

The Honourable Robert French AC

(b. 19.3.1947) (Chief Justice from 2008-2017)



AUSTRALIAN
CONSTITUTION
CENTRE



The French Court marks a notable era in the High Court's history when it comes to the development of constitutional law principles. The Court developed for the first time a considered and robust set of limitations on the scope of executive power, especially in regard to the expenditure of money. These limitations foreshadow a greater body of jurisprudence that will no doubt be developed over the years and decades to come. They amount to a very significant contrast to the traditional approach taken by the Court towards legislative power, particularly in how the limitations on executive power are infused with federal considerations.

By Harry Hobbs, Andrew Lynch and George Williams

Robert French was born in Perth in 1947. He attended the St. Louis School and then the University of Western Australia, where he graduated with a Bachelor of Science in 1968, majoring in physics. He continued at the University gaining a Bachelor of Law in 1971. French was President of the University's Liberal Club and

served as the Treasurer of the Student Guild. At the age of 22 in 1969, he contested the seat of Fremantle for the Liberal Party lost to Kim Beazley, who later went on to become the Labor Deputy Prime Minister and Opposition Leader. In 1972 French was admitted as a barrister and solicitor in Western Australia. He played a central role in establishing the Aboriginal Legal Service in Western Australia. The Hawke Government appointed him to the Federal Court in 1986. From 1994 to 1998 was the inaugural President of the National Native Title Tribunal, and from 2001 to January 2005 he was president of the Australian Association of Constitutional Law. He was one of the Foundation Fellows of the Australian Academy of Law. In 2008, was appointed as the first Western Australian Chief Justice of the High Court by Prime Minister Kevin Rudd.

French is known for his commitment to federalism principles and for working for the rights of the Aboriginal and Torres Strait Islander peoples. During his period as Chief Justice the *Williams v Commonwealth* cases, also known as the chaplaincy cases were decided, which had the effect of limiting Federal Government spending power.

In 2011, French was the Chief Justice when the High Court invalidated Commonwealth legislation that was designed to send asylum seekers to Malaysia. It was found that this legislation did not meet the Commonwealth obligations for protection of refugees required by the *Migration Act 1958*.

Chief Justice French was known to have considered himself to be 'one among equals' rather than the 'first among equals', which created a collegiate working relationship in the Court. Chief Justice French was appointed a Companion in the General Division of the Order of Australia in 2010. After his retirement in 2017, French was appointed to oversee 'the Justice Project' by the Law Council of Australia. This national review is aimed at smoothing the path to justice for those facing significant economic and social disadvantage. He has also been appointed the 15th Chancellor of The University of Western Australia.

Chief Justice French's quotes in constitutional decisions that encapsulate the vision of him as Chief Justice

1. In *South Australia v Totani* [2010] HCA 39; 242 CLR 1, French CJ confirmed that the rule of law underlies the Constitution, stating at [73] that:

The rule of law, upon which the Constitution is based, does not vary in its application to any individual or group according to the measure of public or official condemnation, however justified, of that individual or that group. The requirements of judicial independence and impartiality are no less rigorous in the case of the criminal or anti-social defendant than they are in the case of the law-abiding person of impeccable character.

(Principle: the rule of law)

2. His Honour also stressed the importance of judicial independence, stating (at [1]) that:

Courts and judges decide cases independently of the executive government. That is part of Australia's common law heritage, which is antecedent to the Constitution and supplies principles for its interpretation and operation. Judicial independence is an assumption which underlies Ch III of the Constitution, concerning the exercise of the judicial power of the Commonwealth. It is an assumption which long predates Federation. ...

(Principle: the separation of powers)

3. French CJ has repeatedly noted the importance of judicial restraint in assessing the constitutional validity of legislative or executive action. For example, in *Rowe v Electoral Commissioner* [2010] HCA 46; 243 CLR 1, French CJ emphasised that Parliament has "considerable discretion as to the means which it chooses to regulate elections", and that (at [29]):

If a law subject to constitutional challenge is a law within the legislative competency of the Parliament that enacts it, the question whether it is a good law or a bad law is a matter for the Parliament and, ultimately, the people to whom the members of the Parliament are accountable. ...

(Principle: the separation of powers)

4. Similarly, in *McCloy v New South Wales* [2015] HCA 34; 89 AJLR 857, French CJ, Kiefel, Bell and Keane JJ stated (at [77]) that:

In a system operating according to a separation of powers, judicial restraint should be understood to require no more than that the courts undertake their role without intruding into that of the legislature.

(Principle: the separation of powers)

5. In *Tajjour v New South Wales*; *Hawthorne v New South Wales*; *Forster v New South Wales* [2014] HCA 35; 254 CLR 508, French CJ stated at [36] that:

Courts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments.

6. However, French CJ has also reaffirmed that (*Tajjour* at [31]):

The Court should not give a strained meaning to statutes in order to avoid the possibility of constitutional invalidity. Parliament's choice of language must be respected, even if the unavoidable consequence of that choice is constitutional invalidity which cannot be cured by statutorily mandated reading down.

(Principle: the separation of powers) (key word: Constitutional invalidity)

7. On the proper approach to constitutional interpretation, French CJ stated in *Fortescue Metals Group Limited v The Commonwealth* [2013] HCA 34; 250 CLR 548, that the relevant constitutional provisions (ss 51(ii) and 99) should be interpreted (at [16]):

[In] a conservative spirit which nevertheless recognises that a written constitution should be able, consistently with textual limitations, to accommodate changing circumstances.

(key word: Constitutional interpretation)

8. On the interaction between the common law and the Constitution, French CJ explained in *Assistant Commissioner v Pompano* [2013] HCA 7; 252 CLR 38 at [2]:

The common law informs the interpretation of the Constitution and statutes made under it. It carries with it the history of the evolution of independent courts as the third branch of government and, with that history, the idea of a court, what is essential to that idea, and what is not.

