Chapter 21

RELATIONS WITH THE HOUSE OF REPRESENTATIVES

IN A BICAMERAL SYSTEM the conduct of relations between the two houses of the legislature is of considerable significance, particularly as the houses must reach full agreement on proposed legislation before it can go forward into law, and action on other matters also depends on the houses coming to agreement.

In practice, under the system of government as it has developed in Australia, relations between the two Houses are relations between the Senate and the executive government, as the latter, through its control of a disciplined party majority, controls the House of Representatives. This chapter could well have been combined with Chapter 19, Relations with the Executive Government. There is value, however, in treating the matter on the basis of the constitutional assumption of dealings between two representative assemblies, as this pattern may in certain circumstances, for example, a government in a minority in the House, reassert itself.

The Constitution contains some provisions regulating relations between the Houses:

- section 53 provides some rules relating to proceedings on legislation
- section 57 provides for the resolution of certain disagreements between the Houses in relation to proposed legislation by simultaneous dissolutions of the Houses.

The rules contained in section 53 are dealt with in Chapter 12, Legislation, and Chapter 13, Financial Legislation. Simultaneous dissolutions under section 57 are dealt with in this chapter.

The standing orders of the Senate provide more detailed rules for the conduct of relations between the Houses, particularly in relation to legislation. In so far as these rules regulate relations between the Houses generally, they are also dealt with in this chapter, and in so far as they relate to legislation they are dealt with in more detail in chapters 12 and 13.

Communications between the two Houses

Senate standing orders are concerned only with formal communications between the Houses, as distinct from the many private communications and consultations between members and office-holders of the Houses. The latter, while indispensable to the efficient and orderly conduct of parliamentary proceedings, are of course not regulated by formal rules.

Communications with the House of Representatives may be by:

- message
- conference
- committees conferring with each other (SO 152).

The most common form of communication is by message. Conferences are treated below. For committees conferring with each other, see Chapter 16, Committees; a committee of the Senate may confer with a committee of the House of Representatives only by order of the Senate.

Messages

Messages between the two Houses may deal with:

- transmission of bills for concurrence, return of bills with or without amendment, and other proceedings in connection with the consideration of bills (see Chapter 12, Legislation)

- requests for the attendance of members or officers of the other House as witnesses to be examined by the House or committee (SO 178)

- appointment of joint committees, appointment of members of such committees, and changes in membership (SO 42)

- requests for conferences (see under Conferences, below)

- transmission of resolutions for concurrence (SO 154).

A message from the Senate to the House of Representatives is in writing, is signed by the President or Deputy President, and is delivered by a clerk at the table or the Usher of the Black Rod (SO 153).

If the House of Representatives is sitting, a message is delivered to the House and received by the Deputy Clerk or Sergeant-at-Arms. If the House is not sitting, the message is delivered to the Clerk of the House.

Most messages, for example messages with respect to proceedings on bills, pass automatically between the Houses, under provisions in the standing orders. A motion may be moved at any time without notice that any resolution of the Senate be communicated by message to the House of Representatives (SO 154). This procedure is used where the agreement of the House to a resolution is sought, or it is thought appropriate to advise the House of a resolution of the Senate.

A motion that a resolution of the Senate be communicated by message to the House may be moved by any senator, and not necessarily the senator who moved the motion for the resolution (ruling of President Gould, SD, 28/10/1908, p. 1554).

A message from the House of Representatives is received, if the Senate is sitting, by a clerk at the table, and if the Senate is not sitting, by the Clerk of the Senate, and is reported by the

President as early as convenient, and a future time is normally fixed for its consideration; or it may, by leave, be dealt with at once (SO 155).

A message is reported to the Senate by the President at any stage when other business is not before the Senate. By convention, however, a message from the House concerning government business is handed to the President by the Clerk when a minister indicates that the government is ready for the message to be reported.

The general rule, that when a message has been reported a future time is fixed for its consideration, and it may be dealt with at once only by leave, does not apply to messages with respect to bills, for which special provision is made: see Chapter 12, Legislation.

An unusual situation arose in 1912, when a motion for fixing the time for consideration of a message from the House of Representatives was negatived (21/12/1912, J.244). The message requested the concurrence of the Senate in a resolution agreed to by the House favouring the formation of two new states out of the territory known as Northern and Central Queensland. Motion was made that the message be taken into consideration on the next day of sitting, but the motion was negatived. As the Senate did not further sit during that session, the message was not again brought up. The effect of the Senate's action was that it declined to consider the message. On many occasions the Senate has not returned to the consideration of a message when a future time (usually the next day of sitting) has been fixed for its consideration, because the order of the day for consideration of the message has not been reached.

Conferences

Conferences between the two Houses provide a means of seeking agreement on a bill or other matter when the procedure of exchanging messages fails or is otherwise inadequate to promote a full understanding and agreement on the issues involved.

In the history of the Commonwealth Parliament, there have been only two formal conferences, and those were in connection with disagreements between the Houses on amendments to bills. It is quite competent for the Houses to agree to conferences on other matters, however. The first conference proposed in the Commonwealth Parliament was to consider the question of the selection of a site for the federal capital. The House of Representatives, requesting the conference in 1903, proposed that such conference consist of all members of both Houses, but the conference was refused by the Senate (24/9/1903, J.185; 30/9/1903, J.189). (For history of a proposed conference on the site of the new Parliament House, and resolutions concerning construction matters, see *ASP*, 6th ed., pp 896-900.)

As far as conferences on bills are concerned, the standing orders of the Senate prescribe the stage at which the Senate may request a conference. That stage, pursuant to standing order 127(1), is reached when agreement cannot be achieved, by an exchange of messages, with respect to amendments to Senate bills. There is no provision in the standing orders for a request by the Senate for a conference on a bill originating in the House of Representatives.

The following conferences have been held between the Senate and the House of Representatives:

- Appropriation Bill 1921-22. Disagreement between the Houses on Senate's request for amendments; an informal conference of representatives of both Houses considered the matter in disagreement, namely, whether the salaries of the Clerks of the Houses should be uniform; conference recommended uniformity, and recommendation endorsed by the Houses (10/12/1921, J.527).

- Commonwealth Conciliation and Arbitration Bill 1930 (HR bill). Conference agreed to, at request of House of Representatives, on amendments in dispute. (7/8/1930, J.170).

- Northern Territory (Administration) Bill 1931 (HR bill). Conference agreed to, at request of House of Representatives, on amendments in dispute. (17/12/1930, J.238; 26/3/1931, J.255).

In each of these cases the conference was successful, agreement being reached by the managers and, following their report, by the Houses.

The standing orders provide general rules relating to conferences, which are applicable to conferences on other matters as well as conferences on bills.

Conferences sought by the Senate with the House of Representatives are requested by messages (SO 156(1)). In one instance only has the Senate requested a conference with the House of Representatives, in relation to the Social Services Consolidation Bill 1950. The House of Representatives having insisted on an amendment to the bill to which the Senate insisted on disagreeing, a conference was requested with the House of Representatives on the amendment (22/6/1950, J.98-9). The House of Representatives, however, did not agree to the request of the Senate for a conference, and desired the reconsideration of the bill by the Senate in respect of the amendment. The Senate subsequently agreed to the amendment insisted on by the House of Representatives.

In requesting a conference, the message from the Senate states, in general terms, the object for which the conference is sought and the number of managers proposed, which is not less than five (SO 156(2)).

A motion requesting a conference contains the names of the senators proposed by the mover to be the managers for the Senate. If, on such motion, any senator so requires, the managers for the Senate are selected by ballot (SO 157).

During a conference the sitting of the Senate is suspended (SO 158). For precedent, see conference in connection with Northern Territory (Administration) Bill 1931 (29/4/1931, J.270). The time having arrived for the holding of the conference, the sitting of the Senate was suspended until such time as the conference between the Houses should be concluded. When the conference was ready to report, the bells were rung and the sitting resumed.

Before the Senate suspended for this conference, a point of order was taken on whether a conference could take place except during a suspension of the sittings. President Kingsmill held that, while it was unusual for a conference to sit when the House has adjourned, he did not think that there was anything in the standing orders of the Senate to forbid, or even to imply, that a

conference may not take place when the Senate has adjourned (ruling of President Kingsmill, SD, 29/4/1931, p. 1360).

A conference may not be requested by the Senate on any bill or motion of which the House of Representatives is at the time in possession (SO 156(3)). The rationale of this rule is that a conference should be held only if the Senate is notified of a disagreement between the Houses on a measure.

The managers to represent the Senate in a conference requested by the House of Representatives must consist of the same number of members as those of the House of Representatives (SO 157(3)).

The conferences on the Commonwealth Conciliation and Arbitration Bill 1930 and the Northern Territory (Administration) Bill 1931 both consisted of five managers for the Senate and five managers for the House of Representatives.

In a conference between the Houses, if managers appointed by the Senate decline to act, they should be replaced by others. It has been held that there is no means of compelling any senator to act on a conference (ruling of President Kingsmill, SD, 17/12/1930, p. 1624). For precedent for senator discharged from duty as a manager, and another senator appointed, see 29/4/1929, J.269.

In respect of any conference requested by the House of Representatives the time and place for holding the conference is appointed by the Senate; and when the Senate requests a conference, it agrees to its being held at such time and place as appointed by the House of Representatives, and such agreement is communicated by message. At conferences requested by the House of Representatives the managers for the Senate assemble at the time and place appointed, and receive the managers of the House of Representatives (SO 159).

At conferences the reasons or resolutions of the Senate, to be communicated by the managers, are in writing; and the managers may not receive any such communication from the managers for the House of Representatives unless it is in writing. The managers for the Senate read the reasons or resolutions to be communicated, deliver them to the managers for the House of Representatives, or hear and receive from the managers for the House the reasons or resolutions communicated by the latter; after which the managers for the Senate are at liberty to confer freely with the managers for the House of Representatives (SO 160). That is to say, after the preliminary exchange of formalities, a "free" conference is held, at which debate is permissible.

The managers for the Senate, when the conference has terminated, report their proceedings to the Senate (SO 161). In the case of the two precedents referred to, the Commonwealth Conciliation and Arbitration Bill 1930 and the Northern Territory (Administration) Bill 1931, the bill was, in each case, in possession of the Senate at the time of the conference. On presentation of the report of the conference, motion was made that the report be adopted and taken into consideration in conjunction with the message of the House of Representatives (returning the Bill and requesting the conference) in committee of the whole.

The adoption of the report of a conference does not necessarily bind the Senate to the proposals of the conference, which, with reference to amendments in a bill, come up for consideration in committee of the whole (ruling of President Kingsmill, SD, 29/4/1931, p. 1365).

There must be only one conference on any bill or other matter (SO 162). In so providing, the Senate profited from the experience of the South Australian Parliament, where it was found that a number of conferences served no good purpose, because the representatives of both Houses always put off coming to a final decision until the last conference.

The main reason for conferences falling into disuse is the rigidity of ministerial control over the House of Representatives. It is more efficient for senators involved with legislation to negotiate directly with the ministers who control what the House does with the legislation.

SIMULTANEOUS DISSOLUTIONS OF THE HOUSES

Constitutional provisions and their application

When the Constitution of the Commonwealth was in preparation, one of the major issues in contention was a provision for resolving deadlocks between the Houses of Parliament over legislation. Few constitutions extant at the time contained any such mechanism: those which did mainly provided for conferences between the Houses, reflecting practice as it had developed in the Congress of the United States. Only with enactment of the *Parliament Act 1911* did the United Kingdom establish a formal framework for resolving a deadlock between the House of Commons and the House of Lords, reflecting the non-elected character of the latter house. Canada's national parliament, now the only bicameral legislature in that country, still does not have a comparable procedure. Such procedures as exist in Australian State constitutions post-date the Commonwealth Constitution.

The procedure eventually adopted, and embodied in section 57 of the Constitution, was thus a major innovation in constitutional and bicameral practice. Part of the innovation was the possibility of dissolution of and general election for both Houses of the Parliament.

The provisions in section 57 were intended to be more than a mechanism for resolving deadlocks. They were to be a concession of federalism to democracy. Provided that the whole process set out in section 57 is followed, the normal double majority for the passage of laws would be dispensed with, only for the legislation causing the deadlock, and laws could be passed in accordance with the wishes of the majority of the representatives of the people as a whole, if that majority were not too narrow. In cases of significant disagreement, democratic representation was to prevail over the geographically distributed representation of the people provided by the Senate. (But see Chapter 1 for the point that the House of Representatives is now controlled by the executive government and may not in fact reflect in its composition the votes of the majority of the electors.) It is sometimes said that the purpose of section 57 is to enable the government or the House of Representatives to prevail over the Senate. This interpretation, however, was explicitly rejected by the High Court (see H. Evans, 'Constitution, section 57', *Constitutional Law and Policy Review*, 1.2, August 1998).

Laws have been passed in this way only once, in 1974, when there occurred the only double dissolution followed by a joint sitting of the Houses.

Section 57 of the Constitution as it relates to simultaneous dissolutions provides:

> 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.

Since federation, section 57 has been activated on six occasions — 1914, 1951, 1974, 1975, 1983 and 1987 — to resolve deadlocks over legislation between the Houses. On three occasions the government advising simultaneous dissolutions has been returned to office; on only one of those occasions, 1974, did the legislation leading to the dissolutions become law, and, in that instance, after a joint sitting as provided for in paragraphs 2 and 3 of section 57. In 1951, the Menzies Government, while not reintroducing the banking legislation which was the subject of the simultaneous dissolutions, nonetheless proceeded with other legislation of similar character. The Hawke Government abandoned the single bill on which it had secured a simultaneous dissolution in 1987 when a majority of the Senate in effect declared that it would disallow regulations made under the legislation to bring it into operation.

The simultaneous dissolutions of 1914 and 1983 saw the defeat of the government advising the dissolutions. The legislation on which the dissolution was based was, in all cases, dropped. In 1975, the simultaneous dissolutions were based on 22 proposed laws of the ousted Whitlam Government. The caretaker Fraser Government, however, secured majorities in both Houses so no further action was taken.

As a consequence of the six simultaneous dissolutions, and the judgments of the High Court in the three cases arising from the 1974 dissolutions, it is now possible to amplify the workings of section 57 of the Constitution so far as simultaneous dissolutions of the two Houses are concerned. The following observations can be advanced as influencing the activation of section 57.

1. **The provisions of section 57 are mandatory, not directory in respect of the validity of legislation.** Failure to comply with them therefore results in invalidity of any enactment which does not conform to its stipulations. However, even failure to observe the provisions of section 57 would not invalidate dissolutions of the two Houses. (*Victoria v Commonwealth* 1975 7 ALR 1)

2. **The interval of three months referred to in paragraph 1 of section 57 is measured from the Senate's rejection or failure to pass a bill.** According to the High Court, it is "measured not from the first passage of a proposed law by the House of Representatives, but from the Senate's rejection or failure to pass it. This interpretation follows both from the language of section 57 and its purpose which is to provide time for the reconciliation

of the differences between the Houses; the time therefore does not begin to run until the deadlock occurs". (*Victoria v Commonwealth* 1975 7 ALR 1)

3. **A prorogation of Parliament does not have the effect of negating earlier events which qualified bills as proposed laws in respect of which a double dissolution could be granted.** Simultaneous dissolutions may be granted in respect of bills which qualified under section 57 in an earlier session. (*Western Australia v Commonwealth* 1975 7 ALR 159)

4. **Simultaneous dissolutions have been granted on several occasions where the proposed legislation has been deemed to have "failed to pass" the Senate.** In 1951, following the second passage of the Commonwealth Bank Bill through the House, the Senate, after second reading debate extending over several days, referred it to a select committee. This was said by Prime Minister Menzies to constitute "failure to pass", a phrase which encompassed "delay in passing the bill" or "such a delaying intention as would amount to an expression of unwillingness to pass it". The Attorney-General, Senator J.A. Spicer, wrote that the phrase, "failure to pass", was intended to deal with procrastination. Professor K.H. Bailey, the Solicitor-General, considered, inter alia, that "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". (See below, under Simultaneous dissolutions of 1951.)

   The Deputy Leader of the Opposition in the House of Representatives, Dr H.V. Evatt, had previously been reported in the press as saying that referral of legislation to a select committee, being clearly provided for in the standing orders of the Senate, was not a failure to pass. (See below.)

   In 1975, the High Court held that the proposed law creating the Petroleum and Minerals Authority had not, as claimed, "failed to pass" the Senate on 13 December 1973 and, as a result, it was declared not to be a valid law of the Commonwealth. The second reading was, in fact, negatived a first time in the Senate on 2 April 1974. In its judgment, the High Court held that "The Senate has a duty to properly consider all Bills and cannot be said to have failed to pass a Bill because it was not passed at the first available opportunity; a reasonable time must be allowed". In so deciding, the majority observed that the opinions of individual members of either House "are irrelevant to the question of whether the Senate's action amounted to a failure to pass". (*Victoria v Commonwealth* 1975 7 ALR 1)

   In 1983 nine proposed laws dealing with sales tax were deemed to have "failed to pass" the Senate after being first passed by the House of Representatives. These bills, being legislation which under section 53 the Senate could not amend but only suggest amendments, were in the possession of the House of Representatives prior to being discharged from its notice paper, the Senate having decided to press requests. As the government was defeated in the election it is not possible to affirm conclusively that the Senate had, in these circumstances, "failed to pass" the bills. It might be argued that pressed requests refused by the House are analogous to amendments to a bill by the

Senate which are unacceptable to the House of Representatives and thus bring the proposed legislation within the ambit of section 57, but this argument was not advanced.

5. **It is not necessary for the Houses to be dissolved without delay once the conditions of section 57 have been met.** According to the High Court,

> This interpretation follows both from the language of s. 57, which provides for express time limits in relation to other parts of the procedure laid down by the section but provides for none in respect to the interval between the Senate's second rejection of a proposed law and the double dissolution...

Inter alia, the Court observed that "'undue delay' would be impossible of determination by the court". (*Western Australia v Commonwealth* 1975 7 ALR 159) In the case in question, Chief Justice Barwick (in minority) contended that "there is a temporal limitation which requires that the second rejection by the Senate and the double dissolution must be so related in time as to form part of the current disagreements between the Houses". However, the lapse of time in this instance, a maximum of seven and a half months, was not sufficient to disqualify them as grounds for simultaneous dissolutions. (*ibid*.)

6. **Not only is it not necessary for simultaneous dissolutions to follow a second rejection etc. by the Senate "without undue delay", it is not usual for account to be taken of the currency of legislation when it is submitted as a basis for simultaneous dissolutions.** Thus, in 1983, Governor-General Stephen simply noted that "in the case of each of these measures a considerable time has passed since they were rejected or not passed a second time in the Senate". (Governor-General to Prime Minister, 4 February 1983, PP 129/1984, p. 43)

7. **There is no limit to the number of proposed laws on which simultaneous dissolutions of the Houses may be based.** The first dissolutions based on more than one bill occurred in 1974 (subsequently in 1975 and 1983). In 1974 the Attorney-General (Senator Lionel Murphy, QC) and the Solicitor-General (M.H. Byers, QC) advised the Governor-General in a joint opinion that:

> The words of the paragraph [one of section 57], in our view, clearly indicate that the power to dissolve is exercisable when more than one proposed law has been dealt with in the required manner. ... Our view does not require nor involve that the words "any proposed law" are read as comprising a plural. We do not, of course, suggest that so to read them would be to depart from recognised canons of construction. What we have said above but treats the words of condition as operating successively and singularly upon each such law. (PP 257/1975, p. 30)

This view, when challenged, was upheld by the High Court: "... a joint sitting of both Houses of Parliament convened under s. 57 may deliberate and vote upon any number of proposed laws in respect of which the requirements of s. 57 have been fulfilled." (*Cormack v Cope* 1974 131 CLR 432). As Justice Stephen observed: "One instance of double rejection suffices but if there be more than one it merely means that there is a

multiplicity of grounds for a double dissolution, rather than grounds for a multiplicity of double dissolutions" (*ibid*., 469).

8. **The political or policy significance of legislation is not material to a decision to accede to a request that both Houses be simultaneously dissolved.** This issue arose in 1914. The Opposition in the Senate, which contested the Governor-General's decision to grant simultaneous dissolutions, protested that the proposed legislation, the Government Preference Prohibition Bill, was not a vital measure and that the deadlock had been contrived. That the deadlock was contrived in a narrow sense cannot be disputed for this is clearly set out in a memorandum furnished to the Governor-General by Prime Minister Joseph Cook which stated that when it became "abundantly clear" that the Opposition had taken control of the Senate, "we [the Government] decided that a further appeal to the people should be made by means of a double dissolution, and accordingly set about forcing through the two short measures for the purpose of fulfilling the terms of the Constitution". (PP 2/1914-17, p. 3)

   An address to the Governor-General carried by the Senate on motion of the Opposition Labor Party stated that the Senate's powers would be "reduced to a nullity" were it possible to secure a dissolution on legislation which contained "no vital principle" or gave "effect to no reform". (17/6/1914, J.86-8)

   It has been customary subsequently for prime ministers, when proposing simultaneous dissolutions, to stress the significance of the legislation involved. Thus, in 1951, Prime Minister Menzies referred to the Commonwealth Bank Bill and other proposed laws about which there was dispute between the Senate and the House as "major legislative measures"; in 1974, Prime Minister Whitlam informed the Governor-General that "the Senate has twice rejected, failed to pass or unacceptably amended several proposed laws which are integral parts of the Government's program of reform and development", and, later, "the six proposed laws are all of importance to the Government"; in 1983, Prime Minister Fraser based advice about simultaneous dissolutions on 13 proposed laws "of importance to the Government's budgetary, education and welfare policies ..."; four years later Prime Minister Hawke declared that the Australia Card Bill 1986 was "an integral part of the Government's tax reform package and is aimed at restoring fairness to the Australian taxation and social welfare systems". (See below for relevant documents.)

   Except in 1983 (up to a point), governors-general have refrained from comment about the significance of the legislation. In 1983, Governor-General Stephen wrote that on the basis of precedents he should inter alia "pay regard to the importance of the measures in question". In the event, however, he disclaimed ability so to do: "... 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". (PP 129/1984, pp 43-4)

9. **Even where the conditions for simultaneous dissolutions as prescribed in section 57 have been met, it is customary for advice to be provided to the Governor-General on the "workability of Parliament".** The issue of the workability of the Parliament was addressed in the granting of the 1914 simultaneous dissolutions. Prime Minister Cook claimed that the Liberal Government was hindered in the Senate but that the Opposition

Labor Party would not be able to "carry on for a single hour in the House of Representatives". The caucus practices of Labor made compromise impossible. Moreover, a dissolution of the House of Representatives alone would not necessarily resolve the situation: "... however large the Liberal majority in the House of Representatives might be as a result of an election, it would have the same Senate as at present". (PP 2/1914-17, p. 4)

In 1951, Prime Minister Menzies observed that in discussions about the 1914 simultaneous dissolution "... some importance appears to have been attached to the unworkable condition of the Parliament as a whole". He went on to state 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". (PP 6/1957, p. 12)

In 1974, Prime Minister Whitlam wrote that "the Senate has delayed and obstructed the program on the basis of which the Government was elected to office in December 1972". (PP 257/1975, p. 4) Nine years later, Prime Minister Fraser stated that he regarded "a double dissolution as critical to the workings of the government and of the Parliament ... some significant Government legislation was not passed by the Senate. There are measures that we have not even put to the Parliament because we know that they would not achieve passage through the Senate". (PP 129/1984, p. 5)

And in 1987 Prime Minister Hawke advised: "In summary, I regard the situation which has arisen in the Parliament as critical to the workings of the Government and the Parliament. The Senate has been spending large amounts of time debating matters of marginal significance, with the effect of reducing substantially the time available for proper consideration of essential government legislation. The imposition of artificial deadlines by the Senate on receipt of government bills for passage has exacerbated this problem. Just today the Senate has refused to reconsider the Government's legislation to extend television services to rural areas." (PP 331/1987, p. 2)

Argument about the workability of the Parliament is sometimes joined by argument about the importance of decisions to be made in the future. Prime Minister Cook said that "It has been apparent to all that the Federal Parliament will shortly be faced with the most serious financial difficulty which has yet come before it". (PP 2/1914-17, p. 1)

The 1983 advice included the following observation:

> It is of paramount importance in facing the difficult economic circumstances that lie ahead that the Government knows that it has the full confidence of the Australian people and that the Australian people have full confidence in its Government's ability to point the way towards recovery. I regard this as of such paramount importance that on this issue alone I believe that I am justified in asking Your Excellency to dissolve the Parliament and issue writs for a general election in both Houses. (PP 129/1984, p. 5)

Governor-General Munro-Ferguson, in 1914, responded simply that he had decided to accede to the Prime Minister's request "having considered the parliamentary situation". (PP 2/1914-17, p. 1)

Governor-General Hasluck refused to be drawn in 1974: as it was clear that the grounds for granting simultaneous dissolutions were provided by the parliamentary history of the six nominated bills, it was "not necessary for [him] to reach any judgment on the wider case [the Prime Minister had] presented that the policies of the Government have been obstructed by the Senate". He concluded: "It seems to me that this is a matter for judgment by the electors". (PP 257/1975, p. 38)

The simultaneous dissolutions of 1975, whilst not providing opportunity for advice in the usual manner, nevertheless disclosed the views of the Governor-General in authorising simultaneous dissolutions on that occasion. The election itself was brought on by the Prime Minister's inability to secure passage of appropriation legislation through the Senate. The Governor-General decided that "the appropriate means is a dissolution of the Parliament and an election for both Houses".

Governor-General Kerr, in his 'Detailed Statement of Decisions', specifically rejected use of a periodical election for the Senate (due by 30 June 1976) as a possible resolution of the deadlock because it would "not guarantee a prompt or sufficiently clear prospect of the deadlock being resolved in accordance with proper principles". (see *ASP*, 6th ed., p. 85) The treatment of this possibility in this instance is not dissimilar to that of Prime Minister Cook's review of possible solutions to the situation faced by his Government.

Governor-General Stephen adopted a different view in 1983. In considering the Prime Minister's advice he decided, on the basis of "such precedents as exist", that he should, inter alia, "pay regard ... to the workability of Parliament"; and it was on this "score" that he sought further advice from the Prime Minister. The Prime Minister's counsel was unambiguous: "Clearly, there is a need for the Government, in the critical period we face, to have decisive control over both Houses of Parliament". (PP 129/1984, p. 41)

10. The process of enacting legislation by joint sitting following simultaneous dissolutions may be the subject of review by the High Court to ensure compliance with the terms of section 57.

In 1974 legislation of the Whitlam Government creating a Petroleum and Minerals Authority was held by the High Court to be invalid on the ground that its enactment did not comply with the requirements of section 57. In particular, the Court held that the provision for an interval of three months between first rejection by the Senate and second passage by the House of Representatives had not been observed. In so deciding, the Court determined that the fact that the Senate had not passed the bill on 13 December 1973, the day on which it was received from the House of Representatives, did not constitute a failure to pass.

Among the findings of the Court on this matter were the following:

- The Court has jurisdiction to intervene at any stage in the special process provided by s. 57 to restrain excesses of constitutional authority, but it should not do so before a proposed law is passed by a joint sitting in any case where the

proposed law can be declared invalid if s. 57 has not been complied with. (*Cormack v Cope* 1974 131 CLR 432)

- The provisions of s. 57 are not concerned with internal parliamentary procedure but constitute conditions of law-making; the principle that courts may not examine the law-making process has no application where a legislature is established and governed by an instrument which prescribes that certain laws may only be passed in a particular way. (*Victoria v Commonwealth* 1975 7 ALR 1)

- The question of whether there was any failure to comply with the provisions of s. 57 is justiciable. *(Victoria v Commonwealth* 1975 7 ALR 1)

11. Amendments may be included in a bill on its second presentation. Section 57 allows a bill submitted to the Senate for a second time to include "any amendments which have been made, suggested, or agreed to by the Senate". This provision has not been subjected to judicial analysis, but see C.K. Comans, 'Constitution, section 57 — further questions', *Federal Law Review*, 15:3, September 1985, p. 243. For the question of amendments which may be submitted to a joint sitting, see below under Joint sittings of the Houses. If the Senate were to agree to amendments to a bill but reject it at the third reading, it may be doubted whether those amendments could be included in the bill on its second presentation (this question arose in relation to the New Tax System Bills in May 1999). For a bill resubmitted to the Senate after a three month interval with amendments made by the Senate, see the Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill 1995: the original bill, the ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994 was still in the possession of the Senate after the government had disagreed to some Senate amendments; see also SD, 21/3/1995, pp 1803-4, for an observation by a senator that a mistake had been made in incorporating one of the Senate's amendments, which probably prevented the bill validly providing a basis for a simultaneous dissolution, apart from the dubious character of the government's claim that the original bill had failed to pass within the meaning of section 57.

12. A disagreement between the Houses over amendments probably requires more than a single rejection of Senate amendments by the government to satisfy the requirements of section 57.

In *Victoria v Commonwealth* 1975 7 ALR 1, the Chief Justice made the following observation (at 16):

> The expression in s 57 is "passes with amendments with which the House of Representatives will not agree". Those words would not, in my opinion and with due respect to a contrary opinion attributed to Sir Kenneth Bailey, necessarily be satisfied by the amendments made in the first place by the Senate. At the least, the attitude of the House of Representatives to the amendments must be decided and, I would think, must be made known before the interval of three months could begin. But the House of Representatives, having indicated in messages to the Senate why it will not agree, may of course find that the Senate concurs in its view so expressed, or there may be some modification thereafter of the amendments made by the Senate which in due course may be acceptable to the House of Representatives. It cannot be said, in my opinion, that there are amendments to

> which the House of Representatives *will* not agree until the processes which parliamentary procedure provides have been explored.

Although the question was not decided by the Court, it is reasonable to conclude that there is not a disagreement over amendments within the terms of section 57 until the House has disagreed with Senate amendments and the Senate has had an opportunity, by the return of the bill to the Senate, to decide whether it insists on its amendments.

In 1997-98 the government claimed that the conditions of section 57 had been met in respect of the Native Title Amendment Bill 1997 by the government rejecting some Senate amendments in the House and immediately laying the bill aside without returning it to the Senate. This claim was disputed by advices provided to senators by the Clerk of the Senate. (The advices were tabled in the Senate: 1/4/1998, J.3541.) As the government did not proceed to simultaneous dissolutions on the basis of this bill, there was no opportunity for this question to be judicially answered. The view then taken seems to have been abandoned in the case of the Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No. 2], which made a further journey between the Houses after the Senate had already once insisted on its amendments (24/3/2003, J.1629).

For the "processes which parliamentary procedure provides" referred to by the Chief Justice, see Chapter 12, Legislation. See also H. Evans, 'Constitution, section 57', *Constitutional Law and Policy Review*, 1.2, August 1998.

On occasions the government in the Senate has voted against the third readings of its own bills, apparently to express disapproval or rejection of amendments made by the Senate to the bills (Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002, 21/8/2002, J.621; Workplace Relations Amendment (Genuine Bargaining) Bill 2002, 25/9/2002, J.822). If those bills had been rejected at the third reading, the government could not have claimed that there was a disagreement between the Houses over amendments, because the House of Representatives would not have considered the amendments. It would also be difficult to argue that the Senate had rejected or failed to pass the bills when the government had voted against them.

Simultaneous dissolutions of 1914

Following the 1913 general election for the House of Representatives and periodical election for the Senate, the new Liberal government under Joseph Cook had a narrow majority in the House (38-37) but was in a significant minority (29-7) in the Senate. These were the circumstances in which the first simultaneous dissolutions of the two Houses of the Commonwealth Parliament occurred the following year.

The occasion for the simultaneous dissolutions was the Government Preference Prohibition Bill. The bill was first passed by the House on 18 November 1913, only to be rejected in the Senate on the second reading on 11 December 1913; in the next session the proposed law was again passed by the House on 28 May 1914 and again rejected by the Senate on the first reading on 28 May 1914.

On 10 June 1914 the Prime Minister informed the House of Representatives that, subject to provision of funds for carrying on the public service during the election period, the Governor-General had granted a double dissolution on the basis of advice that the "Parliament was unworkable, that it was impossible to manage efficiently the public business... ." (HRD, pp 1970-1).

There was debate about the decision to dissolve on the ground that the measure in question was not a national or vital one. The Deputy Leader of the Opposition in the Senate, Senator G.F. Pearce of Western Australia, contended that a simultaneous dissolutions should only occur when the Senate, by its treatment of the financial measures of the Government, rendered government impossible. Pointing to the collocation of section 57, which follows immediately upon those sections of the Constitution dealing with the financial powers of the Houses, Pearce argued that the House of Representatives was specifically mentioned in section 57 because it is there that money bills must originate. (SD, 15/5/1914, pp 1009-23)

Quick and Garran claim that section 57 may apply to any bill (*Annotated Constitution of the Australian Commonwealth*, 1901, p. 685), but Pearce's argument found support in a speech to the Federal Convention by Edmund Barton, Leader of the Convention:

> "Deadlock" is not a term which is strictly applicable to any case except that in which the constitutional machine is prevented from properly working. I am in very grave doubt whether the term can be strictly applied to any case except the stoppage of legislative machinery arising out of conflict upon the finances of the country. A stoppage which arises on any matter of ordinary legislation, because the two Houses cannot come to an agreement at first, is not a thing which is properly designated by the term "deadlock" — because the working of the Constitution goes on — the constitutional machine proceeds notwithstanding a disagreement. It is only when the fuel of the machine of government is withheld that the machine of government comes to a stop, and that fuel is money. (Debates of the Convention, Sydney, 1897, p. 620)

Pearce's approach would likewise seem to be supported by the advice of Chief Justice Griffith to the Governor-General. According to Griffith, the power of dissolution should not be exercised simply because the conditions specified in section 57 exist:

> 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. (Quoted in L.F. Crisp, *Australian National Government*, 4th ed., 1978, pp 404-5)

Pearce also observed that the government had not made any attempt to resolve the deadlock by means of a conference between managers of the two Houses.

On 17 June 1914 the Senate agreed to an address to the Governor-General requesting that the correspondence which passed between the Governor-General and his advisers in regard to the double dissolution of the Parliament might be made public. The address stated, inter alia, that:

> The decision of Your Excellency appears to be fatal to the principles upon which the Senate has hitherto acted, which, we submit, are in strict accordance with a truly Federal interpretation of the Constitution. The Constitution deliberately created a House in which the States as such may be

> represented, and clothed this House with co-ordinate powers (save in the origination of Money Bills) with the Lower Chamber of the Legislature. These powers were given to the Senate in order that they might be used; but if a Senate may not reject or even amend any bill because a Government chooses to call it a "test" bill, although such bill contains no vital principle or gives effect to no reform, the powers of the Senate are reduced to a nullity. We submit that no constitutional sanction can be found for that view, which is repugnant to one of the fundamental bases of the Constitution, viz, a Legislature of two Houses, clothed with equal powers, one representing the people as such, the other representing the States. And we respectfully submit that the dissolution of the Senate ought not to follow upon a mere legitimate exercise of its functions under the Constitution, but only upon such action as makes responsible government impossible, e.g. the rejection of a measure embodying a principle of vital importance necessary in the public interest, creating an actual legislative deadlock and preventing legislation upon which the Ministry was returned to power. These conditions do not exist in the present case. (J.86-8)

The Address also stated that there was not a deadlock between the Houses, referring to the following statement:

SESSION 1913

Bills passed and assented to	23
Bills passed by Senate only	6
Bills passed by Senate without amendment	18
Bills passed by Senate with amendments	5
Amendments disagreed with (Bills laid aside by House of Representatives)	3*
Bills rejected by Senate	2

* Including Committee of Public Accounts Bill No. 1

The Governor-General declined to respond to the Senate's request. He stated, however, that the grounds for the decision were to be found in the Prime Minister's statement, made with his permission, to the House of Representatives.

The Parliament was dissolved on 30 July 1914. At the election on 5 September 1914, the Labor Party led by Andrew Fisher won 42 seats in the House of Representatives against 32 by the Liberal Party, with one Independent; the result in the Senate was: Labor, 31; Liberal, 5.

The correspondence relating to the dissolutions was tabled in both Houses on 8 October 1914 (PP 2/1914-17).

Simultaneous dissolutions of 1951

The general election for the House of Representatives and the periodical election for the Senate held on 10 December 1949 were notable in that they were the first to be held following enlargement of the Parliament in 1948 for the first time since the formation of the Commonwealth, and since adoption of the proportional/preferential method of electing the Senate. The election brought the Menzies Liberal-Country Party Government to office with a majority in the House (74-48, with one independent) but, partly as a result of the as yet uncompleted transition from the old method of election, in a minority in the Senate (34-26).

Soon after the Parliament assembled in 1950 it became obvious that there would be serious disagreements between the Houses. These were ultimately resolved at a double dissolution election on 28 April 1951 based on the Commonwealth Bank Bill. While the Government's House majority was slightly reduced (69-54), the Senate position was reversed and it now had a majority of 4 (32-28).

The proposed legislation which formed the basis of the double dissolution was the Commonwealth Bank Bill.

In initial consideration of the proposed legislation, the bill was read a third time in the House of Representatives on 4 May 1950 and received by the Senate on 10 May 1950. After amendment, it was read a third time by the Senate on 21 June 1950. The next day the House disagreed with the amendments of the Senate; the Senate insisted on the amendments which were again rejected by the House on 23 June 1950. The Senate reaffirmed its insistence on the amendments on 10 October. The bill was returned to the House which ordered that the Senate's message be taken into consideration at the next sitting. The matter was, however, put on the bottom of the House notice paper and was still there when Parliament adjourned on 8 December 1950.

Meanwhile, on 4 October 1950, an identical bill, the Commonwealth Bank Bill (No. 2) was introduced in the House of Representatives, was read a third time a week later, and was received by the Senate on 12 October 1950.

The battle over the bill resumed the following year when, on Monday evening 12 March 1951, the Leader of the Government in the Senate, Senator O'Sullivan, ordered a reprint of the Senate notice paper in order to bring the Commonwealth Bank Bill (No. 2) to the top of the business paper. When the Senate met on 13 March 1951 it proceeded with consideration of the bill.

The same evening, in the House of Representatives, the Prime Minister challenged the Labor majority in the Senate to reject the measure.

However, following the second reading of the bill late that night, the Leader of the Opposition in the Senate, Senator Ashley, successfully moved that the bill be referred to a select committee. The resolution provided that the select committee should report in four weeks. (This course of action had been foreshadowed in Senator Ashley's second reading speech.)

On the basis of advice submitted on Friday 16 March by the Prime Minister, the Governor-General dissolved both Houses on 19 March. In the Proclamation the Governor-General determined that the Senate had "failed to pass" the Commonwealth Bank Bill after it had, on the first occasion, been unacceptably amended.

In addition to the Commonwealth Bank Bill, there was disagreement between the Houses about other legislation. At the time of the winter adjournment the House of Representatives had laid aside the Communist Party Dissolution Bill on the basis that amendments made in the Senate were not acceptable. The bill was again passed by the House. When it reached the Senate, the Government Leader (O'Sullivan) moved unsuccessfully "That the bill be declared an Urgent Bill." Also unsuccessful was a government attempt to suspend Standing Orders so as to eliminate formal delays in the passage of the legislation. For their part, the Opposition brought on its own

bill, the Constitution Alteration (Prices) Bill. It was resolved that this bill should have precedence so long as it remained on the notice paper.

Eventually, following a decision by the National Executive of the Labor Party, it was decided that the Party should not oppose the Communist Party Dissolution Bill in the form submitted to the Senate. The bill was brought forward on 17 October and passed all remaining stages the next day. The legislation was declared invalid by the High Court on 9 March 1951.

Another bill, the Government's Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill, was referred to a select committee of the Senate for report.

In the new year, the Labor caucus resolved on 7 March 1951, the day following its introduction, to block government legislation amending the Conciliation and Arbitration Act to provide for secret ballots for the election of union officials.

Other bills which had failed to pass but did not meet the requirements of section 57 were the Social Services Consolidation Bill and the National Service Bill. The latter bill had been referred to a select committee which trenchantly criticised the government for the action of the cabinet in causing a direction to be issued to the Chiefs of Staff and certain other officials not to attend before the committee.

The 1951 double dissolution did not involve rejection of proposed legislation and accordingly gave rise to discussion of the meaning of "fails to pass." In handling the Commonwealth Bank Bill (No. 2), Prime Minister Menzies stated in advice to the Governor-General that:

> ... 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 it, 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. (PP 6/1957, pp 10-11)

The Prime Minister then outlined decisions of the Senate, made against the vote of the government, which provided "evidentiary value as an indication of the real intentions of the Senate."

The Prime Minister further observed that when the bill came before the Senate for the second time, the Senate might have given the bill a second reading and immediately referred it to a select committee. Instead, there was another second reading debate "precisely similar" to that which had occurred months before.

The Prime Minister's advice to the Governor-General concluded:

> There is no room for doubt that ever since the bill went to the Senate for a second time on October 12th, 1950, no new issues have arisen in relation to it. It is a relatively short bill. Its contentious provisions are clear, have been canvassed in both Houses of Parliament at great length, and have been the subject, as I have shown, of a long series of votes. The appointment of a Select Committee at this extremely late hour is conclusive evidence of an intention to delay the bill, and clearly constitutes a failure to pass it. (*ibid*., p. 12)

The Prime Minister, referring back to the double dissolution of 1914, observed that "some importance appears to have been attached to the unworkable condition of the Parliament as a whole."

The Attorney-General, Senator Spicer, informed the Prime Minister in advice later put before the Governor-General:

> 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. (*ibid*., pp 16-17)

Professor K.H. Bailey, the Solicitor-General, stated that:

> 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.
> (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. (*ibid*., pp 18-22)

The double dissolution was criticised on two grounds. Dr H.V. Evatt, MP, Deputy Leader of the Opposition in the House of Representatives and a former Justice of the High Court, claimed that the requirements of section 57 had not been met:

> That section stated that there should be an interval of at least three months between the end of the first dispute between the House of Representatives and the Senate and the beginning of the second dispute on the same issue before a double dissolution could be sought on the ground that the legislation had been twice rejected or unacceptably amended. (*Sydney Morning Herald*, 30/10/1950)

The second objection was that reference of the bill to a select committee did not constitute failure to pass, such reference being clearly provided for in the standing orders of the Senate and being a legitimate and proper function of the Senate in the consideration of bills.

On 17 October 1951 Senator McKenna, Leader of the Opposition in the Senate, moved that government papers relating to the double dissolution be tabled. In his speech Senator McKenna said that production of the documents would do a great deal to clarify certain constitutional issues involved: Whether the period of three months which must elapse before the same bill is again presented commences from the beginning of the dispute between the two Houses, or from the end of the first dispute between the two Houses; in what circumstances apart from outright rejection of a measure, or the making of amendments to it which are unacceptable to the House of Representatives, can the Senate be deemed to have failed to pass it; has the Governor-General, under section 57, an absolute discretion either to grant or to refuse a request for a double dissolution, or is he bound to act upon the advice tendered to him by the Ministers of the Crown; and whether the government based any portion of its case upon the general conduct of the Senate apart altogether from the Commonwealth Bank Bill.

The Prime Minister, whilst agreeing to table the documents at "a proper time", told the House of Representatives that he did not propose to do so "at a time when they would give rise to discussions in which the present occupant of the position of Governor-General would be involved." The documents were tabled on 24 May 1956 (PP 6/1957).

In a foreword, the Prime Minister offered views which coincide with those of Chief Justice Griffith in his advice to the Governor-General concerning the 1914 double dissolution:

> 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. (*ibid*., p.4)

Simultaneous dissolutions of 1974

On 11 April 1974 Governor-General Hasluck simultaneously dissolved the Senate and the House of Representatives, acting upon advice of Prime Minister Whitlam.

This occasion was unusual in several respects. In the first instance, the Prime Minister's advice did not immediately stem from disagreement over legislation but from the decision of the Opposition (Liberal and Country) parties, supported by the Democratic Labor Party in the Senate, to refuse passage of the second reading of appropriation legislation until the government agreed "to submit itself to the judgment of the people" at the same time as the forthcoming periodical election for the Senate which had been set down for 18 May 1974. The specific background to this decision of the Opposition parties was the announcement that Senator Vincent Gair, a former Premier of Queensland and a former Leader of the Democratic Labor Party in the Senate, had accepted an appointment as Australian Ambassador to Ireland.

As Gair's term did not expire until 30 June 1977, his appointment was seen as creating a sixth vacancy in Queensland: there was speculation that the additional vacancy would improve the government's chances of winning a third seat in Queensland and thus improve its chances of securing a majority in the Senate.

Second, while the simultaneous dissolutions of 1914 and 1951 had been granted on the basis of a single bill only, that of 1974 was granted on the basis of six bills believed to meet the terms of section 57 of the Constitution. Subsequently, and again for the first time, one of the bills (following enactment) was challenged in the High Court. The court declared the legislation invalid because the terms of section 57 had not been met.

Finally, the simultaneous elections for the two Houses did not resolve the disagreement and a joint sitting was thus required to consider and enact the legislation upon which the election had been based.

The 1974 general elections for both Houses were the climax of disagreements between the two following the general election of 1972. At that election the ALP secured a majority in the House by winning 68 seats to 58 won by the Opposition parties. It thus formed a government for the first time in 23 years. The party position in the Senate, however, remained as it had been since 1 July 1971: ALP, 26; Liberal, 21; Country Party, 5; Democratic Labor Party, 5; Independents, 3.

From the commencement of the Parliament it was clear that the Senate would continue to be a forum of vigorous scrutiny of the government as it had been especially in the previous half decade. Indeed, in the debate on the Address-in-Reply, Senate Opposition Leader, Senator Withers, reminded the Senate that it had been deliberately created by the founding fathers to act as a check and a balance and that it might well be called upon to protect the national interest by exercising its undoubted constitutional rights and powers.

In considering the background to the simultaneous dissolutions of 1974 it is sensible to distinguish those aspects which relate directly to legislation, and thus potentially fall within the scope of section 57, and other, general proceedings of the Parliament including scrutiny of regulations, statutory rules and the like.

Four bills were postponed. Two, relating to seas and submerged lands, were initially postponed in order to allow the states to consult each other or to make representations to the Commonwealth Government. In postponing consideration of the legislation it was explained that such a course was consistent with the Senate's role as a states assembly and that the step was taken in the knowledge that all six state premiers (3 ALP; 2 Liberal; 1 Country Party) were opposed.

The government, however, reintroduced the bills in the House instead of bringing on the bills on the Senate notice paper for debate.

The second Seas and Submerged Lands Bill was eventually amended on the ground that the proposed mining code vested too much power in the minister; the second Seas and Submerged Lands (Royalty on Minerals) Bill was rejected as having no relevance following rejection of the mining code.

The Compensation (Commonwealth Employees) Bill 1973 was postponed, inter alia, to await a report on national rehabilitation and compensation from a committee chaired by Mr Justice Woodhouse. Consideration was resumed in committee of the whole on 11 December 1973; on motion by an Opposition senator, progress was reported and further consideration deferred until the first sitting day of the Senate after 21 February 1974.

The Constitution Alteration (Inter-change of Powers) Bill 1973 was deferred until after its proposals had been considered by all state governments and by the Australian Constitutional Convention.

Three bills were referred to committees: the Constitution Alteration (Simultaneous Elections) Bill 1973 to the Standing Committee on Constitutional and Legal Affairs (a move deemed by the government to be a failure to pass); the Australian Industry Development Corporation Bill 1973 and the National Investment Fund Bill 1973 to a Select Committee on Foreign Ownership and Control.

The following legislation was amended and the amendments were accepted by the House of Representatives:

- Pipeline Authority Bill 1973
- Cities Commission Bill 1973
- Australian National Airlines Bill 1973
- Australian Citizenship Bill 1973
- States Grants (Advanced Education) Bill 1973
- States Grants (Universities) Bill 1973
- Australian Capital Territory (House of Representatives) Bill 1973

- Schools Commission Bill 1973
- States Grants (Schools) Bill 1973.

The House did not, however, accept Senate amendments to the Constitution Alteration (Mode of Altering the Constitution) Bill 1973. A second bill, amended in similar manner, was laid aside at the third reading because it did not pass the Senate by an absolute majority as required by the Constitution.

The following bills were rejected by the Senate:

- Commonwealth Electoral Bill (No. 2) 1973: second reading negatived on 17 May 1973; after an interval of three months, bill again passed by House of Representatives; second reading negatived in Senate on 29 August 1973.

- Conciliation and Arbitration Bill 1973: second reading negatived on 6 June 1973. (A second bill passed by House but not in same terms, certain contentious provisions being eliminated or amended. Thirty amendments made to the second bill, all of which were accepted by the House.)

- Senate (Representation of Territories) Bill 1973: Second reading negatived on 7 June 1973; after interval of three months, bill again passed by the House; second reading negatived by Senate on 14 November 1973.

- Representation Bill 1973: Second reading negatived on 7 June 1973; after interval of three months, bill again passed by House (27 September 1973) but second reading negatived by Senate (14 November 1973).

- Constitution Alteration (Democratic Elections) Bill: second reading negatived (4 December 1973).

- Constitution Alteration (Local Government Bodies) Bill: second reading negatived (4 December 1973).

- Health Insurance Commission Bill 1973: second reading negatived (13 December 1973). In addition, the second reading of the Health Insurance Bill 1973 was rejected by way of amendment (12 December 1973).

- Petroleum and Minerals Authority Bill 1973: received from House of Representatives on 13 December 1973; debate adjourned until first sitting day in February 1974; restored to notice paper following prorogation on 12 March 1974; second reading negatived on 2 April 1974.

By the time that the Opposition declared its intention to block appropriation legislation on 4 April 1974, three bills, the Commonwealth Electoral Bill (No. 2) 1973; Senate (Representation of Territories) Bill 1973; and Representation Bill 1973, provided the basis for a simultaneous dissolution. In the period leading up to the Proclamation dissolving the Parliament on 11 April 1974, the government reintroduced, and the Senate negatived, the two Health Insurance Bills and

the Petroleum and Minerals Authority Bill (although the latter was negatived for the first time in the Senate on 2 April 1974, the government appeared to argue that the three months period commenced on 12 December 1973 when the House of Representatives first passed the bill, an argument subsequently rejected by the High Court).

The government's proposals for amending the Constitution were also rejected by the Senate. Such legislation, however, is governed by special procedures set down in section 128 of the Constitution rather than by the provisions of section 57. Under the second paragraph of section 128, legislation proposing a referendum, if passed by either House by an absolute majority, and is, in the same form, passed again by an absolute majority after an interval of three months, may be submitted to the electors even if the other house rejects or fails to pass it, or passes it with any amendment to which the first-mentioned house will not agree. Accordingly, the Senate's concurrence was not necessarily required in order to hold a referendum to amend the Constitution.

It was, however, not only in legislation that the government experienced vigorous second chamber scrutiny. Scrutiny manifested itself with particular force in four matters during 1973.

On 7 March 1973 the Opposition successfully moved disallowance of a determination of the Public Service Arbitrator increasing annual leave of public servants from three to four weeks but in effect confining eligibility to members of the staff associations which made application to the Arbitrator. The determination was disallowed on the basis that public servants should not be compelled to join a union in order to enjoy a benefit which it was considered should be in the nature of a common rule. It was also considered that as the Public Service Act made explicit provision for three weeks annual leave, the appropriate method for introducing an entitlement of four weeks was by way of amending the legislation. The Public Service Act was subsequently amended for this purpose. The Senate later (29 March 1973) disallowed the Matrimonial Causes Rules. Opposition to these rules included argument that, while the Senate was not opposed to divorce reform, the rules were not consistent with the Act and were of a nature that should be implemented by legislation, not by executive regulations.

Terrorist activity in Australia was another issue. The Senate considered that a board of inquiry consisting of three High Court or Supreme Court justices should be established by the government to inquire into terrorist activity in Australia and the actions of the Attorney-General in entering the Canberra and Melbourne offices of the Australian Security Intelligence Organisation, accompanied by Commonwealth police officers. The Senate's opinion was expressed in a resolution which was agreed to on 12 April 1973 (J.124-5).

The government, however, declined to appoint the proposed board of inquiry. The Senate responded by proposing (on the motion of the Democratic Labor Party) that a select committee be appointed on civil rights of migrant Australians, including the circumstances surrounding and relevant to the Attorney-General's actions in relation to ASIO. This motion was negatived on 10 May 1973, when the government cancelled pairs, the government contending that "all pairs are off" if there is anything which amounts to a vote of confidence, and the proposed inquiry, it was argued, involved that question in relation to the Attorney-General. It was further argued that the non-government parties had broken convention by not providing that the proposed committee

should have a chair from the government side and also a majority of government votes even if (as was the case) the government were in a minority on the floor of the Senate.

The breaking of pairs which led to the defeat of the select committee motion caused considerable bitterness and the Leader of the Opposition (Senator Withers) announced that, at the next sitting, he would give notice for the rescission of the vote negativing the appointment of the select committee. This was done and, on 17 May 1973, the Senate reversed the vote of 10 May and a Select Committee on Civil Rights of Migrant Australians was appointed, consisting of seven senators, three to be nominated by the Leader of the Government in the Senate and four other senators, one to be nominated by the Leader of the Opposition in the Senate, one to be nominated by the Leader of the Democratic Labor Party, one to be nominated by the Leader of the Australian Country Party in the Senate and one Independent senator to be nominated by the independent senators.

There was speculation in the press as to whether the government would nominate members to the committee. In the event, government senators served on the committee. (The committee had not reported when both Houses were dissolved on 11 April 1974 and the committee was not re-appointed in the new Parliament.)

Added to these non-legislative disputes was the matter of the Address-in-Reply. To the usual motion for the adoption of a formal Address-in-Reply, the Leader of the Opposition (Senator Withers) moved an amendment criticising the government's economic, defence and foreign policies. There was precedent in 1914 for an amendment critical of government policies but, as in 1914, the government in 1973 believed there were other forms of the Senate to propose such matters and, as the session proceeded, the Address-in-Reply debate was put aside for consideration of the legislative program. The Address-in-Reply, as amended, was eventually agreed to on 30 August 1973, and presented on 19 September, but no government senator attended Government House for the presentation of the address.

On 10 April 1974 the Prime Minister advised a simultaneous dissolution based on six bills:

> Commonwealth Electoral Bill (No. 2) 1973;
> Senate (Representation of Territories) Bill 1973;
> Representation Bill 1973;
> Health Insurance Commission Bill 1973;
> Health Insurance Bill 1973;
> Petroleum and Minerals Authority Bill 1973.

He claimed that each proposed law was of "importance to the Government". He also drew attention to other legislation which, he asserted, had "in one way or another been the subject of unreasonable obstruction in the Senate". The Prime Minister referred also to legislation proposing amendments to the Constitution, and to Opposition action concerning Appropriation bills.

Prime Minister Whitlam also made reference to previous simultaneous dissolutions. That of 1914, he wrote, had been granted partly on the basis that a dissolution of the House alone "might

well not resolve the political situation, and that a situation under section 57 of the Constitution being in existence, a dissolution of both Houses should be ordered".

With reference to the simultaneous dissolution in 1951, the Prime Minister observed that Prime Minister Menzies had drawn attention to "difficulties" relating to other legislation and "that this indicated a continuing conflict between the two Houses".

He concluded: "It is the Government's view that the present circumstances are analogous to those in which the earlier dissolutions were granted ...".

The Governor-General's reply was, however, confined to the matter as it related to section 57. He wrote to the Prime Minister: "As it is clear to me that grounds for granting a double dissolution are provided by the Parliamentary history of the six bills ..., 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".

The Prime Minister's advice included, as an attachment, an opinion of the Attorney-General and the Solicitor-General on application of section 57 to more that one proposed law. Their view was "that section 57 of the Constitution is applicable to more than one law at each of the stages it refers to". The Attorney-General also furnished detailed advice on the application to each proposed law of section 57.

In responding to the Prime Minister the Governor-General stated that, in agreeing to the advice tendered on simultaneous dissolutions, he had "accepted the learned Opinion of the Attorney-General on the requirements for the exercise of the Governor-General's power under section 57 and the Joint Opinion of the Attorney-General and the Solicitor-General on the question whether section 57 is applicable to more than one proposed law".

Having regard to the provisions of section 128, the Prime Minister recommended and the Governor-General agreed that four questions seeking amendment of the Constitution would be submitted to the people although the relevant legislation had not passed the Senate. The questions concerned simultaneous elections, the mode of altering the Constitution, democratic elections and local government bodies. None was endorsed by a majority of the voters and in only one state, New South Wales, were the proposals supported by a majority.

The documents relating to the dissolutions were tabled on 30 October 1975 (PP 257/1975).

Simultaneous dissolutions of 1975

The simultaneous elections for both Houses on 18 May 1974 did not resolve the political situation which led to its calling. The government retained a majority in the House of Representatives, albeit reduced (66-61). The party situation in the Senate was ALP, 29; Liberal, 23; National Country Party, 6; Liberal Movement, 1; and Independent, 1. During the course of the Parliament the government's position was further weakened by the resignation, in February 1975, of the Attorney-General, Senator Murphy (New South Wales), who was replaced by an independent, Senator Cleaver Bunton, and the death of Senator Milliner (Queensland) on 30 June

1975. Senator Milliner was replaced by Senator Albert Field, also an independent, whose eligibility to sit was immediately challenged. (The decision of the two state governments not to appoint nominees of the parties of the senators whose resignation or death had caused the casual vacancy was unprecedented in the period since introduction of proportional representation in 1948. The method of filling casual vacancies was the subject of successful amendment of the Constitution in 1977.)

After the new Parliament opened, the first business centred upon the six bills which had formed the grounds for the simultaneous dissolution. These bills again failed to pass the Senate. A joint sitting of the two Houses was convened in the House of Representatives chamber in the provisional Parliament House on 6-7 August 1974. Numbers favoured the government in the Joint Sitting (95-92) and the six bills were enacted, although the *Petroleum and Minerals Authority Act 1974* was later declared to be invalid by the High Court on the basis that its passage did not conform to the requirements of section 57.

The parliamentary crisis, however, deepened in the course of the Parliament. From the start the government laid grounds for a possible simultaneous dissolution of the Parliament, including in the event that appropriation legislation did not pass the Senate. By the end of 1974 there were three bills (Health Insurance Levy Assessment Bill 1974; Health Insurance Levy Bill 1974; and Income Tax (International Agreements) Bill 1974) meeting the stipulations of section 57. By the time that the Houses were dissolved on 11 November 1975, the total was 21.

During 1975 the political climate was influenced by the decision to appoint Senator Murphy to the High Court and his replacement by an independent senator on the ground, in the words of then Liberal Premier of New South Wales, Tom Lewis, that it was a "contrived vacancy"; the circumstances of Speaker Cope's resignation on 27 February 1975; controversies concerning overseas loans, including special sittings of both Houses in July; the result of the Bass by-election occasioned by the resignation of Defence Minister Lance Barnard on appointment as Australian Ambassador to Denmark; selection of independent Senator A. Field by the Queensland Parliament to fill the casual vacancy caused by the death of Senator Milliner (ALP, Qld); and the dismissals of the Deputy Prime Minister (Dr J.F. Cairns) and the Minister for Minerals and Energy (Mr R.F.X. Connor).

In March 1975 Mr Malcolm Fraser replaced Mr B.M. Snedden as Leader of the Opposition in the House of Representatives. In a press conference at the time he said that governments should run a full term except in the event of unforeseen and reprehensible circumstances. The Opposition in the Senate remained active in examination of legislation and the list of rejected and twice rejected bills continued to increase. As the time for consideration of the appropriation legislation arising from the 1975 Budget grew closer there seemed little doubt that the Prime Minister would not be as acquiescent to the blocking of funds by the Senate as he had been in April 1974.

There was, at the same time, speculation that the government would seek to restore its parliamentary position by a periodical election for half the Senate, to be held before 30 June 1976. Some calculations indicated that the government might, without delay, be able to add sufficiently to its numbers in the Senate, expanded to 64 by the High Court's decision to uphold the validity of the Senate (Representation of Territories) Act, to win control at least where

Budget legislation was concerned. This speculation hinged on Labor candidates successfully filling the vacancies created by Senator Murphy's resignation and Senator Milliner's death, success for former Prime Minister John Gorton in the ACT contest (combined with that of the ALP candidate), and an affirmative vote from Senator Steele Hall, Liberal Movement, South Australia. This strategy depended, inter alia, on the agreement of state governors to issue the necessary writs.

On 15 October 1975 the Opposition announced that its members in the Senate would vote against the Loan Bill 1975, Appropriation Bill (No. 1) 1975-76, and Appropriation Bill (No. 2) 1975-76. The motion for the second reading of these bills would be amended to the effect that the legislation "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 ...".

The Prime Minister responded the following day with a detailed resolution in the House of Representatives in which the claim was made that "the Constitution and the conventions of the Constitution vest in [the House of Representatives] 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 Parliament in relation to the appropriation of moneys".

The reference in the resolution to the House of Representatives' control of the supply of money is true only to the degree that initiative in money matters is vested in that House; the Senate has constitutional power to defer or reject all bills. Any contention that there is a convention that the Senate should not defer or reject money bills is insupportable:

(1) When the executive government first sought funds in 1901, the Senate deferred the passing of supply until the government acknowledged that the provision of supply was a joint grant of the two Houses.

    The Senate followed up in 1904 by resolving that an Address be presented to the Governor-General praying His Excellency that, on all occasions when opening or proroguing Parliament, due recognition should be made of the constitutional fact that the providing of revenue and the grant of supply is the joint act of the Senate and the House of Representatives, and not of the House of Representatives alone.

(2) In 1974 the Opposition in the Senate moved to defer the appropriation bills until the government agreed to submit itself to the judgment of the people. The then Leader of the Government in the Senate (Senator Murphy) moved the closure to the Opposition's motion, declaring that if the closure motion were defeated, the government would treat that as a denial of supply and that the Prime Minister would then tender certain advice to the Governor-General. The closure motion was defeated and Parliament was dissolved the next day, 11 April 1974.

(3) See also appendix 6 listing money bills in respect of which the Senate has not only made requests for amendments but has pressed its requests until complied with by the House of Representatives.

(4) Tax bills which passed the House of Representatives but were rejected by the Senate include the Entertainments Tax Bill 1920, Lessee Tax Bill (No. 2) 1924 and Income Tax Bill 1965.

(5) Precedents in the Australian states for upper houses denying supply to a government include: 1878 Victoria; 1912 South Australia; 1947 Victoria; 1948 Tasmania; 1952 Victoria.

Furthermore, on 18 June 1970 (SD, p. 2647) the then Leader of the Opposition in the Senate (Senator Lionel Murphy, QC, Australian Labor Party) said:

> The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money bill or other financial measure whenever necessary to carry out our principles and policies. The Opposition has done this over the years, and, in order to illustrate the tradition which has been established, with the concurrence of honourable senators I shall incorporate in Hansard at the end of my speech a list of the measures of an economic or financial nature, including taxation and appropriation bills, which have been opposed by this Opposition in whole or in part by a vote in the Senate since 1950.

Addressing himself to the Appropriation Bill (No. 1) 1970-71, the then Leader of the Opposition in the House of Representatives, Mr E.G. Whitlam, QC, said on 25 August 1970:

> Let me make it clear at the outset that our opposition to the Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it. (HRD, p. 463.)

As foreshadowed by Mr Whitlam, the Australian Labor Party in the Senate voted against the third reading of Appropriation Bill (No. 1) 1970-71 and also against the third reading of the Appropriation Bill (No. 2) 1970-71; the voting on the first bill was 25 Ayes and 23 Noes and on the second bill 24 Ayes and 23 Noes.

On 1 October 1970, Mr Whitlam, speaking in the House of Representatives with reference to the receipts duties legislation, said:

> We all know that in British parliaments the tradition is that, if a money bill is defeated, as the receipts duties legislation was defeated last June [by the Senate], the government goes to the people to seek their endorsement of its policies. (HRD, pp 1971-2.)

In the above-mentioned statements, Mr Whitlam was referring to the rejection of a money bill. On 21 October 1975 (pp 2301-2), Mr Whitlam drew attention to the fact that the Senate had deferred, not rejected, the appropriation bills 1975-76. Because the Senate had not rejected the appropriation bills, they were still before the Senate and it was open to the Senate to pass the bills.

The next parliamentary development was on 21 October 1975 when the House of Representatives resolved to send a message to the Senate asserting that the action of the Senate

in delaying the passage of the appropriation bills was not contemplated within the terms of the Constitution and was contrary to established constitutional convention, and requesting the Senate to reconsider and pass the bills without delay. The Leader of the Government in the Senate (Senator Wriedt), in response, proposed a motion for the restoration of the appropriation bills to the notice paper. The next day, however, the Opposition successfully moved an amendment declaring that there was no convention and never had been any convention that the Senate should not exercise its constitutional powers. The Senate affirmed that it had the constitutional right to act as it had and, now that there was a disagreement between the Houses of Parliament and a position might arise where the normal operations of government could not continue, a remedy was available to the government under section 57 of the Constitution to resolve the deadlock. In the debate, government and Opposition again declared their determination not to back down.

On 23 October 1975 the Senate considered two further appropriation bills sent to it by the House of Representatives. These bills were identical in every respect to Appropriation Bill (No. 1) 1975-76 and Appropriation Bill (No. 2) 1975-76, consideration of which had been deferred by the Senate on 16 October 1975 until the government agreed to submit itself to the judgment of the people. The second bills met the same fate as the first bills, being deferred until the government agreed to an election. Thus the deadlock continued, the Senate contending that the remedy was available to the government under section 57 of the Constitution (the simultaneous dissolutions provision) and the Prime Minister adamant that while he commanded a majority in the House of Representatives there would be no election for that House at the behest of the Senate.

Over the following weeks the government and Opposition engaged in various stratagems but the crisis remained unresolved:

- 27 October 1975: Mr Khemlani, a central figure in the overseas loan raising controversies, returned to Australia. Neither the government nor Opposition responded to his proposal for a Senate hearing.

- 29 October 1975: the Opposition in the Senate gave notice of motion for appointment of a select committee to inquire into aspects of the overseas loan raising activities of the government, but the motion was not proceeded with.

- 30 October 1975: the Governor-General spoke to the Prime Minister and the Leader of the Opposition in the House of Representatives. Following the talks, both leaders reaffirmed their determination not to give in and the deadlock remained.

- The Leader of the Opposition in the House suggested a compromise — passage of the Budget bills in return for an undertaking to hold a general election for the House and a periodical election for the Senate before 1 July 1976. The compromise was rejected.

- 5 November 1975: a government motion to restore the appropriation bills to the Senate notice paper was negatived. Further, identical appropriation bills were sent by the House. Although the bills were declared to be urgent bills, the Opposition again successfully moved that the bills be not further proceeded with until the government had submitted itself to the people.

- 5 November 1975: Loan Bill 1975 again blocked.

- 11 November 1975: the Prime Minister and the Leader of the Opposition met at 9 am. They did not reach agreement. When the House met at 11.45 am the Opposition moved to censure the government; the government countered with a resolution censuring the Leader of the Opposition.

During the luncheon adjournment the Governor-General dismissed the Prime Minister and commissioned the Leader of the Opposition to form a caretaker government which was able "to secure supply and willing to let the issue go to the people".

The Governor-General issued a statement on his decisions of 11 November 1975. He wrote that it was necessary for him "to find a democratic and constitutional solution to the current crisis which will permit the people of Australia to decide as soon as possible what should be the outcome of the deadlock which developed over supply between the two Houses of Parliament and between the Government and the Opposition parties".

He stated that "the Senate undoubtedly has constitutional power to refuse or defer supply to the Government. Because of the principles of responsible government a Prime Minister who cannot obtain supply, including money for carrying on the ordinary services of government, must either advise a general election or resign".

The Governor-General drew a distinction between the Commonwealth Parliament and that of the United Kingdom, pointing out that under the Constitution of Australia "the confidence of both Houses on supply is necessary to ensure its provision".

In a detailed statement of reasons the Governor-General stated that he had come to the conclusion that there was "no likelihood of a compromise". He considered that "When ... an Upper House possesses the power to reject a money bill including an appropriation bill, and exercises the power by denying supply, the principle that a government which has been denied supply by the Parliament should resign or go to an election must still apply — it is a necessary consequence of Parliamentary control of appropriation and expenditure and of the expectation that the ordinary and necessary services of Government will continue to be provided".

Of the Senate, the Governor-General wrote: "It was denied power to originate or amend appropriation bills but was left with power to reject them or defer consideration of them. The Senate accordingly has the power and has exercised the power to refuse to grant supply to the Government".

He specifically observed that he would have rejected advice for a periodical election of senators because such an election "held whilst supply continues to be denied does not guarantee a prompt or sufficiently clear prospect of the deadlock being resolved in accordance with proper principles".

Chief Justice Barwick in a letter of 10 November 1975 to the Governor-General, pointed to the Senate's position in the parliamentary framework specified by the Constitution: "The Parliament

consists of two houses, the House of Representatives and the Senate, each popularly elected, and each with the same legislative power, with the one exception that the Senate may not originate nor amend a money bill". And again: "... the Senate has constitutional power to refuse to pass a money bill; it has power to refuse supply to the Government of the day. Secondly, a Prime Minister who cannot ensure supply to the Crown, including funds for carrying on the ordinary services of Government, must either advise a general election (of a kind which the constitutional situation may then allow) or resign".

In the House of Representatives, Malcolm Fraser, now Prime Minister, announced that he had accepted the Governor-General's commission and that he would seek to secure passage of appropriation legislation then before the Senate. He also stated that all bills in a double dissolution position would be put forward as the basis for the dissolution.

While these proceedings were continuing in the House of Representatives, the Senate had resumed at 2 pm and dealt with some other business. At 2.20 pm the first Order of the Day was called on by the Clerk, the consideration of Message No. 406 from the House of Representatives (J.1022-3) calling upon the Senate to pass the appropriation bills without further delay. The Order of the Day having been called on, Senator Wriedt moved:

> That, responding to Message No. 406 of the House of Representatives again calling upon the Senate to pass without further delay the Appropriation Bill (No. 1) 1975-76 and the Appropriation Bill (No. 2) 1975-76, and responding to the Resolution of the Senate agreed to on 6 November on the voices and without division that the Appropriation bills are urgent bills, and in the public interest, so much of the Standing Orders be suspended as would prevent a Question being put by the President forthwith — That the bills be now passed — which Question shall not be open to debate or amendment. (J.1031)

The motions were agreed to on the voices and the appropriation bills passed the Senate. Then the Senate suspended at 2.24 pm, not to meet again until after general elections for both Houses, the date of which was subsequently fixed for 13 December 1975.

The extraordinary feature of the proceedings was that the Senate was not advised that there had been a change of government during the luncheon adjournment. If the Senate had been advised of the change of government, it is unlikely that the former Government Leader in the Senate would have proceeded with the passing of supply. Obviously Senator Withers (Leader of the Opposition when the Australian Labor Party was in office) knew what the position was and he did not oppose a speedy passage of the appropriation bills.

If the Senate had been informed of the dismissal of the Whitlam ministry, the course of events might have been different. For example, the Australian Labor Party senators could have delayed the calling on of the appropriation bills by moving motions to bring on other business. Having a majority, the Liberal-National Country Party senators would eventually have taken charge of the business of the Senate, but they would have had problems. If Senator Withers had moved the motion proposed by Senator Wriedt, and if the motion had been opposed by Australian Labor Party senators, it would have failed unless carried by 31 affirmative votes, being an absolute majority for the suspension of the standing orders without notice as required by then standing order 48. To muster 31 votes, the support of Senator Steele Hall (Liberal Movement) or Senator Bunton (Independent) would have been required. There were, therefore, procedures and

circumstances which might have upset any timetable for a dissolution of the Parliament on 11 November 1975, but the final act could only have been delayed, not changed.

In the House of Representatives, the Prime Minister (Mr Fraser), having announced the change of government, moved that the House adjourn, but the motion was negatived by 64 Labor votes to the new government's 55 votes. Thereupon Mr Whitlam (as Leader of the Australian Labor Party) moved: "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". It was argued that, the budget bills having been passed by the Senate, there was no longer a deadlock between the two Houses, the party Mr Whitlam led had the confidence of the House, and that Mr Whitlam should therefore be called to form a government. As an argument it fails, because obviously the Senate agreed to supply on the understanding that an election would ensue. Also, a government which lacks the confidence of the House may properly appeal to the electorate, which is what Mr Fraser's government did.

The House of Representatives, by 64 Labor Party votes to 54 for Mr Fraser's Government, carried the motion of want of confidence in the Prime Minister, Mr Fraser. Mr Speaker announced that he would convey the advice to the Governor-General at the first opportunity and the House then suspended from 3.15 pm to 5.30 pm, but it was destined not to meet again till after the general elections for both Houses on 13 December 1975.

If there had been more time for thought, other procedures might have been devised. For example, the Labor Party might have considered stalling proceedings in the Senate while the Labor Party majority in the House of Representatives put through a motion rescinding all votes on the appropriation bills and sending a message to the Senate acquainting that House of the decision of the House of Representatives and desiring the return of the bills. If the Senate ignored a request for the return of the appropriation bills and went ahead and passed them notwithstanding a message from the House of Representatives that all votes on the bills had been rescinded, conceivably the House could have instructed the Speaker that the bills were not to be presented to the Governor-General for assent. Failing the passing of supply, presumably there would have been simultaneous dissolutions and an election with what funds were available and with what arrangements could be made for the services of the government until the meeting of the new Parliament.

The bills forming the basis for the simultaneous dissolutions of the Senate and the House of Representatives were, as cited in the Proclamation of 11 November 1975:

Health Insurance Levy Bill 1974
Health Insurance Levy Assessment Bill 1974
Income Tax (International Agreements) Bill 1974
Minerals (Submerged Lands) Bill 1974
Minerals (Submerged Lands) (Royalty) Bill 1974
National Health Bill 1974
Conciliation and Arbitration Bill 1974
Conciliation and Arbitration Bill (No. 2) 1974
National Investment Fund Bill 1974

Electoral Laws Amendment Bill 1974
Electoral Bill 1975
Privy Council Appeals Abolition Bill 1975
Superior Court of Australia Bill 1974
Electoral Re-distribution (New South Wales) Bill 1975
Electoral Re-distribution (Queensland) Bill 1975
Electoral Re-distribution (South Australia) Bill 1975
Electoral Re-distribution (Tasmania) Bill 1975
Electoral Re-distribution (Victoria) Bill 1975
Broadcasting and Television Bill (No. 2) 1974
Television Stations Licence Fees Bill 1974
Broadcasting Stations Licence Fees Bill 1974.

Mr Fraser's caretaker government was sworn in on Wednesday, 12 November 1975, and comprised himself as Prime Minister and 14 other ministers, the ratio between the Houses being 9 members of the House of Representatives and 6 senators.

The same day, 12 November 1975, the Speaker of the House of Representatives (Mr Scholes) addressed a letter to the Queen, communicating his concern at the maintenance in office of Mr Fraser as Prime Minister despite his lack of majority support in the House of Representatives and asking for the restoration of Mr Whitlam as prime minister. The reply from Buckingham Palace, dated 17 November 1975, advised that the only person competent to commission a Prime Minister in Australia was the Governor-General, and the Queen had no part in the decisions which the Governor-General must take in accordance with the Constitution.

The elections were held on 13 December 1975 and the result was a win for the Liberal-National County Party coalition by 55 seats in the House of Representatives and by 6 in the Senate. The party composition in the two Houses was as follows: House of Representatives — Liberal, 68; National Country Party, 23; ALP, 36; Senate — Liberal, 27; National Country Party, 8; ALP, 27, Liberal Movement, 1; Independent, 1.

It is of interest, in reflecting on the events of October/November 1975, to consider what might have happened if there had been no twice rejected bill or bills upon which to base simultaneous dissolutions of the two Houses.

It was argued at the time that, the disagreement between the Houses being in relation to supply, the constitutional process of section 57 of the Constitution should have been followed with respect to the appropriation bills. That is to say that, the Senate having failed to pass the appropriation bills on the first occasion, there should have been an interval of three months, the bills resubmitted and, if they again failed to pass the Senate, then a dissolution of the Parliament might have ensued.

The weakness of that argument is that, without supply for three months, the machine of government could come to a halt. Obviously, the government of the country cannot remain at a standstill for months while constitutional requirements for a double dissolution based on an appropriation bill are being satisfied.

Therefore, if there had been no twice rejected bill or bills upon which to base a simultaneous dissolution at the time when the Senate withheld supply in 1975, a dissolution of the House of Representatives alone would appear to have been inevitable.

It is also of interest to consider whether, notwithstanding that proposed laws were available for the purpose of a double dissolution pursuant to section 57 of the Constitution, the refusal of supply by the Senate might have been resolved by a dissolution of the House of Representatives pursuant to section 5 and 28 of the Constitution and not by a dissolution of both Houses pursuant to section 57. That could have happened, but in all the circumstances it was fair that both Houses should have been dissolved, and that was what the Senate resolution advocated.

The simultaneous dissolutions of 1974 and 1975 may be regarded as affirming that a government which has been denied supply by the Senate cannot govern and should advise a general election or resign. If a prime minister refuses to take either course, the Governor-General has constitutional authority to make other arrangements for the carrying on of the government. The difficult question is always likely to be when and in what way the Governor-General might invoke the reserve powers. While circumstances will govern such decision-making, the presumption must always be that the Constitution and the public interest will prevail over all other considerations.

In 1982 the Senate passed the Constitution Alteration (Fixed Term Parliaments) Bill 1982. The bill would have provided that the House of Representatives could not be dissolved except in the circumstance of no person being able to form a government with the support of the House, or under section 57 of the Constitution. If a House were dissolved more than three months before the expiration of its term its successor would last only till the end of that term. These provisions would have overcome the difficulties highlighted by the 1975 simultaneous dissolutions, in that they would have effectively removed the ability of the Senate to force an early House of Representatives election by refusing supply. Although introduced and supported by the Australian Labor Party, the bill was abandoned after that party came to government in 1983.

For a proposal to ensure that both Houses would be dissolved in the event of a Senate rejection of supply, see the Constitution Alteration (Appropriation Bills) Bill 1983 (agreed to by the Senate, but failed to gain absolute majority, 13/10/1983, J.386).

For a proposal to allow the government access to appropriations equal to those of the previous year in the event of a Senate rejection or failure to pass supply, see the Constitution Alteration (Appropriations for the Ordinary Annual Services of the Government) Bill 1987 (introduced but not considered, 23/9/1987, J.111).

Simultaneous dissolutions of 1983

Following the general election for the House of Representatives and the periodical election for the Senate in October 1980, the Fraser Government had a secure majority in the House (82-66), but after 1 July 1981 only 31 votes in a Senate of 64 (the Opposition had 27, Australian Democrats 5 and Independent 1).

The government's minority situation was revealed in consideration of Sales Tax Amendment Bills (Nos 1A to 9A) 1981. These proposed laws were finally passed by the House on 27 August 1981, and received by the Senate on the same day. Following debate in the Senate, the bills were returned to the House on 23 September 1981 requesting amendments. The House resolved on 14 October 1981 not to make the requested amendments. The Senate considered the House's position and declined to pass a resolution "that the requests be not pressed," the effect of which was to press the requests. This action, it was argued in the Prime Minister's advice to the Governor-General recommending simultaneous dissolution of the two Houses, constituted "failure to pass": "Pressing the requests was simply prevarication," the Prime Minister claimed.

In the event, the requests were returned to the House which declined to consider the message containing them. The bills were not again considered by the House and on 7 May 1982 the relevant Order of the Day was discharged from the notice paper.

In the meantime, on 16 February 1982, bills in the same form were again presented to the House of Representatives. They were passed the following day and transmitted to the Senate on 18 February 1982. After debate the Senate declined, on 10 March 1982, to give the bills a second reading.

Other bills, Social Services Amendment Bill (No. 3) 1981, States Grants (Tertiary Education Assistance) Amendment Bill (No. 2) 1981, Australian National University Amendment Bill (No. 3) 1981 and the Canberra College of Advanced Education Bill 1981, were also cited as coming within section 57 for simultaneous dissolution purposes when Prime Minister Malcolm Fraser, on 3 February 1983, tendered advice to Governor-General Stephen. All of these bills had been twice rejected outright by the Senate.

According to the Prime Minister, the 13 proposed laws were "of importance to the Government's budgetary, education and welfare policies". A second consideration was that Australia was facing "a very difficult economic period with potentially great social consequences". He continued:

> It is of paramount importance in facing the difficult economic circumstances that lie ahead that the Government knows that it has the full confidence of the Australian people and that the Australian people have full confidence in its Government's ability to point the way towards recovery. I regard this as of such paramount importance that on this issue alone I believe that I am justified in asking Your Excellency to dissolve the Parliament and issue writs for a general election in both Houses. (PP 129/1984, p. 5)

Later in the day the Prime Minister wrote, in further correspondence with the Governor-General:

> ... I regard a double dissolution as critical to the workings of the Government and of the Parliament.
>
> Clearly, there is a need for the Government, in the critical period we face, to have decisive control over both Houses of Parliament. Even though the last session continued well past its normal time, indeed close to Christmas, some significant Government legislation was not passed by the Senate. There are measures that we have not even put to the Parliament because we know that they would not achieve passage through the Senate. (*ibid*., p. 41)

In responding the Governor-General wrote that he had satisfied himself that there existed measures meeting "the description of measures such as are referred to in section 57 of the Constitution". He continued:

> 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; the nine Sales Tax measures seek to impose tax on a range of goods now exempt; three of the other measures provide for the limited re-introduction of tuition fees in tertiary education institutions; the last measure, a social service measure, seeks to preclude spouses of those involved in industrial action from receiving unemployment and special benefits.
>
> 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 context, 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 described 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. (*ibid.*, p. 43-4)

At the election, actually fought on issues of economic management, interest rates, industrial relations and union power, saw a victory for the Opposition which won 75 seats in the House of Representatives to 50 for the Liberal-National parties. The result in the Senate contest was: ALP, 30; Liberal, 24; National, 4; Australian Democrats, 5; and Independent, 1.

The simultaneous dissolution of 1983 again highlighted "grey areas" in relation to disagreements between the Houses. One was the stockpiling of several bills in anticipation of simultaneous dissolution, a matter to which the Governor-General referred when he eventually accepted the Prime Minister's advice ("... a considerable time has passed since [the proposed laws] were rejected or not passed for a second time in the Senate" [*ibid*., p. 43]). At least in circumstances where there is no withholding of supply by the Senate, such a use of stockpiled bills, perhaps stale and unrelated to a particular situation, does not appear to be within the intent of section 57 of the Constitution.

It was to meet this aspect of simultaneous dissolution practice that Senator David Hamer (Liberal, Victoria) proposed amendment to the Constitution so that such dissolutions had to take place within three months of the Senate rejecting or otherwise failing to pass a bill for the second time (Constitution Alteration (Double Dissolution) Bill 1983; agreed to by the Senate but failed to gain absolute majority, 13/10/1983, J.386-7).

A new and more contentious element in the events leading to the simultaneous dissolution of 1983 is the treatment of the sales tax bills. As the above account shows, the initial parliamentary consideration of these bills ended in the House, not the Senate. The fault lay with the House in deliberately and wrongly breaking off communication with the Senate and shelving the bills. The issue of the Senate's right to press suggested amendments to bills which it may not amend is addressed in Chapter 13, Financial Legislation.

At the time it was contended that sufficient grounds for simultaneous dissolutions existed on the basis of the legislative history of the sales tax bills. Whether the Governor-General would have been satisfied that the Senate had failed to pass the bills on the first occasion is an interesting question.

Simultaneous dissolutions of 1987

The simultaneous dissolutions of the House of Representatives and the Senate on 5 June 1987 were, by comparison with other such dissolutions, relatively straightforward. A single proposed law, the Australia Card Bill, was involved. The bill was unquestionably of major significance to the government and had been unambiguously rejected by the Senate on two occasions in clear conformity with the time requirements of section 57.

The Australia Card Bill 1986 was presented to the House of Representatives and read a first time on 22 October 1986. It completed its passage through the House on 14 November and was received by the Senate, and read a first time, on 17 November 1986. On 10 December 1986 the Senate refused to give the bill a second reading.

The bill was presented to the House of Representatives again on 18 March 1987 and read a first time. It was read a second time on 25 March 1987, declared an urgent bill, and read a third time on the same day.

The bill was received by the Senate and read a first time on 26 March 1987. Following debate the Senate again refused to give the bill a second reading on 2 April 1987.

On 27 May 1987 the Prime Minister advised the Governor-General to dissolve the House and the Senate simultaneously on 5 June 1987. In his letter the Prime Minister wrote:

> I advise you to exercise your power under section 57 of the Constitution and dissolve simultaneously the Senate and the House of Representatives on 5 June, with a view to elections for both Houses being held on Saturday 11 July 1987.
>
> The provisions of the Constitution for a double dissolution are set out in the first paragraph of section 57 ...
>
> I advise that all conditions justifying a double dissolution have been established. The Senate has twice rejected the Australia Card Bill 1986 in a manner which brings this proposed law directly within the provisions of section 57 and your power to dissolve both Houses. The prohibition in the last sentence quoted above does not apply as the term of the House of Representatives does not expire until 21 February 1988.
>
> The Australia Card Bill 1986 is an integral part of the Government's tax reform package and is aimed at restoring fairness to the Australian taxation and social welfare systems. By providing a

> basic national system of personal identification, together with broad and effective protections for individual privacy, the Bill would help to ensure that every Australian pays his or her fair share of tax and that benefits from the welfare system go properly and only to those in need.
>
> The Government considers that introduction of the Australia Card would result in savings of considerable magnitude — the most conservative estimate by the Australian Taxation Office of revenue gains in the tax area alone being $724 million a year once the program is fully operational. Department estimates of savings which would accrue in social security and medicare expenditures are of the order of $153 million, so that the total gain to public resources from this measure would be of the order of $877 million. This makes it the single most effective weapon available to the Government for combating tax evasion and welfare fraud and an important element in the Government's program of economic reform to meet the challenge of difficult economic circumstances. My Government believes that it is bound at this time to seize every reasonable opportunity, such as is afforded by this Bill, to reduce the budgetary deficit and thus to underpin our progress towards economic recovery.
>
> The Australia Card Bill which has been obstructed by the Senate is a fundamental part of the Government's legislative program both in terms of its economic impact and in terms of the principle of equity it represents. Not only has the Senate frustrated this critical measure but it has also obstructed a number of other measures including various taxation bills such as the Taxation (Unpaid Company Tax) Assessment Amendment Bill 1985.
>
> The Senate has been spending large amounts of time debating matters of marginal significance, with the effect of reducing substantially the time available for proper consideration of essential government legislation. The imposition of artificial deadlines by the Senate on receipt of government bills for passage has exacerbated this problem. Just today the Senate has refused to reconsider the Government's legislation to extend television services to rural areas.
>
> In summary, I regard the situation which has arisen in the Parliament as critical to the workings of the Government and the Parliament. (PP 331/1987, pp 1-2)

The Governor-General replied later the same day:

> I am satisfied that circumstances such as are specified in S57 of the Constitution exist in relation to the Australia Card Bill and that I should dissolve both Houses of the Parliament simultaneously in accordance with your advice.
>
> I note your assurances that funds will be available which will ensure that the work of the administration can continue through the election period. I note, too, your intention to table in the Parliament your letter and my reply to it. (*ibid*., p. 5)

A proclamation dissolving the two Houses was accordingly issued by the Governor-General on 5 June 1987.

The government was returned at the general election on 11 July 1987 by 86 seats to 62 in the House of Representatives. However, it remained in a minority in the Senate (32-44).

The Australia Card legislation was again passed by the House of Representatives on 16 September 1987. During second reading debate in the Senate the Opposition released details of advice that the legislation, to be effective, would be dependent on certain action taken by regulations. These regulations would be liable to disallowance in the Senate. Government attempts to forestall disallowance by seeking passage of a resolution stating that the Senate affirmed "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" did

not succeed. 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 government 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. It was then open to the government, on the basis that it could claim that the Senate had again failed to pass the bill, to advise the Governor-General to call a joint sitting of the two Houses, at which the government would have had a majority to pass the bill. The resulting statute, however, could have been rendered inoperative by the disallowance by the Senate of any regulations made under it. This problem could not be overcome by amendment of the bill, because under section 57 a bill submitted to a joint sitting must be the bill as last proposed by the House of Representatives together with any amendments proposed by one House and not agreed to by the other. There were no such amendments which could be put to a joint sitting. Any amendment would have to be made after the bill's passage and would require the consent of the Senate. (On the question of the same bill under s. 57, and the amendments which may be put to a joint sitting, see below and C.K. Comans, 'Constitution, section 57 — further questions', *Federal Law Review*, 15:3, September 1985, p. 243.)

The government therefore decided to abandon the bill.

Joint sittings of the Houses

Simultaneous dissolutions of the two Houses of the Parliament do not necessarily ensure that the proposed law(s) in dispute between them will be settled. As has been noted, the two Houses constitute distinctive reflections of electoral opinion and, particularly when it is closely divided, it is possible that there will be different majorities in the two Houses following simultaneous elections.

In the history of simultaneous dissolutions the consequent elections have brought the disputes decisively to a conclusion on four occasions, 1914, 1951, 1975 and 1983. On only one of these occasions, 1951, was the government whose legislation was at stake returned to office and in that instance it also secured a majority in the Senate.

On two occasions, however, the resulting elections have not been sufficient to resolve the fate of the legislation in dispute. In 1974, the Whitlam Government, although supported by a majority in the House, still lacked support for the disputed legislation in the Senate. As a consequence, a joint sitting was convened as provided for in paragraphs 2 and 3 of section 57:

> 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.

The requirements for a joint sitting are thus that following simultaneous elections for the two Houses, the proposed law must again be passed by the House of Representatives, "with or without any amendments which have been made, suggested, or agreed to by the Senate". If the Senate then rejects, or fails to pass the proposed law(s) or passes it (them) with amendments to which the House does not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

At the joint sitting the members present "may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives".

The joint sitting is empowered to consider amendments proposed by one House and not agreed by the other. To take effect these amendments must be affirmed by an absolute majority of the total number of senators and members of both Houses. The wording of this provision concerning amendments presents some difficulties of interpretation, concerning which see C.K. Comans, 'Constitution, section 57 — further questions', *Federal Law Review*, 15:3, September 1985, p. 243. The provision does not allow the government to submit to a joint sitting completely new provisions which have not previously been considered by the Senate, as this would amount to de facto unicameralism for any legislation following a simultaneous dissolution. The provision refers only to amendments agreed to by the Senate and amendments proposed by the House in substitution for Senate amendments prior to the dissolution. It may be doubted whether the provision allows the submission of amendments to a bill to which the Senate agreed where the Senate subsequently rejected the bill at the third reading (see also above, under Constitutional provisions and their application, section 11).

The proposed law itself, with the amendments, if any, must likewise be affirmed by an absolute majority of the total number of senators and members.

Following the simultaneous dissolutions of April 1974 the six proposed laws in dispute were submitted to the new Parliament for consideration. They were swiftly passed by the House of Representatives, where the guillotine was employed, but again were rejected by the Senate. A joint sitting of the two Houses was therefore convened for 6-7 August 1974 to deliberate and vote upon each of the six bills "as last proposed by the House of Representatives" (Proclamation of 30 July 1974).

Prior to the joint sitting, however, two senators sought injunctions from the High Court to prevent it from proceeding. Issues in question concerned consideration of more than one proposed law at a joint sitting; "stockpiling" of bills prior to simultaneous dissolutions; the meaning of "failure to pass" in relation to one of the proposed laws; the effect of prorogation on bills which already met the requirements of section 57; and specification in the Proclamation of the proposed legislation to be considered at the joint sitting. The Court refused to grant interim injunctions: *Cormack v Cope* 1974 131 CLR 432. The issues in question were ultimately determined in later challenges to laws enacted at the joint sitting. Briefly, the Court saw no

objection to more than one bill forming the basis for simultaneous dissolutions; nor did it consider that prorogation altered the status of a bill so far as section 57 requirements were concerned. It did, however, eventually hold one of the six laws enacted on this occasion to be invalid on the basis that the timetable specified in section 57 had not been observed: *Victoria v Commonwealth* 1975 7 ALR 1.

So far as the joint sitting itself was concerned there were questions about the proclamation. In answering them there was a divergence of opinion in the Court, ranging from Chief Justice Barwick, who held that specification of the proposed laws to be considered may invalidate the proclamation, through views that specification was unnecessary, to positive statements that the proclamations should always state the proposed laws which are the subject of double dissolution and joint sitting. There are advantages in specifying the proposed laws being considered, for this in effect provides the basis for an agenda.

Prior to the joint sitting, rules for its conduct were drawn up and adopted by the two Houses. These are set out in *ASP*, 6th ed., pp 1052-6.

The rules provided only for those procedures which appeared to be necessary for the consideration of proposed laws under section 57 of the Constitution and they kept as close as possible to standard parliamentary practices. An exception was in the mode of putting the question on a proposed law, namely: "That the proposed law be affirmed". Because amendments could not be moved at the joint sitting to any of the proposed laws, it was considered unnecessary to take a bill through the usual three readings and committee stage. Other rules provided for a 20 minute time limit on all speeches, relief for the Chair, closure of debate, and suspension of the rules (those relating to the 20 minute time limit on speeches and the closure could not be suspended). In any matter of procedure not provided for in the rules, the Standing Orders of the Senate were to be followed as far as they could be applied.

The venue for the joint sitting was the chamber of the House of Representatives in the provisional Parliament House. The rules provided that members and senators should address the joint sitting from lecterns provided on either side of the chair.

In sittings of each House prior to the joint sitting, other bills were introduced to enact amendments to the Parliamentary Papers Act, the Parliamentary Proceedings Broadcasting Act, and the Evidence Act, so that those Acts could apply to the proceedings of a joint sitting. The Parliamentary Papers Act was amended to protect the Government Printer in publishing the Hansard report of the joint sitting as well as any papers that might be tabled at the joint sitting. The amendment of the Parliamentary Proceedings Broadcasting Act ensured that the proceedings of the joint sitting could be broadcast and televised and that the Australian Broadcasting Commission would enjoy the same immunity in respect of the broadcasting and televising of a joint sitting as it enjoyed in relation to an ordinary sitting of either House. The amending Evidence Act applied provisions of the Act to a joint sitting, so that judicial notice could be taken of the official signature of the member presiding at a joint sitting, and provided for documents presented at a joint sitting to be admitted in court in evidence.

On the question of freedom of speech at the joint sitting, it was considered that section 49 of the Constitution applied to a joint sitting.

The matter was the subject of a resolution of the Senate:

> That this Senate resolves that it be a rule and order of the Senate that, at a joint sitting with the House of Representatives, the proceedings are proceedings in Parliament, and that the powers, privileges, and immunities of Senators shall, *mutatis mutandis*, be those relating to a sitting of the Senate. (J.117)

A similar resolution was also agreed to by the House of Representatives.

A further question considered was the matter of possible disagreement by the Houses on the proposed rules. Section 50(ii) of the Constitution contemplates that both Houses sitting separately would adopt the rules to apply to the joint sitting. Failing agreement being reached by both Houses, it was thought possible that a joint sitting might have sufficient authority to draw up its own rules. A further suggestion was that the joint sitting might resolve to adopt the standing orders and practices of the Senate as far as they could be applied, in accordance with the parliamentary convention that the procedure of a joint committee of the two Houses follows the procedure of committees of the Senate when such procedure differs from that of committees of the House whether the chair is a member of the House or not. Following that guideline, it was suggested that the joint sitting might resolve that the standing orders and practices of the Senate apply to the procedure of the joint sitting, subject to certain modifications, which would include such matters as the mode of putting questions and speaking times.

All proceedings of the joint sitting were broadcast by the Australian Broadcasting Commission and a complete sound record was made for archival purposes.

The joint sitting occupied two days, 6-7 August 1974, and the six proposed laws named in the Governor-General's proclamation were all affirmed by an absolute majority of the total number of the members of the Senate and of the House of Representatives, as required by section 57 of the Constitution. The bills were so certified by the Joint Clerks, presented to the Governor-General, and assented to. As noted above, one of the laws was subsequently held to be invalid by the High Court.

The simultaneous dissolutions of 1987, based on the Australian Card Bill 1986, had a simpler and speedier resolution. Once again, the government proposing the legislation secured a majority in the House but failed to do so in the Senate. The proposed legislation was promptly introduced, again passing the House. The bill was then sent to the Senate. During the second reading debate in the Senate, it was pointed out that the bill depended for its operation upon regulations which could be disallowed by the Senate. The bill was then abandoned by the government, thus obviating the possibility of a joint sitting.

Reform of section 57

Section 57 of the Constitution was intended to provide a mechanism for resolving deadlocks between the two Houses in relation to important legislation. By judicial interpretation, and by the misuse of the section by prime ministers over the years, it now appears that simultaneous dissolutions can be sought in respect of any number of bills; that there is no time limit on the seeking of simultaneous dissolutions after a bill has failed to pass for the second time; that a

ministry can build up a "storehouse" of bills for simultaneous dissolutions; that the ministry which requests simultaneous dissolutions does not have to be the same ministry whose legislative measures have been rejected or delayed by the Senate; that virtually any action by the Senate other than passage of a measure may be interpreted as a failure to pass the measure, at least for the purposes of the dissolutions; and that the ministry does not need to have any intention to proceed with the measures which are the subject of the supposed deadlock after the elections. By putting up a bill which is certain of rejection by the Senate on two occasions, a ministry, early in its life, can thus give itself the option of simultaneous dissolutions as an alternative to an early election for the House of Representatives. This gives a government a de facto power of dissolution over the Senate which it was never intended to have, and greatly increases the possibility of executive domination of the Senate as well as of the House of Representatives:

> The power of a double dissolution is one of the reserve powers of the Constitution and should only be resorted to on great and urgent occasions involving momentous issues of legislative policy. (John Quick, *The Legislative Powers of the Commonwealth and the States of Australia*, 1919, p. 641)

Consideration should be given to a reform of section 57 to restrict the power of a ministry to go to simultaneous dissolutions as a matter of political convenience. In order to restrict section 57 to its intended purpose, a limitation should be placed on the number of measures which may be the subject of a request for dissolutions, time limits should be placed upon such dissolutions in relation to the rejection of the measures in question, and a prime minister should be required to certify that the measures in question are essential for the ministry to carry on and that it is the intention of the ministry to proceed with the measures should it remain in office, and the Governor-General should be required to be satisfied independently as to those matters. Any ambiguity as to the amendments which may be submitted to a joint sitting should also be removed.

In October 2003 the then Prime Minister announced that he was considering a scheme of constitutional amendment, supposedly to "reform" section 57, but in effect either to allow legislation to bypass the Senate or to give the Prime Minister greater control over the electoral cycle. A consultative group appointed by the Prime Minister reported in 2004 that the electors would not approve such schemes. (15/6/2004, J.3439-40; letter from the Clerk of the Senate to the consultative group, 4/11/2003)

A simpler method of resolving disagreements between the Houses could be sought without, unlike such proposals, giving a government in control of the House of Representatives unfettered power to legislate by decree. At the Constitutional Convention of 1897, a proposal was considered to refer legislation in disagreement to a referendum, to allow the electors to resolve the issue. This would provide a wholly democratic method of resolution without destroying the essential safeguard of bicameralism.

DISAGREEMENT BETWEEN THE HOUSES
SECTION 57 OF THE CONSTITUTION