
Wavering alternations of valour and caution: Commercial and regulatory litigation in the French CJ High Court

Peta Spender*

This article examines commercial and regulatory litigation in the High Court since Robert French was appointed Chief Justice in 2008. An analysis of six cases reveals a spectrum of valour and caution, courage and coyness. The French High Court has asserted judicial leadership and a public responsiveness in some areas but in others it has retreated to a narrow incrementalism that pulls away from broader issues and leaves important questions unanswered. Although the article concludes that it is too early to determine a particular judicial method of the French High Court (as compared to some of its predecessors), it raises questions about what should be expected of Australia's highest appellate court in this area.

INTRODUCTION

[H]ow... [can] the “perpetual process of change in the body of common law”... “be reconciled with the principle of authority and the rule of *stare decisis*?” Beneath the dry and niggling distinctions, the flat frustrating contradictions, behind the bold dynamic precept suddenly emasculated or the mouldering precedent revived by a new constellation of facts, behind the wavering alternations of judicial caution and judicial valour, coyness and courage, the lawyer of imaginative intelligence must be conscious of the elements of a perennial mystery. He is challenged to ask what magic at the heart of the system of *stare decisis* can transform a symbol of immobility into a vehicle of change?¹

Robert French was appointed as Chief Justice of the High Court of Australia in September 2008. He brought a wealth of commercial law experience to the High Court, due in part to his previous experience as a Justice of the Federal Court of Australia from 1986. In October 2012, a colloquium was held at the Australian National University College of Law where the commercial law jurisprudence of the High Court under the leadership of Chief Justice French (the “French High Court”) was examined. In exploring this general theme, each of the speakers chose to present in a particular area of commercial law jurisprudence.

As part of the colloquium, the present author chose six cases that illustrate the approach of the French High Court to commercial litigation. Unfortunately, the term “commercial litigation” does not accurately describe the eclectic group of six cases that has been selected. These cases reveal elements of the French High Court’s approach to private law litigation involving commercial parties both institutionally and by the judicial method adopted by the court in individual cases. All of the cases reflected a wider controversy or garnered a reasonable level of public and/or professional interest. None of the cases involved public law² but many raised issues about regulation, either directly (because a regulator was a party to the proceedings) or indirectly (because of a public debate about regulation that was generated by the case).

* Professor of Law, ANU College of Law, Australian National University. The author wishes to thank Michael Tarlowski (for his research and his appreciation of Julius Stone’s scholarship), as well as Stephen Bottomley, Alex Bruce, Tony Hartnell, Pauline Ridge, Daniel Stewart and the other participants in the *Hartnell Colloquium 2012: An Exploration of Commercial Law Under the High Court of Chief Justice French* held at the ANU College of Law on 26 October 2012. The author is also grateful for the initiatives of the Public Information Committee of the High Court, which allowed her easy access to the filed material and transcripts of the cases discussed in this article and the speeches of Chief Justice French.

¹ Stone J, “The Ratio of the Ratio Decidendi” (1959) 22 *Modern Law Review* 597 at 597.

² Noting the following caveat made by Chief Justice French in 2009 that public law is “the ether in which private law moves in a regulated society”: French R, “Public & Private Law: The Intersection” (*La Trobe Lecture*, Melbourne, 30 October 2009) p 7, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj30oct09.pdf>.

Relying on elements of both commercial (particularly corporate) and litigation law, this article speculates about whether the French High Court is developing a distinctive judicial style that differentiates it from its predecessors, particularly the Gleeson and Mason courts. Although the French High Court is well known for its robust independence in areas such as judicial review,³ commercial litigation law might demand qualities of Australia's highest court that differ substantially from public law. This article concludes that the performance of the French High Court as a forum to resolve questions about commercial litigation is mixed and the sample of cases too small to support sweeping conclusions. Nevertheless, this is an opportunity to consider what ought to be expected from the highest court in this area, what elements of judicial method promote both certainty and change in commercial litigation and (referring to the words of Stone quoted above) what "magic" can transform commercial and regulatory law through judicial interpretation?

The article first examines the French High Court's general assertion of the authority of the courts and considers whether the French High Court favours a more public model of participation in litigation and engagement generally. It then explores the judicial method of the French High Court through several cases where certainty has sometimes been generated by clear statements or, alternatively, where judicial segues or "dry niggling distinctions"⁴ have distorted the message sent by the court. Finally, it considers whether, in Dworkin's terminology, a justificatory ascent may be discerned in this small group of cases, where judicial decision-making strives to unify the law under an umbrella of meta-principles; questions whether such an ascent should form part of a commercial litigator's expectations; and compares the emerging approach of the French High Court to previous courts, particularly the Mason and Gleeson courts.

The project and methodology

Although the term "commercial litigation" generally has a particular meaning that involves litigation between commercial participants (often competitors), this article takes an expansive view of the term and considers cases that involve actions by regulators and cases that deal with litigation as a commercial enterprise. In the latter category, cases that are shaping the commercial activity of litigation funding are particularly important. The cases are examined from the perspective of a lawyer who might be advising a commercial entity or be on the receiving end of action by a commercial entity or a regulator. The term "commercial litigation" has both a conjunctive and disjunctive operation, therefore in some of the chosen cases the litigation aspect predominates and in others the commercial aspect is more obvious. Sometimes both subject areas intersect in equal measure.

The following discussion straddles both substantive and procedural law, but its focus is primarily upon the procedural. At times the focus is entirely procedural because it draws out different aspects of the court as a forum for litigation. At other points the cases demonstrate the litigious elements of a commercial or regulatory dispute.

The cases have been chosen for their potential long-term salience. Although the cases emerge from a relatively short period of time – four years – they have been selected to attempt to capture both long and short-term perspectives that have so far been created by the French High Court. In some respects, this is a random set of disputes that has been tailored by the special leave requirement.⁵ Therefore, chance plays a significant role in what happens, as identified by Lord Rodger of Earlsferry:

³ Exemplified by *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 and *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)* (2011) 244 CLR 144.

⁴ Stone, n 1 at 597.

⁵ By, inter alia, establishing a question of law that is of public importance or because the interests of the administration of justice require consideration of the issue raised by the case by the High Court: *Judiciary Act 1903* (Cth), s 35A. Note that the cases falling within the second limb of s 35A, comprising cases where the interests of justice in the particular case require a grant of special leave, are referred to as "visitation cases". See Hayne J, "Advocacy and Special Leave Applications in the High Court of Australia" (*The Victorian Bar – Continuing Legal Education*, 22 November 2004), http://www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej_22nov04.html.

[It is] a cardinal error to imagine that, even with a modern system of appeal courts, generally speaking, legal developments are the result of some grand strategy on the part of the judges that has gradually unfolded and continues to unfold.⁶

With that warning in mind, the following six cases have been chosen because of their general importance to commercial litigation, as broadly defined above:

- *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175;
- *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522;
- *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498;
- *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455;
- *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75; and
- *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 86 ALJR 205.

These cases have been chosen because they collectively:

- ride on a growing collective controversy (eg litigation funding);
- test the authority of the French High Court and (sometimes) its role as the third branch of government;
- demonstrate how the French High Court operates as a body that espouses certain principles, eg open justice or democratic engagement; and
- demonstrate strengths and flaws in the judicial method adopted by the French High Court in commercial law cases.

On the final point, most of the following criticisms are focussed upon the narrowness of the French High Court's decisions, which has so far prevented guidance on some critically important legal principles and underlying social disputes that the legal doctrine should mediate. This creates uncertainty. Certainty is of course critical to any area of law but has particular resonance in commercial law because law often plays an *ex ante* role in commercial dealings.⁷ This may be contrasted with other areas where social actors do not necessarily base their actions upon an understanding of the legal consequences, eg tort or family law, or, more particularly, plan their activity around particular legal outcomes or advantages. The narrowness comes in various forms. It can be narrowness as to interpretation (*International Litigation Partners*), or it could be narrowness of the conduct of the matter, which means that the appellate decision turns upon a narrow procedural point rather than substantive issues (*Hellicar*).

This begs the question about what is wanted or needed from Australia's highest court in commercial law. The court is obviously needed to state and clarify the law, but in the author's view it must be mindful of its role as the third arm of government even within the realm of commercial disputes. The French High Court is very aware of its role as a constitutional court and exercises considerable authority in that area, but the perception of the importance of its leadership may not have extended to commercial law. Arguably, leadership in commercial and regulatory law is now more important than ever as conventional models of geopolitical power and sovereignty transition to non-state actors, such as corporations. In this environment, there needs to be confidence that there is an expansive understanding of judicial leadership being utilised when disputes about corporate or market power are adjudicated.

⁶ Lord Rodger of Earlsferry, "What are Appeal Courts for?" (2004) 10 *Otago Law Review* 517 at 518.

⁷ Kennedy D, "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard Law Review* 1685 at 1688.

Judicial method, certainty and the role of the highest appellate court

In passing, it is worth considering how the judicial method of the French High Court compares with its predecessors. The consensus of the commentators seems to be that the Gleeson Court reverted to a form of legalism, which was more characteristic of the Dixon Court.⁸ Legalism generally refers to “the text as a touchstone”.⁹ However, Gray notes that it also advocates a specific methodology by which legal texts may be interpreted and Gageler explains that this methodology reflects:

strict analytical and conceptual techniques of formal legal argument to form an interpretive judgment as to the meaning of a constitutional or statutory text or the scope of a judicial precedent. The role of the Court [is] to ascertain that meaning and then simply to apply it to the circumstances of the case at hand.¹⁰

Zines also posits that legalism places an emphasis upon adherence to the doctrine of precedent.¹¹ Therefore, a legalistic methodology generally “advocates incremental change in the development of law consistent with an orthodox, common law approach [and] change may only be apparent over an extended timeframe”.¹²

Several commentators have concluded that legalism had a significant influence on the Gleeson Court. This is evident from the emphasis that Gleeson CJ placed upon legalism in his judgments and when speaking extra-judicially, for example, in the Boyer Lectures in 2000.¹³ However, the exact form of legalism that was embraced by the Gleeson Court is the subject of debate.¹⁴

It is too early to tell whether the French High Court has or will develop an overarching judicial methodology. However, in the area of commercial law an interesting comparator is the Mason Court. The Mason Court is regarded as one of the high points of judicial activism, more so in common law than in constitutional law.¹⁵ The Mason Court favoured the articulation of broad legal principles and the adaptation of the common law with more attention to policy considerations and a preference for substance over form.¹⁶ Pierce states that the Mason Court recognised an obligation to use individual cases to formulate broadly applicable legal principles that were communicated to a wider audience rather than merely to the parties to litigation. This audience included lower court judges, lawyers, and legislators.¹⁷ In Pierce’s observations (based on a survey of senior appellate judges), the Mason Court appeared to be undertaking what Dworkin calls a “justificatory ascent”.¹⁸

Dworkin used this term as a normative descriptor of judicial decision-making that strives to unify the law under an umbrella of meta-principles that define a particular legal and political system.¹⁹ Several informants interviewed by Pierce in his study of the Mason Court noted that justificatory

⁸ Gray R, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, 2008) p 13. Note, however, that Gray distinguishes between Dixonian legalism and the approach taken by the majority of the Gleeson Court at pp 13-14, 38-41.

⁹ Mason A, “The Interpretation of the Constitution in a Modern Liberal Democracy” in Samford C and Preston K (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) p 13.

¹⁰ Gageler S, “Legalism” in *Oxford Companion to the High Court* (Oxford University Press, 2001) p 431.

¹¹ Zines L, *The High Court and the Constitution* (4th ed, Butterworths, 1997) p 435.

¹² Gray, n 8, p 19.

¹³ Gleeson M, “The Rule of Law and the Constitution” (*Boyer Lectures*, 2000). See also Gleeson M, “Judicial Legitimacy” (2000) 12 *Judicial Officers’ Bulletin* 41.

¹⁴ Zines L, *The High Court and the Constitution* (5th ed, Federation Press, 2008) p 608.

¹⁵ Coper M, “Concern About Judicial Method” (2006) 30 *Melbourne University Law Review* 554 at 565.

¹⁶ McHugh M, “The Constitutional Jurisprudence of the High Court: 1989-2004” (speech delivered at the *Inaugural Sir Anthony Mason Lecture in Constitutional Law*, Sydney, 26 November 2004) quoted in Coper, n 15 at 565.

¹⁷ Pierce J, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) p 86.

¹⁸ Dworkin R, “Order of the Coif Lecture: In Praise of Theory” (1997) 29 *Arizona State Law Journal* 353 at 356, discussed in Pierce, n 17, pp 86-87.

¹⁹ Dworkin, n 18.

ascent was a hallmark of that court. As one interviewee, a Federal Court judge, said:

[T]he High Court tried to modernise, to rationalise the law. Identifying overarching principles was the big theory. The fault of the common law is that disparate rules can develop hundreds of years that aren't cohesive... The High Court was hell bent on trying to work out overarching principles.²⁰

Pierce's interviews with members of the Mason Court showed that they candidly acknowledged the drive to establish overarching principles and considered that this distinguished them from their predecessors.²¹ By way of further example, in a public lecture that was delivered by Sir Anthony Mason just after Australia had abolished appeals to the Privy Council, the then Chief Justice of the High Court pointed to a number of areas where the views of the High Court had departed from those of the House of Lords. He then said that in future the High Court would "proceed to develop a coherent common law that is specifically suited to our needs... a common law for Australia that is best suited to our conditions and circumstances".²²

The development of contract doctrine by the Mason Court illustrates this quality. The Mason Court transformed contract by advancing doctrines such as estoppel (*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen* (1990) 170 CLR 394) and relief against forfeiture exemplified by *Stern v McArthur* (1988) 165 CLR 489. The developments were exciting to lawyers who were interested in the dynamic development of the law.

However, Australian judicial orthodoxy and practitioners place great weight on the law providing *certainty*, particularly in commercial law due to its involvement in structuring transactions, and Pierce's study found that the Mason Court often engendered uncertainty and unpredictability in law.²³ Clearly there will always be a tension between certainty and change in the common law but Stone has noted its generational quality, stating:

[T]he *ratio decidendi* [is] the indispensable organic link between generations both of men and of emerging legal precepts... If *stare decisis* seems to import a mood of resting on the old ways, of stability and even stasis in the legal materials, then history compels us to observe that this apparent mood overlays a process of constant and often dynamic change.²⁴

One important difference between the Australian legal landscape during the Mason Court era and now is that legislation is the dominant form of law-making.²⁵ Most of the cases discussed below involve statutory interpretation. *Prima facie*, this provides less scope for a judicial method that is based upon principles – or at least shifts its focus to the development of principles via interpretation. However, as stated by French CJ:

The dominance of statute law in our society might suggest that [the] interstitial or incremental law-making role of the judges [in the common law] has been much diminished. That is not the case because statutes require interpretation and contested interpretations require choices to be made between competing meanings. The making of such choices can be seen as a species of law-making. It is, however, a species of law-making necessarily constrained by the requirement that the judges confine themselves to interpretation within the range of meanings which the words can bear and not engage in rewriting laws to attain desired outcomes.²⁶

²⁰ Pierce, n 17, p 87.

²¹ Pierce, n 17, p 87.

²² Mason A, "The Wilfred Fullagar Memorial Lecture" (1987) 13 *Monash University Law Review* 149 at 154, discussed in Lord Rodger of Earlsferry, n 6 at 526.

²³ Pierce, n 17, p 46.

²⁴ Stone, n 1 at 599.

²⁵ For an interesting analysis of this, see eg Calabresi G, *Common Law for the Age of Statutes* (Harvard University Press, 1982); Ramsay I, "Corporate Law in the Age of Statutes" (1992) 14 *Sydney Law Review* 474; Beatson J, "Has the Common Law a Future?" (1997) 56 *Cambridge Law Journal* 291; Kingsford Smith D, "Interpreting the Corporations Law: Purpose, Practical Reasoning and Public Policy" (1999) 21 *Sydney Law Review* 161.

²⁶ French R, "The Judicial Function in an Age of Statutes" (*Goldring Memorial Lecture*, Wollongong, 18 November 2011) p 8, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18nov11.pdf>.

The modern role of courts recognises their function as both the “authorised interpreters” of the law²⁷ (including the common law) and as the third branch of government.²⁸ This role of the High Court as a third branch of government has both public and private elements and French CJ has asserted that the rule of law requires the recognition of boundaries beyond which incremental judicial law-making will not trespass.²⁹

Although the French High Court is being viewed over a relatively short period of time, an interesting question is how certainty is engendered in the long term. One further question is whether a principled approach to judicial law-making is more certain in the long term rather than an iceberg-like incrementalism that pulls away from broader questions and leaves important issues undecided.

The development of principle may be facilitated by obiter dicta but Blackshield argues that the High Court has been “ambivalent in its attitude to obiter dicta”.³⁰ He predicted that the ambivalence was likely to continue and underscored “the breadth of the choices open to an appellate court in developing the law of the land”.³¹ In this respect French CJ may share the wider institutional hesitation about dicta. For example, he has expressed caution about judicial activism, which he has defined judicial activism as denoting “a willingness to write opinions brimming with dicta”.³² However, this author suggests that more obiter dicta might provide gentle guidance about the broader issues raised by cases without waving the flag of judicial activism.

As discussed below, the French High Court has asserted the authority of courts (and judicial officers) in *Aon Risk Services* but has also shown a willingness to invite more public participation in the court through its public access scheme. *Roadshow* demonstrates that this willingness may extend to public involvement in commercial litigation. . In terms of judicial method, the court has on occasion generated certainty through clear guiding statements in cases such as *Equuscorp* and *Katauskas* but it also engaged in a judicial segue in *International Litigation Partners*. In *Hellicar*, although the case concerned the fate of the James Hardie directors and therefore prompted considerable public interest, the French High Court confined the field of enquiry to a very narrow point, thereby resisting any temptation to engage in justificatory ascent.

THE AUTHORITY OF COURTS – AON RISK SERVICES

Background

Case management was introduced into Australian courts during the 1990s to curtail the chronic delays that had arisen due to a combination of the party control of litigation and indulgences given by courts. The last two decades have seen a move away from adversarialism and party control of litigation as the dominant paradigms of civil procedure to a system where courts control the progress of individual matters in their lists by the use of case management practices. Case management has been facilitated by the development of overarching purpose provisions – ie legislation or court rules that allow the courts to interpret procedural rules and individual orders to promote an overriding purpose.³³

²⁷ French R, “Litigating in a Statutory Universe” (*Victorian Bar Association 2nd Annual CPD Conference*, Melbourne, 18 February 2012) p 8, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18feb12.pdf>.

²⁸ French R, “Essential and Defining Characteristics of Courts in an Age of Institutional Change” (*Supreme and Federal Court Judges Conference*, Adelaide, 21 January 2013) p 3, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21jan13.pdf>.

²⁹ French R, “Opening Address” (*Conference on Judicial Reasoning: Art or Science?*, National Judicial College of Australia and Australian Academy of Forensic Science, Australian National University, Canberra, 7 February 2009) p 2, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj7feb09.pdf>.

³⁰ Blackshield T, “Obiter Dicta” in *Oxford Companion to the High Court*, n 10, p 508.

³¹ Blackshield T, “Obiter Dicta” in *Oxford Companion to the High Court*, n 10, p 508.

³² Grano JD, “Delimiting the Concept of Judicial Activism: Flag Desecration and Abortion” (1989) 60 *Cooley Law Review* 439 at 441, cited in French R, “Judicial Activists – Mythical Monsters?” (2008) 12 *Southern Cross University Law Review* 59 at 69.

³³ Colbran S, Spender P, Jackson S and Douglas R, *Civil Procedure: Commentary and Materials* (5th ed, LexisNexis, 2012) p 37.

Although judges originally resisted case management, most of them adapted quickly and favourably to the new regime. In an early decision in *Sali v SPC* (1993) 67 ALJR 841, the Mason Court recognised that a court is entitled to consider the effect of a request for adjournment on court resources and on other litigants waiting in the court lists as well as the interests of the parties and that the issue was not merely resolvable by an order for costs. However, ardent implementation of case management challenges notions of individual justice, therefore in *Queensland v JL Holdings* (1997) 189 CLR 146, the Brennan Court held that justice is the paramount consideration. The court held that whilst case management is a relevant consideration, it should not prevail over proper adjudication of issues between the parties.

Zealous reformers, such as Ipp, then a judge of the West Australian Supreme Court, condemned *JL Holdings* as a “major limitation to reform” that undermined efficiency and professionalism.³⁴ In some ways, *JL Holdings* typified a long-term confrontation between the legal profession and the judiciary. The latter were increasingly introducing overriding purpose clauses into court rules, which emphasised that disputes need to be dealt with quickly, inexpensively and efficiently, but the profession nevertheless continued to seek indulgences in the forms of adjournments and amendments to pleadings. *JL Holdings* was decided in the midst of the affray and the judgment had a “damaging influence on the conduct of litigation”, whether it had “been correctly understood or not”.³⁵

Aon Risk Services

By 2008, it was well understood in the legal profession that the High Court, now led by French CJ, was open to applications for special leave to overturn *JL Holdings* and the Australian National University (ANU) provided it with an opportunity to do so. ANU was in a dispute with its insurers and insurance brokers regarding the damage caused to the Mount Stromlo observatory during the 2003 Canberra bushfires. Two days into a hearing that had been allocated four weeks, ANU applied for an adjournment and leave to amend its statement of claim to add a substantial new claim against its insurance broker. ANU asserted that the decision to amend was based on information received during a mediation that had proceeded on the previous day, and that the mediation was confidential and refused to explain further. The judge at first instance and the ACT Court of Appeal held that *JL Holdings* applied to allow the adjournment and amendment notwithstanding that the power to amend was subject to an overriding purpose in r 21 of the *ACT Court Procedure Rules 2006* (ACT), which required the courts to facilitate a just resolution of the real issues in civil proceedings with minimum delay and expense.

The majority judgment in the High Court in *Aon Risk Services* (Gummow, Hayne, Crennan, Kiefel and Bell JJ) stated that an important aspect of the approach taken by the plurality in *JL Holdings* suggested that a party has something approaching a right to an amendment. This is not the case.³⁶ Conversely, the majority continued, the objectives of case management are now expressly stated in r 21 of the *Court Procedures Rules* and the purposes stated in r 21 cannot be ignored.³⁷ In applying an overriding purpose rule such as r 21, the majority also held that the court must take into account the effect of delays and wasted costs on the parties, the courts and other litigants,³⁸ thereby reinstating the decision in *Sali*.

In a separate judgment, French CJ considered that the *JL Holdings* case had been misunderstood but stated that case management considerations and questions of the suitable use of court resources should be given proper weight by courts.³⁹ Importantly, his Honour considered that, when exercising

³⁴ Ipp D, “Opportunities and Limitations for Change in the Australian Adversary System” (paper presented to *Beyond the Adversarial System: Changing Roles and Skills for Courts, Tribunals and Practitioners Conference*, Brisbane, 10-11 July 1997) p 5.

³⁵ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [133].

³⁶ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [96].

³⁷ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [97].

³⁸ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [111].

³⁹ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [6].

its discretion to allow an amendment, the court must consider that the time of the court is a publicly funded resource as well as the need to maintain public confidence in the judicial system.⁴⁰

AON Risk Services is a relatively straightforward case; however, it represents an important part of the armoury of courts and tribunals in conducting case management and imposing sanctions for breach of case management orders. It has been cited in nearly 1,000 decisions on Austlii since it was handed down less than four years ago. This count (of course) would not include the number of times it has been uttered in exasperation from the bench or cited in an *ex tempore* judgment. This is probably one of the highest citation rates of any High Court decision and demonstrates its ongoing importance to judicial authority.

APPELLATE LITIGATION: A PUBLIC OR PRIVATE MODEL? – ROADSHOW

This section explores how appellate courts communicate with litigants and the broader community when engaging in decision-making. It exemplifies the issue by reference to the *Roadshow* case but the standing issue ventilated in that case is only a small and, relatively speaking, minor aspect of a policy developed by the French High Court to encourage public engagement with the court. Significant progress has been made in this respect. The court has developed a new public access scheme designed to promote greater public understanding of the role and functions of the High Court.⁴¹ In 2009, a Public Information Committee was established with the purpose of developing initiatives that would foster better public understanding of the High Court.⁴² The Committee has implemented a number of important programs. These include: the opening of the High Court on Sundays to encourage greater visitor numbers; the development of an excellent new High Court website, making electronic transcripts available to the public within a few hours of the conclusion of a hearing; electronic filing of case submissions that are publicly available on the court's website; and the hosting of an annual lecture series.⁴³ The availability of information about how the High Court operates is unprecedented and there is an enormous public benefit in having easy access to this information. For example, the electronic provision of submissions and transcripts provides researchers with valuable material to more fully understand how the parties' arguments were presented to the court.

Intervention and amici

Does this public engagement extend to private litigation?⁴⁴ Legal scholars conceptualise appellate litigation in a variety of ways but a common distinction is made between the public and private litigation models.⁴⁵

On the private litigation model, only the parties who are directly involved will bring their dispute before the court so that judges can reach a decision specifically tailored to the conflict.⁴⁶ Pierce argues that Australia's judicial orthodoxy conceives litigation mainly in terms of the private model and emphasises judges' responsibility to limit themselves to resolving particular disputes.⁴⁷ He concludes:

[W]hat takes place in a court, even in an appellate court, is conceived first and foremost as a private affair between the immediate parties in the court.⁴⁸

⁴⁰ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [5].

⁴¹ High Court of Australia, *Annual Report 2011-2012* (2012) "Chief Justice's Overview", p 10, <http://www.hcourt.gov.au/assets/corporate/annual-reports/2012annual.pdf>.

⁴² High Court of Australia, n 41, p 43.

⁴³ High Court of Australia, n 41, pp 10, 14, 15, 43.

⁴⁴ *High Court Rules 2004* (Cth), r 44.01.2 defines intervener to include a person who is seeking leave to be heard as *amicus curiae* before the Full Court.

⁴⁵ Pierce, n 17, p 48.

⁴⁶ Fuller L, "Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353.

⁴⁷ Pierce, n 17, p 49.

⁴⁸ Pierce, n 17, p 49.

This private model is clearly dominant in commercial litigation, which has been traditionally conceptualised as a trial between two individuals (or two unitary interests) who are diametrically opposed.⁴⁹

The public model conceives of litigation in broader terms.⁵⁰ Litigation still resolves disputes but has additional effects, including social control, lawmaking, promulgation and enforcement of public norms, and providing a venue to interest groups to pursue policy goals.⁵¹

The conceptualisation of litigation as public or private clearly has consequences for participation by third parties and, in the context of the High Court, Pierce contends that a:

distrust of expanding litigation beyond what the immediate parties seek is illustrated by the comparatively anaemic practice of third-party intervention and *amici curiae* participation in Australian courts.⁵²

However, the French High Court has shown some receptivity to the involvement of a broader audience than the immediate parties in three constitutional law cases – *Wurridjal v Commonwealth* (2009) 237 CLR 309, *Pape v Commissioner of Taxation* (2009) 238 CLR 1 and *Momcilovic v R* (2011) 245 CLR 1. For example, in *Wurridjal*, French CJ dissented from the view of the majority that the application by the *amicus curiae* should not be granted. He stated:

In recent years, this Court has relaxed somewhat its earlier reluctance to permit *amici curiae* to intervene in proceedings. This development partly reflects the greater recognition by the Court of its normative role as a final national court... In recent years, even where, occasionally, this Court has rejected [*amici curiae*] applications, it has commonly permitted written submissions to be tendered by such *amici*... [T]hat course was refused by this Court in the present case. This was so despite the fact that, in the event, the *amici curiae* only sought to tender written materials on international law. I favoured receiving the written materials... Respectfully, I maintain my disagreement with that decision.⁵³

In *Pape*, a concession by the Commonwealth that Mr Pape had standing as an individual taxpayer to challenge the constitutionality of an appropriation was accepted by the High Court. Similarly in *Momcilovic*, the Human Rights Law Resource Centre (HRLRC) was permitted to participate as *amicus* and it made both oral and written submissions regarding the proper construction of provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The HRLRC's submissions were explicitly adopted by French CJ,⁵⁴ Crennan and Kiefel JJ,⁵⁵ and referenced abundantly in the other three judgments.⁵⁶

In *Roadshow*, this somewhat more permissive approach to third party intervention was explored in a private law setting. The French High Court in that case clarified the nature of the interest that must be demonstrated by a party who is seeking leave to intervene, following the test posited by Brennan CJ in *Levy v Victoria* (1997) 189 CLR 579 at 600-605. Brennan CJ in *Levy* held that leave to intervene may be granted where “a substantial affection of a person’s legal interests is demonstrable... or likely”.⁵⁷

The court in *Roadshow* found that a direct affectation will be grounds for the grant of leave to intervene and used the example where someone would be bound by the decision. It also stated that a non-party whose legal interests in other pending litigation is likely to be affected substantially by the

⁴⁹ Chayes A, “The Role of the Judge in Public Law Litigation” (1976) 89 *Harvard Law Review* 1281 at 1282.

⁵⁰ Chayes, n 49; Fiss O, “The Social and Political Foundations of Adjudication” (1982) 6 *Law and Human Behaviour* 121.

⁵¹ Pierce, n 17, p 49.

⁵² Pierce, n 17, p 50.

⁵³ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [261]-[263].

⁵⁴ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [32]-[34].

⁵⁵ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [682]-[685].

⁵⁶ See generally Wachniewski V, *Renovations at the Australian High Court: Making Room for the Public Interest Litigant?* (Honours Thesis, ANU College of Law, 2011) p 32.

⁵⁷ *Levy v Victoria* (1997) 189 CLR 579 at 602.

outcome of the present proceedings will satisfy the precondition. However, an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the court or their effect upon future litigation would not be sufficient for the grant of leave.⁵⁸ The court considered that in cases (such as *Roadshow*) where the parties are large organisations represented by experienced lawyers applications for leave to intervene or to make submissions as amicus would seldom be necessary or appropriate and the applicant must identify with some particularity what he or she seeks to add to the argument that the parties will advance.⁵⁹ This approach is consistent with the United States *Supreme Court Rules*, which state as follows:

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter[s] not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.⁶⁰

Therefore, in *Roadshow* various parties such as ARIA and the Media, Entertainment and Arts Alliance were refused leave because the court found that their submissions were unlikely to add to the submissions made by the parties and an application to be heard as an amicus by the Privacy Foundation was dismissed because it was not sufficiently relevant to the matters that the court had to decide.⁶¹

Roadshow does not demonstrate that the French High Court has embraced a public model of appellate litigation. However, as discussed above, the French High Court has actively pursued a policy of public engagement, and an expanded amicus procedure through the *High Court Rules 2004* (Cth) would be an effective extension of its public access policy. The amicus practice adopted by the United States Supreme Court would be a useful model to consider. It allows attorneys to file amicus briefs that will assist the courts, therefore recognising the role of attorneys as gatekeepers. Certain disclosures are required. For example, where a brief is filed by an entity other than the United States Solicitor General or a government agency it must disclose all parties who made a monetary contribution to fund the preparation or submission of the brief.⁶² The “brief” consists of written submissions and an amicus will be permitted by the court to make oral submissions “only in the most extraordinary circumstances”.⁶³ Amicus briefs are made available on the Supreme Court website and provide a valuable adjunct to the parties’ submissions. Although the purpose of the briefs is to assist the Supreme Court in its deliberations, the briefs will often traverse policy and explain aspects of the context of the case rather than purely focussing on doctrine.⁶⁴

SEARCHING FOR THE JUSTIFICATORY ASCENT – HELLICAR

In the above discussion of the differences between the Gleeson Court and the Mason Court it was noted that the Mason Court was more likely to engage in the justificatory ascent (to coin Dworkin’s term), that is, to use reasoning based on principles rather than adopting a legalistic analysis.

The James Hardie asbestos imbroglio produced some of the most important litigation in the history of Australian corporate law. In this episode of the saga, the Australian Securities and Investments Commission (ASIC) commenced civil penalty proceedings against the directors of James

⁵⁸ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 86 ALJR 205 at [2].

⁵⁹ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 86 ALJR 205 at [6].

⁶⁰ Rule 37(1) of the *Rules of the Supreme Court of the United States* (adopted 19 April 2013, effective 1 July 2013).

⁶¹ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 86 ALJR 205 at [7].

⁶² Rule 37(6) of the *Rules of the Supreme Court of the United States* (adopted 19 April 2013, effective 1 July 2013).

⁶³ Rule 28(7) of the *Rules of the Supreme Court of the United States* (adopted 19 April 2013, effective 1 July 2013). For a general discussion, see Williams G, “The Amicus Curiae and Interveners in the Australian High Court: A Comparative Analysis” (2000) 28 *Federal Law Review* 365 at 374-376.

⁶⁴ For an example of the use of amicus briefs for research and policy analysis, see the discussion of the US Supreme Court judgment in *Morrison v National Australia Bank Ltd*, 130 S Ct 2869 (2010) in Spender P and Tarlowski M, “Adventures on the Barbary Coast: Morrison and Enforcement in a Globalised Securities Market” (2011) 35 *Melbourne University Law Review* 280 at 294-296.

Hardie in February 2007 for breaches of s 180 of the *Corporations Act 2001* (Cth) due to a misleading announcement sent to the Australian Securities Exchange (ASX), which stated that the company's asbestos liabilities were fully funded. By the time the case got to the High Court many of the important issues about directors' duties had been left behind in the New South Wales courts. However, what remained for consideration by the High Court was still exceedingly important: does ASIC owe a duty of fairness when it is conducting litigation and, if so, what is its content? ASIC has the obligation to act as a model litigant but how far does this obligation extend in civil penalty proceedings? This is an issue that is not only well-ventilated in the case law but also in the literature.⁶⁵ Of particular importance is the extent to which the court may impose additional duties upon ASIC that equate with a prosecutor's duty of fairness.

In *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140, the New South Wales Court of Appeal, in a rather flamboyant gesture, held that ASIC's failure to call a witness, Mr Robb, who had prepared the critical board minute that documented the announcement to the ASX meant that it had breached its duty of fairness and this diminished the cogency of the evidence that was called by ASIC. In other words, the Court of Appeal had applied a type of generic discount to the case that had been put forward by ASIC.⁶⁶ This approach was subsequently described by Heydon J in the High Court as "avowedly novel".⁶⁷

Interestingly, the New South Wales Court of Appeal recognised that the prosecutorial duty of fairness had no direct application but nonetheless applied the prosecutorial duty analogically with ASIC's "duty of fairness".⁶⁸ The duty was said to stem from a proposition that "the public interest can only be served if the case advanced on behalf of the regulatory agency does in fact represent the truth, in the sense that the facts relied upon as primary facts actually occurred".⁶⁹

The operation of the "duty of fairness" had a devastating effect upon ASIC's case before the Court of Appeal. It lost. The Court of Appeal stated:

The failure to call Mr Robb means more than disinclination to draw inferences favourable to ASIC's case. Failure of a party with the onus of proof to call an available and important witness, the more so if the failure is in breach of the obligation of fairness, counts against satisfaction on the balance of probabilities.⁷⁰

The Court of Appeal's judgment in *Morley* generated considerable controversy. Einstein and Sheldon concluded that the correctness of the propositions put by the Court of Appeal was a "matter of extreme importance to ASIC, other governmental bodies and to the legal community in general".⁷¹

ASIC appealed to the High Court and during that appeal the respondents did not advance any submissions in support of the Court of Appeal's "duty of fairness", rather they relied upon a conventional analysis of *Blatch v Archer* (1774) 98 ER 969, which assesses the evidentiary impact by the alleged failure of ASIC to call material witnesses.⁷²

In the judgments of the High Court, the majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) found that the premise of the Court of Appeal was false by applying various evidentiary

⁶⁵ See eg Middleton T, "The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC's Civil Penalty Proceedings under the Corporations Act" (2003) 8 C&SLJ 507; Spender P, "Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation" (2008) 26 C&SLJ 249; Comino V, "Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem" (2009) 33 *Melbourne University Law Review* 802.

⁶⁶ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [155].

⁶⁷ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [237].

⁶⁸ *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140 at [775].

⁶⁹ *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140 at [717].

⁷⁰ *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140 at [795].

⁷¹ Einstein C and Sheldon M, "ASIC – How Far Does its Obligation of Fairness Extend" (2011) 26 *Australian Journal of Corporate Law* 112 at 117.

⁷² Respondents' Submissions (Hellicar, Brown, Gillfillan and Koffel) in *ASIC v Hellicar* (Case S174/2011, filed 20 July 2011) at [28].

rules that apply in both civil and criminal proceedings.⁷³ Although the plurality and the concurring judgment of Heydon J accepted that courts and litigants rightly expect that ASIC will conduct any litigation in which it is engaged fairly, the High Court found that the Court of Appeal was wrong to hold that ASIC had breached a “duty of fairness” by not calling the solicitor. It also found that the Court of Appeal further erred in concluding that a failure to call a witness, in breach of a “duty of fairness”, diminished the cogency of the evidence that was called.⁷⁴

Because the respondents’ argument in the High Court proceeded by asserting that the *actual conclusions* reached by the Court of Appeal about the consequences of ASIC not calling Mr Robb could be shown to be correct, without regard to questions of duty and fairness, the plurality in the High Court considered that it was not necessary to consider how the Court of Appeal’s “duty of fairness” was derived or what the content of the duty might be.⁷⁵ The majority judgment in the High Court ultimately despatched the argument by finding that ASIC “worked no unfairness” to the respondents at trial, therefore it was “neither necessary nor desirable to explore the issues about source or content of the asserted duty in any detail”.⁷⁶

In attempting to glean ASIC’s obligations from this case it can be noted, as stated above, that the plurality accepted that the courts and litigants expect that ASIC will conduct any litigation in which it is engaged fairly, stating that “it is convenient to assume, without deciding, that ASIC is subject to some form of duty, even if a duty of imperfect obligation, that can be described as a duty to conduct litigation fairly”.⁷⁷ However, the majority did not directly rule out the operation of the prosecutorial duty of fairness, rather indicating that it had “no direct application”.⁷⁸

In a slightly dangerous move if the prosecutorial duty has no operation, the plurality asked what consequences flow from the failure to call a witness in criminal proceedings, including where there has been a miscarriage of justice that necessitated a retrial.⁷⁹ Although the majority judgment provides a good explanation of the application of rules of evidence to the case it did not answer the vital question about the content of ASIC’s duty.

Some commentators have argued that, because the majority held that the prosecutor’s duty to call material witnesses “had no direct application”, the High Court did not disturb the widely accepted principle that counsel alone retains the right to decide which witnesses should be called in civil proceedings.⁸⁰ However, in the author’s view, the reasoning is tentative and turns on a factual analysis of the evidence that Mr Robb might have given. Consequently, very little may be derived from the judgments about the content of ASIC’s so-called duty of fairness.

The majority has left us wondering.

Heydon J’s judgment is more edifying. His Honour stated squarely that the civil standard applied in the proceedings and the prosecutorial duty of fairness did not. He opined that s 1317L of the *Corporations Act*, which states that in civil penalty proceedings the court “must apply the rules of evidence and procedure from civil matters”, means that the rules that apply to ordinary suits between

⁷³ Eg *Evidence Act 1995* (NSW), s 140; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Jones v Dunkel* (1959) 101 CLR 298; *Blatch v Archer* [1774] ER 2. See generally *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [142]-[146].

⁷⁴ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [9].

⁷⁵ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [148].

⁷⁶ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [148].

⁷⁷ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [147], [152].

⁷⁸ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [140].

⁷⁹ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [152].

⁸⁰ For a discussion of this principle, see Einstein and Sheldon, n 71 at 119, relying on *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 19 FCR 494 at 514; *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157; *Rich v ASIC* (2009) 236 FLR 1.

ordinary civil litigants also apply to civil penalty proceedings.⁸¹ Section 1317E leaves open no room for modifying those rules where the moving party is ASIC. Heydon J further noted that until the Court of Appeal's decision there was no rule of evidence or procedure in civil cases imposing a duty on ASIC to call witnesses. To create that rule would not only change the common law but would also "undermine the legislative regime requiring civil proceedings as the mode of trial for civil penalties".⁸²

Heydon J continued:

[H]ad the legislation made civil penalties recoverable in criminal proceedings, the prosecutor's duty to call witnesses would have applied. But it made civil penalties recoverable in civil proceedings. That excludes any duty of that kind.⁸³

Although French CJ has lamented the tendency of some academics to bemoan "missed opportunities" when criticising particular judicial decisions,⁸⁴ this author will join the chorus and complain that this was a lost opportunity; a moment of caution rather than valour.

Why is the content of the so-called duty of fairness so important?

Perhaps, in Stone's language, the Court of Appeal had engaged in a "bold dynamic precept" that was eventually emasculated,⁸⁵ but the argument before the High Court revealed the vagueness of the recognised duty of ASIC to conduct litigation fairly.⁸⁶ ASICs submissions explained the foundation of the Court of Appeal's "duty of fairness" as follows:

- (a) the body of cases dealing generally with the Crown's obligation as a model litigant;
- (b) the necessity to ensure that there had been a fair trial, and the attributes of such a trial; and
- (c) the various statutory provisions concerning ASIC's powers and obligations.⁸⁷

It was described in the hearing by the then Solicitor-General, Stephen Gageler, as "an aspiration" that had been "translated into some form of legally enforceable obligation".⁸⁸ However, when the High Court attempted to pin down the source of the Court of Appeal's aspiration, it stumbled upon the flimsiness of the foundational elements of the duty of ASIC to conduct litigation fairly, particularly the model litigant obligation.

It is generally understood that the model litigant standard may be traced to *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342, where Griffith CJ referred to the "old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects". In the discussion during the hearing in the High Court in *Hellicar*, it was agreed that the model litigant obligations of the Commonwealth are relevant to the exercise of procedural discretions,⁸⁹ that it is a common law notion that might be a subset of the principle of legality⁹⁰ and that it might have been modified in the federal jurisdiction by the operation of s 64 of the *Judiciary*

⁸¹ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [243].

⁸² *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [243].

⁸³ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [243].

⁸⁴ French R, "Judges and Academics – Dialogue of the Hard of Hearing" (*Inaugural Patron's Lecture*, Australian Academy of Law, Sydney, 30 October 2012) p 13, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj30oct12.pdf>.

⁸⁵ Stone, n 1 at 597.

⁸⁶ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [152].

⁸⁷ Appellant's Submissions in *ASIC v Hellicar* (Case S176/2011, filed 23 June 2011) at [32].

⁸⁸ *Australian Securities and Investments Commission v Hellicar* [2011] HCATrans 293 (25 October 2011) p 36.

⁸⁹ Exchange between Gummow J and Stephen Gageler in *Australian Securities and Investments Commission v Hellicar* [2011] HCATrans 293 (25 October 2011) p 35.

⁹⁰ *Australian Securities and Investments Commission v Hellicar* [2011] HCATrans 293 (25 October 2011) p 36 per Crennan J.

Act 1903 (Cth).⁹¹ Although the model litigant rule is a “self-imposed obligation to observe the highest standards of propriety, professionalism and fairness”, it assumes that “the same procedural rules that govern all”.⁹² It is not an obligation to “fight under some modified rules of engagement”.⁹³

Related to this is the question of whether civil penalty proceedings occupy the “middle ground” between civil and criminal proceedings, as mentioned by the Court of Appeal in *Morley*.⁹⁴ The question was not answered by the plurality in the High Court in *Hellicar*, although Heydon J gave some guidance. There was no reference in the High Court judgments to the substantial debate about this issue or the middle ground literature that was referenced in ASIC’s submissions.⁹⁵

Therefore, although the French High Court recognised that the case raised questions of considerable public importance,⁹⁶ these questions were left unanswered.

The financial media was also left wondering. Marcus Priest in the *Australian Financial Review* concluded that the High Court’s finding that ASIC had a duty to “conduct litigation fairly” did not add much to the model litigant rules.⁹⁷ He also commented that if the decision had gone the other way it would have been much more significant.⁹⁸ The present author agrees with both comments.

The main coverage of the case in the media focussed upon the importance of having accurate board minutes and the need to check them. That seems anticlimactic.

James Eyers, also of the *Australian Financial Review*, stated that the High Court decision – which, like most legal cases, was based on a narrow set of facts – did not displace the need for a thorough policy debate on whether regulation is dissuading directors from joining boards to the detriment of the Australian economy. He then wrote:

[D]irectors looking to the High Court for guidance on the duty of care and the extent they can rely on others will be disappointed: most of the 72 page judgement is taken up with an analysis of why the Court of Appeal got it wrong when it assessed the corporate regulator’s decision not to call a key adviser to give evidence... It seems one of the salient lessons from the James Hardie saga – and countless other corporate cases – is that long-running and expensive litigation often fails to clarify the scope of directors duties.⁹⁹

WAVERING ALTERNATIONS OF JUDICIAL CAUTION AND JUDICIAL VALOUR – KATAUSKAS, EQUUSCORP AND INTERNATIONAL LITIGATION PARTNERS

In this cluster of cases, the French High Court has ruled on issues that are relevant to litigation funding. By and large, neither the Executive nor Parliament has shown much interest in systematically regulating this area. This ostensible lack of interest is well and truly outweighed by the exceptional interest in the area that is shown by lawyers, academics and the courts. However, certain groups have the ear of the federal government. This might explain the amendment to the *Corporations Regulations 2001* (Cth) in July and December 2012, which had the effect of exempting litigation funding schemes

⁹¹ “In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject”: *Judiciary Act 1903* (Cth), s 64. Exchange between Gummow J and Stephen Gageler in *Australian Securities and Investments Commission v Hellicar* [2011] HCATrans 293 (25 October 2011) pp 35-36.

⁹² *Australian Securities and Investments Commission v Hellicar* [2011] HCATrans 293 (25 October 2011) p 33 per Gageler J.

⁹³ *Australian Securities and Investments Commission v Hellicar* [2011] HCATrans 293 (25 October 2011) p 33 per Gageler J.

⁹⁴ *Morley v Australian Securities and Investments Commission* (2010) 247 FLR 140 at [705].

⁹⁵ Appellant’s Submissions in *ASIC v Hellicar* (Case S176/2011, filed 23 June 2011) at [32]ff.

⁹⁶ *Australian Securities and Investments Commission v Hellicar* (2012) 86 ALJR 522 at [5].

⁹⁷ Priest M, “Regulator’s Victory a Lesson to All”, *Australian Financial Review* (4 May 2012).

⁹⁸ Priest, n 97.

⁹⁹ Eyers, “Ruling Leaves Directors in the Dark”, *Australian Financial Review* (4 May 2012).

from the regulation of managed investment schemes in the *Corporations Act* and exempting funders from the requirement to hold an Australian Financial Services Licence (AFSL).¹⁰⁰ The debate about licensing is discussed in more detail below.

These three cases demonstrate the significance of litigation funding as an area of contestation in the courts. In summary, the *Katauskas* and *Equiscorp* cases provide valuable guidance to potential litigants, whereas the reasoning in *International Litigation Partners* avoided the issue by peremptorily (and in this author's view, incorrectly) characterising the litigation funding agreement as a credit facility without a thorough analysis of why it was not a financial product, which would require the relevant litigation funder to hold an AFSL. However, more broadly, it was another "missed opportunity" for the French High Court to interpret the complex definitions in Ch 7 of the *Corporations Act* to test whether a litigation funding agreement is or is not a financial product. This would have a twofold benefit. First, it would clarify the operation of the Ch 7 definitions; and, secondly, it would have highlighted whether there is an analytical fit between the Executive's decision to exempt the funding agreements and how the funding agreements would fair under the unrestrained operation of the Ch 7 definitions without the exemption. In other words, there has been no analysis of whether the agreements are financial products, therefore falling within the requirements of Ch 7 in the absence of the special exemption that was provided by the Executive. This was a "missed opportunity" for the French High Court to exercise its powers as "authorised interpreter" of the law¹⁰¹ and as the third branch of government¹⁰² in a private law setting.

Katauskas

The *Katauskas* case concerned a relatively straightforward question: can a party seek costs from a third party litigation funder? The High Court found that such a party could not and held that a mere agreement to fund litigation without a corresponding obligation to indemnify a party for costs would not give rise to an obligation to the other party to the litigation. This is another example in a series of cases where litigants have tried to characterise litigation funding agreements as an abuse of process.

Rickard Constructions (the original plaintiff) had entered into an agreement with SST Consulting whereby SST agreed to pay legal fees and expenses incurred in the conduct of litigation commenced by Rickard Constructions but not adverse costs orders. Although Rickard Constructions was not a nominal plaintiff and there was no suggestion that the proceedings were conducted for an improper purpose, it was unable to pay the costs awarded to the successful defendants.¹⁰³ The successful defendants therefore sought to recover their costs from SST. Although the general rule in the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) is that costs are not to be ordered against a non-party, r 42.3(2)(c) of the UCPR allowed for costs to be awarded against a non-party who had committed an abuse of process of the court.

The majority judgment in the High Court (French CJ, Gummow, Hayne and Crennan JJ) found that a general proposition that contends that funding another's litigation for reward should amount to an abuse of process was contrary to the earlier Gleeson High Court decision in *Campbells Cash and Carry Pty Ltd v Fostif* (2006) 229 CLR 386.¹⁰⁴ Further, there is no general proposition that someone who funds another's litigation must place the party funded in a position to meet any adverse orders for costs. The mere fact that a funder is to receive a benefit from the litigation does not conclusively mean that the funding arrangement constitutes an abuse of process. In deciding whether there had been an abuse of process, proper weight must be given to the general rule under the UCPR that costs are not to

¹⁰⁰ *Corporations Amendment Regulation (No 6)* (Cth) (dated 12 July 2012, amended 12 December 2012).

¹⁰¹ French, n 27, p 8.

¹⁰² French, n 28, p 3.

¹⁰³ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at [36].

¹⁰⁴ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at [26], citing *Campbells Cash and Carry Pty Ltd v Fostif* (2006) 229 CLR 386.

be ordered against a non-party.¹⁰⁵ The High Court recognised that the successful defence of an action may come at a considerable cost to a defendant but any resulting “unfairness” suffered by the defendants due to the impecuniosity of the plaintiff requires the application of the rules that govern security for costs.¹⁰⁶

Heydon J dissented, finding that this was an example of the maintaining of litigation for the primary purpose of profit without an effective indemnity from the funder for the potential liability to the defendant. On this ground, Heydon J considered that *Campbells Cash and Carry* was distinguishable.¹⁰⁷

The majority in the High Court in *Katauskas* continued the light touch that the Gleeson Court has previously adopted in adjudicating disputes about litigation funding, particularly those involving assertions that litigation funding arrangements amount to an abuse of process. However, Heydon J’s judgment demonstrates the strongly held views of a minority regarding the desirability of these arrangements and the continued vitality of concerns about maintenance and champerty in debates about litigation funding in Australia.

Equuscorp

Although *Equuscorp* is not squarely about litigation funding, it dealt with an issue that frequently arises in that context, which is whether causes of action may be assigned. Some litigation funding arrangements in Australia involve the direct assignment of a cause of action to a litigation funder.¹⁰⁸ Alternatively, the degree of control that is exercised by a funder may amount to a constructive assignment of the cause of action.¹⁰⁹ The relevant cause of action in *Equuscorp* was a restitutionary claim for money had and received under a loan agreement that was unenforceable due to statutory illegality.

The background to the constraints that have been imposed upon the assignability of causes of action was explained by Dodds-Streton J in the Victorian Court of Appeal in *Equuscorp*:

Traditionally, bare causes of action (a bare right to litigate) could not be assigned. The benefit of purely personal rights and tortious rights of action were unassignable. On the other hand, rights such as debts were assignable, as were rights of action incident or subsidiary to property rights. Similarly, it appeared that a contract (non debt) could be assigned with any causes of action for breach (although probably not the right of action alone). The restriction on assignability was driven, inter alia, by the concern to prevent trafficking in litigation (maintenance and champerty). Thus, rights such as debts tended to be assignable, because the assignee had an interest over and above the right to litigate. That was less evident in the case of a tortious cause of action, which arose independently of agreement.¹¹⁰

Her Honour further observed that “the closer to a proprietary right a chose in action was, the less problematic was its assignment”.¹¹¹

By contrast, case law in the United Kingdom has recognised that a bare right to litigate may be assigned if the assignee has a genuine commercial interest in it.¹¹² The latter exception is drawn from the House of Lords decision in *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 and the English

¹⁰⁵ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at [41].

¹⁰⁶ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at [39].

¹⁰⁷ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at [49]-[54].

¹⁰⁸ Eg the Hillcrest Litigation Services webpage provides the following paraphrase of its litigation funding agreement: “in consideration of the Company providing such funding to the client, the client assigns to the Company an agreed percentage of the balance of the Settlement Sum” (see <http://www.hillcrestlitigation.com.au>).

¹⁰⁹ See Spender P, “After Fostif: Lingering Uncertainties and Controversies about Litigation Funding” (2008) 18 JJA 101 at 106.

¹¹⁰ *Haxton v Equuscorp Pty Ltd* (2010) 28 VR 499 at [281] per Dodds-Streton J.

¹¹¹ *Haxton v Equuscorp Pty Ltd* (2010) 28 VR 499 at [282] per Dodds-Streton J.

¹¹² *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 at 703 per Lord Roskill.

courts have incrementally applied this extension to permit various forms of litigation funding.¹¹³ However, *Trendtex* and the general issue of assignability of causes of action had been dealt with strictly by Australian courts, notably in *Poulton v Commonwealth* (1952) 89 CLR 540 at 571, 602.¹¹⁴

Although the Victorian Court of Appeal found that characterising a restitutionary claim along the spectrum discussed by Dodds-Streton J was problematic because “it occupies an uncertain ground between the three established bases of contract, tort and trusts” and “could share with tort the quality of arising independently of agreement”,¹¹⁵ the Court of Appeal considered that it was capable of assignment, particularly if the lender has a genuine commercial interest of the kind that was recognised in *Trendtex*.¹¹⁶

The majority in the High Court (French CJ, Crennan and Kiefel JJ; Gummow and Bell JJ agreeing) upheld the Court of Appeal’s decision that the restitutionary claims were assignable because the claim was received under an unenforceable loan agreement and was inescapably linked to the performance of that agreement. It was not assigned as a bare cause of action because it was assigned along with contractual rights, albeit that their existence is contestable. French CJ, Crennan and Kiefel JJ considered that “[n]either policy nor logic stands against its assignability in such a case”.¹¹⁷ Importantly, French CJ, Crennan and Kiefel JJ followed the reasoning of *Trendtex* in concluding that the restitutionary claims were assignable because, inter alia, Equuscorp was a party with a genuine commercial interest in the restitutionary rights, due to it taking an assignment of purported contractual rights for value. Gummow and Bell JJ applied *Trendtex* and found that a genuine and substantial commercial interest (here a charge held by Equuscorp over the assignor’s assets) was sufficient to overcome the statement of principle in *Poulton*.¹¹⁸

The decision of the majority is a careful extension of the Australian law by adopting the *Trendtex* standard, which clarifies the law. However, the court still has yet to decide whether a bare right of action may be assigned. For example, recently the UK Court of Appeal in *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] 1 All ER 1423 found that an agreement to assign a cause of action in personal injury held by a patient who had acquired a bacterial infection whilst in the defendant hospital was void due to champerty. The patient had assigned his right for £1 to a person who was crusading about the standards in the hospital. Despite her honourable motives, the claimant did not have had an interest in the cause of action that the law recognised and therefore this constituted a bare right of action. The court found that her actions were no more than wanton and officious intermeddling, stating:

... it is clear from the decision in the *Trendtex Trading* case and from subsequent statements of judicial opinion... that an assignment of a bare cause of action in tort for personal injury remains unlawful and void. Since the law on maintenance and champerty is open to further development as perceptions of the public interest change, I do not think that it is possible to state in definitive terms what does and does not constitute a sufficient interest to support the assignment of a cause of action in tort for personal injury.¹¹⁹

This question will no doubt arise in Australia as the market for litigation rights further develops.

International Litigation Partners

In this case, International Litigation Partners (ILP) agreed to fund Chameleon’s litigation against another company in return for a share of the proceeds of that litigation. The Funding Deed allowed ILP to terminate this arrangement and entitled it to an early termination fee if there was a “change in

¹¹³ See discussion in Walters A and Peysner J, “Event-triggered Financing of Civil Claims: Lawyers, Insurers and the Common Law” (1999) 8 *Nottingham Law Journal* 1 at 13ff.

¹¹⁴ Spender, n 109 at 106-107.

¹¹⁵ *Haxton v Equuscorp Pty Ltd* (2010) 28 VR 499 at [283] per Dodds-Streton J.

¹¹⁶ *Haxton v Equuscorp Pty Ltd* (2010) 28 VR 499 at [310] per Dodds-Streton J.

¹¹⁷ *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [53].

¹¹⁸ *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [79].

¹¹⁹ *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] 1 All ER 1423 at [24].

control” of Chameleon. A change in control did take place, and ILP terminated the arrangement and claimed the early termination fee. Chameleon refused to pay, arguing that ILP was not entitled to the fee because ILP did not hold an AFSL under Pt 7.6 of the *Corporations Act*.

A threshold question that arose was whether the Funding Deed was a financial product under Ch 7 of the *Corporations Act*. The definitions of “financial product” and related terms in Ch 7 are complex and detailed and each of the definitions has distinct regulatory consequences. Moreover, the definitions are widely and functionally drafted, and therefore naturally contain exceptions. Importantly, persons must have a financial services licence if they provide financial product advice or deal in a financial product.¹²⁰ The major litigation funder in Australia (IMF) holds an AFSL but other participants in the market generally resist the requirement. Because they are not required to hold an AFSL, they are exempt from an independent assessment of their competency and capital adequacy to carry on the business of litigation funding.¹²¹

In the New South Wales Court of Appeal, all three judges (Giles JA, Hodgson and Young JJA) found that the Funding Deed was a facility through which financial risk was managed, therefore, subject to exceptions, was a financial product. The next question was whether the Funding Deed was a credit facility and therefore excluded from the definition of a financial product. On this aspect of the case, Giles and Young JJA held that the agreement was not a credit facility, whereas Hodgson JA dissented. Giles and Young JJA found that it was not a credit facility because it was an agreement to pay legal costs and was not couched in terms of a loan or advance. While ILP promised to pay money for the benefit of Chameleon, it did not advance money to it and there is no debt owed by Chameleon, payment of which was deferred.¹²² Hodgson JA found that the Funding Deed was a credit facility because it involved a contract, arrangement or understanding under which, at some time in the future, a debt from one person to another may arise. It was also in substance a loan of costs, which must be repaid in the not unlikely event that the proceedings are sufficiently successful.¹²³

Before the High Court, in a judgment that was very brief (45 paragraphs) compared to the extensive treatment given by the first instance¹²⁴ and intermediate courts,¹²⁵ the High Court considered that the Funding Deed was a credit facility, which placed it wholly outside Ch 7.¹²⁶

A “credit facility” is a specific exclusion in s 765A(h)(i) of the *Corporations Act* as defined by reg 7.1.06 of the *Corporations Regulations*. According to the Explanatory Memorandum, the reason for its exclusion of credit facilities from the definition of financial product was to avoid an overlap between regulation by Ch 7 of the *Corporations Act* and consumer credit regulation (then regulated by the Uniform Consumer Credit Code (UCCC)). The intention was that all credit would be regulated by the *Australian Securities & Investment Commission Act 2001* (Cth) (ASIC Act). By reason of this, the definition of “credit facility” reflects the definition in the UCCC at the time Ch 7 was enacted.¹²⁷

Whilst acknowledging that Ch 7 “contains complex definitional provisions”,¹²⁸ the majority in the High Court seized upon the broad wording of the definition of “credit facility” in the relevant

¹²⁰ *Corporations Act 2001* (Cth), ss 766B, 766C.

¹²¹ Schneider M, “High Court Decision: International Litigation Partners Pte Ltd v Chameleon Mining NL” (2012) 28(2) *Australian Banking and Finance Law Bulletin* 86 at 88.

¹²² *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 248 FLR 149; 82 ACSR 517 at [80], [218]-[219]. See generally “Headnote” (2011) 82 ACSR 517 at 518.

¹²³ *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 248 FLR 149; 82 ACSR 517 at [136]-[137]. See generally “Headnote” (2011) 82 ACSR 517 at 518.

¹²⁴ *Chameleon Mining NL v International Litigation Partners Pte Ltd* (2010) 79 ACSR 462.

¹²⁵ *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 248 FLR 149; 82 ACSR 517.

¹²⁶ *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at [22].

¹²⁷ Explanatory Memorandum, *Financial Services Reform Bill 2001* (Cth) at [6.83].

¹²⁸ *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at [6].

provisions to find that a Funding Deed was a credit facility. They concluded:

The result is that a contract, arrangement or understanding that is any form of financial accommodation is “credit”, and its provision “for any period” will be a “credit facility”.¹²⁹

With respect, this is superficial, all the more so because the finding that the agreement was a credit facility meant that it was “wholly outside Chapter 7”¹³⁰ and the High Court (unlike the court at first instance and the intermediate court) did not analyse whether it was a financial product within Ch 7. It is worth comparing the approach of Young JA in the Court of Appeal who stated that he did not classify it as a credit facility because “there are many and perhaps more significant aspects to it”.¹³¹

The problem with the reasoning of the High Court is that it is perfunctory, and aspects of the Funding Deed, which were critical to its status (and corresponding regulation), were not discussed. For example, under the Funding Deed ILP arguably obtained an interest in the subject matter of the litigation because the parties had agreed that it would receive a percentage of the resolution sum, being the gross amount received upon settlement or judgment in the proceedings. Although such a contingent liability *may* still be consistent with the characterisation of the arrangement as a credit facility, it still takes on a hue that requires it to be measured against the financial product standard set in Ch 7. As stated by the second respondent in its submissions before the High Court:

Even if some funding deeds, properly construed, may be a “credit facility” this one is not. It is expressly recognised in the funding deed that the funding deed does not create a debt. Recital D contains an acknowledgement by Chameleon that the funding deed confers on ILP an interest in the subject matter of the litigation, a characterisation which, due to clauses 3.2-3.8 and 8 of the funding deed, is correct and wholly inconsistent with a debtor/ creditor relationship. The funding deed is not a loan but effects an assignment of an interest in or creation of an interest in Chameleon’s causes of action¹³²

The problem with the High Court’s analysis is that just about anything that involves the transfer of money, where payment is deferred and there is some additional consideration for the exchange may be called “credit”. That is one of the reasons why such effort was taken to set out the various complex definitions in Ch 7 of the *Corporations Act* in the first place. The High Court failed to give a detailed analysis as to why it was not a financial product; rather, it took a very small slice of the very detailed definition provisions in Ch 7 and declined to explain how, on a purposive interpretation of those provisions, the arrangement in question was a credit facility rather than a financial product.

This is not an arid ivory tower argument because the narrowness of the approach taken by the High Court ignores the critical consequences that flow from the differential regulation of credit facilities (other than consumer credit contracts, a category that this contract does not fall into) and financial products.

Now the reader may wonder why this matters because by the time the High Court handed down its decision the Executive had passed regulations that exempted litigation funding agreements from the financial licensing provisions. Did this influence the High Court? Maybe it did. The moves by the Executive were certainly discussed during the hearing.

In reply, the author argues that the High Court could have held a mirror up to the Executive by a detailed analysis of the true nature of this arrangement. In response to the High Court judgment in *International Litigation Partners*, the Executive amended the *Corporations Regulations* in December 2012 by deeming litigation funding schemes and arrangements to be financial products and not credit

¹²⁹ *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at [26].

¹³⁰ *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at [22].

¹³¹ *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 248 FLR 149; 82 ACSR 517 at [219].

¹³² Second Respondent’s Submissions in *International Litigation Partners Pte Ltd v Chameleon Mining NL* (Case S362/2011, filed 16 December 2011) at [77].

facilities¹³³ and then continued to exempt them from the operation of Ch 7. The apparent lack of interest shown by the High Court in the issue may encourage apathy by the regulators in either bringing litigation funding under broader financial regulation or developing a licensing scheme that is tailored to the litigation funding industry but also protects litigants who are unable to fund litigation themselves.¹³⁴

It is accepted that the High Court exercises robust powers as a consequence of judicial review, but should we expect less when the court deals with a question about commercial litigation?

CONCLUSION

Although the role of the French High Court as a constitutional court has generated an abundant literature, little attention has been given to its modus operandi in private and regulatory disputes. This article examined six cases to discern whether the French High Court is developing a particular judicial method in cases involving commercial litigation. The chosen cases all demonstrate elements of Stone's descriptions of change in the common law, eg dry niggling distinctions, coyness and courage, valour and caution.

The institutional leadership of French CJ is evident in the High Court's public engagement through its public access policy. The spirit of this policy has been articulated in *Roadshow* where the court has further developed its amicus curiae jurisprudence. This article has argued for the extension of this jurisprudence into formal procedures, so that a clear amicus curiae procedure is established in the *High Court Rules*. The *Aon Risk Services* case allowed the High Court to assert judicial authority to buttress reforms to the justice system. This assertion of authority was particularly directed at the legal profession and protects reforms to the civil justice system.

However, the valour shown by the French High Court in public law has not necessarily been extended to private and regulatory law. The court shows little inclination to develop the law through justificatory ascent and the exposition of meta-principles. Rather, a narrow approach is favoured. In the author's view, this narrowness sometimes results in clear succinct guidance (*Katauskas, Equuscorp*), whereas at other times the court leaves vital questions unanswered by deciding the issue on a narrow point (*Hellicar*) or perceiving its interpretative role narrowly (*International Litigation Partners*) then declining to provide guidance though obiter dicta.

This begs the question about what the community should expect of the highest appellate court in the area of commercial and regulatory litigation. Clearly certainty is vital and, as posited above, obiter dicta would provide gentle guidance to the broader questions raised by the cases without waving the flag of judicial activism. Moreover, the development of principles may be more conducive to long-term certainty than hesitant incrementalism.

However, the community might go further and expect that the High Court would exercise its powers as the "authorised interpreter" to scrutinise legislation affecting commercial actors in fulfilment of its role as the third branch of government. With the blurring of public and private roles, this may be part of Stone's "magic" that can "transform a symbol of immobility into a vehicle of change".¹³⁵

¹³³ *Corporations Amendment Regulation 2012 (No 6)* (Cth) (12 December 2012), regs 7.1.04N, 7.1.06(2A), (2B).

¹³⁴ Schneider, n 121 at 88.

¹³⁵ Stone, n 1 at 597.