THE DOUBLE DISSOLUTION AND JOINT SITTING OF FEDERAL PARLIAMENT

CORMACK v. *COPE*

THE PETROLEUM AND MINERALS AUTHORITY CASE

THE TERRITORIAL SENATORS CASE

Stephen, J. in *Western Australia and Others* v. *The Commonwealth* said:

> The consequences, in terms of litigation, of the double dissolution of the Australian Parliament in April 1974 and of the ensuing joint sitting have been far-reaching.[1]

This case note discusses the way in which this litigation has explained s. 57 of the Constitution. The cases discussed are *Cormack* v. *Cope*,[1a] *State of Victoria and Others* v. *Commonwealth*[1b] (the *Petroleum and Minerals Authority Case*) and *Western Australia and Others* v. *Commonwealth*[1c] (the *Territorial Senators Case*).[2] A brief look at the historical background of the use of s. 57 will be followed by a summary of the cases. This case note will then examine the main elements of s. 57 discussed by the High Court in these three cases. The issues are: what was the effect of the unnecessary material in the Governor-General's proclamation convening the joint sitting? Did it invalidate the joint sitting? Can more than one proposed law be discussed and voted upon at a joint sitting under s. 57? Is there an implied limitation of time in s. 57, must the Governor-General exercise his power without delay? When does the three month period mentioned in the section commence? What is meant by the Senate's failure to pass a proposed law? Are the actions of Parliament under s. 57 reviewable by the court? This will

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[1] *Western Australia* v. *Commonwealth* (1975) 7 A.L.R. 159 at 190.

[1a] *Cormack* v. *Cope* (1974) 131 C.L.R. 43.

[1b] *State of Victoria* v. *Commonwealth* (1975) 7 A.L.R. 1.

[1c] *Western Australia* v. *Commonwealth* (1975) 7 A.L.R. 159.

[2] These cases are discussed in M. Coper, "The Place of the Senate in the Constitutional Framework", *Australian Current Law Digest*, December, 1975 at 281.

be followed by some general points raised by the court relating to the purpose and use of s. 57.

The section reads as follows:

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.
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> 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 the House of Representatives.
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> 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.

Background

The Governor-General has invoked s. 57 and dissolved both houses of Parliament on three occasions;[3] in 1914, in 1951 and in 1974.[4]

In 1914 the Liberal Party under Cook had a very slim majority

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[3] Perhaps on four occasions if the dissolution on 11th November, 1975, is considered an exercise of s. 57.

[4] The first two occasions are discussed in P. H. Lane, "Double Dissolution of Federal Parliament" (1973) 47 *A.L.J.* 290 and J. E. Richardson, "Federal Deadlocks: Origin and Operation of Section 57", *T.U.L.R.*, Vol. 1, 1958-63, p. 706 and the 1974 double dissolution is discussed in P. H. Lane, "The Third Double Dissolution" (1974) 48 *A.L.J.* 575.

in the House of Representatives and a hostile Labor Senate. The occasion for the use of s. 57 was the Senate's refusal to pass the Government Preference Prohibition Bill which proposed to abolish preference for unionists in the Commonwealth Public Service. The necessary steps were taken; the Senate rejected the bill and after three months the House of Representatives passed it and the Senate again rejected it. The Governor-General on the advice of the Prime Minister dissolved the Senate and the House of Representatives.

In 1951 the Liberal/Country Party had a majority in the House of Representatives but faced a hostile Senate. The proposed law for the purpose of s. 57 was the Commonwealth Bank Bill which provided for the re-establishment of a Board of Directors for the Commonwealth Bank. On this occasion, the use of s. 57 was not as clear cut. The Senate did not actually reject the bill, it resolved to refer the bill to a Select Committee after delaying it in the Senate. Prime Minister Menzies advised the Governor-General that in his opinion there had been a failure to pass the bill. The Governor-General subsequently dissolved both houses of Parliament. No recourse to a joint sitting was necessary on either of these occasions as the electorate, in each instance, returned a like-minded majority to both houses.

In 1974 the Australian Labor Party with a majority in the House of Representatives faced a hostile Liberal/Country Party majority in the Senate. Prime Minister Whitlam advised the Governor-General that in his opinion a double dissolution was required to resolve the deadlock caused by the Senate's refusal to pass six bills. These were the Commonwealth Electoral Bill (No. 2); the Representation Bill; the Senate (Representation of Territories) Bill; the Health Insurance Commission Bill, all of which had been refused a second reading in the Senate. The Health Insurance Bill had been unacceptably amended by the Senate and subsequently (after being passed a second time by the House of Representatives) had been refused a second reading by the Senate. The debate in the Senate on the Petroleum and Minerals Authority Bill had been adjourned to the first day of the next sitting and subsequently amended by the Senate. It was again passed by the House of Representatives and again amended by the Senate. Between the time that the Senate refused to read three of the bills[5] for the second time, and the double dissolution, Parliament was prorogued.

After the subsequent election the Prime Minister asked Sir John Kerr, the Governor-General, to convene a joint sitting. In his proclamation the Governor-General specified the business of the joint sitting. He said that the houses:

> may deliberate and shall vote together upon each of the said

[5] The Commonwealth Electoral Bill (No. 2); The Senate (Representation of Territories) Bill; The Representation Bill.

proposed laws last proposed by the House of Representatives.[6] The proclamation also required all members of both Houses to attend.

Cormack v. *Cope*

Four days before the joint sitting was to take place, proceedings were instituted by two senators in the High Court to ask for an interlocutory injunction to restrain the joint sitting. The State of Queensland issued a separate writ seeking a declaration that the Petroleum and Minerals Authority Bill was not a proposed law under s. 57. The Queensland application was refused for lack of standing.[7] The Senators' motion was also refused on the ground that the court would not interfere before a joint sitting, where a law passed by that sitting could be declared invalid if s. 57 had not been followed.[8] During these proceedings the court discussed the use of s. 57 and doubt was cast on whether the Petroleum and Minerals Authority Bill qualified as a proposed law for the purposes of s. 57.[9]

Petroleum and Minerals Authority Case[10]

Subsequent to the joint sitting an action was brought by the State of Victoria and others against the Commonwealth seeking a declaration that the Petroleum and Minerals Authority Act was not a valid law of the Commonwealth. This case examined the functioning of s. 57. It raised the issues of where the three month period specified in the section commenced, examined the meaning of "fails to pass" and discussed whether more than one bill could be passed under s. 57, a question also discussed in *Cormack* v. *Cope*. It investigated the nature and extent of judicial review of the issues relating to the passing of proposed laws. The Petroleum and Minerals Authority Act was declared invalid by a majority of the court[11] on the ground that the requirements of s. 57 were mandatory and that they had not been complied with. It was said that three months had not passed since the Senate's failure to pass the proposed law and the House of Representative's repassing of the bill. Therefore the bill had not been a "proposed law" within the scope of s. 57. The majority of the court held that the issues were justiciable.[12]

The Territorial Senators Case

Western Australia and others brought an action against the Commonwealth, challenging the validity of the Commonwealth Electoral Act (No. 1) 1973; the Representation Act 1973 and the Senate (Representation of Territories) Act 1973. The plaintiffs asked whether

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[6] *Australian Government Gazette*, 30 July, 1974.

[7] *State of Queensland and Another* v. *Whitlam and Others* (1974) 131 C.L.R. 475.

[8] *Per* Barwick, C.J.; Gibbs, J. and J. Mason, J.

[9] *Id. per* Barwick, C.J. at 490 and Stephen, J. at 470.

[10] *State of Victoria* v. *Commonwealth* (1975) 7 A.L.R. 1.

[11] *Per* Barwick, C.J., Gibbs, J. Stephen, J. and Mason, J.; McTiernan, J. and Jacobs, J. dissenting.

[12] *Per* Barwick. C.J., Gibbs, J., Stephen, J. and Mason, J.; McTiernan, J. against and Jacobs, J. not deciding.

each act was duly passed within the meaning of s. 57, whether the Senate (Representation of Territories) Act was within the legislative power of the Commonwealth and whether the issues were justiciable.

The court held that the Electoral Act (No. 2) 1973, the Representation Act 1973 and the Senate (Representation of Territories) Act 1973 had been duly passed. The court held that s. 57 does not require that a double dissolution be granted without undue delay after the second rejection by the Senate of a proposed law. It also decided that prorogation does not negate earlier events with respect to the proposed laws. That part of the Governor-General's proclamation relating to the Petroleum and Minerals Authority Bill was declared mere surplusage and not to affect the validity of the convening of the joint sitting. The majority (Murphy, J. dissenting) agreed that the issues were justiciable. The majority[13] held that the Senate (Representation of Territories) Act was valid, on the grounds that s. 122 must be given its full meaning and be read as an exception to s. 57. It also decided that this interpretation was consistent with the purposes of the Constitution and the founders who envisaged that the territories would develop to a point where Parliament might decide such representation was justified.

The main elements of s. 57 which were discussed in these three cases will now be examined.

What was the effect of the "unnecessary material" in the Governor-General's Proclamation of 30 July 1974 convening the joint sitting?

Barwick, C.J. in *Cormack* v. *Cope*[14] noted that the Governor-General had exceeded his function in specifying the business of the joint sitting. His Honour pointed out that the court did not have any statutory provisions which would enable severance and doubted whether the statement in the proclamation specifying the business of the joint sitting could be regarded as surplusage. Menzies, J. disagreed.[15] His Honour was of the opinion that the proclamation was effective to the extent that the conditions set out in s. 57 had been fulfilled and was not subject to attack because it contained unnecessary matter. Mason, J., Stephen, J. and Gibbs, J. agreed,[16] Gibbs, J. stating that the direction in the proclamation could be ignored. In the *Territorial Senators Case*[17] Gibbs, J. reconsidered his opinion in *Cormack* v. *Cope*. His Honour said that he now thought that the concluding words of the proclamation were intended to be a description of the purposes of the joint sitting rather than an authorisation or direction to the members present at it. Both Gibbs, J. and Stephen, J. in the *Territorial Senators Case*[18] stressed

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[13] *Western Australia and Others* v. *Commonwealth* (1975) 7 A.L.R. 159. *Per* McTiernan, J., Mason, J., Jacobs, J. and Murphy, J; Barwick, C.J., Gibbs, J. and Stephen, J. dissenting.

[14] *Cormack v. Cope* (1974) 131 C.L.R. at 458.

[15] *Id.* at 462.

[16] *Id.* at 473, 471 and 468

[17] *Western Australia* v. *Commonwealth* (1975) 7 A.L.R. at 183.

[18] *Id.* at 185 and 201.

that the question is whether or not His Excellency did convene a joint sitting. The answer is that he did and the surplusage in no way affects the efficacy of the proclamation. Jacobs, J.[19] stated that the submission equated the summoning of a joint sitting with the calling of a company meeting and was without foundation, while Murphy, J.[20] said that to apply the rules applicable to lesser bodies, to parliament, was an exercise in the absurd.

It seems clear that if the Governor-General exceeds his authority in a proclamation convening a joint sitting the defects in form will be regarded as surplusage and will not invalidate an otherwise effective joint sitting. Although this finding was vital to the defendants' case in the *Petroleum and Minerals Authority Case,* it is unlikely to be of great importance in the future. The court has spelt out the limitations of the Governor-General's authority under this section. Menzies, J. in *Cormack* v. *Cope*[21] summarised it succinctly:

> The power of the Governor-General is simply to convene a joint sitting. It is not for the Governor-General to prescribe what may occur at such a sitting, and in my opinion, the members would not be bound by any attempt to do so.

After such a clear direction it seems unlikely that the situation will recur.

More than one proposed law?

Can more than one proposed law be discussed and voted upon at a joint sitting under s. 57?

Although it was not necessary to decide the case on this ground in *Cormack* v. *Cope,* the court gave opinions on this question. Barwick, C.J. noted that there is nothing in the section, or in the reasons for its enactment, which requires that only one proposed law should be discussed and voted upon. He was conscious that such a view of s. 57 left open the possibility that a storehouse of proposed laws could be built up in the life of a Parliament so that after a double dissolution they could be presented to a joint sitting. He considered that the control of such a possibility might lie in the formation and observance of parliamentary conventions designed to implement the spirit of bicameral parliamentary government as well as the Constitution. Menzies, J.[22] took the view that the paragraph applied distributively to any such proposed law. Gibbs, J.[23] agreed, explaining that the section would not achieve its purpose of resolving deadlocks if each proposed law had to be the cause of a separate dissolution and the subject of a special joint sitting. Stephen, J.[24] added that if there were more than one bill it merely

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[19] *Id.* at 213.
[20] *Id.* at 225.
[21] *Cormack* v. *Cope* (1974) 131 C.L.R. at 462.
[22] *Id.* at 463.
[23] *Id.* at 468.
[24] *Id.* at 469 to 470.

meant that there was a multiplicity of grounds for a double dissolution. He accepted that this infringed the bicameral nature of the legislature but considered the intention of the section was to ensure that the will of the Lower House prevailed. Mason, J.[25] agreed with Barwick, C.J., adding that the contents of particular statutes made it inevitable that a disagreement between the Houses on an important matter of policy will necessarily extend beyond the bounds of a single law.

Although the point was not at issue in the *Petroleum and Minerals Authority Case*, McTiernan, J.[26] in passing noted that a number of proposed laws could be used for the purposes of s. 57. Barwick, C.J.[27] in the *Territorial Senators Case* stated that the court in *Cormack* v. *Cope* had decided the matter.

Must the Governor-General dissolve Parliament without delay, under s. 57?

The finding of the court that more than one proposed law could be used for the purposes of s. 57 has widened the possible use of the section to resolve deadlocks between the two houses. In the *Territorial Senators Case* arguments were submitted that such a finding would enable a government to stockpile bills for a future double dissolution founded on some remote event, unrelated in time and to the situation in which the stockpiled bill was twice rejected. Barwick, C.J.[28] in this case suggested that such a bill would become "stale" and therefore a temporal relationship must exist between Senate's failure to pass the proposed law a second time and the date of the double dissolution. The other members of the court did not agree. Gibbs, J.[29] asserted that it is not correct to say that the houses have ceased to disagree simply because some time elapses during which no action is taken to resolve the disagreement. In his Honour's opinion, the power conferred by the section should not be used at the first opportunity but only as a last resort. Stephen, J.[30] stated that he could not conceive of any curial measure by which the concept of undue delay could be judged. Mason, J.[31] agreed with Gibbs, J., stating that such a notion was artificial and in many circumstances at variance with the facts. Jacobs, J.[32] stated that a deadlock on a proposed law is never stale: it continues capable of resolution. Murphy, J.[33] took a literal approach to the construction of the section and said that the only limitation of time in the proceedings of s. 57 was that of the three months mentioned in the section. In his

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[25] *Id.* at 474.
[26] *State of Victoria* v. *Commonwealth* (1975) 7 A.L.R. at 22.
[27] *Western Australia* v. *Commonwealth* (1975) 7 A.L.R. at 166.
[28] *Id.* at 168.
[29] *Id.* at 179.
[30] *Id.* at 192.
[31] *Ibid.*
[32] *Id.* at 212.
[33] *Id.* at 221.

Honour's opinion the Senate's failure to pass continued until resolution of the deadlock.

It is here respectfully submitted that the views of Mason and Gibbs, JJ. are preferable. The court has agreed that the purpose of the section is to resolve deadlocks between the houses in exceptional circumstances. The section, it is respectfully submitted, should therefore not be used as soon as possible but only as a last resort when the situation between the houses is irreconcilable. Since more than one law can be voted upon at a joint sitting, the Governor-General and his advisors may take the view that the Senate's rejection of one law might not create a deadlock sufficient to occasion the use of s. 57. Over a period of time, however, the Senate's refusal to pass a number of proposed laws may make Parliament and the legislative programme so unworkable that exceptional measures would be needed to solve the deadlock. The earlier proposed law will not have become stale. The deadlock concerning its passing will still exist and would support the later use of s. 57 as more bills fulfilled the requirements of s. 57 adding to the deadlock.

When does the three months period mentioned in the section commence?

In *Cormack* v. *Cope* Barwick, C.J.[34] and Stephen, J.[35] suggested that the three months commenced on the Senate's refusal to pass the proposed law. The plaintiffs in the *Petroleum and Minerals Authority Case* took up this suggestion to put their submission that this Act was not a valid law. Three months had not passed between the Senate's rejection and the House of Representatives' repassing of the bill. Barwick, C.J.[36] in this case took a literal approach to the construction of s. 57. His Honour, "looking at the paragraph as a piece of English", was unable to see any basis on which the interval of three months could be referable to any event other than the action of the Senate.

His Honour said that the purpose of the section was to fix the period of time after the Senate had considered the law and taken up a definite position with respect to it, during which the House of Representatives would have time to consider whether the law should go forward again. McTiernan, J.[37] decided from convenience that the interval runs from the time the House of Representatives first passes the proposed law. If it were to run from the Senate's failure to pass it could create difficulties for the Governor-General in deciding whether to exercise his discretion under s. 57 in a given case. Gibbs, J.,[38] like Barwick, C.J. looked to the purpose of the section. He disagreed with the conclusion of Stephen, J. in *Cormack* v. *Cope* that the purpose of s. 57 is to allow the will of the House of Representatives to prevail. Gibbs, J. decided

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[34] *Cormack* v. *Cope* (1974) 131 C.L.R. at 457.

[35] *Id.* at 470.

[36] *State of Victoria* v. *Commonwealth* (1975) 7 A.L.R. at 15.

[37] *Id.* at 23.

[38] *Id.* at 39.

that the purpose of the section is to provide a means of avoiding a deadlock when the two houses are in conflict. For this reason and also for reasons of construction his Honour decided that the period commenced when the Senate failed to pass the proposed law. Mason, J.,[39] agreeing with Stephen, J. in *Cormack* v. *Cope*, decided that to hold that the period began when the House of Representatives passed the bill would serve no useful purpose in avoiding the deadlock because it would not provide time for an attempted reconciliation of differences between the two houses. Jacobs, J.[40] took a different view of failure to pass (this is discussed later). His Honour decided that the only practicable construction was one where the interval of three months was that during which the Senate does not pass the proposed law. That interval is, in his Honour's opinion, the interval after the House of Representatives passes the proposed law and sends the bill to the Senate. Murphy, J.[41] in the *Territorial Senators Case* agreed with Jacobs, J. in the *Petroleum and Minerals Authority Case* on this point, and quoted the Royal Commission on the Constitution in 1929 to support this view.

What is meant by "failure to pass"?

Barwick, C.J.[42] in the *Petroleum and Minerals Authority Case* decided that the word "fails" in s. 57 involves the notion that a time has arrived when, even allowing for the deliberative processes of the Senate, the Senate ought to answer whether or not it will pass the bill or make amendments to it for consideration by the House of Representatives. If that time has arrived and the Senate merely prevaricates and refuses to take a stand, it can properly be said that the Senate has failed to pass the bill. His Honour noted that the conduct of the Senate may be relevant in determining this time, but not the opinions of individual senators. In this judgment his Honour discussed the 1951 double dissolution where the Commonwealth Bank Bill was referred to a select committee noting that on another occasion such a referral may not be considered a failure to pass. In his Honour's opinion failure to pass means more than "not pass". It imports the notion of an obligation to take a definitive stand. Gibbs, J.[43] in the *Petroleum and Minerals Authority Case* decided that failure to pass could include inaction. His Honour noted that a motion that a bill be read "this day six months" is a traditional way of defeating a bill, as is refusal to entertain a bill transmitted by the House of Representatives. In his Honour's opinion, the words "within a reasonable time" must be implied into the paragraph. If "fails to pass" imports some element of fault, there will only be a failure to pass when the Senate, having had a reasonable opportunity,

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[39] *Id.* at 66.
[40] *Id.* at 71.
[41] *Western Australia* v. *Commonwealth* (1975) 7 A.L.R. at 221.
[42] *State of Victoria* v. *Commonwealth* (1975) 7 A.L.R. at 14.
[43] *Id.* at 32 to 33.

fails to do so. Stephen, J.[44] did not think that any conclusive test could be devised to decide when senatorial conduct involves a failure to pass for the purposes of s. 57. His Honour pointed out that otherwise appropriate parliamentary procedures may be adopted and used excessively to bring about a failure to pass. Filibustering is an example. His Honour decided that the meaning of "fails" must depend on the context. Mason, J.[45] adopted the "reasonable time" test of Gibbs, J. Jacobs, J.[46] was of the opinion that any time after the House of Representatives passed the bill, the Senate may pass it. As long as it does not do so, it is in a state of failing to pass the bill. The three month period mentioned in the section commences once the House of Representatives has passed the bill and the Senate has received but not passed it. McTiernan, J.[47] decided that the intention of the Senate, as it is manifested in its acts, was relevant to failure to pass. He agreed with Barwick, C.J. that delay could amount to an expression of unwillingness to pass the bill. However, his Honour was of the opinion that the question whether the Senate had failed to pass a bill was a political one and not within the judicial power of the court.

It seems to this writer that Barwick, C.J.'s interpretation is broad enough to encompass the many situations in which the Senate would fail to pass a bill. The words "fails to pass" import a stronger intention than "does not pass" which is the synonym that the interpretations of Murphy, J. and Jacobs, J. suggest. "Fails to pass" implies that the Senate has taken a definitive stand on the issue: it has decided to do something about the bill or decided to do nothing about the bill. A definitive stand may be indicated in a variety of ways: referral to a select committee, a motion that the bill be read again this day six months, deferment, filibustering can all indicate that the Senate has taken a definitive stand. The concept of the Senate's failure to pass as continuing from the time of the House of Representatives' passing a bill would imply a "failure" before the Senate even considered the matter. Whether or not the Senate's actions indicate a failure to pass is a question for the court. In deciding whether or not there had been a failure to pass the court would take all circumstances into consideration. What might be a reasonable time for the Senate to consider one bill might not be for another. It is clear on this approach that the court would be required to discern a particular point of time when the failure to pass occurred. It is from this point that the three months mentioned in the section would be measured.

Justiciability

Can the court interfere in the law-making process before the proposed law is enacted to prevent the passing of an unconstitutional law?

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[44] *Id.* at 53.
[45] *Id.* at 65.
[46] *Id.* at 75 to 76.
[47] *Id.* at 24.

Can the court review the passing of a law and consider whether the conditions in s. 57 have been followed in deciding its validity?

Cormack v. *Cope*

The plaintiffs in this case sought intervention by the court in the law-making process in order to stop a joint sitting. The court decided not to grant interlocutory relief but was divided in its reasons. Barwick, C.J.[48] asserted that only the court may decide conclusively whether in fact the occasion for the exercise of power of double dissolution has arisen. His Honour pointed out the Governor-General must make up his own mind whether the occasion has arisen, but what he decides for himself is in no wise binding. His Honour saw the Governor-General's action as part of the law-making process[49] and cited as authority *Bribery Commissioner* v. *Ranasinghe*[50] to support the statement that when the law-making process of the legislature is laid down by a written instrument the courts have a right and a duty to ensure that the law-making process is observed. His Honour limited the statements of the court in *Osborne* v. *Commonwealth*[51] to the specific sections, i.e., s. 53 and s. 54 and the specific "proposed laws" discussed in that case. In his Honour's opinion, the statements in *Osborne* v. *Commonwealth* limiting the court's intervention in the Parliamentary process and with proposed laws in particular are not acceptable as statements of general application. Gibbs, J.[52] agreed that the court did have the power to interfere at this stage to prevent a violation of the Constitution but his Honour did not think that it should be exercised in this case.

Menzies, J.[53] disagreed with Barwick, C.J. His Honour stated that it is no part of the authority of the court to restrain Parliament from making unconstitutional laws. His Honour distinguished *Trethowan* v. *Peden*[54] and *McDonald* v. *Cain*[55] stating that they were not authority for the proposition that the court can dictate to the members of the Houses of Parliament what they can deliberate or vote upon in parliamentary proceedings. His Honour reaffirmed the principle laid down in *Osborne* v. *Commonwealth* disagreeing with Lord Diplock's interpretation of Griffith, C.J.'s judgment in *Osborne's Case* in *Rediffusion (Hong Kong) Ltd.* v. *Attorney General (Hong Kong)*[56] Menzies, J. had one reservation. This was that if by following some procedure it was possible to exclude the jurisdiction of the court once the legislation was enacted, that this situation would give rise to another question altogether. His

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[48] *Cormack* v. *Cope* (1974) 131 C.L.R. at 451.
[49] *Id.* at 452.
[50] *Bribery Commissioner* v. *Ranasinghe* [1965] A.C. 172.
[51] *Osborne* v. *Commonwealth* (1911) 12 C.L.R. 321.
[52] *Cormack* v. *Cope* (1974) 131 C.L.R. at 466.
[53] *Id.* at 464 to 465.
[54] *Trethowan* v. *Peden* [1930] S.R. (N.S.W.) 183.
[55] *McDonald* v. *Cain* [1953] V.L.R. 411.
A.C. 1130.
[56] *Rediffusion (Hong Kong) Ltd.* v. *Attorney General (Hong Kong)* [1970] A.C. 1130.

Honour stressed that it was firmly established that the court did have the power to treat any law as invalid if it were made without the authority of the Constitution, after it had become an Act. McTiernan, J.[57] stated that the conditions or events mentioned in s. 57 are intrinsically of concern to parliament and are not justiciable issues. Stephen, J.[58] decided that the procedure laid down was well within the legislative process, reaffirming what was said in *Osborne* v. *Commonwealth*. His Honour noted that the *Rediffusion Case* was concerned with a very different kind of proposed law which would not have been subject to challenge later on, pointing out that when the Petroleum and Minerals Authority Bill became law, there would be an opportunity for those affected by its terms to attack it. Unlike Barwick, C.J. and Gibbs, J., Stephen, J. decided that the limitation on intervention by the court depended not on discretionary grounds but on justiciability. Mason, J.[59] left the issue of judicial review undecided in this case.

Petroleum and Minerals Authority Case

This case revived some of the justiciability questions raised in *Cormack* v. *Cope*.

Barwick, C.J.[60] restated that he was of the opinion that the court, when approached by a litigant with a proper interest has a duty to examine whether or not the law-making process prescribed by the Constitution had been followed and if it has not, to declare the law invalid. His Honour was of the opinion that nothing said in *Clayton* v. *Heffron* cast any doubt on the court's power to declare such invalidity. Gibbs, J.[61] agreed, also distinguishing *Clayton* v. *Heffron* on the grounds that the second chamber in that case had to pass the bill, that it concerned an amendment to the Constitution and that it involved a unitary Constitution. His Honour also distinguished *Osborne* v. *Commonwealth* on the ground that it dealt with proposed laws of a different kind. His Honour cited *Harris* v. *Minister of Interior*[62] and *Bribery Commissioner* v. *Ranasinghe* as supporting the court's power of review. Mason, J.[63] agreed that the court has the power of review of the processes of s. 57 but pointed out that the majority in *Cormack* v. *Cope* held the view that the relief should not be granted if the court has the power to later declare the law invalid. McTiernan, J.[64] following the same line that he took in *Cormack* v. *Cope* decided that the question whether the Senate failed to pass the bill on 13 December 1973 is a political question and not within the judicial power of the Commonwealth. His Honour cited *Clayton* v.

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[57] *Cormack* v. *Cope* (1974) 131 C.L.R. at 461.

[58] *Id.* at 472.

[59] *Id.* at 473.

[60] *State of Victoria* v. *Commonwealth* (1975) 7 A.L.R. at 11.

[61] *Id.* at 45.

[62] *Harris* v. *Minister of Interior* [1952(2)] S.A. 428.

[63] *State of Victoria* v. *Commonwealth* (1975) 7 A.L.R. at 61.

[64] *Id.* at 24.

Heffron in support of this view. Jacobs, J.[65] expressed some doubt as to whether the issues are justiciable but found it unnecessary to decide the matter.

Territorial Senators Case

Only Jacobs, J. and Murphy, J. added to what was said in the *Petroleum and Minerals Authority Case* on justiciability. Jacobs, J.[66] stated that the doubt he expressed in the earlier case had crystallised in the current case. His Honour was of the opinion that no court, including the High Court has the right to tell Parliament that although it has power to pass the law, it should do it again and next time do it properly. His Honour nevertheless felt bound to follow the recent decision of the court in the *Petroleum and Minerals Authority Case* and therefore treated the issues as if they were justiciable. Murphy, J.[67] agreed with Jacobs, J. that such issues are non-justiciable. His Honour said that the decision whether the procedures in s. 57 had been observed is a political decision confided by the Constitution in the Governor-General. His Honour agreed with McTiernan, J. in the *Petroleum and Minerals Authority Case* and reasserted the doctrine of the court in *Osborne* v. *Commonwealth*. However, like Jacobs, J., his Honour was bound to follow the majority in the *Petroleum and Minerals Authority Case* and dealt with the issues as if they were justiciable.

It is here respectfully submitted that Menzies, J. in *Cormack* v. *Cope* took the view most consistent with precedent. His Honour decided that the court could not directly interfere in the law-making process but that the court did have the power to review a law after it has been enacted, to see whether the conditions laid down in s. 57 have been followed. The majority of the Judges in all the cases accepted that the court is the guardian of the Constitution. This being so, the court has a right and a duty to see that the Constitution is not infringed and that the law-making process in s. 57 is observed. It is here submitted that this duty arises when the proposed law becomes an act. It is only then at the suit of a proper litigant, whose rights have been affected by that act that the court's duty arises. The court supported this line in *Clayton* v. *Heffron*. Dixon, C.J. there expressed the opinion that the plaintiff's proper remedy lay in proceedings for a declaration of invalidity after the bill had been enacted. This case seems to be clear authority for Menzies, J.'s view in *Cormack* v. *Cope*. Menzies, J. disagreed with Lord Diplock's interpretation, in the *Rediffusion Case*, of Dixon, C.J.'s remarks in *Clayton* v. *Heffron*. Lord Diplock said[68] that this was a statement of what should be the settled practice of the courts to granting discretionary relief in respect of unlawful proceedings in legislative bodies rather than

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[65] *Id.* at 73.
[66] *Id.* at 211.
[67] *Id.* at 225.
[68] *Rediffusion (Hong Kong) Ltd.* v. *Attorney General (Hong Kong)* [1970] A.C. 1136 at 1156.

a denial of jurisdiction. In the view of Menzies, J. the statements by Dixon, C.J. denied that the issues were justiciable before the proposed law became a law. It is here respectfully submitted that this is the better view.

Some members of the court in *Cormack* v. *Cope* attempted to read down the court's statements in *Osborne* v. *Commonwealth* limiting them to s. 53 and s. 54 of the Constitution. It seems to this writer that that was not the intention of the court in this case. O'Connor, J.[69] supporting Griffith, C.J.'s earlier statements, said:

> This court can have no cognizance of proposed laws, nor can it in any way interfere in questions of parliamentary procedure. Its jurisdiction arises when the proposed law becomes a law.

This clearly is support for Menzies, J.'s view in *Cormack* v. *Cope.*

The view of Murphy, J. and Jacobs, J. and McTiernan, J. that the issues are political and therefore non-justiciable while demonstrating a profound belief in the separation of powers and the primacy of Parliament are not supported by precedent. The steps in s. 57 are undoubtedly part of the Parliamentary process. However, the Privy Council in *Bribery Commissioner* v. *Ranasinghe*[70] reaffirmed the line taken in *Clayton* v. *Heffron.*[71] The Privy Council pointed out that the framers of a Constitution can make the validity of a law depend upon any fact, event or consideration that they choose. If one is chosen which consists of a proceeding within Parliament, the courts must take it under their cognizance in order to determine whether the law is valid.

The court in *Cormack* v. *Cope* was evenly divided on the question whether the court has the power to directly intervene before a law is passed, to restrain exercises of constitutional authority. It is clear from the *Petroleum and Minerals Authority Case* and the *Territorial Senators Case* that the court is empowered to examine whether the conditions set out in s. 57 have been followed in determining whether or not a law has been validly passed.

What is the purpose of s. 57?

In *Cormack* v. *Cope* Stephen, J.[72] stated that the purpose of s. 57 is such that the will of the House of Representatives will ultimately prevail. His Honour saw this as manifested in two ways. Firstly, its provisions only apply to laws originating in the House of Representatives and secondly the final arbitration is a joint sitting in which those upholding the views of the majority in the more numerous House will be likely to outvote the opposing voices, including the majority in the less numerous Senate. Barwick, C.J.[73] in the *Petroleum and Minerals Authority Case* firmly disagreed. His Honour stated that s. 57 is a means by

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[69] *Osborne* v. *Commonwealth* (1911) 12 C.L.R. 321 at 355.
[70] *Bribery Commissioner* v. *Ranasinghe* [1965] A.C. 177 at 197, 198.
[71] *Clayton* v. *Heffron* (1960) 105 C.L.R. at 288.
[72] *Cormack* v. *Cope* (1974) 131 C.L.R. at 468.
[73] *State of Victoria* v. *Commonwealth* (1975) 7 A.L.R. at 17.

which the electorate can express itself and so perhaps resolve a deadlock between the two Houses. The purpose of the joint sitting is to secure the view of the absolute majority of the total number of both Houses which may or may not represent the will of the House of Representatives. Gibbs, J.[74] agreed that while it is likely that the will of the House of Representatives will be given effect it is not certain. Stephen, J.[75] in this case further explained his statements in *Cormack* v. *Cope*. His Honour pointed out that s. 57 is an extraordinary provision which involves the abandonment of the bicameral system for the purpose of resolving disputes between two equally powerful Houses. His Honour agreed that it would be too simplistic to suggest that the will of the House should prevail and do so without delay. His Honour thought it now more accurate to say that s. 57 serves to allow the will of the electorate to prevail as it is reflected in the election for both chambers. Jacobs, J.[76] in the *Territorial Senators Case* added that s. 57 sustains the principle of English democracy that parliamentary government is representative not merely popular government. The electorate therefore does not vote on the merits of the proposed law but the merits of the government.

Conclusion

These three cases have explained the purpose, function and limits of s. 57 and have interpreted the section widely. No longer can it be assumed that s. 57 is merely a last resort to resolve a deadlock over a single vital bill. The decision that more than one bill can be used as a "proposed law" for the purposes of s. 57 has opened the possibility that a Government faced with a hostile Senate may stockpile "proposed laws" during the earlier part of its term, against a future double dissolution when the political climate would be favourable, thereby completely undermining the bicameral nature of the Parliament. The broad and uncertain interpretation of the Senate's failure to pass gives a wide discretion to the Governor-General and his advisors in making up their minds whether or not an occasion has arisen for the use of s. 57. The finding that there is no temporal limitation on the use of the Governor-General's power and that the proposed laws need not be inter-related, enables the Governor-General to dissolve both Houses at any time, when in his opinion the situation has arisen warranting the use of his powers. The section makes no mention of the advice, if any, the Governor-General is to act upon.

The court has decided that such an action is reviewable by the court, the court having the power to decide whether or not in fact the occasion had arisen for the use of the Governor-General's power. The court was split evenly over the question whether the court has the power to intervene before the bill in question became law. While the

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[74] *Id.* at 36.

[75] *Id.* at 51.

[76] *Western Australia* v. *Commonwealth* (1975) 7 A.L.R. at 212.

court's decision on the justiciability of the issues reaffirms the court's role as guardian of the Constitution, such guardianship only arises on the suit of a proper litigant whose rights have been affected by a law passed at a joint sitting. Such a litigant may not be forthcoming. The broad interpretation of s. 57 opens the way to the use of the Constitution as a political expedient. By stockpiling proposed laws early in its term, a government could gamble on the political climate, and if the Governor-General agreed, bring about a double dissolution. Upon re-election the proposed laws could be passed by a joint sitting thereby by-passing the Senate and undermining the bicameral nature of the Parliament.

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