THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

MICHAEL O'DEA ORATION 2019

'"EASIER FOR A CAMEL TO PASS THROUGH THE EYE OF A NEEDLE": THE LESSONS FOR AUSTRALIA FROM BREXIT'

THURSDAY 23 MAY 2019

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. We must always remember and respect the unique connection which they have with this land under their ancient laws and customs. Our commitment to upholding and strengthening this connection must be and is an important part of achieving equal justice for all Australians.

2. This principle is not simply an idle ideal. It is an essential component of the legal system which underpins the rule of law in this country. Now, more than ever, we need lawyers who understand that the rule of law is a hollow promise unless it is based on an underlying sense of what is right and what is wrong. It is for this reason that we no longer only study the law simply as we find it written in statutes, judgments and textbooks. It is essential to also look at how the law works in practice and affects people in their everyday lives.

3. I have no doubt that every one of you who has been invited to this prize-giving ceremony tonight is here because you have demonstrated an outstanding understanding not only of the law as it is written, but of how it is applied in practice, and how it can affect those upon whom it bears harshly. I congratulate you all for each of your achievements. Should you decide to seek admission as a lawyer, these skills will certainly stand you in good stead whether you decide to pursue a career as a solicitor or a barrister.

4. I should also say that, whatever your chosen path may be, the career of Michael O'Dea should serve as an example to be followed. He has demonstrated that the practice of the law always requires attention to the fundamental principle of justice, and has followed this through with his active involvement in a number of community organisations. He has set the standard for what hard-working and conscientious members of the legal profession should aim to achieve, and it is for that reason that his name marks the occasion of this annual prize-giving.

5. Now, it is difficult to say much more about what it means to be a part of the legal profession than what I have already said. Broad principles and good examples can say a lot more than specific and detailed rules. There are several tried and true topics which can be used at a ceremony like this, but I'm sure many of you will already be familiar with them. They include the future of the legal profession, the impact of technology on the legal profession, the challenges facing the legal profession, and, perhaps a slightly more daring choice, how your legal education will assist your practice in the legal profession after you graduate.

6. I have decided not to speak on any of these topics tonight because I would have a good chance of sending you to sleep given the hour of the address, and you've probably heard it all before anyway. Instead, I'm going to try to speak about something more controversial and interesting. Tonight, I'm going to talk about Brexit, and the lessons which Australia can learn from it. You might accuse me of being self-indulgent, but there is some backstory.

7. As a young student, around the age of many of the recipients here tonight, I studied an economics course with Sir Hermann Black. He was a member of the negotiating team when the United Kingdom first tried to enter the European Economic Community in 1961, and he had us all enthralled as he described the reaction of the team on hearing that the French President Charles de Gaulle had rejected the application with a

curt "non".[1] I have been interested in events concerning the European Union ever since, including the recent stories about Brexit.

8. But for many of us, Brexit will not be a topic which is at the forefront of our minds. At most, it is a somewhat amusing and at times worrying story of political brinksmanship which we hear about through the media from the safe distance of several thousand kilometres. The challenges of withdrawing the United Kingdom from the European Union are far greater than may have been envisaged, or at least, acknowledged by those who supported it.[2] In fact, even after several months of negotiations after the original deadline for Brexit, I would say that it seems like it would be, to adopt the Biblical expression, "easier for a camel to pass through the eye of a needle" than to reach agreement on how the United Kingdom was going to leave the Union.[3]

9. However, I do not think that the withdrawal negotiations themselves can teach us much of use in Australia, except possibly for the fact that negotiation deadlines are made to be broken, extended, brought closer, extended again, and ultimately, ignored. Rather, it is the idea of Brexit itself and what it can tell us about the nature and function of law in a modern society which I find the most interesting, since in many respects, the tensions between the United Kingdom and the European Union mirror those which exist at the margins of our own legal system. But, to understand these tensions, we first need to have some understanding of Union law.

10. Now, the European Union is a complex legal entity as a result of several decades of incremental institutional development, and, to both your relief and mine, the university has not invited me here to kick off a new

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1 For the history of the predecessors to the European Union, see David Edward and Robert Lane, *Edward and Lane on European Union Law* (Edward Elgar, 2013) ch 1.

2 For a useful and comprehensive timeline of the events leading up to and following the Brexit referendum in 2016, see Nigel Walker, 'Brexit Timeline: Events Leading to the UK's Exit from the European Union' (Briefing Paper Number 7960, House of Commons Library, 24 April 2019) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7960>.

3 See Matthew 19:16–30; Mark 10:17–31; Luke 18:18–30.

elective course on Union law.[4] But, fortunately, it is not too difficult to draw rough parallels with the federal system under our own *Constitution*, and for present purposes, we can limit our focus to the legislative power of the Union only.

11. An exercise of legislative power occurs when the Council of the European Union, which is a body consisting of representatives of each of the governments of the states of the Union, and the European Parliament, which is a body directly elected by the people of the states of the Union, both agree to a legislative proposal put forward by the European Commission, which is the unelected executive government of the Union.[5] While the Council and the Parliament can each veto a proposal, suggest amendments to a proposal, and reject amendments made by the other,[6] the initiative in making a proposal for legislation always remains with the European Commission.

12. When a proposal eventually becomes law, it can come into force either as a regulation or a directive. Broadly speaking, the provisions of a regulation are immediately binding on the states of the Union, while those of a directive require the states to take further action to implement their terms.[7] However, it is here that the complexities of Union law come into play. These regulations and directives do not only take effect as between the states of the Union, as might normally be the case for the acts of an international body. In certain circumstances, both regulations and directives may be interpreted as having "direct effect", conferring

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4 For one of the leading English-language texts on European Union law, see Edward and Lane, above n 1.

5 *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) ('*TFEU*') art 294.

6 *TFEU* art 294(3)–(9).

7 *TFEU* art 288. For further explanation on the distinction, see Edward and Lane, above n 1, 340–1 [6.59] (regulations), 342 [6.63] ff (directives).

rights which may be asserted by individuals under national law within each of the states of the Union.[8]

13. A provision of a law which has "direct effect" has an effect on national law which is very similar to that given by federal legislation over state law under section 109 of our *Constitution*. To the extent that the Union law is incompatible with the national law, then the Union law has "primacy" over the national law to the extent that they are incompatible and the operation of the national law is suspended.[9] However, a significant difference from our own constitutional law is that where a state fails to give effect to Union law according to its terms, it may be liable to pay an affected person damages.[10]

14. Since the areas of legislative competence for the Union include a wide variety of topics, such as the customs union, monetary policy, competition law, consumer protection, energy, agriculture and fisheries, the environment and most broadly, the "internal market",[11] domestic legislation might be suspended in favour of Union law in a wide range of activities which our Commonwealth could only ever dream of regulating.[12] In the United Kingdom, all these features of Union law were given effect through section 2 of the *European Communities Act 1972* (UK), which incorporated "enforceable EU rights" existing under Union law from time to time into domestic law and gave them primacy.[13]

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8 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen* (C-26/62) [1963] ECR 1. For further explanation on "direct effect", see Edward and Lane, above n 1, 293–7 [6.13]–[6.15].

9 *Costa v ENEL* (C-6/64) [1964] ECR 585, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (C-106/77) [1978] ECR 629. For further explanation on "primacy", see Edward and Lane, above n 1, 297–307 [6.16]–[6.22].

10 *Francovich v Italian Republic* (C-6/90; C-9/90) [1990] ECR I-5357; *Brasserie de Pêcheur SA v Federal Republic of Germany* (C-46/93; C-48/93) [1996] ECR I-1029. For further explanation on state liability in damages, see Edward and Lane, above n 1, 321–6 [6.35]–[6.40].

11 *TFEU* arts 3–4.

12 Cf *Australian Constitution* s 51.

13 *Thoburn v Sunderland City Council* [2003] QB 151, 176–9 [37]–[47] (Laws LJ); *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 144–5 [66].

15. As a result of this provision, Brexit was not simply a matter of the United Kingdom government giving notification to the European Union that it no longer wanted be part of the club.[14] The significant effect which the *European Communities Act 1972* (UK) had on domestic law meant that it had abrogated the prerogative power of the Crown to terminate its participation in the Union without the authorisation of Parliament.[15] It was only with specific parliamentary approval that the process of Brexit could commence.[16] Further legislation has now been put in place to give effect to the gradual disentangling of Union law and domestic law, but its implementation awaits final approval of a withdrawal agreement.[17]

16. The task of negotiating an acceptable agreement, and indeed, the entire issue of Brexit, has been complex because of the high level of integration between the United Kingdom and European Union economies brought about by the merger of these two legal regimes. Indeed, the strong relationship between the two economies was one of the principal arguments relied upon by the "Remain" campaign to support its case against Brexit. This should not be surprising, given the fact that one of the primary purposes of the European Union, dating back to when it began life as the European Coal and Steel Community in the 1950s, is to create closer economic union between its members.[18]

17. As we know, in the end, the economic argument failed to persuade the majority of people who participated in the Brexit referendum in 2016. Many explanations have been given for why this occurred which suggest that it might not have been the product of reasoned and rational assessment of the argument. Emotion and sentiment appear to have played at least some role. Now, it is not my purpose tonight to give my

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14 See *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) ('*TEU*') art 50.

15 *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

16 *European Union (Notification of Withdrawal) Act 2017* (UK).

17 *European Union (Withdrawal) Act 2018* (UK).

18 Edward and Lane, above n 1, 3–5 [1.01]–[1.03], 41–2 [2.19]–[2.20]; *TEU* art 3.

take on the legitimacy of these views, or to analyse the relative economic merits of the United Kingdom being inside or outside the European Union. But I do think that it is here that we can begin to appreciate the first of three related lessons which I think that Australia can learn from Brexit.

18. The first lesson concerns how the public discourse is used to frame the nature of law and society. To see what I mean by this rather abstract proposition, take one of the principal arguments of the "Remain" campaign. It focused on the benefits of European Union membership for "the economy" of the United Kingdom.[19] It framed the changes to the domestic legal and regulatory regimes which were required by membership merely as the price to pay for fine-tuning policy settings to support and encourage a "better" economy. The difficulty with this view is that few voters see debates about proposals for change as being solely in these terms for the simple reason that the idea of "the economy" is so abstract and intangible.

19. For example, for many of the voters in the Brexit referendum, membership of the European Union was clearly about more than just "the economy" in the abstract.[20] While it is true that many of the powers of the Union are concerned, directly or indirectly, with the regulation of the economy, it would be wrong to describe the Union merely as an economic regulator. The Union also assumes a measure of political integration the value of which cannot be quantified. Most obviously, it requires domestic law on a wide range of topics to be subordinated to Union law proposed by the unelected European Commission and approved by a Council and Parliament of which United Kingdom representatives form but one part.

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[19] See, eg, Peter Tammes, 'Investigating Differences in Brexit-vote Among Local Authorities in the UK: An Ecological Study on Migration- and Economy-related Issues' (2017) 22 *Sociological Research Online* 143, 144–5.

[20] John Clarke and Janet Newman, '"People in This Country Have Had Enough of Experts": Brexit and the Paradoxes of Populism' (2017) 11 *Critical Policy Studies* 101, 107–10.

20. These facts were evidently at the forefront of the minds of many of the voters at the Brexit referendum,[21] and they were entitled to take these matters into account and give them more prominence in their decision-making than vague appeals to the impact on "the economy" which Brexit might have. I think that the contrast between these two perspectives on the issue illuminates a fundamental division in the way in which different groups can think about the nature of law and society in modern times. I think understanding this fact will be critical in navigating Australia's legal and political challenges in the years to come.

21. On the one hand, there is a view of society which might be described as technocratic and analytical. It sees the legal framework of society as a tool to be used to fine-tune and optimise certain outcomes. It thus prefers to measure the success of legal reform by how well it targets various quantitative indicators, with the most convenient reference point usually being "the economy". Needless to say, a blinkered focus on targets can often mean that this view fails to engage with questions about the overall direction in which a society is heading.

22. On the other hand, there is a view of society which places more emphasis on the values which it expresses through its legal framework.[22] It sees the importance of a measure to lie in its objects and purposes and how it will be perceived by others, rather than relying on quantitative measures of success. It is easy for this view to reach a wide audience because the values about which it speaks are often universal and have an intrinsic emotional appeal. Of course, this view runs the risk of ignoring reality and not paying sufficient attention to the results and outcomes of the changes which it proposes.

23. Now, I do not highlight this contrast to say that either approach is better or worse than the other. In fact, as with so many things in life, either

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[21] Agust Arnorsson and Gylfi Zoega, 'On the Causes of Brexit' (2018) 55 *European Journal of Political Economy* 301, 314–15.

[22] See, eg, Chief Justice James Allsop, 'The Law as an Expression of the Whole Personality' (Speech, Maurice Byers Lecture, 1 November 2017).

view, taken to extremes, can produce unsatisfactory outcomes, and I think that this is well-illustrated by both campaigns in the Brexit referendum. The "Remain" campaign failed to recognise and engage with the deep-seated resentment which many people felt about what they saw, justifiably or otherwise, as the increasing subordination of their interests to those of the Union. The "Leave" campaign failed to provide clear arguments as to how leaving the Union would benefit the United Kingdom as a whole, particularly since it was contrary to the near consensus of expert opinion.[23]

24. I think that the lesson here for Australia is that we should be wary of arguments for legal reform which appear to take too narrow a view of what is relevant to the decision. Now, I will not seek to give any examples from our recent public debate, since we have just endured an election campaign and I'm sure you could identify many examples yourselves. It suffices to say that each side of politics put forward arguments and policies which tended to emphasise one view to the exclusion of the other. They might have done so for tactical reasons, or they might have done so out of honest belief. Either way, whenever it happens, we tend to lose sight of the bigger picture and our public decision-making is the poorer for it.

25. A debate at the time of the Brexit referendum which squarely confronted the shortcomings of the viewpoints adopted by the "Remain" and "Leave" campaigns could have changed how the referendum is viewed by history. It could have resulted in a victory for the misguided "Remain" campaign, or it could have legitimised what even now is regarded as an impulsive victory by the "Leave" campaign. Instead, the Brexit referendum will be remembered for the influence that nationalism and concerns about the effects of increasing European integration had in the minds of voters.

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[23] Cf Clarke and Newman, above n 20, 110–112.

26. However, despite thinking that they could have been better addressed during the process of debate leading to the referendum, I think that these concerns are worth taking seriously. Similar, though perhaps more muted, concerns may be seen about the relationship between Australia and the international stage in our public debate. These concerns will only grow stronger over time, since the changes which have been wrought by globalisation are not going to disappear. For this reason, I think that the second lesson which Australia can take from Brexit can be found in what it tells us about the ongoing relevance of the idea of national sovereignty.

27. Now, I am not here talking about the legal concept of "sovereignty" in the field of international law.[24] I am talking about the more general idea that decisions about law, policy, and the public interest are made in or are held to account by the elected representatives of the people sitting in the legislature. There is little unexpected or unorthodox about this idea when stated in this way, but often, a further step is taken. It is said, in addition, that the decisions taken by the representatives of the people are an expression of the "public will",[25] or to use the expression much loved by successful political parties, fulfil the giving of a "mandate". This characterisation of the process may be something of a fiction, but it is nevertheless powerful, and regardless of its theoretical underpinnings, I think that voters feel a justifiable sense of ownership, and ultimately control, over the decisions made by their representatives in the legislature.

28. I do not think that it is hard to see how the proximity of the relationship between the United Kingdom and the European Union could have interfered with this sense of ownership and control, particularly when the

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[24] See Malcolm N Shaw, *International Law* (Cambridge University Press, 8th ed, 2017) 363–4.

[25] See, eg, *Singh v Commonwealth* (2004) 222 CLR 322, 329 [5] (Gleeson CJ). See also Chief Justice T F Bathurst, 'Defining the Public Interest: Where Lawyers Fear to Tread?' (Speech, Public Interest Symposium, 16 April 2019) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Chief%20Justice/Bathurst_20190416.pdf>.

effect of the *European Communities Act 1972* (UK) is considered. As I explained earlier, the Act has the effect that the decisions which are made by Union institutions directly alter the content of the law which applies in the United Kingdom by prevailing over incompatible domestic legislation, without needing to be approved by the representatives of the people in the legislature. While the people of the United Kingdom do have a voice in the process by which these Union decisions are made, it is limited. They must share the floor with the voices of 27 other nations and can only debate the proposals which have been put before them by the European Commission.[26]

29. These circumstances necessarily entail some loss of sovereignty. It may be true that, from the perspective of the domestic legal system, the legislature of the United Kingdom remained free to repeal these measures at any time, but it is unrealistic to say that this could ever be a plausible option when regard is had to the international consequences of such action. I think that it is fair to say that the remaining members of the European Union would not look kindly on unilateral withdrawal otherwise than in accordance with the correct, negotiated procedure. Thus, for better or for worse, the United Kingdom is bound to implement the decisions of the Union until it withdraws in a lawful manner. In my opinion, it is this loss of sovereignty which many of those who voted to "Leave" were rejecting in the Brexit referendum.

30. While this attitude might be somewhat unique to the situation of the United Kingdom as a member of the European Union, I do not think that this means that a similar attitude is not present in Australia. Its presence will require us to ask difficult questions in the future about the extent to which we are ourselves prepared to give up part of our decision-making power as a nation in the interests of international cooperation. So far, we have not really had to confront this issue. Few of the treaties and other international obligations which we have entered

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[26] *TFEU* art 294(2).

into have the same kind of impact on domestic law as Union law has had in the United Kingdom.[27]

31. One area in which we have seen hints that these issues could arise is investor-state dispute settlement, which moved into the public consciousness after the international tobacco company Philip Morris sought an award of damages from Australia as compensation for the introduction of tobacco plain packaging legislation in 2011.[28] While Australia was ultimately successful in having the claim dismissed, its legal costs in conducting its defence were substantial.[29] They could have been even greater if Philip Morris had succeeded in its claim, the merits of which did not need to be considered by the arbitral tribunal. No doubt as a result of this risk, the Australian government subsequently introduced a policy of avoiding investor-state dispute settlement clauses in international investment agreements.[30]

32. Since then, this policy has been relaxed, with such clauses now being found in a number of recent international trade and investment agreements, including the successor to the Trans-Pacific Partnership Agreement.[31] It may be true that these types of clauses do not directly

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27 Cf *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975), which was the subject of litigation about the relationship between domestic and international law in *Tasmania v Commonwealth* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

28 For materials relating to this case, see *Philip Morris Asia Ltd (Hong Kong) v Commonwealth of Australia* (Web Page) <https://pca-cpa.org/en/cases/5/>.

29 Pat Ranald, 'The Cost of Defeating Philip Morris over Cigarette Plain Packaging', *The Sydney Morning Herald* (online, 2 April 2019) <https://www.smh.com.au/national/the-cost-of-defeating-philip-morris-over-cigarette-plain-packaging-20190327-p5182i.html>.

30 For a history of Australia's international investment policy, see Kyle Dickson-Smith and Bryan Mercurio, 'Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree of a Few Rotten Apples?' (2018) 40 *Sydney Law Review* 213.

31 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, [2018] ATS 23 (entered into force 30 December 2013) art 1(1) ('*CPTPP*'), incorporating the provisions of the *Trans-Pacific Partnership Agreement* ('*TPP*'), which never entered into force. The text of the *TPP* is available at <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership/>.

place constraints on the power of the legislature to pass laws taking action which might affect foreign investments.[32] In the main, their practical effect is limited to requiring the payment of compensation to investors where there has been an "expropriation" of an investment.[33] However, as I pointed out above, something similar could be said about the effect of repealing Union law in the United Kingdom. It is only the inevitable practical pressure from other member states caused by a unilateral withdrawal which precludes this course of action.

33. It is this threat of practical consequences which is significant because it can discourage legislatures and governments from fulfilling their duty to carry out the "public will". Even if this were not the case,[34] the perception that there might be some impact can remain, with the result that people lose confidence in the ability of their elected representatives and government to work in their interests, in favour of appeasing the international community. Again, while Australia has not had to confront these issues yet, there will come a time when we have to make tough decisions about the balance between our national sovereignty and international cooperation.

34. These decisions are important. They concern important questions about our national identity and place on the international stage. Thus, the process by which these decisions are made assumes some importance, and it is here that I think we find the final lesson which we can learn from Brexit. We are perhaps the more experienced nation when it comes to holding popular referendums,[35] although we have not had any

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32 Department of Foreign Affairs and Trade, 'Investor-State Dispute Settlement (ISDS)', *About Foreign Investment* (Web Page) <https://dfat.gov.au/trade/investment/Pages/investor-state-dispute-settlement.aspx>.

33 See, eg, *TPP* art 9.8.

34 Cf Dickson-Smith and Mercurio, above n 36, 231–3.

35 There have only been three referendums held throughout the entire United Kingdom since 1973, while there have been seven occasions on which Australians have had to vote in a referendum or plebiscite over the same time period: see United Kingdom Parliament, 'Referendums in the UK', *Vote in general elections and referendums* (Web Page) <https://www.parliament.uk/get-involved/elections/referendums-held-in-the-uk/>.

referendum or plebiscite result in Australia which has turned out in quite the same way as Brexit. Nevertheless, I think there is still something that we can learn from the process followed during the Brexit referendum, particularly given the fact that we have seen renewed interest in direct democracy for important issues of policy in recent times.

35. The basic philosophy behind the various forms of direct democracy is quite simple. If it is accepted that a society should be governed in accordance with the public will, then it would seem to follow that the best form of government is one which attempts to ascertain directly what the public will is by asking each member of the community what they believe should be done. Of course, there are practical difficulties with implementing such a system. It will be obvious to everyone here that it would be expensive and time consuming. However, there is also a related problem which is much more rarely discussed, but which I think is much more troubling for this method of democracy. It is the problem of framing a question to be put to the electorate so that we can receive a meaningful response.

36. With the benefit of hindsight, I think that it was at this hurdle that the Brexit referendum stumbled. The choice which faced the voters at the time might have seemed to clearly present two alternatives, but later events have shown that this was not in fact the case, since it was only the "Remain" campaign which had proposed a concrete policy platform in the form of the concessions for the United Kingdom which had already been agreed with the European Union should it have chosen to remain.[36] By contrast, there was no clear policy which was proposed if the "Leave" campaign prevailed, and it seems difficult to see how there could have

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[36] See United Kingdom Government, 'The Best of Both Worlds: The United Kingdom's Special Status in a Reformed European Union' (Report, February 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504220/The_best_of_both_worlds_the_UKs_special_status_in_a_reformed_EU_print_ready.pdf>.

been, since the European Union was not prepared to commence negotiations on withdrawal until the referendum had occurred.

37. This created an ambiguity in the meaning of the "Leave" result which has plagued the course of subsequent negotiations. Far from being conclusive, the result of the referendum has turned out to be unacceptably vague and was not clarified by the governing party in their policy platform at a later general election.[37] Further, I cannot help but think that the result weakened the position of the United Kingdom in the resulting withdrawal negotiations. The result of the referendum meant that walking away from the negotiations without some plan for withdrawal simply was not an option, which has culminated with the current withdrawal agreement being the only alternative to a no-deal Brexit.[38] As a consequence, the government has been left with the unenviable task of trying to convince the Parliament to accept an agreement as a fait accompli. Even then, the agreement leaves many issues undecided, such as the "backstop" on the Irish border and the future relationship with the European Union.

38. In light of all of this, it must be said that the path forward for the United Kingdom remains unclear, and I think that the spectre of such an outcome must loom large in considering any further use of direct democracy in Australia. It certainly can be tempting for politicians to promise "opinion poll" plebiscites as an easy, short-term solution to seemingly intractable issues, but the Brexit experience shows that this can simply exacerbate the same problems later on. Fortunately, our first brush with direct democracy in the same-sex marriage postal survey was not on an issue on which there was much scope for debate about implementation. However, there are other issues on the horizon, such

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37 The Conservative Party was returned to government with a reduced number of seats in Parliament at the 2017 general election, but did not take any concrete proposal for withdrawal to the election: see Walker, above n 2, 13–16.

38 The current version of the Withdrawal Agreement, as well as a shorter document explaining its key provisions, are available at <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>.

as plebiscites on a republic or an Indigenous Australian voice in the federal Parliament, which are more complex. They will have to be handled with care if we are to avoid the mistakes of Brexit.

39. The three lessons which I have outlined in this address tonight are by no means the only ones which we can learn from Brexit, but they are three which I think are interesting, relevant, and perhaps unappreciated. They are all examples of how thinking about the law, and in particular, law reform, involves not only an understanding of the black-letter issues, but the entire context within which the law operates. We need lawyers who are able to navigate these problems, and it is for this reason that tonight we are celebrating your academic achievements at university. I once again congratulate you all on your outstanding efforts, and wish you all the best for the future.

40. Thank you for your time.