RECONCEPTUALISING EXECUTIVE POWER TO DENOUNCE TREATIES IN THE TWENTY-FIRST CENTURY

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This article explores the conceptual basis of treaty denunciation in Australia, and whether this power is the executive's unfettered prerogative. In light of uncertain jurisprudence on the conceptual origins of the categories of non-statutory executive power in Australia, the authors countenance the possibility of reconceptualising treaty ratification and denunciation as inhering in multiple aspects of non-statutory executive power under s 61 of the Commonwealth Constitution*; that is, in both the prerogative power and the nationhood power. The paper then considers practical consequences that may follow this conclusion, such as constitutional limitations to treaty withdrawal under certain circumstances.*

I INTRODUCTION

Treaty withdrawal is increasingly a practical reality in many jurisdictions. This article considers the scope of Australia's executive power to withdraw from treaty obligations and whether any constitutional safeguards inhere in its constitutional text beyond the prerogative. We countenance the possibility of reconceptualising treaty ratification and denunciation as inhering in multiple aspects of executive power under s 61 of the *Commonwealth Constitution*; that is, in the prerogative

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power *and* the nationhood power ('nationhood theory').[1] Recent scholarship on the limits of treaty denunciation in Australia has failed to consider this second possibility.[2] This article examines domestic and international principles that guide and frame disengagement from international law and the powers that vest in executive governments seeking those ends.

In this context, we examine whether parliamentary approval is ever required before Australia's executive can exercise power to withdraw from treaty obligations, having regard to the reasoning in *R (Miller) v Secretary of State for Exiting the European Union* ('*Miller*').[3] Recent scholarship has considered the continuing validity of legislation, which is wholly supported by Australia's external affairs power, in *contemplation* of executive withdrawal from the relevant treaty.[4] By contrast, this article is concerned with whether the executive's power of withdrawal can be conceptualised as coming within the scope of the Commonwealth's nationhood power, which, if accepted, would necessarily limit Australia's non-statutory executive power of treaty denunciation.[5] The concept of what is now broadly called the nationhood aspect of executive power was contemplated by the High Court not long after federation, and has continued to

1 The so-called nationhood power allows the Commonwealth to 'engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation': *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J) ('*AAP*'). The nationhood power has not been fully clarified by the High Court. As noted in *Davis v Commonwealth* (1988) 166 CLR 79 ('*Davis*'), '[t]he scope of s 61 has not been charted nor … is its scope amenable to exhaustive definition': at 107 (Brennan J). The authors adopt the term *nationhood theory* to describe the source of the power of treaty ratification and denunciation as dually inhering in the prerogative and the nationhood power.

2 See, eg, Luke Chircop and Timothy Higgins, 'The Executive Power to Withdraw from Treaties in Australia' (2019) 30(3) *Public Law Review* 229; Elizabeth Brumby, 'The Effect of Treaty Withdrawal on Implementing Legislation' (2019) 47(3) *Federal Law Review* 390.

3 [2018] AC 61 ('*Miller*').

4 See Brumby (n 2); Zaccary Molloy Mencshelyi, Stephen Puttick and Murray Wesson, 'The Executive and the External Affairs Power: Does the Executive's Prerogative Power to Vary Treaty Obligations Qualify Parliamentary Supremacy?' (2018) 43(2) *University of Western Australia Law Review* 286. Ultimately, scholarship on this question is inconclusive. According to Molloy Mencshelyi, Puttick and Wesson, '[t]reaty withdrawal or amendment may … affect the validity of legislation that has implemented the treaty': at 288–9. They seek to dispel the sense of disquiet generated by the conclusion that the executive possesses such a wide-ranging power by implying 'a legislative intention that an implementing statute should not endure beyond the facts that support its validity': at 289. In other words, the operation of the implementing statute was 'always intended to cease with the executive's decision to withdraw'. The more recent article by Brumby reaches a different conclusion. Thus, 'a law implementing a treaty would likely survive treaty withdrawal in most cases due to the law's enduring nexus with Australia's foreign relations': Brumby (n 2) 392.

5 The phrase 'non-statutory [e]xecutive power' first appeared in the Commonwealth Law Reports in 2005: see *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 84 [129] (Callinan J). Since then, the phrase appears not to have had any definite meaning or application. As Hayne argues, 'it is necessary to examine carefully whether it is a useful tool of legal analysis or description': KM Hayne, 'Non-Statutory Executive Power' (2017) 28(4) *Public Law Review* 333, 333.

evolve 'in multiple contexts, creating a complicated jurisprudence'.[6] The nationhood power has been considered by the High Court on various occasions more recently, though its scope and content remain to be fully explored.[7] Further, the High Court has yet to articulate clearly the conceptual origins of what is commonly referred to as non-statutory executive power,[8] and there remain persisting and unresolved doctrinal tensions as to its precise source.[9] Indeed, Hayne has written that: 'The expression "non-statutory executive power" has no single received meaning or application. It is a statement of conclusion, not a useful tool of legal analysis or description.'[10] Hayne further states that this phrase has not been given any 'definite meaning', and sets out instances where it has variously been used: to describe the Crown's capacities; to describe prerogative powers; and to describe some inherent power to defend the nation's borders from unpermitted incursion.[11] Given the uncertainty around the meaning of non-statutory executive power, we consider whether the power of treaty withdrawal can be more precisely categorised as a particular expression of executive power also inhering in the nationhood aspect of executive power, which extends to the Commonwealth the ability to 'engage in enterprises and activities peculiarly adapted to the government of a nation'.[12] We argue more specifically that ratifying and denouncing treaties may be conceived as activities coming within the scope of this more precise category.

Recent comparative international scholarship demonstrates that constitutional courts of various nations have inferred superadded limitations upon treaty denunciation over and above anything required for treaty ratification.[13] To date, given the lack of opportunity for judicial consideration in Australia regarding these specific questions, as well as the conceptual uncertainties around non-statutory

6 Cheryl Saunders, 'Separation of Legislative and Executive Power' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 617, 633 ('Separation of Legislative and Executive Power').

7 See *AAP* (n 1); *Davis* (n 1); *Ruddock v Vadarlis* (2001) 110 FCR 491 ('*Ruddock*'); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*').

8 Anne Twomey, 'Pushing the Boundaries of Executive Power: Pape, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313, 330 ('Pushing the Boundaries of Executive Power').

9 See Anne Twomey, 'The French Court, the Nature of the Executive Power and its Reconciliation with the Expenditure Power' in Henry Jackson (ed), *Essays in Honour of Chief Justice French* (Federation Press, 2019) 27, 46, 49–51 ('The French Court'); Nicholas Condylis, 'Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power' (2015) 39(2) *Melbourne University Law Review* 385, 387; Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, "Nationhood" and the Future of the Prerogative' (2012) 12(1) *Oxford University Commonwealth Law Journal* 97, 97 ('The Executive Power of the Commonwealth of Australia').

10 Hayne (n 5) 333.

11 Ibid.

12 *AAP* (n 1) 397 (Mason J).

13 Hannah Woolaver, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal' (2019) 30(1) *European Journal of International Law* 73, 77, 79, 81.

executive power, the extent to which the High Court may countenance inherent constitutional limits on executive treaty denunciation merits attention.

We argue that if the source of the treaty denunciation power can lie in the 'nationhood' aspect of executive power, this may provide a basis for identifying limits to the exercise of that constitutional power in the Australian context. Consequently, this article is structured around three broad themes. Part II considers the executive's role in treaty denunciation in the light of current jurisprudence and scholarly commentary. Next, Part III examines the nature and scope of the executive's power to make and unmake treaties and the intervention of Parliament in the process of treaty-making. Part IV then analyses the decision in *Miller* from comparative perspectives with a view to assessing the appropriateness of denunciation by the Australian executive absent parliamentary approval. The significance of reconceptualising Australia's treaty power as possibly inhering in *both* the prerogative and the nationhood power achieves two important outcomes: it secures these powers as inherent executive powers, whilst framing and limiting its usage. It is consistent with the inherent view of executive power developed by the High Court, but also serves to import constitutional safeguards emanating from the nationhood power. To this end, we argue that inherent non-statutory executive power may evolve over time. Where a species of executive power might have more than one conceptual source, as we suggest, then a court may have recourse to doctrinal considerations which would arguably favour the conceptual source that limits arbitrary and unfettered non-statutory executive power.

II THE FOUNDATION AND DEVELOPMENT OF EXECUTIVE POWER IN AUSTRALIA

Executive power of the Commonwealth government is detailed in s 61 of the *Commonwealth Constitution*, which states: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General … and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'

The sparseness of s 61 raises the question as to the nature and scope of Commonwealth executive power — and by extension the powers of treaty ratification and denunciation. Various assumptions and doctrines, not expressly stated, form 'part of the fabric on which the written words of the *Constitution* are superimposed'.[14] Notably, the last phrase of s 61 divides power into two types: the power to execute and maintain the *Constitution*; and the conferral of a power as it relates to the laws of the Commonwealth. As discussed by Condylis,[15] an ancillary power arises from the conferral of power to 'maintain' the *Constitution*, which has been reasoned to extend to and include the capacity to act without legislative

14 *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J). See also Justice BM Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14(4) *Public Law Review* 234.

15 Condylis (n 9) 386–7.

authority[16] — the non-statutory executive power as Hayne and Bell JJ described it in *CPCF v Minister for Immigration and Border Protection*.[17] As Winterton stated, this aspect of executive power is considerably more difficult to interpret.[18] This is so because when the executive acts without statutory authority, there is no 'measuring-rod' or evaluative tool available in s 61 to appraise its constitutionality.[19] Consequently, s 61 describes but does not define executive power,[20] and leaves the nature and scope of the power 'shrouded in mystery'.[21] It is this aspect of the power that supports treaty ratification and, as this article will canvass, ostensibly the act of treaty denunciation.

Attempts to categorise executive power have 'created conceptual and terminological confusion'.[22] In 1924, HV Evatt (later Evatt J of the High Court) grouped the prerogatives of the Crown into three broad categories: 'executive powers, certain immunities and preferences, and proprietary rights'.[23] Following several more High Court cases, which considered the nature and scope of executive power, Twomey offered a threefold distinction between prerogative powers, nationhood power and legal capacities.[24] How the prerogatives 'come to form part of, or at least to inform, the executive power of the Commonwealth' remains the subject of some conjecture.[25] As Gerangelos et al state, citing Zines' commentary of Evatt's work: 'when and how the Commonwealth acquired the powers that at Federation were regarded as remaining with the Imperial authorities, particularly powers of war and peace and of treaty making', are important matters for consideration.[26]

Leading scholars have concluded that the conceptual origins of Commonwealth non-statutory executive power have not been fully explicated by the High Court.[27] The High Court has itself conceded that the precise scope and ambit of executive

16 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230 (Williams J) ('*Australian Communist Party Case*').

17 (2015) 255 CLR 514, 564–8 [137]–[151].

18 George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25(1) *Adelaide Law Review* 21, 26.

19 *Commonwealth v The Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 442 (Isaacs J) ('*Wool Tops Case*').

20 Ibid 440 (Isaacs J).

21 Michael Crommelin, 'The Executive' in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) 127, 147.

22 Dan Meagher et al, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 10th ed, 2016) 800.

23 HV Evatt, *The Royal Prerogative* (Law Book, 1987) 31.

24 Twomey, 'Pushing the Boundaries of Executive Power' (n 8) 316.

25 Peter A Gerangelos et al, *Winterton's Australian Federal Constitutional Law: Commentary and Materials*, ed Peter A Gerangelos (Lawbook, 3rd ed, 2013) 272.

26 Ibid, citing Evatt (n 23) C3–C7.

27 Twomey, 'Pushing the Boundaries of Executive Power' (n 8) 330; Twomey, 'The French Court' (n 9) 46, 49–51; Saunders, 'Separation of Legislative and Executive Power' (n 6) 640–1.

power has been difficult to delineate,[28] though it is worth noting that the same dilemma attends other key constitutional concepts such as judicial power.[29] Through evolving jurisprudence, the High Court in 1988 determined that the appropriate starting point for examining executive power was s 61 of the *Constitution*,[30] and that in defining its scope, one looks to its textual source for guidance ('the inherent view').[31] According to this view, executive power emanates from s 61 and can develop and evolve to also 'engage in enterprises and activities peculiarly adapted to the government of a nation'.[32] Its content is therefore revealed by 'interpreting the provision consistently with the Commonwealth's character and status as a national government'.[33] An alternative view, expounded by 'leading constitutional scholars', sees recourse to the Crown's prerogative powers as necessary to inform the scope of executive power in s 61 ('the common law view').[34] One of the aspects of this executive power is the prerogative — a vestige of monarchical power that constitutes a 'limited and diminishing field' of power that may be moderated or displaced by statute.[35] It is generally accepted that it is the prerogative aspect of executive power that permits ratification of international treaties and, it has been presumed, denunciation.

Traditionally, the international law position on states' powers with respect to making and unmaking treaties is captured by Sir Humphrey Waldock's statement that '[t]he power to annul, terminate, withdraw from or suspend treaties, no less than the power to conclude treaties, forms part of the treaty-making power of the State'.[36] This is the commonly ascribed view. Understandably, it may be supposed that both treaty ratification and denunciation should emanate from the same conceptual source — that being the prerogative. Notwithstanding this assumption, recent scholarship indicates that whilst the *acte contraire* theory at international law assumes that the making and unmaking of a rule should be identical, this theory

28 *Davis* (n 1) 107 (Brennan J). In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, Gageler J states that Commonwealth executive power 'is described — not defined — in s 61 of the *Constitution*, in that it is extended — not confined — by that section to the "execution and maintenance" of the *Constitution* and of laws of the Commonwealth': at 96.

29 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ); *Luton v Lessels* (2002) 210 CLR 333, 386–8 (Callinan J). See also *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

30 *Davis* (n 1) 92–3 (Mason CJ, Deane and Gaudron JJ).

31 Condylis (n 9) 387, citing Gerangelos, 'The Executive Power of the Commonwealth of Australia' (n 9) 97.

32 *AAP* (n 1) 397 (Mason J).

33 Condylis (n 9) 387, citing Gerangelos, 'The Executive Power of the Commonwealth of Australia' (n 9) 97.

34 Ibid.

35 Twomey, 'Pushing the Boundaries of Executive Power' (n 8) 325. See also *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ), cited in Twomey, 'Pushing the Boundaries of Executive Power' (n 8) 325.

36 'Second Report on the Law of Treaties' (1963) 2 *Yearbook of the International Law Commission* 36, 85.

is not necessarily borne out by the state practice of constitutional courts contemplating this very question.[37] The idea that denunciation is automatically the inverse of ratification may not be supported by recent comparative examples in foreign constitutional courts.[38] The shift in emphasis by the High Court to s 61 being the starting point for examining executive power is justified by the idea that federation, and the resulting *Constitution*, brought into existence '"a new body politic" with "capacities superior to that of a mere aggregation of the federating colonies"'.[39] So, whilst treaty ratification has long been considered a prerogative power of the executive, jurisprudential uncertainty regarding the precise nature of inherent executive power in Australia[40] opens the possibility to treaty ratification and denunciation inhering in the nationhood aspect of executive power. As Jacobs J stated in *Victoria v Commonwealth* ('*AAP*'),[41] '"the idea of Australia as a nation within itself and in its relationship with the external [sic] world" lay within the phrase "maintenance of the Constitution" in section 61'.[42]

Given the lack of opportunity for judicial consideration, the extent to which the High Court may diverge from the *acte contraire* presumption to frame (or reframe) the power of treaty withdrawal, as other states have done, may prove to have practical significance. Woolaver's argument provides a foothold to consider whether the treaty power generally, or the power of denunciation more specifically, might also be reasoned to conceptually inhere in a different aspect of non-statutory executive power. With the High Court's position on the conceptual origins of non-statutory executive power open to debate, deeper consideration of the conceptual distinction between the prerogative powers and the nationhood power remains open to fuller interrogation.[43]

Further, the argument that the power to ratify and denounce treaties can be sourced to multiple aspects of non-statutory executive power is plausible. Just as a law may be characterised as being a law 'with respect to' more than one head of legislative power,[44] the possibility of sourcing the power of ratification and denunciation to multiple aspects of executive power — namely to the prerogative power *and* the nationhood power — is, conceptually, available. This question has not been

37 Woolaver (n 13) 76. See also Annalisa Ciampi, 'Invalidity and Termination of Treaties and Rules of Procedure' in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011) 360.

38 Woolaver (n 13) 76.

39 Saunders, 'Separation of Legislative and Executive Power' (n 6) 633, quoting *Pape* (n 7) 85 [222] (Gummow, Crennan and Bell JJ).

40 See above at nn 8–9.

41 *AAP* (n 1).

42 Saunders, 'Separation of Legislative and Executive Power' (n 6) 633, quoting *AAP* (n 1) 406.

43 See above at n 26.

44 See *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 7 (Kitto J).

contemplated by the courts or scholars.[45] If the power to denounce treaties in the contemporary context may dually inhere in the prerogative *and* the nationhood aspects of s 61, then sourcing it to the latter would necessarily invoke constitutional limitations. Relevantly, we must consider whether Parliament may legislate to alter and/or possibly remove the power of denunciation from the executive. The accepted view is that 'whatever is within the competence of the Executive under s 61, including or as well as the exercise of the prerogative … may be the subject of legislation of the Australian Parliament'.[46] On this view, the powers of ratification and denunciation, as inherent executive powers, may be expropriated from the executive by the Parliament.[47] The alternative view questions whether Parliament can legislate to entirely expropriate powers of a sort, such as the powers concerning treaty ratification and denunciation, assumed inherent to the executive. This latter view may be consistent with an approach

> principally developed by the High Court of Australia, [which] argues that the power is to be sourced directly in s 61 and given content by interpreting the provision consistently with the Commonwealth's character and status as a national government ("the inherent view").[48]

This inherent view presupposes that certain executive powers likely cannot be expropriated by the Parliament; that is, they are essential and inherent to the executive and cannot be usurped by parliamentary action.[49]

Notwithstanding these competing views, reconceptualising the treaty power as inhering in both the prerogative as well as the nationhood power serves to secure these as inherent executive powers, consistent with the inherent view developed by the High Court, while also importing constitutional safeguards that emanate from the scope and application of the nationhood power. To this end, we argue that inherent executive power is not fixed, but that it may change and evolve over time.[50] In circumstances where an expression of executive power might have more than one conceptual source, as envisaged by the *nationhood theory*, then a court

45 Despite the similarity of subject matter, recent scholarship on the executive power of treaty withdrawal has examined the issue from different perspectives: see, eg, Brumby (n 2); Molloy Mencshelyi, Puttick and Wesson (n 4); Chircop and Higgins (n 2).

46 *AAP* (n 1) 406 (Jacobs J).

47 *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 147 (Knox CJ, Isaacs, Rich and Starke JJ).

48 Condylis (n 9) 387, citing Gerangelos, 'The Executive Power of the Commonwealth of Australia' (n 9) 97.

49 See Enid Campbell, 'Parliament and the Executive' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 88, 92; James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015) 404–5.

50 Saunders, 'Separation of Legislative and Executive Power' (n 6) 632.

may have recourse to doctrinal considerations, such as the rule of law, which would arguably favour the conceptual source that limits unfettered executive power.[51]

Ultimately, treaty denunciation is a matter for a nation — an expression of a state's sovereignty to be considered domestically.[52] As Justice Dixon presciently observed over 85 years ago, it is how we interpret our *Constitution* — and the distinctions we attach to our institutions *and to the source of their powers* — which have many important, practical consequences.[53] Conceivably then, it remains open to carefully consider the conceptual origins of the executive's power to denounce treaties, in light of scholarship regarding the unresolved doctrinal tensions between what has been variously described as the 'inherent view' and the 'common law view' of non-statutory executive power.[54] In countenancing the possibility of treaty denunciation as inhering in alternative sources of non-statutory executive power, practical outcomes such as the imposition of constitutional limitations on its exercise are possible.

The following section will explain Australia's treaty-making process and provide context for further analysis regarding the expanding scope of executive power in Australia. By interrogating the appropriate limits of executive withdrawal, we consider a framework within which the unfettered exercise of executive power may be assessed.[55]

III AN INTERNAL AFFAIR: THE AUSTRALIAN TREATY PROCESS

The power of the Commonwealth Parliament to legislate on international and related matters is supported by s 51(xxix) of the *Constitution*. How the High Court has come to define the scope of this power has been at the centre of much High

51 This theory finds general expression in broad, constructive approaches to constitutional interpretation. See, eg, Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455. Dixon states, at 455–6, that functionalism offers a

> promising middle path between the extremes of pure formalism and pragmatism … invit[ing] courts directly and openly to rely on substantive constitutional values, not simply more "formal" legal sources. But in doing so, it insists that courts should also be able in some way to source the particular values they rely on in the text, history or structure of the relevant constitution.

52 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 133 [263].

53 Justice Owen Dixon, 'The Law and the Constitution' (1935) 51(4) *Law Quarterly Review* 590, 597–8.

54 See Condylis (n 9) 387; Gerangelos, 'The Executive Power of the Commonwealth of Australia' (n 9) 97.

55 See Campbell McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 68(3) *International and Comparative Law Quarterly* 499. McLachlan notes 'the valuable role that national courts may play in applying constitutional law to constrain precipitate executive acts of withdrawal': at 529. He justifies this role according to the demands of the rule of law, a key function of which, he argues, 'is to constrain unfettered executive power': at 525 (citations omitted).

Court jurisprudence,[56] and is well-trodden ground. With respect to the reception of international law, Australia operates within a dualist constitutional framework wherein two discrete and separate steps are required before treaty provisions are enforceable domestically. Thus, the first step of treaty signature and subsequent ratification by the executive is followed by a specific act of legislative transformation into domestic law — the second step — without which treaties have no direct effect in domestic law.[57]

The classic dualist paradigm rests upon the proposition that treaties, though binding on a participating state in international law, are not part of municipal law unless and until they are incorporated into the domestic law by legislation.[58] The relationship was pinpointed by the United Kingdom Supreme Court in *Miller*:

> If treaties can have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged.[59]

Notwithstanding the undoubted foundation of treaty making as an executive power, Australia seeks further parliamentary approval in the ratification process, in an effort to strengthen the democratic legitimacy of what may otherwise be an exercise of unilateral executive power. Thus, while the executive power to ratify is unfettered, it has become standard practice for Parliament to consider the efficacy of the treaty before the executive formally binds the state to any treaty obligations.[60] No formal consultation with or endorsement by the Parliament, the States, non-government organisations ('NGOs') nor the public is required, although a degree of consultation is thought appropriate. Such a process is an

56 See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta*'); *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232; *AAP* (n 1).

57 See, eg, IA Shearer, 'The Relationship between International Law and Domestic Law' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 34, 36–7; David Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Year Book of International Law* 105; DP O'Connell, *International Law* (Stevens & Sons, 2nd ed, 1970) vol 1, 38–42. In contrast with dualism, the traditional expression of monism, as the above sources indicate, assumes that international law and domestic law constitute part of a single legal system; that international law can be applied directly by a national judge and that it can be directly invoked by citizens without the need for transformation into domestic law. In practice the relationship between international law and domestic law is rarely as clear cut as the above descriptions of monism and dualism would imply. Accordingly, the relationship has been reconceptualised to account for contemporary state practices. On this point, see generally Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005).

58 *Miller* (n 3) 141–2 [55]–[57] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC).

59 Ibid 142 [57], quoting Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) [5.20].

60 'Australia's Treaty-Making Process', *Department of Foreign Affairs and Trade* (Web Page) <https://dfat.gov.au/international-relations/treaties/treaty-making-process/>.

affirmation of parliamentary supremacy, although not legislatively prescribed,[61] and does not fetter the executive's prerogative power to unilaterally ratify treaties.

The Joint Standing Committee on Treaties ('JSCOT') was established by resolution of Parliament in May 1996[62] in response to widespread 'concern and confusion about the effect of treaties on Australian law'.[63] Although the Senate Legal and Constitutional References Committee report that led to the establishment of JSCOT was mostly directed to the process of entering treaties rather than denouncing them,[64] the Committee's Resolution of Appointment ostensibly 'allows it to inquire into and report upon' treaty denunciation as a matter arising, among other things 'from treaties' or 'proposed treaty actions presented or deemed to be presented to the Parliament' or 'such other matters as may be referred to the committee by the Minister for Foreign Affairs'.[65] This resolution has been 'adopted by each succeeding parliament'.[66]

There are some actual instances of withdrawal from international treaties by Australia, but conspicuously few. It is apparent that JSCOT has not examined the issue of withdrawal in detail and the sporadic reports that have considered particular treaty withdrawal have not yielded comprehensive analysis, at least not of the legal requirements for treaty withdrawal nor the impact that withdrawal would have on the content of domestic law. Admittedly, most of the treaties in

61 For past efforts to introduce a requirement of parliamentary approval before ratification which were not implemented, see Treaties Ratification Bill 2012 (Cth); Senate Legal and Constitutional References Committee, Parliament of Australia, *Trick or Treaty: Commonwealth Power to Make and Implement Treaties* (Report, November 1995) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/pre1996 > ('*Trick or Treaty?*').

62 Joint Standing Committee on Treaties, Parliament of Australia, *A History of the Joint Standing Committee on Treaties: 20 Years* (Report No 160, March 2016) ('*A History of the JSCOT*').

63 Melinda Jones, 'Myths and Facts Concerning the Convention on the Rights of the Child in Australia' (1999) 5(2) *Australian Journal of Human Rights* 126, 130. One of the treaties considered by JSCOT in its early days of operation was the *Convention on the Rights of the Child* in 1998 in the wake of the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273: see Joint Standing Committee on Treaties, Parliament of Australia, *United Nations Convention on the Rights of the Child* (Report No 17, August 1998) <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/reports/report17/rept17contents.htm>.

64 The Senate report made only passing reference to the issue of withdrawal at [16.93] in a three-line statement headed, '[p]arliamentary scrutiny of withdrawal of reservations or denunciation of treaties': *Trick or Treaty?* (n 61) 297.

65 Joint Standing Committee on Treaties, Parliament of Australia, *Australia's Withdrawal from UNIDO and Treaties Tabled on 11 February 1997* (Report No 7, March 1997) vii <http://www.austlii.edu.au/au/other/jscot/reports/7/7.pdf> ('*Australia's Withdrawal from UNIDO*').

66 *A History of the JSCOT* (n 62) 17 [3.4].

question have not been of such relevance to the wider public to generate the interest necessary to prompt thorough analysis of these and related issues.[67]

A *Distinguishing Executive Power*

The executive acts of treaty ratification and, by extension, treaty denunciation have national and international dimensions. International law contemplates treaty withdrawal, and in many instances prescribes formal processes for withdrawal within the international treaty itself.[68] In some instances, denunciation may be subject to very strict conditions.[69] Absent such prescription, the *Vienna Convention on the Law of Treaties* ('*VCLT*') prescribes the general requirements associated with such withdrawal in art 56.[70] The status of the *VCLT* is such that it is considered an exposition of customary international law.[71]

In the Australian context, the external affairs power in s 51(xxix) of the *Constitution* grants the Commonwealth legislative power to implement treaty obligations subsequent to a treaty's ratification. The mere existence of treaty obligations is sufficient to enliven the external affairs legislative power,[72] provided that the contents of the treaty itself are sufficiently specific to create legal obligations.[73] Thereafter, the resulting legislation must be reasonably appropriate and adapted to conforming to those treaty obligations.[74]

67 The report on Australia's withdrawal from the United Nations Industrial Development Organization ('UNIDO') illustrates this point. JSCOT noted the decision of Australia to withdraw from UNIDO: see *Australia's Withdrawal from UNIDO* (n 65) 11–12 [2.34]–[2.36], 13 [2.40].

68 A treaty may specify the terms on which a party can denounce. A party will usually be permitted to denounce a treaty by written notification to the Secretary-General of the United Nations: see, eg, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 48.

69 See, eg, *Convention Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 9.

70 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 56 ('VCLT') provides:

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.
>
> 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

71 Oxford University Press, *Max Planck Encyclopedia of Public International Law* (online at 21 November 2021) Vienna Convention on the Law of Treaties (1969), 'F The VCLT and Customary International Law' [14].

72 *Tasmanian Dam Case* (n 56) 129–30 (Mason J).

73 *AAP* (n 1) 486–7 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

74 Ibid.

As noted by Saunders,

> prerogative [powers] are now encompassed by s 61 and, on one view, are derived from the reference to the Queen. In this respect, at least, the continuing influence of a concept of the Crown is apparent. There is nothing new in this conclusion … [p]owers in this category include, for example, the power to conclude treaties.[75]

Twomey, in referencing *Halsbury's Laws of England* and Payne,[76] states:

> Prerogative powers find their source in the royal authority historically exercised, by custom or necessity, by the monarch. That authority is recognised by the common law and hence defined by the courts, even though its original source lies outside the common law.[77]

Saunders states that debates

> over the precise definition of the prerogative in the United Kingdom are not replicated in Australia, where Sir William Wade's superadded requirement of legal effect has not been influential.[78] Recent observations by Justices of the High Court appear to confirm, however, that Blackstone's more narrow formulation of the prerogative is to be preferred in Australia over Dicey's more expansive view, limiting the range of the powers historically attributable to the Crown. Equally significantly, recent decisions also make it clear that the prerogative-type powers available to the Commonwealth executive under s 61 are not coextensive with the prerogative in the United Kingdom, adherence to Blackstone notwithstanding.[79]

As Saunders observes, the narrower range of non-statutory executive powers that fall within Blackstone's explication of the prerogative includes the ratification of treaties.[80] There is doubt, she argues, as to whether this remains an appropriate domain for the exercise of unfettered executive power.[81] There is also doubt as to the precise source of this power. Referring to Latham CJ's judgment in *R v*

75 Cheryl Saunders, 'The Concept of the Crown' (2015) 38(3) *Melbourne University Law Review* 873, 890–1 (citations omitted) ('The Concept of the Crown'). Saunders notes that '[t]he focus here is on power, rather than on other "preferences, immunities and exceptions" associated with the prerogative that also derive from s 61': at 890 n 93, quoting *Williams v Commonwealth* (2012) 248 CLR 156, 228 [123] (Gummow and Bell JJ) ('*Williams [No 1]*'). Hayne notes that '[t]he polity called into existence by the *Constitution* is the Commonwealth' and '[i]t is the polity which is the right and duty-bearing entity, not the [e]xecutive': Hayne (n 5) 337.

76 Butterworths, *Halsbury's Laws of England*, vol 8 (at 31 May 1996) 2 Constitutional Law and Human Rights, '5 The Executive' [368]; Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 77, 78–9, 106–7.

77 Twomey, 'Pushing the Boundaries of Executive Power' (n 8) 325.

78 Sir William Wade, *Constitutional Fundamentals* (Stevens & Sons, rev ed, 1989) 58–62, cited in Saunders, 'The Concept of the Crown' (n 75) 891.

79 Saunders, 'The Concept of the Crown' (n 75) 891 (citations omitted). Saunders reiterates that the Commonwealth's powers 'cannot be co-extensive with the prerogative in England': Saunders, 'Separation of Legislative and Executive Power' (n 6) 630.

80 Saunders, 'The Concept of the Crown' (n 75) 879.

81 Ibid, citing John Howell, 'What the Crown May Do' (2010) 15(1) *Judicial Review* 36, 38.

Burgess; Ex parte Henry,[82] Saunders notes that '[a]rguably, in any event, a concept of the prerogative is unnecessary even for the purposes of foreign affairs and defence, which might equally have been covered by the authority to execute and maintain the *Constitution*'.[83] The oft-cited passage from French CJ illustrates the uncertainty as to the precise subject matter of Commonwealth executive power and its openness to development:

> The collection of statutory and prerogative powers and non-prerogative capacities form part of, but do not complete, the executive power. They lie within the scope of s 61, which is informed by history and the common law relevant to the relationship between the Crown and the Parliament. That history and common law emerged from what might be called an organic evolution. Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.[84]

Prior High Court decisions seemed to somewhat support the development of a form of inherent power in s 61.[85] In *AAP*, Mason J stated that

> there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities *peculiarly adapted* to the government of a nation and which *cannot otherwise be carried on for the benefit of the nation*.[86]

This statement remains elusive as, even after *Pape v Federal Commissioner of Taxation* ('*Pape*'),[87] it is unclear as to whether the power outlined in Mason J's formulation — the so-called nationhood power — exists together with the broader prerogative, or was intended to actually supersede and replace it.[88] Commenting on the *Pape* case, Twomey noted that the Court, 'appeared to eschew any reference to this power as a "nationhood power" … [the High Court] assiduously avoided giving it any name or description',[89] leading to further uncertainty regarding the nature, scope and effect of this power. Post *Pape*, the inherent view of s 61 is being rationalised as the key source of the Commonwealth's non-statutory executive

82 (1936) 55 CLR 608, 644. Latham CJ stated that

> [t]he execution and maintenance of the Constitution, particularly when considered in relation to other countries, involves not only the defence of Australia in time of war but also the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane. … [An] obvious example of [this] is … the negotiation and making of treaties with foreign countries.

83 Saunders, 'Separation of Legislative and Executive Power' (n 6) 632–3.

84 *Pape* (n 7) 60 [127].

85 See *Williams [No 1]* (n 75); *Williams v Commonwealth [No 2]* (2014) 252 CLR 416.

86 *AAP* (n 1) 397 (emphasis added).

87 *Pape* (n 7).

88 Winterton (n 18) 33, 35–6.

89 Twomey, 'Pushing the Boundaries of Executive Power' (n 8) 317.

power.[90] Somewhat completing the description left unresolved by French CJ in *Pape*, Sawer had suggested that the Commonwealth's executive power may include 'an area of inherent authority derived partly from the Royal Prerogative, and probably even more from the necessities of a modern national government'.[91] Despite this 'preponderant drift of both decision and discussion' relating to s 61, the precise ambit of executive power, including those powers extending from the 'maintenance' limb of s 61, have yet to be fully determined.[92]

The broad ratio that emerges from *Pape*, collectively from the judgments of French CJ and of Gummow, Crennan and Bell JJ (constituting the majority in this case), is that the power of the government to respond to the global financial crisis resided directly in s 61 and was to be informed by the Commonwealth's character and status as a national government.[93] It was not informed, constrained or limited by the common law prerogative.[94]

Three years later in *Williams v Commonwealth* ('*Williams [No 1]*'),[95] the High Court further supplemented its approach to federal executive power sourced in s 61 through reference to informing doctrines such as federalism and the distribution of powers between the two constitutionally recognised tiers of government. In considering whether the Commonwealth's attempts to enter funding arrangements absent legislative authorisation could be validated by s 61, the majority reasoned that the Commonwealth's capacity to spend needed to be reconciled with the principle of federalism and the fiscal mechanisms in ch IV (such as s 96) of the *Constitution*, available to the Commonwealth to effectuate its desired outcome.[96] This power to spend was reasoned to be restricted by overarching doctrines such as federalism. Regrettably, the extent to which the Commonwealth executive may unilaterally denounce treaties to which it has become a party remains unexamined by the High Court.

It remains to be seen whether executive treaty denunciation in Australia, particularly of the sort that removes the sole legislative head of power supporting a statute, might be limited by the Australian courts invoking doctrinal arguments of the sort advanced by Wade that such actions had thereto 'produced legal effects

90 See Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35(2) *Sydney Law Review* 253.

91 Geoffrey Sawer, 'The Executive Power of the Commonwealth and the Whitlam Government' (Octagon Lecture, University of Western Australia, 1976) 10, quoted in Peter Gerangelos, 'Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 189, 196 ('The George Winterton Thesis').

92 Gerangelos, 'The George Winterton Thesis' (n 91) 196, quoting Sawer (n 91) 10.

93 *Pape* (n 7) 63–4 [133] (French CJ), 89 [232]–[233] (Gummow, Crennan and Bell JJ).

94 Ibid 60 [127] (French CJ).

95 *Williams [No 1]* (n 75).

96 *Williams [No 1]* (n 75) 192–3 [37], 205–6 [60]–[61] (French CJ), 235–6 [146]–[148] (Gummow and Bell JJ), 347–8 [501]–[503] (Crennan J). See also Appleby and McDonald (n 90) 263–4.

at common law'.[97] Comparative examples highlighted by Woolaver, where courts have ultimately developed doctrinal arguments for fettering the exercise of non-statutory and unilateral executive power to withdraw from treaties,[98] may assuage the hesitation of the Australian courts in refining their own approach to similar questions, and in considering to what extent the *acte contraire* presumption should inform the Australian position on this question. Ultimately, the divergence of approach illustrated by other jurisdictions, most notably the United Kingdom, may stoke the imagination and offer alternative ways of conceptualising the limits of executive power in treaty withdrawal.

B *Constitutionality of Treaty Withdrawal*

Whether the non-statutory executive act of treaty denunciation is specifically reviewable by Australian courts is yet to be judicially considered.[99] However, in a global climate of rising populism the ideals of internationalism are being increasingly challenged, and treaty denunciation is becoming a matter of practical concern as governments around the world either withdraw or contemplate withdrawing from international state obligations. Chief Justice of the High Court of Australia, Susan Kiefel, speaking extrajudicially in the United Kingdom on the matter of the *Miller* decision, observed that the UK courts did not hesitate to determine the limits of executive power. Her Honour stated: 'History may suggest that the courts have not always been comfortable in that role.'[100] Until 1984, the position was that 'a decision of the executive was only amenable to judicial review if it was said to be based on a statute'; before *Council of Civil Service Unions v Minister for the Civil Service*,[101] a 'decision based on the prerogative power was considered to be beyond the reach of the courts'.[102]

Similarly, Australian courts have also affirmed their capacity to review non-statutory executive action,[103] with the broader concept of judicial review being 'axiomatic' in Australia.[104] This is further affirmed by Aronson, Groves and Weeks

97 HWR Wade, 'Procedure and Prerogative in Public Law' (1985) 101 (April) *Law Quarterly Review* 180, 193.

98 Woolaver (n 13) 76–82.

99 The possibility that the matter could be reviewable is beyond doubt as ch III of the *Constitution* creates and entrenches the role of the High Court, including in respect of 'all matters … arising under any treaty': at s 75(i).

100 Chief Justice Susan Kiefel, 'Some Reflections, Following the Brexit Decision, on Secession, on the Roles of Australian and English Courts with Respect to the Validity of Executive and Legislative Action and on Responses to Controversial Decisions of this Kind' (Speech, Anglo Australian Lawyers Association, 12 July 2017) 4 <https://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-kiefel-ac>.

101 [1985] 1 AC 374.

102 Chief Justice Susan Kiefel (n 100) 7. This view about the limits on review of the prerogative changed with the decision in ibid.

103 See, eg, *Williams [No 1]* (n 75); *Pape* (n 7); *Ruddock* (n 7).

104 *Australian Communist Party Case* (n 16) 262–3 (Fullagar J).

who maintain that, subject to justiciability, non-statutory executive power is generally subject to review in Australia.[105] If treaty ratification is taken as an expression of inherent executive power emanating from s 61, the High Court has taken no issue with reviewing the proper and appropriate limits of the exercise of this power.[106] With respect to the proper exercise of the executive's power to ratify treaties, the High Court has maintained the position that the motivation for ratification cannot simply be to enlarge the scope of its legislative power, such that the act of treaty ratification must itself be 'genuine' or 'bona fide'.[107]

Given the capacity to judicially consider the scope of the power to ratify treaties, it logically follows that the same right of review would exist and extend to the power to denounce a treaty. What, then, is the appropriate 'measuring-rod' against which the constitutionality of treaty denunciation may be appraised?[108] Developed over a succession of cases including *Koowarta v Bjelke-Petersen*,[109] *Commonwealth v Tasmania* ('*Tasmanian Dam Case*')[110] and others, the High Court has framed the executive power to ratify treaties within the context of the overarching principle of federalism and the federal distribution of legislative powers. The authors propose that the High Court can and should extend this rationale to frame the constitutionality of treaty denunciation. Additionally, as demonstrated in the following section, the *Miller* decision provides a rationale for adoption in the Australian context, insofar as what was decidedly significant in that case was that treaty denunciation would fundamentally alter constitutional arrangements.[111] Denouncing Australia's treaty obligations and effectuating withdrawal could plausibly result in a situation that substantially alters significant *legislative* arrangements of the Commonwealth where such arrangements cannot otherwise be carried on for the benefit of the nation.

Chircop and Higgins have recently argued that there are three possible sources of inherent constitutional limitation on treaty withdrawal by the executive: 'representative and responsible government; … federalism and … the requirement of bona fides in international relations',[112] though ultimately, they conclude that the power only potentially remains subject to 'a requirement that it be exercised for bona fide purposes'.[113] In reaching these conclusions, Chircop and Higgins assert that 'it is sufficient … to conclude that the basis for the Executive's power

105 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 123–6.

106 See, eg, *Koowarta* (n 56), *Tasmanian Dam Case* (n 56).

107 *Koowarta* (n 56) 197, 200 (Gibbs CJ), 224, 229 (Mason J).

108 *Wool Tops Case* (n 19) 442 (Isaacs J), quoted in Condylis (n 9) 387.

109 *Koowarta* (n 56).

110 *Tasmanian Dam Case* (n 56).

111 *Miller* (n 3) 149 [81], [83] (Lord Neuberger PSC, Baroness Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge JJSC).

112 Chircop and Higgins (n 2) 238.

113 Ibid 247.

to withdraw from treaties is s 61 of the *Constitution*'.[114] With respect to these authors, we argue that it is insufficient to not fully interrogate the precise source of this power because of the practical consequences that follow. Given the conceptual uncertainties regarding the scope of executive power, a more detailed investigation of the precise power in s 61 upon which the power of denunciation may be based is warranted. As Hayne states, reliance upon descriptions or 'expressions like "the Crown and its capacities" or "non-statutory executive power"' to describe or capture the source of a particular power as 'substitutes for [legal] analysis and argument'[115] is problematic, and should be discarded.[116] To this end, we consider whether the power of treaty withdrawal can be more precisely categorised as being of a sort inhering in the nationhood power; this aspect of executive power extending to the Commonwealth the ability to 'engage in enterprises and activities peculiarly adapted to the government of a nation'.[117] We argue that, as a more precise and useful tool of legal analysis and description, the ratification and denunciation of treaties might be conceived of as activities of this sort.

If the executive action of contemporary treaty denunciation can be reasoned to inhere not only in the prerogative-like powers of the executive but also in the nationhood power, then this power is permitted to develop and evolve to 'engage in enterprises and activities peculiarly adapted to the government of a nation'.[118] Treaty denunciation, as one such activity, would then be further revealed by 'interpreting the provision consistently with the Commonwealth's character and status as a national government'.[119] If treaty denunciation can inhere in the nationhood aspect of s 61 as well as in the prerogative, then withdrawal from a treaty upon which significant legislative arrangements wholly depend for their constitutionality and that cannot otherwise be carried out for the benefit of the Australian nation, would, arguably, provide grounds for constitutional limitation on such actions. This is significant. Practically, this would imbue the unfettered and unilateral exercise of treaty denunciation with some constitutional limitations. For example, the authors envisage that denunciation of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*'),[120] arguably the sole legislative basis for the *Racial Discrimination Act 1975* (Cth),[121] would be justiciable on the grounds set out. A further safeguard, akin to Wade's precondition that the impugned treaty has 'produce[d] legal effects at common law' may further provide a rational and principled basis upon which to

114 Ibid 235.

115 Hayne (n 5) 334.

116 See Hayne (n 5).

117 *AAP* (n 1) 397 (Mason J).

118 Ibid.

119 Condylis (n 9) 387, citing Gerangelos, 'The Executive Power of the Commonwealth of Australia' (n 9) 97.

120 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

121 See generally *Koowarta* (n 56).

frame and limit non-statutory treaty denunciation.[122] Admittedly, a potential safeguard of this sort might be of limited utility when considering the effects at common law of newer treaties regarding issues such as the global commons or climate change. Nevertheless, the decision in *Miller* points to a possible way forward where the exercise of prerogative power poses a threat to individual rights and parliamentary supremacy among other values.

IV THE EXECUTIVE'S PREROGATIVE?

A *Lessons from* Miller*: Withdrawal under the* Treaty on European Union

In considering the nature and scope of the Commonwealth's non-statutory executive power to denounce treaties, it is instructive, though by no means determinative, to consider the manner in which UK courts have dealt with the issue in the context of the UK's withdrawal from the European Union ('EU') treaty system.

Article 50 of the *Treaty on European Union* ('*Treaty on EU*')[123] regulates the withdrawal of a member state from the EU. This provision applies exclusively, despite the existence of art 54 of the *VCLT*, which allows for '[t]ermination of or withdrawal from a treaty under its provisions'.[124] This is because art 5 of the *VCLT* mandates that the Convention also applies 'to any treaty which is the constituent instrument of an international organization … without prejudice to any relevant rules of the organization'.[125] Article 50(1) of the *Treaty on EU* states that '[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'.[126]

To date the UK is the only state to have invoked art 50 of the *Treaty on EU*, having officially notified the European Council of its intention to withdraw following the results of the consultative referendum on 23 June 2016 and the outcome of legal proceedings on the nature and scope of the royal prerogative. Indeed, the act of notification — ultimately effected by Prime Minister Theresa May on 29 March 2017 — had been subjected to thorough legal scrutiny in proceedings concerning the role of the Parliament in the notification procedure. While the UK government argued that the royal prerogative afforded a sufficient legal basis for the Prime Minister to notify the European Council of its intention to withdraw, a panel of a divisional court of the Supreme Court in *Miller* unanimously held that the royal prerogative did not provide a legal basis for the executive to invoke art 50 of the

122 HWR Wade (n 97) 193.

123 *Treaty on European Union*, opened for signature 7 February 1992, [2016] OJ C 202/13 (entered into force 1 November 1993) ('*Treaty on EU*').

124 *VCLT* (n 70) art 54.

125 Ibid art 5.

126 *Treaty on EU* (n 123) art 50(1).