DOUBLE DISSOLUTION OF FEDERAL PARLIAMENT — THE FIFTH DOUBLE DISSOLUTION

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[In this article, Mr O'Brien examines issues arising from the recent double dissolution of Federal Parliament. First, he examines the Senate's action of pressing requests to the House of Representatives for amendments to Bills, and considers that this constitutes a 'failure to pass' the Bills; and suggests that a Bill submitted to the Senate for a second time will be 'the same proposed law' as when first submitted, notwithstanding minor alterations such as the date of commencement. Secondly, he suggests that the Prime Minister's reference to economic issues in his advice to the Governor-General that Parliament be dissolved was not properly relevant to the exercise of the Governor-General's power. Finally, he examines in depth the question of whether the Governor-General can exercise any independent discretion in the granting of a double dissolution, and concludes that he cannot.]

A. INTRODUCTION

The official correspondence between the Prime Minister, Mr Fraser, and the Governor-General, Sir Ninian Stephen, which led to the simultaneous dissolution of both Houses of the Federal Parliament on 4 February 1983 was made public by Mr Fraser on 7 February 1983 and was reproduced in the daily press on the following day. In this article an examination is made of the issues of the double dissolution. The first issue examined concerns the package of nine Sales Tax Bills which were among the thirteen Bills referred to in the Governor-General's proclamation of dissolution.[1] The questions concerning the sales tax package are essentially of a legal nature. Did the pressing by the Senate on 20 October 1981[2] of its requests in relation to the Bills amount to a failure to pass them within the meaning of section 57 of the Commonwealth Constitution, as advised by Prime Minister Fraser? When those Bills were re-introduced in the House of Representatives on 16 February 1982,[3] was it legally necessary for them to have the same date of commencement as they had when originally dealt with by the Senate? The second issue examined is of a conventional nature. Was it proper for the Prime Minister's advice to the Governor-General to draw attention to economic arguments in favour of a dissolution of the Houses? The final

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1 Australia, *Government Gazette*, 4 February 1983. The parliamentary chronology of the thirteen Bills is set out in the Appendix to this article.

2 Australia, *Parliamentary Debates*, Senate, 20 October 1981, 1411-2.

3 Australia, *Parliamentary Debates*, House of Representatives, 16 February 1982, 68.

issue examined is the important conventional issue of the extent of the Governor-General's discretion under the first paragraph of section 57.

B. SALES TAX BILLS

1. *Pressing of Senate Requests*

It seems clear that an exercise by the Senate of the power given to it under section 53 of the Constitution to request the House of Representatives to amend a Bill does not constitute a failure to pass the Bill within the meaning of section 57. This is because the power to make requests is a Constitutional power given to the Senate in specific terms by section 53, and the majority Justices in *Victoria v. Commonwealth (P.M.A. Case)*,[4] although not giving a definitive interpretation of the words 'fails to pass' in section 57, indicated that an act in connection with a Bill which could be characterized as a normal exercise of the Senate's legislative function would not be regarded as a failure to pass the Bill.[5]

The pressing of a request for an amendment of a Bill is another matter. By 'pressing' a request is meant the Senate's insisting on a request made by it in the face of a refusal by the House of Representatives to make the requested amendment. The pressing of the Senate's requests on the Sales Tax Bills occurred when the motion of the Attorney-General, Senator Durack, that the Bills be not pressed was defeated in the Senate on 20 October 1981.[6] Although differing views have been expressed as to the Senate's power to press requests,[7] the better view appears to be that it is not a power constitutionally given to the Senate by section 53.[8] Accordingly, the pressing of a request may be construed, in accordance with the interpretations of 'failure to pass' favoured by the majority Justices in the *P.M.A. Case*, as a failure by the Senate to perform its legislative function and may thus attract the operation of section 57.

A further reason for suggesting that the pressing by the Senate of a request attracts the operation of section 57 rests on the parliamentary significance of that Senate action. Its significance is that it provides the first evidence of a legislative dispute between the Houses having arisen in relation to a particular Bill. None of the antecedent steps leading up to that action necessarily provides such evidence. For, in response to the initial request,

[4] (1975) 134 C.L.R. 81, 123 *per* Barwick C.J., 145-6 *per* Gibbs J., 184-6 *per* Mason J., 171-2 *per* Stephen J.

[5] Senator Evans apparently takes a contrary view: Australia, *Parliamentary Debates*, Senate, 20 October 1981, 1396.

[6] Australia, *Parliamentary Debates*, Senate, 20 October 1981, 1411-2.

[7] Australia, *Parliamentary Debates*, Senate, 20 October 1981, 1385-411; House of Representatives, 14 October 1981, 1997-2002; Quick J. and Garran R. R., *The Annotated Constitution of the Australian Commonwealth* (1901) 671-2; Odgers J. R., *Australian Senate Practice* (5th ed. 1976) 406-10; Pettifer J. A., *House of Representatives Practice* (1981) 380-4; Pearce D. C., 'The Legislative Power of the Senate' in Zines L., *Commentaries on the Australian Constitution* (1977) 119, 128-30.

[8] Pearce, *loc. cit.*

the House of Representatives may well agree to make the requested amendment as contemplated by the fourth paragraph of section 53. If the House of Representatives does not agree, the Senate may well reconsider its attitude to the Bill concerned. However, the pressing of a request against the opposition of the House of Representatives indicates for the first time in the Bill's parliamentary progress a deadlock between the Houses. The object of section 57 is to resolve such deadlocks.[9]

Once the Senate by pressing its requests on the Sales Tax Bills on 20 October 1981 failed to pass them, the three-month time interval provided for in section 57 commenced to run from the date of that failure to pass.[10] The three-month interval was satisfied when the Bills were again passed by the House of Representatives on 17 February 1982.

2. *The Same Proposed Law*

When the Sales Tax Bills were re-introduced in the House of Representatives on the first day of the 1982 parliamentary sittings, their date of commencement was expressed to be 1 January 1982, that date being the same as the date of commencement of the Bills as originally dealt with by the Senate. Yet, prior to the commencement of the 1982 sittings, it had been announced by the Government that, because the Bills had not been passed in 1981, it was proposed that their date of effect be altered to 29 March 1982. Accordingly the Treasurer, Mr Howard, proposed that once the Bills as re-introduced were passed they would be followed by amending Bills that changed their date of effect to 29 March 1982.

The retention in the re-introduced Bills of 1 January 1982 as their date of commencement was obviously aimed at ensuring that the Bills would be regarded for the purposes of section 57 as the same proposed laws which the Senate had not passed on 20 October 1981. The argument that it was necessary to preserve the commencement clause in its original form probably rested on the wording of the first paragraph of section 57 which permits the proposed law to be re-introduced into the House of Representatives 'with or without any amendments which have been made, suggested, or agreed to by the Senate'. The specific mention of those amendments, it might be argued, implies that no other alterations to a section 57 Bill are permissible.

Such a reading of the section is, however, very cautious. It would seem to lead to the result that, if there were a clerical error in the Bill as originally dealt with by the Houses, that error could not be corrected in the second stage of the section 57 procedure. It would also seem to require that the citation of the year in the short title of the Bill would have to remain the same as it was when the Bill was originally introduced, notwithstanding

[9] *Cormack v. Cope* (1974) 131 C.L.R. 432, 468 *per* Gibbs J.
[10] *P.M.A. Case* (1975) 134 C.L.R. 81, 124 *per* Barwick C.J., 154 *per* Gibbs J.

that a new calendar year may have commenced during the three-month period prescribed by the section.[11]

It is submitted that such a reading of section 57 is not warranted. Considerations of practicality or convenience suggest that a less rigid interpretation of the section's requirements is called for. It is suggested that the appropriate test should be along similar lines to the test adopted in section 49 of the *Acts Interpretation Act 1901* in relation to disallowed regulations, namely, whether the proposed law as re-introduced is the same in substance as its predecessor.[12] Such a test would accord with the purpose of section 57 to resolve matters of principle at issue between the Houses.

C. THE PRIME MINISTER'S ADVICE — ECONOMIC ARGUMENTS

The Prime Minister's advice[13] to the Governor-General fell into two parts. The first part of the advice was concerned with setting out the Parliamentary history of the thirteen Bills which the Prime Minister said had satisfied the requirements of section 57 and with briefly describing the purpose of the Bills. The second part of the advice drew attention to the economic situation in Australia, to the wages pause initiated by the Government and to alleged union opposition to the wages pause. Mr Fraser said:

> 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 (*sic*) 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. . . .[14]

[11] This reading of the section was apparently adopted during the 1974 double dissolution process in relation to the Health Insurance Bill 1973, the Health Insurance Commission Bill 1973 and the Petroleum and Minerals Authority Bill 1973: Australia, *Simultaneous Dissolution of the Senate and the House of Representatives 11 April 1974* (1975) P.P. No. 257, 3-4.

[12] The words 'the same in substance' in s. 49 were considered by the High Court in *Victorian Chamber of Manufacturers v. Commonwealth* (1943) 67 C.L.R. 335. In that case Latham C.J. held that for the purposes of the section regulations should be held to be substantially the same 'not only if they differ only in form but also if their material provisions . . . produce the same substantial result as a disallowed regulation, even though there may be a difference in details' (365). McTiernan J. said that a new regulation would be the same in substance as a disallowed regulation 'if, irrespective of form or expression, it were so much like the disallowed regulation in its general legal operation that it could be fairly said to be the same law as the disallowed regulation' (389). Williams J. said that the test was satisfied if the 'real purpose and effect' of the two regulations was in substance the same (406).

[13] A surprising feature of the advice was that it was not accompanied by a written legal opinion from the Attorney-General or Solicitor-General, although it is possible that a verbal opinion was given. A written legal opinion was provided in relation to the 1974 and 1975 double dissolutions, although in 1975 the initial opinion appears to have been verbal, confirmation in writing being given on the day following the double dissolution: Australia, *Simultaneous Dissolution of the Senate and the House of Representatives 11 November 1975* (1979) P.P. No. 15, 9. The provision of a legal opinion, preferably written, is desirable in order to lend support to the Governor-General's decision and to ensure that, in his consideration of the compliance of the Bills concerned with s. 57, he is not left to make an independent assessment.

[14] The final sentence quoted here is puzzling. It is clear that the Prime Minister could not obtain a double dissolution only on the basis of his economic argument. Perhaps his reference to 'the Parliament' was intended as a reference to the House of Representatives alone.

It is submitted that Mr Fraser's advice in referring to economic arguments introduced considerations that were not relevant to the exercise by the Governor-General of his power under the section. Prime Minister Cook put the matter succinctly in 1914: section 57 provides a specified remedy to deal with a specified event, namely, a deadlock between the Houses over a Bill. In this respect, he argued, the section was to be distinguished from section 5 of the Constitution. He went on to say that section 57 formed but one part of a scheme of bicameral government in which disagreements between the Houses were contemplated; however, by sections 61 to 64 responsible government was expressly provided for and such government would be impossible if the Senate were able to defeat measures supported by a ministry possessing the confidence of the House of Representatives and if that ministry were left without a constitutional remedy. That remedy, said Cook, was section 57:

> On the face of the Constitution, therefore, is a clear provision that, in a specified event, a specified remedy is available.[15]

He said that with section 5, on the other hand, a wide discretion was involved in the exercise of which the Governor-General might be called upon to enter into political considerations.[16]

D. THE DISCRETION OF THE GOVERNOR-GENERAL

1. *Compliance of a Bill or Bills with Section 57 Requirements*

It would seem to be clear enough that, for the purposes of the working or practical operation of section 57, the Governor-General is entitled to consider whether the prerequisites to a double dissolution that the section specifies have been satisfied in respect of a particular Bill or particular Bills.[17] As was mentioned above,[18] it is desirable that he have the support of an opinion of the Law Officers for the purposes of this consideration. Sir Ninian Stephen, in his letter to Prime Minister Fraser, indicated that he acted on the view that the Governor-General should satisfy himself that

[15] Australia, 'Double Dissolution — Correspondence Between the Late Prime Minister (The Right Honourable Joseph Cook) and His Excellency the Governor-General' in Australia, *Parliamentary Papers 1914-17* v, 127, 133.

[16] In fact it is doubtful whether a wide discretion is involved in the case where a s. 5 dissolution is sought by a government with a secure majority in the House of Representatives. See the author's letter to the *Age* (Melbourne), 30 July 1982; Sawer G.'s comment in Australian Constitutional Convention (Standing Committee D), *Fourth Report to Executive Committee* (1982) 27.

[17] The majority High Court view in the 1974 double dissolution cases was that what the Governor-General determines for himself on this matter is not binding but is reviewable by the Court (see, *e.g., Cormack v. Cope* (1974) 131 C.L.R. 432, 450 *per* Barwick C.J.). This writer does not support that majority High Court view on justiciability. It is submitted that, as the steps prescribed by the section lead to a democratic election in which the people have the opportunity of considering the merits of the proposed law or laws which led to the election, it is not appropriate for the judiciary to make a judgment whether or not the proposed law or laws have met the requirements of the section.

[18] See n. 13, *supra.*

there existed measures that met the requirements of the section. It is not proposed to examine this matter further. The controversial question, one that was also raised in the 1983 double dissolution correspondence, is whether the Governor-General possesses any further discretion under the section. It is that question which is now considered.

2. *The Governor-General as 'Independent Arbiter'*

In his memorandum to the Governor-General, Sir Ronald Munro Ferguson, in 1914, Prime Minister Cook argued that the discretionary power given to the Governor-General under section 57 was one which could only be exercised by him in accordance with the advice of Ministers possessing the confidence of the House of Representatives. Sir Ronald, however, felt that the question of a double dissolution was not one to be determined solely on the advice of Ministers.[19] With the approval of Cook, he consulted with the Chief Justice, Sir Samuel Griffith.[20] The Chief Justice emphasized that the Governor-General possessed an independent discretion whether or not to grant the double dissolution:

> An occasion for the exercise of the power of double dissolution under section 57 formally exists whenever the event specified in that section has occurred, but it does not follow that the power can be exercised whenever the occasion formally exists. It should, on the contrary, be regarded as an extraordinary power, to be exercised only in cases in which the Governor-General is personally satisfied, after independent consideration of the case, either that the proposed law as to which the Houses have differed in opinion is one of such public importance that it should be referred to the electors of the Commonwealth for immediate decision by means of a complete renewal of both Houses, or that there exists such a state of practical deadlock in legislation as can only be ended in that way. As to the existence of either condition he must form his own judgment.
>
> Although he cannot act except upon the advice of Ministers, he is not bound to follow their advice, but is in the position of an independent arbiter.[21]

This 'independent arbiter' concept is supported by Professor Lane[22] and Professor Ryan.[23] It was also referred to by Sir Ninian Stephen in his letter to Prime Minister Fraser. After stating that he had satisfied himself that the 13 Bills which were the subject of Mr Fraser's advice had met the technical requirements of section 57, the Governor-General said:

[19] Scott E., 'Australia During the War' in Bean C. E. W., *Official History of Australia in the War of 1914-18* (9th ed. 1943) xi, 1, 18.

[20] The propriety of the approach to Griffith, even with Cook's approval is, it is submitted, open to serious question on the ground that the judiciary should be seen to be independent from the executive arm of government. See Sawer G., *Australian Federal Politics and Law 1901-1929* (1956) 122, n. 72; *Attorney-General (Commonwealth) v. The Queen; ex parte Boilermakers Society of Australia* (1957) 95 C.L.R. 529, 540. A contrary view has been taken by Lane P., 'Double Dissolution of Federal Parliament' (1973) 47 Australian Law Journal 290, 294; and Hasluck P. M. C., *The Office of Governor-General* (1979) 15.

[21] Scott, *op. cit.* 19.

[22] Lane, *op. cit.* 301.

[23] Ryan K. W., 'The power of the Governor-General to Dissolve the House of Representatives and Both Houses of Parliament' in Australian Constitutional Convention (Standing Committee D), *Fourth Report to Executive Committee* (1982) Appendix E, 16-24.

> 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.

The independent arbiter concept, as it was put by Sir Samuel Griffith in 1914 and as it has been concurred in by Professor Lane and Professor Ryan, is not supported by this writer.[24] In this part of this article it is argued that, despite the views expressed by those authorities, the precedents themselves do not tend to support the concept. It is also argued that no justification for the concept may be found in modern constitutional theory and that, on the contrary, any action taken by a Governor-General in reliance on it could be expected to cause serious constitutional difficulties. Finally, it is argued that, while the documents of the 1983 double dissolution refer to the concept, they do not advance it in any substantial way.

(a) *The Double Dissolution Precedents*

The first matter to be borne in mind in considering the independent arbiter argument is that, so far as is publicly known, the factual position is that every request for a federal double dissolution has been granted. Thus, the Governor-General's supposed independent capacity in relation to section 57 is not given force by precedent.[25] Furthermore, a number of the writings on or connected with those double dissolutions deny the independent arbiter argument.

In connection with the 1914 double dissolution, A. B. Keith's conclusion, having regard to Sir Ronald's ultimate accession to Cook's request, was as follows:

> The action . . . of the Governor-General was explicable on one theory only, that he had decided to act strictly on the British principle, and to throw responsibility on his Ministers and not on himself.[26]

Evatt too concluded that Sir Ronald's decision established a precedent that future exercises of power under section 57 would accord with ministerial advice:

> so long as the conditions mentioned in Section 57 are complied with, the Governor-General will grant a double dissolution to Ministers who possess the confidence of the House of Representatives.[27]

[24] It is notable that in the Fourth Report of Standing Committee D to the Executive Committee, Australian Constitutional Convention, the Committee listed amongst the practices which it recommended that the Convention declare as conventions a practice that the Governor-General may refuse advice to dissolve both Houses if he is not satisfied that the conditions in s. 57 have been complied with (Australian Constitutional Convention, *op. cit.* 44, practice 26). Standing Committee D did not take up the suggestion of its Conventions Sub-Committee that the questions of the unworkability of Parliament and of the importance of the Bills concerned were also relevant (Australian Constitutional Convention, *op. cit.* 40, recommendation 27).

[25] The record in relation to s. 5 is also interesting. It shows that since 1909 every request for a mid-term dissolution of the House of Representatives — a request in connection with which the Governor-General is said to possess a broad discretion — has been granted, whether or not the government making the request had the confidence of that House. The occasions concerned occurred in 1929, 1931, 1955, 1963 and 1977.

[26] Keith A. B., *Responsible Government in the Dominions* (1928) i, 138.

[27] Evatt H. V., *The King and His Dominion Governors* (2nd ed. 1967) 45.

The advice of Prime Minister Menzies to Sir William McKell in 1951 was, in the main, confined to the establishment of the formal steps set out in section 57. In that advice Menzies also referred to the independent arbiter argument which had been raised in 1914,[28] and the advice went on to illustrate that the government's legislative programme was being made most difficult. However, Menzies expressly doubted whether in 1951 considerations as to the unworkability or otherwise of Parliament were to be given a weight which they had been given in 1914.[29] For his part, Sir William McKell indicated by his decision that he in no way attempted to form an independent conclusion, although it is difficult to say whether he considered that evidence of the unworkability of Parliament was appropriately part of Menzies' advice:

> I have given most careful consideration to the documents referred to and have decided to adopt the advice tendered in your memorandum.[30]

In 1974 Prime Minister Whitlam's advice to Sir Paul Hasluck was not confined to the six Bills which the Prime Minister said had satisfied the requirements of section 57. The advice drew to the attention of the Governor-General 'further evidence' to show that the Senate had 'delayed and obstructed the program on the basis of which the Government was elected to office in December 1972'.[31] In his reply to the Prime Minister Sir Paul said that, since it was clear to him that grounds for granting a double dissolution were provided by the parliamentary history of the six Bills, it was not necessary for him to reach any judgment on the wider case presented by the Prime Minister that the policies of the Government had been obstructed by the Senate. That, he said, was a matter for judgment by the electors.[32]

The documents of the forced dissolution of 1975 are neutral on the issue whether the Governor-General is an independent arbiter under section 57. It is not proposed to enter into any examination of that precedent.

(b) *The Place of the Independent Arbiter Concept in Modern Constitutional Theory*

In considering this matter it is proposed, first, to examine the authorities

[28] Australia, 'Documents Relating to the Simultaneous Dissolution of the Senate and the House of Representatives by His Excellency the Governor-General on 19th March, 1951' in Australia, *Parliamentary Papers 1957-58* v, 915, 926.

[29] *Ibid.*

[30] *Ibid.* 937.

[31] Australia, *Simultaneous Dissolution of the Senate and the House of Representatives 11 April 1974* (1975) P.P. No. 257, 4.

[32] *Ibid.* 38. This writer does not agree with Professor Ryan's view (*supra* n. 23) that what Sir Paul was asserting in his statement was that, as the condition of an unworkable Parliament was clearly established through the rejection by the Senate of six Bills, it was unnecessary for him to consider further matters directed to establishing that situation. Sir Paul, it is submitted, made a clear distinction in his statement between, on the one hand, the establishment of the requirements specified in the section and, on the other, the matter of unworkability.

relied on by Professor Lane in support of the independent arbiter idea.[33] He cites Evatt. However, in 'The Discretionary Authority of Dominion Governors',[34] Evatt drew a distinction, which in this writer's view is critical, between the case where Ministers possessing the confidence of the Lower House advise the Crown representative to dissolve and the case where such advice is tendered by Ministers who have met with defeat in the House. In the former case, said Evatt. '*ex hypothesi*, no alternative Ministry is possible, and the King's representative, who is thereby precluded from obtaining other advisers, must act upon the advice to dissolve, even if, as is often the case, that advice is affected entirely by party considerations'.[35] Professor Lane also cites a statement by Forsey. However, Forsey's statement is nothing more than a statement of the strictly legal position and in a further passage on the same page of his book Forsey distinguishes between the legal position and convention:

> In legal theory the discretion of the Crown is absolute (though of course any action requires the consent of some Minister), but the actual exercise of the power is everywhere regulated by convention.[36]

Recently Forsey has said that the possibility of an alternative government which can carry on without a dissolution is an indispensable condition of refusal of a dissolution.[37]

Professor Lane also cites a number of English authorities.[38] Of the modern authorities among them, de Smith[39] and Wade and Phillips[40] argue that the Queen's power to refuse a dissolution is limited. At the least, those authorities insist that an alternative government enjoying the confidence of the House of Commons must be capable of being formed. Marshall and Moodie,[41] whose work is not referred to by Professor Lane, argue in favour of an even more limited discretion. In their view, the only case in which the Queen should have a discretion to refuse a request for a dissolution is where a Prime Minister who has been defeated at a general election requests another immediate dissolution.[42]

It is suggested therefore that, while the authorities referred to above indicate the existence of some limited discretion inherent in the Crown or

[33] The authorities here considered are set out in Lane, *op. cit.* 301-2.
[34] (1940) 18 *Canada Bar Review* 1.
[35] *Ibid.*
[36] Forsey E. A., *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943) 3.
[37] Forsey E. A., 'The Dissolution of Parliament in Canada' (1977) 58 *The Parliamentarian* 5, 10.
[38] Lane, *op. cit.* 301-2.
[39] De Smith S., *Constitutional and Administrative Law* (3rd ed. 1977) 103-5.
[40] Wade E. C. S. and Phillips G. G., *Constitutional and Administrative Law* (9th ed. 1977) 226-8. There are no substantial differences between the editions of de Smith and of Wade and Phillips cited by Lane and the later editions of both works published since Lane's article.
[41] Marshall G. and Moodie G. C., *Some Problems of the Constitution* (4th ed. 1967).
[42] *Ibid.* 48. Reference may also be made to Alderman R. K. and Cross J. A., 'The Prime Minister and the Decision to Dissolve' (1974-75) 28 *Parliamentary Affairs* 386, 387.

the Crown representative with respect to requests for dissolutions, they provide no warrant for the view that the Governor-General is an independent arbiter under section 57.

A major difficulty with the independent arbiter argument is that the Griffith memorandum from which it is derived pre-dates later constitutional developments which must be seen as casting doubt upon its continued validity. In the Balfour Declaration[43] of 1926 it was accepted and agreed that the Governor-General should stand in the same relation to his Dominion Government as did the Monarch in relation to the United Kingdom Government:

> the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain.[44]

The limits of the Queen's dissolution discretions, as indicated by modern British authorities, were referred to above. Those discretions do not appear to contemplate room for independent action where the Queen is asked for a dissolution by a Prime Minister undefeated in the Commons. If one assumes that the potential room for the exercise of discretion by the Governor-General in respect of either a section 5 dissolution or a section 57 dissolution in relation to which the formal prerequisites of the section have been satisfied is the same in the case where the dissolution concerned is requested by a Prime Minister with a secure majority, then, it would seem that by analogy with the Queen's discretion Griffith's independent arbiter argument is no longer appropriate in relation to the Governor-General's power under section 57.

The virtue of the independent arbiter concept, as Professor Lane sees it, is that '[i]t may be the bulwark protecting parliamentary democracy, or the Constitution, or the usages of Australian government, or the wishes of the electorate against what [may be called] Cabinet democracy'.[45] It is difficult to accept this argument. In the first place, it is hard to see how the Constitution would need protection: if the Constitution grants the power to dissolve and the power is exercised, it is not apparent how the Constitution might thereby be harmed. It is possible that Professor Lane is here adverting to a situation where the section 57 prerequisites had plainly not been satisfied. In that event, however, the High Court has determined that it has power to determine the validity of legislation emanating from the section 57 process.[46] To the extent that the High Court has apparently determined that the validity of a double dissolution itself cannot be reviewed,[47] Professor

[43] For a discussion of the Balfour Declaration, see Wheare K. C., *The Statute of Westminster and Dominion Status* (5th ed. 1953).

[44] United Kingdom, *Imperial Conference: Summary of Proceedings* (1926) Cmd 2768, 12.

[45] Lane, *op. cit.* 301.

[46] *P.M.A. Case* (1975) 134 C.L.R. 81.

[47] *Ibid.* 120 *per* Barwick C.J., 178 *per* Stephen J., 183-4 *per* Mason J. Gibbs J. said that even if the double dissolution were invalid, the elections that followed would be

Lane's concern has more force. But, even on that basis, it must be pointed out that the purpose of a dissolution is an appeal to the ultimate political sovereign, the people, and it is difficult to see how the Constitution may be damaged by having the people exercise their political rights. While 'Cabinet democracy' may in some areas of the public realm need to be guarded against, section 57, it must be remembered, is an inherent part of the political process and it is suggested that it is an impertinence to the people to argue that it ought to be for the Governor-General rather than the people to pass judgment on the merits of the government's double dissolution case.

The practical deficiency of the independent arbiter view is that if the Governor-General, in reliance upon it, were to exercise negatively his discretion and the Prime Minister who advised the double dissolution resigned as a result, the Governor-General might find himself in a situation where no alternative ministry could hope to carry on. Professor Ryan in his paper prepared for the Australian Constitutional Convention recognizes this difficulty in relation to section 5.[48] However, he does not give it its due weight in relation to section 57.

(c) *The 1983 Double Dissolution*

As mentioned above, Sir Ninian said to Mr Fraser that such precedents as existed together with the writings on section 57 suggested that, in considering the Prime Minister's advice, he should pay regard to the importance of the Bills in question and to the workability of Parliament.

The weight to be accorded to this statement is unclear. It is not cast in terms of a positive pronouncement that in exercising his discretion the Governor-General was required to have regard to the importance of the Bills and the workability of Parliament. Rather, the statement appears to do no more than draw attention to the precedents and authorities concerned. There is no concession by the Governor-General that he agreed with those precedents and authorities on this point, nothing to suggest that, so far as his own view was concerned, he considered the matter to be other than open. But, if this statement of Sir Ninian is neutral on the matter, how does one explain his seeking of a second letter from the Prime Minister directed to the question of the workability of Parliament? It is suggested that the evidence of unworkability was sought merely by way of a formal Prime Ministerial certification. In other words, without conceding the necessity of

valid because of the operation of ss 12 and 32 (157). Alone of the Justices, Gibbs J. suggested that injunctive relief would be possible to prevent an invalid double dissolution from having effect (157). Normally, however, the opportunity for seeking such relief would be non-existent because of the instatanenous effectiveness of a proclamation of dissolution. The only occasion on which a proclamation effecting a dissolution on a date later than the date of the proclamation has been used was in 1913; Australia, *Government Gazette*, 19 April 1983. Sir Robert Garran apparently had some legal doubts about a proclamation in this form: Australia (Attorney-General's Department), *Opinions of Attorneys-General* (1981) i, 691-2.

[48] Ryan, *op. cit.* 13.

establishing that the Bills concerned were important or that Parliament had become unworkable, Sir Ninian sought from the Prime Minister some formal reassurance that, if either the matter of the importance of the Bills or the matter of unworkability is properly an element to be established for the purposes of a double dissolution, then there was, in the circumstances of the double dissolution sought by Mr Fraser, at least sufficient evidence of unworkability.

That the independent arbiter argument was raised more as a matter of form than as a matter of substance is indicated by the scanty evidence of unworkability that was in fact presented by Mr Fraser and accepted by Sir Ninian. However, before that evidence is considered, it is proposed to examine the matter of the importance of the Bills.

(i) *The importance of the Bills*

On this matter, Sir Ninian was unable to make any positive determination:

> As to the importance of these measures, viewed in the context of the extraordinary nature of a double dissolution, I am not myself in any position, from their mere subject matter and text, to form a view about the particular importance of any of them.

It is suggested that it is somewhat surprising that Sir Ninian should have made any reference to the importance of the Bills as a relevant consideration, even if only as a concession to the supposed authorities. As a matter of law, it would seem that the matter is not relevant. In *Victoria v. Commonwealth (P.M.A. Case)* Gibbs J. said that section 57 might properly be invoked notwithstanding that the proposed law as to which a disagreement existed was not one of vital importance.[49] This conclusion is reinforced by the language of the section: the phrase 'any proposed law' is used in preference to the phrase 'a proposed law'.

But even as a matter that goes to the conventions surrounding the Governor-General's discretion under the section, it would seem that the importance of the Bills is of doubtful relevance. In 1914 the Government Preference Prohibition Bill which was the subject of the double dissolution was deliberately designed both in form and substance to provoke the opposition of the Labor-controlled Senate.[50] The Bill itself, containing one clause of substance, viz., a negative injunction against preference or discrimination in public service employment on account of membership or non-membership of a trade union, had, as a matter of administration, already been given effect to.[51] Prime Minister Cook put it explicitly in his advice to Sir Ronald that the Government had made up its mind quite deliberately to bring about the conditions for a double dissolution.[52] Having regard to these facts, Evatt

[49] (1975) 134 C.L.R. 81, 144.

[50] With his usual gift for felicitous expression, Professor Sawer has described the Bill as one 'cooked up' for the occasion: *Canberra Times*, 9 February 1983.

[51] Australia, *Parliamentary Debates*, House of Representatives, 10 June 1914, 1972.

[52] Australia, 'Double Dissolution — Correspondence Between the Late Prime Minister (The Right Honourable Joseph Cook) and His Excellency the Governor-General' in Australia, *Parliamentary Papers 1914-17* v, 127, 129.

must surely be correct in concluding that the decision of Sir Ronald must be regarded as establishing the proposition that 'it is not material to consider the importance or significance of the Bill which, being the subject of dispute between the two Houses, becomes the occasion of the double dissolution'.[53]

The importance of the Commonwealth Bank Bill in 1951 is also open to question. In his memoirs, Menzies talks of the Bill as being merely a device:

> Fresh from victory at the General Election as I was, and frustrated in the Senate, I decided that I would work towards a double dissolution on a lively issue . . . the legislation we selected for the test was the Commonwealth Bank Bill. . . .[54]

(ii) *The unworkability of the Parliament*

It was mentioned above that the evidence of unworkability that was presented by Mr Fraser and accepted by Sir Ninian was very weak. It is submitted that the statement by the Prime Minister that he regarded a double dissolution as critical to the workings of the Government and Parliament merely begged the question. It is also submitted that the references by the Prime Minister to 'some significant Government legislation' that was not passed by the Senate and to measures that had 'not even been put to the Parliament' because the Government knew that 'they would not achieve passage through the Senate' were so vague as to carry little evidentiary value. No other evidence of unworkability was referred to.

Having regard to the quality of the evidence of unworkability and to Sir Ninian's eminence as a lawyer and former Justice of the High Court, one tends to be confirmed in the view that the matter of unworkability was not a matter of significance in the granting of the double dissolution. It is submitted that this matter and the independent arbiter viewpoint to which the matter gives expression were raised merely to satisfy form and were not issues of substance in the double dissolution.[55]

(d) *Conclusion*

In this part of the article it has been questioned whether the precedents indicate that, once the Governor-General has satisfied himself as to the compliance of a Bill or Bills with the requirements of section 57, he yet

[53] Evatt, *loc. cit.*

[54] Menzies R. G., *The Measure of the Years* (1972) 43.

[55] If, on the other hand, one were to conclude that unworkability was a substantial issue taken account of by the Governor-General and if it were accepted that it was an irrelevant matter for the Governor-General to consider in the exercise of his power under s. 57, the question might arise whether, on the authority of *Re Toohey; ex parte Northern Land Council* (1981) 56 A.L.J.R. 164 and *F.A.I. Insurances v. Winneke* (1982) 41 A.L.R. 1, his decision would be reviewable. It is suggested that it would not. *Toohey's Case* was concerned with a discretion which, *as a matter of law*, the Crown representative was required to exercise on the advice of Ministers. For that reason the High Court considered that the discretion stood on the same footing as a discretion vested directly in a Minister. Secondly, there are indications in both cases that decisions which affect the community as a whole may be treated differently by the High Court from decisions that affect individuals: *Toohey's Case* 183 *per* Mason J.; *F.A.I. Case* 44 *per* Wilson J.

retains an independent discretion under the section either to grant or to refuse to grant a requested double dissolution. It has also been suggested that no justification for this independent discretion, or for what has been called the position of the Governor-General as an independent arbiter under the section, may be found in modern constitutional theory. So far as the 1983 double dissolution is concerned, it has been submitted that it does no more than formally acknowledge the existence of the argument that the Governor-General is an independent arbiter under the section. If the writer is wrong in taking that view of the 1983 double dissolution documents and if Sir Ninian's statements are to be taken as supporting the continued validity of the independent arbiter concept, it is respectfully submitted that those statements are mistaken.

APPENDIX

PARLIAMENTARY CHRONOLOGY OF DOUBLE DISSOLUTION BILLS

A. *Sales Tax Bills (Nos 1A-9A) 1981*

— introduced together in the House of Representatives for the first time on 25 August 1981 (House of Representatives, *Votes and Proceedings* 429)

— passed by the House of Representatives on 27 August 1981 (House of Representatives, *Votes and Proceedings* 445-6)

— debated by the Senate on 8, 9, 16 and 23 September 1981 and returned by the Senate to the House of Representatives with requests for amendments (*Journals of the Senate* 521-4, 529-30)

— the House of Representatives on 14 October 1981 resolved that the amendments requested by the Senate be not made (House of Representatives, *Votes and Proceedings* 589-93)

— the Senate considered the message of the House of Representatives on 20 October 1981 and, in consequence of the defeat of a motion that 'the requests be not pressed', the Senate resolved that the requests be pressed (*Journals of the Senate* 576-77)

— Bills again presented to the House of Representatives on 16 February 1982 (House of Representatives, *Votes and Proceedings* 701)

— passed by the House of Representatives on 17 February 1982 (House of Representatives, *Votes and Proceedings* 715-6)

— debated by the Senate on 23 and 24 February and 10 March 1982 and second reading refused on 10 March 1982 (*Journals of the Senate* 772-3).

B. *Canberra College of Advanced Education Amendment Bill 1981*

— introduced in the House of Representatives for the first time on 15 October 1981 (House of Representatives, *Votes and Proceedings* 603)

— passed by the House of Representatives on 22 October 1981 (House of Representatives, *Votes and Proceedings* 624)

— rejected by the Senate on 11 November 1981 (*Journals of the Senate* 643)

— Bill again presented to the House of Representatives on 22 April 1982 (House of Representatives, *Votes and Proceedings* 852)

— passed by the House of Representatives on 28 April 1982 (House of Representatives, *Votes and Proceedings* 870)

— second reading refused by the Senate on 19 May 1982 (*Journals of the Senate* 934).

C. *States Grants (Tertiary Education Assistance) Amendment Bill (No. 2) 1981 and Australian National University Amendment Bill (No. 3) 1981*

— both Bills introduced in the House of Representatives for the first time on 17 November 1981 and passed on the same day (House of Representatives, *Votes and Proceedings* 669-71)

— second reading refused by the Senate on 24 November 1981 (*Journals of the Senate* 685)

— Bills again presented to the House of Representatives on 22 April 1982 (House of Representatives, *Votes and Proceedings* 852)

— passed by the House of Representatives on 28 April 1982 (House of Representatives, *Votes and Proceedings* 869-70)

— second reading refused by the Senate on 19 May 1982 (*Journals of the Senate* 934).

D. *Social Services Amendment Bill (No. 3) 1981*

— introduced in the House of Representatives for the first time on 17 November 1981 (House of Representatives, *Votes and Proceedings* 671)

— passed by the House of Representatives on 18 November 1981 (House of Representatives, *Votes and Proceedings* 686)

— second reading refused by the Senate on 25 November 1981 (*Journals of the Senate* 691-2)

— Bill again presented to the House of Representatives on 10 March 1982 (House of Representatives, *Votes and Proceedings* 765)

— passed by the House of Representatives on 11 March 1982 (House of Representatives, *Votes and Proceedings* 773-4)

— second reading refused by the Senate on 24 March 1982 (*Journals of the Senate* 823).