STATUTORY CONSTRUCTION AS AN EXPRESSION OF CONSTITUTIONAL RELATIONSHIPS: APPROACHES OF THE FRENCH HIGH COURT

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A central theme of the High Court's approach during the tenure of French CJ has been to identify the process of statutory construction as an expression of the constitutional relationship between different arms of government, and between government and the governed.

The enactment of a statute by Parliament expresses the will of the democratically elected legislature as an institution of government. The meaning of the statutory text which Parliament employs must be understood by many people. Members of the enacting Parliament will read the text to understand the legal effect of the enactment. Officers of executive governments must understand the laws they are called on to administer. Courts must give meaning to statutes which apply to circumstances that may extend beyond the subjective contemplation of those who drafted and enacted the text. Private corporations and individuals, and lawyers advising them, must understand the legal rights and obligations which the statute creates.

The rules of statutory construction govern the way in which meaning is given to the statutory text which Parliament chooses to enact. Those rules have constitutional significance. They express the constitutional relationship between legislative, executive and judicial arms of government. They affect and reflect the political accountability of members of Parliament to the electorate, and impact on the capacity of the governed to comprehend the laws which regulate their conduct.

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Constitutional relationship between the different arms of government

One of the early decisions of the French Court identified the way in which the rules of statutory construction express the constitutional relationship between parliaments and the courts. In *Zheng v Cai*,[1] the court observed:

> It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws … the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy. (citations omitted)

This observation has been adopted and applied in a number of later decisions of the court.[2]

The passage identifies a constraint on the courts' development of the common law rules of statutory construction. The legitimacy of the process depends on the application of known rules, which may derive from the common law or from statutes such as the *Acts Interpretation Act 1901* (Cth), to statutory text which is ordinarily professionally drafted by parliamentary counsel. While individual legislators may have differing degrees of affinity with those rules, the Parliamentary process produces legislation which is drafted with those rules in mind.

The constitutional relationship described in *Zheng* constrains the manner in which the courts develop or alter the common law rules. The theory breaks down if the rules are changed in a way that undermines the assumptions on which the statutory text has been prepared.

Objective intention

The passage quoted from *Zheng* also emphasizes the objective nature of the exercise of statutory construction. The search is for the objective meaning of the

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1 *Zheng v Cai* [2009] HCA 52; (2009) 239 CLR 446 [28].

2 *Lacey v Attorney General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 [43]; *Queensland v Congoo* [2015] HCA 17; (2015) 256 CLR 239; *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247.

language understood in its context, rather than the meaning which may have been subjectively understood by members of Parliament responsible for its passage.

The objective character of the process is illustrated by two cases in which it may be surmised that the subjective intention of the Minister introducing legislation into Parliament was different to the intention which the courts attributed to Parliament.

The first case is *Saeed v Minister for Immigration*.[3] In that case the court was construing s 51A of the *Migration Act 1958* (Cth), which provided that a subdivision of the Act 'is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'. Section 51A was amended after the court in *Re Minister for Immigration; ex parte Miah*[4] rejected the Minister's argument that certain provisions operated as a code. The second reading speech for the Bill introducing s 51A contained statements indicating that the amendment was to exclude common law requirements relating to the common law hearing rule, so that particular codes in the Act would exhaustively state the requirements of natural justice.

The plurality accepted that regard could be had to parliamentary material to identify the objective of addressing certain shortcomings of the legislation identified in *Miah*.[5] However, the court observed that:

> … it is necessary to keep in mind that when it is said the legislative "intention" is to be ascertained, "what is involved is the 'intention manifested' by the legislation" . Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning [31]. (citation omitted)

The court construed the words 'in relation to the matters it deals with' as confining the operation of s 51A to the provision of adverse information to on-shore applicants for comment. That approach was taken even though it confined the operation of the provision in a way that the Minister introducing the amendment to Parliament apparently did not foresee.[6]

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3 *Saeed v Minister for Immigration* [2010] HCA 23; (2010) 241 CLR 252.

4 *Re Minister for Immigration; ex parte Miah* [2001] HCA 22; (2001) 206 CLR 86.

5 *Saeed v Minister for Immigration* [2010] HCA 23; (2010) 241 CLR 252 [34].

6 *Saeed v Minister for Immigration* [2010] HCA 23; (2010) 241 CLR 252 [42].

The second case is the *Malaysian Declaration Case*.[7] That case concerned the Minister's power to make a declaration which had the effect of identifying a specified country as one to which persons claiming asylum could be taken for assessment. The legislation relevantly allowed the Minister to declare that a country provides 'access, for persons seeking asylum, to effective procedures for assessing their need for protection' under the Refugees Convention. The Minister denied that the section required the relevant country to be under a legal obligation to provide that access. In support of that argument, the Minister submitted that the section was enacted with a view to declaring Nauru to be a specified country, at a time when Nauru was not a signatory to the Refugees Convention. The plurality responded to this submission in the following manner:[8]

> The facts asserted do not identify any mischief to which the provision was directed. Rather, it seemed that the facts were put forward as indicating what those who promoted the legislation hoped or intended might be achieved by it. But those hopes or intentions do not bear upon the curial determination of the question of construction of the legislative text. (citation omitted)

Importance of the statutory text

The court has emphasised that the rules of statutory construction require primary attention to be directed to the text of the relevant provisions.[9] There must be regard to the language of the statutory instrument viewed as a whole, considered in its context.[10]

Of course, language takes its meaning from the context in which it is used. That context will include other related statutory provisions, rules of interpretation, the state of the law which existed at the time of the enactment being construed and the object which the legislation seeks to achieve. The court looks to the ordinary meaning of the language which Parliament has chosen to use and considers how those words should be understood in light of the context in which the legislation was enacted. In that sense, as

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7 *Plaintiff M70/2011 v Minister for Immigration (Malaysian Declaration Case)* [2011] HCA 32; (2011) 244 CLR 144.

8 *Malaysian Declaration Case* [128]; see also French CJ [13] to similar effect.

9 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 [39].

10 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [69]; *Plaintiff S4/2014 v Minister for Immigration* [2014] HCA 34; (2014) 253 CLR 219 [42]; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1; *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19; (2016) 90 ALJR 626; *Tabcorp Holdings Limited v Victoria* [2016] HCA 4; (2016) 90 ALJR 376; *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 90 ALJR 228.

the French Court has continued to emphasise, the process of statutory construction must begin and end in consideration of the relevant statutory provisions.[11]

There is a constitutional element to this approach to statutory construction, concerning the relationship between government and the governed. It concerns the capacity of the governed to comprehend the laws which regulate their conduct. French CJ dealt with this in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:[12]

> The starting point in consideration of the first question is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose. That proposition accords with the approach to construction characterised by Gaudron J in *Corporate Affairs Commission (NSW) v Yuill* as: "dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage." In so saying, it must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read. Context is here used in a wide sense referable, inter alia, to the existing state of the law and the mischief which the statute was intended to remedy.

Of course, few citizens will take the time to read legislation and be equipped with the skills to competently construe it. However, the reality is that legislation is read by a range of people of different legal ability, including public officers who administer the legislation and lawyers who may be asked to advise on its effect. Those who seek to discern the meaning of legislative provisions are more likely to properly understand its effect if the statutory language is given its ordinary and natural meaning.

Legislative purpose and its determination

An important part of that context will be the purpose of the legislation. Interpretation Acts at State and federal level give preference to a construction that promotes the purpose or object of an Act to one that does not.[13] The approach of the common law, reiterated by French CJ and Hayne J in *Certain Lloyd's Underwriters v*

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[11] *R v Getachew* [2012] HCA 10; (2012) 248 CLR 22 [11] and cases cited in footnote 21 of that decision.

[12] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 [4].

[13] See, for example, s 15AA of the *Acts Interpretation Act 1901* (Cth); s 18 of the *Interpretation Act 1984* (WA).

Cross,[14] is that the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed. In *AB v Western Australia*,[15] the court noted:

> … the importance of the context, general purpose, policy and fairness of a statutory provision, as guides to its meaning. The modern approach to statutory interpretation uses "context" in its widest sense, to include the existing state of the law and the mischief to which the legislation is addressed. Judicial decisions which preceded the Act may be relevant in this sense, but the task remains one of the construction of the Act. (citations omitted)

In *AB*, the court was concerned with the question of whether a requirement for the issue of a recognition certificate under the *Gender Reassignment Act 2000* (WA) that the subject have the 'gender characteristics' of the reassigned gender related only to external characteristics. Persons who had undergone gender reassignment procedures and had an outwardly male appearance had been denied certificates on the ground that they retained female reproductive organs. In the course of construing the phrase 'gender characteristics' to refer only to external physical characteristics, the court saw the need to read the provisions in light of their purpose as being of particular significance in the case of legislation which protects or enforces human rights. The court said:[16]

> In construing such legislation "the courts have a special responsibility to take account of and give effect to the statutory purpose". It is generally accepted that there is a rule of construction that beneficial and remedial legislation is to be given a "fair, large and liberal" interpretation. (citations omitted)

The importance of legislative purpose was emphasised by French CJ in *Plaintiff M150/2013 v Minister for Immigration*, another of the many cases in which the French Court was required to apply the principles of statutory construction to the *Migration Act*.[17] That Act, and in particular the provisions dealing with the grant and refusal of protection visas, have proved legally and politically problematic under the tenure of French CJ and a number of his predecessors as Chief Justice. In *Plaintiff M150*, the issue was whether s 85 of the Act (authorising the Minister to prescribe a limit on the

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[14] *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 [24], citing *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, 397 and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 381 [69].

[15] *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390 [10].

[16] *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390 [24].

[17] *Plaintiff M150/2013 v Minister for Immigration* [2014] HCA 25; (2014) 255 CLR 199.

number of visas of a specified class that could be granted in a year) applied to protection visas, which s 65A of the Act required the Minister to grant or refuse within a time limit. Once the limit in numbers was reached, the Minister could not grant or refuse a visa application of the specified class. The legislation provided for the mandatory detention of non-citizens without a visa for purposes which included considering a visa application.

The broad purpose of the relevant provisions of the *Migration Act* was identified by the Court in *Plaintiff M61/2010E v The Commonwealth* in the following terms:[18]

> … the Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.

In resolving the tension between the provisions at issue in *Plaintiff M150/2013*, French CJ focused on this purpose of the legislation, and said that:

> General provisions of the Act should not be construed in a way that is inconsistent with that purpose, involving the discharge of international obligations, unless their text plainly requires such a construction …
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> A construction of s 85 which would permit the deferral of a decision about an application for a protection visa by a person in respect of whom Australia has been found to owe protection obligations, and which would expose such a person to the prolongation of immigration detention, would be at odds with the purposes of the statutory scheme of which protection visas are a central part. That construction is not to be preferred [37]-[38].

Other members of the court also had regard to legislative purpose, and the consequences for the detention of an applicant, in resolving the conflict between the provisions. In the cognate case *Plaintiff S297/2013 v Minister for Immigration*,[19] Crennan, Bell, Gageler and Keane JJ said:

> To resolve the conflict by giving primacy to s 65A best achieves the identified purpose of that section within the scheme of the Act, which, in a number of other respects, treats applications for protection visas differently from other classes of visas. Not only does giving primacy to s 65A provide

[18] *Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41; (2010) 243 CLR 319 [27].

[19] *Plaintiff S297/2013 v Minister for Immigration* [2014] HCA 24; (2014) 255 CLR 179 [64].

> the greater certainty for protection visa applicants, but it places the greater limits on the potential for the prolongation of their detention.

Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. This is an objective exercise of statutory construction which does not involve a search for what those who promoted or passed the legislation may have had in mind when it was enacted.[20] Extrinsic material such as Hansard may be considered to identify the mischief to which the Act is directed,[21] but the language used by a Minister in addressing Parliament is not to be used as a substitute for the statutory text.[22]

The French Court has continued to emphasise that legislative purpose is to be ascertained from what the legislation says, rather than any assumption about the desired or desirable reach or operation of the relevant provisions.[23] As the plurality accepted in *Australian Education Union v Department of Education*,[24] in construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose. To do so would be inconsistent with the constitutional role of the courts and the proper relationship between the courts and Australian parliaments. In *Certain Lloyd's Underwriters v Cross*,[25] French CJ and Hayne J adopted the following extrajudicial statement of Spigelman CJ:

> Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case.

When purpose may override text

It is uncontroversial that legislative purpose may provide context which assists in the construction of the terms of the legislation. However, in some circumstances a properly identified legislative purpose may override language, the clear and natural

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20 *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 [25].

21 *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501 [51]-[52].

22 *Lacey v Attorney General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 [61].

23 *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 [26].

24 *Australian Education Union v Department of Education* [2012] HCA 3; (2012) 248 CLR 1 [28].

25 *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 [26].

meaning of which is inconsistent with that purpose. The High Court addressed when and how this might be done in *Minister for Immigration v SZJGV*.[26]

SZJGV concerned a provision of the *Migration Act* which applied for the purpose of 'determining whether' a person claiming refugee status had a well-founded fear of being persecuted for a relevant reason. The legislation required those to whom it applied to 'disregard any conduct engaged in by the person in Australia' unless the person satisfied the Minister that he or she 'engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee'. The identified purpose of this provision was to ensure that an applicant for a protection visa could not rely on, or gain advantage from, conduct engaged in within Australia for the purposes of strengthening his or her claim. However, the Tribunal had relied on conduct in Australia in concluding that applicants were not actually members of a persecuted group. The question was whether conduct in Australia could be taken into account in deciding that a person was not a refugee.

Hayne J, in dissent, considered the language of the provision to be 'intractable' and thought that it was not possible to construe the provision as allowing regard to be given to conduct tending to show that the claim for refugee status should not be accepted.[27]

Crennan and Kiefel JJ gave greater weight to the legislative purpose, seeing the statement that 'the context, general purpose and policy of a statutory provision may be the surest guides to construction' as apposite.[28] They saw the literal approach as having results which were both inconvenient and improbable, suggesting an alternative approach which 'more closely conforms to the legislative intent' to be preferable.[29] They read the provision, by reference to the identified purpose, as concerned only with conduct that would strengthen the person's claim for refugee status, and saying nothing about conduct which was adverse to the claim.[30]

French CJ and Bell J were more direct in their approach. They read the word 'whether' as meaning 'that'. So construed, the provision permitted conduct in Australia

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[26] *Minister for Immigration v SZJGV* [2009] HCA 40; (2009) 238 CLR 642.

[27] *Minister for Immigration v SZJGV* [2009] HCA 40; (2009) 238 CLR 642 [21].

[28] *Minister for Immigration v SZJGV* [2009] HCA 40; (2009) 238 CLR 642 [47].

[29] *Minister for Immigration v SZJGV* [2009] HCA 40; (2009) 238 CLR 642 [63].

[30] *Minister for Immigration v SZJGV* [2009] HCA 40; (2009) 238 CLR 642 [64]-[65].

to be considered in determining the absence, but not the presence, of a well-founded fear of persecution.[31] In reading the provision in that way, French CJ and Bell J took a 'realistic approach' to dealing with statutory language whose ordinary meaning is plainly at odds with the statutory purpose. They applied English decisions which allowed for the insertion or omission of words to correct 'obvious drafting errors'. They identified the limits of the approach as follows:[32]

> Three matters of which the court must be sure before interpreting a statute in this way were the intended purpose of the statute, the failure of the draftsman and parliament by inadvertence to give effect to that purpose, and the substance of the provision parliament would have made. The third of these conditions was described as being of "crucial importance". Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation.

French CJ, Crennan and Bell JJ returned to consider this approach in their majority judgment in *Taylor v The Owners – Strata Plan 11564*.[33] In that case the question was whether a limit on the award of damages formulated by reference to the 'claimant's gross weekly earnings' applied to a *Lord Campbell's Act* claim by the dependents of a deceased worker. Could the reference to the 'claimant's' earnings be read as the earnings of the claimant or the deceased? The majority rejected the proposition that a purposive approach may never allow reading of a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. They said:

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

The majority said that the task remains the construction of the words the legislature has enacted, and that any modified construction must be consistent with the

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31 *Minister for Immigration v SZJGV* [2009] HCA 40; (2009) 238 CLR 642 [12].

32 *Minister for Immigration v SZJGV* [2009] HCA 40; (2009) 238 CLR 642 [9], citing Lord Nicholls of Birkenhead in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592; [2000] 2 All ER 109, 115. Lord Nicholls' conditions were themselves an adaptation of three conditions identified by Lord Diplock in *Wentworth Securities v Jones* [1980] AC 74, 105.

33 *Taylor v The Owners – Strata Plan 11564* [2014] HCA 9; (2014) 253 CLR 531.

language in fact used by the legislature. Noting that the approach in England laid emphasis on the task as construction and not judicial legislation, the majority said:

> In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the Constitution [40]. (citation omitted)

The majority regarded the statutory language in *Taylor* as incapable of identifying the gross weekly earnings of the deceased.

Harmonious results

Another contextual consideration will be other laws which deal with the same subject matter or field of operation as that dealt with by the statutory provision being construed. The court has regularly applied the injunction, given in *Project Blue Sky Inc v Australian Broadcasting Authority*, to construe legislation on the prima facie basis that its provisions are intended to give effect to harmonious goals in a way that maintains the unity of all statutory provisions.[34]

Two recent decisions of the court illustrate the application of the general principle, which operates both between internal provisions of the same statute and between different statutes which share a field of operation. The rule is that the legislation should be construed in a way which best achieves a harmonious result,[35] and that '[c]onstruction should favour coherence in the law'.[36]

The first decision, *Commissioner of Police (NSW) v Eaton*,[37] involved reconciling the provisions of different statutes. The question in that case was whether a provision of the *Police Act 1990* (NSW), allowing the Commissioner of Police to dismiss a probationary officer at any time and without giving any reasons, was subject to unfair dismissal provisions of the *Industrial Relations Act 1996* (NSW). In holding that it was not, the plurality applied the principle of construction which presumes a later general enactment to not interfere with the operation of an earlier special provision unless it

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[34] See, for example, *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1 [31]; *Plaintiff S297/2013 v Minister for Immigration* [2014] HCA 24; (2014) 255 CLR 179 [25]; *Plaintiff M150 of 2013 v Minister for Immigration* [2014] HCA 25; (2014) 255 CLR 199 [49].

[35] *Commissioner of Police (NSW) v Eaton* [2013] HCA 2; (2013) 252 CLR 1 [78].

[36] *Plaintiff S4/2014 v Minister for Immigration* [2014] HCA 34; (2014) 253 CLR 219 [42].

[37] *Commissioner of Police (NSW) v Eaton* [2013] HCA 2; (2013) 252 CLR 1.

manifests that intention very clearly.[38] In part, the plurality was influenced by the need to avoid internal inconsistency in the *Police Act*, which implied that the power to dismiss a probationary officer was unfettered.[39]

The second decision is *Plaintiff S4/2014 v Minister for Immigration*.[40] In that case, the Minister decided to consider whether it was in the public interest to allow an off-shore entry applicant to apply for a protection visa, under s 46A of the *Migration Act*. Before deciding that question, the Minister of his own motion granted the applicant a seven-day temporary visa under s 195A of the *Migration Act*. The effect of doing so was to preclude the applicant from applying for a visa of any other class. The Minister's purpose in issuing the seven-day visa was to engage the prohibition on applying for a visa of another class. Without a valid visa, the applicant was required to be held in immigration detention. That detention was only authorised for the purpose of removing an unlawful non-citizen from Australia, determining an application for a visa or determining whether to permit a valid application for a visa.

The court applied the principle that 'an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.' The court held that s 46A governed whether and when an unauthorised maritime arrival may make a valid application for a visa. Where the Minister decided to consider whether to exercise the power under s 46A, s 195A was to be construed as not permitting the Minister to grant a visa which prevents the person making an application for any visa other than a visa of a specified class. The court said:

> The construction which has been identified is necessary in order to yield a harmonious operation of ss 46A and 195A and to achieve a construction of and operation for s 195A(2) which allows s 195A to take its place in a coherent statutory scheme for the detention of unlawful non-citizens … the power which the Act provides to the Executive to prolong the detention of a detainee for consideration of the exercise of power under s 46A must be understood as abstracting from the Minister's power under s 195A(2) any power to grant the detainee a visa which is repugnant to the purpose for which prolongation of that detention was justified. When a person's detention is prolonged for the purpose of considering the exercise of the power to permit the detainee to make a valid application for a visa, s 195A(2) does not give power to the Minister to grant a visa which, in

[38] *Commissioner of Police (NSW) v Eaton* [2013] HCA 2; (2013) 252 CLR 1 [46], [92].

[39] *Commissioner of Police (NSW) v Eaton* [2013] HCA 2; (2013) 252 CLR 1 [90], [92].

[40] *Plaintiff S4/2014 v Minister for Immigration* [2014] HCA 34; (2014) 253 CLR 219.

> effect, forbids the very thing which was the subject of uncompleted consideration warranting prolongation of the period of detention [47]. (citation omitted)

Constitutional considerations

There is an inter-relationship between the construction of a statute and the determination of its constitutional validity. The construction of a statute, even one subject to a constitutional challenge, is not divorced from the constitutional restraints on the legislative power of the enacting parliament. French CJ summarised the proper approach in *K-Generation Pty Ltd v Liquor Licensing Court*:[41]

> Before the constitutional validity of a statute is considered its meaning and operation must be ascertained. The point of departure in that exercise is the ordinary and grammatical sense of the words having regard to their context and legislative purpose. Interpretation is also to be informed by the principle that the Parliament, whether of the State or the Commonwealth, did not intend its statute to exceed constitutional limits. It should be interpreted, so far as its words allow, to keep it within constitutional limits. That is a principle of general application. (citations omitted)

The application of this principle is illustrated by the decision in *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (the *Second PSA Case)*.[42]

In an earlier decision (the *First PSA Case)*, the High Court had construed a privative clause in South Australian industrial legislation as precluding judicial review by the South Australian Supreme Court for a failure or refusal to exercise jurisdiction.[43] Subsequently, the High Court held that State legislative power does not extend to depriving a State Supreme Court of its supervisory jurisdiction in respect of jurisdictional error by the executive government of the State, its Ministers or authorities.[44]

In the *Second PSA Case*, which concerned a successor provision in materially the same terms, there was a challenge to an alleged wrongful failure to exercise jurisdiction,

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41 *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501 [46]. See also the cases cited in *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 [41].

42 *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* [2012] HCA 25; (2012) 249 CLR 398.

43 *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132.

44 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531.

which if established would involve jurisdictional error. As construed in the *First PSA Case*, the provision would be invalid and infringe the constitutional limitation on State legislative power which the High Court had subsequently identified.

The construction adopted in the *First PSA Case* was held to be wrong, substantially because the court did not take account of the incapacity of State legislatures to take from their Supreme Courts the authority to grant relief for jurisdictional error (which was not appreciated when the earlier case was decided).[45] In the *Second PSA Case*, the court saw the language of the provision, which allowed for judicial review 'on the ground of excess or want of jurisdiction' as apt to include all species of jurisdictional error, including those derived from a failure to exercise jurisdiction.

Consistently with that general approach, the conferral of a statutory power in general terms may be construed as subject to an implicit requirement that the power be exercised within constitutional limits.

In *Wotton v Queensland*,[46] the court dealt with a challenge to Queensland provisions which prohibited a person from interviewing a prisoner on parole without the permission of the CEO of the department. The Act conferred a broadly expressed discretion on a parole board to impose conditions of parole. It was contended that the prohibition, and the power so far as it authorised conditions prohibiting the plaintiff from attending meetings without approval or receiving payments from the media, infringed the implied constitutional freedom of political communication about government and political matters. An issue of statutory construction which arose in that case concerned the manner in which generally expressed discretionary powers (to grant permission and impose parole conditions) should be construed in light of constitutional limitations on the legislative power of the Queensland Parliament.

The plurality applied the following rule of statutory construction. Where a discretion, though granted in general terms, can be lawfully exercised only if certain limits are observed, the grant of the discretionary power is construed as confining the exercise of the discretion within those limits.[47] The challenged provisions were

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45 *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* [2012] HCA 25; (2012) 249 CLR 398 [16], [60].

46 *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1.

47 *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 [10].

construed as requiring the CEO and parole board to have regard to the constitutional restraint on legislative power in exercising their statutory discretion. So construed, the provisions were found to be valid.[48]

The principle of legality

A central focus of the French Court has been the principle of statutory construction known as the 'principle of legality'. French CJ described the principle in the following terms in *K-Generation Pty Ltd v Liquor Licensing Court*:[49]

> There is also a well-established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law. That is to say, there is a presumption against a parliamentary intention to infringe upon such rights and freedoms. (citations omitted)

French CJ identified the rationale for the approach by adopting the following statement of Lord Hoffman:

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

So explained, the principle of legality is an aspect of the Australian democratic process. It also explains the constitutional relationship between the courts and parliaments in relation to the enactment and interpretation of laws affecting fundamental common law principles. As French CJ noted in *South Australia v Totani*:[50]

> [The principle of legality], well known to the drafters of legislation, seeks to give effect to the presumed intention of the enacting Parliament not to interfere with such rights and freedoms except by clear and unequivocal language for which the Parliament may be accountable to the electorate. Save to the extent that it imposes something approaching a formal requirement of clear statutory language, the principle of legality does not constrain legislative power … it is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the

48 *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 [31]-[33].

49 *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501 [47].

50 *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 [31].

> Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted or qualified.

In *Saeed v Minister for Immigration*,[51] the plurality recognised that the principle of legality governs the relationship between Parliament, the executive and the courts. They adopted the following statement of Gleeson CJ in an earlier case:[52]

> The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.

In *International Finance*,[53] French CJ placed a caveat on the principle of legality and the related principle that where possible, a statute should be construed as operating within the limits of legislative power. He cautioned against construing a statute in a way that is artificial or departs markedly from the ordinary meaning of the statutory text. Two reasons were advanced for this caveat. The first was that:

> if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity [42].

The second reason was that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. French CJ observed:

> To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished. Moreover, there is a real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning [42].

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51 *Saeed v Minister for Immigration* [2010] HCA 23; (2010) 241 CLR 252 [15].

52 *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 [21].

53 *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319.

The court applied the principle of legality in *Lacey v Attorney-General (Qld)*.[54] State legislation provided that, on a Crown appeal, the Queensland Court of Appeal 'may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper'. The question was whether this empowered the court to vary a sentence absent express or inferred error by the sentencing judge. After referring to the historical treatment of Crown appeals against sentence as an exceptional intrusion on the common law's protection against double jeopardy,[55] the plurality said that:

> common law principles of interpretation would not, unless clear language required it, prefer a construction which provides for an increase in the length of the sentence without any need to show error by the primary judge.

This was said to be a specific application of the principle of legality. In the view of the plurality, the conferral of a discretion on the Attorney General to seek a different sentence from the Court of Appeal without the constraint of any threshold criterion tipped the scales of criminal justice in a way that offended 'deep rooted notions of fairness and decency'. Such a construction was not 'lightly to be taken as reflecting the intention of the legislature'.[56] This application of the principle of legality was relied on in finding that the unfettered discretion to vary a sentence arose only once error by the primary judge had been demonstrated.[57]

Another application of the principle of legality was noted by French CJ in *Fazzolari v Parramatta City Council*,[58] in the course of construing a legislative restriction on a power to compulsorily acquire land. The rule identified was that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights.

A further manifestation of the principle of legality is found in *DPP (Cth) v Keating*,[59] where the court held that a clear statement of legislative intent is required before a statute would be construed as imposing retrospective liability for a serious Commonwealth offence.

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54 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573.

55 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 [17].

56 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 [20].

57 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 [61]-[62].

58 *Fazzolari v Parramatta City Council* [2009] HCA 12; (2009) 237 CLR 603 [40]-[43].

59 *DPP (Cth) v Keating* [2013] HCA 20; (2013) 248 CLR 459 [47]-[48].

The French Court has regularly invoked the principle of legality when the rights and freedoms potentially impacted by legislation have been regarded as 'fundamental'. The scope of the principle has not been exhaustively defined. In *Momcilovic v The Queen*,[60] French CJ observed:

> The range of rights and freedoms covered by the principle has frequently been qualified by the adjective "fundamental". There are difficulties with that designation. It might be better to discard it altogether in this context. The principle of legality, after all, does not constrain legislative power. Nevertheless, the principle is a powerful one. It protects, within constitutional limits, commonly accepted "rights" and "freedoms". It applies to the rules of procedural fairness in the exercise of statutory powers. It applies to statutes affecting courts in relation to such matters as procedural fairness and the open court principle, albeit its application in such cases may be subsumed in statutory rules of interpretation which require that, where necessary, a statutory provision be read down so as to bring it within the limits of constitutional power. It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.
>
> The common law "presumption of innocence" in criminal proceedings is an important incident of the liberty of the subject. The principle of legality will afford it such protection, in the interpretation of statutes which may affect it, as the language of the statute will allow. (citations omitted)

In *Lee v NSW Crime Commission*,[61] Gageler and Keane JJ explained the scope of the principle of legality in the following terms:

> Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values [313].

Gageler and Keane JJ, with whom Crennan J agreed on this point,[62] saw the limitation in the principle as deriving from its rationale and the circumstances in which the presumption will not arise or will be rebutted. They said:

> The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values

60 *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 [43]-[44].

61 *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 [313].

62 *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 [126].

> from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.
>
> The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that "[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve" [313]-[314].

As we shall now see, the application of the principle of legality largely explains the division of opinion between different judges of the High Court as to whether statutes authorise the compulsory examination of accused persons.

The companion principle

The constitutional relationship between parliaments and the courts expressed in the rules of statutory interpretation is premised on the application of known rules. Those rules, which may be excluded by a parliament acting within constitutional limits, are compatible with the democratic process because laws are drafted knowing that the rules will be applied to the statutory text. This basis of the constitutional relationship between different arms of government limits the court's ability to develop new common law principles or presumptions, except in a very incremental manner. That premise of the relationship between parliaments and the courts means that the French Court has had little opportunity for innovation in the way the common law requires courts to construe statutes. Consistently with its statements about the common law rules as expressions of the constitutional relationship between different arms of government, the French Court has not made radical changes to those rules.

However, there is one development which has occurred in the common law rules under the French Court which, in my view, can fairly be regarded as an innovation. That is the development of the 'companion principle' which, in combination with the principle of legality, confines the circumstances in which laws will be read as impacting on the accusatorial nature of a criminal trial.

The name 'companion principle' was drawn from the language used by Mason CJ and Toohey J in *Environmental Protection Authority v Caltex Refining Co Pty Ltd*.[63] In that case Caltex, which was subject to criminal prosecution for a pollution offence, received a court 'notice to produce', seeking documents which the prosecutor sought to use to prove Caltex's guilt at trial. Caltex also received a statutory notice under the relevant environmental legislation in the same terms. Caltex resisted the production of the documents required by the notices. Questions of law were stated which asked whether a corporation was entitled to privilege against self-incrimination and whether there was an entitlement to issue the statutory notice for the purpose of obtaining material for use in the prosecution. There was no dispute that the court notice to produce was validly issued, and the only question which arose in relation to the notice to produce was whether a corporation was entitled to rely on the privilege against self-incrimination. In the course of finding that the common law privilege against self-incrimination did not apply to corporations, Mason CJ and Toohey J said:[64]

> Accepting that … the privilege does … protect the individual from being compelled to produce incriminating books and documents, it does not follow that the protection is an essential element in the accusatorial system of justice or that its unavailability in this respect, at least in relation to corporations, would compromise that system. The fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown would remain unimpaired, as would the companion rule that an accused person cannot be required to testify to the commission of the offence charged.

Mason CJ and Toohey J went on to hold that the statutory notice was validly issued. This was essentially on the basis that, as the court's own processes enabled the prosecution to compel production of the documents, there was no reason for construing the provision empowering the issue of the statutory notice restrictively.[65]

In *EPA v Caltex*, there was no suggestion in the majority judgments that, apart from the privilege against self-incrimination, the accusatorial nature of the criminal trial provided a reason for confining the power to issue the court's notice to produce or the statutory notice.

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63 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

64 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503.

65 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 507.

A majority of the French Court adopted the passage quoted above in *X7 v Australian Crime Commission*.[66] In that case a person charged with serious Commonwealth drug offences was summonsed to a compulsory examination under the *Australian Crime Commission Act 2002* (Cth) (ACC Act). The examination was to be conducted in private, and the examiner had power to direct that evidence not be published. Where the examinee claimed privilege against self-incrimination, his or her answers were not admissible in criminal proceedings. The question was whether the ACC Act authorised the examination of a person charged with a Commonwealth indictable offence on topics concerning the subject matter of the charged offence. The majority found that it did not.

The principal majority judgment in *X7* was that of Hayne and Bell JJ, with whom Kiefel J agreed in reasons which proceeded along similar lines. They referred to *EPA v Caltex* and criminal procedure legislation which provided that 'at every stage, the process of criminal justice is accusatorial'. If provisions of the ACC Act were to permit the compulsory examination of a person charged with the offence about the subject matter of the pending charge they would 'effect a fundamental alteration of the process of criminal justice'.[67] Applying the principle of legality, Hayne and Bell JJ held that such an alteration 'can only be made if it is made clearly by express words or necessary intendment',[68] expressing the view that:

> Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has

[66] *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92.

[67] *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92 [118].

[68] *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92 [119], [125].

> been laid by being required to answer questions about the subject matter of the pending charge [124].

French CJ and Crennan J were in dissent. A critical point of difference was that they saw the safeguards in the legislation, particularly the power of the examiner to protect the person examined against direct or indirect use of the material obtained, as capable of preventing a compulsory examination occasioning an unfair burden on the examinee when defending criminal charges. To the extent that the examinee would nevertheless be affected, that consequence is necessarily implied by the terms of the statutory provisions.[69]

The court returned to the interaction between the presumption of legality and the companion principle in *Lee v NSW Crime Commission*.[70] The issue in that case was whether provisions of criminal property confiscation legislation authorised the examination, before the Supreme Court of New South Wales, of persons charged with a criminal offence. The Act expressly provided that answers were not admissible in criminal proceedings but did not preclude derivative use of the information acquired in a criminal prosecution.

The majority of the court in *Lee* determined that the power could be exercised for that purpose. On this occasion, French CJ, Crennan, Gageler and Keane JJ comprised the majority and Hayne, Kiefel and Bell JJ dissented. At least some of the dissentients regarded the majority's decision as inconsistent with *X7*.[71] French CJ identified the issue to be determined in the following terms:

> In some cases, a person under statutory examination may already be facing criminal charges and find himself or herself being asked questions touching matters the subject of those charges. Whether a statute authorises a compulsory interrogation of an accused person in those circumstances is a question of statutory interpretation. The courts do not interpret a statute to permit such questioning unless it is expressly authorised or permitted as a matter of necessary implication. When the text, context and purpose of a statute permit a choice to be made, the courts will choose that interpretation which avoids or minimises the adverse impact of the statute upon common law rights and freedoms. However, subject to constitutional limits, where a parliament has decided to enact a law which abrogates such a right or freedom, its decision must be respected [3].

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69 *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92 [57].

70 *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196.

71 The most strident critic was Hayne J at [61]-[70].

The reasons of different members of the court in *Lee* were detailed and are not easy to adequately summarise here. However, the majority did rely on the fact that the NSW legislation provided for examination by the Supreme Court, rather than an executive body as was the case in *X7*. French CJ referred to the conduct of an inquiry parallel to a person's criminal prosecution as a contempt of court by the executive, and noted that it was not suggested that the Supreme Court could be in contempt of itself or any other court. Judicial sensitivity to the impact of an examination on the accusatorial character of a criminal trial would inform whether and how any examination would be conducted.[72] Crennan J was influenced by the Supreme Court's powers to control any examination ordered, so as to prevent the prosecution from obtaining any unfair forensic advantage not obtainable under ordinary trial procedures.[73] Gageler and Keane JJ saw the language and purpose of the provision as inconsistent with a limitation where a person was charged with an offence. They construed the provision as not authorising the making or implementation of an examination order where to do so would give rise to a real risk of interference with the administration of justice. However, they said that such a risk would not arise by reason only of an overlap between the subject matter of the examination and criminal proceedings that have commenced but not been completed.[74]

The court returned to consider the companion principle in *Lee v The Queen* (*Lee No 2*).[75] That case was concerned with whether the prosecution's unauthorised possession of information acquired in a compulsory interview gave rise to a miscarriage of justice. For present purposes, the significance of the case lies in the statement of the companion principle by all members of the court (French CJ, Crennan, Kiefel, Bell and Keane JJ):

> Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*. The principle is so fundamental that "no attempt to whittle it down can be entertained" albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.

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72 *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 [47]-[49].

73 *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 [151].

74 *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 [335].

75 *Lee v The Queen* [2014] HCA 20; (2014) 253 CLR 455.

> The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof [32]-[33].

The concept of the companion principle as an aspect of the accusatorial nature of a criminal trial in our system of criminal justice, whereby an accused person cannot be compelled to assist the prosecution to make its case, was affirmed in *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*[76] by French CJ, Kiefel, Bell, Gageler and Keane JJ. Their Honours accepted that:

> the companion principle is a fundamental aspect of a criminal trial, which is not to be "whittled down" by an expansive interpretation of legislation that is not clear in its intention. (citation omitted)

However, in *Boral* (which concerned an application for discovery of documents by a respondent to civil contempt proceedings) no criminal trial was in prospect, and the language of the rule of court authorising orders for discovery was applied according to its tenor.[77]

In *R v Independent Broad-based Anti-corruption Commissioner*,[78] the plurality quoted *Boral*, but held that the companion principle did not apply at a point prior to the accused being charged. The plurality referred to the principle of legality as meaning that 'common law rights' will not be taken by a court to have been displaced by legislation unless the intention to do so is 'expressed with irresistible clearness'.[79] They saw the rationale of the companion principle to be the protection of the forensic balance between prosecution and accused in the judicial process as it has evolved in the common law.

In *Commissioner of the Australian Federal Police v Zhao*,[80] it was accepted that criminal proceedings can proceed concurrently with civil proceedings under proceeds of crime legislation. In the circumstances of that case the court held that it was appropriate to stay the civil proceedings until the completion of the criminal proceedings, by reason

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[76] *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21; (2015) 256 CLR 375 [36]-[37].

[77] *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21; (2015) 256 CLR 375 [36]-[47].

[78] *R v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8; (2016) 256 CLR 459 (*R v IBAC*) [47] - [48].

[79] *R v IBAC* [40].

[80] *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; (2015) 255 CLR 46.

of the risk of prejudice to the applicant in his or her criminal trial. In that manner, the policy which informs the companion principle might, but does not necessarily, require the exercise of a power to stay forfeiture proceedings under proceeds of crime legislation.

The companion principle and the related operation of the principle of legality are now well established. In both *X7* and *Lee*, the court divided as to whether the legislation authorised the examination of persons charged with a criminal offence in relation to matters at issue in a pending trial. The difference between the minority and majority positions in those cases seems to have concerned the application rather than the content of the principle of legality and the companion principle.

Statutory construction and judicial review

Judgments of the French Court have focused on the concept of jurisdictional error as a ground for judicial review, and emphasise the centrality of statutory construction in the identification of jurisdictional error.

In *Kirk v Industrial Court (NSW)*,[81] the plurality adopted a passage of the reasons of Hayne J in *Re Refugee Review Tribunal; ex parte Aala*[82] which described the concept of jurisdictional error in the following terms:

> There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

It follows from this definition of the concept that, where action taken in the purported exercise of a statutory power is impugned on the ground of jurisdictional error, the only question is whether what was done was authorised by the empowering legislation. The answer to that question will turn on the identification of the limits of the authority conferred by the relevant statutory provision, and an analysis of the facts to

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81 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 [66].

82 *Re Refugee Review Tribunal; ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 [163].

ascertain whether those limits have been exceeded. This may also be described as identifying the conditions for the valid exercise of the statutory power.

Many of the traditional grounds of judicial review expressly turn on the construction of the legislation which authorises the relevant administrative act. Grounds of review such as taking irrelevant considerations into account, or failing to take relevant considerations into account, are based on a construction of legislation as either prohibiting or requiring consideration of those matters.[83] A ground of review which asserts improper purpose asserts that a power was exercised for a purpose not authorised by the relevant Act.[84] A ground which asserts misapprehension of the nature or limits of the relevant statutory power[85] reflects a requirement of the law that a decision-maker understands his or her statutory powers and obligations.[86]

Where the alleged jurisdictional error arises out of a failure to comply with legislative requirements, it is necessary to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. Answering that question is also a matter of construction of the relevant legislation, having regard to the language of the relevant provision and the scope and object of the whole statute.[87]

An assertion of jurisdictional error in relation to the exercise of a statutory power therefore involves a contention that the holder has purported to exercise his or her power other than in accordance with the conditions for the valid exercise of the relevant power. The identification of those conditions which mark the limits of the holder's authority to decide is purely a matter of statutory construction. Those limits are to be identified by the application of common law and statutory rules of construction to the language which Parliament has chosen, understood in the context in which it appears.

Jurisdictional fact

A number of the French Court's decisions have concerned the identification of 'jurisdictional facts' which limit the authority conferred by a statute. A 'jurisdictional

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83 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-40.

84 *Thompson v Randwick Corporation* (1950) 81 CLR 87; *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, 186, 233.

85 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 [72]; *Craig v South Australia* (1995) 184 CLR 163, 177-178.

86 *Minister for Immigration v Li* [2013] HCA 18; (2013) 249 CLR 332 [71].

87 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [91]-[93].

fact' is a condition for the existence of jurisdiction, or authority, to exercise a statutory power.[88] The legislature may decide to make the valid exercise of a statutory power conditional upon the existence of some set of circumstances. If those circumstances do not exist then the person to whom the statutory power is directed does not have the authority to exercise the power. In reviewing the lawfulness of the purported exercise of the power the court may determine whether those circumstances in fact exist.

The phrase 'jurisdictional fact' has been described as awkward.[89] The use of the phrase may have a greater tendency to confuse than enlighten the debate. For one thing the 'jurisdictional fact' need not be a fact, as is illustrated by the *Malaysian Declaration Case*. That case concerned the validity of the Minister's declaration of Malaysia as a specified country to which claimants for refugee status could be taken for the assessment of their claims. The power, in s 198A(3)(a) of the *Migration Act*, was expressed in the following terms:

> The Minister may:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
>
> (other requirements were then specified)

The section did not expressly specify the conditions for the existence of the power, ie the 'jurisdictional facts' on which the valid exercise of the power depended. Was it necessary that the specified country actually (in the court's assessment) provided the relevant access? Or was it necessary that the Minister form an opinion that the country to be specified provided that access? French CJ explained the distinction between the two kinds of 'jurisdictional fact', in the context of an express provision, in the following terms: [90]

> The term "jurisdictional fact" applied to the exercise of a statutory power is often used to designate a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion. The criterion may be "a complex of elements". When a criterion conditioning

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88 *Gedeon v Commissioner of the NSW Crime Commission* [2008] HCA 43; (2008) 236 CLR 120 at [43]; *Craig v South Australia* (1995) 184 CLR 163, 177.

89 *Minister for Immigration v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 [130].

90 *Plaintiff M70/2011 v Minister for Immigration (Malaysian Declaration Case)* [2011] 244 HCA 32; (2011) 244 CLR 144 [57].

> the exercise of statutory power involves assessment and value judgments on the part of the decision-maker, it is difficult to characterise the criterion as a jurisdictional fact, the existence or non-existence of which may be reviewed by a court. The decision-maker's assessment or evaluation may be an element of the criterion or it may be the criterion itself. Where a power is expressly conditioned upon the formation of a state of mind by the decision-maker, be it an opinion, belief, state of satisfaction or suspicion, the existence of the state of mind itself will constitute a jurisdictional fact. If by necessary implication the power is conditioned upon the formation of an opinion or belief on the part of the decision-maker then the existence of that opinion or belief can also be viewed as a jurisdictional fact. (citations omitted)

The court in the *Malaysian Declaration Case* divided on the question of whether the 'jurisdictional fact' was that the specified country provided the relevant access or whether the 'jurisdictional fact' was the Minister's properly formed opinion as to that matter. French CJ thought that it was the latter, and was influenced by the consideration that the matter identified was an evaluative task and an executive function to be carried out according to law. He said:[91]

> Absent clear words, the sub-section should not be construed as conferring upon courts the power to substitute their judgment for that of the Minister by characterising the matters in sub-paras (i)-(iv) as jurisdictional facts.

By contrast, the plurality regarded the Minister's submission that the existence of the specified matters (in the court's assessment) were not jurisdictional facts as paying 'insufficient regard to the text, context and evident purpose' of the provision.[92]

This difference in the construction of s 198A did not lead to a different outcome in the *Malaysian Declaration Case*. The jurisdictional fact which French CJ identified was an opinion formed in good faith of the matters set out in s 198A(1)(a), properly construed. Proper construction of the provision was a necessary condition for the validity of the declaration.[93] French CJ said:

> Another way of approaching the scope of the ministerial power under s 198A(3) is to treat it as being, by necessary implication, conditioned upon the formation of an opinion or belief that each of the matters set out in s 193A(a)(i)-(iv) is true. The requisite opinion or belief is a jurisdictional fact. If based upon a misconstruction of one or more of the matters, the

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91 *Malaysian Declaration Case* [58].

92 *Malaysian Declaration Case* [108].

93 *Malaysian Declaration Case* [59].

> opinion or belief is not that which the sub-section requires in order that the power be enlivened [60].

Therefore, despite the awkwardness of the expression, the French Court has continued to use of the term 'jurisdictional fact' in identifying jurisdictional error, ie the absence of necessary conditions for the valid exercise of a statutory power.

Reasonableness

Administrative decisions are not infrequently challenged on the ground of 'unreasonableness', although seldom with success. In *Eshetu*,[94] Gleeson CJ and McHugh J observed:

> Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as "illogical" or "unreasonable", or even "so unreasonable that no reasonable person could adopt it". If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.

In *Minister for Immigration v Li*,[95] the French Court explained how a question of reasonableness may arise, as a matter of statutory construction or by way of inference of error, in a way which has particular legal consequences. *Li* concerned the Migration Review Tribunal's refusal to adjourn proceedings in the exercise of a discretion conferred by s 363(1)(b) of the *Migration Act*. The plurality imported the requirement of reasonableness into the Act as a matter of construction:

> Because s 363(1)(b) contains a statutory discretionary power, the standard to be applied to the exercise of that power is not derived only from s 357A(3) [which required that the Tribunal act in a way that was fair and just], but also from a presumption of the law. The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably [63].

Similarly, Gageler J saw reasonableness as a condition for the valid exercise of a statutory power. He identified the general principle as being that when a discretionary power is statutorily conferred on a repository, the legislature is taken to have intended that the discretion be exercised reasonably.[96]

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94 *Minister for Immigration v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 [40].

95 *Minister for Immigration v Li* [2013] HCA 18; (2013) 249 CLR 332.

96 *Minister for Immigration v Li* [2013] HCA 18; (2013) 249 CLR 332 [64]-[65], [88]-[89].

Gageler J also identified a related principle of statutory construction that, where the formation of an opinion is a prerequisite to an exercise of a statutory power or the performance of a statutory duty, there may be an implied condition that the opinion be reasonably formed.[97] Gageler J said of these principles of construction:

> Each is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to reason within limits set by the subject matter, scope and purposes of the statute [90]. (citation omitted)

The reasons of the plurality in *Li* also explain a conceptually distinct way in which the characterisation of a decision as unreasonable may have legal consequences. This consequence derives not only from the interpretation of the statute conferring a power, but from the inferences which may be drawn from the outcome of its purported exercise. The plurality drew an analogy with the approach taken in the appellate review of a judicial discretion, exemplified by the decision in *House v The King*.[98] An appellate court may infer error in the exercise of a judicial discretion if the result is 'unreasonable or plainly unjust'. The plurality in *Li* observed:

> The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification. [76]

The idea that a decision regarded as unreasonable may give rise to an inference that some other kind of jurisdictional error has been made was explained by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*,[99] in the following terms:

> If the result appears to be unreasonable on the supposition that [the decision-maker] addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in

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97 *Minister for Immigration v Li* [2013] HCA 18; (2013) 249 CLR 332 [90], citing *R v Connell; ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 432.

98 *House v The King* (1936) 55 CLR 499, 504-505.

99 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360.

> some way he must have failed in the discharge of his exact function according to law.

That is, jurisdictional error may be inferred from the result reached in the purported exercise of a statutory power, on the basis that the result could not have been arrived at if no jurisdictional error was made (and the result is not explicable by a non-jurisdictional error of law). In *Li*, this passage was cited with approval by French CJ[100] and the plurality.[101]

Procedural fairness

For some time there was heated debate about whether the rules of procedural fairness were common law rules or derived by statutory implication. The French Court has adopted the latter view. In *Saeed*,[102] the plurality observed:

> The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power of the [relevant] kind.

The plurality held that observation of the implied requirements of natural justice was a condition attached to the statutory power, and a decision made without complying with the condition would not be authorised by the statute. Applying the principle of legality, the plurality held that principles of natural justice can be excluded only by 'plain words of necessary intendment'.[103]

In *Plaintiff M61/2010E v The Commonwealth*,[104] the question of whether the rules of natural justice conditioned the non-statutory executive power of the Commonwealth was raised but not resolved. The case concerned the conduct of inquiries to inform the Minister of matters relevant to the exercise of a statutory power to grant a protection visa, which the Minister had decided to consider exercising. The court considered that the inquiries were conducted under the *Migration Act*. The court said that it was

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[100] *Minister for Immigration v Li* [2013] HCA 18; (2013) 249 CLR 332 [27].

[101] *Minister for Immigration v Li* [2013] HCA 18; (2013) 249 CLR 332 [68].

[102] *Saeed v Minister for Immigration* [2010] HCA 23; (2010) 241 CLR 252 [12].

[103] *Saeed v Minister for Immigration* [2010] HCA 23; (2010) 241 CLR 252 [13]-[15].

[104] *Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41; (2010) 243 CLR 319.

unnecessary to consider whether 'identifying the root of the obligation remains an open question'.[105]

Gummow, Hayne, Crennan and Bell JJ returned to this issue in *Plaintiff S10/2011 v Minister for Immigration*, where their Honours said:[106]

> The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai* was identified as the interaction between the three branches of government established by the Constitution. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above. It is in this sense that one may state that "the common law" usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.

The following position was regarded as settled by the court in *Minister for Immigration v SZSSJ*:[107]

> … procedural fairness is implied as a condition of the exercise of a statutory power through the application of a common law principle of statutory interpretation. The common law principle, sufficiently stated for present purposes, is that a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual. The presumption operates unless clearly displaced by the particular statutory scheme.

Conclusion

In the manner described above, the French Court's approach to statutory construction is both informed by and affects the relationship between different branches of government and between government and the governed. The search for meaning is objective, and does not depend on the subjective aspirations of individual legislators.

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[105] *Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41; (2010) 243 CLR 319 [74].

[106] *Plaintiff S10/2011 v Minister for Immigration* [2012] HCA 31; (2012) 246 CLR 636 [97].

[107] *Minister for Immigration v SZSSJ* [2016] HCA 29; (2016) 90 ALJR 901 [75].

Emphasis on the ordinary meaning of the statutory text facilitates the understanding of those who are subject to the law's command.

The French Court has also recognised the limits on the courts' own authority. A purposive approach is often appropriate, but purpose must be determined from what the legislation says rather than what the judge considers to be desirable. The courts must be conscious of the line between interpretation and legislation to avoid violating the separation of powers for which the Constitution provides. The courts also act on rules of construction known to those who prepare and enact laws, the text of which can achieve the desired policy by being formulated in a way that takes account of the rules.

Emphasis has been given to the principle of legality. By requiring clear language before a law will be construed as interfering with fundamental rights, this principle demands political accountability for such interference and reduces the opportunity for it to be inadvertently effected. The court's approach also recognises the right of parliaments, acting within constitutional limits, to effect fundamental changes to the law by using clear language.

The rules of construction, applied to statutory text, provide the foundation for judicial review of administrative decisions. The court's approach has been to construe discretionary powers as implicitly confined within constitutional limits, in a way that reduces the opportunity for legislation to be invalid while requiring those administering legislation to act consistently with constitutional requirements. Concepts of procedural fairness and reasonableness as grounds for judicial review derive from the application of rules of statutory construction to the words used by the legislature.

In these ways, the French Court has identified the rules of statutory construction as recognising and giving effect to the constitutional relationship between different branches of government with respect to the making, interpretation and application of laws, and the relationships between government and the governed.