Miller in Australia — just imagination or the inevitable?

*Dane Luo**

Every three years, the Australian people go to the polls. Armed with a 'democracy sausage', they choose their federal representatives. For the next few years, those representatives go to Canberra. They vote on motions. They write Bills. They ask questions to keep the government accountable. Importantly, they speak for their constituents. The people's elected representatives — all 227 in the House of Representatives and Senate combined — are at the core of the constitutional system of representative and responsible government.

But the executive has a little-known power lurking around. It is the power to 'prorogue' the Parliament.[1] This is a not a word used in common parlance or generally defined in a dictionary. But it has some significant consequences. It gives the Prime Minister the power to suspend Parliament's work. At the stroke of the Governor-General's pen, the people's representatives must stop their work. The votes cannot happen. The Bills cannot be introduced. The committees cannot sit. And the parliamentary chambers are deserted. Put simply, the people's representatives are locked out of their jobs. But down the road, the Ministers are free to exercise their powers without parliamentary accountability. This all happens until the Prime Minister decides to recall the Parliament. (Fortunately, the *Constitution* mandates that Parliament must sit again within 12 months — but, still, 12 months is a very long time.) But the worst part is — if prorogation persists for a long time, the Australian people effectively lose their voice in Parliament. Because when Ministers trigger a prorogation, Parliament cannot stand in the way of having its powers suspended.

But what about the courts? Can they stop the executive wielding this medieval power to frustrate Parliament's constitutional functions? In *R (Miller) v Prime Minister* [2020] AC 373 ('*Miller*'),[2] the Supreme Court of the United Kingdom ('UKSC') held that a prorogation is unlawful if it has the effect of frustrating the constitutional functions of the UK Parliament without reasonable justification. In light of the recent academic discussion of judicial review of non-statutory executive power,[3] it begs the question: can there be judicial review of an executive act to prorogue the Commonwealth Parliament?

This article argues an affirmative answer. This is because the ability of Parliament to perform its constitutional functions is essential to the constitutionally prescribed system of representative and responsible government. Thus, there is a constitutional implication that limits the scope of the power to prorogue the Commonwealth Parliament. This article also addresses issues relating to the jurisdiction of the courts, available remedies and standing.

* Dane Luo BComm (Hons I) LLB (Hons I) (USyd), Associate to Justice Hammerschlag, Chief Judge in Equity at the Supreme Court of New South Wales. This is an edited version of the article which was the winner of the AIAL National Administrative Law Essay Prize for 2023.

1 *Constitution* s 5.

2 [2020] AC 373, 407 [50] (Lady Hale PSC and Lord Reed DPSC for the Court) ('*Miller*').

3 See, eg, Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020).

Prorogation and *Miller*

Nature of prorogation

Prorogation is an executive act which affects the operation of Parliament.[4] It is a power exercised by the Governor-General, on the advice of the Prime Minister.[5] Traditionally, a parliamentary term was divided into sessions, which were usually annual.[6] A session was ended by prorogation, permitting a new session to commence at a later date with a Throne Speech setting out the government's agenda.[7] During the period that Parliament is prorogued, the Houses cannot meet. This means they cannot pass legislation, debate government policy or question ministers. Unless authorised by statute, parliamentary committees may not meet and take evidence.[8] Prorogation also has the effect of 'wiping clean the parliamentary slate' — it vacates all pending proceedings, including Bills that have not completed their passage, questions on notice, orders to produce documents and sessional orders.[9] At the next session, the lapsed items can be reintroduced as if their earlier progress had never happened[10] unless the Standing Orders or legislation permits them to be restored to the stage they were at before the prorogation.[11]

A prorogation is different to a dissolution of the House of Representatives. A dissolution brings a term of Parliament to an end and is followed by a general election.[12] A dissolution thus precipitates democratic accountability whilst a prorogation does not. A prorogation is also distinguishable from an adjournment of a House within a session. An adjournment

4 Bruce M Hicks, 'The Westminster approach to prorogation, dissolution and fixed date elections' (2012) 35(2) *Canadian Parliamentary Review* 20.

5 Whether prorogation is a reserve power has been the subject of debate: see Anne Twomey, 'Prorogation: can it ever be regarded as a reserve power?' (2016) 27 *Public Law Review* 144, 150; Letter from Senator George Brandis QC, Attorney-General, to Sir Peter Cosgrove, Governor-General, 21 March 2016, and attached paper 'The practice and precedents of recall of Parliament following prorogation' <https://www.gg.gov.au/sites/default/files/2019-06/documents_relating_to_prorogation_of_the_parliament_21_march_2016.pdf>.

6 See Legislative Assembly Procedures and Privileges Committee, Parliament of Western Australia, *Changes to Prorogation and Extended Sessions* (Report No 4, 2003) 2 <https://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/024D0345DACEB23548257831003E95DE/$file/Changestoprorogationandextendedsession.pdf>; Clerk of the Parliament, *Queensland Parliamentary Procedures Handbook* (Parliament of Queensland, August 2020) 13.

7 Sir David Natzler et al (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 25th ed, 2019) 163–4 [8.2]. See *Western Australia v Commonwealth* (1975) 134 CLR 201, 290 (Murphy J) ('*WA v Commonwealth*').

8 *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114, 122 (Hungerford J). Whether committees can sit without statutory authorisation is the subject of controversy in Australia: see Teresa McMichael, 'Prorogation and principle: the Gentrader Inquiry, government accountability and the shutdown of Parliament' (2012) 27(1) *Australasian Parliamentary Review* 196.

9 *WA v Commonwealth* (n 7) 254 (Stephen J); see also 238–9 (Gibbs J). See also *A-G (WA) v Marquet* (2003) 217 CLR 545, 575–6 [85] (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*Marquet*').

10 John Hatsell, *Precedents of Proceedings in the House of Commons* (Luke Hansard and Sons, 1818) vol 2, 335–6.

11 *WA v Commonwealth* (n 7) 238–9 (Gibbs J). See, eg, Commonwealth, House of Representatives, Standing Order No 174; *Constitution Act 1934* (SA) s 57(1).

12 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 462. See *WA v Commonwealth* (n 7) 253 (Stephen J).

is effected by a motion passed by the House, not foisted upon it by the government.[13] Importantly, a degree of ministerial accountability is maintained during an adjournment because parliamentary committees continue sitting as usual, written questions may be asked on the Notice Paper and the House can recall itself if a sufficient number of Members desire.[14]

Miller

The UKSC's *Miller* decision is the first decision to find that judicial review of a prorogation is available.

Following a referendum that supported the UK leaving the European Union ('EU') in 2016, the UK Government invoked art 50 of the *Treaty on European Union* to commence the process of leaving the EU.[15] This began a two-year process for the UK Government and European Council to negotiate a withdrawal agreement that contained the terms of the UK's exit.[16] If no agreement was reached by 'exit day' (a 'no-deal Brexit'), the UK would automatically cease to be a member of the EU, with significant consequences for tariffs, trade and the Irish border.[17]

The UK Parliament asserted oversight by requiring that any withdrawal agreement must be approved by the House of Commons, noted by the House of Lords and an Act passed to implement the agreement.[18] The House of Commons rejected, on three occasions, a withdrawal agreement concluded on November 2018 and demanded changes to the agreement. The Johnson Government believed that the European Council would agree to changes to the withdrawal agreement only if there was a genuine risk of a no-deal Brexit. To show it was serious, the Government began preparing for a no-deal Brexit. However, a majority of the Commons did not support that plan.[19]

On 27 August 2019, the Prime Minister advised the Queen to prorogue Parliament from 9 September to 14 October 2019. This was an unusually long prorogation that lasted for 34 of the 52 days leading up to exit day. The prorogation had the effect of reducing the number of sitting days to only four.[20]

13 See *WA v Commonwealth* (n 7) 253 (Stephen J); Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 13.

14 See, eg, Commonwealth, Senate, Standing Order No 55.

15 *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) art 50; *European Union (Notification of Withdrawal) Act 2017* (UK). See also *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 159–60 [121]–[124] (Lord Neuberger PSC, Baroness Hale DPSC, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge JJSC).

16 *Treaty on European Union* (n 15) art 50.

17 'Brexit: What would no deal mean?', *BBC News* (online, 13 December 2020) <https://www.bbc.com/news/uk-politics-48511379>.

18 *European Union (Withdrawal) Act 2018* (UK) s 13.

19 See Heather Stewart and Kate Proctor, 'MPs put brakes on Boris Johnson's Brexit deal with rebel amendment', *The Guardian* (online, 20 October 2019) <https://www.theguardian.com/politics/2019/oct/19/mps-put-brakes-on-boris-johnsons-brexit-deal-with-rebel-letwin-amendment>.

20 Anne Twomey, 'Brexit, the prerogative, the courts and article 9 of the Bill of Rights' (Legal Studies Research Paper Series No 19/79, University of Sydney Law School, February 2020) 4 <https://dx.doi.org/10.2139/ssrn.3503178>.

The UKSC held that the limits of the prerogative power to prorogue is determined by the common law, which must be compatible with fundamental principles of the UK constitution[21] — relevantly, parliamentary sovereignty and parliamentary accountability. First, the principle of parliamentary sovereignty is that laws enacted by the Crown-in-Parliament are the supreme form of law.[22] In practice, this principle would be undermined if the executive had an unlimited prorogation power that prevented Parliament from legislating for as long as the executive pleased.[23] Second, parliamentary accountability describes the principle that Ministers are accountable to Parliament through mechanisms such as answering questions, appearing before committees and scrutiny of delegated legislation.[24] If Parliament is prorogued for a long period, there is a risk that 'responsible government may be replaced by unaccountable government: the antithesis of the democratic model'.[25]

Balancing these two fundamental principles with the fact that Parliament does not remain permanently in session and that it is undoubtedly lawful to prorogue Parliament,[26] the UKSC expressed the following test:

> [A] decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[27]

Applying this test to the facts, the first issue was whether the Prime Minister's advice had the effect of frustrating or preventing Parliament from carrying out its constitutional functions. The Court emphatically answered 'of course it did'.[28] The prorogation was unusually long and prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks leading up to exit day. The circumstances were 'quite exceptional' because a fundamental constitutional change was due to take place and Parliament may have considered that scrutiny of government activity was more important.[29] Even if Parliament went into recess for the normal conference season, Members of Parliament would still be able to hold the government to account, but prorogation prevented that from happening.

The Court held it was impossible, on the evidence presented, to conclude that 'there was any reason — let alone a good reason — to advise Her Majesty to prorogue Parliament for five weeks'.[30] The Court considered the evidence of former Prime Minister Sir John Major that a Queen's Speech typically required four to six days of preparation.[31] The British

21 *Miller* (n 2) 404 [38] (Lady Hale PSC and Lord Reed DPSC for the Court).
22 Ibid 404–5 [41], citing *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352; *A-G v De Keyser's Royal Hotel* [1920] AC 508; *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513.
23 *Miller* (n 2) 405 [42] (Lady Hale PSC and Lord Reed DPSC for the Court).
24 Ibid 406 [46].
25 Ibid 406 [48].
26 Ibid 405 [45].
27 Ibid 407 [50].
28 Ibid 408 [56].
29 Ibid 407–8 [55]–[56].
30 Ibid 410 [61]. Cf Wala Al-Daraji, 'Miller 2: A political decision or a saviour of the UK constitution?' (2020) 12(3) *Amsterdam Law Forum* 1, 6.
31 *Miller* (n 2) 409 [59].

Government's evidence failed to explain why a prorogation of five weeks was needed in the circumstances. It also failed to consider what parliamentary time would be needed to approve any new withdrawal agreement, the impact of prorogation on scrutinising delegated legislation or the competing merits of going to recess and prorogation.[32]

The Court issued a declaration that the advice to the Queen was unlawful[33] and was outside the powers of the Prime Minister to give it. As Her Majesty's Order-in-Council was founded on unlawful advice, it was also unlawful. The actual prorogation was also unlawful, as if the Lords Commissioners 'walked into Parliament with a blank piece of paper'.[34] After concluding that the prorogation was not a proceeding of Parliament, and thus was not affected by parliamentary privilege,[35] the Court declared that Parliament had not been prorogued.[36]

Is a prorogation justiciable?

In *Council of Civil Service Unions v Minister for the Civil Service* ('*CCSU*'),[37] the House of Lords held that an exercise of the prerogative power to prevent public service staff at intelligence headquarters from belonging to a trade union was not immune from judicial review simply on account of the power's non-statutory source.[38] Their Lordships emphasised that it was the subject-matter of the power exercised and its nature, rather than merely its source, that rendered the power justiciable or non-justiciable. Although the High Court has not endorsed the principle that legal source alone should determine justiciability, there is obiter that aligns with *CCSU*,[39] and the principle has been well recognised in intermediate appellate courts.[40]

In *L v South Australia* it was suggested that the power to prorogue may be 'immune from judicial review'.[41] However, that case also recognised that the prerogative powers of the Crown 'exist only in so far as they are recognised by the common law' and that 'an excess of prerogative authority can be set aside by the Courts according to their proper common law limits'.[42] This reflects the dichotomy between jurisdictional and non-jurisdictional errors.[43] Jurisdictional error, which involves determining whether the exercise of power is outside

32 Ibid 409 [60].
33 Ibid 410 [62].
34 Ibid 412 [69].
35 *Bill of Rights 1689,* 1 Wm & M sess 2, c 2, art 9.
36 *Miller* (n 2) 412 [70].
37 [1985] 1 AC 374.
38 Ibid 407 (Lord Scarman), 409–10 (Lord Diplock), 417 (Lord Roskill).
39 See, eg, *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 65 [69] (McHugh, Gummow and Hayne JJ).
40 See, eg, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449; *Victoria v Master Builders Association (Vic)* [1995] 2 VR 121.
41 *L v South Australia* (2017) 129 SASR 180, 208 [109]–[112] (Kourakis CJ, Parker J agreeing at 236 [198], Doyle J agreeing at 236 [199]).
42 Ibid 207 [107].
43 See Justice Jayne Jagot, 'In defence of jurisdictional error' (Speech, 10th Appellate Judges Conference, Australian Judicial Institute of Administration, 21–22 April 2022) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-jagot/jagot-j-20220422>.

the limits of what is conferred, is always justiciable.[44] Thus, determining whether a limit on the power to prorogue has been breached is not, and never has been, beyond the reach of courts.[45]

The case for a *Miller*-like limit in Australia

Once it is accepted that the limits of the prorogation power are justiciable, the question becomes: are there any limits and, if so, what are those limits? This requires consideration of the constitutional text.

Method of interpretation

Section 5 of the *Constitution* provides that the Governor-General 'may … from time to time, by Proclamation or otherwise, prorogue the Parliament'. The phrase 'from time to time' displaces the common law doctrine that 'a power conferred by statute was exhausted by its first exercise'[46] but does not alter the limits of the power spelt out in the *Constitution*.[47] A court would thus turn to interpreting the word 'prorogue' to determine the limits of the power. It would likely begin by considering the meaning of that term at Federation.[48] The word 'prorogation' means putting off to another day.[49] In the Convention Debates, the power was understood to refer to the prerogative power of the British Crown to prorogue the UK Parliament.[50] As with all prerogative powers, the existence and extent of the prorogation power is determined by the common law.[51] This is unsurprising because the *Constitution* was framed in the language of the common law and should be read in that light.[52] At the same time, *Western Australia v Commonwealth*[53] and *Attorney-General (WA) v Marquet*[54] indicate

44 *Craig v South Australia* (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590, 597 [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [162] (Hayne J) ('*Aala*'); Geoffrey Airo-Farulla, 'Rationality and judicial review of administrative action' (2000) 24 *Melbourne University Law Review* 543, 551.

45 See also Jackson A Myers, 'Transatlantic perspectives on the political question doctrine' (2020) 106(4) *Virginia Law Review 1007*, 1021–5.

46 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, 445 [45] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

47 Ibid 445 [45] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

48 See *Cole v Whitfield* (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

49 Denis O'Brien, 'Federal elections — the strange case of the two proclamations' (1993) 4(2) *Public Law Review* 81, 82.

50 *Official Report of the National Australasian Convention Debates*, Adelaide, 30 March 1897, 279–80, 908–9 (George Reid).

51 Anne Twomey, '*Miller* and the prerogative' in Mark Elliot, Jack Williams and Alison L Young (eds), *The UK Constitution after* Miller*: Brexit and Beyond* (Hart Publishing, 2018) 69, 73. In relation to the prerogative generally, see *Case of Proclamations* (n 22) 1354 (Coke LJ); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 223 [75], 226 [86] (Gummow, Hayne, Heydon and Crennan JJ).

52 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 99 [138] (Gageler J) ('*Plaintiff M68/2015*'); *Cheatle v The Queen* (1993) 177 CLR 541, 552 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Cheatle*').

53 *WA v Commonwealth* (n 7).

54 *Marquet* (n 9).

that the term 'prorogue' must be interpreted in a manner consistent with the *Constitution* as a whole,[55] including its underlying principles and implications.[56]

Constitutional implication

The High Court has held that the constitutionally prescribed system of representative and responsible government gives rise to implications concerning political communication and voting rights.[57] It is submitted that, for the same reasons, the *Constitution* gives rise to a constitutional implication that limits the prorogation power to ensure that Parliament can fulfil its constitutional functions of legislating and holding the government to account.

The system of representative and responsible government establishes a chain of accountability[58] — the executive is 'chosen by, … answerable to, and may be removed by' the Parliament,[59] and Parliament is accountable to the people through the requirement that members of both Houses must be 'directly chosen by the people' in periodic elections.[60] As Parliament is at the centre of this chain, the system of representative and responsible government requires not just the mere existence of an elected Parliament, but the ongoing ability of Parliament to perform certain constitutional functions.

The first function is to exercise legislative power, which is conferred by s 1 of the *Constitution*.[61] It may be argued that the executive could govern through its prerogative or nationhood powers or by delegated legislation. However, the grant of prerogative and delegated legislative powers to the executive is fundamentally premised on ongoing parliamentary supervision. This is evident in Professor Dicey's description of the prerogative power as the 'residue … which at any given time is legally left in the hands of the Crown'[62] — a reference to only those historical powers that have not been 'taken away by legislation or fallen into desuetude'.[63] Where the Parliament has delegated its power to the executive,[64] supervision of subordinate legislation is maintained primarily by instruments being tabled and disallowable.[65] In other cases, parliamentary oversight is maintained by the capacity of Parliament to legislate to override any unacceptable statutory instrument.[66] Thus, the system

55 See *WA v Commonwealth* (n 7) 223–4 (Barwick CJ), 239 (Gibbs J), 255 (Stephen J), 266 (Mason J), 278 (Jacobs J), 291 (Murphy J); *Marquet* (n 9) 575–6 [85] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 585–6 [118] (Kirby J).

56 *A-G (NSW) v Brewery Employees' Union of New South Wales* (1908) 6 CLR 469, 611–2 (Higgins J), cited approvingly in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 332 (Dixon J).

57 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198 (Gummow, Kirby and Crennan JJ) ('*Roach*').

58 Benjamin B Saunders, 'Responsible government, statutory authorities and the *Australian Constitution*' (2020) 48(1) *Federal Law Review* 4, 4–5.

59 David Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, 2004) xvii.

60 *Constitution* ss 7, 24. See also *Lange* (n 57) 557–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), citing *Constitution* ss 1, 7, 8, 13, 24, 25, 28, 30.

61 See *Constitution* ss 51, 52.

62 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1961) 424.

63 Sir Frederick Pollock, 'Editorial note' in V St Clair Mackenzie, 'The royal prerogative in war-time' (1918) 34(2) *Law Quarterly Review* 152, 159.

64 See *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

65 *Legislation Act 2003* (Cth) ss 38, 42.

66 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Exemption of Delegated Legislation from Parliamentary Oversight Final Report* (Report, 16 March 2021) 19 [3.1].

of representative and responsible government is postulated on Parliament being able to sit so that it can legislate with respect to matters within Parliament's legislative competence, including matters incidental to the exercise of executive power.[67]

The second function of Parliament is to hold the executive accountable. The House of Representatives can 'make or unmake' the government because Ministers may only govern if they have the confidence of the House.[68] Moreover, both Houses have unique powers that make them 'the only [forum] to test or expose ministerial administrative competence or fitness to hold office'.[69] This includes ordering the production of papers, questioning Ministers, carrying motions of censure, and punishing for contempt of a House's orders and rules.[70] In turn, convention requires that Ministers must explain their actions to Parliament, keep Parliament abreast of developments, face Parliament to answer questions and, if required, resign their ministerial office.[71] Thus, the Parliament's accountability functions are also premised on the Houses and committees being able to sit.

It is clear from the structure of the *Constitution* that both of these functions are uniquely conferred on the Parliament. Section 64 of the *Constitution*, which requires that a Minister must be a Member of Parliament,[72] facilitates ministerial accountability by ensuring that Ministers are subject to the direction and control of the Houses and are answerable to Parliament for all executive acts.[73] The constitutional system ensures that governmental powers 'belong to, and are derived from … the people of the Commonwealth'.[74] According to this principle, the people are 'sovereign'[75] and have 'the ultimate power of governmental control'.[76]

Therefore, the very essence of representative and responsible government rests on the Parliament being able to fulfil its constitutional functions of supervising the executive and legislating where it is necessary to curtail executive power.[77] But Parliament's ability to

67 *Constitution* s 51(xxxix); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 441 (Dawson, Toohey and Gaudron JJ); *Davis v Commonwealth* (1988) 166 CLR 79, 95 (Mason CJ, Deane and Gaudron JJ), 111–12 (Brennan J), 119 (Toohey J); *Brown v West* (1990) 169 CLR 195, 202 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

68 See Peter W Hogg, 'Prorogation and the power of the Governor-General' (2010) 27 *National Journal of Constitutional Law* 193, 198; Elaine Thompson, 'The 'Washminster' mutation' (1980) 15(2) *Politics* 32, 33–4.

69 Billy M Snedden, 'Ministers in Parliament — a Speaker's eye view' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond, 1980) 76.

70 Janina Boughey and Greg Weeks, 'Government accountability as a constitutional value' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 99, 108.

71 See Judy Maddigan, 'Ministerial responsibility: reality or myth?' (2011) 26(1) *Australian Parliamentary Review* 158, 158; Luke Raffin, 'Individual ministerial responsibility during the Howard years: 1996–2007' (2008) 54(2) *Australian Journal of Politics and History* 225.

72 See also *Constitution* s 44(iv).

73 Geoffrey Lindell, *Responsible Government and the Australian Constitution: Conventions Transformed into Law?* (Federation Press, 2004) 5; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 464 [220] (Gummow and Hayne JJ).

74 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70, 72 (Deane and Toohey JJ) ('*Nationwide News*'); *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ); *Lange* (n 57) 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

75 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ) ('*ACTV*').

76 *Nationwide News v Wills* (1992) 177 CLR 1, 71 (Deane and Toohey JJ) ('*Nationwide News*'). See also Paul Finn, 'A sovereign people, a public trust' in Paul Finn (ed), *Essays on Law and Government* (Lawbook, 1995) vol 1, ch 1.

77 Cf Will Bateman, *Public Finance and Parliamentary Constitutionalism* (Cambridge University Press, 2020) ch 9.

exercise its constitutional functions can be seriously impeded if the executive could abuse an unlimited prorogation power. The High Court has sometimes found it helpful to postulate extreme cases.[78] An extreme prorogation could involve Ministers effectively removing themselves from parliamentary scrutiny and suspending Parliament's constitutional powers until a time the Ministers choose (subject to the limit in s 6 of the *Constitution* that there shall be a session of Parliament at least once a year, and the need to secure the passage of annual supply). In contrast, an extended adjournment by the Houses does not pose the same threat because each House retains the power to recall itself from adjournment at any time and parliamentary committees can continue to hold the executive accountable during an adjournment.[79]

The High Court has recognised a distinction between textual and structural implications from the *Constitution*.[80] As the implied constitutional limitation on the power to prorogue is a predominantly structural implication, it 'must be logically or practically necessary for the preservation of the integrity of that structure'.[81] The implied freedom of political communication is considered necessary to prevent the substantial impairment of 'the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions'.[82] In the same way, it is submitted that the ability of the Houses to sit is 'an "essential", "necessary", "indispensable", "presupposed" or "inherent" element of representative democracy'.[83] The ability of Parliament to carry out its constitutional functions of legislating and holding the executive accountable is an 'indispensable incident',[84] at the 'central conception'[85] and 'essential to the maintenance'[86] of the system of representative and responsible government. Thus, there is a constitutional implication that Parliament's ability to reasonably fulfil its functions of legislating and holding the executive to account is not frustrated.

78 Jack Maxwell, 'Extreme examples in Constitutional Law', *AUSPUBLAW* (Blog Post, 5 February 2020) <https://auspublaw.org/blog/2020/02/extreme-examples-in-constitutional-law/>. See, eg, *Kable v DPP (NSW)* (1996) 189 CLR 51, 110–11 (McHugh J).

79 Commonwealth, House of Representatives, Standing Order No 30(c); Commonwealth, Senate, Standing Order No 55(2). See also Commonwealth, *Parliamentary Debates*, Senate, 17 March 2016, 2731–3 (Penny Wong and George Brandis).

80 *Zurich Insurance Co Ltd v Koper* [2023] HCA 25 [26] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) ('*Zurich*'), citing *ACTV* (n 75) 135 (Mason CJ).

81 *ACTV* (n 75) 135 (Mason CJ), quoted in *Zurich* (n 80) [26] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). In *Zurich*, Gordon, Edelman and Steward JJ sharply disagreed with an approach of categorising constitutional implications as either 'textual' or 'structural': [42]–[43]. Their Honours believe that implications need to be 'securely based' on both text and structure: [43]–[45]. It is unclear which approach Beech-Jones J would favour. His Honour's past judgments show that attention is paid to text and structure but do not otherwise shed much light on his approach to drawing constitutional implications: see *Kassam v Hazzard* (2021) 362 FLR 113, 184 [276] (NSWSC). Even if the approach of the minority in *Zurich* is ultimately taken, the implied constitutional limitation on the right to prorogue could nonetheless be found in the same way as the text and structure of the *Constitution* gives rise to the implied freedom of political communication.

82 *Nationwide News* (n 76) 51 (Brennan J).

83 Jeremy Kirk, 'Constitutional implications from representative democracy' (1995) 23(1) *Federal Law Review* 37, 40, 44. See also *Burns v Corbett* (2018) 265 CLR 304, 355 [94], 356 [96] (Gageler J), 383 [175], 388–9 [188] (Gordon J), 392–3 [205] (Edelman J).

84 See *Lange* (n 57) 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

85 *Roach* (n 57) 198 [80] (Gummow, Kirby and Crennan JJ).

86 *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ).

On one view, the constitutional implication operates as a direct limitation on the exercise of the prorogation power under s 5 in the same way that the implied freedom of political communication is a limit on legislative and executive power.[87] On another view, if the term 'prorogue' in s 5 is given its common law meaning,[88] the common law must be interpreted in a manner consistent with the *Constitution*, including implications derived from it.[89] On either view, the power to prorogue is subject to a constitutional limit and a purported prorogation which exceeds that limit is a justiciable matter that can be susceptible to judicial review.

Judicial review of a prorogation

Jurisdiction and the proper defendant

A challenge to a purported prorogation could be brought in the original jurisdiction of the High Court to deal with a matter 'arising under or involving the interpretation of the Constitution'.[90] The High Court recognised jurisdictional error as an entrenched minimum in its original jurisdiction to issue 'constitutional writs' of mandamus or prohibition, or an injunction, against officers of the Commonwealth.[91] This jurisdiction is shared with the Federal Court.[92]

Since *FAI Insurances Ltd v Winneke*,[93] the fact that the power to prorogue is conferred on the Governor-General is not decisive in precluding judicial review or prerogative relief against decisions taken on advice of Ministers. Indeed, the High Court has, on at least three occasions,[94] reviewed executive actions pursuant to or for the purpose of the exercise of a statutory discretion conferred on a Vice-Regal Officer. Whilst it has been regarded as 'settled' that prerogative relief is unavailable against a Vice-Regal Officer,[95] it has been accepted that a remedy can be sought against the Attorney-General[96] or the Minister responsible for tendering the advice to the Vice-Regal Officer.[97] In the case of a prorogation, this would

87 *Lange* (n 57) 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

88 *Brewery Employees' Union* (n 52) 531 (O'Connor J). See also *Plaintiff M68/2015* (n 52) 99 [138] (Gageler J); *Cheatle* (n 52) 552 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 141–2 (Brennan J).

89 *Lange* (n 57) 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Kathleen Foley, 'The Australian Constitution's influence on the common law' (2003) 31 *Federal Law Review* 131, 131 n 4. See also Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 269–70; Adrienne Stone, 'Rights, personal rights and freedoms' (2001) 25 *Melbourne University Law Review* 374, 406.

90 *Constitution* s 76(i); *Judiciary Act 1903* (Cth) s 30(a).

91 *Constitution* s 75(v); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

92 *Judiciary Act 1903* (Cth) s 39B(1).

93 (1982) 151 CLR 342 ('*Winneke*'). See Mark Leeming, 'Judicial review of vice-regal decisions: *South Australia v O'Shea*, its precursors and its progeny' (2015) 36 *Adelaide Law Review* 1, 11.

94 *Winneke* (n 93); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 ('*R v Toohey*'); *South Australia v O'Shea* (1987) 163 CLR 378.

95 *R v Governor (SA)* (1907) 4 CLR 1497, 1512 (Barton J) (mandamus). See *Horwitz v Connor* (1908) 6 CLR 38 (mandamus); *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222, 241 (Barwick CJ) (certiorari) ('*Banks*'); *R v Toohey* (n 94) 186 (Gibbs CJ); *Winneke* (n 93) 386 (Aickin J) (mandamus).

96 *Winneke* (n 93) 351 (Gibbs CJ), 372 (Mason J), 404 (Wilson J), 419–20 (Brennan J).

97 Ibid 387 (Aickin J); *Stewart v Ronalds* (2009) 76 NSWLR 99, 113 [47] (Allsop P). For example, the writ of mandamus was made to the Aboriginal Land Commissioner for the impugned regulation made by the Administrator: *R v Toohey* (n 94).

be the Prime Minister. It is not necessary for the Governor-General to be a party, even in relation to claims that a proclamation is invalid.[98]

Available remedies

Prerogative writs

A party seeking to invalidate a proclamation purporting to prorogue Parliament may seek that the instrument be quashed by a writ of certiorari. That is what occurred in *Miller* when the UKSC quashed the Order-in-Council because it was founded on unlawful advice.[99] It is unclear whether an Australian court would do the same. Historically, it was said that an Order-in-Council or proclamation cannot be quashed on certiorari[100] because there would be an incongruity in the monarch quashing their own act.[101] This justification has largely been eroded by High Court decisions that express its separation from the Crown and the need to modify English assumptions of Crown immunity because of the Court's original jurisdiction under ss 75(iii) and (v).[102] Nevertheless, Australian courts continue to 'avoid' the use of certiorari for Orders-in-Council and proclamations because they are not necessary when declaratory relief is available.[103] Therefore, it is unlikely that certiorari would be available if a declaration that the proclamation proroguing Parliament is invalid would suffice to address the issue.

Declaratory relief

In *Miller*, the UKSC made two declarations: first, that the Prime Minister's advice was unlawful; and second, that Parliament had not been prorogued.[104] However, Australian courts have stated that the conclusion that certiorari does not lie generally requires the further conclusion that no declaration should be made.[105] Thus, attention must be directed to why an Australian court, confronted with a purported prorogation exceeding the limits of a power, should make declaratory relief.

98 *Cormack v Cope* (1974) 131 CLR 432, 449 (Barwick CJ) ('*Cormack*').
99 *Miller* (n 2) 412 [69].
100 *Riverina Transport Pty Ltd v State of Victoria* (1937) 57 CLR 327, 342–3 (Latham CJ); *Ex parte McWilliam* (1947) 47 SR (NSW) 401, 405–6.
101 *R v Powell* (1841) 1 QB 352, 361 (Lord Denman CJ), cited with approval in *M v Home Office* [1994] 1 AC 377, 415 (Lord Woolf). But see *R (Page) v Lord President of the Privy Council* [1993] AC 682 where the House of Lords accepted that certiorari could lie against the Queen as visitor to a university.
102 See *Aala* (n 44).
103 See, eg, *Certain Children v Minister for Families and Children* (2016) 51 VR 473, 552 [300]–[301] (Garde J); *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 606 [579] (Dixon J).
104 *Miller* (n 2) 410 [62], 412 [70] (Lady Hale PSC and Lord Reed DPSC for the Court).
105 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359 [101] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Plaintiff M61/2010E*').

First, the formal requirements for making a declaration would likely be met.[106] The relief is directed to determining a legal controversy[107] and a declaratory order will have foreseeable and practical consequences in determining whether Parliament is prorogued.[108] Even after a purported prorogation has concluded, it is arguable that a declaration can still have consequences for informing whether the parliamentary slate has been wiped.

Second, equity acts on the footing of the inadequacy and technicalities of the prerogative remedies to 'vindicate the public interest in the maintenance of due administration'.[109] Thus, the inability to issue prerogative writs to the Governor-General 'does not deny that the proceedings of the [Vice-Regal Officer] in Council in performance of a statutory function may be void and in an appropriate case be so declared'.[110] Indeed, declarations as to the invalidity of a proclamation are commonly sought and made in Australia.[111]

Third, there is considerable public interest in the observance of the limits of a power and the importance in upholding fundamental constitutional principles.[112] When purely declaratory relief is sought, ordinary principles of judicial review remain applicable and a court would still need to consider whether the decision or advice to prorogue Parliament is attended by jurisdictional error.[113] Thus, notwithstanding the unavailability of certiorari, a court may be able to issue a declaration that reflects the final outcome of the case with certainty and precision.[114] This can include declaring that the advice to prorogue was unlawful and the prorogation proclamation is invalid, and that both are void and of no effect. Consistent with the principle that a decision that involves jurisdictional error is no decision at all,[115] a court would also be able to declare, like the Court did in *Miller*,[116] that Parliament has not been prorogued.

106 See *Plaintiff M68/2015* (n 52) 66 [23] (French CJ, Kiefel and Nettle JJ), 76 [64] (Bell J), 90 [112] (Gageler J), 123 [235] (Keane J), 152 [350] (Gordon J).

107 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355–6 [46]–[47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).

108 Cf *Gardner v Dairy Industry Authority (NSW)* (1977) 18 ALR 55, 69 (Mason J, Jacobs J agreeing at 69, Murphy J agreeing at 69), 71 (Aickin J) (High Court). See *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 391 [233] (Kiefel and Keane JJ).

109 *Bateman's Bay Local Aboriginal Land Council v Australian Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 257 [25] (Gaudron, Gummow and Kirby JJ) ('*Bateman's Bay*'), cited in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 144 [19] (Gleeson CJ, Gummow, Kirby and Hayne JJ). See also Sir Anthony Mason, 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 *Law Quarterly Review* 238.

110 *Banks* (n 95) 241–2 (Barwick CJ), cited in *R v Toohey* (n 94) 224–5 (Mason J), 261 (Aickin J). For declaratory relief in the public law context generally, see *Bateman's Bay* (n 109) 257–8 [24]–[27] (Gaudron, Gummow and Kirby JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 551 [104] (Gaudron J).

111 See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 (declaring that certain proclamations were invalid to the extent they effected acquisitions other than on just terms); *Read v South Australia* (1987) 49 SASR 174 (declaring that a proclamation is invalid); *Cormack* (n 98) (seeking declaration that the Governor-General's proclamation is invalid, void and of no effect).

112 See *Plaintiff M61/2010E* (n 105) 359–60 [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

113 *Buttrose v A-G (NSW)* (2015) 324 ALR 562, 566 [15]–[16] (Beazley P and Leeming JA).

114 *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308, 333 [89] (Besanko and Gordon JJ, Moore J agreeing at 322 [35]).

115 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–6 [51]–[53] (Gaudron and Gummow JJ). Cf *Calvin v Carr* [1980] AC 574, 589–90 (Lord Wilberforce for the Court) (Privy Council).

116 *Miller* (n 2) 410 [62], 412 [70] (Lady Hale PSC and Lord Reed DPSC for the Court).

Statutory orders

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') does not apply to a 'decision by the Governor-General',[117] which appears to exclude prorogation. There was previously conflicting Federal Court authority as to whether a Minister's advice to the Executive Council can be distinguished from the Council and Governor-General so as to enable review.[118] However, since *Australian Broadcasting Tribunal v Bond*, only 'final and operative' decisions and procedural conduct can be reviewed under the *ADJR Act*.[119] As the Prime Minister's advice to the Governor-General to prorogue Parliament is neither final nor operative, and amounts to conduct that is substantive, not procedural, in character,[120] it is unlikely to be reviewable under the *ADJR Act*.

Standing

To obtain declaratory relief, a plaintiff must have a 'real', 'special' or 'sufficient' interest in raising the questions to which the declaration would go.[121] An interest is material if the person is likely to gain some advantage or suffer some disadvantage[122] greater than that of the public at large.[123] The rule is flexible and will depend on the nature and subject-matter.[124] First, there is a public interest in the observance by the executive of the limitations of its power,[125] particularly as they relate to the control of Parliament. Thus, the test for standing should be construed as an 'enabling, not restrictive, procedural stipulation'.[126] Second, in the context where it is 'somewhat visionary' to rely on the Attorney-General's fiat,[127] courts must be mindful to not create what in practice would be an 'unbridled discretion'[128] or 'islands of power immune from supervision and restraint'.[129]

117 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) (definition of 'decision to which this Act applies'). See Matthew Groves, 'Should we follow the gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?' (2010) 34 *Melbourne University Law Review* 736, 751.

118 Two decisions regard the advice as a decision in its own right: *Steiner v A-G (Cth)* (1983) 52 ALR 148; *A-G (NT) v Minister for Aboriginal Affairs* (1987) 16 FCR 267. Two decisions regard the advice as part of the Governor-General's decision: *Thongchua v A-G (Cth)* (1986) 11 FCR 187; *Squires v A-G (Cth)* (1986) 12 FCR 84.

119 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337, 341–2 (Mason CJ).

120 See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 68 n 311.

121 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437–8 (Gibbs J); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 399 ALR 214, 224 [32]–[33] (Kiefel CJ, Keane and Gordon JJ) ('*Hobart International*'); *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552, 558–9 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ) ('*SDA v Minister*').

122 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530 (Gibbs J) ('*ACF v Commonwealth*'), cited in *Hobart International* (n 121) 233 [65] (Gageler and Gleeson JJ).

123 *Kuczborski v Queensland* (2014) 254 CLR 51, 106–7 [175]–[178] (Crennan, Kiefel, Gageler and Keane JJ), 131 [278] (Bell J); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36 (Gibbs CJ), 42 (Stephen J).

124 *SDA v Minister* (n 121) 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ). See also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2015) 626 [19-175].

125 *Bateman's Bay* (n 109) 267 [50] (Gaudron, Gummow and Kirby JJ).

126 Ibid.

127 Ibid 262 [38]. This is particularly so if the Attorney-General is the defendant: see *Winneke* (n 93).

128 *Wotton v Queensland* (2012) 246 CLR 1, 10 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

129 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Parliamentarians

Two Justices in *Combet v Commonwealth*[130] recognised that a member of Parliament had standing to challenge expenditure because their status is recognised in the *Constitution*[131] and they have a 'particular interest in ensuring obedience by the Executive Government to the requirements prescribed by the *Constitution* and the laws'.[132] In the context of a prorogation, the interest of parliamentarians is greater than that of the general public because parliamentarians would suffer a disadvantage from the inference of a prorogation with their constitutional functions and privileges to participate in decisions of Parliament and scrutiny of the executive. Thus, it is likely that parliamentarians have a sufficient material interest to challenge a purported prorogation.

Electors, advocacy groups and political parties

The standing of electors, advocacy groups and political parties is, however, less clear and will largely depend on the circumstances of their challenge. On one view, it is unlikely that such persons would gain some advantage or suffer some disadvantage greater than the general public from a prorogation. A mere intellectual or emotional concern is not sufficient to establish standing.[133] On another view, the trajectory of the courts has been to liberalise standing requirements.[134] Justice Kirby held that there is an 'additional interest' in members of the public ensuring compliance of the executive with the law.[135] Given the significance of Houses being representative of 'the people'[136] and the effect of a prorogation is to stop the functioning of the Houses, courts may be willing to grant standing to a wider range of people.

Conclusion

A former Clerk of the Senate, James Odgers, said in 1991 that 'if the practice of prorogation … is to continue, let its interference with the work of Parliament be minimal and not more than the Houses of Parliament may determine'.[137] Odgers was concerned with the possibility that the executive could abuse the power to frustrate the important accountability functions of the Senate. His remarks were nearly two decades before *Miller* at a time when administrative law was not as well-developed and it seemed that there were only political constraints on the prorogation power.

130 (2005) 224 CLR 494 ('*Combet*').
131 *Constitution* ss 24, 26, 27, 29–39, 41.
132 *Combet* (n 130) 556–7 [97] (McHugh J), 620 [308] (Kirby J). But see *Perrett v A-G (Cth)* (2015) 232 FCR 467, 485 [38]–[39] (Dowsett J); *Robinson v South East Queensland Indigenous Regional Council of the Aboriginal and Torres Strait Islander Commission* (1996) 70 FCR 212, 226 (Drummond J).
133 *ACF v Commonwealth* (n 122) 530 (Gibbs J), 539 (Stephen J), 548 (Mason J).
134 Matthew Groves, 'The evolution and reform of standing in Australian administrative law' (2016) 44 *Federal Law Review* 167; Henry Kha, 'Faith in the courts: the aggrieved faithful seeking standing in Australia' (2014) 26(1) *Bond Law Review* 148.
135 *Combet* (n 130) 620 [306] (Kirby J). See also *Walton v Scottish Ministers* [2013] PTSR 51, 76 [94] (Lord Reed JSC, Lord Carnwath JSC agreeing at 77 [102], Lord Kerr and Lord Dyson JJSC agreeing at 90 [157]).
136 *Constitution* ss 7, 24.
137 James Odgers, *Odgers' Australian Senate Practice* (Royal Australian Institute of Public Administration, 6th ed, 1991) 974.

This article has argued that there may also be legal checks and balances. It is submitted that there is a *Miller*-like limit on the prorogation power in the *Constitution* that is justiciable in the High Court or the Federal Court. The Prime Minister would exceed their powers if they purported to prorogue the Parliament in a manner that conflicted with the constitutional implication that Parliament's ability to reasonably fulfil its functions of legislating and holding the executive to account is not frustrated. It is argued that parliamentarians, particularly members of the Opposition or the crossbench, would likely be able to obtain declaratory relief where a purported prorogation exceeds those constitutional limits. Thus, it is argued that the combination of legal and political checks and balances can ensure that gross misuses can be thwarted but prorogation for legitimate purposes remains unaffected.[138]

138 Thomas G Fleming and Petra Schleiter, 'Prorogation: comparative context and scope for reform' (2021) 74(4) *Parliamentary Affairs* 964, 974–5. See generally Peter Aucoin, Mark D Jarvis and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Emond Montgomery Publications, 2011).