(2017) 19 *Flinders Law Journal*

CASE NOTE

THE BREXIT DECISION:

R (ON THE APPLICATION OF MILLER AND ANOTHER) v SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION[1]

I INTRODUCTION

The unexpected vote in favor of leaving the European Union in a referendum in the United Kingdom was a major political event that will have profound economic implications. It also set in train one of the most important constitutional cases of recent years. This note will set out the main elements of the case and comment in particular on the similarities and differences between the United Kingdom and Australia in relation to several common legal principles. Because of these legal differences the particular legal question in the case could not arise in Australia as we are not members of the European Union. Nevertheless the case dealt with legal matters that are part of Australia law, including the prerogative, the status of treaties in domestic law, the legal status of a referendum result, and whether a state can withdraw from a treaty.

II THE SHORT FACTS

Following a promise by the then British Prime Minister David Cameron that a referendum on Britain's status in the European Union would be held, the British parliament passed the *European*

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1 [2017] UKSC 5; [2017] 2 WLR 583(UKSC).Herein after referred to as *Miller*. All referencing to [2017] 2 WLR 583.

Union Referendum Act 2015 (UK). Section 1(4) of the Act authorized a referendum on the question**:**

> Should the United Kingdom remain a member of the European Union or leave the European Union?

Subsection 5 stated:

> The alternative answers to that question that are to appear on the ballot papers are —
> *Remain a member of the European Union*
> *Leave the European Union*

Although the referendum was challenged in court on the grounds that it would be a breach of European Union law that challenge failed[2] and the referendum was held on 23 June 2016. The official results of the referendum showed that 51.9% voted to leave and 48.1% voted to remain.[3] Shortly thereafter David Cameron resigned and was replaced by Theresa May. The new Prime Minister created a new cabinet level position titled the Secretary of State for Exiting the European Union[4] and later announced that the new government was committed to invoking Article 50 of the *Treaty on European Union* (TEU),[5] an article that came into force in 2009 with the adoption of the *Lisbon Treaty* of 2007[6] and its incorporation into United Kingdom law by the *European Union (Amendment) Act 2008* (UK).

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2 *Shindler v The Chancellor of the Duchy of Lancaster* [2016] 3 WLR 1196.

3 The Electoral Commission, *EU referendum results* <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>.

4 Prime Minister's Office, *New ministerial appointment July 2016: Secretary of State for Exiting the European Union* (13 July 2016) GOV.UK <https://www.gov.uk/government/news/new-ministerial-appointment-july-2016-secretary-of-state-for-exiting-the-european-union>.

5 *Brexit: Theresa May to trigger Article 50 by end of March* (2 October 2016) BBC News <http://www.bbc.com/news/uk-politics-37532364>.

6 Full text available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12007L%2FTXT>.

Article 50 provides:

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
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> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
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> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
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> 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
>
> 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.[7]

The new government also stated that it would give notice of its intention to withdraw from the European Union as required by Article 50 by March 2017.[8] This provoked legal action by three applicants for judicial review in the Divisional Court (ie a panel of

[7] Official text and commentary available at <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf>.

[8] Theresa May, 'Speech to the Conservative Party Conference' (Conservative Conference, Birmingham, 5 October 2016) <http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html>.

three in the English High Court).[9] The applicants were led by Gina Miller a British business woman born in Guyana. Related proceedings were also taken in the High Court of Northern Ireland to challenge the decision to give notice.[10] The proceedings in the Supreme Court heard appeals from both decisions.

III THE CENTRAL LEGAL ISSUE

The central legal issue in the case was whether the British Government could invoke Article 50 without authorizing parliamentary legislation. The argument for the Government was that the royal prerogative to enter into and exit treaties could be used in this case and that this did not require legislative approval. The main contention of the applicants at first instance and as respondents on appeal was that Article 50 could not be triggered by an exercise of the royal prerogative but required legislation by parliament.

IV THE DECISION AND AFTERMATH

The Divisional Court unanimously, and the Supreme Court by a majority of 8 to 3, held that the royal prerogative could not be relied upon and that the giving of notice under Article 50 required parliamentary legislation. Following the result the Government announced and then introduced a short bill to obtain such approval.[11]

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9 *The Queen on the Application of (1) Gina Miller & (2) Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union* (2017) 2 WLR 583(DC). The Divisional Court report appears in the same report as the Supreme Court decision at [2017] 2 WLR 583, 591-621.

10 *McCord's (Raymond) Application* [2016] NIQB 85(28 October 2016).

11 The text as introduced was:

> A BILL TO Confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.
>
> BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

The bill was short and was passed after a struggle. In the House of Lords amendments were made to the bill to guarantee the residency rights of existing European Union citizens in the United Kingdom. These amendments were subsequently overcome after the bill was re-introduced and passed in its original form. The Bill received the royal assent on 16 March 2017.

V THE ARGUMENTS OF THE MAJORITY

The majority conceded that there was nothing in current British statutes to explicitly remove the prerogative power to exit a treaty, including the *Treaty of Lisbon*. However they argued that by implication the body of European Union law that had been imported into United Kingdom law with the *European Communities Act 1972* (UK) changed the legal position. The majority stressed that European Union law was a new source of domestic law and that in many cases it overrode domestic law. For reasons that are somewhat obscure the argument reached the conclusion that this body of law, based on various European Union treaties incorporated by domestic legislation, was a restraint on the prerogative power to withdraw from the European Union. The argument was that since this body of law brought into United Kingdom law many rights, as well as obligations, it was not possible to undermine these rights by by–passing parliament and by relying on the prerogative. Implicit in the argument of the majority was the idea that the matter was so momentous that only parliament could authorize an Article 50

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1 Power to notify withdrawal from the EUROPEAN UNION

(1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EUROPEAN UNION.

(2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

2 Short title

This Act may be cited as the European Union (Notification of Withdrawal) Act 2017.

Full text Available at: <https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0132/17132.pdf>.

notice. Curiously the majority did not consider that the giving of notice of itself could not alter the rights and protections imported into United Kingdom law as a result of the adoption of European Union law.

VI THE ARGUMENTS OF THE MINORITY

The minority made the point that under United Kingdom law the prerogative could be displaced by legislation, this was agreed to by all of the judges. In applying this principle to the facts and law of the case the minority contended that there was no indication in the relevant legislation that Parliament intended to displace the prerogative power. Indeed the only indication on the matter was that Parliament had adopted Article 50 without demur.[12] The minority judges also stressed that at the end of the negotiations there would have to be repealing legislation. The reason for this, supported by statements by Ministers in Parliament, is that while withdrawal would terminate the operation of European Union treaties, they would remain as part of United Kingdom legislation. The only way to remove them from domestic law would be to repeal the domestic legislation that imported them into domestic law in the first place. After all, the prerogative cannot change a statute. The other point made by the dissenting judges was that giving notice under Article 50 does not and cannot change European Union or United Kingdom law and that obligations under these instruments would remain the day after notice was given and remain until actual withdrawal was affected. Giving notice did not alter legal rights. It merely initiated a process that at its end would change rights and even then only after repealing legislation was passed by Parliament.

VII THE PREROGATIVE IN FOREIGN AFFAIRS

Central to the case was the status of the royal prerogative in general

[12] *Mille*r 676 [204] (Lord Reed); 691[259] (Lord Carnwath).

and the prerogative in foreign affairs in particular.[13] The prerogative it will be recalled is the residue of common law[14] executive power that exists apart from statute.[15] Once enormous in scope[16] and immune from review until 1985,[17] the rise of parliamentary government and the emergence of statutory powers conferred by statute on the executive have substantially reduced its scope in a modern parliamentary democracy.[18] But it still exists notably in

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[13] For Australian discussions of the relationship between the foreign affairs prerogative and s 61 of the Constitution see*: Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369-371(Gummow J); *Habib v Commonwealth (No 2)* (2009) 175 FCR 350, 364-365[48]-[55] (Perram J).

[14] The prerogative exists at common law and not statute: *Anon* (1547) Bro NC 152; 73 ER 913; *Davis v Commonwealth* (1988) 166 CLR 79, 108(HCA).

[15] This of course is the famous definition by Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitutio*n (Macmillan, 10th ed, 1960) 424. See also, below n 18.

[16] See Sir Mathew Hale, *The Prerogatives of the King* (Seldon Society, first published circa 1670, 1976 ed); Joseph Chitty, *Treatise on the Law of the Prerogatives of the Crown* (1820). Chitty has been cited in Australia see: *Yanner v Eaton* (1999) 201 CLR 351, 393 fn 163(Gummow J)

[17] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374(HLE)); *Rahmatullah (No 2) v Ministry of Defence* [2017] 2 WLR 287, 298[15](Baroness Hale), 311[56](Lord Mance), 325[101](Lord Neuberger).

[18] See *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 526 (Lord Dunedin) citing AV Dicey without attribution: 'The prerogative is defined by a learned constitutional writer as "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown"'; 568 (Lord Parmoor): 'The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments. The result is that, whereas at one time the Royal prerogative gave legal sanction to a large majority of the executive functions of the Government, it is now restricted within comparatively narrow limits'; *Burmah Oil Co(Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101(Lord Reid): 'The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute'; It seems that there are no new prerogatives: *British Broadcasting Corporation v Johns* [1965] 1 Ch 32, 79 (CA) (Diplock LJ): 'But it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints upon the citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension'. For the transition from common law executive power based on the prerogative to Parliamentary control see Sebastian Payne, 'The Royal Prerogative', in M Sunkin and S Payne (eds) *The Nature of the Crown* (Oxford University Press, 1999) 77.

three major areas: the war prerogative,[19] the foreign affairs prerogative,[20] and the prerogative of mercy.[21] There are many references to various prerogatives in Australia statutes. In many cases the statute expressly preserves a prerogative,[22] or expressly modifies it,[23] or even abolishes it altogether.[24] While a statute may displace the prerogative that remains the case as long as the statute is in place, but if the statute should be repealed the prerogative revives.[25]

The *Miller* case is notable as a recent expression of several established principles. First, that the Crown possesses a prerogative power in foreign affairs to enter into treaties and to exit from them. Second, this power, however, exists at common law and may be subject to ouster or modification by statute, sometimes called the *De Keyser* principle. It will be recalled that in that case the Crown appropriated a hotel in during the first world-war to accommodate

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19 *Farey v Burvett* (1916) 21 CLR 433, 452 (Isaacs J) who noted that it was part of s 61 of the Constitution, ie the executive power of the Commonwealth.

20 Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2015) 115-120. Even where a general statute on foreign relation is passed the prerogative may still be preserved, eg *Foreign Affairs Act 1988*(NZ) s 13. This may merely mean that the Act does not oust it altogether but the provisions of the Act might limit aspects of the prerogative depending on the terms of the statute.

21 *Von Einem v Griffin* (1998) 72 SASR 110, 113(FC). Fiona Wheeler, 'Judicial Review of Prerogative Power in Australia: Issues and Prospects', (1994) 14(4) *Sydney Law Review* 432 discusses the reach of the prerogative in Australia.

22 For eg the prerogative of mercy is preserved in the *Federal Court of Australia Act 1976* (Cth) s 31B; the *Crimes Act 1914* (Cth) s 21D; and the *Spent Convictions Act 2009* (SA) s 15; Crown prerogative in copyright is preserved in the *Copyright Act 1968* (Cth) s 8A (1).

23 *Crown Debts (Priority) Act 1981* (Cth) s 3; *Agricultural and Veterinary Chemicals Act 1994* (Cth) s 16, *Corporations (South Australia) Act 1990* (SA) s 18.

24 Thus the *Bill of Rights 1689* (Eng), which forms part of Australia law (see David Clark and Andrew Groves, 'Research Note: Imperial Acts of Constitutional Significance in South Australia' (2014) 16 *Flinders Law Journal* 267, 316-324), is said to have abolished the prerogatives that allowed the executive to either suspend or dispense with the law without legislative authorization.

25 *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 539 (Lord Atkinson); 561(Lord Sumner).

members of the air force. The Crown also refused to pay the owners any compensation for the seizure. At first instance in the Chancery Division Paterson J rejected the suppliant's claim for compensation on the ground that an earlier decision[26] precluded the claim.[27] The English Court of Appeal allowed the appeal[28] and this decision was upheld on appeal. The House of Lords held that the Crown did have a power to take the hotel under the war prerogative, but that this power did not extend to denying compensation to the owners. The case was notable for the discussion of the principle that the courts could determine the limits to the prerogative and that the prerogative might be ousted by legislation. The *De Keyser* principle has been reaffirmed many times in Britain and also applied in Australia.[29] The Supreme Court referred to the principle and affirmed it.[30] *De Keyser* did not actually introduce a new principle since there were earlier cases that clearly showed that where legislation occupied the same ground as the prerogative the prerogative was displaced.[31]But the case was a powerful and authoritative statement of the principle that the common law prerogative powers of the Crown could be displaced by express language or by necessary implication.

But the issue in *Miller* was whether the *De Keyser* principle applied to the facts and law in the instant case. The majority took the view that the prerogative could be ousted by necessary implication and held that this had occurred in this case, while the dissenters

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26 I*n re a Petition of Right* [1915] 3 KB 649.

27 (1918) 34 Times LR 329(ChD).

28 *In re a Petition of Right of De Keyser's Royal Hotel Ltd* [1919] 2 Ch 197(CA).

29 See, for eg, *Brown v West* (1990) 169 CLR 195, 205; *ICM Agriculture Ltd v Commonwealth* (2009) 240 CLR 140, 210 [181]; *Wurridal v The Commonwealth* (2009) 237 CLR 309, 355 [76]; *Commonwealth of Australia v Sanofi* (2015) 237 FCR 277, 301 [66] (FC) (Kenny and Nicholas JJ); *Bromley v State of South Australia* (1990) 53 SASR 403, 414. The case has also been distinguished where it is clear that a statute occupies the ground formerly occupied by the prerogative: *Re Customs Card(NSW) Pty Ltd and The Companies Act* [1979] 1 NSWLR 241, 255 (Eq Div) (Needham J); *Stockdale v Alesio*s [1999] 3 VR 169, 175-176(CA) (Phillips JA).

30 *Miller*, 633 [48](Majority); 665[168](Lord Reed).

31 See for example: *Dewar v Smith* [1900] SALR 38, 41(SC)(Way CJ); *Hamilton v Foster* (1900) 2 Tas LR 23, 27(FC)(Dodds CJ); *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 494(HCA(Griffith CJ).

thought that ouster in this case had to be explicit and, as there was no such indication of this in the legislation, the prerogative was preserved. The court wrestled with the fact that there was virtually no useful case law, though reference was made by Lord Carnwath in dissent to a Canadian decision involving the withdrawal of Canada from the Kyoto Climate change treaty.[32] But that case was decided on the basis of a different legal consideration, namely whether the decision to withdraw from the Kyoto treaty was reviewable, and was discarded as unhelpful. Whether that case should have been distinguished quite so easily will be commented on below. Similarly the general law on treaties was also distinguished since the issue here turned on the status of European Union treaties as part of the domestic law of the United Kingdom.

Thus the nub of the argument was the nature of an ouster of the prerogative by necessary implication. It was agreed by all that there was no explicit ouster of the prerogative in the relevant legislation. The majority applied the test that if the withdrawal alters, as they argued that it would, some domestic rights from United Kingdom residents (who are not necessarily citizens) it is impermissible for the Government to withdraw from European treaties without prior parliamentary authority.[33] This appears to be a test based on the impact of the decision to give notice on both rights and, as their main point, on the status of European law as a part of United Kingdom law, which they stressed, as did the Divisional Court below, in some cases is superior to United Kingdom law.[34] The dissenters argued that the prerogative could be displaced if a statute occupied the same ground as the prerogative.[35] This was the test applied in the *De Keyser* case and is the orthodox position.[36]

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[32] *Turp v Minister of Justice and Attorney General of Canada* 2012 FC 893 (Can Fed Ct).

[33] *Miller* 610[83] (Majority).

[34] *Miller* 636-639[60]-[68].

[35] Ibid 669 [177] (Lord Reed).

[36] *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508: 526 (Lord Dunedin): '…if the whole ground of something which could have been done by the prerogative is covered by the statute, it is the statute that rules'; and 554 (Lord Moulton): '…when powers covered by this statute are exercised by the Crown it must be presumed that they are so exercised under the Statute ...'. These tests were cited in *Ruddock v Vadarlis* (2001) 110 FCR 491, 501-502

Normally this means that the subject matter of the displacing statute must overlap with the subject matter of the prerogative. In *De Keyser* a statute authorized the taking of the hotel and in fact this was the basis for the Crown claim to the hotel thus displacing the prerogative power to take the property of a subject in a war. But such provisions are to be strictly interpreted. That is, in that case while the Crown could occupy the hotel, there was nothing to oust an obligation to give compensation. The Australian position on the prerogative is that the prerogative can only be curtailed by clear language.[37]

In the *De Keyser* case itself the House of Lords held that as the *Defence Act 1842* (UK) covered the taking of the hotel, the legislation by necessary implication ousted the prerogative. But as the legislation authorizing the seizure did not address the question of compensation for the hotel owners the legislation did not preclude compensation and the presumption in favor of compensation remained and could not be ousted by an exercise of the prerogative in this case. Despite doubts in Canada whether the prerogative can be ousted by necessary implication [38] the Supreme Court of Canada , in a case cited in *Turp*,[39] but not taken up or discussed in *Miller*, adopted a test propounded by HV Evatt, a former Justice of the High Court of Australia, in his monograph on the Royal Prerogative. Justice Bastararche in *Ross River Dena Band v Canada*[40]cited Evatt as writing:

> Where Parliament provides by statute for powers previously within the

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[34] (FC) (Black CJ disssenting).

37 *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ), 508 (Jacobs J); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 218 [57] (HCA) (French CJ) where the Chief Justice stated that 'the abrogation of the prerogative requires "patent precise words"(and possibly necessary implication)'; *Edwards v Olsen* (1996) 67 SASR 266, 275 (FC) (Olsson J). See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Lexis Nexis, 8th ed, 2015) 181 [5].

38 *Ross River Dena Band v Canada* [2002] 2 SCR 816, 821 [4] (Bastararche J doubted that the necessary implication ouster of the prerogative existed in Canada) while at 837 [36] Le Bel J was firmly of the view that 'The royal prerogative can only be limited by means of express language in statute'.

39 2012 FC 893, [24].

40 [2002] 2 SCR 816 (SCC).

> Prerogative being exercised subject to conditions and limitations contained in the statute, there is an implied intention on the part of Parliament that those powers can only be exercised in accordance with the Statute.[41]

The issue in the *Ross River* case concerned the power of the Crown to declare a place an Indian reserve. The court held that the *Indian Act*[42] did not cover the power to declare a reserve, but rather regulated a reserve once declared. This meant that the prerogative power to declare a reserve remained untouched by the Act.[43] It seems then that the Australian position on the ouster of the prerogative follows the British position that it may be ousted either by express language or by necessary implication where the statute occupies the same ground as the prerogative.

The difference between Australia and the United Kingdom appears to be that in Australia the necessary implication test is stricter and requires clear evidence of an intention by parliament to oust the prerogative than the test actually applied by the majority in the *Miller* case.

VIII WITHDRAWAL FROM A TREATY

There is little case law on this matter and most of the academic writing deals with the formation of treaties and the processes by

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41 [2002] 2 SCR 816, 822[4] citing H V Evatt, *The Royal Prerogative* (Thomson Reuters, 1987) 44. Evatt wrote the book as a thesis in 1924 for an LLD from Sydney University, but the book was only printed in 1987. LeBel J at 844 [54] used a slightly different test writing 'The royal prerogative is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: 'once a statute has occupied the ground formerly occupied by the prerogative, the Crown [has to] comply with the terms of the statute'. Citing P W Hogg and P J Monaghan, *Liability of the Crown* (Carswell, 3rd ed, 1991) 17.

42 RSC 1985 c-1-5 (Can).

43 [2002] 2 SCR 816, 822 [5].

which they become incorporated into domestic law. [44]Some guidance is provided in treatises on the law of treaties and in writings by jurists.[45] The best starting point is in Article 54(1) of the *Vienna Convention on the Law of Treaties 1969*, adopted by Australia in 1980.[46] That provision reads:

> The termination of a treaty or the withdrawal of a party may take place:
>
> (a) in conformity with the provisions of the treaty;

In the *Miller* case, as we saw above, Article 50 of the Lisbon Treaty provided:

> Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

Now the *Miller* court had to decide what these constitutional requirements were. There were no express provisions in United Kingdom legislation on the European Union on the matter and thus the court was obliged to consider the relationship between the prerogative, which all agreed included the power to withdraw from a treaty, and the body of European Union law adopted as part of United Kingdom law. Nevertheless the majority, while it conceded that the Crown could withdraw from a treaty by an exercise of the royal prerogative, such as when the United Kingdom withdrew from the European Free Trade Agreement in 1972 as a consequence of entry into the European Union, noticed certain limits to this power, The European Free Trade Agreement example was distinguished on the grounds that the termination of that treaty did not terminate rights and in any case withdrawal followed parliamentary approval.[47] Other instances of prerogative powers changing the facts

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[44] See Joanna Harrington, 'Scrutiny and Approval: The Role For Westminster-Style Parliaments in Treaty-Making', (2006) 55 *International and Comparative Law Quarterly* 121; Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) 126-129, 161-190.

[45] Curtis A Bradley, 'Treaty Termination and Historical Gloss', (2014) 92 *Texas Law Review* 773; Lawrence R Helfer, 'Exiting Treaties', (2005) 91 *Virginia Law Review* 1579.

[46] 1974 Australian Treaty Series 2. Adopted by Australia 27 January 1980.

[47] *Mille*r 647-648 [97]. The court did not notice that the *European Community*

upon which the law is based presented to the Court were dismissed on the basis that they changed the ambit of the law but not, as in this case, the law itself.[48] Lastly, the court referred to the general prerogative power in foreign affairs to engage in diplomatic relations and the power to deploy the armed forces abroad as accepted instances of the prerogative that are not normally unreviewable, but again there were limits. The court relied on an earlier case in which the House of Lords argued that the power to make treaties 'does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament',[49] This was an important and telling passage that explains the approach taken by the majority in the *Miller* case.

In Australian practice Parliament is consulted on treaty action, ie the entry into force of a treaty and, according to the Department of Foreign Affairs and Trade, this would also include withdrawal from a treaty.[50]One instance of this was the withdrawal in 1997 from the United National Industrial Development Organisation (UNIDO) in order to provide foreign aid more directly to states with which Australia has a close relationship. The withdrawal was the subject of special hearings by the Joint Parliamentary Committee on Treaties.[51]

Act 1972 (UK) s 4 and the 3rd schedule repealed the *European Free Trade Association Act 1960* (UK).In *Miller* at [13] it was explained that approval to terminate the European Free Trade Association treaty was by parliamentary resolution. This was regarded as sufficient in that case but not in the *Miller* case because of the adverse impact on rights involved in the exit from the European Union.

48 Ibid 635 [53] giving as examples a declaration of war (*Joyce v Director of Public Prosecutions* [1947] AC 347 (HL(E)) and an exercise of the prerogative that changed the ambit of the United Kingdom's territorial waters: *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, 753 (CA) (Diplock LJ).

49 Ibid 635-636 [56] citing *J H Rayner (Mincing Lane) Ltd v Department of Trade and* Industry [1990] 2 AC 418, 500 (HL(E)) (Lord Oliver).

50 Department of Foreign Affairs and Trade, '*Treaty making process'* <http://dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx>.

51 Commonwealth of Australia, Parliamentary Joint Standing Committee on Treaties, *Australia's Withdrawal from UNIDO and Treaties Tabled on 11 February 1997*, 7th Report (AGPS, 1997). In 2015 Australia withdrew from the World Tourism Organization: Commonwealth of Australia, Parliamentary

Withdrawals are not uncommon and in some cases simply reflect the passage of time since older treaties may often be out of date and in other cases Australia's national priorities have changed.

IX STATUS OF A REFERENDUM

In the course of the *Mille*r judgments the court discussed the legal status of the referendum held to decide whether the United Kingdom should remain in or leave the European Union. Although a statute was passed to permit the referendum[52] the court noted that the result was not legally binding given that such a result can only change the law if parliament acts to change the law. [53] Rather it was a matter for the politicians and the parliament to consider. In the result, as we saw above, the United Kingdom parliament regarded the result as politically binding.[54] The position in Australia depends upon the legal basis for the referendum. In many constitutional instruments in Australia, including in section 128 of the Constitution,[55] a referendum is a necessary part of the amending process of the constitution and therefore would be regarded as binding on the parliament. In the case of several State Constitution Acts such referenda are part of the manner and form requirements under the Constitution Act[56] and as section 6 of the *Australia Act 1986* (Cth) makes clear these are binding on state Parliaments unless and until they are repealed.[57] But a referendum, apart from these constitutional act requirements and unless the statute authorizing it provided otherwise, would likewise not be binding on the political

Joint Committee on Treaties, *Reports 1996-2016* (2017) 50.

52 European Union Referendum Act 2015 (UK).

53 *Miller* 654 [125].

54 Ibid 653 [123].

55 For a list of section 128 referenda and their results see Australian Electoral Commission, *Referendum dates and results* (24 October 2012) <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.

56 For the details see the summary in David Clark, *Introduction to Australian Public Law*, (Lexis Nexis, 5th ed, 2016) 127-131.

57 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 554 [3] (HCA) (Gleeson CJ, Gummow, Hayne and Heydon JJ).

class. In practice in Australia plebiscites, sometimes called advisory referenda,[58] have been held to decide non constitutional questions as in the two Commonwealth plebiscites on military conscription during World War 1.[59] States have also held referenda on controversial issues.[60]

X CONCLUSION

Despite the huge political and economic interest in Brexit, the *Miller* case is likely to have limited impact in Australia, except possibly the point that withdrawal from a treaty in some instances requires statutory authorization. Where a statute has incorporated a treaty into domestic law the act of the executive in withdrawing from the treaty would leave untouched the treaty as incorporated in legislation since the executive cannot change legislation without parliamentary assent. Of course the withdrawal would change Australia's international obligations if the withdrawal were in accordance with the provisions of the treaty itself. But those actions cannot change domestic law. The *Miller* decision went further and held that starting the process of withdrawal by giving notice also required parliamentary assent. This is a radical departure from existing law given that no United Kingdom statute nor any European Law required such approval in express terms. The reasoning of the

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58 The Constitutional Council of Western Australia, *Advisory Referenda* <https://www.constitutionalcentre.wa.gov.au/ResearchAndSeminarPapers/ChangingConstitutions/Pages/AdvisoryReferendums.aspx>.

59 For the details see Australian Electoral Commission, *What are referendums and plebiscites?* (9 September 2015) <http://www.aec.gov.au/Elections/referendums/types.htm>.

60 For the details and links to state electoral commissions see Electoral Commission of NSW *NSW Referendums* <http://www.elections.nsw.gov.au/past_results/referendums_and_polls/nsw_referendums>;Electoral Commission of Queensland, *State referendums* <http://www.ecq.qld.gov.au/ elections/state-referendums>; Electoral Commission SA, *Referenda* <http://www.ecsa.sa.gov.au/elections/referenda>; Tasmanian Parliamentary Library, *Referendums in Tasmania* <http://www.parliament.tas.gov.au/tpl/InfoSheets/referendums.htm>; Elections WA, *What is a referendum* <https://www.elections.wa.gov.au/sites/default/files/content/documents/What_is_referendum.pdf>.

majority that by necessary implication parliamentary approval was required because the prerogative had been displaced was weak and unconvincing. It is true that withdrawal from the European Union will terminate some rights, but the details are yet to be worked out. All that giving notice does is start the negotiation process; it does not determine its substantive outcome. The greatest objection to the majority reasoning in *Miller* lies in its failure to notice that at the end of the process the United Kingdom would still have to repeal the *European Communities Act 1972* and that, of course, would require parliamentary assent.

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