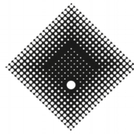

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This is the Published version of the following publication

Harvey, Matt (2024) Double Disillusion: Legal and Political Aspects of the 1974 Double Dissolution. Australian Journal of Politics and History, 70 (2). pp. 232-247. ISSN 0004-9522

The publisher's official version can be found at
https://onlinelibrary.wiley.com/doi/10.1111/ajph.12991?af=R
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AJPH
AUSTRALIAN JOURNAL OF POLITICS AND HISTORY

Australian Journal of Politics and History: Volume 70, Number 2, 2024, pp. 232–247.

Double Disillusion: Legal and Political Aspects of the 1974 Double Dissolution

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One of the great unanswered questions of the Commonwealth Constitution is whether the House of Representatives and Senate are equal or whether one ultimately has more power than the other. The Whitlam Labor government elected in 1972 faced a Senate elected in 1967 and 1970. Despite Senate obstruction, Whitlam proceeded with an ambitious legislative programme through 1973 and into 1974. By April 1974, six bills appeared to provide a "trigger" for the use of the Section 57 deadlock resolution procedure in the Constitution. Section 57 provides that if a bill has been twice passed by the House of Representatives and twice rejected by the Senate, the Governor-General can dissolve both houses and an election is held. If the government is returned and wishes to proceed with the trigger bills, it can again pass them through the House and if they are again rejected by the Senate, the Governor-General can convene a joint sitting of the two houses at which, if the bill is approved by an absolute majority, it is deemed to be passed. Major obstruction in the Senate, including a threat by the Opposition to block supply, led Whitlam to seek a double dissolution, hoping to gain a majority in both houses or, failing that, the opportunity to pass the trigger bills at a joint sitting. The ensuing election saw the return of the Whitlam government in the House but continuing to lack a majority in the Senate. This led to the only joint sitting in federal history, in which all six trigger bills were passed. But there was a constitutional sting in the tail when the *Petroleum and Minerals Authority Act* was subsequently found by the High Court not to have been validly passed. This case is argued to have made s57 potentially unworkable. The 1974 double dissolution stands in stark contrast to the 1975 double dissolution, which is argued here to be its "Evil Twin." There have been three further double dissolutions since 1975: 1983, 1987, and 2016, but no more joint sittings. In 1987, there was set to be a joint sitting on the proposal for an identity card, but this was thwarted on a technicality. So the 1974 double dissolution achieved the objective of breaking a deadlock but at the cost of revealing a way for a determined Senate to make s57 unworkable.

One of the great unanswered questions about the Australian Constitution is whether the powers of the Senate and House of Representatives are equal or if one is to submit to the will of the other. In the United Kingdom, it is clear that the appointed and hereditary House of Lords must give way to the will of the democratically elected House of Commons. Australia has followed the British convention of "responsible government" with the government being formed in the House of Representatives, but Australia's other house, the Senate, is also democratically elected and it is not so clear that it should give way to House of Representatives. There is a small hint of House superiority in Section 53 of the Commonwealth Constitution ("CC") in that the Senate cannot originate or amend legislation providing for spending or taxation, but it does not say that the Senate cannot reject such legislation. There is also Section 57 providing a mechanism to resolve deadlocks between the Senate and the House. It is the use of this

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DOI:10.1111/ajph.12991.

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section, particularly in 1974, that is the subject of this article. Although there have been seven double dissolutions in Australian federal history, only that of 1974 has led to the ultimate resolution of a deadlock through a joint sitting of the two houses. The article also considers the 1975 double dissolution and argues that whereas 1974 entailed using the Section 57 process for the proper purpose of attempting to pass deadlocked legislation, 1975 was its "Evil Twin," misusing an available trigger to hold a double dissolution not to resolve a deadlock, but to provide political cover for the improper dismissal of a government that still enjoyed the confidence of the House of Representatives.

The 1974 double dissolution is thus unique and significant, but also demonstrates problems with the process set out in Section 57, especially as interpreted by the High Court in the *PMA* case.[1]

The Constitutional Context

Section 57 provides a process to resolve deadlocks between the House of Representatives and the Senate. This issue is at the heart of the Australian system with the states insisting on a Senate with equal state representation as a condition for federation. The Senate was to have almost equal power to the House of Representatives with the Section 53 matters discussed earlier the only difference. The Senate enjoys a six-year term compared to the House's three years, with half the Senate to be elected every three years. The House may be dissolved at any time (Section 57), the Senate only as part of the Section 57 procedure.

There was extensive debate at the Constitutional Conventions on the best method to resolve deadlocks. Referendum and a three-fifths majority of a joint sitting were among the options considered before the Section 57 procedure was agreed.

The process is exceedingly cumbersome, requiring legislation to be first passed by the House, rejected or "failed to pass" by the Senate, then at least three months after this rejection or failure to pass, again be passed by the House and again be rejected or failed to be passed by the Senate. This creates the "trigger" for a double dissolution. Although this is said by the section to be at the Governor-General's discretion, the convention (usual practice) has been that the Prime Minister of the day asks for a double dissolution at the time of their choosing and the Governor-General, having satisfied themselves that the conditions have been met, either grants or refuses the double dissolution. There is the further limitation that the double dissolution cannot take place within six months of the expiry of a House of Representatives term (three years since the House first met after the previous election). In practice, no request for a double dissolution has ever been refused, though Sir Paul Hasluck, the Governor-General in 1974, did insist that the supply bills (to provide for general government spending) be passed before the double dissolution would be proclaimed, a condition which the Opposition co-operated to achieve.

But that is only the first part of the process. There is then an election for the two houses and, if the government is returned, it may then pass its legislation a third time through the House and put it to the new Senate. If the new Senate rejects or fails to pass it, the Governor-General can then convene a joint sitting of the two houses at which the legislation can be considered and where the will of the House may prevail as it has twice the number of members as the Senate (specified in CC s24). If the joint

[1] *Victoria v Commonwealth* (1975) 134 Commonwealth Law Reports, p. 81 ("the *PMA* case").

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sitting approves the bill, the Governor-General can then give Royal assent and it becomes an Act.[2]

The s57 process is well illustrated by a table:

(1) House of Representatives passes Bill
(2) Senate fails to pass Bill
(3) (at least three months later) House again passes Bill
(4) Senate fails to pass Bill a second time (creates "trigger")
(5) Double Dissolution (at PM's request and Governor-General's discretion)
(6) Election for both houses
(7) New House passes Bill a 3rd time
(8) New Senate fails to pass the Bill
(9) Joint Sitting convened
(10) Bill is either passed or rejected by Joint Sitting (and receives Royal assent if passed).

There is no guarantee that the party holding a majority in the House will prevail at a joint sitting. If it does not, the Senate has ended supreme, but either way, the deadlock has been resolved. It is assumed that a government would only seek a joint sitting if it was confident of a majority there.

One might expect, given the importance of a deadlock procedure, that the trigger should be pulled immediately a bill is rejected by the Senate for a second time, but there is no such requirement. Rather, the gun can remain in the drawer until the Prime Minister considers the time ripe. Indeed, there is apparently no limit to the number of trigger bills that can be "stockpiled" in this way. The only limitation is that a double dissolution may not be held within six months of the expiry of a House term (three years from the first sitting after the last election).

The Political Context

The Whitlam Labor government was elected in December 1972 after Labor had been in opposition since 1949. The election was for the House alone, so Whitlam was

[2] Section 57: 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. If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

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confronted by a Senate half of which had last been elected in 1967[3] and the other half in 1970. For the 1967 cohort, who had taken their seats on 1 July 1968, a half-senate election was due by the middle of 1974 when their terms would expire. The Senate as at the election of the Whitlam government was ALP 26, Liberal/Country Party 26, Democratic Labor Party (DLP) 5, and Independents 3. It would be fair to describe this as both a stale and a hostile Senate.

During the 1960s, House of Representatives and Senate elections became decoupled. After a House and half-Senate election was held on 9 December 1961, an election for the House only was held on 30 November 1963. A half-Senate election was held on 5 December 1964 at which Labor and the Coalition each won 14 seats and the DLP 2. A House election was held on 26 November 1966 with new Prime Minister Harold Holt and the Coalition gaining ten seats. A half-Senate election was then required, held on 25 November 1967. Labor won 13 seats, the Coalition 14 (a loss of two), and the DLP 2, bringing its tally to 4 and giving it the balance of power from mid-1968. Holt disappeared, presumed drowned, on 17 December 1967. The half-Senate elected in 1967 was still there when Whitlam was elected in December 1972. Meanwhile the new Prime Minister John Gorton led the Coalition to a House election on 25 October 1969 (Whitlam's first as Leader of the Opposition, though he was also Leader at the time of the 1967 half-Senate election) at which Labor gained a swing of nearly 7 per cent but still fell four seats short of a majority. There was then a half-Senate election on 21 November 1970 at which Labor won 14 seats, the Coalition 13, leaving each on 26 seats, the DLP holding the balance of power with 5, and 3 independents. This was the Senate when Whitlam and the ALP won power in December 1972.

The year 1973 was a record year for legislation. A total of 253 bills were passed by the House and presented to the Senate, of which 203 passed, 13 were rejected, and 10 deferred, notably including the *Petroleum and Minerals Authority Bill*, first introduced to the Senate on 13 December 1973, the final sitting day of the year.

By the second half of 1973, the political tide had started to turn against the Whitlam government. The Parramatta byelection on 22 September saw the Liberals retain the seat with a large swing. A referendum on 8 December, proposing to give the Commonwealth power over prices and incomes, was defeated in every state.

The Parliament was, however, sitting for a further week. On 12 December, the House passed the *Petroleum and Minerals Authority Bill 1973* for the first time. On the 13th, the bill was transmitted to the Senate which resolved that Standing Orders be suspended to allow the bill to pass through all stages without delay and then also resolved that it be read a first time. Thus the government was indicating its urgency. During the course of debate, several Opposition senators indicated that the Opposition intended to oppose the bill. On a motion that the bill be read a second time (normally the step at which the bill would be debated in detail), further debate was then adjourned to the first sitting day of 1974. If this was the Senate's first "failure to pass" the bill for the purposes of s57, then the required three months that had to elapse before the House could pass it again began on that day. On the other hand, if this was not "failure to pass," the three months had not yet started to run. This subsequently became the key issue in the *PMA* case.

In the event, the Parliament was prorogued on 14 February 1974 and did not reconvene until 28 February. On 7 March, the House requested that the Senate resume

[3] A half-Senate election was held on 25 November 1967. The six-year terms of the Senators elected started on 1 July 1968.

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consideration of the Bill. On 19 March, the Senate resumed consideration of the bill and on 2 April, the Senate negatived the motion that the bill be now read a second time. That was definitely rejection of the bill by the Senate, but had there been a first failure to pass, and if so, when?

On 8 April, the bill was reintroduced in the House and passed all the necessary stages the same day. It was immediately conveyed to the Senate where again Standing Orders were suspended to enable it to be passed without delay and it was read a first time. On a proposal for a second reading, debate was adjourned to 10 April. Debate was resumed on 10 April which was also the day that the Opposition threatened to block the supply bills. In relation to the *PMA* bill, the Senate passed a motion to defer consideration of the bill for six months in protest at the lack of time being given for its deliberation. This was definitely a second rejection, but was it sufficient to bring the bill within s57?

DLP held the balance of power in the Senate (ALP and Coalition on 26 each, DLP 5, and Independents 3). Senator Vincent Gair, who had been Labor Premier of Queensland from 1952 to 1957, a DLP Senator since 1964, and leader of the DLP until October 1973, appeared to present Whitlam with an opportunity to gain an advantage at the forthcoming half-Senate election. Whitlam offered Gair the post of Ambassador to the Republic of Ireland. With the DLP being a predominantly Roman Catholic party and Gair having Irish roots, the post appealed to him and he accepted it.

Whitlam's plan was for the announcement to be made on 2 April with Gair to resign from the Senate that day. This would have created a casual Senate vacancy in Queensland that could have been filled at the expected half-senate election of 18 May, rather than at the following election, when Gair's term would have expired, or between elections when the casual vacancy would be filled by the Queensland Parliament. Six seats in play in Queensland at the half-Senate election instead of five would have increased Labor's chances of winning control of the Senate. However, news of the appointment was leaked and the Premier of Queensland, Joh Bjelke-Petersen, arranged for the writs to be issued for only five Senate seats instead of six. What initially looked like a political masterstroke by Whitlam turned into a political disaster. The Opposition was able to portray it as a cynical manoeuvre to take control of the Senate. This development was superseded by the double dissolution, but the political fallout continued to haunt Whitlam. Even though the double dissolution election then wiped the DLP out of the Senate completely, the ineptitude of the ALP leadership in political chicanery had been exposed.

The affair bolstered the Opposition's threat to block the supply bills.[4] This was a bid to force the House to another election a mere eighteen months into its term. Senator Withers, the Leader of the Opposition in the Senate, announced in the Senate on 10 April that the Senate would not pass the *Appropriation Bill 1973-74(Cth)* unless the government submitted itself to the people. Senator Murphy, Leader of Government in the Senate, announced that if this resolution proceeded it would be treated as a denial of supply. He moved that the question be put and when that motion failed, Whitlam called an emergency Caucus meeting and proceeded to call on the Governor-General Sir Paul Hasluck to request a double dissolution. The request was granted, with the proviso that supply be sufficient for the election period. The Opposition passed the Supply bills through the Senate that evening and the houses were dissolved on 11 April. Whitlam had called the Opposition's bluff, but it was still a risky strategy.

[4] Jenny Hocking, *Gough Whitlam His Time* (Melbourne: Miegunyah Press, 2012), p. 143.

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A Double Dissolution

Gough Whitlam believed that it was the House of Representatives that transformed the people's will into action. Jenny Hocking traces how Whitlam had come to his view of House superiority after a lifelong study of federal politics, heightened by his twenty years in the House.[5] Whitlam's view is characterised by Brendan Lim as a "monist" vision of democracy.[6] This is problematic in a federation with a bicameral federal parliament. It is to be contrasted with the vision of the Founding Fathers revealed through the Convention Debates and with the content of the Constitution, of which an almost equally powerful Senate, representing the states equally, is a prominent feature.

But there is also, as explored earlier, s57 to resolve deadlocks. Richard O'Connor (later President of the Senate and a High Court judge) suggested that s57 was only for "dangerous deadlocks" such as denial of supply, whereas the process is so cumbersome that it is only suitable for "ordinary" deadlocks — a government cannot afford for supply to run out while working through the s57 process. Whitlam pointed to this to argue that Senate could not block supply.[7] Brian Galligan argues that it was more that the Founding Fathers did not foresee disciplined party politics.[8] Galligan also claimed that the Founding Fathers would have found the denial of supply "practically unthinkable."[9] But the Victorian delegates, in particular, would have been aware of the several denials of supply by the Victorian Legislative Council.

So what is the purpose of s57? It is a procedure to resolve deadlocks where the Senate has refused to pass legislation proposed by the House. Colin Howard suggests that it is so unwieldy that it was actually not intended to be used,[10] but the experience of the Victorian delegates to the Federal Conventions, who had endured a Constitution without a deadlock mechanism since 1855, makes that unlikely in my opinion.[11]

It was certainly not meant to be easy. It cannot be entered into lightly: it carries the risk that an incumbent government may lose office, or it may retain office but end up in an even worse position in the Senate. A government must either really want to get the blocked measures through or see the political moment as opportune. The High Court did not, and indeed could not, take these matters into consideration in applying the section in *PMA*. But some of the judges did dwell on the need for the Senate to have sufficient time to scrutinise the bill and make up its mind before a double dissolution became possible.

This is ironic given that the Senate has never worked as the Founding Fathers intended, but has voted on political rather than state lines since its inception. However, the Senate has also been significantly reformed since federation: the change from

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[5] Jenny Hocking, *Gough Whitlam a Moment in History* (Melbourne: Miegunyah Press, 2008), p. 115.

[6] Brendan Lim Australia's Constitution After Whitlam (Cambridge: Cambridge University Press, 2017), p. 72.

[7] Hansard 4 November 1975 cited in Brendan Lim *Australia's Constitution After Whitlam* (Cambridge) p. 43.

[8] Brian Galligan "The Kerr-Whitlam Debate and the Principles of the Australian Constitution" *The Journal of Commonwealth and Comparative Politics*, Vol 18 (1980), p. 247.

[9] Brian Galligan "The Founders' Design and Intentions Regarding Responsible Government" in *Responsible Government in Australia*, eds, P. Weller, D. Jaensch (Richmond: Drummond, 1980) p.3 cited in Brendan Lim, *Australia's Constitution After Whitlam* (Cambridge: Cambridge University Press, 2017) p.42 n44.

[10] Colin Howard, *Australian Federal Constitutional Law* (3rd ed., Sydney: Law Book Co.,1985), p. 98.

[11] See *Convention Debates* 10 March 1898 where Victorian delegates Isaacs and Higgins took the lead in proposing a deadlock resolution method (p. 2197 et seq).

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plurality voting to proportional representation in 1949 was effected by statute not constitutional amendment. This makes the Senate more democratic but it still gives disproportionate power to the voters of the smaller states. The Senate has more than doubled in size from six Senators per state at federation to twelve since 1984, enabling the House also to double in size. We can also note that it was the 1974 joint sitting that delivered the Territory Senators, a challenge to the concept of the Senate as the states' house.

As Hocking notes,[12] s57 appears to give the House primacy — it only applies to bills passed by the House and rejected by the Senate. Because of the 2:1 size nexus required by s24, a party with a majority in the House is likely to be able to overcome a hostile Senate in a joint sitting, especially in the era of proportional representation in the Senate. But a government has to risk going to the people and losing office and/or achieving an even worse outcome in the Senate. This explains why so few double dissolutions have been called to obtain the passage of a particular bill but rather have been held at a politically opportune time for a government to obtain a new term and perhaps a more favourable Senate. A double dissolution requires a trigger, but the government is often firing into the air: it wants another term and a shot at control of the Senate rather than to live or die by this trigger bill.

This was only the third double dissolution in Australian federal history. In 1914, Liberal Prime Minister Joseph Cook had called one in July, just before the First World War was declared in August. At the election on 5 September, Labor under Andrew Fisher won control of the House and Labor retained control of the Senate, so the trigger bill was never re-presented, and in any case, the war became the overwhelming issue.

Whitlam had come to the House of Representatives in 1952, the year after the double dissolution of 1951, in which the incumbent Coalition was returned, despite losing five seats in the House of Representatives, and also gained control of the Senate. Whitlam would have hoped to emulate this achievement in 1974.

Whitlam had served on the Joint Parliamentary Constitutional Review Committee of 1956–59. Hocking notes the importance of this service in his political development.[13] Among many other things, this Committee recommended an amendment to s57 specifically for money bills.[14] This would have allowed the move straight to a joint sitting after a deadlock. However, none of the Committee's proposed constitutional reforms were put to referendum.

By April 1974, 10 bills had been rejected a second time[15] of which six could be used as triggers for a double dissolution under s57. The other four were proposals for referenda which, though rejected by the Senate, could still be put to the people under the provisions of CC s128.[16]

[12] Jenny Hocking "Gough Whitlam's 1974 Re-election" in *Making of Modern Australia*, ed. Jenny Hocking (Clayton: Monash University Publishing, 2017), ch.5.

[13] Hocking, *Gough Whitlam His Time*, p. 181.

[14] Report of the Joint Committee on Constitutional Review F.8051/59 Chapter 4, "Disagreements between the Senate and the House of Representatives."

[15] Ignoring the subsequent finding that the PMA Bill had not passed through the s57 process as required.

[16] The four questions were put to referendum on election day 18 May. All were successful in New South Wales but failed in every other state and overall.

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The proclamation of the double dissolution on 11 April recited the six bills in respect of which it had been granted: *Commonwealth Electoral Bill (No2) 1973*;[17] *Senate (Representation of Territories) Bill 1973*, *Representation Bill 1973*, *Health Insurance Commission Bill 1973*, and the *Petroleum and Minerals Authority Bill 1973*.

It can be seen that three of the bills related to electoral matters, including the introduction of Territory Senators. Two related to a universal health insurance scheme, Medibank. One established a Petroleum and Minerals Authority to oversee the extraction of these resources. All were close to Whitlam and Labor's heart. All had been vehemently opposed by the Opposition.

The double dissolution of 1974 was a logical response to the frustration by the Senate of key parts of the government's legislative programme. It was a genuine attempt to use Section 57 of the Constitution to get key legislation passed, but it was primarily a political attempt to gain control of both houses so that it could pursue its legislative program free of obstruction by the Senate. The double dissolution must be counted as only a partial success in that the Whitlam government, although retaining control of the House of Representatives, did not win control of the Senate. But the double dissolution also led to the passage of the six trigger bills via the first, and so far only, joint sitting of the two houses. This has been called "government by double dissolution,"[18] It is certainly true that these were significant reforms, but it is a very difficult way to run a government! There was a further setback when the *PMA Act* was subsequently held by the High Court not to have been properly passed, causing doubt about the workability of Section 57 (see further below). The 1974 double dissolution stands in stark contrast to the use of Section 57 as a mechanism to dissolve Parliament subsequent to the 1975 dismissal, which was certainly not for the purpose of trying to pass the blocked legislation. It is suggested below that the 1975 double dissolution was the "Evil Twin" of 1974, designed for the opposite reason to the intention of Section 57.

The joint sitting stands as one of the monuments of the Whitlam government: the only joint sitting in the history of the Commonwealth. It demonstrated the possible use of s57 to pass significant legislation. But it also points to pitfalls in the s57 process that were further demonstrated in 1987 (see further below). Not the least of these is that a government that can get its legislation through a joint sitting has only had to do this because it does not control the Senate and must then continue to govern without a Senate majority, and indeed with a Senate likely to be all the more hostile for having had its will overborne.

The Election

The election was held on 18 May 1974, the date originally planned for the half Senate election. The ALP slogan was: "Give Gough a Go." The Coalition slogan was "Think again." The deadlocked bills were not particularly prominent in the campaign. While Labor could point more generally to Opposition obstruction, the Opposition focussed on inflation and the worsening economy. The ALP primary vote fell 0.29 to 49.3 per cent, two party preferred 51.7 per cent down from 52.7 per cent in 1972. A redistribution had increased the House from 125 to 127 members. Labor lost three seats

[17] Interestingly, the Bills are referred to as "Acts" in the proclamations even though they are yet to be passed.
[18] Geoffrey Sawer first coined the phrase in *Federation under Strain: Australia 1972–1975* (Carlton: Melbourne University Press, 1977), p. 42.

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and won two more, but the Coalition won the two new seats, cutting Labor's majority from nine to five.

In the Senate, Labor went from 26 to 29 and all five DLP Senators were defeated. The Liberals gained three seats and the Country Party retained their five for a Coalition total of twenty nine. Only two independents were elected, down from three, and of these, Senator for Tasmania Michael Townley subsequently (re)joined the Liberal Party. The other, Senator Steele Hall of the Liberal Movement in South Australia, also a former Liberal, retained his independence and voted with the government in 1975.

This gave the ALP 95 seats across the two chambers: 66 in the House and 29 in the Senate, just enough for an absolute majority in a joint sitting of 187.

At the referendum held on the same day, all four questions (which had also been rejected by the Senate but could still be put to the people under CC s128) were defeated.

The New Parliament and Proclamation of the Joint Sitting

The new 29th Parliament was opened by the Governor-General Sir Paul Hasluck on 9 July 1974. The six bills were reintroduced into the House on 10 July and passed, then reintroduced in the Senate and rejected.

Sir John Kerr became Governor-General on 11 July. On 30 July, the new Governor-General issued a proclamation reciting the proclamation of 11 April including the proposed laws and convening a joint sitting for 6 August.

It is striking that both Hasluck and Kerr's proclamations were criticised by the majority of the High Court in *PMA* for reciting the bills deemed to be the triggers. According to these judges, the Governor-General may satisfy themselves that the conditions for a double dissolution exist, but only the court can decide if the legislation has been validly passed under s57. There remains the embarrassing possibility that a double dissolution is based on an incorrect application of s57. According to the High Court, the dissolution and election will not be invalid, but legislation purporting to be passed at a subsequent joint sitting might be. The Governor-General must believe that there is legislation triggering a double dissolution, but once the dissolution has taken place, it is decoupled from the legislation thought to have triggered it and only the court can decide whether all the steps of s57 have been validly followed.

It should also be noted that four months passed from the dissolution to the joint sitting. The economy had only worsened in that time, and as the Whitlam government pursued its precious bills in the joint sitting, there was increasing division in Caucus on the appropriate response to rising inflation and unemployment.

The First Litigation

Two days before the Joint Sitting, the (Liberal) President of the Senate Senator Magnus Cormack and the Country Party Senator James Webster sought an injunction against the Speaker of the House, James Cope, to prevent it from proceeding.[19] They argued that a double dissolution could not be proclaimed for more than one bill and that the *PMA* Bill had not satisfied the requirements of s57. The High Court heard the case urgently and delivered its judgement the following day.

The High Court, comprising Chief Justice Barwick and Justices McTiernan, Menzies, Gibbs, Stephen, and Mason,[20] held unanimously that the Joint Sitting could

[19] *Cormack v Cope* (1974) 131 Commonwealth Law Reports, p. 432.

[20] In constitutional matters there would normally be a full bench of seven but Justice Walsh had died on 29 November 1973 and was yet to be replaced.

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proceed. However, there were ominous signs that even if the legislation was passed at the joint sitting, the *PMA* Bill may not be held to have been validly passed. That is a separate issue from the Territory Senators arrangements, which were subsequently (unsuccessfully) challenged (twice) on their constitutionality.[21] The court had to deal with the delicate issue of how the Governor-General could validly identify that the circumstances for a double dissolution had arisen without being able to find conclusively that the bills met the conditions to be triggers for it.

Chief Justice Barwick pointed out that these were urgent proceedings and that he had not had the opportunity to expound his views fully. (He would take full advantage of this opportunity in the *PMA* case.) Just because an injunction was not granted to stop the joint sitting did not mean that any legislation passed at the joint sitting would have been validly passed.

Indeed, Barwick was of the view that the Governor-General's proclamation of the Joint Sitting on 30 July 1974 was misconceived in that it recited particular bills. While such recital had been the customary practice at previous double dissolutions, in his view, it sat separate from the bills that were its pre-requisite. This was a necessary element in his reasoning that only the court can decide the legality of the double dissolution and the constitutionality of any legislation passed by a subsequent joint sitting.

He held that a joint sitting is "a special process of lawmaking." In effect, it is a special configuration of Parliament. The Commonwealth argued that as the Section 57 procedure was a Parliamentary process, it is covered by Parliamentary privilege, including that no actions of Parliament may be impeached in court. Barwick rejected this argument on the basis that, unlike the Westminster Parliament, the Commonwealth Parliament is governed by the Constitution, of which the High Court is the ultimate guardian.

Barwick noted (para 23) that both houses had resolved that the proceedings of the joint sitting would be parliamentary, and hence covered by Section 49 of the Constitution. This is no impediment to his insistence that they remain under the court's supervision for compliance with the Constitution, but not all the judges agreed.

Section 57 is expressed in the singular, but Barwick found no impediment to the consideration of multiple bills, provided that they had met the s57 pre-requisites.

At para 28, he addressed the concern that a huge number of bills could be stockpiled to be passed at a Joint Sitting, making a mockery of the bicameral system, but he suggested that the solution lies in political convention rather than court action. One might rather suggest that the unlikelihood of this lies more in the cumbersomeness of the s57 procedure!

At para 30, Barwick began to consider the submission with respect to the *PMA* bill, that three months had not elapsed from the Senate's first "failure to pass" it and its subsequent passage through the House and back to the Senate. (These indeed are the grounds on which it was subsequently held invalid in the *PMA* case.) At para 31, he specifically opined that the *PMA* Bill did not qualify, but that finding should await full proceedings rather than this urgent injunction application. The joint sitting could proceed, but the *PMA* Act would be struck down eventually.

Justice McTiernan, appointed by the Scullin Labor government in 1930, gave a much briefer judgement, a mere four paragraphs starting at CLR p. 461. He held that Section 57 is a matter for the Parliament and is not justiciable.

[21] See First and Second Territory Senators cases: WA v Cth (1975) 134 CLR 201 and Qld v Cth (1977) 139 CLR 585.

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Justice Menzies, appointed by a Coalition government headed by his cousin Robert in 1958, refused the injunction but reserved his position on validity. He died on 29 November, 1974 and thus did not sit in the *PMA* case. His judgement is broadly in accord with Barwick.

Justice Gibbs (from CLR p. 466), also gave a brief judgement declining to grant the injunction, holding that the court could intervene at any stage to uphold the Constitution, but could also wait until a bill had purported to be passed before finding it to be unconstitutional. He reserved his position on *PMA* until it was properly argued.[22]

Justice Stephen, appointed by a Coalition government in 1972 (beginning at CLR p. 468), made the interesting finding at para 13 that the powers conferred on the Governor-General in s57 are not executive but a *persona designata* role in the legislative process under that section, and hence are not subject to the processes for judicial review of administrative action. It is an altogether more politically aware judgement than any of the others (as befits a subsequent Governor-General!). He expressed the tentative view that the *PMA Bill* did not appear to have met the requirements of s57.

Justice Mason, appointed by a Coalition government in 1972 and subsequently Chief Justice from 1987 to 1995 (starting at CLR p. 472) held that it was unnecessary for the court to intervene in the legislative process given that any Acts produced by it could subsequently have their validity determined by the court.

Thus the injunction was refused and the joint sitting was able to proceed the following day.

The Joint Sitting

The new Governor-General Sir John Kerr opened the Joint Sitting on 6 August. This historic event was broadcast live on ABC Television, the first time that Parliament had been televised in Australia. The formal opening of Parliament takes place in the Senate but the joint sitting was held in the House of Representatives.

We should dwell for more than a moment on this extraordinary event, a first for the Whitlam government and, 50 years on, still the only time that a joint sitting has been convened. There was to have been one in 1987, but as we will see, an Act to be passed through a joint sitting was thwarted then too.

The Acts were passed on 7 August and given Royal Assent on 8 August.

Subsequent Litigation

Victoria (joined by New South Wales, Queensland, and Western Australia) did not accept the validity of the *PMA Act* and soon brought a challenge to the High Court. Bass Strait oil and gas were major Victorian assets at the time and Victoria was reluctant for the Commonwealth to interfere with them. *Victoria v Commonwealth* (the *PMA* case) (1975) 134 CLR 81 was heard from 24 to 27 February 1975, but judgement was not delivered until 30 September. The High Court held 4:2 that the Act had not been validly passed. This did not affect the validity of the double dissolution or the other bills passed at the joint sitting (see further below).

New South Wales, Western Australia, and Queensland also attacked the *Commonwealth Electoral Act (No2) 1973*, the *Senate (Representation of Territories) Act 1973* and the *Representation Act 1973*, all purported to have been passed at the

[22] *Hughes & Vale P/L v Gair* (1954) 90 CLR 203 from when Gair was (Labor) Premier of Queensland.

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joint sitting.[23] They challenged the length of time between creation of the trigger by the Senate's second rejection of the bills and the pulling of it in the double dissolution. This was the converse of the arguments in *PMA* that the Senate had not had sufficient time between its rejections. While the court held unanimously that the three Acts had been validly passed at the joint sitting, the constitutionality of the *Senate (Representation of Territories) Act 1973* was only upheld by 4:3. This case is better known as the "First Territory Senators' case." It was decided on 17 October 1975, just in time for Territory Senators to be elected at the election on 13 December. Only its compliance with s57 concerns us here.

Victoria v Commonwealth [1975] HCA 39; 134 CLR 81 ("The PMA case")

This case, in which New South Wales, Queensland and Western Australia also joined, challenged the validity of the *Petroleum and Minerals Authority Act 1973* passed at the joint sitting. The case was heard in February 1975 and judgement delivered on 30 September. The judges were Chief Justice Barwick and Justices McTiernan, Gibbs, Stephen, Mason, and Jacobs. Sir Douglas Menzies had died on 29 November 1974 and was yet to be replaced by Justice Murphy. The court held 4:2 that the act had not been validly passed. This did not affect the validity of the double dissolution or the other bills passed at the joint sitting, whose status as triggers was not disputed.

Chief Justice Barwick (in the majority) helpfully included sections 57 and 58 of the Constitution in his judgement, together with part of s128. Section 57 has been extensively analysed earlier. It is indeed hard to understand, though its underlying purpose is clear: to provide a resolution to deadlocks between the Senate and House of Representatives. The case traversed much the same ground covered in *Cormack v Cope* (above) but at greater leisure, given that *Cormack* had been an urgent application the day before the joint sitting. Argument was heard from 24 to 27 February 1975 in Melbourne. On 24 June the court announced its orders and the full reasons for the decision were handed down on 30 September 1975, just six weeks before the Dismissal.

The majority comprised Chief Justice Barwick and Justices Gibbs, Stephen, and Mason. The minority comprised Justices McTiernan and Jacobs, the longest standing and most recent appointments to the court — and indeed the only two Labor appointees. Justice Lionel Murphy, appointed in February, did not sit in the case. The lead majority judgement was delivered by Chief Justice Barwick (pp. 109–127). In summary, the majority held that the Senate did not "fail to pass" the *PMA Bill* on 13 December 1973 and therefore, as the second passing of the bill by the House on 2 April 1974 was not at least three months after the Senate's first "failure to pass," the bill could not form part of the s57 process.

In the minority, Justice McTiernan (pp. 127–139) retained his view from *Cormack* that the matter of parliamentary procedure was not justiciable, but that the Act had been validly passed under s57.

Justice Jacobs (pp. 189–200) found "the only practicable construction" of "fails to pass" in s57 is that the period starts to run from the moment the Senate receives the bill from the House (p. 194). He points out the "very considerable difficulties (p. 196) of ascertaining some other moment at which the Senate has 'failed to pass' and the three-month period starts to run." While he observes that such uncertainty is a normal part of private legal relations, he regards it as completely unsuitable for a constitution.

[23] Reported as *State of Western Australia v Commonwealth* (1975) 134 CLR 201.

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Chief Justice Barwick at p. 120 concluded that the High Court could hear the case — that it is justiciable. He then considered whether and when the Senate "failed to pass" the *PMA Bill*. At p. 121 he concluded that what the Senate did on 13 December 1973 was not a "failure to pass" the bill. In his view, the three months start to run from a time when the Senate has had time to consider the bill and has decided not to take a stand (p. 122). He allowed that in determining when this moment has arrived, antecedent conduct may be relevant. However, he found that the moment did not arrive and that although the Act has received royal assent, it is not a valid Act (p. 127).

Justice Gibbs (pp. 139–65) observed that to call the *PMA Act* an Act would assume that it had been validly passed. He distinguished *Clayton v Heffron* (1960) 105 CLR 214 a case on similar provisions in the New South Wales Constitution. He too found that the *PMA Bill* did not meet the required conditions of s57.

Justice Stephen (pp. 165–181) had decided in *Cormack v Cope* that the three months only started to run after some act of the Senate, not just the moment the Bill was introduced. At p. 167, he gave his view that the Senate is equal to the House except for money bills, and even these it can reject. He mentioned, without quoting, the amount of debate about s57 at the Constitutional Conventions. He noted that the double dissolution of 1914 led to a Senate similar to the one before the election and a House that now resembled the Senate so the deadlock was resolved in the Senate's favour.

He noted the role of proportional representation in making the Senate more evenly balanced (but of course that is not in the Constitution). He noted that it is the will of the electorate that prevails rather than one house or the other. He observed that the Senate is "a high deliberative chamber." He contrasted its taking time to deliberate with an extreme vision of when "the law-making function has been abandoned in favour of mere dilatory evasion" but did not deal with how this would be determined. He did not consider the statements by Opposition figures of their intention not to pass the Bill to be relevant. He rejected the Commonwealth's argument that the three months running from introduction of the Bill to the Senate gives certainty. He observed that the Senate is meant to be a continuous chamber unlike the House.

Justice Mason (CLR pp. 181–189) referred to his judgement in *Cormack*. He noted that the Senate has no duty to pass legislation. He acknowledged the difficulty in determining when "failure to pass" has happened but (p. 188) did not seek to convert its meaning to "did not pass." Thus he found that the Bill had not been validly passed.

I find Justice Jacobs' reasoning (pp. 189–200) persuasive. It makes the three-month period from "failure to pass" possible to ascertain and still leaves the Senate ample opportunity to consider a measure before it becomes a trigger for a double dissolution.

However, by 4:2 the High Court found that the *PMA Bill* had not passed through the required process of s57 and was thus invalid. Striking it down felt like another nail in the Whitlam government's coffin, but its greater significance lies in the majority's unworkable interpretation of s57, whereby a reluctant Senate can find many ways to delay that are not a definitive rejection or failure to pass.

The 1975 Double Dissolution — the "Evil Twin"

The 1975 double dissolution is also in the shadow of the larger events of the Dismissal, but it was a vital piece of the context that made the Dismissal possible. Ironically, s57 is meant to enable resolution of deadlocks, so it would have seemed precisely the mechanism to use to resolve the deadlock over supply. However, especially in the light of the treatment by the court of s57 in *PMA*, s57 would indeed not have been effective to resolve that deadlock. The Senate never actually rejected the supply bills. It certainly failed to pass them but when would the three months have started to run and what if

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supply had run out while the mechanism was being pursued? It is another forgotten feature of 1974 that the supply bills were passed after the double dissolution had been announced. In 1975, the Governor-General first required that the supply bills be passed and only then proclaimed the double dissolution. But this was not for the purpose of resolving the deadlock, rather to send both houses to election in the hope of a political resolution with the help of electors.

The rationale for s57 is the resolution of deadlocks: the House of Representatives wants to get its legislation through, the Senate refuses to pass it (twice), the House cares so much that it is willing to face election to try to get the bill(s) through and is able to take the Senate with it. After the election, the new House passes the bill again (if it still has that wish) the new Senate rejects them again and only then can a Joint Sitting be held, actually a way of potentially overpowering the new Senate rather than the one which rejected the bill twice.

The year 1975 was different. The Senate had now passed the supply bills and the caretaker Prime Minister had no wish to see the deadlocked bills passed. What then was his purpose in advising the double dissolution? It was to get an election. Why not just an election for the House of Representatives under s5? What would the Governor-General have done if there had been no trigger? Even with the abundant triggers, he should have questioned the Prime Minister as to the purpose for the double dissolution. If he had found no proper purpose, he would have been within his powers to refuse the double dissolution. But Kerr was never going to do that because the whole scheme had been his idea: change the Prime Minister so as to get the supply bills through and then to advise a double dissolution to produce a political solution to the affair. At any rate, the House had to be dissolved at once as the caretaker Prime Minister had already been subjected to a motion of no confidence. If Kerr had acceded to the House's wishes and recalled Whitlam, the scheme would have come crashing down.

The double dissolution produced the election. The election produced a Coalition government with a comfortable majority in both houses and no wish to pursue the bills which were the trigger for the double dissolution. Thus 1974 was a genuine attempt to use s57 to resolve a deadlock while 1975 was the opportune misuse of the procedure to get an election to try to regularise a government appointed through dubious manoeuvres.

Subsequent Double Dissolutions

There have been subsequent double dissolutions in 1983, 1987, and 2016, but never another joint sitting. This is partly because the 1983 double dissolution led to election of a new government with no wish to proceed with the blocked legislation that had provided the trigger for the double dissolution. The 2016 double dissolution saw the Turnbull Coalition government returned and the blocked *Australian Building & Construction Commission Bill* was passed by the newly elected Senate.

The double dissolution of most interest since 1975 is 1987, arranged by the Hawke government to try to pass its proposed "Australia Card" legislation. After the election, the Bill again passed the House and was rejected by the Senate. There was to be a joint sitting until retired government lawyer Ewart Smith pointed out that the legislation, even if passed at a joint sitting, could only enter into force via regulations, and that these regulations would have to be laid before both houses, allowing the Senate to disallow them, leaving the Act in limbo. In the face of this, the government shelved the Act. It is striking that a bill could go through all the processes of s.57 but still be thwarted on a technicality. This again points to the unworkability of s.57. It is notable that nearly thirty years passed between the double dissolutions of 1987 and 2016. It is

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also striking that only the double dissolutions of 1951 and 1975 have led to an incumbent obtaining a majority in the Senate — and 1975 was the very unusual caretaker incumbency of Fraser after the Dismissal.

The year 2016 was arranged by Malcolm Turnbull with four bills: three to re-establish the Australian Building and Construction Commission and the fourth to abolish the Clean Energy Finance Corporation.[24] After the election, although the government still did not have a majority in the Senate, the three ABCC bills passed the Senate so no Joint Sitting was required. The *Clean Energy Finance Corporation (Abolition) Bill* was dropped and the CEFC remains in existence.

Conclusion

It must be concluded that double dissolutions are a risky strategy, better pursued for political advantage than for the passage of particular legislation. If anything, they make it easier for minor parties and independents to win seats in the Senate with twelve seats available in each state instead of six.

It is good to have a mechanism to resolve deadlocks in the federal Parliament. Section 57 is satisfactory as long as it is workable. It is a deadlock resolution mechanism that is onerous, but if a bill can be passed through a joint sitting of a newly elected House and Senate, it has passed a democratic super-majority. If the "failure to pass" starts to run from the time a bill is introduced in the Senate, the provision is workable. If it depends on an uncertain event, some definite "failure to pass" as distinct from mere delay or subjection to closer scrutiny, the procedure is able to be frustrated by a hostile Senate. If the "immediate failure to pass" approach of Justice Jacobs is adopted, the Senate still has had two chances to consider the bill over a period of more than three months before a double dissolution. No government would request a double dissolution lightly (it may lose office!). The majority in *PMA* seemed more concerned that the Senate had sufficient time to consider the bill before the dissolution than that the mechanism be workable. It is more likely in reality that a Senate majority has decided to oppose the bill and the question is more how much time they should be allowed to obstruct before a double dissolution is granted. It is unhelpful that trigger bills can be stockpiled until a perceived politically advantageous time for the government. It is of course also possible that a deal can be done to pass a bill, especially in the current era of large cross-benches. The Court seemed mostly unconcerned about workability. If the section is unworkable, the Senate comes to have a power of veto which is inconsistent both with s57 and democracy.

The Whitlam government, with its fresh mandate in the House, faced a stale, hostile Senate and almost entirely non-labour state governments. Section 57 was used for its intended purpose to resolve deadlocks, and although five of the six bills passed at the Joint Sitting were subsequently upheld by the High Court, the *PMA Act* was not. Thus an Act could go through the whole tortuous process of s57 and still be found not to have been properly passed. This says more about the High Court majority of 1975 than about the wisdom of the Founding Fathers.

The conundrum of the Senate continues to haunt us: is it the states' house or something else, especially with proportional (and Territorial) representation? It is beyond the scope of this article to answer this question. The Senate does seem to have carved out its place in the Australian political landscape (with the help of the Constitution) so it is probably better for a government to work with it than to try to

[24] Clean Energy Finance Corporation (Abolition) Bill 2013 (No. 2).

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pretend that it is not there or to try to crash through it with a double dissolution. It may be that the most lasting element of the 1974 double dissolution is that the joint sitting, while passing most of the deadlocked bills, also showed an obstructive Senate the way to stop a joint sitting ever being resorted to again. Section 57 may need to join the long list of provisions that require reform.

Acknowledgement

Open access publishing facilitated by Victoria University, as part of the Wiley - Victoria University agreement via the Council of Australian University Librarians.

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The author has no conflict of interest to declare.

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