

# The Parliament

## COMPOSITION

The Commonwealth Parliament is composed of three distinct elements, the Queen<sup>1</sup> the Senate and the House of Representatives.<sup>2</sup> These three elements together characterise the nation as being a constitutional monarchy, a parliamentary democracy and a federation.

The Constitution vests in the Parliament the legislative power of the Commonwealth. The legislature is bicameral, which is the term commonly used to indicate a Parliament of two Houses.

Although the Queen is nominally a constituent part of the Parliament the Constitution immediately provides that she appoint a Governor-General to be her representative in the Commonwealth.<sup>3</sup> The Queen's role is little more than titular as the legislative and executive powers and functions of the Head of State are vested in the Governor-General by virtue of the Constitution<sup>4</sup>, and by Letters Patent constituting the Office of Governor-General.<sup>5</sup> However, while in Australia, the Sovereign has performed duties of the Governor-General in person<sup>6</sup>, and in the event of the Queen being present to open Parliament, references to the Governor-General in the relevant standing orders<sup>7</sup> are to the extent necessary read as references to the Queen.<sup>8</sup>

The Royal Style and Titles Act provides that the Queen shall be known in Australia and its Territories as:

Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth.<sup>9</sup>

## GOVERNOR-GENERAL

There have been 21 Governors-General of Australia<sup>10</sup> since the establishment of the Commonwealth, seven of whom have been Australian born.

The Letters Patent, of 29 October 1900, constituting the office of Governor-General, 'constitute, order, and declare that there shall be a Governor-General and Commander-in-Chief in and over' the Commonwealth. The Letters, inter alia, make provision for the appointment of a Governor-General from time to time and provide that the Governor-General shall be keeper of the Great Seal of the Commonwealth. They recognise that 'certain powers, functions, and authorities were declared to be

1 The Commonwealth of Australia Constitution Act extends the provisions of the Constitution to the Queen's (Queen Victoria's) successors, s. 2.

2 Constitution, s. 1.

3 Constitution, s. 2.

4 Constitution, s. 2 with s. 61; with certain exceptions relating to disallowance of laws and matters of assent (ss. 58, 59, 60, 74) still nevertheless formal in essence (see Ch. on 'Legislation') by virtue of the *Statute of Westminster Adoption Act 1942*.

5 '*Constitution of Office of Governor-General*', Letters Patent, 29 October 1900, in *Commonwealth Statutory Rules 1901-1956*, V, p. 5301.

6 See *Royal Powers Act 1953* (Act No. 74 of 1953).

7 S.O.s 2-10.

8 S.O. 11.

9 *Royal Style and Titles Act 1973*, Schedule (Act No. 114 of 1973).

10 See Appendix 1.

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vested in the Governor-General' by the Constitution. They also provide for the Governor-General to appoint judges and to exercise the power of dissolution, and so on, such powers also being prescribed by the Constitution. As much of what appears in the Letters Patent is a repetition of powers granted to the Governor-General by the Constitution, it has been said that much of what appears in the Letters is superfluous.<sup>11</sup> The Letters Patent have been amended<sup>12</sup> and have been supplemented by Instructions to the Governor-General<sup>13</sup> and by the assignment of certain (additional) powers to the Governor-General.<sup>14</sup> These instruments together with the Constitution determine the powers and functions of the office of Governor-General. In addition certain prerogative powers are by practice assumed and exercised by the Governor-General (*see p. 4*).

The Governor-General's official title is Governor-General of the Commonwealth of Australia. The additional title of Commander-in-Chief of the Defence Force was discontinued following the issue of new Letters Patent in August 1984, it being considered that the command in chief of the naval and military forces vested in the Governor-General by the Constitution was not a separate office but a function held *ex officio*.<sup>15</sup>

### Appointment

The Governor-General is appointed by the Crown, in practice on the advice of Australian Ministers of the Crown.<sup>16</sup> The Governor-General holds office during the Crown's pleasure, appointments normally being for five years, but some Governors-General have had extended terms of office, and others have resigned or have been recalled. The method of appointment was changed as a result of the 1926 and 1930 Imperial Conferences.<sup>17</sup> Appointments prior to 1924 were made by the Crown on the advice of the Crown's Ministers in the United Kingdom (the Governor-General being also the representative or agent of the British Government<sup>18</sup>) in consultation with Australian Ministers. The Balfour Report stated that the Governor-General should be the representative of the Crown only, holding the same position in the administration of public affairs in Australia as the Crown did in the United Kingdom. The 1930 report laid down certain criteria for the future appointments of Governors-General. Since then Governors-General have been appointed by the Crown after informal consultation with and on the formal advice of Australian Ministers.

The Instructions of 11 August 1902 order that the commission appointing the Governor-General shall be read and published and every Governor-General shall take the oath of allegiance. These acts are to be performed by the Chief Justice of the High Court (or some other judge). The ceremonial swearing-in of a new Governor-General has traditionally taken place in the Senate Chamber.

11 Peter Hanks (ed.), *Fajgenbaum and Hanks' Australian Constitutional Law*, 2nd edn, Butterworths, Sydney, 1980, pp. 355-6.

12 'Absence of Governor-General', Letters Patent, 15 December 1920, in *Commonwealth Statutory Rules 1901-1956*, V, p. 5303; 'Letters Patent Constituting the Office of Governor-General', 30 October 1958, in *Commonwealth Statutory Rules 1958*, p. 494.

13 'Instructions to the Governor-General', 29 October 1900, 11 August 1902, 15 December 1920, in *Commonwealth Statutory Rules 1901-1956*, V, pp. 5310-14.

14 'Assignment of Certain Powers to Governor-General', 2 November 1954, in *Commonwealth Statutory Rules 1901-1956*, V, p. 5315.

15 Constitution, s. 68. *See S. Deb.* (8.3.89) 657, 699-700.

16 *See also H.R. Deb.* (28.11.46)742-3; *H.R. Deb.* (19.2.47)19-20; *H.R. Deb.* (7.5.47)2051.

17 'Imperial Conference 1926', *Summary of Proceedings*, PP 99(1926-28) (*see Balfour Report*, pp. 10-12); 'Imperial Conference 1930', *Summary of Proceedings*, PP 293(1929-31) 17.

18 L.F. Crisp, *Australian National Government*, 4th edn, Longman Cheshire, Melbourne, 1978, p. 398.

## Administrator and Deputies

The Letters Patent constituting the office and the Constitution<sup>19</sup> make provision for the Crown to appoint an Administrator to administer the Government of the Commonwealth 'in the event of the death, incapacity, removal, or absence of the Governor-General' (in effect an Acting Governor-General). As with the Governor-General, the Administrator is required to take the oath of allegiance before the commission takes effect. The Crown's commission is known as a dormant commission<sup>20</sup>, only being invoked when necessary. An Administrator is not entitled to receive any salary from the Commonwealth in respect of any other office during the period of administration.<sup>21</sup> In practice it is a State Governor, generally the most senior, who receives the Administrator's commission. More than one dormant commission may exist at any one time. The Administrator may perform all the duties of the Governor-General under the Letters Patent, the Instructions and the Constitution during the Governor-General's absence.<sup>22</sup> References to the Governor-General in the standing orders extend and apply to the Administrator during any period he or she is administering the Government of the Commonwealth.<sup>23</sup> There is a precedent for an Administrator opening a session of the Parliament when Administrator Brooks opened the Third Session of the 23rd Parliament on 7 March 1961.<sup>24</sup>

The Constitution empowers the Crown to authorise the Governor-General to appoint Deputies to exercise, during the Governor-General's pleasure, such powers and functions as the Governor-General thinks fit.<sup>25</sup> The Letters Patent constituting the office also so authorise the Governor-General. The Governor-General traditionally appoints two Deputies (usually the Chief Justice and one other Justice of the High Court) to carry out certain duties in connection with the opening of a new Parliament. The practice of appointing two Deputies ensures the simultaneous administering of the oath of allegiance to Senators and Members of the House of Representatives on the opening of Parliament following a general election.<sup>26</sup> But where the President of the Senate is still in office and has a commission to administer the oath or affirmation to newly elected or appointed Senators, the Governor-General may appoint a single Deputy to swear in Members of the House of Representatives only.<sup>27</sup>

The Governor-General issues to a Speaker, once elected, a commission to administer the oath of allegiance to Members during the course of a Parliament.<sup>28</sup>

The Governor-General normally appoints the Vice-President of the Executive Council to be the Governor-General's Deputy to summon meetings of the Executive Council and, in the Governor-General's absence, to preside over meetings.<sup>29</sup>

## Salary

The Constitution originally provided for the annual salary of the Governor-General to be £10 000, until the Parliament provides otherwise. The Constitution also precludes any alteration of salary during a Governor-General's term of office.<sup>30</sup> The salary, which is non-taxable, was last altered in 1988<sup>31</sup> to \$95 000 per annum

19 Constitution, s. 4.

20 An example of a dormant commission can be found in *Commonwealth Statutory Rules* 1901-1956, V, p. 5307.

21 Constitution, s. 4.

22 See VP 1974-75/510 (presentation of new Speaker), 532 (recommending amendment to bill).

23 S.O. 11A.

24 VP 1961/1-2.

25 Constitution, s. 126.

26 VP 1976-77/2-3; J 1976-77/2-3.

27 VP 1978-80/3; J 1978-80/3-4.

28 VP 1978-80/6-7.

29 Gazette S150(9.8.78).

30 Constitution, s. 3.

31 *Governor-General Amendment Act 1988* (Act No. 83 of 1988).

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and became payable to the next succeeding Governor-General (Hon. W. G. Hayden). The *Governor-General Act 1974*<sup>32</sup> makes certain retiring allowance provisions for Governors-General and their widows.

#### **Official secretary**

In 1984 the Governor-General Act was amended to provide for the establishment of the statutory office of Official Secretary to the Governor-General.<sup>33</sup> Annual reports of the Official Secretary have been presented to both Houses since 1985.<sup>34</sup>

#### **Powers and functions**

Bagehot described the Crown's role in England in the following classic statement:

To state the matter shortly, the sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn.<sup>35</sup>

In Australia, for all practical purposes, it is the Constitution which determines the nature and the exercise of the Governor-General's powers and functions. In essence these powers can be divided into three groups—prerogative, legislative and executive. The power to appoint royal commissions is, in a sense, a combination of the three.<sup>36</sup>

Although since Federation it has been an established principle that the Governor-General in exercising the powers and functions of the office should only do so with the advice of his or her Ministers of State, the principle has not always been followed. This principle of responsible government is discussed further in the Chapter on 'House, Government and Opposition'.

The Letters Patent are not prescriptive as to prerogative powers (also termed 'reserve' powers or 'discretionary' powers). On the other hand the Constitution provides definite and limited powers although in some cases how these powers may be exercised is not specified. The identification and range of prerogative powers are somewhat uncertain and have on occasions resulted in varying degrees of political and public controversy.

*Quick and Garran* defines prerogative powers as:

... matters connected with the Royal prerogative (that body of powers, rights, and privileges, belonging to the Crown at common law, such as the prerogative of mercy), or to authority vested in the Crown by Imperial statute law, other than the law creating the Constitution of the Commonwealth. Some of these powers and functions are of a formal character; some of them are purely ceremonial; others import the exercise of sovereign authority in matters of Imperial interests.<sup>37</sup>

To some extent this definition may be regarded as redundant or superfluous in modern times. However, the fact that the Constitution states, in some of its provisions, that the Governor-General **may** perform certain acts **alone**, while other provisions state that he shall act **'in Council'**, suggests an element of discretion in exercising certain functions, that is, those in the first category. *Quick and Garran* states:

The first group includes powers which properly or historically belong to the prerogatives of the Crown, and survive as parts of the prerogative; hence they are vested in the Governor-General, as the Queen's representative. The second group includes powers either of purely statutory origin or which have, by statute or custom, been detached from the prerogative; and they can, therefore, without any constitutional impropriety, be

32 Act No. 16 of 1974.

33 *Public Service Reform Act 1984*, s. 141.

34 VP 1985-87/489, 1150.

35 Walter Bagehot, *The English Constitution*, 4th edn, Fontana, London, 1965, p. 111.

36 *Royal Commissions Act 1902*.

37 *Quick and Garran*, p. 390.

declared to be vested in the Governor-General in Council. But all those powers which involve the performance of executive acts, whether parts of the prerogative or the creatures of statute, will, in accordance with constitutional practice, as developed by the system known as responsible government, be performed by the Governor-General, by and with the advice of the Federal Executive Council . . . parliamentary government has well established the principle that the Crown can perform no executive act, except on the advice of some minister responsible to Parliament. Hence the power nominally placed in the hands of the Governor-General is really granted to the people through their representatives in Parliament. Whilst, therefore, in this Constitution some executive powers are, in technical phraseology, and in accordance with venerable customs, vested in the Governor-General, and others in the Governor-General in Council, they are all substantially in *pari materia*, on the same footing, and, in the ultimate resort, can only be exercised according to the will of the people.<sup>38</sup>

Modern references relating to the prerogative or discretionary powers of the Governor-General clarify this view in the interests of perspective. Sir Paul Hasluck made the following observations in a lecture given during his term as Governor-General:

The duties of the Governor-General are of various kinds. Some are laid on him by the Constitution, some by the Letters Patent and his Commission. Others are placed on him by Acts of the Commonwealth Parliament. Others come to him by conventions established in past centuries in Great Britain or by practices and customs that have developed in Australia.<sup>39</sup>

All of these duties have a common characteristic. The Governor-General is not placed in a position where he can run the Parliament, run the Courts or run any of the instrumentalities of government; but he occupies a position where he can help ensure that those who conduct the affairs of the nation do so strictly in accordance with the Constitution and the laws of the Commonwealth and with due regard to the public interest. So long as the Crown has the powers which our Constitution now gives to it, and so long as the Governor-General exercises them, Parliament will work in the way the Constitution requires, the Executive will remain responsible to Parliament, the Courts will be independent, the public service will serve the nation within the limits of the law and the armed services will be subject to civil authority.<sup>40</sup>

The dissolution of Parliament is an example of one of the matters in which the Constitution requires the Governor-General to act on his own. In most matters, the power is exercised by the Governor-General-in-Council, that is with the advice of the Federal Executive Council (in everyday language, with the advice of the Ministers meeting in Council).<sup>41</sup>

The Governor-General acts on advice, whether he is acting in his own name or as Governor-General-in-Council. He has the responsibility to weigh and evaluate the advice and has the opportunity of discussion with his advisers. It would be precipitate and probably out of keeping with the nature of his office for him to reject advice outright but he is under no compulsion to accept it unquestioningly. He has a responsibility for seeing that the system works as required by the law and conventions of the Constitution but he does not try to do the work of Ministers. For him to take part in political argument would both be overstepping the boundaries of his office and lessening his own influence.<sup>42</sup>

On 12 November 1975, following the dismissal of Prime Minister Whitlam, Speaker Scholes wrote to the Queen asking her to intervene and restore Mr Whitlam to office as Prime Minister in accordance with the expressed resolution of the House

38 *Quick and Garran*, p. 406.

39 Sir Paul Hasluck, *The Office of Governor-General*, Melbourne University Press, Carlton, 1979, p. 10.

40 Hasluck, p. 12.

41 Hasluck, p. 16.

42 Hasluck, p. 20.

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the previous day.<sup>43</sup> On 17 November, the Queen's Private Secretary, at the command of Her Majesty, replied, in part:

The Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of The Queen of Australia. The only person competent to commission an Australian Prime Minister is the Governor-General, and The Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution. Her Majesty, as Queen of Australia, is watching events in Canberra with close interest and attention, but it would not be proper for her to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor-General by the Constitution Act.<sup>44</sup>

Other than by recording the foregoing statements and discussing the question of dissolution (*see below*), it is not the intention of this text<sup>45</sup> to detail the various constitutional interpretations as to the Governor-General's discretionary powers. Based on informed opinion, the exercise of discretionary power by the Governor-General can be interpreted and regarded as conditional upon the following principal factors:

- the maintenance of the independent and impartial nature of the office is paramount;
- in the view of *Quick and Garran* the provisions of the Constitution vesting powers in the Governor-General are best read as being exercised 'in Council';
- the provisions of sections 61 and 62 of the Constitution (*Federal Executive Council to advise the Governor-General in the government of the Commonwealth*) are of significance and are interpreted to circumscribe discretions available to the Governor-General;
- the Statute of Westminster diminished to some extent the prerogative powers of the Crown in Australia;
- almost every area of power is directly or indirectly provided for in the Constitution;
- where discretions are available they are generally governed by constitutional conventions established over time as to how they may be exercised, and
- it is either a constitutional fact or an established constitutional convention that the Governor-General acts on the advice of Ministers in all but exceptional circumstances.

### Dissolution

The act of dissolution puts to an end at the same time the duration of the House of Representatives and ipso facto the term of the Parliament.<sup>46</sup> This alone means that the question of dissolution and how the power of dissolution is exercised is of considerable parliamentary importance because of the degree of uncertainty as to **when and on what grounds** dissolution may occur.<sup>47</sup>

The overriding provision of the Constitution, insofar as its intention is concerned, is found in the words of section 28 'Every House of Representatives shall continue for three years from the first meeting of the House, and no longer'<sup>48</sup> to which is

43 VP 1974-75/1125-7.

44 H.R. Deb. (17.2.76)6.

45 For further reading *see* Bibliography in 1st edn.

46 *See also* Ch. on 'The parliamentary calendar'.

47 There is among constitutional authorities considerable divergence of opinion on the true nature and exercise of the power. This is well illustrated by the analysis of Evatt in *The King and His Dominion Governors* and Forsey in *The Royal Power of Dissolution of Parliament in the British Commonwealth*.

48 Section 28 was considered by the High Court in 1975. It was held that an ordinary general election means an election held at or towards the end of the period of three years: *Attorney-General (ex rel. McKinlay) v. Commonwealth* (1975) 135 CLR 1. *Per Barwick C.J.*; section 28 contemplates that the ordinary general election will take place in each three years: *ibid.* p. 29.

added the proviso 'but may be sooner dissolved by the Governor-General'. The actual source of the Governor-General's power to dissolve is found in section 5, the effect and relevant words of which are that 'The Governor-General may . . . by Proclamation or otherwise . . . dissolve the House of Representatives'.

While the Constitution vests in the Governor-General the power to dissolve the House, the criteria for taking this action are not prescribed and, therefore, they are matters generally governed by constitutional convention. In a real sense the exercise of the Crown's power of dissolution is central to an understanding of prerogative powers and the nature of constitutional conventions.

As described earlier in this chapter (*see p. 5*), while it is the prerogative of the Crown to dissolve the House of Representatives, the exercise of the power is subject to the constitutional convention that it does so only on the advice and approval of a Minister of State, in practice the Prime Minister, directly responsible to the House of Representatives. The granting of dissolution is an executive act, the ministerial responsibility for which can be easily established.<sup>49</sup>

The nature of the power to dissolve and some of the historical principles, according to which the discretion is exercised, are illustrated by the following authoritative statements:

Of the legal power of the Crown in this matter there is of course no question. Throughout the Commonwealth . . . the King or his representative may, in law, grant, refuse or force dissolution of the Lower House of the Legislature . . . In legal theory the discretion of the Crown is absolute (though of course any action requires the consent of some Minister), but the actual exercise of the power is everywhere regulated by conventions.<sup>50</sup> If a situation arises, however, in which it is proposed that the House be dissolved sooner than the end of its three-year term, the Governor-General has to reassure himself on other matters. This is an area for argument among constitutional lawyers and political historians and is a matter where the conventions and not the text of the Constitution are the chief guide. It is the function of the Prime Minister to advise that the House be dissolved. The most recent practices in Australia support the convention that he will make his proposal formally in writing supported by a written case in favour of the dissolution. It is open to the Governor-General to obtain advice on the constitutional question from other quarters—perhaps from the Chief Justice, the Attorney-General or eminent counsel—and then . . . a solemn responsibility rests on [the Governor-General] to make a judgment on whether a dissolution is needed to serve the purposes of good government by giving to the electorate the duty of resolving a situation which Parliament cannot resolve for itself.<sup>51</sup>

The right to dissolve the House of Representatives is reserved to the Crown. This is one of the few prerogatives which may be exercised by the Queen's representative, according to his discretion as a constitutional ruler, and if necessary, a dissolution may be refused to responsible ministers for the time being.<sup>52</sup>

It is clear that it is incumbent on the Prime Minister to establish sufficient grounds for the need for dissolution particularly when the House is not near the end of its three year term. The Governor-General makes a judgment on the sufficiency of the grounds. It is in this situation where it is generally recognised that the Governor-General may exercise a discretion not to accept the advice given.<sup>53</sup>

49 *Quick and Garran*, p. 407.

50 Eugene A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, Oxford University Press, Toronto, 1968, p. 3.

51 Hasluck, p. 15.

52 *Quick and Garran*, p. 464.

53 It is relevant to any discussion of this discretion to consider Howard's comment (albeit in connection with a very specific set of circumstances) 'It is one thing to decline to act in accordance with the advice of your Ministers and Law Officers. It is quite another to act positively contrary to that advice, and it is yet another to decline even to seek that advice' in Colin Howard, 'A further comment on the dissolution of the Australian Parliament on 11 November 1975', *The Parliamentarian* LVII,4, 1976, pp. 240-1.

**TABLE 1 EARLY DISSOLUTIONS OF THE HOUSE OF REPRESENTATIVES (a)**

<i>Dissolution date</i>	<i>Parliament: length</i>	<i>Reason (b)</i>
26 March 1917	6th: 2 years 5 months 19 days	To synchronise election of the House with election for half the Senate and to gain a mandate from the people prior to the forthcoming Imperial War Conference (H.R. Deb. (6.3.17) 10 993-11 000).
3 November 1919 (c)	7th: 2 years 4 months 21 days	Not given to House.
16 September 1929	11th: 7 months 11 days	The House amended the Maritime Industries Bill against the wishes of the Government. The effect of the amendment was that the bill should not be brought into operation until submitted to a referendum or an election. Prime Minister Bruce based his advice on the following: 'The Constitution makes no provision for a referendum of this description, and the Commonwealth Parliament has no power to pass effective legislation for the holding of such a referendum. The Government is, however, prepared to accept the other alternative—namely a general election' (H.R. Deb. (12.9.29) 873-4; correspondence read to House).
27 November 1931	12th: 2 years 8 days	The Government was defeated on a formal motion for the adjournment of the House. The Governor-General took into consideration 'the strength and relation of various parties in the House of Representatives and the probability in any case of an early election being necessary' (H.R. Deb. (26.11.31) 1926-7; correspondence read to House).
7 August 1934 (c)	13th: 2 years 5 months 22 days	Not given to House.
4 November 1955	21st: 1 year 3 months 1 day	To synchronise elections of the House with elections for half the Senate; the need to avoid conflict with State election campaigns midway through the ensuing year; the impracticability of elections in January or February; authority (mandate) to deal with economic problems (H.R. Deb. (26.10.55) 1895-6; Sir John Kerr, <i>Matters for Judgment</i> , pp. 153, 412).
1 November 1963	24th: 1 year 8 months 13 days	Prime Minister Menzies referred to the fact that the Government had gone close to defeat on five occasions; the need to obtain a mandate

<i>Dissolution date</i>	<i>Parliament: length</i>	<i>Reason (b)</i>
10 November 1977	30th: 1 year 8 months 25 days	<p>on policies concerning North West Cape radio station, the defence of Malaysia and the proposed southern hemisphere nuclear free zone (H.R. Deb. (15.10.63) 1790-5).</p> <p>To synchronise House election with election for half the Senate; to provide an opportunity to end election speculation and the resulting uncertainty and to enable the Government to seek from the people an expression of their will; to conform with the pattern of elections taking place in the latter months of a calendar year (H.R. Deb. (27.10.77) 2476-7; Kerr, pp. 403-15; <i>Dissolution of the House of Representatives by His Excellency the Governor-General on 10 November 1977</i>, PP 16 (1979)).</p>
26 October 1984	33rd: 1 year 6 months 6 days	<p>To synchronise elections for the House with election for half the Senate; claimed business community concerns that if there were to be an election in the spring it should be held as early as possible ending electioneering atmosphere etc., and to avoid two of seven Senators to be elected (because of the enlargement of Parliament) being elected without knowledge of when they might take their seats (as the two additional Senators for each State would not take their seats until the new and enlarged House had been elected and met). (H.R. Deb. (8.10.84) 1818-1820; correspondence tabled 9.10.84, VP 1983-84/954).</p>

(a) A dissolution of the House of Representatives is counted as 'early' if the dissolution occurs six months or more before the date the House of Representatives is scheduled to expire by effluxion of time. The table does not include simultaneous dissolutions of both Houses granted by the Governor-General under s. 57 of the Constitution (see Ch. on 'Disagreements between the Houses'). (b) The reasons stated in the table may not be the only reasons advised or upon which dissolution was exclusively granted. (c) On two occasions dissolution ended Parliaments of less than two years six months duration where reasons, if any, were not given to the House.

The grounds on which the Governor-General has accepted advice to dissolve the House of Representatives have not always been made public. It is reasonable to presume that no special reasons may be given to the Governor-General, or indeed are necessary, for a dissolution of the House if the House is near the end of its three year term.<sup>54</sup> As far as is known, the majority of dissolutions have taken place in circumstances which presented no special features. Where necessary, it is a normal feature for the Governor-General to grant a dissolution on the condition and assurance that adequate provision, that is, parliamentary appropriation, is made for the Administration in all its branches to be carried on until the new Parliament meets.<sup>55</sup>

The precedents in Table 1 represent those 'early' dissolutions where the grounds, available from the public record, were sufficient for the Governor-General to grant a request for a dissolution. A feature of the precedents is that in 1917, 1955, 1977 and 1984 the grounds given included a perceived need to synchronise the election of the House of Representatives with a periodic election for half the Senate.

On 10 January 1918, following the defeat of a national referendum relating to compulsory military service overseas, Prime Minister Hughes informed the House that the Government had considered it its duty to resign unconditionally and to offer **no advice** to the Governor-General. A memorandum from the Governor-General setting out his views was tabled in the House:

On the 8th of January the Prime Minister waited on the Governor-General and tendered to him his resignation. In doing so Mr. Hughes offered no advice as to who should be asked to form an Administration.

The Governor-General considered that it was his paramount duty (a) to make provision for carrying on the business of the country in accordance with the principles of parliamentary government, (b) to avoid a situation arising which must lead to a further appeal to the country within twelve months of an election resulting in the return of two Houses of similar political complexion, which are still working in unison. The Governor-General was also of the opinion that in granting a commission for the formation of a new Administration his choice must be determined solely by the parliamentary situation. Any other course would be a departure from constitutional practice, and an infringement of the rights of Parliament. In the absence of such parliamentary indications as are given by a defeat of the Government in Parliament, the Governor-General endeavoured to ascertain what the situation was by seeking information from representatives of all sections of the House with a view to determining where the majority lay, and what prospects there were of forming an alternative Government.

As a result of these interviews, in which the knowledge and views of all those he consulted were most freely and generously placed at his service, the Governor-General was of the opinion that the majority of the National Party was likely to retain its cohesion, and that therefore a Government having the promise of stability could only be formed from that section of the House. Investigations failed to elicit proof of sufficient strength in any other quarter. It also became clear to him that the leader in the National Party, who had the best prospect of securing unity among his followers

<sup>54</sup> Sawyer has commented 'I would have thought that the precedents raise no doubt at all about the ability of a government to call for a general election at any time during the last six months of its normal existence, and probably earlier' in Geoffrey Sawyer, 'Dissolution of Parliament in mid-term', *Canberra Times*, 6 July 1977.

<sup>55</sup> H.R. Deb. (18.9.25)2576; see also correspondence between the Prime Minister and the Governor-General in relation to the simultaneous dissolution of 11 November 1975, PP 15(1979)5-6 and the dissolution of 30 November 1977, PP 16(1979)4.

and of therefore being able to form a Government having those elements of permanence so essential to the conduct of affairs during war, was the Right Honourable W.M. Hughes, whom the Governor-General therefore commissioned to form an Administration.<sup>56</sup>

A further case which requires brief mention is that of Prime Minister Fadden who resigned following a defeat in the House on 3 October 1941. According to Crisp the Prime Minister 'apparently relieved the Governor-General from determining the issue involved in the request of a defeated Prime Minister by advising him, **not a dissolution** [emphasis added], but sending for the Leader of the Opposition, Curtin'.<sup>57</sup>

The Governor-General has refused to accept advice to grant a dissolution on three known occasions<sup>58</sup>:

- *August 1904*.<sup>59</sup> The 2nd Parliament had been in existence for less than six months. On 12 August 1904, the Watson Government was defeated on an important vote in the House.<sup>60</sup> On the sitting day following the defeat, Mr Watson informed the House that following the vote he had offered the Governor-General 'certain advice' which was not accepted. He had thereupon tendered the resignation of himself and his colleagues which the Governor-General accepted.<sup>61</sup> Mr Reid was commissioned by the Governor-General to form a new Government.
- *July 1905*. The 2nd Parliament had been in existence for less than 16 months. On 30 June 1905, the Reid Government was defeated on an amendment to the Address in Reply.<sup>62</sup> At the next sitting Mr Reid informed the House that he had requested the Governor-General to dissolve the House. The advice was not accepted and the Government resigned.<sup>63</sup> Mr Deakin was commissioned by the Governor-General to form a new Government.
- *June 1909*. The 3rd Parliament had been in existence for over two years and three months of its three year term. On 27 May 1909, the Fisher Government was defeated on a motion to adjourn debate on the Address in Reply.<sup>64</sup> Mr Fisher subsequently informed the House that he had advised the Governor-General to dissolve the House and the Governor-General on 1 June refused the advice and accepted Mr Fisher's resignation.<sup>65</sup> Mr Deakin was commissioned by the Governor-General to form a new Government. In 1914, Mr Fisher, as Prime Minister, tabled the reasons for his 1909 application for a dissolution.

The advice of Prime Minister Fisher in the 1909 case consisted of a lengthy Cabinet minute which contained the following summary of reasons:

Your Advisers venture to submit, after careful perusal of the principles laid down by Todd and other writers on Constitutional Law, and by leading British statesmen, and the precedents established in the British Parliament and followed throughout the self-governing Dominions and States, that a dissolution may properly be had recourse to under any of the following circumstances:—

- (1) When a vote of 'no confidence', or what amounts to such, is carried against a Government which has not already appealed to the country.

56 H.R. Deb. (10.1.18)2895-6; see also Herbert Vere Evatt, *The King and His Dominion Governors: a Study of the Reserve Powers of the Crown in Great Britain and the Dominions*, 2nd edn, Cheshire, Melbourne, 1967, pp. 153-6.

57 Crisp, pp. 403-4.

58 For comment on these precedents see Evatt, pp. 50-4.

59 No documents in relation to the refusal were made public.

60 VP 1904/147; see also Ch. on 'Motions'.

61 H.R. Deb. (17.8.04)4265.

62 VP 1905/7; see also Ch. on 'Motions'.

63 H.R. Deb. (5.7.05)134-5.

64 VP 1909/7; see also Ch. on 'Motions'.

65 H.R. Deb. (1.6.09)227.

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- (2) When there is reasonable ground to believe that an adverse vote against the Government does not represent the opinions and wishes of the country, and would be reversed by a new Parliament.
- (3) When the existing Parliament was elected under the auspices of the opponents of the Government.
- (4) When the majority against a Government is so small as to make it improbable that a strong Government can be formed from the Opposition.
- (5) When the majority against the Government is composed of members elected to oppose each other on measures of first importance, and in particular upon those submitted by the Government.
- (6) When the elements composing the majority are so incongruous as to make it improbable that their fusion will be permanent.
- (7) When there is good reason to believe that the people earnestly desire that the policy of the Government shall be given effect to.

All these conditions, any one of which is held to justify a dissolution, unite in the present instance.<sup>66</sup>

According to Crisp 'The Governor-General was unmoved by considerations beyond "the parliamentary situation"'.<sup>67</sup> Evatt offers the view that 'certainly the action of the Governor-General proceeded upon a principle which was not out of accord with what had until then been accepted as Australian practice, although the discretion may not have been wisely exercised'.<sup>68</sup>

### *And the Parliament*

The functions of the Governor-General in relation to the legislature are discussed in detail in the appropriate parts of the text. In summary the Governor-General's constitutional duties (excluding functions of purely Senate application) are:

- appointing the times for the holding of sessions of Parliament (s. 5);
- proroguing and dissolving Parliament (s. 5);
- issuing writs for general elections of the House (in terms of the Constitution, exercised 'in Council') (s. 32);
- issuing writs for by-elections in the absence of the Speaker (in terms of the Constitution, exercised 'in Council') (s. 33);
- recommending the appropriation of revenue or money (s. 56);
- dissolving both Houses simultaneously (s. 57);
- convening a joint sitting of both Houses (s. 57);
- assenting to bills, withholding assent or reserving bills for the Queen's Assent (s. 58);
- recommending to the originating House amendments in proposed laws (s. 58), and
- submitting to electors proposed laws to alter the Constitution in cases where the two Houses cannot agree (s. 128).

The Crown in its relations with the legislature is characterised by formality, ceremony and tradition. For example, tradition dictates that the Sovereign should not enter the House of Representatives.

The Governor-General may on occasions appoint a Deputy to swear in Senators, and also appoints a Deputy to administer the oath or affirmation to Members in their own Chamber. Traditionally the Mace is not taken into the presence of the Crown.

66 'Ministerial Crisis 1909', *Cabinet Minute in connexion with the application of the Hon. Andrew Fisher for a dissolution*, PP 5(1914-17)13.

67 Crisp, p. 402.

68 Evatt, p. 54.

It is the practice of the House to agree to a condolence motion on the death of a former Governor-General and to suspend the sitting until a later hour as a mark of respect.<sup>69</sup> In the case of the death of a Governor-General in office the sitting of the House has been adjourned as a mark of respect.<sup>70</sup> An Address to the Queen has been agreed to on the death of a former Governor-General who was a member of the Royal Family<sup>71</sup>, and references have been made to the death of a Governor-General's close relative.<sup>72</sup>

During debate in the House no Member may use the name of the Queen, the Governor-General (or a State Governor) disrespectfully, or for the purpose of influencing the House in its deliberations.<sup>73</sup> The practice of the House is that, unless the discussion is based upon a substantive motion which admits of a distinct vote of the House, reflections (opprobrious references) must not be cast in debate concerning the conduct of the Sovereign or the Governor-General<sup>74</sup>, including a Governor-General designate.<sup>75</sup> It is acceptable for a Minister to be questioned, without being critical or reflecting on conduct, regarding matters relating to the public duties for which the Governor-General is responsible.<sup>76</sup>

On 2 March 1950, a question without notice was directed to Speaker Cameron concerning a newspaper article alleging that during the formal presentation of the Address in Reply to the Governor-General's Speech, the Speaker showed discourtesy to the Governor-General. Speaker Cameron said:

I am prepared to leave the judgment of my conduct at Government House to the honourable members who accompanied me there.<sup>77</sup>

Later, Speaker Cameron made a further statement to the House stating certain facts concerning the personal relationship between himself and the Governor-General. In view of this relationship, the Speaker had decided, on the presentation of the Address, to:

... treat His Excellency with the strict formality and respect due to his high office, and remove myself from his presence as soon as my duties had been discharged.<sup>78</sup>

In a previous ruling Speaker Cameron stated that 'the name of the Governor-General must not be brought into debate either in praise or in blame'.<sup>79</sup> Several Members required the Speaker to rule on this previous ruling in the light of his statement as to his conduct at Government House. Speaker Cameron replied that in his statement he had:

... made a statement of fact. I have made no attack upon His Excellency. I have simply stated the facts of certain transactions between us, and if the House considers that a reflection has been made on the Governor-General it has its remedy.<sup>80</sup>

Dissent from the Speaker's ruling was moved and negatived after debate.<sup>81</sup> Two sitting days later, the Leader of the Opposition moved that, in view of the Speaker's statement, the House 'is of opinion that Mr Speaker merits its censure'. The motion was negatived.<sup>82</sup>

69 VP 1976-77/253-4.

70 VP 1961/6.

71 VP 1974-75/9.

72 VP 1974-75/153.

73 S.O. 74.

74 H.R. Deb. (19.2.76)130-1.

75 H.R. Deb. (26.2.69)207.

76 H.R. Deb. (25.2.69)5-6,12-13; see also Ch. on 'Control and conduct of debate'.

77 H.R. Deb. (28.3.50)1207.

78 H.R. Deb. (30.3.50)1416.

79 H.R. Deb. (2.3.50)362.

80 H.R. Deb. (30.3.50)1417.

81 VP 1950-51/47-8.

82 VP 1950-51/55-6.

*And the Executive Government*

The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative<sup>83</sup>, the Queen's role being essentially one of name only. Section 2 of the Constitution and the various Letters Patent and Instructions also bear on the Governor-General's executive role (*see* p. 1). Section 61 of the Constitution states two principal elements of executive power which the Governor-General exercises, namely, the execution and maintenance of the Constitution, and the execution and maintenance of the laws passed (by the Parliament) in accordance with the Constitution.

The Constitution however immediately provides that, in the government of the Commonwealth, the Governor-General is advised by a Federal Executive Council<sup>84</sup>, effecting the concept of responsible government. The Governor-General therefore does not perform executive acts alone but 'in Council', that is, acting with the advice of the Federal Executive Council.<sup>85</sup> The practical effect of this is, as stated in *Quick and Garran*:

. . . that the Executive power is placed in the hands of a Parliamentary Committee, called the Cabinet, and the real head of the Executive is not the Queen but the Chairman of the Cabinet, or in other words the Prime Minister.<sup>86</sup>

Where the Constitution prescribes that the Governor-General (without reference to 'in Council') may perform certain acts, it can be said that these acts are also performed in practice with the advice of the Federal Executive Council in all but exceptional circumstances.

As Head of the Executive Government, in pursuance of the broad scope of power contained in section 61, the constitutional functions of the Governor-General, excluding those of historical interest, are summarised as follows<sup>87</sup>:

- choosing, summoning and dismissing Members of the Federal Executive Council (s. 62);
- establishing departments of State and appointing (or dismissing) officers to administer departments of State (these officers are Members of the Federal Executive Council and known as Ministers of State) (s. 64);
- directing, in the absence of parliamentary provision, what offices shall be held by Ministers of State (s. 65);
- appointing and removing other officers of the Executive Government (other than Ministers of State or as otherwise provided by delegation or as prescribed by legislation) (s. 67), and
- acting as Commander-in-Chief of the naval and military forces (s. 68).

*And the Judiciary (and see p. 19)*

The judicial power of the Commonwealth is vested in the High Court of Australia, and such other federal courts that the Parliament creates or other courts it invests with federal jurisdiction.<sup>88</sup>

The judiciary is the third element of government in the tripartite division of Commonwealth powers. The Governor-General is specifically included as a constituent part of the legislative and executive organs of power but is not part of the judiciary. While the legislature and the Executive have common elements which

83 Constitution, s. 61.

84 Constitution, s. 62.

85 Constitution, s. 63.

86 *Quick and Garran*, p. 703.

87 For further discussion on the Executive Government (i.e. the Ministry) as an integral part of the Parliament's composition *see* Ch. on 'House, Government and Opposition'.

88 Constitution, s. 71.

tend to fuse their respective roles, the judiciary is essentially independent. Nevertheless in terms of its composition it is answerable to the Executive (the Governor-General in Council) and also to the Parliament. The Governor-General in Council appoints justices of the High Court, and of other federal courts created by Parliament. Justices may only be removed by the Governor-General in Council on an address from both Houses praying for such removal on the ground of proved misbehaviour or incapacity.<sup>89</sup> There has been no occasion of a justice being removed from any federal court (but see p. 21 concerning the Parliamentary Commission of Inquiry of 1986). An alteration to the Constitution in 1977 provided for the retiring ages for judges of federal courts. Judges appointed after the date of effect of the alteration retire upon attaining the age of 70 years.<sup>90</sup>

## POWERS AND JURISDICTION OF THE HOUSES

While the Constitution states that the legislative power of the Commonwealth is vested in the Queen, a Senate and a House of Representatives<sup>91</sup> and, subject to the Constitution, that the Parliament shall make laws for the 'peace, order, and good government of the Commonwealth'<sup>92</sup>, the Parliament has powers and functions other than legislative. The legislative function is paramount but the exercise of Parliament's other powers, which are of historical origin, are important to the understanding and essential to the working of Parliament.

### Jurisdictional power

#### Section 49

Section 49 of the Constitution states:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

In 1987 the Parliament enacted comprehensive legislation under the head of power constituted by section 49. The *Parliamentary Privileges Act 1987* provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the Members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of the Act, continue in force. The provisions of the Act are described in detail in the Chapter on 'Parliamentary privilege'. In addition, the Parliament has enacted a number of other laws in connection with specific aspects of its operation, for example, the *Parliamentary Papers Act* and the *Parliamentary Proceedings Broadcasting Act*.

The significance of these provisions are to give to both Houses considerable authority in addition to the powers which are expressly stated in the Constitution. The effect on the Parliament is principally in relation to its rightful claim to the 'ancient and undoubted privileges and immunities' which are necessary for the exercise of its constitutional powers and functions.<sup>93</sup>

89 Constitution, s. 72.

90 *Constitution Alteration (Retirement of Judge Act 1977* (Act No. 83 of 1977).

91 Constitution, s. 1.

92 Constitution, ss. 51,52.

93 See Ch. on 'Parliamentary privilege' for a detailed discussion of the application of privilege.

*May* states that:

The privileges of Parliament are rights which are 'absolutely necessary for the due execution of its powers' [Hatsell]. They are enjoyed by individual Members, because the House cannot perform its functions without unimpeded use of the services of its Members; and by each House for the protection of its Members and the vindication of its own authority and dignity.<sup>94</sup>

It is important to note that in 1704 it was established that the House of Commons could not create any new privilege<sup>95</sup>; but it could expound the law of Parliament and vindicate its existing privileges. Likewise neither House of the Commonwealth Parliament could create any new privilege for itself.

The following were listed in *Quick and Garran* as among the principal powers and privileges of each House, and of the Members of each House, drawn from the law and custom of the House of Commons as at 1901<sup>96</sup>:

- the power to order the attendance at the Bar of the House of persons whose conduct has been brought before the House on a matter of privilege;
- the power to order the arrest and imprisonment of persons guilty of contempt or breach of privilege;
- the power to arrest for breach of privilege by warrant of the Speaker;
- the power to issue such a warrant for arrest, and imprisonment for contempt or breach of privilege, without showing any particular grounds or causes thereof;
- the power to regulate its proceedings by standing rules and orders having the force of law;
- the power to suspend disorderly members;
- the power to expel members guilty of disgraceful and infamous conduct;
- the right of free speech in Parliament, without liability to action or impeachment for anything spoken therein; established by Article 9 of the Bill of Rights, and
- the right of each House as a body to freedom of access to the Sovereign for the purpose of presenting and defending its views.

The following were listed as instances of parliamentary immunities<sup>97</sup>:

- immunity of Members from legal proceedings for anything said by them in the course of parliamentary debates;
- immunity of Members from arrest and imprisonment in civil causes whilst attending Parliament, and for 40 days after every prorogation, and for 40 days before the next appointed meeting;
- immunity of Members from the obligation to serve on juries;
- immunity of witnesses, summoned to attend either House of Parliament, from arrest in civil causes;
- immunity of parliamentary witnesses from being questioned or impeached for evidence given before either House or its committees, and
- immunity of officers of either House, in immediate attendance and service of the House, from arrest in civil causes.

It should be noted that some of these traditional rights and immunities have been modified since 1901: for instance, warrants for the committal of persons must

<sup>94</sup> *May*, pp. 70-1.

<sup>95</sup> *May*, p. 75.

<sup>96</sup> *Quick and Garran*, p. 501.

<sup>97</sup> *Quick and Garran*, p. 502.

specify the particulars determined by the House to constitute an offence, neither House may expel its members, and the duration of the immunity from arrest in civil causes has been reduced.<sup>98</sup>

*Section 50*

Section 50 of the Constitution provides that:

Each House of the Parliament may make rules and orders with respect to

- (i.) The mode in which its powers, privileges, and immunities may be exercised and upheld:
- (ii.) *The order and conduct of its business and proceedings either separately or jointly with the other House.*

The first part of this section enables each House to deal with procedural matters relating to its powers and privileges and, accordingly, the House has adopted a number of standing orders relating to the way in which its powers, privileges and immunities are to be exercised and upheld. These cover such matters as:

- procedure in matters of privilege (S.O.s 95-97);
- control of disorder (S.O.s 303-306);
- power of arrest (S.O.s 309-311);
- power to appoint committees (S.O. 323);
- power of summons (S.O.s 334-335, 354-358);
- rules on evidence (S.O.s 340, 368), and
- protection of witnesses (S.O. 362).

The second part enables each House to make rules and orders regulating the conduct of its business. A comprehensive set of standing orders has been adopted by the House and these orders may be supplemented from time to time by way of sessional orders and special resolutions.

Section 50 confers on each House the absolute right to determine its own procedures and to exercise control over its own internal proceedings. The House has in various areas imposed limits on itself in respect of its privilege powers and in respect of the conduct of proceedings, for example, with respect to the censure, suspension, or expulsion of its own Members, and by the restrictions placed on Members in its rules of debate. Legislation has been enacted to remove the power of the House to expel a Member.

*Standing order 1*

Standing order 1 provides that, in all cases not provided for by the standing, sessional or other orders or practice of the House, resort shall be had to the practice of the House of Commons in force for the time being, which shall be followed as far as it can be applied.

Much of the practice and procedure of the House of Representatives has been drawn, either directly or indirectly, from that of the House of Commons but, inevitably, over the period since 1901, many of the initial standing orders have been omitted or altered to meet the needs of a House operating in a different political environment.

The House has also developed its own practice in most given situations and, therefore, recourse to the practice of the House of Commons is infrequent. One exception is in respect of matters relating to privilege where the House continues to refer to the precedents of the House of Commons.

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<sup>98</sup> See especially the *Parliamentary Privileges Act 1987* and Ch. on 'Parliamentary privilege'.

**Legislative power**

The legislative function of the Parliament is probably its most important and time-consuming.<sup>99</sup> The principal legislative powers of the Commonwealth exercised by the Parliament are set out in sections 51 and 52 of the Constitution. However, the legislative powers of these sections cannot be regarded in isolation as other constitutional provisions extend, limit, restrict or qualify their provisions.<sup>100</sup>

The important distinction between the sections is that section 52 determines areas within the exclusive jurisdiction of the Parliament, while the effect of section 51 is that the itemised grant of powers includes a mixture of exclusive powers and powers exercised concurrently with the States. For example, some of the powers enumerated in section 51:

- did not belong to the States prior to 1901 (for example, fisheries in Australian waters beyond territorial limits) and for all intents and purposes may be regarded as exclusive to the Federal Parliament;
- were State powers wholly vested in the Federal Parliament (for example, bounties on the production or export of goods), and
- are concurrently exercised by the Federal Parliament and the State Parliaments (for example, taxation, except customs and excise).

In keeping with the federal nature of the Constitution, the exercise of powers in areas of government activity not covered by section 51, or elsewhere by the Constitution, remains within the jurisdiction of the States, known as the 'residual powers' of the States.

It is not the purpose of this text to detail the complicated nature of the federal legislative power under the Constitution.<sup>101</sup> However, the following points are useful for an understanding of the legislative role of the Parliament:

- as a general rule, unless a grant of power is expressly exclusive under the Constitution, the powers of the Commonwealth are concurrent with the continuing powers of the States over the same matters;
- sections, other than sections 51 and 52, grant exclusive power to the Commonwealth, for example, section 86 (customs and excise duties);
- section 51 operates 'subject to' the Constitution, for example, section 51(i.) (Trade and Commerce) is subject to the provisions of section 92 (Trade within the Commonwealth to be free);
- section 51 must be read in conjunction with sections 106, 107, 108 and 109, for example, section 109 prescribes that in the case of any inconsistency between a State law and a Commonwealth law the Commonwealth law shall prevail;
- the Commonwealth has increasingly used section 96 (Financial assistance to States) to extend its legislative competence, for example, in areas such as education, health and transport. This action is a continuing point of contention and has led to changing concepts of federalism;

99 See Ch. on 'The role of the House of Representatives' for its other functions.

100 For a full list of Commonwealth laws enacted by the Parliament under each section of the Constitution see *Acts Tables 1901-1972 and 1973*, Government Printer of Australia, 1974; and see Attorney-General's Department, *The Australian Constitution Annotated and 1976-1979 Cumulative Supplement*, AGPS, Canberra, 1980.

101 Detailed discussion can be found in *Quick and Garran*, pp. 508-662; R.D. Lumb and K.W. Ryan, *The Constitution of the Commonwealth of Australia Annotated*, 3rd edn, Butterworths, Sydney, 1981, pp. 100-224; W. Ansley Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th edn, Law Book Co., Sydney, 1976, Chs. 6 & 7; *The Australian Constitution Annotated*, pp. 45-175.

- section 51 (xxxvi.) recognises Commonwealth jurisdiction over 22 sections of the Constitution which include the provision 'until the Parliament otherwise provides', for example, section 29 (electoral matters). Generally they are provisions relating to the parliamentary and executive structure and, in most cases, the Parliament has taken action to alter these provisions<sup>102</sup>;
- section 51 (xxxix.) provides power to the Parliament to make laws on matters incidental to matters prescribed by the Constitution. This power, frequently and necessarily exercised, has been put to some significant uses, for example, jurisdictional powers and procedure of the High Court, and legislation concerning the operation of the Parliament<sup>103</sup>;
- section 51 itself has been altered on two occasions, namely, in 1964 when paragraph (xxiiiA.) was inserted and in 1967 when paragraph (xxvi.) was altered<sup>104</sup>;
- the Commonwealth has been granted exclusive legislative power in relation to any territory by section 122, read in conjunction with section 52;
- the Federal Parliament on the other hand is specifically prohibited from making laws in respect of certain matters, for example, in respect of religion by section 116, and
- in practice Parliament delegates much of its legislative power to the Executive Government.<sup>105</sup> Acts of Parliament frequently delegate to the Governor-General (that is, the Executive Government) a regulation making power for administrative purposes. However, regulations and other instruments must be laid before Parliament which exercises ultimate control by means of its power of disallowance.<sup>106</sup>

## THE COURTS AND PARLIAMENT

The Constitution deliberately confers great independence on the federal courts of Australia. At the same time the Parliament plays a considerable role in the creation of courts, investing other courts with federal jurisdiction, prescribing the number of justices to be appointed to a particular court, and so on. In the scheme of the Constitution, the courts and the Parliament provide checks and balances on each other.

### Constitutional provisions

With the exception of the High Court which is established by the Constitution, federal courts depend on Parliament for their creation.<sup>107</sup> The Parliament may provide for the appointment of justices to the High Court additional to the minimum of a Chief Justice and two other justices.<sup>108</sup> As prescribed by Parliament, the High Court now consists of a Chief Justice and six other justices.<sup>109</sup>

The appointment of justices of the High Court and of other courts created by the Parliament is made by the Governor-General in Council. Justices of the High Court may remain in office until they attain the age of 70 years. Subject to section

102 *Quick and Garran*, pp. 647-8.

103 *Quick and Garran*, pp. 651-5.

104 *Constitution Alteration (Social Services) 1946* (Act No. 81 of 1946); *Constitution Alteration (Aboriginals) 1967* (Act No. 55 of 1967).

105 *And see* Ch. on 'Legislation'.

106 *See* Chs on 'The role of the House of Representatives' and 'Legislation'. The detailed arrangements vary somewhat, depending on the particular legislation.

107 *E.g.* Federal Court of Australia, Family Court of Australia.

108 Constitution, s. 71.

109 *Judiciary Act 1903*, s. 4.

72 of the Constitution, the maximum age for justices of any court created by the Parliament is 70 years.<sup>110</sup> Justices may only be removed from office by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity<sup>111</sup> (for discussion of the meaning of 'misbehaviour' and 'incapacity' see p. 26). A joint address under this section may originate in either House although *Quick and Garran* suggests that it would be desirable for the House of Representatives to take the initiative.<sup>112</sup> There is no provision for appeal against removal.<sup>113</sup> There has been no case in the Commonwealth Parliament of an attempt to remove a justice of the High Court or other federal court, however the conduct of a judge has been investigated by Senate committees and a Parliamentary Commission of Inquiry (see below).

It may be said that, in such matters, as in cases of an alleged breach of parliamentary privilege or contempt of Parliament, the Parliament may engage in a type of judicial procedure.

The appellate jurisdiction (i.e. the hearing and determining of appeals) of the High Court is laid down by the Constitution but is subject to such exceptions and regulations as the Parliament prescribes<sup>114</sup>, providing that:

. . . no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.<sup>115</sup>

The Parliament may make laws limiting the matters in which leave of appeal to Her Majesty in Council (the Privy Council) may be asked.<sup>116</sup> Laws have been enacted to limit appeals to the Privy Council from the High Court<sup>117</sup> and to exclude appeals from other federal courts and the Supreme Courts of Territories.<sup>118</sup> Special leave of appeal to the Privy Council from a decision of the High Court may not be asked in any matter except where the decision of the High Court was given in a proceeding that was commenced in a court before the date of commencement of the Privy Council (Appeals from the High Court) Act on 8 July 1975, other than an inter se matter (as provided by section 74). Section 11 of the *Australia Act 1986* provided for the termination of appeals to the Privy Council from all 'Australian courts' defined as any court other than the High Court.

The Constitution confers original jurisdiction on the High Court in respect of certain matters<sup>119</sup> with which the Parliament may not interfere other than by definition of jurisdiction.<sup>120</sup> The Parliament may confer additional original jurisdiction on the High Court<sup>121</sup> and has done so in respect of 'all matters arising under the Constitution or involving its interpretation' and 'trials of indictable offences against the laws of the Commonwealth'.<sup>122</sup>

110 Constitution, s. 72.

111 Constitution, s. 72. For observations on the application of s. 72 see article by H. Evans, *Legislative Studies*, vol. 2, no. 2, Spring 1987, pp. 17-30.

112 *Quick and Garran*, p. 731.

113 *Quick and Garran*, p. 730.

114 E.g. *Commonwealth Places (Application of Laws) Act 1970*, s. 16; *Judiciary Act 1903*, s. 35.

115 Constitution, s. 73.

116 Constitution, s. 74.

117 *Privy Council (Limitation of Appeals) Act 1968*, s. 3 (Act No. 36 of 1968); *Privy Council (Appeals from the High Court) Act 1975*, s. 3 (Act No. 33 of 1975).

118 *Privy Council (Limitation of Appeals) Act 1968*, s. 4.

119 Constitution, s. 75.

120 Constitution, s. 77; e.g. *Extradition (Foreign States) Act 1966*, s. 25 (Act No. 76 of 1966).

121 Constitution, s. 76.

122 *Judiciary Act 1903*, s. 30.

Sections 77-80 of the Constitution provide Parliament with power to:

- define the jurisdiction of the federal courts (other than the High Court);
- define the extent to which the jurisdiction of any federal court (including the High Court) shall be exclusive of the jurisdiction of State courts;
- invest any State court with federal jurisdiction;
- make laws conferring rights to proceed against the Commonwealth or a State;
- prescribe the number of judges to exercise the federal jurisdiction of any court, and
- prescribe the place of any trial against any law of the Commonwealth where the offence was not committed within a State.

### Parliamentary Commission of Inquiry

The Parliament established, by legislation, a Parliamentary Commission of Inquiry in 1986.<sup>123</sup>

#### *Background—Senate committee inquiries*

In March 1984 the Senate referred to a select committee the question of whether any or all of certain tapes and transcripts delivered by the *Age* newspaper to the Attorney-General on 1 February and relating to the conduct of a federal judge were authentic and genuine, and, if it were satisfied that the material was authentic and genuine in whole or in part, whether the conduct of the judge as revealed constituted misbehaviour or incapacity which could amount to sufficient grounds for an address from both Houses praying for the judge's removal from office pursuant to section 72 (ii) of the Constitution. The committee met on 22 occasions, and heard evidence at seven meetings. Relevant evidence was forwarded to the judge and written material was received from him. This 'led to a further narrowing of the matters still of concern and a second examination of a particular witness followed'. The complete evidence of this witness was provided to the judge, who was invited to make submissions, through counsel, concerning the evidence, section 72 and the committee's method of proceeding. Such submissions were made by counsel. The judge did not appear before the committee and submissions from counsel were received on the inappropriateness of interrogation of a judge into whose conduct an inquiry was being conducted. The committee's report was presented on 24 August and was accompanied by two dissenting reports. The majority report stated, inter alia, that the committee 'having considered the evidence of Mr Briese [a major witness], reports to the Senate that no conduct of the judge is proved such as would constitute misbehaviour within the meaning of section 72 of the Constitution.' Two opinions relating to the issue of misbehaviour were published with the report (*and see below*).<sup>124</sup>

On 6 September another select committee was appointed by the Senate to inquire into, inter alia, allegations made by Mr Briese concerning Mr Justice Murphy before the select committee, to report its findings of fact upon the allegations and to report in relation to the allegations whether the judge engaged in any conduct which could amount to misbehaviour providing sufficient grounds for an address praying for removal. The resolution establishing the committee provided for the appointment of two Commissioners Assisting to advise the committee and participate in its deliberations. It also allowed for the appointment of counsel to assist the committee on questions of law, evidence and procedure and for witnesses to be

<sup>123</sup> *Parliamentary Commission of Inquiry Act 1986* (Act No. 9 of 1986).

<sup>124</sup> Report of the Senate Select Committee on the Conduct of a Judge, PP 168(1984).

examined and cross-examined by counsel assisting the committee and counsel for other witnesses. The resolution of appointment provided that the judge could not be summoned to give evidence, that all examination of all witnesses take place in the presence of counsel for the judge, and the judge himself if he chose to attend, that when all examination of all witnesses had concluded the judge should be invited to give evidence, but that if he gave evidence the judge should be sworn and subject to examination in accordance with the resolution establishing the committee.<sup>125</sup> Evidence was taken in public. Ten witnesses gave evidence before the committee. The judge did not give evidence, but counsel for him was given leave to make a statement on the reasons, and in the course of this statement counsel stated that the judge categorically denied any misbehaviour. Three of the four members of the committee found that the judge had engaged in certain conduct which had a real tendency to interfere in the due and proper course of the consideration by the magistrate concerned of certain committal proceedings. On the question of whether the intention with which that conduct had been engaged in had been proved, one of these Senators found the matter proved beyond reasonable doubt, whereas the other two Senators found only that the relevant intention to influence the due course of committal proceedings was proven on the balance of probabilities. The fourth Senator found that neither the conduct in question nor the intention behind that conduct was established even on the basis of the civil onus of proof—on the balance of probabilities. Three Senators indicated that on the basis of their findings of fact the conduct engaged in by Mr Justice Murphy could amount to misbehaviour in accordance with the interpretation of ‘misbehaviour’ in each of two opinions appended to the earlier report. The fourth Senator indicated that the conduct of Mr Justice Murphy as found by him could not amount to misbehaviour, whether on the criteria of either of the two opinions, and that this was so whatever the standard of proof adopted.<sup>126</sup>

(For references to matters arising in connection with the use in court of material associated with these inquiries *see* Chapter on ‘Parliamentary privilege’.)

### *Provisions of the Act*

A Parliamentary Commission of Inquiry Bill was presented and passed through all stages in the House on 8 May 1986.<sup>127</sup> The bill was assented to on 13 May.

The Act defined the functions<sup>128</sup> of the commission and contained detailed provisions for its operation. The commission’s function was to inquire and advise the Parliament whether any conduct of the Honourable Lionel Keith Murphy had been such as to amount, in its opinion, to proved misbehaviour within the meaning of section 72 of the Constitution.

The Act provided that, in carrying out its inquiry the commission:

- could consider only specific allegations made in precise terms;
- should have regard to the outcome of any previous official inquiry into that allegation, and only consider it to the extent that the commission believed it necessary or desirable to do so, and should not be precluded by any other law or by any privileges of either House of the Parliament from obtaining access to the records of evidence given at, or findings made as a result of, such an inquiry, and
- should not consider the issues dealt with in the trials leading to the acquittal of the judge of certain criminal charges on 5 July 1985 and 28 April 1986 and, in particular the issue of the judge’s guilt or innocence of those charges,

125 J 1983–84/1079–81.

126 Report of the Senate Select Committee on Allegations Concerning a Judge, FP 271(1984).

127 VP 1985–87/939–42.

128 *Parliamentary Commission of Inquiry Act 1986* (Act No. 9 of 1986).

or whether the conduct to which those charges related was such as to constitute proved misbehaviour within the meaning of section 72 of the Constitution, except to the extent that the commission considered necessary for the proper examination of other issues arising in the course of the commission's inquiry.

It was provided that Mr Justice Murphy should not be required to give evidence on a matter before the commission unless the commission was of the opinion that there was before the commission evidence of misbehaviour within the meaning of section 72 of the Constitution sufficient to require an answer, and the commission had given him particulars in writing of that evidence. In the conduct of its inquiry, the commission could not make a finding except upon evidence that would be admissible in proceedings in a court. The Act required the commission, unless it thought the circumstances required otherwise, to conduct the whole of its inquiry in private, and the commission was required to conduct its inquiry as quickly as a proper consideration of the matters before it would permit.

The Act provided that the commission report to the President of the Senate and the Speaker of the House its findings of fact and its conclusions as to whether any conduct of the judge had been such as to amount in its opinion to proved misbehaviour within the meaning of section 72 of the Constitution. The commission had to report on or before 30 September 1986 unless that date was extended by resolution of each House and it had to submit with its report a record of so much of the evidence before it as it thought necessary to substantiate its findings of fact and its conclusions. The Act required the President and the Speaker, as soon as practicable after they received the report and the record of evidence, to cause copies to be laid before the Senate and the House. (The Act also contained special provisions to govern the situation where the commission was of the opinion that the tabling of any of its findings or conclusions could prejudice investigations, the safety of persons and so on—section 8).

Questions arising before the commission had to be decided by majority vote, or, in the case of there only being two members and where each held a different opinion, in accordance with the opinion of the presiding member. The commission was given power to summon witnesses to appear and produce documents or other things referred to in the summons. It could take evidence on oath or affirmation and it could issue search warrants.

The judge was entitled to appear, and be represented, at any time during a hearing, and, apart from that requirement, the commission could give directions as to the persons who could be present. The commission was able to appoint counsel to assist it, and had the discretion to permit the examination and cross-examination of a witness by counsel assisting, a person authorised or entitled to appear or a legal practitioner authorised to represent a person. Subject to the Act, the procedure at a hearing could be determined by the commission, and it could direct that evidence given or other information acquired not be published. A person could not refuse or fail to answer a question or produce a document that might tend to incriminate the person, but statements or disclosures by a witness in the course of evidence (except in proceedings for an offence against the Act) were not admissible in evidence in any civil or criminal proceedings.

The Act provided for the President and the Speaker to make staff available to the commission, and it contained a special appropriation clause to provide the funds necessary for the inquiry. Other matters covered included provisions for offences in relation to the inquiry, the provision of legal and financial assistance and the reimbursement of expenses.

*Operation*

The Act provided for the commission to consist of three members to be appointed by resolutions of the House and the Senate. A person could not be a member unless he or she was or had been a judge, and the resolutions had to provide for one member to be the Presiding Member. On 27 May 1986 the Hon. Sir George Lush, the Hon. Sir Richard Blackburn, OBE and the Hon. Andrew Wells, QC, were appointed as members of the commission, with Sir George Lush as the Presiding Member.<sup>129</sup> Staff were appointed under the authority of the Presiding Officers, counsel assisting were engaged, and it commenced sitting. Newspaper advertisements were lodged advising of the establishment of the commission and stating that any person wishing to present evidence to the commission of misbehaviour within section 72 of the Constitution should do so by statutory declaration to the secretary to the commission. It later became evident that important disagreements occurred as to the conduct of the inquiry (*and see below*).

*High Court challenge*

On 25 June action on behalf of Mr Justice Murphy was initiated to seek an interim order of the High Court restraining the members and officers of the commission from, inter alia,

- investigating or inquiring into or considering any material or information that was not a specific allegation in precise terms;
- inquiring otherwise than at hearings with the judge present;
- investigating allegations relating to the judge's conduct otherwise than in judicial office in the absence of any allegation of his prior conviction for an offence, and
- proceeding to investigate certain matters set out in a letter from an instructing solicitor to counsel assisting the commission to the judge's solicitors on 20 June.

An interim order was also sought restraining the Hon. Andrew Wells from acting in any way in furtherance of the functions conferred on him pursuant to the Act, and an interim order restraining the members of the commission, their staff and so on from doing any act or thing pursuant to the Act, was sought.<sup>130</sup> A writ of summons was also issued to commence proceedings seeking an order interim and permanent restraining the members of the commission and their officers in a similar way to that outlined in the notice of motion for an interim order, but also, inter alia, seeking a declaration that the Act itself was invalid.<sup>131</sup>

Submissions were made to the court by counsel for the judge on 26 June on the whole validity of the Act and on whether, assuming the Act was valid, it authorised investigations of the kind proposed. A dispute had arisen in connection with the activities of the commission and the commission had rejected the submission of counsel for the judge that the terms of the Act confined the commission to the consideration of allegations in the required form originating outside the commission's activities. The Presiding Member had stated:

The Commission's view is that it is entitled to gather information, examine it and conduct investigations, if necessary with the assistance of investigators, including members of the police forces if made available, based upon the information to ascertain with what precision is possible exactly what the relevant point, if any, of the information is; and

129 VP 1985-87/950; J 1985-87/1009-10.

130 *The Hon. L. K. Murphy v. Sir G. Lush and others*. Notice of Motion, 25 June 1986 (ref. no. 87 of 1986, Sydney Registry of the High Court).

131 *The Hon. L. K. Murphy v. Sir G. Lush and others*. Writ of summons, 25 June 1986 (ref. no. 87 of 1986, Sydney Registry of the High Court).

that it is its duty and specifically the duty of counsel assisting, to formulate the specific allegations which emerge from materials received. It considers that this is no more than a realistic interpretation of the various provisions of the Act.<sup>132</sup>

Counsel for the judge argued before the High Court, *inter alia*, that, if police or officers conducted, under the authority of the commission, inquiries of which the judge was unaware, the judge could suffer irremedial damage, and might not even know that it was being caused to him. In reasons for judgment given on 27 June the full court expressed the view that the likelihood of damage was exaggerated and that the mere conduct of private inquiries, in what it 'must assume will be a responsible manner' was not likely to cause any real damage to the judge's reputation.<sup>133</sup> The court said that there was no suggestion that the commission would be holding a public hearing before the court was asked finally to determine the issues.

In respect of Mr Wells, it had been argued that a statement allegedly made by him in 1984 in essence rejecting a reported statement concerning alleged intervention by judges in public service appointments represented 'a public prejudgment on the propriety of the activity alleged against the plaintiff.'<sup>134</sup> The court rejected the argument, holding 'neither the parties nor the public could reasonably entertain an apprehension that he [Mr Wells] might not be impartial or unprejudiced.'<sup>135</sup>

The Court concluded in respect of the interim order that the balance of convenience required that the investigations for the commission should proceed and that the injunction sought should be refused.<sup>136</sup> The court indicated however that, after hearing an outline of points on the issues other than the allegations of bias (which matter was argued in detail), it was prepared to assume that a triable case had been made out and that the matter should be heard at proper length by the court in August.<sup>137</sup>

The work of the commission continued and by 17 July counsel assisting the commission had caused to be delivered to counsel representing the judge 12 documents each purporting to set out a specific allegation.<sup>138</sup>

#### *Later developments—illness of the judge*

On 5 August the commission forwarded a special report to the President and the Speaker. The report advised, *inter alia*, that counsel for the judge had tendered a statutory declaration, to which was exhibited a copy of a medical certificate. The judge had been diagnosed as having a serious illness and was unable to travel, and an application for an adjournment of hearings until Parliament next sat was granted. The special report also indicated that the inquiry would take at least four more months, but that to continue hearings if the judge were too ill to take part would be contrary to established practice and to natural justice.<sup>139</sup>

The President and the Speaker had a copy of the special report provided to each party leader. Copies of the special report, the letters to party leaders and a statement by the President and Speaker on 4 August were tabled when the House met on 19 August.<sup>140</sup> Solicitors for the judge filed a notice of discontinuance in respect of the High Court proceedings on the matter.

132 *The Hon. L. K. Murphy v. Sir G. Lush and others* (1986) 60 ALJR 524.

133 *The Hon. L. K. Murphy v. Sir G. Lush and others* (1986) 60 ALJR 525-6.

134 *The Hon. L. K. Murphy v. Sir G. Lush and others*, Transcript of proceedings, pp. 65-75.

135 *The Hon. L. K. Murphy v. Sir G. Lush and others* (1986) 60 ALJR 525-6.

136 *The Hon. L. K. Murphy v. Sir G. Lush and others* (1986) 60 ALJR 526.

137 *The Hon. L. K. Murphy v. Sir G. Lush and others*, Transcript of proceedings, p. 62.

138 'Special report dealing with the meaning of "misbehaviour" for the purposes of section 72 of the Constitution, 19 August 1986' *Parliamentary Commission of Inquiry*, PP 443 (1986).

139 'Special report, 5 August 1986' *Parliamentary Commission of Inquiry*, PP 443 (1986), pp. 1-3.

140 VP 1985-87/1051.

*Repeal of Act*

On 20 August the Parliamentary Commission of Inquiry (Repeal) Bill was introduced and later passed. This measure repealed the Act establishing the commission. It also contained detailed provisions for the custody of documents in the possession of the commission immediately before the commencement of the repeal Act.

The Presiding Officers jointly were given 'the exclusive right to possession' of such documents, and they were 'to take such measures as they consider appropriate to prevent persons from gaining access to a document' and could 'commit such a document to the custody of a person designated by them'. Provisions prohibiting disclosure by members and staff and counsel assisting the commission, and providing for penalties for breach of the provisions, were also included.<sup>141</sup> The bill was assented to and came into effect on 25 September. The Presiding Officers, under the provisions of the Act, committed to the custody of the Director-General of the Australian Archives all documents of which they had exclusive right to possession under the Act. They also appointed the Clerk of the House and the Clerk of the Senate, assisted by such officers as may be nominated by the Clerks, to receive the documents on behalf of the Presiding Officers, to transfer them to the custody of the Director-General of Archives and to make arrangements in conjunction with the Director-General for the safe storage of the documents, those steps to be undertaken without the officers of the Houses, or the Director-General or officers of Archives examining any part of the contents of the documents. Arrangements were made to give effect to these matters.

Mr Justice Murphy died on 21 October 1986.

**The meaning of 'misbehaviour' and 'incapacity'**

Prior to the matters arising in 1984-86, little had been written about the meaning of section 72. *Quick and Garran* had stated:

Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. (Todd, *Parl. Gov. in Eng.*, ii. 857, and authorities cited.)

"Incapacity" extends to incapacity from mental or bodily infirmity, which has always been held to justify the termination of an office held during good behaviour . . . The addition of the word does not therefore alter the nature of the tenure of good behaviour, but merely defines it more accurately.

No mode is prescribed for the proof of misbehaviour or incapacity, and the Parliament is therefore free to prescribe its own procedure. Seeing, however, that proof of definite legal breaches of the conditions of tenure is required, and that the enquiry is therefore in its nature more strictly judicial than in England, it is conceived that the procedure ought to partake as far as possible of the formal nature of a criminal trial; that the charges should be definitely formulated, the accused allowed full opportunities of defence, and the proof established by evidence taken at the Bar of each House.<sup>142</sup>

<sup>141</sup> *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Act No. 92 of 1986).

<sup>142</sup> *Quick and Garran*, pp. 731-2.

In an opinion published with the report of the Senate Select Committee on the Conduct of a Judge, the Commonwealth Solicitor-General stated, *inter alia*:

... Misbehaviour is limited in meaning in section 72 of the Constitution to matters pertaining to—

- (1) judicial office, including non-attendance, neglect of or refusal to perform duties; and
- (2) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office.

Misbehaviour is defined as breach of condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the Parliament in proceedings where the offender has been given proper notice and opportunity to defend himself.<sup>143</sup>

Mr C. W. Pincus, QC, in an opinion also published by the committee, stated on the other hand:

As a matter of law, I differ from the view which has previously been expressed as to the meaning of section 72. I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no 'technical' relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under section 72 to be enlivened, that an offence be proved.<sup>144</sup>

On 21 August the Presiding Officers presented a special report from the Parliamentary Commission of Inquiry containing reasons for a ruling, given on 5 August, on the meaning of 'misbehaviour' for the purposes of section 72.<sup>145</sup> Sir George Lush stated, *inter alia*,

... my opinion is that the word 'misbehaviour' in section 72 is used in its ordinary meaning, and not in the restricted sense of 'misconduct in office'. It is not confined, either, to conduct of a criminal matter.

and later

the view of the meaning of misbehaviour which I have expressed leads to the result that it is for Parliament to decide what is misbehaviour, a decision which will fall to be made in the light of contemporary values. The decision will involve a concept of what, again in the light of contemporary values, are the standards to be expected of the judges of the High Court and other courts created under the Constitution. The present state of Australian jurisprudence suggests that if a matter were raised in addresses against a judge which was not on any view capable of being misbehaviour calling for removal, the High Court would have power to intervene if asked to do so.<sup>146</sup>

Sir Richard Blackburn stated:

All the foregoing discussion relates to the question whether 'proved misbehaviour' in section 72 of the Constitution must, as a matter of construction, be limited as contended for by counsel. In my opinion the reverse is correct. The material available for solving this problem of construction suggests that 'proved misbehaviour' means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question. If it be a legitimate observation to make, I find it difficult to believe that the Constitution of the Commonwealth of Australia should be construed so as to limit the

143 *Report of the Senate Select Committee on the Conduct of a Judge*, PP 168 (1984) 58.

144 *Report of the Senate Select Committee on the Conduct of a Judge*, PP 168 (1984) 27.

145 'Special report dealing with the meaning of "misbehaviour" for the purposes of section 72 of the Constitution, 19 August 1986' *Parliamentary Commission of Inquiry*, PP 443 (1986).

146 'Special report dealing with the meaning of "misbehaviour" for the purposes of section 72 of the Constitution, 19 August 1986' *Parliamentary Commission of Inquiry*, PP 443 (1986) 18-19.

power of the Parliament to address for the removal of a judge, to grounds expressed in terms which in one eighteenth-century case were said to apply to corporations and their officers and corporators, and which have not in or since that case been applied to any judge.<sup>147</sup>

Mr Wells stated:

... the word 'misbehaviour' must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the Constitution.

... Section 72 requires misbehaviour to be 'proved'. In my opinion, that word naturally means proved to the satisfaction of the Houses of Parliament whose duty it is to consider whatever material is produced to substantiate the central allegations in the motion before them. The Houses of Parliament may act upon proof of a crime, or other unlawful conduct, represented by a conviction, or other formal conclusion, recorded by a court of competent jurisdiction; but, in my opinion, they are not obliged to do so, nor are they confined to proof of that kind. Their duty, I apprehend, is to evaluate all material advanced; to give to it, as proof, the weight it may reasonably bear; and to act accordingly.

According to entrenched principle, there should, in my opinion, be read into section 72 the requirement that natural justice will be administered to a judge accused of misbehaviour...<sup>148</sup>

### **The courts as a check on the power of Parliament**

In the constitutional context of the separation of powers, the courts, in their relationship to the Parliament, provide the means whereby the Parliament may be prevented from exceeding its constitutional powers. Wynes writes:

The Constitution and laws of the Commonwealth being, by covering Cl. V. [5] of the *Constitution Act*, "binding on the Courts, judges and people of every State and of every part of the Commonwealth", it is the essential function and duty of the Courts to adjudicate upon the constitutional competence of any Federal or State Act whenever the question falls for decision before them in properly constituted litigation.<sup>149</sup>

Original jurisdiction in any matter arising under the Constitution or involving its interpretation has been conferred on the High Court by an Act of Parliament<sup>150</sup>, pursuant to section 76(i.) of the Constitution. The High Court does not in law have any power to veto legislation and it does not give advisory opinions<sup>151</sup> but in deciding between litigants in a case it may determine that a legislative enactment is unconstitutional and of no effect in the circumstances of the case. On the assumption that in subsequent cases the court will follow its previous decision (not always the case<sup>152</sup>) a law deemed ultra vires becomes a dead letter.

147 'Special report dealing with the meaning of "misbehaviour" for the purposes of section 72 of the Constitution, 19 August 1986' *Parliamentary Commission of Inquiry*, PP 443 (1986) 32.

148 'Special report dealing with the meaning of "misbehaviour" for the purposes of section 72 of the Constitution, 19 August 1986' *Parliamentary Commission of Inquiry*, PP 443 (1986) 45.

149 Wynes, p. 30.

150 *Judiciary Act 1903*, s. 30.

151 See *In re Judiciary and Navigation Acts*, (1921) 29 CLR 257. A Constitution Alteration (Advisory Jurisdiction of High Court) Bill 1983 provided for a referendum to be held on this matter but, although passed by both Houses, it was not submitted to the people.

152 E.g. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (Engineer's Case)* (1920) 28 CLR 129.

The power of the courts to interpret the Constitution and to determine the constitutionality of legislation gives the judiciary the power to determine certain matters directly affecting the Parliament and its proceedings. The range of High Court jurisdiction in these matters can be seen from the following recent cases:

- Petroleum and Minerals Authority case<sup>153</sup>—The High Court ruled that the passage of the Petroleum and Minerals Authority Bill through Parliament had not satisfied the provisions of section 57 of the Constitution and was consequently not a bill upon which the joint sitting of 1974 could properly deliberate and vote, and thus that it was not a valid law of the Commonwealth.<sup>154</sup>
- Webster's case<sup>155</sup>—On 22 April 1975, the Senate referred two questions to the High Court as the Court of Disputed Returns, namely, whether Senator Webster (1) was or (2) had become incapable of being chosen or sitting as a Senator under sections 44(v.) and/or 45(iii.) of the Constitution.<sup>156</sup> The Court answered 'No' to both questions.<sup>157</sup>
- Wood case—In February 1988 the Senate referred a matter relating to the election of Senator W. R. Wood, and the Court of Disputed Returns held, inter alia, that Mr Wood had not been eligible for election, that a vacancy had existed since the election and that a recount should be conducted (*and see* Chapters on 'Elections and the electoral system' and 'Members').<sup>158</sup>
- McKinlay's case<sup>159</sup>—The High Court held that (1) sections 19, 24 and 25 of the *Commonwealth Electoral Act 1918*, as amended, did not contravene section 24 of the Constitution and (2) whilst sections 3, 4 and 12(a) of the *Representation Act 1905*, as amended, remained in their present form, the Representation Act was not a valid law by which the Parliament otherwise provides within the meaning of the second paragraph of section 24 of the Constitution.
- McKellar's case<sup>160</sup>—The High Court held that a purported amendment to section 10 of the *Representation Act 1905*, contained in the *Representation Act 1964*, was invalid because it offended the precepts of proportionality and the nexus with the size of the Senate as required by section 24 of the Constitution.

It should be noted that the range of cases cited is not an indication that either House has conceded any role to the High Court, or other courts, in respect of its ordinary operations or workings. In *Cormack v. Cope* the High Court refused to grant an injunction to prevent a joint sitting convened under section 57 from proceeding (there was some division as to whether a court had jurisdiction to intervene in the legislative process before a bill had been assented to). The joint sitting proceeded, and later the Court considered whether, in terms of the Constitution, one Act was validly enacted.<sup>161</sup>

153 *Victoria v. Commonwealth* (1975) 134 CLR 81.

154 See also Ch. on 'Disagreements between the Houses' for the cases concerning s. 57.

155 *In re Webster* (1975) 132 CLR 270.

156 S. Deb. (22.4.75) 1198-1223; J 1974-75/628-9.

157 See also Ch. on 'Elections and the electoral system' regarding the Court of Disputed Returns.

158 J 1987-89/472, 709.

159 *Attorney-General (Australia) (ex rel. McKinlay) v. Commonwealth* (1975) 135 CLR 1.

160 *Attorney-General (NSW) (ex rel. McKellar) v. Commonwealth* (1978) 139 CLR 527.

161 *And see* Lumb and Ryan, pp. 240-1; Fajgenbaum and Hanks, pp. 164-95.

### Jurisdiction of the courts in matters of privilege

By virtue of section 49 of the Constitution the powers, privileges and immunities of the House of Representatives were, until otherwise declared by the Parliament, the same as those of the House of Commons as at 1 January 1901. The *Parliamentary Privileges Act 1987* constituted a declaration of certain 'powers, privileges and immunities', but section 5 provided that, except to the extent that the Act expressly provided otherwise, the powers, privileges and immunities of each House, and the members and committees of each House, as in force under section 49 of the Constitution immediately before the commencement of the Act, continued in force. As far as the House of Commons is concerned, the origin of its privileges lies in either the privileges of the ancient High Court of Parliament (before the division into Commons and Lords) or in later law and statutes; for example, Article 9 of the Bill of Rights of 1688 declares what is perhaps the basic privilege:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

This established the basis of the relationship between the House of Commons and the courts. However a number of grey areas remained, centering on the claim of the House of Commons to be the sole and exclusive judge of its own privilege, an area of law which it maintained was outside the ambit of the ordinary courts and which the courts could not question. The courts maintained, on the contrary, that the *lex et consuetudo parliamenti* (the law and custom of Parliament) was part of the law of the land and that they were bound to decide any question of privilege arising in a case within their jurisdiction and to decide it according to their own interpretation of the law. Although much of this question of jurisdiction remains formally unresolved, there has developed a wide field of agreement between the House of Commons and the courts on the nature and principles of privilege. *May* summarises as follows<sup>162</sup>:

(1) It seems to be recognized that, for the purpose of adjudicating on questions of privilege, neither House is by itself entitled to claim the supremacy over the ordinary courts of justice which was enjoyed by the undivided High Court of Parliament. The supremacy of Parliament, consisting of the Sovereign and the two Houses, is a legislative supremacy which has nothing to do with the privilege jurisdiction of either House acting singly.<sup>163</sup>

(2) It is admitted by both Houses that, since neither House can by itself add to the law, neither House can by its own declaration create a new privilege. This implies that privilege is objective and its extent ascertainable, and reinforces the doctrine that it is known by the courts.<sup>164</sup>

On the other hand, the courts admit:

(3) That the control of each House over its internal proceedings is absolute and cannot be interfered with by the courts.<sup>165</sup>

(4) That a committal for contempt by either House is in practice within its exclusive jurisdiction, since the facts constituting the alleged contempt need not be stated on the warrant of committal. [Since 1987 this has not been the case in respect of the Commonwealth Parliament.]<sup>166</sup>

These matters are dealt with in more detail in the Chapter on 'Parliamentary privilege'.

<sup>162</sup> *May*, pp. 203-4.

<sup>163</sup> See *R. v. Knollys*, 1694 in *May*, p. 187; *Ashby v. White and others*, 1703-04 in *May*, pp. 187-8; *Stockdale v. Hansard* 1836-37 in *May*, pp. 190-1.

<sup>164</sup> See *Stockdale v. Hansard* 1836-37 in *May*, pp. 190-1.

<sup>165</sup> See *Stockdale v. Hansard* 1836-37 in *May*, pp. 190-1; *Bradlaugh v. Gossett* 1884 in *May*, p. 193.

<sup>166</sup> See *Burdett v. Abbott* 1811 in *May*, pp. 189-90; *Howard v. Gossett* 1845 in *May*, pp. 191-2.

## The right of Parliament to the service of its Members in priority to the claims of the courts<sup>167</sup>

This is one of the oldest of parliamentary privileges from which derives Members' immunity from arrest in civil proceedings and their exemption from attendance as witnesses and from jury service.

Members of Parliament are immune from arrest or detention in a civil cause on sitting days of the House of which the person is a Member, on days on which a committee of which the person is a member meets and on days within five days before and after such days.<sup>168</sup> This privilege lost most of its importance in the 19th century with the virtual abolition of imprisonment in civil process.<sup>169</sup>

Section 14 of the Parliamentary Privileges Act also grants an immunity to Senators and Members from attendance before courts or tribunals for the same periods as the immunity from arrest in civil causes. In the House of Commons it has been held on occasions that the service of a subpoena on a Member to attend as a witness was a breach of privilege.<sup>170</sup> When such matters have arisen the Speaker has written to court authorities asking that the Member be excused. An alternative would be for the House to grant leave to a Member to attend.

The serving or executing of a civil or criminal process within the precincts of the House while the House is sitting without obtaining the leave of the House has been considered to be a contempt of the House.<sup>171</sup>

By virtue of the Jury Exemption Act, Members of Parliament are not liable, and may not be summoned, to serve as jurors in any Federal, State or Territory court.<sup>172</sup>

## Attendance of parliamentary officers in court or their arrest<sup>173</sup>

Section 14 of the Parliamentary Privileges Act provides that an officer of a House shall not be required to attend before a court or tribunal, or arrested or detained in a civil cause, on a day on which a House or a committee upon which the officer is required to attend meets, or within five days before or after such days.

Standing order 368 provides that no officer of the House, or shorthand writer employed to take minutes of evidence before the House or any committee thereof, may give evidence elsewhere in respect of any proceedings or examination of any witness without the special leave of the House.

A number of parliamentary officers have traditionally been exempted from attendance as jurors in Australian Capital Territory or New South Wales courts as the case may be.<sup>174</sup> Exemption from jury service has been provided only on the basis that certain officers have been required to devote their attention completely to the functioning of the House and its committees.

## Parliamentary debate and the courts

Other matters involving the relationship between Parliament and the courts which require brief mention are:

- *Interpretation of the Constitution.* In 1908, the Speaker ruled:

. . . the obligation does not rest upon me to interpret the Constitution . . . the only body fully entitled to interpret the Constitution is the High Court . . . Not even this House has the power finally to interpret the terms of the Constitution.<sup>175</sup>

This ruling has been generally followed by all subsequent Speakers.

167 For a more detailed treatment of this subject see Ch. on 'Parliamentary privilege'.

168 *Parliamentary Privileges Act 1987*, s. 14.

169 *May*, p. 98.

170 *May*, p. 107.

171 *May*, pp. 154-5—but see Ch. on 'Parliamentary privilege'.

172 *Jury Exemption Act 1965*, s. 4.

173 See also Chs on 'Papers and documents', 'Parliamentary committees' and 'Parliamentary privilege'.

174 *Jury Exemption Regulations*, SR 186 of 1987.

175 H.R. Deb. (22.4.08)10486.

- *The sub judice rule.* It is the practice of the House that matters awaiting or under adjudication in a court of law should not be brought forward in debate, except by means of a bill. This rule is sometimes applied to restrict discussion on current proceedings before a royal commission, depending on its terms of reference. Issues of national importance before the Arbitration Commission, for example, may be referred to unless such references would constitute a real and substantial danger of prejudice to the proceedings. In exercising a discretion in applying the sub judice rule the Speaker makes decisions which involve the inherent right of the House to inquire into and debate matters of public importance which are within the responsibility of Ministers while at the same time ensuring that the House does not set itself up as an alternative forum to the courts or permit the proceedings of the House to interfere with the course of justice.<sup>176</sup>
- *Reflections on the judiciary.* Standing order 75 provides, inter alia, that no Member may use offensive words against any member of the judiciary.<sup>177</sup>

### CONSTITUTION ALTERATION

The Constitution from which Parliament obtains its authority cannot be changed by Parliament alone. A majority vote of the people of the Commonwealth is also required (*but see* below). The Constitution itself, expressing as it does the agreement of the States to unite into a Federal Commonwealth, was originally agreed to by the people of the States at referendum.<sup>178</sup> The process of constitutional alteration commences with the Houses of Parliament.

A proposal to alter the Constitution may originate in either House of the Parliament by means of a bill. Normally, the bill must be passed by an absolute majority of each House but, in certain circumstances, it need only be passed by an absolute majority of one House.<sup>179</sup> Subject to the absolute majority provision, the passage of the bill is the same as for an ordinary bill.<sup>180</sup>

In the case of a bill having passed through both Houses, it shall be submitted to the electors in each State and Territory not less than two or more than six months after its passage (*but see* below). The bill is presented to the Governor-General for the necessary referendum arrangements to be made.<sup>181</sup>

If the bill passes one House and the other House rejects or fails to pass it, or passes it with any amendment to which the originating House will not agree, the originating House, after an interval of three months in the same or next session, may again pass the bill in either its original form or in a form which contains any amendment made or agreed to by the other House on the first occasion. If the other House again rejects or fails to pass the bill or passes it with any amendment to which the originating House will not agree, the Governor-General may submit the bill as last proposed by the originating House, either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory. The words 'rejects or fails to pass, etc.' are considered to have the same meaning as those in section 57 of the Constitution.<sup>182</sup>

In June 1914, six bills which had been passed by the Senate in December 1913 and not by the House of Representatives were again passed by the Senate.<sup>183</sup> The

176 See also Ch. on 'Control and conduct of debate'.

177 See also Ch. on 'Control and conduct of debate'.

178 See *Quick and Garran*, pp. 282 ff.

179 Constitution, s. 128.

180 See Ch. on 'Legislation'.

181 See Ch. on 'Legislation'.

182 See Ch. on 'Disagreements between the Houses'.

183 Constitution alteration bills relating to Corporations, Industrial Matters, Nationalization of Monopolies, Railway Disputes, Trade and Commerce, and Trusts; J 1913/120-3; VP 1913/232, xlix; J 1914/77-8.

bills were sent to the House which took no further action after the first reading.<sup>184</sup> After seven days the Senate requested the Governor-General, by means of an Address, that the proposed laws be submitted to the electors.<sup>185</sup> Acting on the advice of his Ministers, the Governor-General refused the request.<sup>186</sup>

*Odgers* puts the view that the point to be made is that, following only a short period after sending the bills to the House of Representatives, the Senate felt competent to declare that they had failed to pass the other House.<sup>187</sup> The view of Lumb and Ryan is that as there had been no 'rejection' or 'amendment' of the bills in the House of Representatives then the only question was whether there had been a failure to pass them, and that there had been no 'failure to pass' by the House and that therefore the conditions precedent for holding a referendum had not been fulfilled.<sup>188</sup>

The circumstances of this case were unusual as a proposed double dissolution had been announced<sup>189</sup>, and the Prime Minister had made it clear that the bills would be opposed and their discussion in the House of Representatives would not be facilitated.<sup>190</sup> It was also significant that referendums had been held in May 1913 on similar proposals and were not approved by the electors.

Similar bills were again introduced in 1915 and on this occasion passed both Houses.<sup>191</sup> Writs for holding referendums were issued on 2 November 1915. The Government subsequently decided not to proceed with the referendums and an Act was passed authorising the Governor-General to direct the withdrawal of the writs and to direct that no further proceedings be taken in relation to the submission of the bills to the electors.<sup>192</sup>

During 1973 a similar situation arose in respect of four bills<sup>193</sup> passed by the House of Representatives.<sup>194</sup> Three of them were not passed by the Senate and the fourth was laid aside by the House when the Senate insisted on amendments which were not acceptable to the House.<sup>195</sup> After an interval of three months (in 1974), the House again passed the bills<sup>196</sup> which were rejected by the Senate.<sup>197</sup> Acting on the advice of his Ministers, the Governor-General, in accordance with section 128 of the Constitution, submitted the bills to the electors where they failed to gain approval.<sup>198</sup>

The *Referendum (Machinery Provisions) Act 1984* contains detailed provisions relating to the submission to the electors of constitution alteration proposals. It covers, inter alia, the form of a writ, the distribution of arguments for and against proposals, voting, scrutiny, the return of writs, disputed returns and offences. The Act places responsibility for various aspects of the conduct of a referendum on the Electoral Commissioner, State Electoral Officers and Divisional Returning Officers.<sup>199</sup> The interpretation of provisions of the *Referendum (Machinery Provisions)*

184 VP 1914/75-7.

185 J 1914/91-4.

186 J 1914/98.

187 *Odgers*, p. 73; and see Ch. on 'Disagreements between the Houses'.

188 Lumb and Ryan, p. 401.

189 VP 1914/71.

190 H.R. Deb. (17.6.14)2191-2.

191 VP 1915/276-7; J 1915/229-32.

192 *Referendum (Constitution Alteration) Act (No. 2) 1915* (Act No. 51 of 1915). During its passage through the House the bill was incorrectly identified in the Votes and Proceedings as the *Referendum (Withdrawal of Writs) Bill*, VP 1914-17/408,420. The reason for this is unknown. It was correctly identified in the Senate.

193 Constitution alteration bills relating to Simultaneous Elections, Democratic Elections, Local Government Bodies, and Mode of Altering the Constitution.

194 VP 1973-74/525-8,532-5,535-8,551-6.

195 J 1973-74/552-5,567-8; VP 1973-74/609-10, 615,16.

196 VP 1974/17-29.

197 J 1974/49, 50, 54-5.

198 Detailed proceedings of all proposals to alter the Constitution initiated in the 1973-75 period are shown in Appendix 25 of the 1st edn.

199 *Referendum (Machinery Provisions) Act 1984* (Act No. 44 of 1984).

Act came before the High Court in 1988 when a declaration was made that the expenditure of public moneys on two advertisements was, or would be, a breach of subsection 11 (4) of the Act. Arguments were accepted that certain words used in two official advertisements, which were said to be confined to an encouragement to the electors to be aware of the issues in the impending referendums, in fact promoted aspects of the argument in favour of the proposed laws, that is, in favour of the "yes" case.<sup>200</sup>

Voting is compulsory. If convenient, a referendum is held jointly with an election for the Senate and/or the House of Representatives.

If the bill is approved by a majority of the electors in a majority of the States, that is, at least four of the six States, and also by a majority of all the electors who voted, it is presented to the Governor-General for assent.<sup>201</sup> However, if the bill proposes to alter the Constitution by diminishing the proportionate representation of any State in either House, or the minimum number of representatives of a State in the House of Representatives, and so on<sup>202</sup>, the bill shall not become law unless the majority of electors voting in that State approve the bill. This means that the State affected by the proposal must be one of the four (or more) States which approve the bill.

The reference to 'Territory' in relation to a referendum means a Territory which is represented in the House of Representatives. Electors in the Australian Capital Territory and the Northern Territory gained the right to vote at a referendum in 1977.<sup>203</sup>

There is no limit to the power to amend the Constitution provided that the restrictions applying to the mode of alteration are met.<sup>204</sup> However, there is considerable room for legal dispute as to whether the power of amendment extends to the preamble and the preliminary clauses of the Constitution Act itself.<sup>205</sup>

The validity of any referendum or of any return or statement showing the voting on any referendum may be disputed by the Commonwealth, by any State or by the Northern Territory, by petition addressed to the High Court within a period of 40 days following the gazettal of the referendum results.<sup>206</sup> The Electoral Commission may also file a petition disputing the validity of a referendum. Pending resolution of the dispute or until the expiration of the period of 40 days, as the case may be, the bill is not presented for assent.

The short title of a bill proposing to alter the Constitution, in contradistinction to all other bills, does not contain the word 'Act' during its various stages, for example, the short title is in the form *Constitution Alteration (Referendums) 1977*. While the proposed law is converted to an 'Act' after approval at referendum and at the point of assent, in a technical sense it is strictly a constitution alteration and its short title remains unchanged.

In some cases constitution alteration bills have not been submitted to the people, despite having satisfied the requirements of the 'parliamentary stages' of the necessary processes. In 1915 seven constitution alteration bills were passed by both Houses, and submitted to the Governor-General and writs issued. When it was decided not to proceed with the proposals, a bill was introduced and passed to

200 *Reith v. Morling and ors*, Reasons for judgment, 12 August 1988 (High Court of Australia, Melbourne Registry, No. M57 of 1988—unreported).

201 For assent details see Ch. on 'Legislation'.

202 See 5th paragraph of s. 128 of Constitution.

203 *Constitution Alteration (Referendums) 1977* (Act No. 84 of 1977).

204 *Quick and Garran*, pp. 988-91. One exception could be the constitutional validity of a proposal for the abolition or secession from the Commonwealth of an Original State see Lumb and Ryan, p. 403.

205 Lumb and Ryan, pp. 402-3.

206 *Referendum (Constitution Alteration) Act 1906*, ss. 27, 28.

provide for the withdrawal of the writs and for other necessary actions.<sup>207</sup> In 1965 two constitution alteration proposals, having been passed by both Houses, were deferred, but on this occasion writs had not been issued. When a question was raised as to whether the Government was not 'flouting . . . the mandatory provisions of the Constitution' the Prime Minister stated, inter alia, '. . . the advice of our own legal authorities was to the effect that it was within the competence of the Government to refrain from the issue of the writ'.<sup>208</sup> In 1983 five constitution alteration bills were passed by both Houses, but the proposals were not proceeded with.<sup>209</sup> Section 7 of the *Referendum (Machinery Provisions) Act 1984* now provides that whenever a proposed law for the alteration of the Constitution is to be submitted to the electors, the Governor-General may issue a writ for the submission of the proposed law.

An Act to alter the Constitution comes into operation on the day on which it receives the Royal Assent, unless the contrary intention appears in the Act.<sup>210</sup>

(And see Chapter on 'Legislation'.)

### Constitution review

In August 1927, the Government appointed a royal commission to inquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation. The report was presented to Parliament in November 1929<sup>211</sup> but did not bring any positive results. In 1934, a Conference of Commonwealth and State Ministers on Constitutional Matters was held but little came of it.<sup>212</sup> In 1942, a Convention of Government and Opposition Leaders and Members from both Commonwealth and State Parliaments met in Canberra to discuss certain constitutional matters in relation to post-war reconstruction. They made significant progress and approved a draft bill transferring certain State powers, including control of labour, marketing, companies, monopolies and prices, from the States to the Commonwealth Government. However only two of the State Parliaments were prepared to approve the bill.<sup>213</sup>

The next major review of the Constitution was conducted by a joint select committee of the Parliament, first appointed in 1956.<sup>214</sup> The committee presented its first report in 1958<sup>215</sup> and a final report in 1959.<sup>216</sup> The report made many significant recommendations, but no constitutional amendments resulted in the short term.

Recommendations of the committee which were submitted some years later to the people at referendum were:

- to enable the number of Members of the House to be increased without necessarily increasing the number of Senators (1967);
- to enable Aboriginals to be counted in reckoning the population (1967);
- to ensure that Senate elections are held at the same time as House of Representatives elections (1974 and 1977);

207 *Referendum (Constitution Alteration) (No. 2) Act 1915* (Act No. 51 of 1915).

208 H.R. Deb. (9.3.66) 51.

209 S. Deb. (15.12.83) 3920-1.

210 *Acts Interpretation Act 1901*, s. 5(1B).

211 *Report of the Royal Commission on the Constitution*, PP 16(1929-31); VP 1929-31/9.

212 P.H. Lane, *An Introduction to the Australian Constitution*, 2nd edn, Law Book Co., Sydney, 1977, p. 247.

213 *Convention of Representatives of Commonwealth and State Parliaments on Proposed Alteration of the Commonwealth Constitution—Record of Proceedings*, 24 November—2 December, 1942, Govt Pr., Canberra.

214 VP 1956-57/168-9,171.

215 VP 1958/214; *Report of the Joint Committee on Constitution Review*, PP 50(1958).

216 VP 1959-60/306; *Report of the Joint Committee on Constitutional Review*, PP 108(1959-60).

- to facilitate alterations to the Constitution (1974);
- to ensure that Members of the House are chosen directly and democratically by the people (1974), and
- to ensure, so far as practicable, that a casual vacancy in the Senate is filled by a person of the same political party as the Senator chosen by the people (1977).

In 1970, the Victorian Parliament initiated a proposal to convene an Australian Constitutional Convention. Following agreement by the States to the proposal and the inclusion of the Commonwealth in the proposed convention, the first meeting took place at Sydney in 1973 and was followed by further meetings of the convention at Melbourne (1975), Hobart (1976) and Perth (1978). The convention agreed to a number of proposals for the alteration of the Constitution, some of which were submitted to the people at the referendums of 1977. The referendums on Simultaneous Elections, Referendums, and the Retirement of Judges were the subject of resolutions of the convention at meetings held in Melbourne and Hobart.

In 1985 the Commonwealth Government announced the establishment of a Constitutional Commission which was required to report on or before 30 June 1988 on the revision of the Constitution. It consisted of five members (a sixth resigning upon appointment to the High Court) and it operated by means of five advisory committees, covering the Australian judicial system, the distribution of powers, executive government, individual and democratic rights, and trade and national economic management. A series of background papers were published by the commission and papers and reports were prepared by the advisory committees.<sup>217</sup> The commission's first report was presented on 10 May 1988, and a summary was presented on 23 May 1988.<sup>218</sup> The commission's review and report preceded the presentation of four constitution alteration bills, dealing respectively with parliamentary terms, elections, local government, and rights and freedoms.<sup>219</sup>

### **Distribution to electors of arguments for and against proposed constitutional alterations**

The Referendum (Machinery Provisions) Act makes provision for the distribution to electors of arguments for and against proposed alterations. The 'Yes' case is required to be authorised by a majority of those Members of the Parliament who voted in favour of the proposed law and the 'No' case by a majority of those Members of the Parliament who voted against it.<sup>220</sup> In the case of the four constitution alteration bills of 1974, which were passed by the House of Representatives only and before the enactment of the Referendum (Machinery Provisions) Act provisions, the Government provided by administrative arrangement for 'Yes' and 'No' cases to be distributed, the 'No' case being prepared by the Leader of the Opposition in the House of Representatives.<sup>221</sup>

### **Referendum results**

Of the 42 referendums<sup>222</sup> submitted to the electors since Federation, eight have been approved. Of those which were not approved, 29 received neither a favourable majority of electors in a majority of States nor a favourable majority of all electors, while the remaining five achieved a favourable majority of all electors but not a favourable majority of electors in a majority of States.

217 *And see* VP 1987-89/30.

218 VP 1987-89/516, 559.

219 VP 1987-89/517-8.

220 *Referendum (Machinery Provisions) Act 1984*, s. 11.

221 *See* S. Deb. (21.3.74)469-70.

222 *See* Appendix 14.

The eight constitution alterations which gained the approval of the electors were submitted in 1906, 1910, 1928, 1946, 1967 and 1977 (3). The successful referendums were approved by majorities in every State, with the exception that New South Wales alone rejected the Constitution Alteration (State Debts) Bill submitted in 1910.

The proposals of 1906, 1910, 1946, 1974 and 1984 were submitted to the electors concurrently with general elections.

Successful referendums relating to the electoral and parliamentary processes have been:

- *Constitution Alteration (Senate Elections) 1906*. This was the first constitutional referendum. It altered section 13 to cause Senators' terms to commence in July instead of January.
- *Constitution Alteration (Senate Casual Vacancies) 1977*. It provided that, where possible, a casual vacancy in the Senate should be filled by a person of the same political party as the Senator chosen by the people and for the balance of his term.
- *Constitution Alteration (Referendums) 1977*. It provided for electors in the Territories to vote at referendums on proposed laws to alter the Constitution.

The Constitution Alteration (Mode of Altering the Constitution) Bill 1974 sought to amend section 128 in order to facilitate alterations to the Constitution but was rejected by the electors. The intention of the amendment was to alter the provision that a proposed law has to be approved by a majority of electors 'in a majority of the States' (four States) and, in its stead, provide that a proposed law has to be approved by a majority of electors 'in not less than one-half of the States' (three States). The further requirement that a proposed law has to be approved by 'a majority of all the electors voting' was to be retained.

Proposals rejected by the electors which have specifically related to the parliamentary and electoral processes have included:

- *Constitution Alteration (Parliament) 1967*. This proposal intended to amend section 24 by removing the requirement that the number of Members shall be, as nearly as practicable, twice the number of Senators. Other than by breaking this 'nexus', an increase in the number of Members can only be achieved by a corresponding increase in the number of Senators, regardless of existing representational factors applying to the House of Representatives only.
- *Constitution Alteration (Simultaneous Elections) 1974 and 1977*. These proposals were intended to ensure that at least half of the Senate should be elected at the same time as an election for the House of Representatives. It was proposed that the term of a Senator should expire upon the expiration, or dissolution, of the second House of Representatives following the first election of the Senator. The effective result of this proposal was that a Senator's term of office, without facing election, would be for a period less than the existing six years.
- *Constitution Alteration (Democratic Elections) 1974*. This proposal intended to write into the Constitution provisions which aimed to ensure that Members of the House and of the State Parliaments are elected directly by the people, and that representation was more equal and on the basis of population and population trends.
- *Constitution Alteration (Terms of Senators) 1984*. This proposal sought to make Senators' terms equal to two terms of the House and to ensure that Senate and House elections were held on the same day.

- *Constitution Alteration (Parliamentary Terms) 1988*. This proposal sought to extend the maximum term of the House of Representatives from three years to four years, beginning with the 36th Parliament. It also proposed that the terms of all Senators would expire upon the expiry or dissolution of the House of Representatives, that is, the 'continuity' achieved from the half-Senate election cycle would have been ended, and Senators would have been elected, to use the common phrase, as for a double dissolution election. The practical effect of the bill was to establish a maximum four-year term and elections for both Houses of Parliament on the same day.
- *Constitution Alteration (Fair Elections) 1988*. This proposal sought, inter alia, to incorporate in the Constitution a requirement concerning a maximum ten percent tolerance (above or below the relevant average) in the number of electors at elections for the Commonwealth and State Parliaments and for mainland territory legislatures.

### **Other referendums**

Referendums, other than for purposes of constitution alteration, were held in 1916 and 1917. These referendums related to the introduction of compulsory military service and were rejected by the people. The first was authorised by an Act of Parliament<sup>223</sup> and the second was held pursuant to regulations made under the War Precautions Act.<sup>224</sup>

In May 1977, concurrent with the constitution alteration referendums then being held, electors were asked, in a poll as distinct from a referendum<sup>225</sup>, to express on a voluntary basis their preference for the tune of a national song to be played on occasions other than Regal and Vice-Regal occasions.

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223 *Military Service Referendum Act 1916* (Act No. 27 of 1916).

224 War Precautions (Military Service Referendum) Regulations, SR 290 of 1917.

225 VP 1977/4.