3

Disagreements between the Houses

From time to time since Federation the governing party or coalition has not had a majority in the Senate.[1] At these times the likelihood that the Senate might reject government sponsored legislation has been substantially increased. The Senate has equal power with the House of Representatives in respect of all proposed laws, except those appropriating revenue or moneys or imposing taxation, which must originate in the House. The Senate however cannot amend proposed laws imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government, or amend any proposed law so as to increase any proposed charge or burden on the people.[2]

The terms of the Constitution do not prevent the Senate rejecting any legislation, financial or otherwise. Prior to 1975 the Senate had neither rejected nor refused to pass an appropriation or supply bill and thus a restraint in the nature of a convention that the Senate would not do so was considered to have been established.[3] Despite the actions of the opposition-controlled majority in the Senate in 1974 and 1975, which sought to cause a dissolution of the House of Representatives by means of an amendment to a motion in respect of the Appropriation Bill (No. 4) 1973–74 and the Appropriation Bills (Nos 1 and 2) 1975–76, there has still been no occasion when the Senate has rejected outright an appropriation or supply bill. The events surrounding the Senate's actions in 1975 on Appropriation Bill (No. 1) 1975–76, as are described below (*see* p. 54), brought to a head the most significant disagreement between the Houses in the history of the Parliament. The situation brought into focus a number of parliamentary, procedural, constitutional and political questions.

There have been many instances where the Senate has rejected or made amendments regarded as unacceptable to legislation initiated in the House, some of which have related to major policy proposals.[4] Not all disagreements between the Houses are finally resolved. In many instances the House has not proceeded with bills not passed by the Senate. In other cases the Senate has not insisted on its amendments. In such cases the political forces in each House compromised and acted as a check on each other or other factors have been taken into account. This chapter describes the processes followed and the problems which arise when no compromise can be reached between the Houses by the usual process of agreeing to amendments or requests and communicating by message. The resolution of such conflicts may be by way of conferences between the Houses or ultimately by way of the procedure specified in section 57 of the Constitution leading to a double dissolution and an election for both Houses. If, following a double dissolution, the disagreement persists, the matter may be determined by a joint sitting of members of both Houses.

1 A circumstance in which the Senate is commonly termed 'hostile'.

2 Constitution, s. 53; *and see* Ch. on 'Legislation'.

3 *See* Appendix 18.

4 *See* Ch. on 'Legislation' for description of the process for the resolution of differences by the process of exchange of messages.

CONFERENCES

The standing orders of both the House and Senate provide for the holding of conferences[5] between the two Houses. The House standing orders provide that, in certain situations of disagreement between the Houses over legislation, should a bill be returned by the Senate with amendments to which the House does not agree, the House may return the bill to the Senate, order the bill to be laid aside or request a conference. If the bill is again returned from the Senate with any of the requirements of the House still disagreed to, the House shall fix a time for consideration, and, on consideration, the bill must be laid aside or a conference requested.[6] Should the House wish to hold a conference with the Senate, it sends a request by message to the Senate, stating, in general terms, the purpose of the conference and proposing the names of not less than five Members of the House to be managers of the conference on behalf of the House.[7] No conference can be requested by the House concerning any bill or motion which the Senate possesses at that time.[8] Equal numbers of managers are nominated by the Senate and the House.[9] The sittings of both Houses are suspended during a conference.[10]

When the House requests a conference, the Senate chooses the time and place it is to be held, and when the Senate requests a conference the House decides the time and place.[11] If the House agrees to a conference requested by the Senate, then the managers for the House assemble at the agreed time and place, and receive the Senate managers[12], and vice versa if the Senate agrees to a conference requested by the House.[13]

At all conferences the reasons or resolutions of the House or Senate are communicated by the managers in writing.[14] After the reasons or resolutions have been read, the managers of the House and Senate confer freely together by word of mouth.[15] The managers of the House attempt to obtain either a withdrawal of the point in dispute by the Senate managers or a settlement of the point by modification or further amendment. If a bill is the subject of the conference, no amendment, except a consequential amendment, may be suggested by the managers to any words of a bill to which both Houses have at that stage agreed, unless these words are immediately affected by the disagreement under discussion.[16] When the conference is over, the managers for both Houses report proceedings to their respective Houses.[17]

There is no provision in the standing orders of either House for a request by one House for a conference on a bill originating in the other House. The Senate standing orders provide that there shall be only one conference on any bill or other matter.[18]

Two formal conferences have been held between the Houses, both initiated by the House of Representatives. In both cases they were held in camera and standing orders

5 For discussion of 'conferences' in the sense of joint meetings of both Houses *see* Ch. on 'Routine of business and the sitting day'.
6 S.O. 250.
7 S.O.s 373, 374, 375.
8 S.O. 377.
9 S.O. 378; Senate S.O. 157.
10 S.O. 376; Senate S.O. 158.
11 S.O. 379; Senate S.O. 159.
12 S.O. 380.
13 Senate S.O. 159.
14 S.O. 381.
15 S.O. 382; Senate S.O. 160.
16 S.O. 383.
17 S.O. 384; Senate S.O. 161.
18 Senate S.O. 162.

383 (now S.O. 376—Business of the House suspended during conference) and 390 (now S.O. 383—Duties of Managers) were suspended for the purposes of the conferences.[19]

On 7 August 1930 the House resolved to request a conference with the Senate on amendments, insisted upon by the Senate, to the Conciliation and Arbitration Bill 1930. The House appointed and named five managers.[20] The Senate agreed to the conference, appointed and named five managers and named the Senate Committee Room (main floor) as the place and 12.30 a.m., Friday, 8 August 1930 as the time for the holding of the conference.[21] The managers reported to the House that some of the amendments should be agreed to, some amendments should be agreed to with modifications, and other amendments should not be agreed to. Following consideration and the exchange of further messages, the Senate returned the bill amended in accordance with the agreement reached at the conference.[22] The bill was thereupon passed by both Houses and assented to on 18 August 1930.[23]

On 17 December 1930 the House resolved to request a conference with the Senate on amendments, insisted upon by the Senate, to the Northern Territory (Administration) Bill 1930. The House appointed and named five managers.[24] On 29 April 1931 the Senate agreed to the conference, appointed and named five managers and appointed the Senate Committee Room (main floor) as the place, and 8.00 p.m. that day as the time, for the holding of the conference.[25] On 5 May the managers reported to the House that the Senate amendments should not be agreed to.[26] A message was received from the Senate on 6 May insisting on its amendments.[27] The conference report was considered in the committee of the whole on 14 May and the House did not insist on disagreeing with the amendments insisted on by the Senate.[28] The bill was thereupon passed by both Houses and assented to on 21 May 1931.[29]

The only other formal conference proposed on a bill was on 22 June 1950 when the Senate resolved to request a conference with the House of Representatives on an amendment insisted upon by the House to the Social Services Consolidation Bill 1950.[30] This bill was initiated in the Senate. The House did not agree to the request for a conference and asked the Senate to reconsider the amendment.[31] The Senate agreed to the amendment and the bill was assented to on 28 June 1950.[32]

Informal conference

On 10 December 1921 the Prime Minister notified the House that an informal committee of three Members of each House had considered an amendment requested by the Senate to the Appropriation Bill 1921–22. The amendment would have reduced a salary increase for the Clerk of the House so as to maintain parity with the Clerk of the Senate. The conference recommended that there should be uniformity in

19 VP 1929–31/375, 476.
20 VP 1929–31/375.
21 VP 1929–31/382.
22 VP 1929–31/386, 393.
23 VP 1929–31/398.
24 VP 1929–31/476, 497.
25 VP 1929–31/598.
26 VP 1929–31/605.
27 VP 1929–31/608.
28 VP 1929–31/613, 622.
29 VP 1929–31/643.
30 J 1950–51/99.
31 J 1950–51/108.
32 J 1950–51/108–9, 112.

salaries of the chief officers in the Senate and the House of Representatives and that in the future preparation of the estimates this uniformity should be observed. The House endorsed the recommendations and gave the necessary authority to Mr Speaker to carry them into effect.[33] In view of this the Senate did not press its request for amendment.[34]

DOUBLE DISSOLUTION

Section 57 of the Constitution[35]

If a proposed law passed by the House is rejected by the Senate or passed with amendments to which the House will not agree, or the Senate fails to pass the bill, then the constitutional means for resolving the disagreement between the Houses commences, with a 'double dissolution' provided for by section 57 of the Constitution.[36] A fundamental purpose of section 57 is expressed by *Quick and Garran* which states that in the exclusive powers of the House of Representatives with regard to the initiation and amendment of money bills there is a predominating national element; and this is still further emphasised in the 'deadlock clause', which is designed to ensure that a decisive and determined majority in the national chamber shall be able to overcome the resistance of a majority in the 'provincial chamber' (the Senate).[37]

Section 57 provides several distinct and successive stages in the procedure by which a disagreement may be determined and reads as follows:

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.
>
> If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.
>
> The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

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33 VP 1920–21/863.

34 VP 1920–21/864.

35 For examination of the operation of section 57 the following references are noted: *Report from the Joint Committee on Constitutional Review*, PP 108 (1959–60) 19–34; 'Constitutional Alteration (Avoidance of Double Dissolution Deadlocks) Bill', *Report from Senate Select Committee*, S1 (1950–51); George Howatt, *Resolving Senate–House Deadlocks in Australia without endangering the smaller States*, PP 51 (1964–66).

36 The Senate can only be dissolved pursuant to this section.

37 *Quick and Garran*, p. 339.

As with all prerogative powers, the Governor-General dissolves both Houses on the advice of Ministers who have the confidence of the House of Representatives.[38] However the Governor-General may exercise a reserve power to refuse such advice if he or she is not satisfied as to the existence of the conditions of fact set out in section 57, for example, whether there was a failure to pass the proposed law.[39] The Governor-General may also seek additional information from the Prime Minister. The Prime Minister's advice has been accepted in all instances to date. In 1975 Mr Whitlam, who had been Prime Minister until the day of the double dissolution, did not advise a double dissolution and the Governor-General dissolved both Houses acting on the advice of newly-commissioned Prime Minister Fraser who did not have majority support in the House.

It is a requirement of section 57 that both Houses be dissolved simultaneously. The process for the settlement of deadlocks is only applicable to bills which have been initiated and passed by the House of Representatives.[40] There is no similar procedure in the Constitution to resolve any deadlock on legislation initiated in the Senate.

A double dissolution cannot take place within six months before the date the House is due to expire by effluxion of time. According to *Quick and Garran* the purpose of this restriction is that the House of Representatives may not be permitted to court a deadlock and to force a dissolution of the Senate, when the House is on the point of expiry.[41]

In considering whether to grant a double dissolution, the Governor-General may be expected to satisfy himself or herself that there is in reality a deadlock and that the requirements of section 57 have in fact been fulfilled. In addition regard has been had to the importance of the bill or bills in question and the workability of Parliament.[42]

There must be an interval of three months between the first rejection, failure to pass or passage with unacceptable amendments by the Senate and the passage of the bill a second time by the House.[43] That interval gives time for consideration and conciliation, and permits the development and manifestation of public opinion throughout the Commonwealth. The interval may be composed of time wholly within the same session of Parliament as that in which the bill was proposed and lost, or it may be composed of time partly in that session and partly in a recess, or in the next session. The interval may be longer than three months, but it cannot extend beyond the next session of the Parliament.[44]

The bill which is again passed by the House and sent to the Senate after the three month interval must be the original bill modified only by amendments made, suggested or agreed to by the Senate.[45]

Interpretations of the phrases 'interval of three months' and 'fails to pass', contained in section 57, have been the subject of considerable examination. Interpretations of the significance and meaning of these words are dealt with in the case studies which follow.

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38 *Quick and Garran*, p. 685.

39 Lumb and Ryan, 3rd edn, p. 238.

40 *Quick and Garran*, p. 685.

41 *Quick and Garran*, p. 686.

42 *See*, for example, *Simultaneous Dissolution of the Senate and the House of Representatives 4 February 1983*, PP 129 (1984) 43–4.

43 Constitution, s. 57, *and see Victoria v. Commonwealth* (1975) 134 CLR 81–200 (Petroleum and Minerals Authority Case).

44 *Quick and Garran*, p. 685.

45 In 1994 the Senate made extensive amendments to *the ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994*. The Government agreed to accept 21 of the amendments, and a second version of the bill, with a new short title and incorporating the agreed Senate amendments was introduced, H.R. Deb. (28.2.95) 1106. At the time it was considered that the changes made to the original bill did not preclude the possibility that if necessary the bill could become a bill subject to the s. 57 provisions.

The 1914 double dissolution

Following the general election of 1913 the Cook Liberal Ministry was sworn in on 24 June 1913 with a majority in the House of Representatives of one but was in a minority in the Senate.

On 31 October 1913 the Government introduced into the House the Government Preference Prohibition Bill 1913.[46] The bill was passed by the House on 18 November 1913 after a division had been called at every stage and the closure moved to end every debate.[47] The bill was introduced into the Senate on 20 November 1913 and on 11 December the second reading of the bill was negatived.[48] Parliament was prorogued on 19 December 1913. The bill was reintroduced into the House on 6 May 1914 and again passed by the House on 28 May.[49] During the proceedings on the bill in the House the Speaker exercised his casting vote on six occasions.[50] The bill was again introduced into the Senate on 28 May and negatived on the first reading.[51]

On 4 June 1914 Prime Minister Cook wrote to the Governor-General (Sir Ronald Munro-Ferguson) in the following terms:

> Mr. Cook presents his humble duty to His Excellency the Governor-General, and advises him, in accordance with the provisions of clause 57 of the Constitution, to dissolve simultaneously the Senate and the House of Representatives. The provisions of clause 57 of the Constitution have been completely complied with in respect of a Bill ("The Government Preference Prohibition Bill"), which has twice passed the House of Representatives, and which has been twice rejected by the Senate.
>
> The almost equal numbers of the two parties in the House of Representatives, and the small number supporting the Government in the Senate, render it impossible to manage efficiently the public business.[52]

In a lengthy background memorandum Mr Cook also told the Governor-General that the Labor majority in the Senate 'has for two successive sessions made the parliamentary machine unworkable'.[53] In conclusion Mr Cook advised the Governor-General that it:

> . . . appears that the expressed views of those who took part in the framing of the Constitution support the conclusion drawn from the language and the scheme of the Constitution itself, namely, that the discretion of the Governor-General to grant or to refuse a dissolution of both Houses, under section 57, is a discretion which can only be exercised by him in accordance with the advice of his Ministers representing a majority in the House of Representatives.[54]

The Governor-General replied on the same day:

> Referring to the Prime Minister's memorandum of this date, the Governor-General desires to inform the Prime Minister that, having considered the parliamentary situation, he has decided to accede to the Prime Minister's request, and will grant an immediate simultaneous dissolution of the Senate and the House of Representatives, on condition that he receives a definite assurance that the financial position is such that adequate provision exists for carrying on the Public Service in all its branches during the period of time covered by the elections.

Mr Cook replied to the Governor-General guaranteeing that a supply bill would be introduced and passed before an election was held.[55]

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46 VP 1913/132.
47 VP 1913/162–5.
48 J 1913/93, 137.
49 VP 1914/33, 61.
50 VP 1914/40, 41, 42, 48, 53, 61.
51 J 1914/53.
52 *Double Dissolution Correspondence between the late Prime Minister (the Right Honourable Joseph Cook) and His Excellency the Governor-General*, PP 2 (1914–17) 3.
53 PP 2 (1914–17) 4.
54 PP 2 (1914–17) 8.
55 PP 2 (1914–17) 3.

On 29 June 1914 the Governor-General prorogued Parliament[56] and on 30 July 1914 the Governor-General, on the advice of the Government, issued a proclamation referring to the provisions of section 57, citing the bill in question and dissolving both Houses simultaneously.[57]

Elections were held on 5 September 1914 and the Labor Party was elected to government with a majority in both Houses. The deadlock having been broken a joint sitting did not therefore eventuate.

An interesting facet of the 1914 double dissolution was that with Prime Minister Cook's consent, the Governor-General sought advice from the Chief Justice of the High Court, Sir Samuel Griffith, who held the view that:

> An occasion for the exercise of the power of double dissolution under Section 57 formally exists . . . whenever the event specified in that Section has occurred, but it does not follow that the power can be regarded as an ordinary one which may properly be exercised whenever the occasion formally exists. It should, on the contrary, be regarded as an extraordinary power, to be exercised only in cases in which the Governor-General is personally satisfied, after independent consideration of the case, either that the proposed law as to which the Houses have differed in opinion is one of such public importance that it should be referred to the electors of the Commonwealth for immediate decision by means of a complete renewal of both Houses, or that there exists such a state of practical deadlock in legislation as can only be ended in that way. As to the existence of either condition he must form his own judgment. Although he cannot act except upon the advice of his Ministers, he is not bound to follow their advice but is in the position of an independent arbiter.[58]

A formal address from the Senate to the Governor-General, seeking the reasons advanced by Mr Cook for the double dissolution, was agreed to by the Senate on 17 June 1914[59] but was rejected by the Governor-General in the following terms:

> I am advised by [my Advisers] that the request . . . is one the compliance with which would not only be contrary to the usual practice, but would involve a breach of the confidential relations which should always exist in this as in all other matters between the representative of the Crown and his Constitutional Ministers. I am advised further that to accede to the request . . . would imply a recognition of a right in the Senate to make the Ministers of State for the Commonwealth directly responsible to that Chamber . . . and that such a recognition would not be in accordance with the accepted principles of responsible government.[60]

The 1951 double dissolution

Following the general election on 10 December 1949 a Liberal–Country Party coalition led by Prime Minister Menzies was returned to power with a majority in the House of Representatives but it was in a minority in the Senate.

On 16 March 1950 the Commonwealth Bank Bill 1950 was introduced into the House of Representatives.[61] The bill passed the House on 4 May 1950[62] and was introduced into the Senate on 10 May.[63] On 21 June the Senate passed the bill with certain amendments.[64] On 22 June the House disagreed to the Senate amendments, and sent a message to the Senate asking the Senate to reconsider.[65] The Senate insisted on the amendments[66] and the House resolved that 'The House insists on disagreeing to the

56 Gazette 38 (29.6.14) 99.
57 Gazette 48 (30.7.14) 101.
58 'Memorandum by Sir Samuel Griffith', quoted in L. F. Crisp, *Australian National Government*, 5th edn, pp. 404–5.
59 J 1914/86–8.
60 J 1914/98. Double dissolution papers later tabled in House on 8 October 1914, VP 1914–17/5.
61 VP 1950–51/34.
62 VP 1950–51/73.
63 J 1950–51/42.
64 J 1950–51/93–4.
65 VP 1950–51/170–1.
66 J 1950–51/107–8.

Amendments insisted on by the Senate'.[67] The Senate received the message from the House to this effect on 23 June. On 10 October the opposition majority in the Senate took control of business in order that the message could be considered in committee of the whole. The Senate again insisted on its amendments.[68] The message was received by the House on 11 October but was not considered.[69]

On 4 October 1950 the Commonwealth Bank Bill 1950 [No. 2], identical to the earlier Commonwealth Bank Bill, was introduced into the House of Representatives. On 11 October the bill was declared an urgent bill and passed by the House.[70] The bill was introduced into the Senate on 12 October[71] and following its second reading on 14 March 1951 was referred to a select committee.[72]

On 16 March Prime Minister Menzies wrote to Governor-General McKell advising him to dissolve simultaneously both Houses and sending him supporting opinions from the Attorney-General and Solicitor-General.[73] In his letter to the Governor-General, Mr Menzies set out the stages of proceedings on the Commonwealth Bank Bill in both Houses and stated:

> . . . there is clear evidence that the design and intention of the Senate in relation to this Bill has been to seek every opportunity for delay, upon the principle that protracted postponement may be in some political circumstances almost as efficacious, though not so dangerous, as straight-out rejection. Since failure to pass is, in section 57, distinguished from rejection or unacceptable amendment, it must refer, among other things, to such a delay in passing the Bill or such a delaying intention as would amount to an expression of unwillingness to pass it. Clear evidence emerges from the whole of the history of the legislation in the Senate.

Mr Menzies then referred in detail to events in the Senate, analysing these events in terms of 'delay' and 'failure to pass' (*and see* p. 57 of the second edition).[74]

In addition to stating that grounds existed for a double dissolution in respect of the Commonwealth Bank Bill, Mr Menzies also referred to disagreements between the Houses on the Social Services Consolidation Bill, the Communist Party Dissolution Bill and the National Service Bill, none of which had gone through the constitutional requirements to be the reason for a double dissolution. Mr Menzies said that in considerations surrounding the 1914 double dissolution 'some importance appears to have been attached to the unworkable condition of the Parliament as a whole' and stated that 'the present position in the Commonwealth Parliament is such that good government, secure administration, and the reasonably speedy enactment of a legislative program are being made extremely difficult, if not actually impossible'.[75]

In his foreword to the published double dissolution documents, Mr Menzies wrote on 24 May 1956:

> In the course of our discussion, I had made it clear to His Excellency that, in my view, he was not bound to follow my advice in respect of the existence of the conditions of fact set out in section 57, but that he had to be himself satisfied that those conditions of fact were established.[76]

In the concluding paragraph of his advice tendered to the Governor-General, Mr Menzies stated:

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67 VP 1950–51/174.

68 J 1950–51/123–5. *Odgers*, 6th edn, gives a more detailed account on pp. 38–9.

69 VP 1950–51/195.

70 VP 1950–51/195–7.

71 J 1950–51/131–2.

72 J 1950–51/223–4.

73 *Simultaneous dissolution of the Senate and the House of Representatives by His Excellency the Governor-General on 19 March 1951*, PP 6 (1957–58).

74 PP 6 (1957–58) 10–12.

75 PP 6 (1957–58) 12.

76 PP 6 (1957–58) 4.

> I am, of course, at Your Excellency's service to discuss with you the matters referred to above and also any other aspects of the problem which seem to Your Excellency to merit examination. But my advice to you is, as I have said, that you should forthwith dissolve the Senate and the House of Representatives simultaneously so that the conflicts which have arisen may be authoritatively resolved.[77]

In an opinion submitted to the Governor-General by Mr Menzies, the Solicitor-General stated that he believed that the three month interval before the second passage of the bill through the House of Representatives commenced when the Senate passed the bill with amendments to which the House would not agree.[78] In *Victoria v. The Commonwealth* the High Court was not required to reach a conclusion on this particular aspect of s. 57, but comments were made on the point.[79]

When the Senate considered the Commonwealth Bank Bill for the second time and referred it to a select committee it did not actually reject the bill. Therefore to comply with the constitutional requirements for a double dissolution it had to be established that the Senate had 'failed to pass' the bill. The Senate Opposition argued that a double dissolution was not justified on the grounds that:

- the reference of the bill to a select committee was a normal procedural form and should not be regarded as a 'failure to pass', and
- the required interval of three months had not in fact transpired.

In an opinion submitted to the Governor-General by Mr Menzies, the Attorney-General stated:

> The words "fail to pass" in the section are designed to preclude the Senate, upon being proffered a Bill with an opportunity to pass it with or without amendments or to reject it, from declining to take either course, and instead deciding to procrastinate.
>
> In the present circumstances the Senate has had a second opportunity of choosing whether to pass with or without amendments or to reject the proposed law. It has declined to take either course and, unquestionably, has decided to procrastinate. In my opinion, this completely satisfies the words "fail to pass" as properly understood in the section and, in my opinion, the power of the Governor-General to dissolve both Houses has arisen.[80]

The Solicitor-General made the following points in his opinion on this matter:

> The addition of the words "fail to pass" is intended to bring the section into operation if the Senate, not approving a Bill, adopts procedures designed to avert the taking of either of these definitive decisions on it. The expression "fails to pass" is clearly not the same as the neutral expression "does not pass", which would perhaps imply mere lapse of time. "Failure to pass" seems to me to involve a suggestion of some breach of duty, some degree of fault, and to import, as a minimum, that the Senate avoids a decision on the Bill.
>
> In a recent opinion, Sir Robert Garran enumerated as follows, and in terms which in general I respectfully adopt, the matters to be taken into account in ascertaining the fact of failure or non-failure to pass:
>
> "Mainly, I think, the ordinary practice and procedure of Parliament in dealing with Bills; including facts arising out of the unwritten law relating to the system of responsible government: the way in which the Government arranges the order of business and conducts the passage of Government measures through both Houses, and the various ways in which the Opposition seeks to oppose. It will be material to know what opportunities the Government has given for proceeding with the Bill, and what steps the Senate has taken to delay or defer consideration.
>
> There are many ways in which the passage of a Bill may be prevented or delayed: e.g.
>
> (i) It may be ordered to be read (say) this day six months.
>
> (ii) It may be referred to a Select Committee.
>
> (iii) The debate may be repeatedly adjourned.

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77 PP 6 (1957–58) 15.

78 PP 6 (1957–58) 20–1.

79 (1975) 134 CLR 81 at 125 per Barwick CJ; 147, 149 and 151 per Gibbs J; 167 per Stephen J; and 187 per Mason J.

80 PP 6 (1957–58) 16–17.

(iv) The Bill may be 'filibustered' by unreasonably long discussion, in the House or in Committee.

The first of these would leave no room for doubt. To resolve that a Bill be read this day six months is a time-honoured way of shelving it.

The second would be fair ground for suspicion. But all the circumstances would need to be looked at.

The third, if it became systematically employed against the Government, would lead to a strong inference.

But just at what point of time failure to pass could be established, might be hard to determine . . .

In the fourth case too, the point at which reasonable discussion is exceeded, and obstruction, as differentiated from honest opposition, begins, would be very hard to determine. But sooner or later, a 'filibuster' can be distinguished from a debate . . ."

Section 57 cannot of course be regarded as nullifying the express provision in section 53 that except as provided in that section the Senate should have equal power with the House of Representatives in respect to all proposed laws. But it is equally clear that on the fair construction of section 57 a disagreement between the Houses can be shown just as emphatically by failure to pass a Bill as by its rejection or amendment. Perhaps the principle involved can be expressed by saying that the adoption of Parliamentary procedures for the purpose of avoiding the formal registering of the Senate's clear disagreement with a Bill may constitute a "failure to pass" it within the meaning of the section.[81]

Mr Menzies made it clear in his memorandum to the Governor-General that he considered that the Senate had adopted parliamentary procedures for the purpose of avoiding the formal registering of the Senate's clear disagreement with the bill.

On 17 March the Governor-General wrote to Mr Menzies:

I have given most careful consideration to the documents referred to and have decided to adopt the advice tendered in your memorandum.[82]

On 19 March, on the advice of the Government, the Governor-General issued a proclamation referring to the provisions of section 57, citing the Commonwealth Bank Bill and dissolving the Senate and the House of Representatives.[83]

A general election was held on 28 April 1951 and the Menzies Government was returned with a majority in both Houses, enabling the Government to effect the passage of the Commonwealth Bank Bill which was assented to on 16 July 1951.[84]

The 1974 double dissolution

On 2 December 1972 there was a general election and the Whitlam ALP Government was elected with a majority in the House of Representatives, but in the Senate the Government held only 26 of the 60 seats.

During the course of the 28th Parliament six bills were considered by the Government to have fulfilled the constitutional requirements to be treated as double dissolution bills.[85]

On 21 March 1974 Prime Minister Whitlam announced in the House that the Government had decided to invite the Governor-General to communicate with the State Governors proposing that the next election for half the Senate should be held on 18 May 1974.[86]

The catalyst for the 1974 double dissolution, however, was not so much the defeat in the Senate of government legislation but the Senate's threat to prevent passage of Appropriation Bills (Nos 3 and 5) 1973–74.

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81 PP 6 (1957–58) 21–2.

82 PP 6 (1957–58) 23.

83 Gazette 19A (19.3.51) 740A.

84 VP 1951–53/82; Act No. 16 of 1951.

85 For details of general Senate opposition to government activity and other political developments *see Odgers*, 6th edn, pp. 43 ff.

86 VP 1974/65.

On 2 April 1974 Appropriation Bill (No. 4) 1973–74 was introduced into the House of Representatives.[87] On 10 April the bill was passed by the House and sent to the Senate.[88] On 4 April Prime Minister Whitlam had informed the House that if the Senate rejected any 'money' bill he would advise the Governor-General to dissolve both Houses.[89] Appropriation Bill (No. 4) 1973–74 was introduced into the Senate on 10 April and debate on the second reading adjourned. A motion was then moved 'That the resumption of the debate be an order of the day for a later hour of the day', to which the Leader of the Opposition in the Senate (Senator Withers) moved an amendment to add the following words to the motion:

> . . . but not before the Government agrees to submit itself to the judgment of the people at the same time as the forthcoming Senate election . . .

The debate was interrupted to enable the Leader of the Government in the Senate (Senator Murphy) to announce that Prime Minister Whitlam had advised the Governor-General to grant a simultaneous dissolution of both Houses and that the Governor-General had agreed to do so on the condition that the necessary provisions were made for carrying on the Public Service. Senator Withers thereupon withdrew his amendment and Appropriation Bill (No. 4) was passed by the Senate[90], together with Appropriation Bills (Nos 3 and 5) 1973–74 and Supply Bills (Nos 1 and 2) 1974–75 received from the House that day.

In his advice to the Governor-General, Mr Whitlam listed the progress on the six bills which he considered satisfied the requirements of section 57 of the Constitution. He also gave other examples of what he regarded as the Senate's obstruction of the government program, stating that 21 out of the 254 bills put before Parliament in the first session had been rejected, stood aside or deferred by the Senate.[91] Mr Whitlam provided the Governor-General with a joint opinion from the Attorney-General and the Solicitor-General which concluded that section 57 was applicable to more than one proposed law.[92] An opinion from the Attorney-General that the six bills had satisfied the requirements of section 57 accompanied the Prime Minister's advice to the Governor-General.[93]

In his letter to the Prime Minister, accepting his advice, the Governor-General stated:

> As it is clear to me that grounds for granting a double dissolution are provided by the Parliamentary history of the six Bills listed above, it is not necessary for me to reach any judgment on the wider case you have presented that the policies of the Government have been obstructed by the Senate. It seems to me that this is a matter for judgment by the electors.[94]

On 11 April 1974 the Governor-General, on the advice of the Government, issued a proclamation referring to the provisions of section 57, citing the six bills which satisfied its provisions and dissolving the Senate and the House of Representatives.[95]

The elections were held on 18 May 1974 and the Whitlam Government was returned with a majority of five seats in the House. In the Senate, the election resulted in the Government holding 29 seats, the Liberal-Country Party coalition also holding 29, the Liberal Movement one, and one seat being held by an independent Senator.

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87 VP 1974/77.
88 VP 1974/102–3.
89 H.R. Deb. (4.4.74) 1054.
90 J 1974/109–14.
91 *Simultaneous dissolution of the Senate and the House of Representatives, 11 April 1974*, PP 257 (1975) 4.
92 PP 257 (1975) 30–1.
93 PP 257 (1975) 32.
94 PP 257 (1975) 38.
95 Gazette 31B (11.4.74).

The new Parliament met on 9 July 1974 and on 10 July the six double dissolution bills were introduced into the House and declared urgent bills.[96] The Commonwealth Electoral Bill (No. 2), the Senate (Representation of Territories) Bill and the Representation Bill were passed by the House that day.[97]

The Health Insurance Commission Bill, the Health Insurance Bill and the Petroleum and Minerals Authority Bill were passed by the House on 11 July.[98] All six bills were negatived by the Senate at the second reading between 16 July and 24 July 1974.[99]

The Government considered that these six bills had then fulfilled the constitutional requirements to be submitted to a joint sitting of the Houses (for a description of further proceedings and developments *see* p. 64).

The 1975 double dissolution[100]

The double dissolution of 11 November 1975 differed from earlier double dissolutions. Liberal Prime Minister Fraser who advised the Governor-General to grant a double dissolution had been Prime Minister only for a matter of hours and was not supported by a majority in the House. The bills which had satisfied the requirements of section 57 and which provided the technical grounds for the double dissolution had been introduced by the ALP Government, which had been dismissed from office earlier that day.

From July 1974, when the 29th Parliament commenced, to November 1975, 21 bills were regarded as fulfilling the requirements of section 57, having been twice rejected by the Senate. In addition there was Senate opposition to a considerable number of other government bills.[101]

As with the 1974 double dissolution, the critical event leading up to the double dissolution concerned the passage of bills appropriating revenue for the ordinary annual services of the Government, namely, Appropriation Bills (Nos 1 and 2) 1975–76. It was on these bills that the Houses were in actual deadlock but they were not the bills in respect of which the double dissolution was granted. The deadlock in fact was broken when the Senate finally passed the appropriation bills on 11 November prior to the announcement of the proposed double dissolution (*see below*). On 19 August 1975 these bills were introduced into the House[102] and passed on 8 October.[103] The bills were introduced into the Senate on 14 October.[104] On 16 October the Senate agreed to the following amendment to the motion for the second reading in respect of each of the bills:

> . . . this Bill be not further proceeded with until the Government agrees to submit itself to the judgment of the people, the Senate being of the opinion that the Prime Minister and his Government no longer have the trust and confidence of the Australian people . . .[105]

A similar resolution had been agreed to by the Senate on the Loan Bill 1975 on the previous day.[106] Meanwhile the House agreed to a motion which in part read:

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96 VP 1974–75/17–18.

97 VP 1974–75/22–4.

98 VP 1974–75/26–8.

99 *See* Appendix 22 of first edition.

100 There were many political factors which had a direct bearing on the 1975 double dissolution, e.g. the manner of filling casual vacancies in the Senate, the 'loans affair', and ministerial resignations. The intention here is to cover only the parliamentary aspects of the crisis.

101 *See* Appendixes 23 and 24 of first edition.

102 VP 1974–75/840.

103 VP 1974–75/953–6.

104 J 1974–75/952.

105 J 1974–75/962–5.

106 J 1974–75/954–6.

Considering that the actions of the Senate and of the Leader of the Opposition will, if pursued, have the most serious consequences for Parliamentary democracy in Australia, will seriously damage the Government's efforts to counter the effect of world-wide inflation and unemployment, and will thereby cause great hardship for the Australian people:

(1) This House declares that it has full confidence in the Australian Labor Party Government;

(2) This House affirms that the Constitution and the conventions of the Constitution vest in this House the control of the supply of moneys to the elected Government and that the threatened action of the Senate constitutes a gross violation of the roles of the respective Houses of the Parliament in relation to the appropriation of moneys;

(3) This House asserts the basic principle that a Government that continues to have a majority in the House of Representatives has a right to expect that it will be able to govern;

(4) This House condemns the threatened action of the Leader of the Opposition and of the non-government parties in the Senate as being reprehensible and as constituting a grave threat to the principles of responsible government and of Parliamentary democracy in Australia, and

(5) This House calls upon the Senate to pass without delay the Loan Bill 1975, the Appropriation Bill (No. 1) 1975–76 and the Appropriation Bill (No. 2) 1975–76.[107]

Following the passage of this resolution on 16 October 1975, and receipt of Senate messages communicating its resolutions on the appropriation and loan bills[108], a series of further messages concerning the bills were exchanged between the Houses:

- on 21 October the House asserted that the Senate's action on the appropriation bills was not contemplated within the terms of the Constitution and was contrary to established constitutional convention.[109] On the same day in considering the Senate's resolution in relation to the loan bill the House resolved that the action of the Senate in delaying the passage of the bill for the reasons given in the Senate's resolution was contrary to the accepted means of financing a major portion of the defence budget and requested the Senate to pass the bill without delay[110];
- on 22 October the Senate asserted that its action in delaying the bills was a lawful and proper exercise within the terms of the Constitution and added several statements to support this view[111];
- on 28 October the House, in dealing with the Senate's message, denounced the Senate's action as a 'blatant attempt by the Senate to violate section 28 of the Constitution for political purposes by itself endeavouring to force an early election for the House of Representatives'[112] and resolved that it would uphold the established right of the Government with a majority in the House of Representatives to be the Government of the nation[113];
- on 5 November the Senate rejected the House's claims[114] and the House, when dealing with the Senate's reply, declared that the Constitution and its conventions vest in the House the control of the supply of moneys to the elected Government and that the action of the Senate constituted a gross violation of the roles of the respective Houses in relation to the appropriation of moneys. The House further declared its concern that the unprecedented and obstructive stand taken by the

107 VP 1974–75/987–90.

108 VP 1974–75/992–3, 997–8.

109 VP 1974–75/1004–6.

110 VP 1974–75/1007–9.

111 J 1974–75/978–80.

112 Section 28 reads 'Every House of Representatives shall continue for three years from the first meeting of the House and no longer, but may be sooner dissolved by the Governor-General'.

113 VP 1974–75/1045–7.

114 J 1974–75/1016–18.

Senate in continuing to defer the passage of the bills was undermining public confidence in the parliamentary system of government[115]; and

- a further resolution was agreed to by the Senate on the same day with respect to the Loan Bill 1975 [No. 2] in the same terms as that agreed to on the first loan bill on 15 October but was not considered by the House.[116]

Whilst these messages were being exchanged between the Houses, the House, on 22 October, introduced and passed appropriation bills similar to the first bills.[117] Upon receipt of the bills, the Senate again resolved that the bills would not be further proceeded with until the Government agreed to submit itself to the judgment of the people. The Senate resolution on a third set of the bills was transmitted but was not considered by the House.[118]

The Government was not only faced with the problem of continuing conflict with the Senate in respect of its legislative program. By early November, the moneys provided by the supply bills to maintain the public services of the country for the first five months of the financial year, pending the passage of the main appropriation bills, were becoming depleted and there were indications that there would be insufficient moneys to meet the necessary commitments of the Government at some time prior to 30 November.

A motion of want of confidence in the Government had been moved on 29 October and defeated[119] and on 6 November, four sitting days later, Leader of the Opposition Fraser gave notice of a motion of censure of the Government based on the consequences of the appropriation bills failing to pass both Houses.

The next sitting day, 11 November, produced a sudden and dramatic climax of events. The Government allowed precedence to the motion of censure to which Prime Minister Whitlam moved an amendment censuring Leader of the Opposition Fraser.[120]

During the lunch suspension Mr Whitlam went to Government House for a prearranged meeting with Governor-General Kerr. Mr Whitlam intended to advise His Excellency to approve an election for half the Senate, which was due in any case before 30 June 1976. During the course of the meeting the Governor-General terminated Mr Whitlam's commission as Prime Minister. The following is the text of the letter of dismissal[121]:

Government House,
Canberra. 2600
11 November 1975

Dear Mr Whitlam,

In accordance with section 64 of the Constitution I hereby determine your appointment as my Chief Adviser and Head of the Government. It follows that I also hereby determine the appointments of all of the Ministers in your Government.

You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you and your ministerial colleagues. As it appeared likely that you would today persist in this attitude I decided that, if you did, I would determine your commission and state my reasons for doing so. You have persisted in your attitude and I have accordingly acted as indicated. I attach a statement of my reasons which I intend to publish immediately.

115 VP 1974–75/1105–7.

116 J 1974–75/1018–20; VP 1974–75/1107.

117 VP 1974–75/1017–21, 1067–70.

118 J 1974–75/987–8, 1023–4; VP 1974–75/1118.

119 VP 1974–75/1059–60.

120 VP 1974–75/1121–3.

121 *Simultaneous dissolution of the Senate and the House of Representatives by His Excellency the Governor-General on 11 November 1975*, PP 15 (1979) 1.

It is with a great deal of regret that I have taken this step both in respect of yourself and your colleagues.

I propose to send for the Leader of the Opposition and to commission him to form a new caretaker government until an election can be held.

Yours sincerely,
(signed John R. Kerr)

The Honourable E. G. Whitlam, Q.C., M.P.

At 2.34 that afternoon Mr Fraser announced to the House that the Governor-General had commissioned him to form a Government.[122] The Governor-General informed the Speaker by letter that he had that day determined the appointment of Mr Whitlam and had commissioned and administered the oath of office to Mr Fraser as Prime Minister. In accepting the commission Prime Minister Fraser made the following undertakings in a letter to the Governor-General:

. . . I confirm that I have given you an assurance that I shall immediately seek to secure the passage of the Appropriation Bills which are at present before the Senate, thus ensuring Supply for the carrying on of the Public Service in all its branches. I further confirm that, upon the granting of Supply, I shall immediately recommend to Your Excellency the dissolution of both Houses of this Parliament.

My Government will act as a caretaker government and will make no appointments or dismissals or initiate new policies before a general election is held.[123]

A few minutes before Mr Fraser made his announcement in the House, the Senate had passed the main appropriation bills.[124] Following Mr Fraser's announcement, the House agreed to the following motion by Mr Whitlam:

That this House expresses its want of confidence in the Prime Minister and requests Mr Speaker forthwith to advise His Excellency the Governor-General to call the honourable Member for Werriwa [Mr Whitlam] to form a Government.[125]

In speaking to his motion Mr Whitlam stated:

There is no longer a deadlock on the Budget between the House of Representatives and the Senate. The Budget Bills have been passed. Accordingly, the Government which twice has been elected by the people is able to govern. Furthermore, as has been demonstrated this afternoon, the parties which the Prime Minister leads do not have a majority in the House of Representatives. The party I lead has a majority in the House of Representatives. It has never been defeated in the year and a half since the last election and in those circumstances it is appropriate, I believe, that you, Mr Speaker, should forthwith advise the Governor-General—waiting upon him forthwith to advise him—that the party I lead has the confidence of the House of Representatives, and you should apprise His Excellency of the view of the House that I have the confidence of the House and should be called to form His Excellency's Government.[126]

At 3.15 p.m. the Speaker suspended the sitting and sought an appointment with the Governor-General to convey to him the terms of the House's resolution. An appointment was made for the Speaker to see the Governor-General at 4.45 p.m. At 4.30 p.m. the Governor-General dissolved both Houses and at 4.45 p.m. the double dissolution proclamation, in accordance with practice, was read by the Governor-General's Official Secretary on the steps of Parliament House. The sittings of the Houses did not resume. The double dissolution proclamation was signed before the Speaker was able to see the Governor-General and present the House's resolution to him.[127]

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122 H.R. Deb. (11.11.75) 2928; Gazette S227 (11.11.75).

123 H.R. Deb. (11.11.75) 2928.

124 J 1974–75/1031.

125 VP 1974–75/1125–7.

126 H.R. Deb. (11.11.75) 2931.

127 An acknowledgment, dated 13 November, of receipt of the resolution of the House was received by the Speaker on 17 November.

The double dissolution proclamation referred to the provisions of section 57, cited 21 bills accepted as satisfying the provisions of section 57 and dissolved the Senate and the House of Representatives.[128]

The Governor-General made public on the day of the dissolution his reasons for dismissing Prime Minister Whitlam[129]—the terms of the statement and of advice to the Governor-General by the Chief Justice of the High Court are incorporated in full at pp. 58–61 of the first edition and pp. 65–8 of the second edition.

On the following day Mr Scholes, as Speaker, wrote to the Queen expressing his serious concern that[130]:

> . . . the failure of the Governor-General to withdraw Mr. Fraser's commission and his decision to delay seeing me as Speaker of the House of Representatives until after the dissolution of the Parliament had been proclaimed were acts contrary to the proper exercise of the Royal prerogative and constituted an act of contempt for the House of Representatives. It is improper that your representative should continue to impose a Prime Minister on Australia in whom the House of Representatives has expressed its lack of confidence and who has not on any substantial resolution been able to command a majority of votes on the floor of the House of Representatives.
>
> It is my belief that to maintain in office a Prime Minister imposed on the nation by Royal prerogative rather than through parliamentary endorsement constitutes a danger to our parliamentary system and will damage the standing of your representative in Australia and even yourself.
>
> I would ask that you act in order to restore Mr Whitlam to office as Prime Minister in accordance with the expressed resolution of the House of Representatives . . .

On 17 November the Queen's Private Secretary, at the command of Her Majesty, replied that[131]:

> . . . 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.

The election was held on 13 December 1975 and the Liberal–Country Party coalition gained a majority of seats in both Houses. None of the bills which formed the technical grounds for double dissolution were reintroduced by the new Government. A full time-table of events of the 1975 parliamentary crisis is given at pp. 62–4 of the first edition.

Significance of the constitutional crisis of 1975

> The political upheavals of 1975 add up to the most significant constitutional developments in this country since federation. They resulted in a fundamental redistribution of power between the two Houses of the national parliament and between Parliament and the executive. Owing to the result of the election [13 December 1975] the more important effects of the change are unlikely to become obvious for a while yet, but it would be unrealistic to hope that they will remain quiescent for more than a few years at most.[132]

The foregoing comment from Professor Colin Howard, Hearn Professor of Law, University of Melbourne, reflected the view of a wide spectrum of academic and political thought in Australia.

The significant departure from perceived constitutional conventions which occurred in 1975 caused some reflection on the intention of the framers of the Constitution. Quick

128 Gazette S229 (11.11.75)

129 PP 15 (1979) 2–4.

130 H.R. Deb. (17.2.76) 5.

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

132 Colin Howard, 'The constitutional crisis of 1975', *Australian Quarterly* 31, 1, 1976, p. 5.

and Garran, who were intimately involved in the development of the Constitution[133], referred to the possible differences which could emerge over time between the Houses and commented on the way in which it was foreseen that the concept of responsible government and majority rule (as seen in the House) and State representation (as provided for in the Senate) would operate in the Federal Parliament.

First, the role of the Crown in relation to the Cabinet was set out:

> Whilst the Constitution, in sec. 61, recognizes the ancient principle of the Government of England that the Executive power is vested in the Crown, it adds as a graft to that principle the modern political institution, known as responsible government, which shortly expressed means that the discretionary powers of the Crown are exercised by the wearer of the Crown or by its Representative according to the advice of ministers, having the confidence of that branch of the legislature which immediately represents the people. The practical result is 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. (Dicey, Law of the Const. p. 9.) There is therefore a great and fundamental difference between the traditional ideal of the British Constitution, as embodied in sec. 61, giving full expression to the picture of Royal authority painted by Blackstone (Comm. I. p. 249) and by Hearn (Gov. of Eng. p. 17), and the modern practice of the Constitution as crystallized in the polite language of sec. 62, "there shall be a Federal Executive Council to advise the Governor-General in the Government of the Commonwealth".[134]

Then, the reason for the establishment and maintenance of the relationship between the Crown and the Ministry as set out with some clarity by Sir Samuel Griffith, later to be the first Chief Justice of the Australian High Court, was quoted:

> There are perhaps few political or historical subjects with respect to which so much misconception has arisen in Australia as that of Responsible Government. It is, of course, an elementary principle that the person at whose volition an act is done is the proper person to be held responsible for it. So long as acts of State are done at the volition of the head of the State he alone is responsible for them. But, if he owns no superior who can call him to account, the only remedy against intolerable acts is revolution. The system called Responsible Government is based on the notion that the head of the State can himself do no wrong, that he does not do any act of State of his own motion, but follows the advice of his ministers, on whom the responsibility for acts done, in order to give effect to their volition, naturally falls. They are therefore called Responsible Ministers. If they do wrong, they can be punished or dismissed from office without effecting any change in the Headship of the State. Revolution is therefore no longer a necessary possibility; for a change of Ministers effects peacefully the desired result. The system is in practice so intimately connected with Parliamentary Government and Party Government that the terms are often used as convertible. The present form of development of Responsible Government is that, when the branch of the Legislature which more immediately represents the people disapproves of the actions of Ministers, or ceases to have confidence in them, the head of the State dismisses them, or accepts their resignation, and appoints new ones. The effect is that the actual government of the State is conducted by officers who enjoy the confidence of the people. In practice they are themselves members of the Legislature . . . The 'sanction' of this unwritten law is found in the power of the Parliament to withhold the necessary supplies for carrying on the business of the Government until the Ministers appointed by the Head of the State command their confidence. In practice, also, the Ministers work together as one body, and are appointed on the recommendation of one of them, called the Prime Minister. And, usually, an expression of want of confidence in one is accepted as a censure of all. This is not, however, the invariable rule; and it is evidently an accidental and not a fundamental feature of Responsible Government.[135]

In continuing the description of the relationship of the Crown's representative with the Cabinet, *Quick and Garran* states:

> In the formation of a Cabinet the first step is the choice and appointment of its President or spokesman, the Prime Minister; he is chosen and appointed by the Crown or by its representative. In the choice of a Prime Minister, however, the discretion of the Crown is fettered; it can only select one who can command the confidence of a majority of the popular House. The other members of the Cabinet are chosen by the Prime Minister and appointed by the Crown on his recommendation.[136]

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133 *Quick and Garran*, p. ix.

134 *Quick and Garran*, p. 703.

135 Sir Samuel Griffith, *Notes on Australian Federation, 1896*, pp. 17–18, quoted in *Quick and Garran*, pp. 703–4.

136 *Quick and Garran*, p. 705.

Tensions in the system of Cabinet government in a State-represented federal system

At the time of federation Quick and Garran discerned problems in the constitutional provisions relating to the powers of the two Houses. They recorded the following difficulties foreseen by some eminent federalists:

> The Cabinet depends for its existence on its possession of the confidence of that House directly elected by the people, which has the principal control over the finances of the country. It is not so dependent on the favour and support of the second Chamber, but at the same time a Cabinet in antagonism with the second Chamber will be likely to suffer serious difficulty, if not obstruction, in the conduct of public business.
>
> This brings us to a review of some of the objections which have been raised to the application of the Cabinet system of Executive Government to a federation. These objections have been formulated with great ability and sustained with force and earnestness by several Australian federalists of eminence, among whom may be mentioned the names of Sir Samuel Griffith, Sir Richard C. Baker, Sir John Cockburn, Mr. Justice Inglis Clark, and Mr. G.W. Hackett, who have taken the view that the Cabinet system of Executive is incompatible with a true Federation. (See "The Executive in a Federation", by Sir Richard C. Baker, K.C.M.G., p. 1.)
>
> In support of this contention it is argued that, in a Federation, it is a fundamental rule that no new law shall be passed and no old law shall be altered without the consent of (1) a majority of the people speaking by their representatives in one House, and (2) a majority of the States speaking by their representatives in the other house; that the same principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action; that the State should not be forced to support Executive policy and Executive acts merely because ministers enjoyed the confidence of the popular Chamber; that the State House would be justified in withdrawing its support from a ministry of whose policy and executive acts it disapproved; that the State House could, as effectually as the primary Chamber, enforce its want of confidence by refusing to provide the necessary supplies. The Senate of the French Republic, it is pointed out, has established a precedent showing how an Upper House can enforce its opinions and cause a change of ministry. On these grounds it is contended that the introduction of the Cabinet system of Responsible Government into a Federation, in which the relations of two branches of the legislature, having equal and co-ordinate authority, are quite different from those existing in a single autonomous State, is repugnant to the spirit and intention of a scheme of Federal Government. In the end it is predicted that either Responsible Government will kill the Federation and change it into a unified State, or the Federation will kill Responsible Government and substitute a new form of Executive more compatible with the Federal theory . . .
>
> . . . the system of Responsible Government as known to the British Constitution has been practically embedded in the Federal Constitution, in such a manner that it cannot be disturbed without an amendment of the instrument. There can be no doubt that it will tend in the direction of the nationalization of the people of the Commonwealth, and will promote the concentration of Executive control in the House of Representatives. At the same time it ought not to impair the equal and co-ordinate authority of the Senate in all matters of legislation, except the origination and amendment of Bills imposing taxation and Bills appropriating revenue or money for the ordinary annual services of the Government.[137]

As foreseen, the power of the Senate to refuse supply, that is reject or delay the passage of appropriation and supply bills (bills which are required by the Government to provide funds for it to carry on its day to day business) is a power which remains a potential threat to the tenure of a Government despite the Government's majority support in the House. This was illustrated with dramatic effect in 1975. Since 1975 there has been debate in respect of limiting the powers of the Senate in this area.[138]

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137 *Quick and Garran*, pp. 706–7.

138 For further information and argument on the conflict of principles of responsible government and federalism *see* for example, Australian Constitutional Convention 1977, Standing Committee D, *Special report to Executive Committee on the Senate and Supply*, 23 June 1977 (especially pp. 39–45); Sir Billy Snedden, *The Constitution, Parliament and the Westminster Heritage*, 20 October 1979, House of Representatives, Canberra; *Report of the Advisory Committee on Executive Government*, Constitutional Commission, Canberra, June 1987.

Impact of the 'supply' provisions

The power of the Senate to reject appropriation and supply bills, that is, bills which are required by the Government to carry on its day-to-day business, is a power which remains as a potential threat to the tenure of a Government despite its retention of majority support in the House, and it may be seen by some to be in conflict with the concept of responsible government.

The rejection of bills other than appropriation and supply bills would seem to present no insuperable hurdle to constitutional democratic government. Certainly it may hinder a Government's legislative program but if such hindrance is considered as serious this will be reflected in public opinion which will, in turn, eventually influence Senate action on the legislation. This process may take some time to work out; meanwhile the Government has the task of convincing the people of the correctness of its policies.

On the other hand a rejection of supply by the Senate resulting in the fall of a Government strikes at the root of the concept of representative government. The House of Representatives was designed and has always been recognised as the House of government—the people's House. Its method of election is broadly on the 'one vote one value' system. In theory, each vote has equal weight, in effect each enfranchised member of the community has an equal say in electing the party he or she favours to govern. Voters presumably believe that they are electing a Government to serve for a term of up to three years. The possibility of some shorter period of government procured by the intervention of the Senate is contrary to any such expectation.

One of the features of the Westminster system of government is the existence of a clear line of representation from the people through the Parliament to the Executive Government. This in turn results in a clear line of responsibility in reverse order from the Executive to the Parliament to the people. Once this clear line of responsibility is interfered with (as with the intervention of the Senate which is not an equitably representative body in the sense that the House is) the powerful concept of representative and responsible government is weakened. Since 1975 proposals have been made for constitutional change so as to limit the powers of the Senate in this area.[139]

The 1983 double dissolution

In the 32nd Parliament the Liberal–National Party Government did not have a majority in the Senate. During the course of the Parliament the Senate twice rejected or failed to pass 13 proposed laws in a manner which the Government considered brought them directly within the provisions of section 57.

In September 1981 the Senate requested amendments to nine sales tax amendment bills which sought to impose sales tax on certain items previously exempted and which were introduced as part of the 1981 Budget measures. The House considered the Senate requests but declined to make the amendments on 14 October 1981. The Senate resolved, on 20 October 1981, to press its requests, and the House was so advised. The Government considered that this action constituted 'failure to pass' the Bills.[140] Mr Speaker made a statement on the constitutional issues involved, noting that the right of the Senate to repeat and thereby press or insist on a request for an amendment had never been accepted by the House. The House then agreed to a resolution inter alia endorsing

139 *See*, for example, *Report of the Advisory Committee on Executive Government*, Constitutional Commission, Canberra, June 1987 (especially pp. 20–8); Republic Advisory Committee, *An Australian Republic—the options*. v.1, pp. 114–6, (PP 168 of 1993).

140 Letter of 3 February 1983 from the Prime Minister to the Governor-General, PP 129 (1984) 1–15.

the statement of the Speaker in relation to the constitutional questions raised by the Senate message and declining to consider the message in so far as it purported to press amendments contained in the earlier message.[141]

On 7 May the order of the day was discharged from the Notice Paper and on 16 February 1982 the bills were again introduced in the House. They were passed by the House on 17 February and transmitted to the Senate which, on 10 March, negatived the motion for the second readings.

The Government also introduced three bills to implement decisions for the limited re-introduction of tertiary tuition fees. By May 1982 the Senate had twice rejected or failed to pass the Canberra College of Advanced Education Bill, the States Grants (Tertiary Education Assistance) Amendment Bill (No. 2) and the Australian National University Amendment Bill (No. 3).[142] A Social Services Amendment Bill (No. 3) 1981 dealing with the eligibility of spouses of persons involved in industrial action to certain benefits was also passed by the House but the motion for the second reading was later negatived by the Senate. It was again introduced in the House, passed and transmitted to the Senate, but the motion for the second reading was, on 24 March 1982, again negatived by the Senate.

On 3 February 1983 the Prime Minister advised the Governor-General that the Senate had twice rejected or failed to pass the 13 bills and recommended that the Governor-General dissolve simultaneously the Senate and the House. The advice referred to the progress of the bills, and further details were provided in an attachment. The Prime Minister stated that the bills in question were of importance to the Government's budgetary, education and welfare policies. He also said there was a second consideration which had led him to recommend a dissolution—he referred to economic problems facing the country, and said that it was of paramount importance, in facing difficult economic circumstances, for the Government to know that it had the full confidence of the people and that the people had full confidence in the Government's ability to point the way towards recovery. Later on 3 February the Prime Minister wrote to the Governor-General referring to his earlier letter and a telephone conversation that he had had with the Governor-General. This letter advised that the Prime Minister regarded a double dissolution as critical to the workings of the Government and the Parliament. He said that there was a need for the Government to have decisive control over both Houses, noted that some significant legislation had not been passed by the Senate and said that some measures had not even been put to the Parliament because the Government knew that they would not achieve passage through the Senate.[143]

The Governor-General replied on the same day, stating that he had satisfied himself that there existed measures which had been twice rejected or not passed by the Senate and which otherwise met 'the description of measures such as are referred to in Section 57'. He further stated:

> Such precedents as exist, together with the writings on Section 57 of the Constitution, suggest that in circumstances such as the present, I should, in considering your advice, pay regard to the importance of the measures in question and to the workability of Parliament.
>
> I note that your letter states that the thirteen proposed Laws are 'of importance to the Government's budgetary, education and welfare policies'. I also note that in the case of each of these measures a considerable time has passed since they were rejected or not passed for a second time in the Senate. I have considered their nature . . .

141 VP 1980–83/613–5.

142 Fuller details are contained in the paper *Simultaneous Dissolution of the Senate and the House of Representatives, 4 February 1983*, PP 129 (1984).

143 PP 129 (1984) 1–15, 41.

> As to the importance of these measures, viewed in the context of the extraordinary nature of a double dissolution, I am not myself in any position, from their mere subject matter and text, to form a view about the particular importance of any of them.
>
> It was in those circumstances that I spoke with you by telephone early this afternoon about the workability of Parliament, seeking further advice from you on that score; this was a matter to which you had already referred, in a prospective sense, in your original letter.
>
> As a result of your second letter to me, in which you speak of difficulties of the immediate past and describe a double dissolution as critical to the workings of the Government and of the Parliament, I am now satisfied that in accordance with your advice I should dissolve the Senate and the House of Representatives simultaneously. I note your assurance as to the availability of funds to enable the work of the administration to be carried on through the election period.[144]

On 4 February, on the advice of the Government, the Governor-General issued a proclamation referring to the provisions of section 57, citing the 13 bills and dissolving the Senate and the House of Representatives.[145] A general election was held on 5 March 1983, the Government of Prime Minister Fraser was defeated and the bills in question were not re-introduced.

The 1987 double dissolution

In the 34th Parliament the Government of Prime Minister Hawke did not enjoy a majority in the Senate. In November 1986 the House passed the Australia Card Bill which provided for a basic national system of personal identification. In the Senate the motion for the second reading of the bill was defeated on 10 December 1986. On 25 March 1987 the House again passed the bill, but on 2 April the motion for the second reading was again defeated in the Senate.

On 27 May the Prime Minister informed the Governor-General that all conditions justifying a double dissolution had been satisfied in respect of the bill, and he advised the Governor-General to dissolve simultaneously the Senate and the House of Representatives. The Prime Minister's letter also referred to the importance of the bill in the Government's legislative program. It alleged that the Senate had obstructed other measures, and expressed the view that the situation which had arisen was critical to the workings of the Government and Parliament.[146]

Later on the same day the Governor-General replied, confirming his acceptance of the Prime Minister's advice, saying that he was satisfied that the circumstances such as were specified in section 57 existed in relation to the bill and noting the assurance that funds would be available to ensure that the work of the administration could continue through the election period.[147] On 5 June, on the advice of the Government, the Governor-General issued a proclamation referring to the provisions of section 57, citing the Australia Card Bill and dissolving the Senate and the House of Representatives.[148] A general election was held on 11 July, and the Government of Prime Minister Hawke was returned but it still lacked a majority in the Senate.

The Australia Card Bill was again passed by the House of Representatives on 16 September. While the second reading was being debated in the Senate, however, the Opposition released details of advice it had received on the matter. The burden of the advice was that the effective operation of the bill, if passed, would be dependent upon certain action to be taken by regulation. Disallowance of the regulations by the Senate

144 PP 129 (1984) 43–4.

145 PP 129 (1984) 47–8.

146 *Simultaneous Dissolution of the Senate and the House of Representatives, 5 June 1987*, PP 331 (1987) 1–4.

147 PP 331 (1987) 5.

148 PP 331 (1987) 8.

would, it was argued, make the Act wholly ineffective.[149] During debate in the Senate on the motion for the second reading and on amendments to refer the bill to a committee of inquiry, a government amendment was defeated which proposed to add, 'but the Senate affirms that it will, consequent upon the passage of the Australia Card Bill at a joint sitting of the Houses, secure the effective operation of the legislation by not disallowing regulations made pursuant to sub-section 32 (1) providing for the "first relevant day" and the "second relevant day" '.[150] The bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on 23 September 1987.

On 8 October 1987 the Senate resolved, on the motion of the Minister with primary responsibility for the Australia Card legislation, that the committee report the bill on or before the next sitting without further considering the bill or matters referred in relation to it, and that on receipt of the report the bill be laid aside without further question being put.[151] The Government had decided not to proceed further with the bill, which was laid aside when reported by the committee on 9 October.

JOINT SITTING

After a double dissolution has been granted, elections are held for both Houses. In the new Parliament the House of Representatives may again pass the proposed law which was the subject of the double dissolution with or without any amendments which have been made, suggested or agreed to by the Senate. If the Senate rejects the proposed law, passes it with amendments to which the House will not agree or fails to pass it, the Governor-General may convene a joint sitting of members of the House of Representatives and the Senate.[152]

When a joint sitting is held Members and Senators deliberate and vote together on the proposed law in the form it was last proposed by the House of Representatives. Any amendments which have been made by one House and not agreed to by the other are considered and if affirmed by an absolute majority of the total members of both Houses, are taken to have been carried.[153] The proposed law as a whole is voted on by all members of both Houses and if it is affirmed by an absolute majority then it shall be taken to have been duly passed by both Houses of Parliament and is presented to the Governor-General for assent.[154]

Only one such joint sitting has been held and this followed the 1974 double dissolution. When the 29th Parliament sat, following the double dissolution and election of 1974, the six proposed laws which were the subject of the double dissolution were again passed by the House of Representatives and again rejected by the Senate.[155]

Following the Senate rejection, the Governor-General, on the advice of the Government, issued a proclamation on 30 July 1974 which referred to the double dissolution, listed the six proposed laws in question and stated that, since the dissolution and election, the conditions upon which the Governor-General was empowered to convene a joint sitting had been fulfilled in respect of each of the proposed laws. The Governor-General by the proclamation convened a joint sitting commencing in the House of Representatives Chamber at 10.30 a.m. on 6 August 1974. The proclamation

149 S. Deb. (23.9.87) 565.

150 J 1987–88/116–7.

151 J 1987–88/152–4.

152 Constitution, s. 57.

153 In respect of the 1974 joint sitting; bills were not amended by either House prior to the joint sitting.

154 Constitution, s. 57.

155 *See* Appendix 22 of 1st edn.

provided that Members 'may deliberate and shall vote together upon each of the said proposed laws as last proposed by the House of Representatives' and that all Members of the Senate and the House were 'required to give their attendance accordingly'.[156]

The Constitution provides for each House to make rules for the order and conduct of business either separately or jointly with the other House.[157] At the time[158] the standing orders of the Houses contained only two standing orders applying to a joint sitting, namely:

> II. The Members present at the joint sitting, under section 57 of the Constitution, shall appoint by ballot a Member to preside, and until such appointment the Clerk of the Senate shall act as chairman.
>
> III. The Member chosen to preside shall present to the Governor-General for the Royal Assent any proposed law duly passed at such joint sitting.

It was therefore necessary that special rules for the joint sitting be drawn up following discussions between the leaders and officers of the two Houses. These rules were adopted by both Houses on 1 August 1974.[159]

Certain legislation touching on proceedings in Parliament was amended to cover the joint sitting.[160] The Evidence Act then in force was amended to provide for judicial notice to be taken of the official signature of the Member presiding at the joint sitting and for copies printed by the Government Printer of the formal record of proceedings to be admitted in court as evidence.[161] The Parliamentary Papers Act was amended to extend to the publication of the proceedings, or documents laid before the joint sitting, the same protection against actions for defamation or other legal proceedings as applied in ordinary sittings.[162] The Parliamentary Proceedings Broadcasting Act was amended to permit the broadcasting of the proceedings of the joint sitting. It enabled the Parliamentary Joint Committee on the Broadcasting of Parliamentary Proceedings to make determinations covering such broadcasts, and afforded the broadcasts the same protection as applied to normal parliamentary broadcasts. It also provided that the proceedings could be telecast direct to air or recorded for telecasting at a later time.[163]

The Joint Committee on the Broadcasting of Parliamentary Proceedings made a number of determinations under the amending Act. These included requirements that the Australian Broadcasting Corporation make a complete colour video tape and sound recording of the joint sitting, that ABC stations which normally broadcast Parliament should broadcast the joint sitting, that live telecasts be carried by the ABC at certain times (over five hours in total each day) on 6 and 7 August 1974 and that a one hour composite program be prepared by the ABC to be shown nationally.[164]

On 31 July the House resolved:

> . . . that it be a rule and order of the House of Representatives that, at a joint sitting with the Senate, the proceedings are proceedings in Parliament, and that the powers, privileges and immunities of Members of this House shall, *mutatis mutandis*, be those relating to a sitting of this House.[165]

This resolution is considered to have continuing effect in respect of future joint sittings as far as the House of Representatives is concerned.

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156 Gazette S62B (30.7.74).

157 Constitution, s. 50.

158 The Senate has since discarded the standing orders, although they have been retained by the House.

159 VP 1974–75/118–21; J 1974–75/117–20. *See* Rules for joint sittings.

160 The three amending Acts concerned were assented to on 1 August 1974, VP 1974–75/121.

161 *Evidence Act 1974* (Act No. 31 of 1974).

162 *Parliamentary Papers Act 1974* (Act No. 33 of 1974).

163 *Parliamentary Proceedings Broadcasting Act 1974* (Act No. 32 of 1974).

164 H.R. Deb. (1.8.74) 1007–8.

165 VP 1974–75/106. The Senate passed a similar resolution on 1 August, J 1974–75/117.

The joint sitting commenced at 10.30 a.m. on 6 August 1974 in the House of Representatives Chamber.[166] The Governor-General's proclamation convening the joint sitting was read by the Clerk of the Senate (Mr J. R. Odgers). The Clerk of the Senate then proceeded to conduct proceedings for the appointment of Chairman. The Speaker of the House (Mr J. F. Cope) being the only Member proposed, was accordingly declared appointed as Chairman and was conducted to the Chair by the Leader of the House (Mr F. M. Daly) and the Manager of Government Business in the Senate (Senator D. McClelland).

The Chairman read Prayers and, after making a statement on the constitutional significance of the joint sitting, called on the first proposed law. The question put to the joint sitting was 'That the proposed law be affirmed'. The Commonwealth Electoral Act (No. 2), Senate (Representation of Territories) Act and the Representation Act were affirmed by an absolute majority on 6 August 1974 and received assent on 7 August.

The Health Insurance Commission Act, Health Insurance Act and Petroleum and Minerals Authority Act were affirmed by an absolute majority on 7 August and received assent on 8 August.

All Members of both Houses attended the sitting on each day, a total of 66 members participating in the debates. Each of the proposed laws was affirmed by an absolute majority, as is required by the Constitution.

On 7 August, before consideration commenced on the sixth proposed law, the Member for Mackellar (Mr Wentworth) moved that so much of the standing orders be suspended as would prevent him moving forthwith:

> That this joint sitting of the Houses should not be finally adjourned until either it has adequately discussed the present economic and industrial situation in Australia, or else the Government has indicated that both Houses will meet next week to discuss these matters.

The Chairman ruled that:

> The Proclamation by the Governor-General on 30 July 1974 convened a joint sitting of the Members of the Senate and of the House of Representatives for the purpose of deliberating and voting upon each of 6 proposed laws and, in his [that is the Chairman's] opinion, neither section 57 of the Constitution nor the Proclamation authorised the consideration of any other matters by the joint sitting—

and ruled the motion out of order. Mr Wentworth moved dissent from the Chairman's ruling, the motion being negatived on the voices after the closure of the debate was agreed to.

Later, Mr McMahon, Member for Lowe, raised a point of order 'referring to the judgment of the Chief Justice on the challenge to the joint sitting'. He was immediately ruled out of order by the Chairman who stated that a point of order could relate only to the standing orders and the rules the Houses had adopted governing the joint sitting. Mr McMahon claimed that action was being taken on proclamations the Chief Justice had said were improper, but the Chair called on the next business and the matter was not pursued.

During the joint sitting Members of the House of Representatives were called by electoral division and name, Senators by name, Ministers by portfolio and name, and Leaders of the Opposition by office and name.

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166 The record of the joint sitting can be found in the following parliamentary records: (a) Minutes of Proceedings of Joint Sitting, 6–7 August 1974, and (b) H.R. Deb. (6 and 7.8.74) 1–175.

High Court cases relating to joint sitting

The validity of the joint sitting and the validity of certain laws passed by the joint sitting were the subject of a number of cases brought before the High Court.[167]

The Governor-General's proclamation of Tuesday, 30 July 1974, convened the joint sitting for 10.30 a.m. the following Tuesday, 6 August. On Thursday, 1 August, a writ was filed in the High Court by two opposition Senators, Senator the Hon. Sir Magnus Cormack and Senator James Webster, challenging the legality of the joint sitting and seeking an interlocutory injunction to prevent it being held.[168]

On 2 August writs were served on the Speaker (Mr J. F. Cope), the President of the Senate (Senator J. O'Byrne), the Prime Minister (Mr E. G. Whitlam), the Clerk of the House (Mr N. J. Parkes), the Attorney-General (Senator L. Murphy), the Governor-General (Sir John Kerr) and the Clerk of the Senate (Mr J. R. Odgers) to appear before the High Court of Australia. On 2 August the Speaker informed the House that writs had been served on the Clerk and himself and tabled certain papers.[169] The High Court considered the matter on Friday, 2 August, and Monday, 5 August, but refused to grant the interlocutory injunction sought to prevent the joint sitting being held.

The suit principally sought to have the High Court:

- invalidate the proclamation for the joint sitting;
- declare that the joint sitting was not empowered to vote on all the proposed laws referred to in the proclamation;
- declare that the joint sitting could only vote on one proposed law; and
- declare that the Petroleum and Minerals Authority Bill did not fulfil the requirements of section 57 and could not be voted upon at the joint sitting.

The case was heard before Chief Justice Barwick and Justices McTiernan, Menzies, Gibbs, Stephen and Mason. The Court ruled that more than one proposed law could be dealt with in a double dissolution and at a joint sitting. In his judgment Chief Justice Barwick stated that there is nothing in the section, or in the evident reasons for its enactment, which requires that only one proposed law should be so discussed and voted upon.

On the question that the listing of the six bills in the joint sitting proclamation went beyond what was required by the Constitution the Chief Justice stated that it was no part of the Governor-General's function to determine what should occur at a joint sitting or to direct what proposals might be discussed or not discussed at such a sitting or what was the purpose of the joint sitting; that was determined by the Constitution in the third paragraph of section 57.

Menzies J stated that the power given to the Governor-General was simply to convene a joint sitting and it was not for the Governor-General to prescribe what may occur at such sitting.

McTiernan J was of the opinion that neither proclamation (that is, double dissolution and joint sitting) upon its proper construction contravened section 57. He saw no reason for declaring either of the proclamations to be invalid.

Gibbs J stated that, in his opinion, the Governor-General had no power to direct the members present at the joint sitting upon what proposed laws they may deliberate and should vote, but that the inclusion of a direction of that kind did not affect the validity of the proclamation assuming it to be otherwise valid.

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167 Many aspects of the wording of section 57 were discussed.

168 *Cormack v. Cope* (1974) 131 CLR 432.

169 VP 1974–75/127.

Stephen J stated that the section itself prescribed what was to be the business of the joint sitting and the terms of the proclamation could not affect this one way or another.

Mason J stated that, if the proclamation was effective to convene a joint sitting, 'as I happen to think it is', so long as there was at least one proposed law which answered the description contained in section 57, it did not follow that it had conclusive effect so far as its recitals asserted that, in relation to each of the six bills, the provisions of the section had been satisfied.

In view of the doubt as to whether or not the proposed law(s) should be listed in the proclamation, should any future proclamation convening a joint sitting not list the proposed laws to be considered, it may be necessary to devise a procedure to initiate the consideration of the proposed laws. This could be done by motion by a Minister, and for this purpose some suitable provision may be necessary in the rules.

On the question of whether the Petroleum and Minerals Authority Bill had fulfilled the requirements of section 57, the Court ruled that a declaration should not be made in the interlocutory proceedings but that once the proposed law had been affirmed at a joint sitting it would then be appropriate for the Court to pronounce on its validity.

The validity of some of the bills passed at the joint sitting was in fact later challenged by several of the State Governments. In one judgment the High Court ruled by a majority decision that the Petroleum and Minerals Authority Bill was not one within the meaning and scope of section 57 of the Constitution upon which the joint sitting could properly deliberate and vote, and that it was not a valid law of the Commonwealth. The Court held that the interval of three months had to be computed from the date of rejection of or failure to pass the bill by the Senate and not from the date of the passing of the bill by the House. The Court also held that the Senate had not 'failed to pass' the bill on 13 December 1973.[170]

In a separate judgment the High Court ruled by a majority decision that the *Commonwealth Electoral Act (No. 2) 1973*, the *Senate (Representation of Territories) Act 1973* and the *Representation Act 1973* were Acts duly passed by both Houses of the Parliament within the meaning of section 57 of the Constitution and that the *Senate (Representation of Territories) Act 1973* was not invalid, in whole or in part, as being beyond the legislative powers of the Commonwealth Parliament.[171]

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170 *Victoria v. Commonwealth* (1975) 134 CLR 81–200 (Petroleum and Minerals Authority Case).

171 *Western Australia v. Commonwealth* (1975) 134 CLR 201 (Territories Representation Case); *see also Queensland v. Commonwealth* (1977) 139 CLR 585.