SECTION 57 OF THE CONSTITUTION — THE SIXTH DOUBLE DISSOLUTION

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1 INTRODUCTION

The events leading up to the sixth double dissolution of the Commonwealth Parliament on 2 June 1987 and the subsequent abandonment of the Australia Card Bill 1986[1] highlight the difficulties any Federal Government faces when negotiating the passage of controversial legislation through a hostile Senate.

In the light of the legislative history of the Australia Card Bill, I propose to discuss the requirement of "identical bills" in s 57 of the Constitution, the amendments which a joint sitting may consider and finally, the disallowance of regulations by the Senate with reference to s 57.

2 LEGISLATIVE HISTORY OF THE AUSTRALIA CARD BILL

The Australia Card Bill 1986 was first introduced into the House of Representatives on 22 October 1986. The Bill immediately became controversial because it proposed an identity card system for Australians which required every person to carry an identity card. The card would have been required to be produced for a range of transactions including the opening of a bank account, share transfers and so on. Penalties were provided for breaches of these requirements. The Bill was first passed by the House on 14 November 1986.[2] It was then introduced into the Senate on 17 November 1986 where after considerable debate it was rejected on 10 December 1986.[3]

Before introducing the Bill into the House of Representatives the second time, Dr Blewett, the Minister responsible for the legislation, issued a press release on 5 February 1987 indicating that the Bill would be altered in certain respects to improve the implementation of the legislation and to clarify the safeguards of privacy already built into the proposed system — matters upon which the Senate acted in rejecting the Bill. However, when the Bill was re-introduced into the House of Representatives on 18 March 1987, it was identical to the Bill as originally passed by the House without any of the changes proposed by the Minister. The Bill was passed again by the House on 25 March 1987 without amendment.[4] The Minister during his second reading speech made no reference to the changes he proposed earlier.[5] The Opposition fully appreciated the Government's back-down as indicated by Mr Blunt MHR for Richmond during debate on the Bill on 24 March 1987.[6] After alleging the Government's intention was to trigger a double dissolution, the Member surmised:

> Someone then said: 'There is a problem. The Minister for Health, good old Dr Blewett, has promised to amend it, and under the Constitution there cannot be a double dissolution unless the legislation is exactly the same, right down to the

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1 There were three Australia Card Bills Nos 1, 2 & 3 each in identical terms.

2 H Reps Deb 1986, Vol 152, 3131 (14 November 1986).

3 Sen Deb 1986, Vol 118, 3762 (10 December 1986).

4 H Reps Deb 1987, Vol 154, 1472 (25 March 1987).

5 *Ibid* 1054-1060 (18 March 1987).

6 *Ibid* 1399 (24 March 1987).

same i's and t's, the crossings and the dots on those letters. What has happened is that Dr. Blewett had to change his mind?' What do we have here now? We have the same exact legislation, word perfect.

What is the motive? It is not a desire to get the ID card implemented . . . it is a cynical attempt to set up the preconditions for a double dissolution.[7]

The same Bill was re-introduced into the Senate on 26 March 1987 and was again rejected by the Senate on 2 April 1987.[8] Having been passed by the House of Representatives twice and rejected by the Senate twice, with the requisite three months period expiring between the first rejection by the Senate and the second passage through the House of Representatives, the Australia Card Bill satisfied the requirements of s 57 of the Constitution. This enabled the Prime Minister to advise the Governor-General to proclaim a double dissolution of the Commonwealth Parliament on 5 June 1987. In his letter[9] to the Governor-General on 27 May 1987, the Prime Minister stated the importance to the Government of the Australian Card Bill as "an integral part of the Government's tax reform package"[10] and hence, the need to resolve the deadlock with the Senate by a general election.

The Hawke Labor Government was returned to office on 11 July 1987 but, without a majority in the Senate. The Government still intended to re-introduce the Australia Card Bill. If the Senate continued to block the Bill it seemed inevitable that a joint sitting of both Houses of Parliament would occur — only the second in its history.[11]

The identical Bill was introduced for the third time into the House of Representatives on 15 September 1987 and was passed on 16 September 1987.[12] It was again introduced into the Senate on 17 September 1987. During the course of its second reading debate in the Senate, the Opposition Leader, Mr. Howard, in the House of Representatives on 23 September 1987 argued publicly for the first time that the legislation was "effectively dead".[13] The Bill's substantive clauses 40 to 54, which prescribed the circumstances in which the identity card was to be produced, only came into force upon dates to be fixed by regulations. It was likely that these regulations, like the Bill itself, would be disallowed by the Senate. Almost immediately, the Government admitted defeat and abandoned the Bill.[14]

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7 *Ibid* 1400 ff.

8 Sen Deb 1987, Vol 120, 1789–1790 (2 April 1987).

9 The correspondence between the Prime Minister and the Governor-General has been published by the Australian Government Publlishing Service: *Simultaneous Dissolution of the Sente and the House of Representatives 5 June 1987* 1987.

10 *Ibid* 2.

11 The only previous joint sitting of the Commonwealth Parliament was on 6 and 7 August 1974.

12 H Reps Deb 1987, Vol 156, 193 (16 September 1987).

13 *Ibid* 572 (23 September 1987).

14 The Prime Minister announced on 6 October 1987 that the Government would no longer proceed with the Bill then before the Senate — see H Reps Deb 1987, Vol 156, 749 (6 October 1987). The Senate resolved that the Bill be withdrawn on 8 October 1987 — see Sen Deb 1987, Vol 122, 874 (8 October 1987).

3 SECTION 57 IMPLICATIONS

The history of the Australia Card Bill raises a number of interesting constitutional issues in relation to s 57 of the Constitution which provides:

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

There are three issues which require consideration:

(1) The need for the Bill to remain identical throughout the stages prescribed by s 57 except for "amendments which have been made, suggested, or agreed to by the Senate".
(2) The view that the joint sitting itself could not consider an amendment to the Bill so as to enable it to operate without reliance on regulations.
(3) The inability of s 57 to cope with a disagreement between the Houses over regulations.

A Identical Bills

There seems to be general agreement amongst those few commentators[15] who have considered the issue, that at the second passage through the House of Representatives, if the requirements of s 57 are to be satisfied, the Bill must be identical to the one initially passed by the House, except for any amendments made, suggested or agreed to by the Senate. Consequently, the House of Representatives is precluded from amending the Bill at any time after its first passage if it wishes to retain the option of s 57. Hence, Dr Blewett's proposed changes to the Australia Card Bill before its re-introduction

[15] J Quick and R R Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 685; May, *Practice of the House of Representatives* (1981) 44; D Pearce, "The Legislative Power of the Senate" in L Zines (ed) *Commentaries on the Australian Constitution* (1977) 149; C K Comans, "Constitution, Section 57 — Further Questions" (1985) 15 F L Rev 241.

into the House of Representatives were stifled to maintain the Bill's capacity to trigger a double dissolution. Yet, the Senate is free to suggest or make amendments. Is this accepted interpretation of s 57 correct? If so, is it desirable?

The language of s 57 certainly indicates the need for identical legislation when it refers to "the proposed law" at each stage "with or without amendments which have been made, suggested, or agreed to by the Senate". No reference at all to amendments by the House of Representatives occurs in s 57 except in its final paragraph (which I will discuss below).[16]

There is no clear judicial comment on this issue of identity in any of the High Court decisions on s 57. The High Court decisions[17] on s 57 concerned those six bills which were the subject of the only joint sitting under s 57 in 1974. All six Bills remained identical throughout their enactment. One related comment was made by Stephen J in *Victoria v Commonwealth* (*PMA* case):

> At each stage of the process 'the proposed law' acquires an additional quality, that of having been subjected to whatever process that stage has involved.[18]

But Gibbs J in *Western Australia v Commonwealth*[19] implicitly recognised the requirement of identity. In rejecting an argument that after the second rejection by the Senate the Governor-General was required to proclaim a double dissolution without undue delay, His Honour illustrated how further time for negotiation was available. His Honour suggested that another Bill more acceptable to the Senate could be put forward and if no agreement were reached, the House of Representatives could use the original Bill for s57 purposes.[20]

It may seem enigmatic that the provision inserted into the Constitution to resolve disagreements between the two Houses, denies the House of Representatives the ability to alter its proposed legislation in negotiating agreement with the Senate, if the House is to retain the benefit of a s 57 resolution. However, there remains, albeit a cumbersome procedure, the option proferred by Gibbs J above,[21] to introduce other legislation while keeping the s 57 Bills in reserve. Alternatively, there is the opportunity to hold a "conference" comprising five members from each House to consider a settlement to the deadlock. Given that there have been only two such formal conferences,[22] it is clearly an option not availed of, probably because negotiation is not an objective. Rather the objective is a double dissolution. Nonetheless, the requirement of identity has the potential to inhibit the ability of the House of Representatives to negotiate without losing its s 57 options.

Interestingly, it appears this requirement was not a real obstacle until 1987 with the withdrawal of the Australia Card Bill. Since federation, there have been six double dissolutions on the basis of 43 Bills, all of which were never amended at any stage by the House of Representatives. With respect to both the first double dissolution in 1914 and the second double dissolution in

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16 *Infra* text at nn 32-38.

17 *Cormack v Cope* (1974) 131 CLR 432, *Victoria v Commonwealth* (the *PMA* case) (1975) 134 CLR 81 and *Western Australia v Commonwealth* (1975) 134 CLR 201.

18 *Victoria v The Commonwealth* (the *PMA* case) (1975) 134 CLR 81, 178.

19 (1975) 134 CLR 201.

20 *Ibid* 237.

21 *Supra* text at n 20.

22 In August 1930 and April 1931 — see J R Odgers, *Australian Senate Practice* (1976), 581.

1951, only one Bill[23] on each occasion was relied upon. It seems clear from the moment the Senate first rejected each Bill, the Government on each occasion was seeking a double dissolution and thus no amendments were contemplated. In 1974, several bills were relied upon for the third double dissolution — six in all — after which the High Court [24] upheld the application of s 57 to multiple Bills. This was followed in 1975 when the fourth double dissolution occurred on the basis of twenty-one Bills. In relation to *all* of the Bills relied upon for the double dissolutions in 1974 and in 1975, on no occasion were any of them amended by the House of Representatives. Similarly in 1983, thirteen Bills were relied upon, none of which was amended by the House of Representatives. Whether the lack of amendment was due to the absence of any desire to amend or due to the requirement of identity is not clear in all cases. What is clear is the determination of each Government of the day, after the Senate's first rejection of the Bill or Bills, to push them through the s 57 procedure in order to obtain a double dissolution and hopefully gain a majority in both Houses. In 1983, a potential problem existed in relation to the nine Sales Tax Bills relied upon, with four other Bills, for the double dissolution in that year. All of the nine Sales Tax Bills if enacted were by s 2 of each enactment to commence on 1 January 1982. However, it was 16 February 1982 before the Bills were re-introduced into the House of Representatives after being rejected by the Senate. The then Treasurer, Mr Howard, stated in the House that the date of commencement had not been changed in order to comply with "constitutional considerations"[25] but that subsequent legislation would be enacted to change the commencement date. Obviously, the likelihood of such legislation being passed by both Houses was negligible if the original bill was blocked. In the end, the Fraser Government lost the general election after the 1983 double dissolution and the Sales Tax Bills were dropped.

The difficulty which arose in 1983 as a result of the out-dated commencement date for the Sales Tax Bills, if it had it not been avoided by the change of Government, would have been easily resolved if s 57 had been drafted along similar lines to the Parliament Act 1911 (UK) sub-s 2(4) of which provides:

> 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 or to represent any amendments which are certified by the Speaker to have been made by the House of Lords [in the second session] and agreed to by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance to this section.

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[23] Government Preference Prohibition Bill 1914 and the Commonwealth Bank Bill 1951 respectively.

[24] *Cormack v Cope* (1974) 131 CLR 432, 455-456 *per* Barwick C J, 461 *per* McTiernan J, 462 *per* Menzies J, 468 per Gibbs J, 469-470 *per* Stephen J, 474 *per* Mason J. See also Victoria v Commonwealth (the *PMA* case) (1975) 134 CLR 81.

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

This provision has been adopted by the Constitution of Victoria.[26] It is worth noting that the proviso to sub-s 2(4) expressly deals with the capacity of the lower House to amend Bills by providing that the House of Commons during the second passage of the Bill may not only "suggest further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and, if agreed to by that House, shall be treated as amendments made by the House of Lords and agreed to by the House of Commons".

A similar provision to the substantive part of sub-s 2(4) permitting necessary amendments due to the time which has elapsed, has been recommended for insertion into the Commonwealth Constitution by the Constitutional Commission in its Final Report.[27]

It seems that the accepted interpretation of s 57 is not open to doubt, that is, that the Bill must maintain identical provisions except for any Senate amendments. Whether the identity of a Bill is tested by form and/or substance[28] is another issue which is beyond the scope of this discussion. Since the policy behind the same identity requirement of s 57 has been adopted by other jurisdictions, what grounds are there for preventing any amendments by the House of Representatives? Two important reasons can be given.

First, it prevents the grafting onto the Bill of other controversial legislation to which the Senate would not agree at other stages of the s 57 procedure. But should there not be some provision for minor amendments, in the same way that the Parliament Act 1911 (UK) permits amendments arising from the lapse of time? The difficulty of defining permissible minor amendments may be one reasons for not allowing them. The reliance on regulations in the Australia Card Bill was a technical hitch unrelated to the substantive provisions and arguably no different from the case of a Bill becoming outdated. Possibly, one can argue that the requirements for identical Bills is not mandatory but directory in which case one can rely on the comments of Stephen J in the *PMA* case who suggests s 57 may be given a directory construction in appropriate cases where there needs to be only "substantial compliance with the general object at which the statutory provision aims".[29]

The second reason for this inflexibility is that as it is only by this section that the Senate can be dissolved, s 57 was never intended to be easily triggered. On the other hand, to deny a right of amendment to the House of Representatives under any circumstances, one might argue, encourages at the outset the use of the s 57 procedure to force a double dissolution rather than deterring its use.

B Amendments at the Joint Sitting

Given the apparent inability of the House of Representatives to amend a Bill under s 57 and given the precision to which s 57 refers in each stage "the proposed law with or without any amendments which have been made . . . *by the Senate*",[30] it is surprising to find in the final paragraph of s 57

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[26] Constitution Act 1975 (Vic) s 67 inserted by the Constitution (Duration of Parliament) Act 1984 (Vic).

[27] *Final Report of the Constitutional Commission* (1988) Vol 1, paras 4.682-4.683.

[28] This issue is discussed by C K Comans "Constitution, Section 57 — Further Questions" (1985) 15 F L Rev 241, 246 ff.

[29] (1975) 134 CLR 81, 179-180.

[30] Italics added.

that the joint sitting may vote 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* . . .".[31] Literally read, this phrase contemplates not only amendments made by the Senate and not agreed to by the House of Representatives, but also *amendments made by the House of Representatives* and not agreed to by the Senate. It is interesting to note that the Government did not refer to this possible interpretation as a basis for amending the Australia Card Bill during its third passage through the House of Representatives in order to overcome the Bill's dependence on regulations. In contrast to the wording of s 57 in this respect, is the relevant provision in the New South Wales Constitution Act 1902 s 5B(1), which states that the joint sitting of both Houses of the New South Wales Parliament may "deliberate upon the Bill as last proposed by the Legislative Assembly and upon any amendments made by the Legislative Council with which the Legislative Assembly does not agree". What then is the correct interpretation of s 57 in this respect?

One might agree that *any* amendments proposed by either House during the legislative history of a Bill can be put to the joint sitting. This, the widest possible interpretation, provides flexibility at the final stage of the s 57 process to ensure that if the legislation is to be enacted, it reflects the intention of the majority of the Parliament sitting as a unicameral legislature. Yet such an interpretation seriously weakens the position of the Senate, the less numerous of the two Houses, unless some restriction is placed on the type of amendments contemplated for the joint sitting.

The Constitutional Commission in its *Final Report*[32] adopted a narrower interpretation:

> On its face [*ie* s57], this appears to allow for the possibility of the House of Representatives amending its own Bill during the period following its third rejection by the Senate but before a joint sitting.[33]

The Commission, however, concluded:

> We do not think that that result was intended by those who drafted the section. It would make nonsense of the requirement that the Bill maintain its identity throughout the procedure and would be very unfair to the Senate. If the House of Representatives amends a Bill without the agreement of the Senate, the process should start again.[34]

A third possible interpretation which lies between the two proposed already, is that the House of Representatives is able to propose amendments during the third passage of the Bill and these amendments may be put to the joint sitting. It seems just as unfair for the House of Representatives to be denied this power of amendment as it is for the Senate to alone possess such power. Indeed, the Victorian Constitution Act 1958 s 56(2) (repealed in 1975) provided that the joint sitting could vote on any amendments in the Bill proposed at the joint sitting. In any event, one can say that this aspect of s 57 still requires clarification, an opportunity for which arose with the Australia Card Bill.

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[31] *Id.*
[32] *Supra* n 27.
[33] *Ibid* para 4.674.
[34] *Ibid* para 4.675.

Professor Colin Howard, without directly commenting on the above issue, suggests a far wider power for the Parliament, convened at a joint sitting, namely, that further amendments can be proposed at the joint sitting which have not been previously proposed by either House.[35] Indeed, he suggests other legislation maybe proposed at the joint sitting as a unicameral legislative body with general legislative power by relying on ss 50(8) and 58 of the Constitution.[36] It is unlikely that such a wide view of the powers of a joint sitting would be adopted by the High Court in the light of comments such as those of Barwick CJ in *Western Australia v Commonwealth*.[37] For example, Barwick CJ said, "It is evidently important that such a body should be strictly confined to the terms of the section".[38]

C Regulations and s 57

The weapon which the Opposition parties in control of the Senate threatened to use to force the Government's withdrawal of the Australia Card Bill and the abandonment of any plans for a joint sitting, was their declared intention to disallow in the Senate any regulations which would be made pursuant to the Australia Card Act (if enacted at the joint sitting). These regulations were essential for the substantive provisions of the Act to come into force.

The power to disallow regulations is vested in both Houses by the Acts Interpretation Act 1901 (Cth) s 48 which requires all regulations made pursuant to an Act of Parliament to be laid before each House within 15 sitting days of being made or within such other time as the Act provides. Failure to comply with these requirements renders such regulations void. Then, each House has the opportunity to disallow the regulations by a resolution passed pursuant to a motion of which notice has been given within 15 days after the regulations were laid before the House. If no action is taken by either House within this time after notice of a motion to disallow is given to the House, then they are deemed to have been disallowed.[39] Section 57 does not apply to a deadlock between the two Houses over regulations. No provision is made in the Acts Interpretation Act or elsewhere, for the resolution of any deadlock arising in the Senate over regulations. This power of disallowance has been used on several occasions by the Senate.[40] Therefore the Opposition's readiness in 1987 to disallow the proposed Australia Card regulations was not unprecedented. Indeed, since 1932 the Senate under Standing Order No 36A has provided for a Standing Committee on Regulations and Ordinances which is appointed at the commencement of each Parliament, comprising seven Senators of which four are nominated by the Leader of the Government in the Senate and three are nominated by the Leader of the Opposition in the Senate. Once regulations are laid before the Senate, they stand referred to this Standing Committee for its consideration and the Committee may report to the Senate with its recommendations.

The Committee performs its review function by examining:

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35 C Howard, *Australian Federal Constitutional Law* (1985) 109.
36 *Id.*
37 (1975) 134 CLR 201.
38 *Ibid* 217.
39 A motion can be made without notice being given if the Standing Orders are suspended — see J R Odgers, *Australian Senate Practice* (1976) 457.
40 *Ibid* 460-465.

> delegated legislation to ensure that it is in accordance with the letter, the spirit and the intention of its enabling Act, that it does not unduly trespass on personal rights and civil liberties, that significant discretionary administrative decisions made under it are subject to a right of appeal on the merits and that it does not contain matter more befitting enactment in a Bill before the Parliament.[41]

The recommendations of the Committee are generally accepted by the Minister responsible for the regulations thereby avoiding any need for the Senate to formally disallow them.[42] However, in the past there have been many occasions on which the Senate has exercised its veto power over regulations.[43] Intended by no means as a comprehensive account of these occasions, the following three occasions are illustrative of the Senate's exercise of this power. In 1931, the Senate disallowed the Transport Workers (Waterside Workers) Regulations[44] and the High Court upheld this disallowance in *Dignan v Australian Steamships Pty Ltd.*[45] In 1967, regulations made under the Post and Telegraph Act 1901-1966 were disallowed by the Senate[46] and again in 1970, amendments to the Conciliation and Arbitration Act regulations were disallowed in view of their retrospective operation to 1967.[47]

To the extent that any controversial legislation depends upon the making of regulations, whether to effectively implement the legislation at the outset or for its effective operation thereafter, such legislation is clearly at risk when the Senate possesses an unlimited power of disallowance with respect to regulations made thereunder. This is particularly so when disallowance prevents the same or other regulations which are in substance the same, to be made within six months of the date of disallowance unless the relevant House rescinds its resolution of disallowance.[48]

The mechanisms of a double dissolution and a joint sitting in s57 are not appropriate for a deadlock over regulations. In the absence of any limit on the Senate's power to disallow regulations, legislation which is likely to be controversial must be carefully drafted to ensure minimal dependence on the making of regulations.

4 CONCLUSION

The concern one may have for the adequacy and flexibility of the procedure prescribed by s 57 for the resolution of deadlocks between the Houses is probably misplaced when it is realised that the mechanism of a double dissolution has not been used, nor is likely to be used in the future, as the democratic solution to a dispute over specific legislation, but is used instead as a means of obtaining an early general election. On that basis, there is a change in one's approach to s 57, from initially seeking an effective dispute resolution mechanism to now ensuring its exercise does not become too easy. The Constitutional Commission in its *Final Report,*[49] after reviewing "the

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[41] P O'Keefe, "Scrutiny of delegated legislation in the Australian Senate" (1988) 69 The Parliamentarian 111, 111.
[42] *Ibid* 112.
[43] J R Odgers, *Australian Senate Practice* (1976), 453 ff.
[44] *Ibid* 396.
[45] (1931) 45 CLR 188.
[46] Sen Deb 1967, Vol 33-34, 1966-1967 (20 June 1967).
[47] Sen Deb 1970, Vol 44, 1664-1681 (21 May 1970).
[48] Acts Interpretation Act 1901 (Cth) s 49.
[49] *Supra* n 27.

history of the use of s 57 to bring about a double dissolution rather than to resolve a disagreement over proposed legislation"[50] concluded:

> We consider that, in its present form, s.57 is detrimental to stable government. It is also detrimental to the review function of the Senate because the Senate is put at risk if it rejects a bill.[51]

[50] *Ibid* para 4.650.
[51] *Id.*