



# *The Parliament and the role of the House*

## 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.

## THE QUEEN

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> However, while in Australia, the Sovereign has performed duties of the Governor-General in person,<sup>5</sup> and in the event of the Queen being present to open Parliament, references to the Governor-General in the relevant standing orders<sup>6</sup> are read as references to the Queen.<sup>7</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>8</sup>

## GOVERNOR-GENERAL

The Governor-General is covered in this chapter as a constituent part of the Parliament. However, it is a feature of the Westminster system of government that the Head of State is part of both the Executive Government and the legislature. The relationship between these two bodies and the role of Governor-General as the Head of the Executive Government are discussed in the Chapter on 'House, Government and

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1 The Commonwealth of Australia Constitution Act extends the provisions of the Constitution to the Queen's (Queen Victoria's) heirs and 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 See *Royal Powers Act 1953*.

6 S.O.s 4–8.

7 S.O. 9(a).

8 *Royal Style and Titles Act 1973*, Schedule.

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Opposition'. There have been 25 Governors-General of Australia<sup>9</sup> since the establishment of the Commonwealth, 11 of whom have been Australian born. The Governor-General's official title is Governor-General of the Commonwealth of Australia.<sup>10</sup>

### Appointment

The Governor-General is appointed by the Crown, in practice on the advice of Australian Ministers of the Crown.<sup>11</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 Governor-General is appointed pursuant to Letters Patent issued by Her Majesty Queen Elizabeth as Queen of Australia, which deal with the appointment of a person to the office of Governor-General, the appointment of a person as Administrator of the Commonwealth, and the appointment of a person as a Deputy of the Governor-General.<sup>12</sup>

The Letters Patent provide that the appointment of a person as Governor-General shall be by Commission which must be published in the official gazette of the Commonwealth.<sup>13</sup> They also provide that a person appointed to be Governor-General shall take the oath or affirmation of allegiance and the oath or affirmation of office. These acts are to be performed by the Chief Justice or another justice of the High Court. The ceremonial swearing-in of a new Governor-General has traditionally taken place in the Senate Chamber.

### Historical

The method of appointment of the Governor-General was changed as a result of the 1926 and 1930 Imperial Conferences.<sup>14</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 then being also the representative or agent of the British Government<sup>15</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.

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<sup>9</sup> See Appendix 1.

<sup>10</sup> Constitution, s. 68. Originally the additional title of Commander-in-Chief of the Defence Force was also used. This was not included in the 1984 Letters Patent, as it was 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, see S. Deb. (8.3.1989) 655, 697.

<sup>11</sup> See also H.R. Deb. (28.11.1946) 742-3; H.R. Deb. (19.2.1947) 19-20; H.R. Deb. (7.5.1947) 2051.

<sup>12</sup> *Letters Patent relating to the Office of Governor-General of the Commonwealth of Australia*, 21 August 2008, in Gazette S179 (9.9.2008). These revoked and replaced, with minor amendment and in gender-neutral language, the Letters Patent of 21 August 1984, in Gazette S334 (24.8.1984). For the original Letters Patent see *Constitution of Office of Governor-General*, Letters Patent, 29 October 1900, in *Commonwealth Statutory Rules 1901-1956*, V, p. 5301.

<sup>13</sup> See Gazette S181 (10.9.2008). The Gazette also included copies of the oath of allegiance and oath of office and the new Governor-General's proclamation that she had assumed the office.

<sup>14</sup> '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.

<sup>15</sup> L. F. Crisp, *Australian national government*, 5th edn, Longman Cheshire, Melbourne, 1983, p. 398.

## Administrator and Deputies

The Letters Patent relating to the office and the Constitution<sup>16</sup> make provision for the appointment of an Administrator to administer the Government of the Commonwealth ‘in the event of the absence out of Australia, or the death, incapacity or removal of the Governor-General for the time being, or in the event of the Governor-General having absented himself or herself temporarily from office for any reason’. An Administrator is in effect an Acting Governor-General. As with the Governor-General, the Administrator is required to take the oath or affirmation of allegiance and the oath or affirmation of office before the commission takes effect. The Crown’s commission is known as a dormant commission, being invoked only when necessary, and more than one commission may exist at any one time.<sup>17</sup> Pursuant to the Letters Patent an Administrator’s commission is activated, depending on the circumstances, by the request of the Governor-General, Prime Minister, Deputy Prime Minister or most senior available Minister.<sup>18</sup>

An Administrator is not entitled to receive any salary from the Commonwealth in respect of any other office during the period of administration.<sup>19</sup> The Administrator may perform all the duties of the Governor-General under the Letters Patent and the Constitution during the Governor-General’s absence.<sup>20</sup> A reference to the Governor-General in the standing orders includes an Administrator of the Commonwealth.<sup>21</sup> There is a precedent for an Administrator calling Parliament together for a new session: Administrator Brooks did so in respect of the Third Session of the 23rd Parliament on 7 March 1961.<sup>22</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>23</sup> The Letters Patent give this authority and specify the manner of appointment and powers of Deputies. State Governors considered to be more readily available in cases of urgency have been appointed as Deputies of the Governor-General with authority to exercise a wide range of powers and functions, including the making of recommendations with respect to the appropriation of revenues or moneys, the giving of assent to proposed laws and the making, signing or issuing of proclamations, orders, etc. on the advice of the Federal Executive Council.<sup>24</sup> These arrangements ensure that urgent matters can be attended to in situations where, even though the Governor-General is in Australia, he or she is unavailable. The Governor-General also 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>25</sup>

The Governor-General traditionally appoints a Deputy (usually the Chief Justice) to declare open a new Parliament. The same judge is also authorised to administer the oath

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16 Constitution, s. 4.

17 In practice State Governors are commissioned—for example, *see* Gazette S205 (17.6.2003) for commissions appointing five Governors dated 20 May, the other Governor having been commissioned on 11 May, Gazette S152 (15.5.2003).

18 The Administrator issues a proclamation citing the dormant commission and announcing that he or she has assumed the administration of the Government, e.g. Gazette S44 (18.3.2009); Gazette S137 (19.7.2010).

19 Constitution, s. 4.

20 E.g. *see* VP 1974–75/510 (presentation of new Speaker), 532 (recommending amendment to bill); Gazette S139 (20.7.2010) (issue of election writs).

21 S.O. 2.

22 VP 1961/1–2.

23 Constitution, s. 126.

24 E.g. *see* instruments appointing the Governors of New South Wales and Victoria as Deputies, Gazette S180 (10.9.2008).

25 Or in the Vice-President’s absence, the Deputy Vice-President or most senior Minister present, e.g. Gazette S195 (2.10.2008).

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or affirmation of allegiance to Members.<sup>26</sup> Sometimes, when there are Senators to be sworn in as well, two judges may be commissioned with the authority to administer the oath or affirmation to Members and Senators.<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>

#### 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>29</sup> The Official Secretary and his or her staff provide administrative support to the Governor-General and administer the Australian honours and awards system. Annual reports of the Official Secretary have been presented to both Houses since 1985.<sup>30</sup>

### POWERS AND FUNCTIONS OF THE GOVERNOR-GENERAL

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>31</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.

#### Prerogative powers

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 Constitution provides definite and limited powers, although in some cases the ways in which 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>32</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 without any explicit qualification, while other provisions state that the Governor-General shall act 'in Council', suggests an element of

26 E.g. VP 2008–9/1–2.

27 E.g. VP 1987–89/3.

28 E.g. VP 2010–12/7.

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

30 E.g. VP 2010–12/143.

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

32 *Quick and Garran*, p. 390.

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 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>33</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>34</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>35</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>36</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>37</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 the previous day.<sup>38</sup> On 17 November, the Queen's Private Secretary, at the command of Her Majesty, replied, in part:

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33 *Quick and Garran*, p. 406.

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

35 *ibid.*, p. 12.

36 *ibid.*, p. 16.

37 *ibid.*, p. 20.

38 VP 1974-75/1125-7.

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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>39</sup>

Other than by recording the foregoing statements and discussing the question of dissolution (*see below*), it is not the intention of this text 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;
- the reality that so many areas of power are 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>40</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>41</sup>

The critical provision of the Constitution, in so far 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>42</sup> to which is 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'.

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<sup>39</sup> H.R. Deb. (17.2.1976) 6.

<sup>40</sup> *See also* Ch. on 'The parliamentary calendar'.

<sup>41</sup> 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*.

<sup>42</sup> 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 CJ*; section 28 contemplates that the ordinary general election will take place in each three years: *ibid.*, p. 29.

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, 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>43</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>44</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>45</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>46</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>47</sup>

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43 *Quick and Garran*, p. 407.

44 Eugene A. Forsey, *The royal power of dissolution of Parliament in the British Commonwealth*, Oxford University Press, Toronto, 1968, p. 3.

45 Sir Paul Hasluck, *The Office of Governor-General*, Melbourne University Press, Carlton, 1979, p. 15.

46 *Quick and Garran*, p. 464.

47 It is relevant to any discussion of this discretion to consider the 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 1.1** EARLY DISSOLUTIONS OF THE HOUSE OF REPRESENTATIVES

<i>Dissolution date (a)</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. (6.3.1917) 10,993–11,000).
3 November 1919	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. (12.9.1929) 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. (26.11.1931) 1926–7; correspondence read to House).
7 August 1934	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 mid-way through the ensuing year; the impracticability of elections in January or February; authority (mandate) to deal with economic problems (H.R. Deb. (26.10.1955) 1895–6; Sir John Kerr, <i>Matters for Judgment</i> , pp. 153, 412).

<i>Dissolution date</i>	<i>Parliament: length</i>	<i>Reason (b)</i>
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 on policies concerning North West Cape radio station, the defence of Malaysia and the proposed southern hemisphere nuclear free zone (H.R. Deb. (15.10.1963) 1790–5).
10 November 1977	30th: 1 year 8 months 25 days	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. (27.10.1977) 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)).
26 October 1984	33rd: 1 year 6 months 6 days	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. (8.10.1984) 1818–1820; correspondence tabled 9.10.84, VP 1983–84/954).
31 August 1998	38th: 2 years 4 months 1 day	Not given to House.
19 July 2010	42nd: 2 years 5 months 7 days	Not given to House.

(a) A dissolution of the House of Representatives is counted here 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. On four occasions reasons, if any, were not given to the House—for example, the House may not have been sitting at the time.

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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>48</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>49</sup>

The precedents in Table 1.1 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.

### *New Government commissioned without dissolution*

#### ADVICE TO DISSOLVE NOT ACCEPTED

The Governor-General is known to have refused to accept advice to grant a dissolution on three occasions:<sup>50</sup>

- *August 1904.*<sup>51</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>52</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>53</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>54</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>55</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. On 27 May 1909 the Fisher Government was defeated on a motion to adjourn debate on the Address in Reply.<sup>56</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

48 Professor 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.

49 H.R. Deb. (18.9.1925) 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.

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

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

52 VP 1904/147; see also ‘Motions of no confidence or censure’ in Ch. on ‘Motions’.

53 H.R. Deb. (17.8.1904) 4265.

54 VP 1905/7; see also ‘Motions of no confidence or censure’ in Ch. on ‘Motions’.

55 H.R. Deb. (5.7.1905) 134–5.

56 VP 1909/7; see also ‘Motions of no confidence or censure’ in Ch. on ‘Motions’.

resignation.<sup>57</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.
- (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.<sup>58</sup>

The advice went on to state that 'All these conditions, any one of which is held to justify a dissolution, unite in the present instance.' According to Crisp 'The Governor-General was unmoved by considerations beyond "the parliamentary situation"'.<sup>59</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>60</sup>

#### NO ADVICE TO DISSOLVE

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

57 H.R. Deb. (1.6.1909) 227.

58 'Ministerial crisis 1909', *Cabinet minute in connection with the application of the Hon. Andrew Fisher for a dissolution*, PP 5 (1914-17) 13.

59 L. F. Crisp, *Australian national government*, 5th edn, Longman Cheshire, Melbourne, 1983, p. 402.

60 H. V. 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, p. 54.

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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 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>61</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, but sending for the Leader of the Opposition, Curtin'.<sup>62</sup>

### Functions in relation to the Parliament

The functions of the Governor-General in relation to the legislature are discussed in more detail elsewhere 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. Traditionally the Mace is not taken into the presence of the Crown.

It is the practice of the House to agree to a condolence motion on the death of a former Governor-General,<sup>63</sup> but on recent occasions the House has not usually followed the former practice of suspending the sitting until a later hour as a mark of respect.<sup>64</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>65</sup> An Address to the Queen has been agreed to on the

61 H.R. Deb. (10.1.1918) 2895–6; see also H. V. 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.

62 L. F. Crisp, *Australian national government*, 5th edn, Longman Cheshire, Melbourne, 1983, pp. 403–4.

63 VP 1990–92/605.

64 E.g. VP 1976–77/253–4; VP 1990–93/605.

65 VP 1961/6.

death of a former Governor-General who was a member of the Royal Family,<sup>66</sup> and references have been made to the death of a Governor-General's close relative.<sup>67</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>68</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, including a Governor-General designate. It is acceptable for a Minister to be questioned, without criticism or reflection on conduct, regarding matters relating to the public duties for which the Governor-General is responsible. (For more detail and related rulings *see* Chapters on 'Control and conduct of debate' and 'Questions'.)

On 2 March 1950 a question 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>69</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>70</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>71</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>72</sup>

Dissent from the Speaker's ruling was moved and negatived after debate. 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>73</sup>

### Functions in relation to 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>74</sup> the Queen's role being essentially one of name only. Section 61 of the Constitution states two principal elements of executive power which the Governor-General exercises, namely, the execution and

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66 VP 1974-75/9.

67 VP 1974-75/153.

68 S.O. 88.

69 H.R. Deb. (28.3.1950) 1207.

70 H.R. Deb. (30.3.1950) 1416.

71 H.R. Deb. (2.3.1950) 362.

72 H.R. Deb. (30.3.1950) 1417.

73 VP 1950-51/47-8, 55-6.

74 Constitution, ss. 2, 61.

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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>75</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>76</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>77</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,<sup>78</sup> 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:

- 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).

### Functions in relation to the Judiciary

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>79</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 Government have common elements which tend to fuse their respective roles, the judiciary is essentially independent. Nevertheless in terms of its composition it has a relationship to the executive branch (the Governor-General in Council) and is answerable in certain circumstances to the Parliament. The Governor-General in Council appoints justices of the High Court, and of other federal courts created

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<sup>75</sup> Constitution, s. 62.

<sup>76</sup> Constitution, s. 63.

<sup>77</sup> *Quick and Garran*, p. 703.

<sup>78</sup> For further discussion on the Executive Government (i.e. the Ministry) see Ch. on ‘House, Government and Opposition’.

<sup>79</sup> Constitution, s. 71.

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>80</sup>

*See also* 'The Courts and the Parliament' at page 18.

## 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>81</sup> and, subject to the Constitution, that the Parliament shall make laws for the 'peace, order, and good government of the Commonwealth',<sup>82</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.

### Non-legislative powers

#### *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 Precincts Act*, the *Parliamentary Papers Act*, the *Parliamentary Service Act* and the *Parliamentary Proceedings Broadcasting Act*.

The significance of these provisions is that they 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 claim to the 'ancient and undoubted privileges and immunities' which are necessary for the exercise of its constitutional powers and functions.<sup>83</sup>

It is important to note that in 1704 it was established that the House of Commons (by itself) could not create any new privilege;<sup>84</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, although the Parliament could enact legislation to such an end. The principal powers, privileges and immunities of the House of Commons at the time of Federation (thus applying in respect of the Commonwealth

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<sup>80</sup> Constitution, s. 72.

<sup>81</sup> Constitution, s. 1.

<sup>82</sup> Constitution, ss. 51, 52.

<sup>83</sup> See Ch. on 'Parliamentary privilege' for a detailed discussion of the application of privilege.

<sup>84</sup> *May*, 2th edn, p. 218.

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Parliament until the Parliament ‘otherwise provided’) are summarised in *Quick and Garran*.

It should be noted that some of the traditional rights and immunities enjoyed by virtue of s. 49 have been modified since 1901—for instance, warrants for the committal of persons must 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>85</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 the:

- procedure in matters of privilege (S.O.s 51–53);
- power to order attendance or arrest (S.O.s 93, 96);
- power to appoint committees (S.O.s 214–224);
- power of summons (S.O.s 236, 249, 254);
- issues to do with evidence (S.O.s 236, 237, 242, 255); and
- protection of witnesses (S.O. 256).

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—for example, 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.<sup>86</sup>

### *Legislative power*

The legislative function of the Parliament is its most important and time-consuming. 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.

The 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:

<sup>85</sup> See especially the *Parliamentary Privileges Act 1987* and Ch. on ‘Parliamentary privilege’.

<sup>86</sup> *Parliamentary Privileges Act 1987*, s. 8.

- 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); or
- 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, powers in areas of government activity not covered by section 51, or elsewhere by the Constitution, have been regarded as remaining within the jurisdiction of the States, and have been 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>87</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 to the extent of the inconsistency;
- the Commonwealth has increasingly extended its legislative competence by means of section 96 (Financial assistance to States)—for example, in areas such as education, health and transport. This action has been a continuing point of contention and has led to changing concepts of federalism;
- 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>88</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>89</sup>

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<sup>87</sup> Detailed discussion can be found, for example, in *Quick and Garran*, pp. 508–662; G. Moens and J. Trone, *Lumb and Moens’ The Constitution of Australia annotated*, 7th edn, LexisNexis Butterworths, Sydney, 2007, pp. 102–214; W. Anstey 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; and P. Hanks and D. Cass, *Australian constitutional law: material and commentary*, 6th edn, Butterworths, 1999.

<sup>88</sup> *Quick and Garran*, pp. 647–8.

<sup>89</sup> *Quick and Garran*, pp. 651–5.

- section 51(xxix) the ‘external affairs power’ has been relied on effectively to extend the reach of the Commonwealth Parliament’s legislative power into areas previously regarded as within the responsibility of the States (in the *Tasmanian Dams Case* (1983) the High Court upheld a Commonwealth law enacted to give effect to obligations arising from a treaty entered into by the Federal Government);<sup>90</sup> similarly section 51(xx) the ‘corporations power’ has been relied on in relation to federal legislation on workplace relations;
- 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>91</sup>
- the Commonwealth has been granted exclusive (as against the States) 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;
- in practice Parliament delegates much of its legislative power to the Executive Government. 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 legislative instruments must be laid before Parliament, which exercises ultimate control by means of its power of disallowance;<sup>92</sup>
- it is not possible for a Parliament to bind successor Parliaments, for example by enacting legislation in certain terms, as whatever provisions may be provided for in an Act may be repealed or amended by another Parliament.<sup>93</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>94</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>95</sup> As prescribed by Parliament, the High Court now consists of a Chief Justice and six other justices.<sup>96</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. The maximum age for justices of any

<sup>90</sup> *Commonwealth v. Tasmania* (1983) 158 CLR 1.

<sup>91</sup> *Constitution Alteration (Social Services) 1946*; *Constitution Alteration (Aboriginals) 1967*.

<sup>92</sup> See ‘Delegated legislation’ in Ch. on ‘Legislation’.

<sup>93</sup> *Kartinyeri v. Commonwealth* [1998] HCA 22, paras 13–16; and see, for example, H.R. Deb. (30.5.2006) 17–18.

<sup>94</sup> E.g. Federal Court of Australia, Family Court of Australia, Federal Magistrates Court.

<sup>95</sup> Constitution, s. 71.

<sup>96</sup> *Judiciary Act 1903*, s. 4.

court created by the Parliament is also 70 years, although the Parliament may legislate to reduce this maximum.<sup>97</sup> Justices may be removed from office by the Governor-General in Council following addresses by both Houses of the Parliament<sup>98</sup> (see page 20).

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>99</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>100</sup>

The Constitution empowers the Parliament to make laws limiting the matters in which leave of appeal to Her Majesty in Council (the Privy Council) may be asked.<sup>101</sup> Laws have been enacted to limit appeals to the Privy Council from the High Court<sup>102</sup> and to exclude appeals from other federal courts and the Supreme Courts of Territories.<sup>103</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). The possibility of such an appeal has been described as ‘a possibility so remote as to be a practical impossibility’.<sup>104</sup> 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>105</sup> with which the Parliament may not interfere other than by definition of jurisdiction.<sup>106</sup> The Parliament may confer additional original jurisdiction on the High Court<sup>107</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>108</sup>

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.

97 Constitution, s. 72. Constitution alteration in 1977, *Constitution Alteration (Retirement of Judges) Act 1977*.

98 Constitution, s. 72.

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

100 Constitution, s. 73.

101 Constitution, s. 74.

102 *Privy Council (Limitation of Appeals) Act 1968*, s. 3; *Privy Council (Appeals from the High Court) Act 1975*, s. 3.

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

104 P. Hanks and D. Cass, *Australian constitutional law: material and commentary*, 6th edn, Butterworths, 1999, pp. 314–5.

105 Constitution, s. 75.

106 Constitution, s. 77; e.g. *Extradition (Foreign States) Act 1966*, s. 25.

107 Constitution, s. 76.

108 *Judiciary Act 1903*, s. 30.

### Removal of justices from office

Section 72 of the Constitution provides that 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>109</sup> 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>110</sup> There is no provision for appeal against removal.<sup>111</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. It may be said that, in such matters, as in cases of an alleged breach of parliamentary privilege or contempt, the Parliament may engage in a type of judicial procedure.

### *Parliamentary Commission of Inquiry*

In May 1986 the Parliament established, by legislation, a Parliamentary Commission of Inquiry<sup>112</sup> to inquire and advise the Parliament whether any conduct of the Honourable Lionel Keith Murphy (a High Court judge) had been such as to amount, in its opinion, to proved misbehaviour within the meaning of section 72 of the Constitution.

The Act provided for the commission to consist of three members, including a Presiding Member, each to be a serving or former judge, to be appointed by resolutions of the House and the Senate.<sup>113</sup> Staff were appointed under the authority of the Presiding Officers.

In August 1996, following a special report to the Presiding Officers relating to the terminal illness of the judge,<sup>114</sup> the inquiry was discontinued and the Act establishing the Commission repealed. The repealing Act also contained detailed provisions for the custody of documents in the possession of the commission immediately before the commencement of the repeal Act.

### *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

109 See also *Oggers*, 13th edn, pp. 655–86.

110 *Quick and Garran*, p. 731.

111 *Quick and Garran*, p. 730.

112 *Parliamentary Commission of Inquiry Act 1986*. Accounts of the 1984 Senate committee inquiries leading to the establishment of the Commission, and of the operation of the Commission and the course of its inquiry are given at pp. 21–26 of the second edition.

113 VP 1985–87/950; J 1985–87/1009–10.

114 Parliamentary Commission of Inquiry, *Special report, 5 August 1996*, PP 443 (1986).

England,<sup>115</sup> 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>116</sup>

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>117</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>118</sup>

The Presiding Officers presented a special report from the Parliamentary Commission of Inquiry containing reasons for a ruling on the meaning of 'misbehaviour' for the purposes of section 72.<sup>119</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>120</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 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>121</sup>

115 The Act of Settlement 1701 (UK) provided that judges held office during good behaviour but could be removed by addresses from both Houses of Parliament. For historical discussion relating to Australia see L. Lovelock and J. Evans, *New South Wales Legislative Council Practice*, Federation Press, Sydney, 2008, pp. 581–2.

116 *Quick and Garran*, pp. 731–2.

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

118 *ibid.*, p. 27.

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

120 *ibid.*, pp. 18–19.

121 *ibid.*, p. 32.

## 22 *House of Representatives Practice*

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<sup>[122]</sup> will be administered to a judge accused of misbehaviour . . .<sup>123</sup>

### *Parliamentary Commission to investigate misbehaviour or incapacity*

Legislation was introduced in the 43rd Parliament to provide for the establishment of an independent Commission to assist the Parliament in the exercise of its powers to remove a federal justice in circumstances of proved misbehaviour or incapacity pursuant to section 72 of the Constitution.

The Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012<sup>124</sup> provided that the Houses of the Parliament may each pass a resolution, in the same session, establishing a Commission to investigate a specified allegation of misbehaviour or incapacity of a specified Commonwealth judicial officer (that is, a High Court judge, a judge of the Federal Court of Australia or the Family Court of Australia, or a Federal Magistrate). The purpose of a Commission is to investigate the allegation, and report to the Houses of the Parliament on whether there is evidence that would let the Houses of the Parliament conclude that the alleged misbehaviour or incapacity is proved.

A Commission is established by the resolution of both Houses, and consists of three members, nominated by the Prime Minister following consultation with the Leader of the Opposition. A Commission ceases to exist, by joint determination of the Presiding Officers, when the Presiding Officers are satisfied that the Commission’s functions have been performed, or that the specified person has ceased to be a Commonwealth judicial officer. The legislation sets down the rules for an investigation by a Commission, and requires it to report on its investigation to the Houses of the Parliament.

### *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>125</sup>

122 Now more commonly referred to as ‘procedural fairness’.

123 *ibid.*, p. 45.

124 Bill not yet passed at date of publication. In the previous Parliament a private Member’s bill with similar aims, the Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill 2010, had received bipartisan support.

125 W. Anstey Wynes, *Legislative, executive and judicial powers in Australia*, 5th edn, Law Book Co., Sydney, 1976, p. 30.

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>126</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>127</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>128</sup>) a law deemed ultra vires (that is, beyond the powers of the Parliament) becomes a dead letter.

The power of the courts to interpret the Constitution and to determine the constitutionality and validity 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 cases:<sup>129</sup>

- Petroleum and Minerals Authority case<sup>130</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>131</sup>
- McKinlay's case<sup>132</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>133</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.
- Postal allowance case<sup>134</sup>—The High Court held that the operation of section 4 of the *Parliamentary Allowances Act 1952* and provisions of the *Remuneration Tribunals Act 1973* denied the existence of an executive power to increase the level of a postal allowance—a ministerial decision to increase the allowance was thus held to be invalid.
- Roach case<sup>135</sup>—The High Court found in 2007 that amendments to section 93 of the *Commonwealth Electoral Act 1918*, to remove the entitlement to vote from all

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126 *Judiciary Act 1903*, s. 30.

127 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.

128 E.g. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (Engineers Case)* (1920) 28 CLR 129; and *Cole v. Whitfield* (1998) 165 CLR 360.

129 For the High Court's role as the Court of Disputed Returns see Ch. on 'Elections and the electoral system'. Cases involving challenges to membership of the Parliament under the Constitution are covered in the Ch. on 'Members', and cases involving taxation and some other laws are covered in the Ch. on 'Financial legislation'.

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

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

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

133 *Attorney-General (NSW) (ex rel. McKellar) v. Commonwealth* (1977) 139 CLR 527.

134 *Brown v. West and anor* (1990) 169 CLR 195.

135 *Roach v. Electoral Commissioner* [2007] HCA 43.

persons serving a sentence of imprisonment, were invalid, being inconsistent with the system of representative democracy established by the Constitution.

- Rowe case<sup>136</sup>—During the 2010 general election campaign, the High Court declared invalid amendments to the *Commonwealth Electoral Act 1918* which had reduced the time available for updating the electoral rolls after the issue of writs.
- Cases involving Commonwealth expenditure—in *Combet* (2005) the High Court rejected arguments that the broad terms of statements in an Appropriation Act were such that the Parliament could not be said to have authorised certain expenditure. The effect was that it was recognised as a matter for the Parliament, and not the courts, to determine the level of detail in such provisions. In *Pape* (2009) the Court held that a parliamentary appropriation was a prerequisite for the lawful availability of money for expenditure, but not in itself authority for expenditure; and that authority for Commonwealth expenditure must be found in the executive power or in legislation under a head of power in the Constitution. In this case the Court upheld the validity of the *Tax Bonus for Working Australians Act (No. 2) 2009*, but in *Williams* (2012) the Court held that the Commonwealth did not have the power to make payments under funding agreements (in this instance in relation to school chaplaincy) without the legislative authority to do so.<sup>137</sup>

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>138</sup>

### 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<sup>139</sup> declares what is perhaps the basic privilege:

136 *Rowe v. Electoral Commissioner* [2010] HCA 46. The amendments made in 2006 had operated for the 2007 general election.

137 *Combet v. Commonwealth* (2005) 221 ALR 621; *Pape v. Commissioner of Taxation* [2009] HCA 23; *Williams v. Commonwealth of Australia* [2012] HCA 23.

138 *And see* G. Moens and J. Trone, *Lumb and Moens' The Constitution of Australia annotated*, 7th edn, LexisNexis Butterworths, Sydney, 2007, pp. 235–6; P. Hanks and D. Cass, *Australian constitutional law: material and commentary*, 6th edn, Butterworths, 1999, pp. 268–76.

139 Cited by some authorities as an enactment of 1689. However, for the sake of consistency with the *Parliamentary Privileges Act 1987*, references in this text are to ‘1688’.

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 helped establish the basis of the relationship between the House of Commons and the courts. However a number of grey areas remained, centring 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 there is a wide field of agreement between the House of Commons and the courts on the nature and principles of privilege, questions of jurisdiction are not wholly resolved.<sup>140</sup>

In the Commonwealth Parliament, the raising, consideration and determination of complaints of breach of privilege or contempt occurs in each House. The Houses are able to impose penalties for contempt, although some recourse to the courts could be possible. Section 9 of the Parliamentary Privileges Act requires that where a House imposes a penalty of imprisonment for an offence against that House, the resolution imposing the penalty and the warrant committing the person to custody must set out the particulars of the matters determined by the House to constitute the offence. The effect of this provision is that a person committed to prison could seek a court determination as to whether the offence alleged to constitute a contempt was in fact capable of constituting a contempt.

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

### **The right of Parliament to the service of its Members in priority to the claims of the courts**

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>141</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>142</sup> When such matters have arisen the Speaker has sometimes written to court authorities asking that the Member be excused.

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>143</sup>

For a more detailed treatment of this subject *see* Chapter on 'Parliamentary privilege'.

<sup>140</sup> For historical account *see* *May*, 24th edn, pp. 281–305.

<sup>141</sup> *Parliamentary Privileges Act 1987*, s. 14.

<sup>142</sup> *May*, 24th edn, p. 248, although it is doubtful whether in modern times actual service would as a general rule be regarded as a breach.

<sup>143</sup> *Jury Exemption Act 1965*, s. 4.

### Attendance of parliamentary employees in court or their arrest

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 253 provides that an employee of the House, or other staff employed to record evidence before the House or any of its committees, may not give evidence relating to proceedings or the examination of a witness without the permission of the House.

A number of parliamentary employees are exempted from attendance as jurors in Federal, State and Territory courts.<sup>144</sup> Exemption from jury service has been provided on the basis that certain employees have been required to devote their attention completely to the functioning of the House and its committees.

(*See also* Chapters on ‘Documents’, ‘Parliamentary committees’ and ‘Parliamentary privilege’.)

### Parliament and the courts—other matters

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>145</sup>  
This ruling has been generally followed by all subsequent Speakers.
- *The sub judice convention.* 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. This convention is sometimes applied to restrict discussion on current proceedings before a royal commission, depending on its terms of reference and the particular circumstances. In exercising a discretion in applying the sub judice convention the Speaker makes decisions which involve the inherent right of the House to inquire into and debate matters of public importance 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>146</sup>
- *Reflections on the judiciary.* Standing order 89 provides, inter alia, that a Member must not use offensive words against a member of the judiciary.<sup>147</sup>
- *The legal efficacy of orders and resolutions of the House.* This is discussed in the Chapter on ‘Motions’.

## CONSTITUTION ALTERATION

There is no limit to the power to amend the Constitution provided that the restrictions applying to the mode of alteration are met.<sup>148</sup> However, there is considerable room for

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144 Jury Exemption Regulations, SR 186 of 1987.

145 H.R. Deb. (22.4.1908) 10486.

146 *See also* Ch. on ‘Control and conduct of debate’.

147 *See also* Ch. on ‘Control and conduct of debate’.

148 *Quick and Garran*, pp. 988–91.

legal dispute as to whether the power of amendment extends to the preamble and the preliminary clauses of the Constitution Act itself.<sup>149</sup>

The Constitution, from which Parliament obtains its authority, cannot be changed by Parliament alone, although some provisions, such as sections 46–49, while setting out certain detail, are qualified by phrases such as ‘until the Parliament otherwise provides’, thus allowing the Parliament to modify, supplement or alter the initial provision. To change the Constitution itself a majority vote of the electors of the Commonwealth, and of the electors in a majority of the States, at a referendum is also required. 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>150</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 (*see below*), it need only be passed by an absolute majority of one House.<sup>151</sup> Subject to the absolute majority provision, the passage of the bill is the same as for an ordinary bill.<sup>152</sup> (The House procedures for the passage of constitution alteration bills are covered in the Chapter on ‘Legislation’.)

The short title of a bill proposing to alter the Constitution, in contradistinction to other bills, does not contain the word ‘Act’ during its various stages, for example, the short title is in the form *Constitution Alteration (Establishment of Republic) 1999*. 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 proposal and its short title remains unchanged.

### Constitution alteration bills passed by one House only

If a bill to alter the Constitution 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.’ have been considered to have the same meaning as those in section 57 of the Constitution.<sup>153</sup>

In June 1914 six constitution alteration 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>154</sup> The bills were sent to the House which took no further action after the first reading.<sup>155</sup> After seven days the Senate requested the Governor-General, by means of an

149 G. Moens and J. Trone, *Lumb and Moens’ The Constitution of Australia annotated*, 7th edn, LexisNexis Butterworths, Sydney, 2007, p. 147.

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

151 Constitution, s. 128.

152 *See* Ch. on ‘Legislation’.

153 *See* Ch. on ‘Disagreements between the Houses’.

154 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.

155 VP 1914/75–7.

Address, that the proposed laws be submitted to the electors.<sup>156</sup> Acting on the advice of Ministers, the Governor-General refused the request.<sup>157</sup>

*Odgers* put 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>158</sup> The view of Lumb and Moens has been 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 condition precedent for holding a referendum had not been fulfilled.<sup>159</sup>

The circumstances of this case were unusual as a proposed double dissolution had been announced,<sup>160</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>161</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>162</sup> Writs for holding referendums were issued on 2 November 1915. The Government subsequently decided not to proceed with the referendums (*see below*).

During 1973 a similar situation arose in respect of four bills passed by the House of Representatives. 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>163</sup> After an interval of three months (in 1974), the House again passed the bills which were rejected by the Senate.<sup>164</sup> Acting on the advice of 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>165</sup>

### Constitution alteration bills not submitted to referendum

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 process. The history of the seven constitution alteration bills of 1915 is outlined above. These 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 provide for the withdrawal of the writs and for other necessary actions.<sup>166</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

156 J 1914/91–4.

157 J 1914/98.

158 *Odgers*, 6th edn, p. 103; and *see* Ch. on ‘Disagreements between the Houses’.

159 R. D. Lumb and G. A. Moens, *The Constitution of the Commonwealth of Australia annotated*, 5th edn, Butterworths, Sydney, 1995, p. 569.

160 VP 1914/71.

161 H.R. Deb. (17.6.1914) 2191–2.

162 VP 1915/276–7; J 1915/229–32.

163 Constitution alteration bills relating to Simultaneous Elections, Democratic Elections, Local Government Bodies, and Mode of Altering the Constitution, VP 1973–74/525–8, 532–5, 535–8, 551–6; J 1973–74/552–5, 567–8; VP 1973–74/609–10, 615–16.

164 VP 1974/17–29; J 1974/49, 50, 54–5.

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

166 *Referendum (Constitution Alteration) (No. 2) Act 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.

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>167</sup> In 1983 five constitution alteration bills were passed by both Houses, but the proposals were not proceeded with.<sup>168</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.

## Referendum

In the case of a bill having passed through both Houses, if a referendum is to be held the bill must be submitted to the electors in each State and Territory<sup>169</sup> not less than two nor more than six months after its passage. The bill is presented to the Governor-General for the necessary referendum arrangements to be made.<sup>170</sup> Voting is compulsory. If convenient, a referendum is held jointly with an election for the Senate and/or the House of Representatives. The question put to the people for approval is the constitutional alteration as expressed in the long title of the bill.<sup>171</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 ballot paper and 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. The interpretation of provisions of the *Referendum (Machinery Provisions) 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>172</sup>

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>173</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, or altering the limits of the State,<sup>174</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.

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167 H.R. Deb. (9.3.1966) 51.

168 S. Deb. (15.12.1983) 3920-1.

169 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, *Constitution Alteration (Referendums) 1977*.

170 See Ch. on 'Legislation'.

171 *Referendum (Machinery Provisions) Act 1984*, schedule 1.

172 *Reith v. Morling and ors*, (12 August 1988, High Court Registry, No. M58 of 1988).

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

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

An Act to alter the Constitution comes into operation on the day on which it receives assent, unless the contrary intention appears in the Act.<sup>175</sup>

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

The Referendum (Machinery Provisions) Act makes provision for the distribution to electors, by the Australian Electoral Commission, 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>176</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>177</sup>

### *Dispute over validity of referendum*

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>178</sup> The Electoral Commission may also file a petition disputing the validity of a referendum.<sup>179</sup> 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.

### **Referendum results**

Of the 44 referendums<sup>180</sup> submitted to the electors since Federation, eight have been approved. Of those which were not approved, 31 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.

The eight constitution alterations which gained the approval of the electors were submitted in 1906, 1910, 1928, 1946, 1967 and 1977 (three). 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.

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<sup>175</sup> *Acts Interpretation Act 1901*, s. 5(1B).

<sup>176</sup> *Referendum (Machinery Provisions) Act 1984*, s. 11. Members may thus vote against the bill, not because they oppose the question being put to the people, but to be able to be involved in the preparation of the ‘No’ case, H.R. Deb. (9.8.1999) 8148.

<sup>177</sup> See S. Deb. (21.3.1974) 469–70.

<sup>178</sup> *Referendum (Machinery Provisions) Act 1984*, s. 100.

<sup>179</sup> *Referendum (Machinery Provisions) Act 1984*, s. 102.

<sup>180</sup> See Appendix 14.

- *Constitution Alteration (Senate Casual Vacancies) 1977*. This 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 the Senator's term.
- *Constitution Alteration (Referendums) 1977*. This 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 proportionate 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 were 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 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.

## 32 *House of Representatives Practice*

- *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.
- *Constitution Alteration (Establishment of Republic) 1999*. This proposal sought to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.

### Referendums for other purposes

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>181</sup> and the second was held pursuant to regulations made under the War Precautions Act.<sup>182</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>183</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.

### Review of the Constitution

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>184</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>185</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>186</sup>

The next major review of the Constitution was conducted by a joint select committee of the Parliament, first appointed in 1956.<sup>187</sup> The committee presented its first report in 1958<sup>188</sup> and a final report in 1959.<sup>189</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:

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181 *Military Service Referendum Act 1916*.

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

183 VP 1977/4.

184 Royal Commission on the Constitution, *Report*, PP 16 (1929–31); VP 1929–31/9.

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

186 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.

187 VP 1956–57/168–9, 171.

188 VP 1958/214; Joint Committee on Constitutional Review, *Report*, PP 50 (1958).

189 VP 1959–60/306; Joint Committee on Constitutional Review, *Report*, PP 108 (1959–60).

- 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);
- 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 to report 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 was published by the commission and papers and reports were prepared by the advisory committees.<sup>190</sup> The commission's first report was presented on 10 May 1988, and a summary was presented on 23 May 1988.<sup>191</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>192</sup>

In 1991 the Constitutional Centenary Foundation was established with the purposes of encouraging education and promoting public discussion, understanding and review of the Australian constitutional system in the decade leading to the centenary of the Constitution.<sup>193</sup>

In 1993 Prime Minister Keating established the Republic Advisory Committee with the terms of reference of producing an options paper describing the minimum constitutional changes necessary to achieve a republic, while maintaining the effect of existing conventions and principles of government. The committee's report *An Australian republic—the options* was tabled in the House on 6 October 1993.<sup>194</sup>

In February 1998 the Commonwealth Government convened a Constitutional Convention to consider whether Australia should become a republic and models for

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190 *And see* VP 1987–89/30.

191 VP 1987–89/516, 559.

192 VP 1987–89/517–8.

193 A non-partisan non-government body (although mostly funded by Commonwealth, State and Territory government grants).

194 PP 167–169 (1993).

choosing a head of state. Delegates (152—half elected, half appointed by the Government) met for two weeks in Canberra in Old Parliament House. The Convention also debated related issues, including proposals for a new preamble to the Constitution. The Convention supported an in-principle resolution that Australia should become a republic, and recommended that the model, and other related changes, supported by the Convention be put to the Australian people at a referendum. Constitution alteration bills for the establishment of a republic and for the insertion of a preamble followed in 1999, with those concerning the proposed republic being referred to a joint select committee for an advisory report. All the proposals were unsuccessful at referendum.

### ASPECTS OF THE ROLE OF THE HOUSE OF REPRESENTATIVES

The bicameral nature of the national legislature reflects the federal nature of the Commonwealth. The House of Representatives was seen by *Quick and Garran* in 1901 as embodying the national aspect and the Senate the State aspect of the federal duality.<sup>195</sup>

It has been said that the federal part of the Australian Parliament is the Senate which being the organ of the States links them together as integral parts of the federal union. Thus, the Senate is the Chamber in which the States, considered as separate entities and corporate parts of the Commonwealth, are represented.<sup>196</sup> The (original) States have equal representation in the Senate, irrespective of great discrepancies in population size.

On the other hand the House of Representatives is the national branch of the Federal Parliament in which the people are represented in proportion to their numbers—that is, each Member represents an (approximately) equal number of voters. In this sense the House may be said to be not only the national Chamber but also the democratic Chamber.<sup>197</sup> *Quick and Garran* stated ‘its operation and tendency will be in the direction of unification and consolidation of the people into one integrated whole, irrespective of State boundaries, State rights or State interests’.<sup>198</sup> Thus, the House of Representatives is the people’s House and the inheritance of responsible government, through the Cabinet system, is the most significant characteristic attaching to it.

The framers of our Constitution, in some cases almost as a matter of course,<sup>199</sup> took the Westminster model of responsible government (influenced by the colonial experience and by the experience of the United States of America<sup>200</sup>) and fitted it into the federal scheme. Thus the role and functions of the House of Representatives are direct derivatives of the House of Commons, principal features being the system of Cabinet Government and the traditional supremacy of the lower House in financial matters.

The notion of responsible government is embodied in the structure and functions of the House of Representatives.<sup>201</sup> That party or coalition of parties which commands a majority in the House is entitled to form the Government. From this group emerges the Prime Minister and the major portion of the Ministry, usually more than 75 per cent. This

195 *Quick and Garran*, p. 339.

196 *Quick and Garran*, p. 414.

197 *Quick and Garran*, p. 448.

198 *Quick and Garran*, p. 337.

199 But not without question in the minds of others—see, for example, I. C. Harris, ‘The Structure of the Australian House of Representatives over its first one hundred years’, *UNSW Law Journal*, vol. 24, no. 3, 2001, referring to statements by Messrs Baker and Barton at the Adelaide Convention.

200 It has been stated that ‘Probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism.’ *R v Kirby; ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 275.

201 See also Ch. on ‘House, Government and Opposition’.

fact, and certain provisions of the Constitution concerning legislation, means that most legislation originates in the House of Representatives, and this emphasises its initiating and policy roles as distinct from the review role of the Senate.

In Australia the legal power to initiate legislation is vested in the legislature and nowhere else. In practice the responsibility falls overwhelmingly to one group within the legislature—the Ministry. However there are checks and balances and potential delays (which may sometimes be regarded as obstruction) in the legislative process because of the bicameral nature of the legislature, and these have particular importance when the party or coalition with a majority in the House does not have a majority in the Senate.

The Ministry is responsible for making and defending government decisions and legislative proposals. There are few important decisions made by the Parliament which are not first considered by the Government. However, government proposals are subject to parliamentary scrutiny which is essential in the concept of responsible government. The efficiency and effectiveness of a parliamentary democracy is in some measure dependent on the effectiveness of the Opposition; the more effective the Opposition, the more responsible and thorough the Government must become in its decision making.

The nature of representation in the Senate, the voting system used to elect Senators and the fact that only half the Senators are elected each third year may cause the Senate to reflect a different electoral opinion from that of the House. The House reflects, in its entirety, the most recent political view of the people and is the natural vehicle for making or unmaking governments. Jennings emphasises the role of the lower House in the following way:

The fact that the House of Commons is representative, that most of the ministers and most of the leading members of Opposition parties are in that House, and that the Government is responsible to that House alone, gives the Commons a great preponderance of authority. The great forum of political discussion is therefore in the Lower House.<sup>202</sup>

In Parliaments in the Westminster tradition the greater financial power is vested in the lower House. The modern practice in respect of the House of Commons' financial privileges is based upon principles expressed in resolutions of that House as long ago as 1671 and 1678:

That in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords; . . .

That all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords.<sup>203</sup>

These principles are reflected in a modified way in the Australian Constitution. The Constitution was framed to express the traditional right of the lower House, the representative House, to initiate financial matters,<sup>204</sup> to prevent the Senate from amending certain financial bills and to prevent the Senate from amending any proposed law so as to increase any proposed charge or burden on the people.<sup>205</sup> In all other respects the Constitution gives to the Senate equal power with the House of Representatives in respect of all proposed laws, including the power of rejection.

202 Sir Ivor Jennings, *Parliament*, 2nd edn, Cambridge University Press, 1957, p. 398.

203 *May*, 24th edn, p. 786; CJ (1667–87) 235, 509.

204 For a detailed discussion see Ch. on 'Financial legislation'.

205 Constitution, s. 53.

## INDEPENDENCE OF THE HOUSES

Each House functions as a distinct and independent unit within the framework of the Parliament. The right inherent in each House to exclusive cognisance of matters arising within it has evolved through centuries of parliamentary history<sup>206</sup> and is made clear in the provisions of the Constitution.

The complete autonomy of each House, within the constitutional and statutory framework existing at any given time, is recognised in regard to:

- its own procedure;
- questions of privilege and contempt; and
- control of finance, staffing, accommodation and services.<sup>207</sup>

This principle of independence characterises the formal nature of inter-House communication. Communication between the Houses may be by message,<sup>208</sup> by conference,<sup>209</sup> or by committees conferring with each other.<sup>210</sup> The two Houses may also agree to appoint a joint committee operating as a single body and composed of members of each House.<sup>211</sup>

Contact between the Houses reaches its ultimate point in the merging of both in a joint sitting. In respect of legislative matters this can occur only under conditions prescribed by the Constitution and when the two Houses have failed to reach agreement.<sup>212</sup>

The standing orders of both the House and the Senate contain particular provisions with respect to the attendance of Members and employees before the other House or its committees. Should the Senate request by message the attendance of a Member before the Senate or any committee of the Senate, the House may authorise the Member to attend, provided the Member agrees. If a similar request is received in respect of an employee, the House may instruct the employee to attend.<sup>213</sup> In practice, there have been instances of Members and employees appearing as witnesses before Senate committees, in a voluntary capacity, without the formality of a message being sent to the House.<sup>214</sup> Senators have appeared before the House Committee of Privileges, the Senate having given leave for them to appear, after having received a message from the House on the matter.<sup>215</sup> In 2001 the Senate authorised Senators to appear before the committee 'subject to the rule, applied in the Senate by rulings of the President, that one House of the Parliament may not inquire into or adjudge the conduct of a member of the other House'.<sup>216</sup>

As an expression of the principle of independence of the Houses, the Speaker took the view in 1970 that it would be parliamentarily and constitutionally improper for a Senate

206 For example, see John Hatsell, *Precedents of proceedings in the House of Commons* (1818) Vol 3, p. 67. Hatsell notes the leading principle that there shall subsist a perfect equality between the two Houses and total independence in every respect one of the other, and continues 'From hence it is, that neither House can claim, much less exercise, any authority over a Member of the other ...'.

207 See also Chs on 'Parliament House and access to proceedings' and 'The Speaker, Deputy Speakers and officers'.

208 S.O.s 258–261.

209 S.O.s 258, 262–266.

210 S.O. 238, 258; and see Ch. on 'Parliamentary committees'.

211 S.O.s 224–7; and see Ch. on 'Parliamentary committees'.

212 Constitution, s. 57; and see Ch. on 'Disagreements between the Houses'. For joint sittings to choose a person to fill a vacancy in the place of a Senator for a Territory see Ch. on 'Elections and the electoral system'.

213 S.O.s 251, 252; Senate S.O.s 178, 179; and see Chs on 'Parliamentary committees' and 'Parliamentary privilege'.

214 In 1981 Speaker Snedden appeared voluntarily before the Senate Select Committee on Parliament's Appropriations and Staffing, S. Deb. (12.6.1981) 3198–9.

215 VP 1985–87/1365; J 1985–87/1514, 1576; VP 1993–95/596, 649; J. 1993–95/1077–8.

216 VP 1998–2001/2157.

estimates committee to seek to examine the financial needs or commitments of the House of Representatives.<sup>217</sup> In similar manner the House of Representatives estimates committees, when they operated, did not examine the proposed appropriations for the needs of the Senate.

As a further expression of the independence of the Houses it had been a traditional practice of each House not to refer to its counterpart by name but as ‘another place’ or ‘Members of another place’. The House agreed to remove the restriction on direct reference to the Senate and Senators in 1970 following a recommendation by the Standing Orders Committee.<sup>218</sup> The standing orders prescribe that a Member must not use offensive words against either House of the Parliament or a Member of the Parliament.<sup>219</sup>

## FUNCTIONS OF THE HOUSE

The principal functions of the House, and the way in which they are expressed and carried out, can be summarised under the headings which follow.<sup>220</sup> It should be realised, however, that the House frequently performs functions which cross categories. For example, in a body in which a predominance of time is devoted to debating legislation initiated by the Government, the House is performing an accountability function as well as a legislative function.

### The Government—making and unmaking

It is accepted that the House of Representatives, which reflects the current opinion of the people at an election, is the appropriate House in which to determine which party or coalition of parties should form government. Thus the party or coalition of parties which commands the support of a majority in the House assumes the Government and the largest minority party (or coalition of parties) the Opposition.

A hung Parliament is said to exist when no single party or coalition of parties has a majority of seats in the House of Representatives. A minority Government can be formed when a party or coalition, not having a majority of seats in its own right, is nevertheless able to achieve a majority on the floor of the House with support from independent Members or minor parties. As was the case in the 43rd Parliament, in the formation of a minority Government the support of certain Members may be limited to specified matters, but the Government’s continuation in office necessarily requires majority support on the main appropriation bills and motions of confidence and want of confidence.

Within this framework resides the power to ‘unmake’ a Government should it not retain the confidence and support of a majority of the Members of the House. To enable a Government to stay in office and have its legislative program supported (at least in the House), it is necessary that Members of the government party or parties support the Government, perhaps not uncritically, but support it on the floor of the House on major issues. Party discipline is therefore an important factor in this aspect of the House’s functions.

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217 Following introduction of Senate estimates committees in 1970.

218 VP 1970–72/252–3; PP 114 (1970) 2–3.

219 S.O. 89; *and see* Ch. on ‘Control and conduct of debate’.

220 Detailed discussion of the procedural forms mentioned can be found elsewhere in the text.

A principal role of the House is to examine and criticise, where necessary, government action, with the knowledge that the Government must ultimately answer to the people for its decisions. It has been a Westminster convention and a necessary principle of responsible government that a Government defeated on the floor of the House on a major issue should resign or seek a dissolution of the House. Such a defeat would indicate *prima facie* that a Government had lost the confidence of the House, but there is no fixed definition of what is a matter of confidence. If a defeat took place on a major matter, modern thinking is that the Government would be entitled to seek to obtain a vote on a motion of confidence in order to test whether in fact it still had the confidence of the House. Defeat on a minor or procedural matter may be acknowledged, but not lead to further action, the Government believing that it still possessed the confidence of the House.

The Government has been defeated on the floor of the House of Representatives on a major issue on eight occasions since Federation following which either the Government resigned or the House was dissolved. The most recent cases were in 1929 (the Bruce–Page Government), 1931 (the Scullin Government), and 1941 (the Fadden Government). On 11 November 1975 immediately following the dismissal of the Whitlam Government, the newly appointed caretaker Government was defeated on a motion which expressed a want of confidence in Prime Minister Fraser and requested the Speaker to advise the Governor-General to call the majority leader (Mr Whitlam) to form a government. However, within the next hour and a half both Houses were dissolved and the resolution of the House was not acted on.<sup>221</sup>

The fact that the power of the House to ‘unmake’ a Government is rarely exercised does not lessen the significance of that power. Defeat of the Government in the House has always been and still is possible. It is the ultimate sanction of the House in response to unacceptable policies and performance. In modern times, given the strength of party discipline, defeat of a Government on a major issue in the House would in normal circumstances most likely indicate a split within a party or a coalition, or in a very finely balanced House the withdrawal of key support.

For greater historical detail *see* ‘Motions of no confidence and censure’ in Chapter on ‘Motions’. *See also* ‘New Government commissioned without dissolution’ at page 10.

### The initiation and consideration of legislation

Section 51 of the Constitution provides that the Parliament has the power to make laws for the peace, order, and good government of the Commonwealth with respect to specified matters. The law-making function of Parliament is one of its most basic functions. The Senate and the House have substantially similar powers in respect of legislation, and the consideration of proposed laws occupies a great deal of the time of each House. Because of the provisions of the Constitution with respect to the initiation of certain financial legislation and the fact that the majority of Ministers are Members of the House of Representatives, the great majority of bills introduced into the Parliament originate in the House of Representatives.

Any Member of the House may introduce legislation—*see* Chapters on ‘Legislation’, ‘Financial Legislation’ and ‘Non-government Business’.

<sup>221</sup> For further detail on 1975 events *see* ‘The 1975 double dissolution’ in Ch. on ‘Disagreements between the Houses’.

### Seeking information on and clarification of government policy

The accountability of the Government to Parliament is pursued principally through questions, in writing or without notice at Question Time, directed to Ministers concerning the administration of their departments, during debates of a general nature—for example, the Budget and Address in Reply debates—during debates on specific legislation, or by way of parliamentary committee inquiry.

The aim of parliamentary questioning and inquiry is to seek information, to bring the Government to account for its actions, and to bring into public view possible errors or failings or areas of incompetence or maladministration.

### Surveillance, appraisal and criticism of government administration

Debate takes place on propositions on particular subjects, on matters of public importance, and on motions to take note of documents including those moved in relation to ministerial statements dealing with government policy or matters of ministerial responsibility. Some of the major policy debates, such as on defence, foreign affairs and the economy, take place on motions of this kind. Historically, opportunities for private Members to raise matters and initiate motions which may seek to express an opinion of the House on questions of administration were limited, but these increased significantly in 1988. In addition Members have regular opportunities to raise matters of concern during periods set aside for Members' statements, adjournment debates and grievance debates.<sup>222</sup>

It is not possible for the House to oversee every area of government policy and executive action. However the House may be seen as an essential safeguard and a corrective means over excessive, corrupt or extravagant use of executive power.<sup>223</sup> From time to time the Opposition may move a specific motion expressing censure of or no confidence in the Government. If a motion of no confidence were carried, the Government would be expected to resign. A specific motion of censure of or no confidence in a particular Minister or Ministers may also be moved. The effect of carrying such a motion against a Minister may be inconclusive as far as the House is concerned as any further action would be in the hands of the Prime Minister. However a vote against the Prime Minister, depending on circumstances, would be expected to have serious consequences for the Government.<sup>224</sup>

### Consideration of financial proposals and examination of public accounts

In accordance with the principle of the financial initiative of the Executive, the Government has the right to initiate or move to increase appropriations and taxes, but it is for the House to make decisions on government proposals and the House has the right to make amendments which will reduce a proposed appropriation or tax or to reject a proposal. Amendments to certain financial proposals may not be made by the Senate, but it may request the House to make amendments.

The appropriation of revenue and moneys is dependent on a recommendation by the Governor-General to the House of Representatives. Traditionally the Treasurer has been a Member of the House. Reflecting this, the government front bench in the House, now

<sup>222</sup> See Ch. on 'Non-government business'.

<sup>223</sup> For commentary on these matters see John Uhr, *Deliberative democracy in Australia: The changing place of Parliament*, Cambridge University Press, 1998.

<sup>224</sup> And see 'Motions of no confidence or censure' in Ch. on 'Motions'.

commonly known as the ministerial bench, was in past times referred to as the Treasury bench.

It is the duty of the House to ensure that public money is spent in accordance with parliamentary approval and in the best interests of the taxpayer. The responsibility for scrutinising expenditure is inherent in the consideration of almost any matter which comes before the House. The most significant means by which the Government is held to account for its expenditure occurs during the consideration of the main Appropriation Bill each year. However the examination of public administration and accounts has to some extent been delegated to committees<sup>225</sup> which have the means and time available for closer and more detailed scrutiny (*and see below*).

### **Inquiry by committee**

The consideration of specific matters by a selected group of Members of the House is carried out by the use of standing and select committees, which is now an important activity of a modern Parliament and a principal means by which the House performs some of its functions, such as the examination of government administration. In 1987 the House took a significant step in establishing a comprehensive system of general purpose standing committees, empowered to inquire into and report upon any matter referred to them by either the House or a Minister, including any pre-legislation proposal, bill, motion, petition, vote or expenditure, other financial matter, report or document (*see Chapter on 'Parliamentary committees'*).

The Public Accounts and Audit Committee, a joint statutory committee, is required to examine the accounts of the receipts and expenditure of the Commonwealth and each statement and report made by the Auditor-General. As is the case with other committees, inquiries undertaken by the committee result in the presentation of reports to the Parliament. The Public Works Committee, also a joint statutory committee, considers and reports on whether proposed public works referred to it for investigation should be approved, taking into account, *inter alia*, the financial aspects.

### **Ventilation of grievances and matters of interest or concern**

The provision of opportunities for the raising by private Members of particular matters—perhaps affecting the rights and liberties of individuals, or perhaps of a more general nature—is an important function of the House. Opportunities for raising these matters occur principally during periods for private Members' business, Members' statements, constituency statements, grievance debates, adjournment debates, and during debates on the Budget and the Address in Reply. Outside the House Members may make personal approaches to Ministers and departments regarding matters raised by constituents or other matters on which they require advice or seek attention.<sup>226</sup>

### **Receiving petitions**

Petitions from citizens requesting action by the House may be sent directly to the Petitions Committee or via a Member. They are presented to the House by the Chair of the committee or may be presented directly by Members themselves. A copy of the

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<sup>225</sup> See Ch. on 'Parliamentary committees'.

<sup>226</sup> As a collective function of the House this is largely an extension of a fundamental role of the individual Member whether it is exercised in the House or outside it. See particularly Ch. on 'Members'.

petition may then be (and in practice is) referred to the appropriate Minister for a response, which is expected within 90 days. The ministerial response is also reported to the House.<sup>227</sup>

### Examination of delegated legislation

Regulations and other forms of subordinate legislation made by the Government pursuant to authority contained in an Act of the Parliament must be tabled in both Houses. A notice of motion for the disallowance of any such delegated legislation may be submitted to the House by any Member. Disallowance is then automatic after a certain period, unless the House determines otherwise.<sup>228</sup>

### Prerequisites for fulfilling functions

The exigencies of politics, the needs of the Government in terms of time, and its power of control of the House, have resulted in the evolution of a parliamentary system which reflects the fact that, while the will of the Government of the day will ultimately prevail in the House, the House consists of representatives of the people who will not hesitate to speak for the people and communities they represent. A responsible Government will keep the House informed of all major policy and administrative decisions it takes. A responsible Opposition will use every available means to ensure that it does. However, the effective functioning of the House requires a continual monitoring and review of its own operations and procedure. The forms of procedure and the way in which they are applied have an important effect on the relationship between the Government and the House. The Procedure Committee has presented reports on many aspects of the work of the House and its committees and has dealt with the issue of community involvement. It has sought to contribute to the maintenance and strengthening of the House's capacity to perform its various functions.

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<sup>227</sup> See 'Petitions' in Ch. on 'Documents'.

<sup>228</sup> See 'Delegated legislation' in Ch. on 'Legislation'. The Senate Standing Committee on Regulations and Ordinances plays a major role in overseeing delegated legislation.