The Practice of Proroguing the Parliament and the Effect on Parliamentary Committees[#]

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Introduction

The power of Parliamentary committees to meet following prorogation of the Parliament has been an ongoing debate. In 2004 the establishment of a controversial Senate inquiry, following the proclamation of the Governor-General setting the day and time to prorogue the Parliament and dissolve the House of Representatives, reopened that debate.

This paper examines the right of the Senate and its committees to meet. It summarises the procedures of proroguing the Parliament and dissolving the House of Representatives, and the timing of these procedures in 2001 and 2004 amidst the 'children overboard' affair. It also considers in brief the timing of the two proclamations issued in 2007.

The 2001 Election and a Certain Maritime Incident

On 5 October 2001 the announcement came that the federal election had been called and the Parliament was to be prorogued and the House of Representatives dissolved on 8 October.

However on 7 October, following the announcement of the election but before prorogation and dissolution, several Australian Government Ministers were advised that asylum seekers aboard the SIEV 4 had thrown children overboard in an attempt to thwart Australian efforts to return the boat to Indonesia. The story with 'authenticating' photographs was widely publicised in the media.[1]

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[1] *Report*, Senate Select Committee on the Scrafton Evidence, 9 December 2004, p.1.

Throughout the 2001 federal election campaign the Prime Minister and Senior Ministers contended that the original advice provided to them (that children were *thrown* overboard) had never been retracted. At no point prior to the election on 10 November did the Prime Minister publicly acknowledge that he had had any communication which could indicate that there doubts regarding these original reports.

Following the 2001 election, it became apparent that the claims of children having been thrown overboard were misleading. The Senate established the Select Committee on a Certain Maritime Incident to examine issues surrounding the 'children overboard' incident and inquire into the advice given to Ministers and the Prime Minister. The Senate report found that

> … Mr Reith deceived the Australian people during the 2001 Federal Election campaign concerning the state of the evidence for the claim that children had been thrown overboard from SIEV 4.
>
> It is not possible to make a finding on what the Prime Minister or other Ministers had communicated to them about this incident due to the limitations placed on this inquiry by the order of the Cabinet for ministerial staff not to give evidence.[2]

The 2004 Election and the Scrafton Evidence

In August 2004, amid speculation regarding the next federal election, the children overboard affair resurfaced. On 16 August, Mr Michael Scrafton, a Ministerial Adviser to the Defence Minister at the time of the affair alleged that he had spoken with the Prime Minister three times on the evening of 7 November 2001 (three days before the election) and had advised him that claims of asylum seekers throwing children overboard were unsubstantiated.

Scrafton claimed that he had told the Prime Minister, *inter alia*:

> that the photographs that had been released in early October were definitely of the sinking of the refugee boat on October 8 and not of any children being thrown into the water; and that no one in Defence that [he] dealt with on the matter still believed any children were thrown overboard.[3]

Following the publication of Scrafton's claims,[4] The *Sunday Herald Sun* reported that:

> … the Government was plagued by poor polling and continued allegations over the children overboard affair.

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[2] *A Certain Maritime Incident*, Report of the Senate Select Committee on a Certain Maritime Incident, 23 October 2002, p.xxiv.

[3] Mike Scrafton, Letter to *The Australian*, 16 August 2004

[4] 'Poll crisis talks' *Sunday Herald Sun*, 29 August 2004, p.3; 'Push to Quiz Staff', *Sunday Canberra Times*, 29 August 2004, p.14; 'PM's Moment of Truth' *Sunday Age*, 29 August 2004, p.13.

> An October 9 poll would allow the Government to avoid parliamentary scrutiny and capitalise on the euphoria surrounding Australia's Olympic success.[5]

The Governor-General's Proclamation — to Sit or Not to Sit

That afternoon, on Sunday 29 August, and prior to both Houses resuming on the Monday, the Prime Minister made the long anticipated drive to the Governor-General's residence. The proclamation issued that day announced that the Parliament would be prorogued at 4:59 pm on Tuesday 31 August 2004 and the House of Representatives dissolved one minute later at 5 pm. A general election would be held on 9th October.

Technically the Parliament and House of Representatives continued to operate on Monday 30 August through to close of business (or one minute before at 4:59 pm) on Tuesday 31 August. However, the Speaker made the decision for the House not to sit and no business was conducted over this time — effectively ending the business of the House two days before its dissolution and the prorogation of the Parliament.

> Mr Andrew [the Speaker of the House] says ... that Mr Howard advised there was no outstanding legislation to consider, the Speaker consulted the Clerk who said it would be extraordinary for the House to sit after an election date had been announced.[6]

In response to a question regarding the rationale for allowing the Senate to sit during those two days, the Prime Minister replied:

> Well the Senate of course is not controlled by the Government, and it's in the hands of the non-Government parties as to whether the Senate sits because there's a standing resolution. It can only sit for two days because the prorogation takes effect on Tuesday afternoon.[7]

Thus the effect of the Governor-General's proclamation was for the House of Representatives to *act as though* it were dissolved from the Monday morning, and for the Senate to conduct business as usual until prorogation on the Tuesday afternoon.

Committee Business — a New Inquiry

Senators took their places in the Senate for the usual procedures and business of a sitting day. The Senate passed the motion establishing a Select Committee to

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5 'Poll crisis talks' *Sunday Herald Sun*, 29 August 2004, p.3.

6 'Election 2004: Senate establishes another inquiry into 'children overboard' affair / House of Representatives rises', *PM* transcript, 30 August 2004.

7 Prime Minister the Hon John Howard MP, *Federal Election 2004*, Transcript of Press Conference, 29 August 2004.

inquire into the Scrafton evidence. The inquiry was given a reporting date of 24 November 2004 and was directed to inquire into and report on:

> Matters arising from the public statements made by former ministerial staffer, Mr Mike Scrafton, about the conversations he had with the Prime Minister, Mr Howard, about the 'children overboard' affair on 7 November 2001 and the implications of these statements for the findings of the Select Committee on a Certain Maritime Incident.[8]

The Committee met in private for the first time on the evening of Monday 30 August and on the Tuesday conducted a four hour public hearing with Scrafton and two other witnesses. Committee Chair Senator Robert Ray stated that:

> In light of today's evidence, the Committee has decided to invite a further four witnesses to give evidence at a public hearing to be scheduled after the Federal election.[9]

Following the hearing the Parliament was prorogued at 4:49 pm and, one minute later at 5 pm, the House of Representatives was dissolved.

Two days following dissolution, on 2 September, the Senate Committee wrote to four individuals inviting them to appear at a public hearing to be held some time after the federal election. All four individuals declined the invitation to appear and the Committee did not attempt to subpoena them as witnesses.[10]

The sequencing of these events — the Governor-General issuing the proclamation two days before dissolving the House of Representatives, the decision to prorogue the Parliament one minute before dissolving the House of Representatives, the establishment of the Senate Scrafton inquiry one day before prorogation and suggestions that it may meet subsequent to prorogation — raised several procedural questions.

Proroguing the Parliament

While the life of a Parliament may be divided into a number of sessions, it is now usual practice for Parliaments to consist of one session only.[11]

HoR Practice cites the following description from the 23rd edition of *Erskine May's Parliamentary Practice* on the constitutional and parliamentary nature of prorogation:

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[8] *Report*, Senate Select Committee on the Scrafton Evidence, 9 December 2004, p.1.

[9] Senate Select Committee on the Scrafton Evidence, *Media release*, 1 September 2004.

[10] One of the individuals invited to appear was the Hon Peter Reith, former Minister for Defence. There ensued considerable debate regarding the power of the Senate Select Committee to either invite or subpoena a former Minister to appear before the Committee to respond to questions relating events that took place while in his capacity as a federal Minister.

[11] *HoR Practice*, ed. I C Harris, 5th edn 2005, p.226.

> The prorogation of Parliament is a prerogative act of the Crown. Just as Parliament can commence its deliberations only at the time appointed by the Queen, so it cannot continue them any longer than she pleases.[12]

Odgers' Guide to Australian Senate Practice (hereafter referred to as *Odgers*) also notes that the commencement and termination of sessions of the Parliament, following prorogation of the Parliament or dissolution of the House, are determined by the Governor-General under section 5 of the Constitution.[13] However *Odgers* goes on to note that the regulation of proceedings is a matter for each House of the Parliament to determine.

The effect of proroguing the Parliament is to bring all proceedings and business on the Notice Paper of the House of Representatives to an end and the House may not meet again until the date nominated in the proclamation.[14] It is current practice that, following prorogation of the Parliament, the Senate does not meet again until the date for the subsequent session of the Parliament set by the Governor-General.

However, two key arguments have been put forward supporting the *right* of the Senate to meet. The first suggests that, although Parliament is a collective entity comprising three parts, these parts are constituent rather than subordinate and consequently all do not cease to exist following prorogation. *Odgers* asserts that:

> Under the Australian constitution, however, the three parts of the parliament are constituted independently of each ... In so far as prorogation prevents the Parliament as a whole from operating it has the effect of temporarily suspending those powers and functions of the Parliament that require the coordinate actions of its parts.[15]

The second key argument noted by *Odgers* concerns the continuing nature of the Senate:

> The six-year term of senators and the retirement of half the Senate every three years means that the Senate is a continuing body ... The continuing nature of the Senate is reflected in the standing orders and other orders of continuing effect.[16]

While asserting its right to meet following prorogation, the practice of the Senate has been for it to rise at the time that the Parliament is prorogued and to not sit again until the Parliament resumes a new session.

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[12] Raphael, D.D. et al, *Erskine May's Parliamentary Practice* 23rd edn 2004, London, Butterworths Tolley, p.225.
[13] *Odgers*, ed. H. Evans, 11th edn 2004, p.498.
[14] *HoR Practice*, ed. I C Harris, 5th edn 2005, p.227.
[15] *Odgers*, ed. H. Evans, 11th edn 2004, p.500.
[16] *Odgers*, ed. H. Evans, 11th edn 2004, p. 501.

Dissolving the House of Representatives

Whereas a prorogation terminates the session of a Parliament, dissolution of the House of Representatives terminates the government and must therefore be followed by a general election of the House. However, as with prorogation, there are divergent views on the right of the Senate to meet following dissolution of the House.

Although the Senate has not met following dissolution of the House, *Odgers* asserts the constitutional right of the Senate to meet:

> A dissolution of the House of Representatives means that, for a period of time, one of the components of the parliament ceases to exist and thus the Parliament cannot perform those functions for which all three parts are required, principally the enactment of legislation. There is no constitutional provision or doctrine, however, that would prevent the Senate from meeting for non-legislative purposes.[17]

House of Representatives Committees

In relation to the operation of Parliamentary committees following prorogation, *HoR Practice* states that:

> Committees of the House and joint committees appointed by standing order or by resolution for the life of the Parliament continue in existence but may not meet and transact business following prorogation. Committees whose tenure is on a sessional basis cease to exist. Statutory committees continue in existence and may meet and transact business if, as is the normal practice, the Act under which they are appointed so provide.[18]

Prorogation prevents House committees from meeting or conducting business, although they continue to exist. The effect of dissolution is for all House of Representatives committees, whether established by resolution or Act, to cease to exist.

Senate Committees

The Senate observes a different practice in regard to the appointment of Parliamentary committees and their operation following prorogation of the Parliament. *Odgers* notes that 'The Senate has asserted since 1901 the right to empower committees to meet during the recess which follows a prorogation'.[19]

In asserting the right of Senate committees to meet, the Senate maintains that it has the power to pursue non-legislative functions, including debating public affairs and

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[17] *Odgers*, ed. H. Evans, 11th edn 2004, p.500.
[18] *HoR Practice*, ed. I C Harris, 5th edn 2005, p.227.
[19] *Odgers*, ed. H. Evans, 11th edn 2004, p.501.

inquiring into matter of concerns, principally through the Senate committee system. It follows then that the Senate position is that:

> While the Senate has not met at any time during which the House of Representatives was dissolved nor in the recess following a prorogation, Senate committees have often done so. The standing orders empower most standing committees of the Senate to meet during recess and some of the relevant provisions refer explicitly to the period of a dissolution of the House of Representatives. It is usual for Senate select committees to be given power to meet during recess and following dissolution of the House.[20]

Consequently the motion to establish the Senate Select Committee on the Scrafton evidence included the following clause:

> That the committee and any subcommittee have power to send for and examine persons and documents, to move from place to place, to sit in private or in public, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and have leave to report from time to time its proceedings and the evidence taken and such interim recommendations as it may deem fit.[21]

However there is a history of debate from the 1970s and 1980s concerning the right of the Senate and of Senate committees to meet following prorogation of the Parliament and dissolution of the House of Representatives. Opinions range from those that refute the power of the Senate or its committees to meet, to those that maintain both the Senate and its committees may meet, and those that suggest Senate committees but not the Senate may meet.

Neither the Senate nor its Committees may Meet

Opinions refuting the right of the Senate to meet have been put forward by Professor Sawer, Attorney General Greenwood and Solicitor-General Ellicott. Professor Sawer, from the Australian National University, in an opinion dated 1969, contends that:

> … once the House of Representatives is dissolved under section 5 of the Constitution, the 'Parliament' ceases to exist and so does the possibility of the Senate continuing to function as an independent and separate entity until a 'Parliament' is again in session pursuant to the appointment of a time by the Governor-General under section 5.[22]

Sawer argues that, while the sittings of the Houses are in the control of each House during sessions, the dates to begin and end sessions are established for the whole Parliament, and do not take place separately for each House. Sawer is silent on the

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[20] *Odgers*, ed. H. Evans, 11th edn 2004, pp.500–501.

[21] Appointment of the Senate Select Committee on the Scrafton Evidence 30 August, 2004, Senate Journal 162, p.3954.

[22] *Odgers*, ed. H. Evans, 11th edn 2004, p.505.

matter of Senate committees meeting during the period of dissolution or prorogation.[23]

Solicitor-General Ellicott concurs with Sawer and, in an opinion dated 23 October 1972, provides a number of arguments to support this conclusion. [24] Firstly, he refers to section 1 of the Constitution which emphasises the organic unity of the Parliament and maintains that, in setting out these three bodies, the Constitution follows the basic notion of the Parliament at Westminster. Therefore:

> It is axiomatic that none of these constituent parts alone, constitutes the Parliament. Without the other, any one of them is powerless to pass any law. The function of each is to act in concert with the others.[25]

The second point made by Ellicott relates to section 5 of the Constitution which gives the Governor-General the power to determine the timing of the sessions of the Parliament, and to prorogue the Parliament and dissolve the House of Representatives. Ellicott reasons that the reference in section 5 of the Constitution to dissolving the House of Representatives (rather than the Parliament) is to distinguish between a dissolution of the House and a double dissolution, which is provided for in section 57. He states:

> However, even though s. 5 only speaks of the dissolution of the House of Representatives I have no doubt that, when it is dissolved, the Federal Parliament is also dissolved, for until a new House of Representatives is elected there are in existence only two of the three bodies which are the repositories of the legislative power of the Commonwealth under s. 1. As is clear, no two can act without the third.[26]

In regard to the Senate meeting following prorogation of the Parliament, Ellicott also concludes that the Senate does not have the right to meet. He refers again to the United Kingdom (UK) precedent whereby following prorogation:

> Not only are the sittings of Parliament at an end but all proceedings, pending at the time are quashed except impeachments by the Commons and appeals before the House of Lords … Once the [Australian] Parliament is prorogued, I think each House would be affected in the same way as the UK Commons. Section 49 of the Constitution, in my view, has this effect …[27]

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[23] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p.1275 (Opinion of Professor Sawer, 1969).

[24] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p.1275 (Opinion of Solicitor-General Ellicott, 23 October 1972, p.2).

[25] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p.1275 (Opinion of Solicitor-General Ellicott, 23 October 1972, p.2).

[26] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p.1275 (Opinion of Solicitor-General Ellicott, 23 October 1972, p.4).

[27] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p.1275 (Opinion of Solicitor-General Ellicott, 23 October 1972, p.5).

Ellicott concludes that between sessions Senate committees should not be able to exercise any powers.[28]

The opinion of Attorney General Senator the Hon. I. J. Greenwood, dated 24 October 1972, also concludes that neither the Senate nor Senate committees can sit or lawfully transact business during the dissolution period.[29] In providing his opinion to the President of the Senate, he attaches Ellicott's opinion and maintains that the Parliament is constituted as an organic and whole union under the Constitution.

Both the Senate and its Committees may Meet

Professor Colin Howard and Mr Harry Evans, then Clerk Assistant of Committees in the Senate, assert the right of both the Senate and its committees to meet during the period of dissolution or prorogation.

Professor Howard's opinion, dated March 1973 agrees that the coordinate parts of the Parliament cannot legislate in isolation.[30] However he contends that this does not prevent them from performing their own particular functions at different times. Howard suggests that the continuity of parliamentary government has now been established and so there is no longer a reason why parliamentary business should be concluded within a single session or indeed within a session at all.

On the matter of Senate committees meeting following dissolution or prorogation, Howard refers to section 49 of the Constitution. Rather than examining if the 1901 British Houses had the power to authorise committees to meet during recess of the Parliament, he argues that there is nothing to indicate a contrary power. He also argues that the practice of the Australian Parliament has been to define and gain powers by assertion, within the words set out in sections of the Constitution.

From this approach Howard concludes that no other constituent part of the Parliament can prevent the Senate from performing its constitutional functions. While unable to participate in the legislative process during a recess, as this process requires the contemporaneous coordination of other parts of the Parliament, the Senate is still able to meet and perform its other functions — including committee work.

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[28] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p.1275 (Opinion of Solicitor-General Ellicott, 23 October 1972, p.7).

[29] *Odgers*, ed. H. Evans, 11th edn 2004, pp.504-5.

[30] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p.1275 (Opinion of Professor Howard, March 1973).

Following Howard's 1973 opinion, J. R. Odgers raised a number of other arguments in support of the Senate and its committees meeting.[31] Odgers acknowledges the Australian Parliament's relations to the Westminster model, but also asserts that:

> … it would be unreal to expect kindred [Australian] legislation to follow slavishly all Westminster interpretations and applications of the law and custom of Parliament.[32]

Odgers concedes that section 49 of the Constitution refers to the powers of the House of Commons unless otherwise declared. However he argues that section 50 of the Constitution provides that each House may make their own rules and orders with respect to the conduct of their business and this, he contends, recognises that the Australian Houses of Parliament 'would necessarily build up conventions and practices of their own'.[33]

Odgers summarises his arguments in support of the Senate and its committees meeting:

> (1) The Senate is a continuing body and is not dissolved upon dissolution of the House of Representatives. ...
>
> (2) The 'organic whole' theory that the two Houses live and die together finds no support in the Constitution because section 5 does not expressly provide that, upon a dissolution of the House of Representatives, the 'Parliament' as a whole ceases to exist. Nor does the Constitution expressly provide that, by reason of dissolution of the House of Representatives, neither the Senate nor its committees can continue to function.
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> (3) The Senate's inter-session right to transact its own business following dissolution of the Lower House makes even more sense than in the case of prorogation of the Parliament.[34]

Odgers concludes that:

> It would be harmful to the proper and efficient functioning of the legislature and the independence of the Senate, if urgent and important committee inquiries by Senate committees should come to an unnecessary halt for up to four months while the other arm of the legislature — the House of Representatives — was engaged in an election.[35]

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[31] Odgers, J R, 'Power of Committees to Function During Prorogation or Dissolution', *The Table* Vol XLII 1974.

[32] Odgers, J R, 'Power of Committees to Function During Prorogation or Dissolution', *The Table* Vol XLII 1974, p. 34.

[33] Odgers, J R, 'Power of Committees to Function During Prorogation or Dissolution', *The Table* Vol XLII 1974, p.34.

[34] Odgers, J R, 'Power of Committees to Function During Prorogation or Dissolution', *The Table* Vol XLII 1974, p.38

[35] Odgers, J R, 'Power of Committees to Function During Prorogation or Dissolution', *The Table* Vol XLII 1974, p.38

Odgers' arguments seem predicated on what he considers are practical and sensible means for the Australian Senate to operate. This is consistent with Odgers' approach that asserted powers and convention should determine practice:

> … as has been shown, with the development of its committee system and the need for continuity of inquiries during the months when the House or Representatives is dissolved for election purposes, it was a logical and necessary step for the Senate further to develop its customs by resolving that committees have power to function notwithstanding any dissolution of the Lower House. Thus does the law and custom of Parliament evolve.[36]

Supporting both Howard's and Odgers' opinions, in 1984 the Senate Clerk Assistant of Committees, Mr Harry Evans, summarised as follows the right of the Senate and its committees to meet:

(a) it is wrong to equate a dissolution of the House of Representatives with a prorogation, and the Senate and its committees may meet after a such dissolution;
(b) in any case, the Senate and its committees may meet after a prorogation;
(c) it is not tenable to maintain that the Senate committees may meet during a period during which it is claimed that the Senate may not meet: if Senate committees may meet after prorogation, the Senate also may meet; and
(d) the Senate may authorise, in advance of their receipt, the publication with absolute privilege of reports of its committees, because —
    i. this is in accordance with the Parliamentary Papers Act; and
    ii. the power to authorise the publication of any document with absolute privilege is one of the powers of the House of Commons adhering to the Senate by virtue of section 49 of the Constitution.[37]

The Senate may Not Sit but Senate Committees may Meet

Solicitor-General Dr Griffith, in an opinion dated 9 October 1984, agreed with the earlier opinions of Greenwood and Ellicott that the Senate was not empowered to meet during the period following dissolution or prorogation. Griffith considers that, when one of the Houses is dissolved, there can be no exercise of legislative power as there are in existence only two of the three constituent bodies of the Parliament.[38]

> I reject [Howard's] Opinion's conclusion that the Senate may continue to sit after the Parliament has been prorogued or the House of Representatives dissolved. Whilst it is not the case that during the period after prorogation of the Parliament or dissolution of the House of Representatives and the commencement of the next

[36] Odgers, J R, 'Power of Committees to Function during Prorogation or Dissolution', *The Table* Vol XLII 1974, p.40.
[37] Paper tabled in the Senate, 19 October 1984, SJ no. 123 18, p.1270 (Opinion of Mr H. Evans, Clerk Assistant of Committees in the Senate, 18 October 1984)
[38] Paper tabled in the Senate, 19 October 1984, SJ no. 123 18, p.1270 (Opinion of Solicitor-General Griffith, 9 October 1984, p.6).

> session of the parliament, the Senate ceases to exist, the Senate cannot continue to sit after the end of the session of the Parliament.[39]

However Griffith dismisses the extrapolation of this argument to Senate committees:

> The Senate, as part of the parliament in which the legislative power of the Commonwealth is vested, is prevented from sitting by the terms of the Constitution itself. It does not follow that the position of the Senate committees is similarly determined.
>
> As to this aspect, there is no express constitutional prohibition against either House of Representatives authorising a committee, or a joint committee, to sit between sessions ... there is no specific prohibition in the Constitution to prevent the Senate authorising its committees to sit after a session or a parliament is brought to an end.[40]

Griffith concludes that the Senate is able to exercise the power to authorise committees to meet, even though it may not do so itself following prorogation or dissolution.[41]

Senate Resolution that Committees may Meet

In 1984, the Senate debated its own right and the right of its committees to meet following dissolution of the House of Representatives and / or a prorogation of the Parliament. The opinions of Griffith, Evans, Sawer, Ellicott, Greenwood and Howard were tabled, and the following motion was eventually passed by the Senate:

> That the Senate declares that where the Senate, or a committee of the Senate which is empowered to do so, meets following a dissolution of the House of Representatives and prior to the next meeting of that House, the powers, privileges and immunities of the Senate, of its members and of its committees, as provided by section 49 of the Constitution, are in force in respect of such meeting and all proceedings thereof.[42]

Following this resolution, Senate committees have regularly met and taken evidence in the period after prorogation of the Parliament and dissolution of the House of Representatives. However, despite asserting its right to meet and at least carry out non-legislative functions, the Senate has not met during a period of dissolution or prorogation.

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[39] Paper tabled in the Senate, 19 October 1984, SJ no. 123 18, p.1270 (Opinion of Solicitor-General Griffith, 9 October 1984, p. 8).

[40] Paper tabled in the Senate, 19 October 1984, SJ no. 123 18, p.1270 (Opinion of Solicitor-General Griffith, 9 October 1984, p.10).

[41] Paper tabled in the Senate, 19 October 1984, SJ no. 123 18, p.1270 (Opinion of Solicitor-General Griffith, 9 October 1984).

[42] Senator Durack, 22 October 1984, SJ No.124 13, p .1276.

The Practice of Prorogation

Between 1928 and 1990 Parliament was not expressly prorogued prior to dissolution of the House.[43] Since 1993 it has once again been the practice to prorogue the Parliament prior to dissolution. It has been suggested that the revival of this practice is in response to the debate concerning the power of the Senate to meet during this period. Denis O'Brien comments:

> … the act of prorogation may be seen as a concession to the longstanding advocacy of the Clerks of the Senate, James Odgers and Harry Evans in particular, that the Senate could sit and its committees could function in spite of a dissolution of the House of Representatives … Whether or not the Prime Minister conceded any validity to the argument of the Senate advocates, he prorogued the parliament as a whole to make absolutely sure that the Senate did not meet and transact business under parliamentary privilege in the politically sensitive period leading up to the general elections.[44]

While *Odgers* and others still claim the right of the Senate to sit and carry out non-legislative functions following prorogation, it appears from practice that the Senate is highly unlikely to do so. Despite the asserted rights of the Senate to meet, even *Odgers* concedes that proroguing the Parliament has the practical effect of terminating debate in the Senate. *Odgers* comments:

> A government can normally use its compliant party majority in the lower house to adjourn that house, but where such a majority is lacking in the second chamber prorogation may be the only means of avoiding embarrassing parliamentary debate or inquiry ... The potential for misuse of the power adds significance to the question whether prorogation prevents the Senate meeting.[45]

Consequently the question as to the power of the Senate to meet following prorogation remains largely a theoretical matter of procedure, rather an issue to be tested by a change in practice.

2004 — Prorogation and Privilege

The 2004 proclamation remains an interesting phenomenon in the history of prorogations as it could have tested the right of the Senate to meet and the rights and privilege of Senate committee hearings.

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[43] During this time the proclamation dissolving the House also contained a phrase discharging Senators from attendance. The practice was discontinued after 1990 as '[t]his phrase had no constitutional basis and arose from a misunderstanding of the procedures and previous proclamations … In 1990 the Clerk of the Senate drew this fact to the attention of the Official Secretary to the Governor-General' and the practice was discontinued. *Odgers*, ed. H. Evans, 11th edn 2004, p.499.

[44] O'Brien, Denis 'Federal Elections – The Strange Case of Two Proclamations', *Public Law Review* vol 4(2) 1993, p.82.

[45] *Odgers*, ed. H. Evans, 11th edn 2004, p.499.

The timing of the proclamation, issued two days before the Parliament was to be prorogued and the House dissolved, drew criticism from the Opposition and other quarters. Senator John Faulkner, Leader of the Opposition in the Senate, issued a media release questioning the reasoning behind the timing of the proclamation and the prorogation:

> Labor questions the decision of the Prime Minister to put in place a procedure whereby the House of Representatives will be effectively dissolved as of today, but parliament will not be prorogued until late Tuesday.
>
> Because of this bizarre arrangement, according to advice from the Clerk of the Senate, there is no alternative but for Senate to proceed with its sitting on Monday and Tuesday
>
> If the Government does not want the Senate to sit, why didn't the Prime Minister prorogue the Parliament today?
>
> The only possible explanation is that he's running away from scrutiny in the House of Representatives.[46]

Reporting on the progress of the Senate Scrafton inquiry, an article in *The Age* commented that Senate committees could continue hearings throughout the election campaign and:

> Greens leader Bob Brown even raised the prospect of recalling the Senate during the campaign if matters of 'national importance' emerged from the overboard inquiry.[47]

Should the Senate have been recalled, or if hearings for the Scrafton inquiry had taken place following dissolution of the House, the matter of the Senate right to meet and parliamentary privilege may have been tested. *Odgers* has refuted any suggestion that parliamentary privilege is not extended to evidence taken during committee inquiry hearings over this period, stating that:

> On many occasions, Senate committees have continued their activities after the dissolution of the House of Representatives or prorogation of Parliament, including by taking evidence and presenting reports. The absolute privilege of these activities has not been called into question and the practice is now firmly entrenched in standing orders as well as being confirmed by declaratory resolution.[48]

However Ellicott has cautioned that if a Senate committee met following prorogation and this was found to not be a properly constituted meeting, then witnesses who appear before a committee and give evidence may not be entitled to the protection of parliamentary privilege. This would leave witnesses open to incriminating themselves in evidence given or for their evidence to be actionable at the suit of third parties. Similarly, Senators may not be afforded parliamentary privilege for any statements made by them during committee hearings.

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[46] Senator John Faulkner, *Senate Sitting*, Media release 29 August 2004.
[47] Scrafton ready for new Senate inquiry, *The Age*, 30 August 2004, p.9.
[48] *Odgers*, ed. H. Evans, 11th edn 2004, p.379.

Ellicott goes on to suggest that '[w]itnesses who were summoned to give evidence would, of course, be well advised to refuse to do so'.[49] He concludes his opinion with the following cautionary note:

> In the circumstances, therefore, Senators might consider that the interests of the public and the Senate would be best served if its committees ceased to function on dissolution of the House of Representatives and until Parliament reassembles.[50]

In 2004 the Senate did not meet following prorogation or dissolution, and in the Senate Scrafton inquiry additional hearings were prudently scheduled to take place after the federal election. It would seem that O'Brien was correct in his 1993 summation that the 'opportunity to test the issue in the Australian High Court may now never arise'.[51]

2007 — Prorogation and Electoral Rolls

In 2007 election lead up, there was no comparable children overboard incident to influence the announcement or timing of prorogation and dissolution. However, when the election announcement came, it did break with what had become established practice.

On Sunday 14 October 2007, it was announced that the Parliament was to be prorogued at noon on Monday 15 October but the House of Representatives was not to be dissolved until noon on Wednesday 17 October. While the practice of proroguing the Parliament was continued in 2007, it was unusual to provide two days between prorogation and dissolution.

The effect of the early prorogation was that neither House sat in the period following the election announcement and before dissolution of the House. While the Senate does assert its right to meet during prorogation, there was little on the Senate agenda to justify its meeting at that time and, given that the Coalition had a majority in the Senate at that time, there was unlikely to be a push for the Senate to debate any business that may be critical of the Government.

The effect of the later dissolution of the House was to extend the period for first time voters to register on the electoral roll. Changes passed in *The Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Amendment Act 2006* meant that the deadline for first time voter enrolment is now 8 pm on the same

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[49] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p .1275 (Opinion of Solicitor-General Ellicott, 23 October 1972, p.10).

[50] Paper tabled in the Senate, 22 October 1984, SJ No.124 6, p .1275 (Opinion of Solicitor-General Ellicott, 23 October 1972, p.10).

[51] O'Brien, Denis 'Federal Elections – The Strange Case of Two Proclamations', *Public Law Review* vol 4(2) 1993, p. 83.

day the writs for the election are issued.[52] By announcing the election date on Sunday and proroguing the Parliament on Monday, the Prime Minister ended debate in the Parliament but extended until Wednesday (the day of dissolution) the cut-off for first time voters to enrol.

Summary

The timing of the 2004 Governor-General's proclamation and the establishment of the Scrafton inquiry, following the election announcement but prior to prorogation, indicates that the debate over the right of the Senate and its committees to sit is by no means resolved.

As events unfolded in the Scrafton inquiry, the issue was sidestepped once more and the matter of parliamentary privilege for committees meeting during this period was not tested.

Similarly in 2007, the two proclamations and the two days separating prorogation and dissolution provided the opportunity for the Senate to act on its asserted right to meet following prorogation. However, with no pressing business to attend to, the Senate did not break with practice and test its asserted right.

Though prorogation may regarded by some as little more than a formality prior to dissolution, the 2004 and 2007 proclamations indicate it forms part of procedural debates around the Senate's right to meet, and the timing of prorogation continues to be used to effect. However, as with many aspects of Australian politics, this debate may never reach a constitutional show-down. It will likely remain a procedural game of manoeuvrings where the rights of practice and privilege are touted — but not tested. ▲

[52] Prior to this Act first time voters had seven days from the issue of the writs in which to enrol.