CONSTITUTION, SECTION 57 – FURTHER QUESTIONS

BY C K COMANS*

A number of questions concerning the construction and application of section 57 of the Constitution have now been determined by the High Court. The purposes of this note are to examine critically some implications of these answers and to direct attention to some other technical questions that could arise in the future. The special interest of the writer in these matters arises from the fact that he was closely involved in the preparation of documents in relation to the double dissolutions of 1974 and 1975 and the joint sitting of 1974.

It is not within the purposes of this article to discuss generally the extent to which the Governor-General may be entitled to exercise a personal judgment or discretion in granting or refusing a double dissolution. That is a matter of constitutional propriety rather than the justiciable constitutional law with which this article is concerned. However, it will be suggested that there are circumstances in which such a discretion to refuse a double dissolution may be exercised and that this possibility is relevant to the legal operation of the section in relation to two or more Bills. It would seem that, whilst a Prime Minister with a majority in the House of Representatives can, in effect, force the Governor-General to grant a dissolution of the House of Representatives by threatening to resign, he cannot, by the same means, force the Governor-General to grant a double dissolution even where circumstances exist that would enable the Governor-General to do so.

1 FORM AND EFFECT OF DOUBLE DISSOLUTION PROCLAMATIONS

The three most recent double dissolution Proclamations each recited the fact of a number of specified Bills having come within the first paragraph of section 57 as the reason for the dissolution. In *Cormack* v *Cope*[1] Barwick CJ thought this "quite unnecessary". He added that it "tends to support the misconception that the dissolution is in respect of or in relation to a specific proposed law or specific proposed laws".[2] None of the other justices expressed a similar view. The writer finds it difficult to see why it should be undesirable to specify the Bill or Bills by reason of the parliamentary history of which the Proclamation is made. In *Western Australia* v *Commonwealth*[3] Stephen and Murphy JJ expressed the view that it was desirable for the Proclamation to recite the Bills relied on[4] and Stephen J appears to have been of the opinion that, where Bills are so recited, no other Bill can be considered at a joint sitting following the dissolution.[5] His opinion gave reasons which, with respect, appear to the writer to be convincing.

---

* CBE, QC, LLM; Former First Parliamentary Counsel, Commonwealth of Australia.

[1] (1974) 131 CLR 432.

[2] *Ibid* 450.

[3] (1975) 134 CLR 201.

[4] *Ibid* 261 and 292 respectively.

[5] *Ibid* 261-262.

It is interesting to note that the former Mr Justice Stephen, in his later capacity as Governor-General, signed the double dissolution Proclamation of 4 February 1983 in a form that recited the thirteen Bills upon which the Proclamation was based.

The view of Stephen J referred to above is strengthened if it is accepted that there could be circumstances in which the Governor-General could properly refuse to exercise the dissolution *power* in accordance with ministerial advice based on the application of the section to a particular Bill even though the Bill came within the first paragraph of the section. Apart from more general considerations of a political nature, such a discretion may exist where it is clear that the government no longer wants the Bill passed. It may be noted that in *Western Australia* v *Commonwealth*[6] Mason J was of opinion that the dissolution *power* would continue in these circumstances but, if this is so,[7] it does not follow that the Governor-General would not refuse to accept advice to dissolve. The question whether he could properly so refuse is one of constitutional propriety rather than constitutional law but it is submitted that it would be consistent with the purpose of the section for him to do so. Further, if there were two Bills coming within the first paragraph but only one of which would, in the view of the Governor-General, furnish a proper basis for double dissolution, it would not seem consistent with the scheme of the section for the other Bill to be eligible for consideration at a later joint sitting. Suppose, for example, that the Senate had twice rejected two quite unrelated Bills, A and B. The government might consider that it would be supported by the electorate as regards Bill A but that it would suffer electorally if it persisted with Bill B. Suppose, then, that the government advised a double dissolution, at the same time announcing publicly that it had no intention of proceeding further at any time with Bill B. It may well be that, as a matter of law, Bill B could be the basis of a dissolution Proclamation. However, it would seem proper for the Governor-General to recite Bill A in the dissolution Proclamation and not Bill B and, consistently with the reasoning of Stephen J already referred to, Bill B should not then, as a matter of law, be eligible for consideration at a joint sitting if, after the election, the government reintroduced it and the Senate again rejected it.

2 JOINT SITTING WHERE TWO OR MORE BILLS INVOLVED

In *Cormack* v *Cope*[8] Barwick CJ and Menzies, Gibbs and Stephen JJ all considered that it was no part of the function of the Governor-General to determine the business of a joint sitting, which means that the Governor-General could not exclude a qualified Bill from the agenda any more than he could include an unqualified one. Stephen J seems to have resiled from that view in *Western Australia* v *Commonwealth*.[9] In *Western Australia* v *Commonwealth*[10] Gibbs CJ acknowledged that it may be convenient (although unnecessary) for the Governor-General to specify the Bills on which

---

[6] *Ibid* 265.
[7] *Ibid* 277, where Jacobs J took a contrary view.
[8] (1974) 131 CLR 432.
[9] (1975) 134 CLR 201, 261-262.
[10] *Ibid* 242.

it is expected that the members will vote, but this did not affect his view as to the absence of power of the Governor-General to determine the agenda. It is submitted that the view implicit in *Cormack* v *Cope*[11] that the Governor-General cannot convene separate joint sittings for different Bills is inconvenient and not compelled by the words of the section.

It is not entirely clear on what basis the High Court in *Cormack* v *Cope* held more than one proposed law can be considered at a joint sitting.[12] However, it seems that the result was arrived at not by the process of reading singular words in the plural but by treating the section as capable of application distributively to a number of Bills. It is submitted that a logical result of reading the section distributively would be that rejection by the Senate of each Bill after the double dissolution gives rise to a separate power to convene a joint sitting in relation to that Bill. There should be no great difficulty in further holding that the joint sitting in respect of a particular Bill could be either separate or concurrent with the joint sitting in respect of another Bill or other Bills. Obviously, concurrent joint sittings would be convenient in respect of related Bills, such as a tax rate Bill and a related machinery Bill, but there could be circumstances, illustrated below, in which separate joint sittings were desirable.

Cormack v *Cope* appears to establish that if a joint sitting is convened at a time when two or more Bills have qualified for consideration at a joint sitting, that joint sitting is competent to deal with all the Bills and, if the sitting refrains from dealing with one of the Bills, the Governor-General cannot convene a subsequent joint sitting to deal with that Bill. This could create an awkward, and it is submitted unreasonable, dilemma for a government. Suppose that two Bills, A and B, both satisfy the first paragraph of section 57 at the time of a double dissolution. Suppose that, after the election, the House of Representatives again passes both Bills and the Senate rejects Bill A but takes some delaying action with regard to Bill B of such a kind that opinions could differ on the question whether the Senate has failed to pass the Bill. The government might want Bill A to become law as a matter of great urgency but may be prepared to delay joint sitting action on Bill B until it is clear beyond doubt that the Senate has no intention of passing it and has indisputably rejected or failed to pass it. It may be that *Cormack* v *Cope* would not preclude consideration of Bill A at one joint sitting and the convening of a subsequent joint sitting at which Bill B could be considered if the true legal position was that the Senate had not failed to pass Bill B at the time of the convening of the first joint sitting.[13] But the government would nevertheless face a dilemma. If it decided to have the two Bills considered at an early joint sitting and both Bills were passed at that sitting, Bill B (as an Act) might subsequently be held invalid on the ground that at the time of the convening of the joint sitting the Senate had not failed to pass it. If, on the other hand, the government left Bill B to a later joint sitting, convened after a time at which the Senate had clearly rejected or failed to pass it, the Bill (as an Act) might be held invalid on the basis of a finding that the Senate had failed to pass it before the convening of the first joint

---

[11] (1974) 131 CLR 432.
[12] See G Sawer, "Singulars, Plurals and Section 57 of the Constitution" (1976) 8 FLRev 45.
[13] *Cf* G Sawer *op cit* 55.

sitting and that the second joint sitting was therefore invalid. The problem could not be solved by adjourning the first joint sitting, as it would seem from *Cormack* v *Cope* that the agenda of the joint sitting is determined at the time when it is convened and can consist only of Bills qualified at that time. In the absence of an advisory jurisdiction of the High Court, it is difficult to see how a government will ever be in a position, without risk to its legislation, to ask the High Court to reconsider this matter.

3 CONTINUED IDENTITY OF THE PROPOSED LAW

The application of section 57 in respect of a particular proposed law at each stage depends on the retention of the identity of the proposed law as the proposed law originally passed by the House of Representatives, or that proposed law with such amendments only as have been made, suggested or agreed to by the Senate. This would seem to preclude any alteration of the text of the proposed law (other than such amendments). (It may be noted that, as regards the enacting words of a proposed law, section 57 provides that a proposed law passed at a joint sitting "shall be taken to have been duly passed by both Houses of the Parliament" and therefore the ordinary words of enactment remain, as a matter of law but not as a matter of substance, appropriate to a law so passed. Accordingly the Acts resulting from the 1974 joint sitting are expressed to be enacted by the Queen, the Senate and the House of Representatives).[14]

However, it may be that identity of text is not necessarily enough. It may be argued that if the legal operation that a proposed law would have upon enactment has been altered otherwise than by a change in its text, it ceases to be the same proposed law.

If the Labor Party had, at the 1975 election, won control of the House of Representatives but not of the Senate and the 21 proposed laws mentioned in the double dissolution Proclamation of 11 November 1975 had been again rejected by the Senate and submitted to a joint sitting, the question could have been, raised in regard to some of them, whether they had retained the necessary identity.

For example, two of the Bills were Bills expressed to amend the Conciliation and Arbitration Act 1904 (Cth). Between the dates of the first and second rejections of these Bills by the Senate, Act No 89 of 1974 made certain amendments to the Conciliation and Arbitration Act. It could be argued that, if the section 57 Bills had been enacted after these amendments, they would have amended a law different from that to which they were originally related and had therefore become different proposed laws. However, as the amendments made by Act No 89 of 1974 had no direct relevance to the amendments proposed by the section 57 Bills, it would seem that the Bills did retain the necessary identity and were therefore properly included in the dissolution Proclamation.

A similar position existed as regards the amending National Health Bill 1974. Between the dates of the two rejections by the Senate the principal

[14] Section 4 of the Parliament Act 1911 (UK) makes provision for altering the enacting words of Acts passed in accordance with that Act.

Act, the National Health Act 1953(Cth) was amended by Act No 37 of 1974 and Act No 1 of 1975 and after the second rejection but before the double dissolution a further Act amending the National Health Act 1953(Cth) became law, namely, Act No 13 of 1975. Again the various amendments had no direct relevance to the amendments proposed by the section 57 Bill. The section 57 Bill was expressed to amend the principal Act by reference to a citation that did not include these amendments but this fact would be unlikely to cause a court to treat the Bill, if enacted, as ineffective. This Bill also would seem to have been properly included in the Proclamation.

However, it is easy to imagine circumstances where an intervening amendment *did* have a bearing on the legal effect of a proposed law. For example, the intervening amendment might confine the operation of the principal Act to Australian citizens or to persons over 18 years of age, and the amendments proposed by the proposed law might therefore become similarly limited. Again an alteration to a definition in the principal Act could vitally affect the proposed law, as could an amendment of the Acts Interpretation Act 1901(Cth). Another example would be an intervening amending Act that repealed one of the sections proposed to be amended by the section 57 Bill, or so amended such a section that an amendment proposed by the section 57 Bill could no longer have effect. It could be that the clause of the section 57 Bill that was affected was of minor importance only but it would nevertheless be difficult to maintain that the same proposed law was extant.

The impact of the intervening law would need to be considered in each case, and one can well imagine borderline cases. For example, the proposed law might give powers to a specific board and the constitution of that board may have been drastically altered by an intervening Act.

A slightly different problem could have arisen in connection with another of the 1974 Bills, the Electoral Laws Amendment Bill 1974. After that Bill had been twice rejected by the Senate, the then Government introduced in the House of Representatives a number of Bills each containing provisions taken from the rejected Bill. The idea was that the Senate might agree to pass some of the proposals if presented separately. In the event, the separate Bills were passed in the House of Representatives and sent to the Senate but had not been dealt with by the Senate before the double dissolution. If some only of these Bills had been passed by the Senate and the Labor Party had won the election without obtaining control of the Senate a technical problem would have arisen. It would seem that, to keep within the terms of section 57, the twice rejected Bill would have had to be introduced in its original form notwithstanding that that form included some provisions already enacted. However, as these provisions of the reintroduced Bill could not, in the circumstances, have any legal effect, it could have been argued with some force that the Bill was not the same proposed law as that previously twice rejected by the Senate.

A different possible problem of identity of proposed laws is afforded by the double dissolution Proclamation of 1983. That Proclamation listed, as coming within the first paragraph of section 57, Bills that included nine Bills relating to sales tax. These Bills each contained a commencement clause in the following form:

> 2. This Act shall come into operation on 1 January 1982.

The Bills were originally transmitted to the Senate on 27 August 1981 and, if passed in the ordinary course by the Senate, would no doubt have received the Royal Assent before 1 January 1982. They were transmitted to the Senate for the second time on 18 February 1982 although still expressed to come into operation on 1 January 1982. When the Bills were introduced in the House of Representatives for the second time on 16 February 1982 the Treasurer made the following statement:

> As honourable members know, it is for constitutional reasons established practice to enact nine separate Acts when imposing sales tax. Constitutional considerations also lead to these Bills being in exactly the same form as the Bills of the same title that were last year passed by ths House but not the Senate. The Government trusts that on this occasion the Bills will be approved by both Houses. The delay in their passage means that it will not be practicable to adhere to the planned commencement date of 1 January 1982 and, as I have already indicated, a new operative date of 29 March 1982 has been set. It is the Government's intention that, as soon as these Bills have been passed by both Houses, a further Bill will be introduced to change from 1 January 1982 to 29 March 1982 the date on which these Bills come into operation.[15]

If the Bills had been passed by the Senate on the second occasion or had been passed at a joint sitting after the double dissolution, it is not too clear what their legal operation would have been. Two possibilities that could be argued are first, that they would have had retrospective effect from 1 January 1982[16] or secondly that they would, notwithstanding the expressed commencement date, have had effect only from the date of Royal Assent. Perhaps a third possibility is that they would have been completely inoperative as it would have been impossible for them to have had a commencement in accordance with their express commencement clauses. Whichever of these possible answers is correct, it can surely be argued that the Bills, as rejected by the Senate on the second occasion, were not the same proposed laws as were not passed on the first occasion even though the text remained unchanged. The Minister's own statement recognized that the Bills could no longer have the operation originally intended and provided by their texts. The point was not raised in the Prime Minister's advice to the Governor-General as published in Parliamentary Paper No 129 of 1984. Whatever the legal position, no injustice was done to the Senate by the inclusion of these Bills in the Proclamation, as it was clear that the Government would have accepted a request by the Senate to update the commencement clause as a condition of the passing of the Bills by the Senate.

It is interesting to note that a means by which the draftsmen of section 57 could have avoided the awkward position that arose in regard to those sales tax Bills is suggested by the Parliament Act 1911 (UK). Section 2(4) of that Act includes the following provision:

> (4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill . . .

---

[15] H Reps Deb 1982, Vol 126, 69 (16 February 1982).

[16] *cf* Report on those Bills esp. The Senate Standing Committee for the Scrutiny of Bills Parliamentary Paper No. 2/1982.

4 AMENDMENTS THAT MAY BE CONSIDERED AT A JOINT SITTING

Section 57 provides that, at a joint sitting, the members present 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". There are two difficulties arising from the description of the amendments that may be considered.

First, whilst amendments made by one House and *not* agreed to by the other may be considered, amendments made by one House and *agreed* to by the other are not covered. Thus an anomalous position could arise if, in the proceedings in Parliament after the double dissolution, the House of Representatives accepted one amendment made by the Senate but rejected another. It would seem that at a subsequent joint sitting the accepted amendment could not be considered.

On this point reference to the debates of the Australasian Federal Convention of 1898 reveals that the clause was altered in a relevant respect at a late stage. On 10 March 1898 an amendment by Mr O'Connor was adopted[17] to insert in the relevant part of the clause the words "with or without the amendments, if any, *agreed to by the House of Representatives*, or made by the Senate and not agreed to by the House of Representatives". However the clause, as it emerged from the Drafting Committee with suggested further amendments, did not contain the reference to amendments *agreed to* by the House of Representatives. When the draft was further considered in the Convention, the point was raised by Mr Kingston[18], who said that it seemed to him that the clause did not provide for amendments which had been agreed to between the two Houses. Mr Barton, the Chairman of the Drafting Committee, replied that such amendments were included in the words "as last proposed by the House of Representatives" (which had been inserted by the Drafting Committee) and this answer seems to have been accepted. It is submitted, however, that the words "as last proposed by the House of Representatives", in their natural sense in the context, refer to the Bill as passed by the House and sent to the Senate after the double dissolution, and do not include amendments thereafter made by the Senate and agreed to by the House. If this is so, a practical solution to the difficulty may be for the government, in the joint sitting, to undertake to propose a further Bill in the Parliament to make the amendments previously agreed between the Houses.

The second difficulty regarding amendments to be considered at a joint sitting is that, whilst one can readily comprehend the reference to amendments made by the Senate and not agreed to by the House of Representatives, it is not at first sight easy to see how the proposed law, as last proposed by the House of Representatives, could have been the subject of amendments made by the House of Representatives and not agreed to by the Senate. The reference would seem to be to amendments made by the House upon return of the Bill to the House by the Senate for consideration of amendments made or suggested by the Senate. Reference to the Convention De-

---

[17] Debates of the Australasian Federal Convention 1898 Vol II, 2245, 2247 [emphasis added).
[18] *Ibid* 2453.

bates shows that Mr Isaacs raised the question of amendments made by the Senate and agreed to by the House with amendments that are not accepted by the Senate. The treatment of such amendments was discussed in the Convention on 16 March 1898[19] between Mr Isaacs and Mr Barton and it seems that as a result words proposed by the Drafting Committee referring to amendments made by the Senate and not agreed to by the House were replaced by the present words referring to amendments made by one House and not agreed to by the other.

It seems open to question, however, whether it is reasonable that amendments made by the House of Representatives after the double dissolution but not agreed to by the Senate should be eligible for consideration at a subsequent joint sitting. The amendments so made by the House could vitally alter the Bill on the basis of which the double dissolution was granted.

Standing Order 246 of the House of Representatives (dealing with Bills returned from the Senate with amendments) provides that no amendment may be moved to an amendment of the Senate that is not relevant thereto; nor may an amendment be moved to the Bill unless the same be relevant to, or consequent upon, either the acceptance or the rejection of an amendment by the Senate. However, it is always open to the House to suspend a Standing Order and there seems no constitutional reason why the House could not make radical new amendments to a Bill returned from the Senate. Perhaps the High Court would hold that a change to the text is not an "amendment", within the meaning of section 57, if it introduces new subject matter, but there seems no convincing basis for such a view and in any case it would seem that such a rule would be very difficult to apply.

It may equally be argued that the section is unreasonable in allowing a joint sitting to vote on amendments made by the Senate to the Bill as again passed by the House after the election and not agreed to by the House, as such amendments could radically alter the effect of the Bill that occasioned the double dissolution. However this may be, it is submitted that if a Bill was passed at a joint sitting in a form unacceptable to the Government, the Government could prevent the Bill from becoming law by advising the Governor-General to withhold the Royal Assent.[20]

It may be noted that the section does not allow a joint sitting to vote on requests made by the Senate and not accepted by the House. Reference to the Convention Debates shows that this was a deliberate omission.[21]

5 UNCONSTITUTIONAL BILLS

There seems no reason why, as a matter of law, the Governor-General could not grant a double dissolution on the basis of Senate rejection of a Bill that

---

[19] *Ibid* 2452-2453.

[20] *Cf* G Winterton, *Parliament, the Executive and the Governor-General* (1983) 18-19, and H E Renfree, *The Executive Power of the Commonwealth of Australia* (1984) 172. Because a Bill passed at a joint sitting is to be taken to have been duly passed by both Houses, section 58 applies to such a Bill. The advice normally given to the Governor-General when a Bill is presented for the Royal Assent does not expressly advise him to assent to the Bill (H Rep Deb 1977, Vol 106, 719). However, on ordinary principles, the Governor-General would be bound to accept ministerial advice to withhold assent.

[21] Debates of the Australasian Federal Convention 1898, Vol II, 2245-2247.

was arguably, or even clearly, unconstitutional in the sense that, if enacted, it would be wholly or partly invalid. The Senate would know that, if it passed such a Bill, its validity or invalidity could be established later by proceedings in the High Court. The foregoing would apply even to a Bill contravening section 55, which section is intended to protect the rights of the Senate.

Nevertheless it could be argued that the Governor-General could properly take into account any obvious invalidity in exercising a discretion to refuse to grant a double dissolution to a government. An example would be a Bill to diminish the remuneration of judges during their term of office. If the Governor-General were minded to do this the question whether the Governor-General could seek outside advice and, if so, from whom, would arise. It may be noted that the Governor-General was not given, nor did he seek, official or ministerial advice as to the validity of the Senate (Representation of Territories) Bill 1973 before including that Bill in the double dissolution proclamation of 1974 even though questions as to its validity were raised in the debates in the Senate.

A related problem would arise if section 57 were sought to be applied to a Bill appropriating revenue or moneys for the ordinary annual services of the government, although it seems most unlikely that this would ever occur.[22] Section 54 of the Constitution provides that such a proposed law "shall deal only with such appropriation". It seems established that, if a proposed law offending against section 54 were passed by both Houses, or at a joint sitting, and assented to, it would be valid. It would seem that the Governor-General would be justified in refusing to grant a double dissolution on the basis of rejection of a proposed law that offended against section 54, but very difficult questions arise in determining whether a proposed law does so offend.[23]

---

[22] See H E Renfree, *The Executive Power of the Commonwealth of Australia* (1984), 161, and Report from the Joint Committee on Constitutional Review 1959, para 182.

[23] On this matter reference may be made to the draft section 54A, and notes thereon, prepared by the writer for Standing Committee "D" of the Australian Constitutional Convention 1982: Fourth Report to the Executive Committee 1982, Vol 1, 72–73.