and more recently still in *McCloy v NSW*.[75] Save for *Momcilovic*, which involved the interaction of Victorian human rights legislation and suitable directions to be given in a criminal trial, these cases involved only constitutional arrangements.

Proportionality has had some distinguished academic support in Australia. Sir Anthony Mason has described proportionality as the concept which is particularly helpful in dealing with cases in which it is alleged that a decision results in an unacceptable violation of, or interference with, fundamental rights. Proportionality poses the question whether that result is disproportionate to the need to protect the legitimate interest which the decision-maker has sought to protect.[76]

Sir Anthony Mason sees the concept of proportionality as having a potential application where there is detriment to the individual by the application of policy grossly disproportionate to the risk of compromising the policy if the decision went the other way. He does not see proportionality as confined to the area of fundamental rights of freedom, although it has been accepted in England that, the more substantial the interference with fundamental rights, the more the court will require by way of justification before it can be satisfied the interference is reasonable.

However, there is perhaps a hint of interest on the part of French CJ in *Minister for Immigration and Citizenship v Li*[77] (*Li*), where his Honour said:

> A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable. It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts. Be that as it may, a disproportionate exercise of administrative discretion, taking a sledge hammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves. That approach is an application of the principles discussed above and within the limitation they would impose on curial review of administrative discretion.[78]

Li concerned the refusal of an adjournment by a Tribunal member where the applicant sought adjournment in order to get a skills assessment to secure a visa. The Court found there was a lack of evident and intelligible justification in the reasons advanced for refusing the adjournment. The comment by French CJ indicates possible scope for proportionality as a species of unreasonableness or irrationality that could one day constitute a basis for jurisdictional error.[79]

Proportionality in England

Proportionality has been largely accepted in England. Recently, in *Bank Mellat v Her Majesty's Treasury (No 2)*,[80] the *Counter Terrorism Act 2008* (UK) allowed the Treasury, where it reasonably believed that entities operating in the financial sector were aiding the development of nuclear proliferation, to be excluded by order from access to the UK banking market. The legislation also provided that the requirements imposed by Treasury order must be proportionate to the risks referred to, being nuclear proliferation. The purpose of the Treasury direction was to shut Bank Mellat out of the UK financial sector when much of the bank's international trade finance was transacted through London. In March 2009, the bank issued letters of credit with an aggregate value of about US$11 billion and the bank's own estimate of its revenue loss was about US$25 million per year. Important banking relations had been lost to the bank.

Bank Mellat brought an action that the decision of the Treasury was irrational, disproportionate and discriminatory. The Treasury said the fundamental justification was that Bank Mellat, by reason of its international reach, was well placed to assist entities to facilitate the development of nuclear weapons by providing them with banking facilities and, in particular, with trade finance. Bank Mellat had provided banking services to two entities which were involved in the Iranian nuclear weapons missile program, but this had happened without their knowledge and despite operating procedure directed to avoid this. Conversely, Bank Mellat accepted that the statutory prerequisites for making the order were satisfied in that the Treasury reasonably believed that Iran's nuclear missile's program posed a significant risk to the national interests of the United Kingdom. However, the order was not intended to be part of a sanctioned regime but was essentially preventative and remedial rather than punitive or deterrent.

The essential question was whether the interruption of commercial dealings with Bank Mellat in the financial markets in Britain bore some rational and proportionate relationship to the statutory purpose of hindering Iran's pursuit of its weapons program. The fourfold proportionality test to be applied was whether the objective was sufficiently important to justify the limitation of a fundamental right; whether it was rationally connected to the objective; whether a less intrusive measure could have been used; and whether, having regard to these matters and to the severity of the consequences, a fair balance had been struck between the rights of the individual and the interests of the community.[81]

The Court allowed that the nature of the issue required the Treasury to be allowed a large measure of judgment, especially as it is difficult to think of a public interest as important as nuclear non-proliferation.

However, Bank Mellat had been singled out from other banks despite it being a general risk, and Lord Sumption, speaking for the majority, said that a measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of it being discriminatory in some respect that is incapable of objective justification.[82]

The majority accepted that there was a rational connection between the order made and the objective of frustrating, as far as possible, the weapons program, but the distinction made between Bank Mellat and other Iranian banks, which was part of the Treasury case put to Parliament by Ministers, 'was an arbitrary and irrational distinction and that the measure was as a whole disproportionate'.[83] The majority also considered that the Treasury had a duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory notice was to be exercised, and the majority considered that Bank Mellat should have been given an opportunity to make representations before the direction was made.[84]

Lord Reed, who dissented, traced the history of proportionality as an aspect of justice to St Thomas Aquinas. He cited *Commentaries on the Laws of England*[85] that the concept of civil liberty comprises 'natural liberties so far restrained by human laws (and not further) as is necessary and expedient for the general advantage of the public'. That the State should limit natural rights only to the minimum extent necessary was developed in Germany into a public law standard of proportionality. It migrated to the case law of the European Court of Justice and then to Canada and then to common law jurisdictions.[86]

Summary of Chief Justice French's legacy

One can therefore say that, during the term of French CJ, the Court has strengthened the constitutional power relationships.

First, there has been a readiness to assert the role of the judiciary by striking down privative clauses which seek to immunise executive decision-makers against appeal and, in doing so, developed what had been adumbrated in his *NAAV* dissent as a Federal Court judge. Chief Justice French's approach — to confine the operation of privative clauses — was largely followed in *Plaintiff S157* by the Gleeson Court and then by the High Court, over which he himself presided in the privative clause cases such as *Kirk* and *Wainohu* thereafter.

Second, in *Kirk* and *Wainohu,* the French Court adopted a logical progression in that state legislatures were required now to respect the existence of jurisdictional error as a constitutionally protected form of judicial review, notwithstanding the absence of a recognised separation of powers under state Constitution Acts. State legislature cannot now impose upon state Supreme Courts functions incompatible with their essential characteristics as courts or subject their judicial decision-making to executive direction.[87] Prior to French CJ, the principle of the need for legislation to respect the institutional integrity of state courts had only been enunciated once in *Kable v DPP*,[88] which many predicted would be 'a dog that barks but once'.

Third, there was further affirmation of the more exacting and rigorous separation of judicial power from executive power, which meant that the role of legitimate expectation would continue to have no freestanding status and would at most be a facet to consider in determining what is fair. Indeed, legitimate expectation is a term which French CJ said in his Cambridge lecture that some would describe as a 'zombie principle'.[89] Those words

therefore afford no present scope to underpin substantive entitlements in the way that they may do in England.

Fourth, proportionality is yet to be recognised as a form of jurisdictional error, although there is a hint in *Li* that his Honour considers it may one day have a role, either as a form of unreasonableness giving rise to possible jurisdictional error or perhaps as a distinctive basis for jurisdictional error.[90] In his Cambridge lecture, having alluded to its relevance in constitutional arrangements, he said, 'whether proportionality reasoning finds a place as an aspect of judicial review relating to the reasonableness and rationality of administrative decisions remains to be seen'.[91]

In these and other important respects, the High Court under French CJ has done much to develop, assert and uphold the central role of the judiciary in strengthening the vital power relationships which underpin the foundations of the federal *Constitution*.

Endnotes

1 Justice William Gummow AC, 'A Fourth Branch of Government?' (2012) *AIAL Forum* 70, 19.
2 Severin Woinarski (ed), *Jesting Pilate and other papers and addresses by Sir Owen Dixon* (WS Hein & Co, New York, 1965) 203.
3 (1803) 5 US 187, 111.
4 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; Sir Anthony Mason, 'The Foundations and the Limitations of Judicial Review' (2001) *AIAL Forum* 31, 13.
5 *Kirk v Industrial Relations Commission* (2010) HCA 1; (2010) 239 CLR 531.
6 (1945) 70 CLR 598.
7 Ibid 617.
8 [2002] FCAFC 228; 123 FCR 298.
9 (2003) 211 CLR 476.
10 (2002) FCAFC 228, [499], [500], [537].
11 (1999) 197 CLR 510.
12 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.
13 Ibid [19] (Gleeson CJ).
14 Ibid [57] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
15 Ibid [64].
16 Ibid [65].
17 Ibid [60].
18 Ibid [65].
19 Ibid [76]; see also *Cashman v Brown* (2011) HCA 22, where a privative clause making a determination of a Medical Panel in Victoria 'final and conclusive' was held not to exclude judicial review in respect of a common law claim since the claim was not brought under the *Accident Compensation Act 1985* (Vic).
20 (2003) 211 CLR 476, [98].
21 2004 ALR 12; 2004 78 ALJR 992.
22 Ibid [57].
23 1997 HCA 11; 1997 191 CLR 602.
24 (2010) HCA 1; (2010) 239 CLR 531.
25 (1874) LR 5PC 417.
26 (1874) LR 5PC 417, 442 (emphasis added).
27 (2010) HCA 1; (2010) 239 CLR 531, [93].
28 Ibid [64] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).
29 *Craig v South Australia* (1995) 184 CLR 163.
30 1995 184 CLR 163, 179.
31 (2010) HCA 1; (2010) 239 CLR 531, [73].
32 Ibid [83].
33 Ibid. See also Kristen Walker QC, 'Jurisdictional Errors since Craig' (2012) 86 *AIAL Forum* 35, 38, which refers to some of the above grounds of jurisdictional error.
34 (2011) HCA 24.
35 Ibid [15] (French CJ and Kiefel J).
36 Ibid [46] (French CJ and Kiefel J).
37 Ibid [94] (Gummow, Hayne, Crennan and Bell JJ).
38 (2010) NSCWA 190.
39 (2004) NSWLR 421.
40 Ibid [108] (Basten JA; Spigelman CJ agreeing at [56]; McDougall J at [287]).
41 (2011) WASCA 237.

42 At [37] (Edelman J).
43 *Seddon v Medical Assessment Panel (No 1)* (2011) WASC 237 at [35]–[49]; *Seddon v Medical Assessment Panel (No 2)* (2012) WASC 1.
44 *Seddon v Medical Assessment Panel* (2015) WASC 386, [107].
45 Justice John Basten, 'Judicial Review in State Jurisdiction' (2016) 84 *AIAL Forum* 10.
46 For example, J Hathaway, Goodwin Gill and Grahl Madsen, *Using International Law in Domestic Courts* (Bloomsbury Publishing, 2005).
47 J Hathaway and M Foster, *The Law of Refugee Status* (2nd ed, Cambridge University Press, 2014).
48 The Hon Wayne Martin SC, 'National Lecture on Administrative Law: 2014 National Administrative Law Conference' (2014) 78 *AIAL Forum* 2.
49 SA de Smith, *The New Commonwealth and its Constitutions* (Stevens & Sons, 1964).
50 Professor de Smith lectured at the London School of Economics and then Cambridge. His LLB was 'Constitutional Laws of the Commonwealth' (framed on Australia, Canada, India and Pakistan). His book, *The New Commonwealth and its Constitution* (Stevens & Sons, 1964) devoted attention to the constitutions of Ghana, Malaysia, Nigeria, West Indian Federation, Singapore, Uganda, and Kenya (amongst many others). He was described as 'a scholar and a gentleman': 'Professor SA de Smith' (obituary) (1974) 37 *Modern Law Review* 241.
51 (1990) 170 CLR 1.
52 (1995) 183 CLR 273.
53 (1992) 176 CLR 1, [38].
54 Ibid [36].
55 Ibid [34].
56 (2002) 195 ALR 502.
57 See Henry Burmester AO QC, 'Teoh Revisited after *Lam*' (2004) 40 *AIAL Forum* 33. Henry Burmester represented the Minister in the High Court.
58 (2002) 195 ALR 502, [105] (McHugh and Gummow JJ).
59 Ibid [91].
60 Ibid [99].
61 Ibid [105].
62 Ibid [83] (McHugh & Gummow JJ).
63 Chief Justice French, 'The Globalisation of Public Law — A Quilting of Legalities' (speech given to the Cambridge Public Law Conference, Cambridge, UK, 12 September 2016) 3.
64 (2002) 195 ALR 502, 148 (Callinan J).
65 (2001) QB 213.
66 (1985) AC 835, 862.
67 (2000) IWLR 1115, 129.
68 (2002) UKHL 8.
69 Ibid [34].
70 Sir Anthony Mason, 'The Scope of Judicial Review' (2001) 31 *AIAL Forum* 40.
71 (2001) EWCA Civ 607; reversed on appeal (2002) UKHL 3.
72 (2011) HCA 34, [43].
73 (2010) HCA 46, [424]–[480].
74 (2011) HCA 34.
75 (2015) HCA 34, [69]–[93].
76 Mason, above n 70, 37.
77 *MIC v Li* (2013) HCA 18, [30].
78 Ibid [30].
79 In *R (on the application of Lumsdon and others) v Legal Services Board* (2015) UK SC 41, Lord Reed and Lord Toulson explained (at [23]) that proportionality has been applied in different contexts, as had been said in *Pham v Secretary of State for the Home Department* (2015) UK SC 19, [107]. The differences between proportionality at common law and the principle applied under the Convention were discussed in *R (Daly) v Secretary of State for the Home Department* (2001) 2 AC 532 at [27]–[29].
80 (2013) UKSC 39.
81 Ibid [20] (Lord Sumption), [74] (Lord Reed).
82 Ibid [25] (Lord Sumption), referring to *A v Secretary of State for the Home Department* (2005) 2 AC 68, where the issue was a derogation from the convention permitting the detention of non-nationals whose presence in the UK was considered by the Home Secretary to be a risk to national security and who could not be deported. It was held that this was not a proportionate response to the terrorist risk threat which provoked it. It was held disproportionate because liberty was a fundamental right and discriminatory because detention was confined to non-nationals.
83 Ibid [27] (Lord Sumption).
84 Ibid [32] (Lord Sumption).
85 Sir William Blackstone, *Commentaries on the Laws of England* (9th ed, Callaghan, 1915) Vol 1, 125.
86 (2013) UKSC 39, [68] (Lord Reed).
87 (2011) 243 CLR 181; *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319, where French CJ was in a 4:3 majority striking down an executive direction.
88 (NSW) 1996 HCA 24; (1996) 189 CLR 51.

89 French, above n 63, 3.

90 Justice Griffiths, 'Keynote: Developments in Judicial Review Affecting Migration' (speech delivered at the Law Council of Australia CPD Immigration Law Conference, Sydney, 24 February 2017) 12–15 discusses proportionality in judicial review of administrative action. His Honour refers to Professor Allars' identification of proportionality as one of three 'paradigms' of unreasonableness. However, he also cites French CJ as stating, in *Attorney General re the State of South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, [55], that proportionality is not a legal doctrine.

91 French, above n 63, 10.