

Pulling the Trigger: the 1914 Double Dissolution Election and its Legacy.

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It is not a small thing to exercise a constitutional power for the first time. Yet, in June 1914, when Prime Minister Joseph Cook advised the Governor-General, Ronald Munro Ferguson, to simultaneously dissolve both of the Commonwealth Houses of Parliament, following the procedure set out in section 57 of the Constitution, he did so with a surprising confidence, even bravado, which seemed to belie the fact of novelty and experiment.

In 1914, the Constitution was still very young, not quite in its infancy, but not yet fully grown, and far from fully tested. Many sections had been tried out for the first time in the decade since the inauguration of the Commonwealth, on New Year's Day, 1901. Constitutional novelty was an unavoidable feature of the era. But section 57 was not just an untried provision. It was unprecedented, indeed unique, in the history of bicameral legislatures. The problem it was intended to resolve – deadlocks between two legislative houses – was not unfamiliar; indeed, it was well-known in Australian colonial history and easy to characterise. But there was nothing familiar about the backdrop to the deadlocks that were anticipated to arise between the House of Representatives and the Senate, and little to guide the specific design of section 57.

There was also nothing straightforward about the evolution of the section. Section 57 was adopted after one of the lengthiest and most tortuous debates in the Federal Convention of 1897-98 at which the Bill that became the Constitution of the Commonwealth of Australia was drafted. Numerous complicated formulae were tried out, multiple amendments were proposed, and the vote was repeatedly taken, but just as soon as it appeared that something had been settled, another iteration was suggested and the debate began again.

Indeed, at its peak, the debate on what emerged as section 57 occupies four hundred pages of the Official Record of the Convention Debates. Just week one before the Convention finally wound up, in March 1898, the delegates finally agreed on its wording. Even then, as we shall see, it wasn't finished.

The Australian Commonwealth is built around two great institutional principles: representation of the people of the nation in a system of British parliamentary government, and equal representation of the states in a system of American-style federalism. These two principles find their expression respectively in the House of Representatives and the Senate. They work together, in a lopsided, power-sharing arrangement, complementary but constantly in tension: an asymmetrical symmetry, we might say.

What we see in section 57 is a reflection of this arrangement. It captures the multiple interests that were at stake in the project of federating Australia's self-governing colonies into one 'indissoluble federal Commonwealth'. It displays, in particular, the tensions. The section provides for the resolution of otherwise unresolvable disagreements – deadlocks – between the houses of parliament via an election in which all seats of the House of Representatives and all Senate places are simultaneously re-contested. In the normal course of constitutional business, only half the Senate is elected every three years, and a half-Senate election may, but does not have to, occur at the same time as an election for the House of Representatives.

Section 57, in contrast, contemplates the extraordinary.

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.

The first paragraph describes the circumstances in which a deadlock arises. It sets out what have come to be known as the 'triggers'. First, the Senate rejects or fails to pass a bill (a 'proposed law') that has been passed in the House, or the Senate passes a bill with amendments that the House will not accept. Then, after an interval of three months, if the Senate again rejects the same bill or fails to pass it or passes it with unacceptable amendments, the Governor-General may dissolve both Houses simultaneously, but not less than six months before a regular House of Representatives election is due.

The second paragraph defines what may follow if the deadlock on the same bill continues after a double dissolution election has taken place: namely, the convening of a joint sitting of both Houses of Parliament.

The third paragraph describes how the joint sitting will proceed, and how the vote on the deadlocked bill is to be counted – that is, the steps required for the previously deadlocked bill to become law.

We note several salient features. The deadlocked bill must originate in the House of Representatives. Section 57 cannot apply to bills that originate in the Senate. The reference to passing a bill with unacceptable amendments cannot apply to money bills, since, under section 53 of the Constitution, the Senate cannot amend 'proposed laws imposing taxation, or ... appropriating revenue or moneys for the ordinary annual services of the Government'.

The House of Representatives does not have to take any action; it does not have to treat the Senate's rejection of, or failure to pass, a bill as a step towards a double dissolution. The House is not obliged to reintroduce the deadlocked bill after a dissolution, and a subsequent joint sitting is not mandated. The Governor-General's role is central. He or she dissolves both houses and convenes a joint sitting, if this takes place.

The stipulations in the section appear precise, but this precision is deceptive.

Notwithstanding the length of the provision – it is one of the wordiest sections of a mostly very economical Constitution – numerous essential matters are missing from its text.

Although its framers laboured long and hard on its wording, many questions were left unanswered when the provision reached its final form. These included:

- What constituted a 'failure to pass'?
- How was the interval of three months to be calculated? From when did it start to run?
- Could the rejection of any proposed law, on any subject matter, qualify as a double dissolution trigger – or did the rejected bill have to be on a matter essential to government, or central to the government's program?
- Did the provision allow for only one bill to be the subject of a double dissolution, or could multiple bills serve that purpose? Could rejected bills be 'stockpiled', stored up by a frustrated government for potential resolution at a joint sitting?
- Could a government deliberately 'manufacture' the conditions for a double dissolution, effectively enticing the Senate to twice reject a bill?
- Does the Governor-General have to follow the advice of the Prime Minister to dissolve both Houses?
- Or does the Governor-General have to satisfy him or herself personally that the preconditions of section 57 have been met, or on the general workability of government?
- Whom could the Governor-General consult in determining whether to grant a double dissolution?

Little by little, over the decades, and in the course of Australia's six double dissolutions¹, answers to these questions became known, although even now, not all are clear. In 1914, notwithstanding how recently the Constitution had been completed, notwithstanding the fact that many who sat in parliament, and fully four of the seven sitting Justices of the High Court, had been delegates at the federal Conventions of the 1890s, the scope of the provision remained uncertain.

On 2 June, 1914, meeting with the Governor-General, Prime Minister Cook explained the legislative history of one particular bill – the *Government Preference Prohibition Bill* (a bill to

¹ Including challenges resolved in the High Court: *Cormack v Cope* (1974) 131 CLR 432; *Victoria v Commonwealth* (1975) 134 CLR 81 ('PMA Case').

prohibit union preference in Commonwealth employment) – which had been rejected twice by the Senate, with an unambiguous three months interval between the two rejections. Cook explained that obstruction in the Senate had made government unworkable. He advised the Governor-General to dissolve both Houses, as provided for in section 57.

What, if any guidance did the Governor-General have on how to proceed? It was well known that there had been constitutional crises in the colonial parliaments, associated with bills deadlocked between the Houses. In few of these, however, was the crisis over ordinary legislative bills. Most involved deadlocks over money bills and were therefore potential roadblocks for government. But Cook's Government Preference Prohibition Bill in no way resembled a money bill or threatened the viability of government.

In any case, most colonial precedents involved upper houses that were appointed, not elected. At that time, in South Australia alone both Houses were elected. In 1881, a provision had been inserted in the South Australian Constitution specifically to deal with the settlement of deadlocks between its houses; one of the measures it contemplated was a double dissolution. But such had never taken place.² Even had it done, however, the deadlock issue was different; neither the South Australian Legislative Council, nor any of the other colonial upper houses had been designed, as the Senate was, to represent different regional interests or self-governing units.

There were no historical lessons either from other countries. Australia's parliament was unique in having both houses directly elected. Double dissolution procedures could have no application in bicameral systems with only one elected house. There were no indirect analogies to be made, either. The British House of Lords was, of course, unelected, and Britain's then very recent constitutional crisis, 1909-1911, had been resolved with an Act limiting the House of Lords' power to obstruct bills from the Commons. But such an Act was simply not constitutionally available to the Australian parliament. The Canadian Senate was not an elected house either. The United States Senate was unelected until the ratification of the 17th amendment in 1913 which transformed it into a directly elected house, but the first Senate election did not take place until November 1914, and no deadlock issue arose.

The request for a double dissolution

² Rick Crump, 'Why the Conference Procedure Remains the Preferred Method for Resolving Disputes between the Two Houses of the South Australian Parliament' (2007) 22 *Australasian Parliamentary Review* 120.

Lack of precedents notwithstanding, Prime Minister Cook had firm views about the application of section 57 to the circumstances facing his government. Cook had not been a delegate at either of the federal Conventions, but he had worked closely with colonial politicians who were, including in the 1890s in the cabinet of NSW Premier, George Reid (who was to take the lead in the final shaping of section 57). In 1901, in common with Reid (later Australia's fourth Prime Minister) and many other members of the federal Conventions, Joseph Cook entered the new Commonwealth parliament, representing the NSW seat of Parramatta.

In colonial politics and for the first few years in the life of the Commonwealth, federal politics had been organised around two major parties – their names and purpose now lost to popular memory – the Protectionists and the Free Traders. But the Labor party was already a significant alternative. By 1903, the three parties stood, effectively, shoulder to shoulder. Alfred Deakin famously called them the 'three elevens.' By 1909, it had become clear to the non-Labor side that they had more in common as opponents of Labor than against each other; the Free Traders and the Protectionists amalgamated, or 'fused'. Cook became deputy leader of the new Fusion Party (soon after known as the Federal Liberal Party) led by Alfred Deakin.

In 1913, Deakin stepped down, and Cook took his place; the Liberals defeated the Fisher Labor government that same year. It was a fragile victory. The new government's margin in the House of Representatives was the narrowest possible: one seat alone. Cook, now Prime Minister, tried to entice the outgoing Labor Speaker to stay on, but was unsuccessful. Thereafter, the Liberals had to rely on the casting vote of their own Speaker for the passage of bills. Even more frustrating was the lack of balance in the Senate. The Opposition was firmly in command. Of the 36 Senate places, 29 were Labor; 7 alone were Liberal.

From the start, both parties had their eye on the strategic possibilities in this arrangement. The Senate repeatedly obstructed where it could, including refusing to grant pairs. Less than a year after forming government, Cook sought, and was granted, a double dissolution. The parliament was dissolved on 30 July 1914, and the election set for 5 September.

In opening his election campaign, Cook dwelled on his government's frustration at the hands of the Senate, describing the calling of a double dissolution as 'the only honourable course to take':

Our opponents never once, "played the game". From the first day we had to meet a hurricane of virulent abuse and bitter recrimination... [I]n the Senate, the one place of all where one would expect calm and reasonable consideration of the country's affairs, [there has been] insolence and over-bearing arrogance ... Altogether, the performances of these gentlemen have made a perfect parallel to one of Gilbert and Sullivan's operas.

Cook assured his audience that

it was only after exhausting all the possibilities of the situation that we decided to clear the desks, alter the course, and steer the ship of State back to the port of public opinion from which it had set out on its tempestuous voyage a year ago.

'Any action,' he concluded, 'which does not finally and firmly uphold the right of the democracy to sovereign power, and compel the Senate ultimately to bow to that power, would be a betrayal of the people.'³

Cook made no attempt to disguise the fact that, almost immediately after the 1913 election, he had devised a plan to activate section 57. Barely months in government, he had two bills drafted that he knew to be contrary to Labor policy, and that he openly and calculatingly planned to offer as double dissolution 'triggers': a bill to restore postal voting, and the Government Protection Prohibition Bill. The second, as intended, was a red rag to the Senate. Like clockwork, the bill was passed in the House, rejected in the Senate, passed again in the House three months later, and rejected a second time. The last federal election had been only a year earlier; there was no danger of running into the six months cut-off before a regular election was due 'by effluxion of time'.

All appeared to be in place, and Cook was, it seems, entirely confident that the Governor-General would act as advised and dissolve both Houses. Indeed, Cook was of the

³ <http://electionspeeches.moadoph.gov.au/speeches/1914-joseph-cook>

view that the Governor-General was *obliged* to act on the advice of the Prime Minister, that he had no discretion in the matter.

The role of the Governor-General

Between the first Senate rejection and the request for a double dissolution, a new Governor-General had arrived in Australia. Sir Ronald Munro Ferguson was no stranger to politics. He had behind him thirty years' service as a Liberal Member of the House of Commons, including as parliamentary private secretary to the one-time British Prime Minister, Lord Rosebery. He was, in addition, a man whose vigorous, independent temperament had made the British government more than happy to offer him the role of representative of the Crown in a far-distant Dominion. His favourite form of exercise, we are told, was chopping down trees.⁴

Before his arrival, Munro Ferguson had been following the Australian political scene, receiving information from the outgoing Governor-General, Lord Denman, and consulting with the former Prime Minister, George Reid, now High Commissioner in London on how to proceed in the likely event of a request for a double dissolution. It was clear that the technical preconditions surrounding section 57 had been satisfied; the major unanswered question about the section's operation was whether he, as Governor-General, could exercise any discretion in the matter.

Cook's view, expressed in a memo prepared by his Attorney-General was that the representative of the Crown was obliged to follow ministerial advice. This opinion was fortified by the recent writings of the leading British constitutional authority, Arthur Berriedale Keith.⁵ But, there were alternative perspectives. Keith's views were based on British conventions, and formed in relation to the dissolution of lower houses. The powers of Australia's Governors-General were to be exercised in a different context, and were complicated by the difference between the constitutional status of the Governor-General and the Monarch.

Until 1926 at least, when constitutional equality between the Dominions and the United Kingdom was declared, Governors-General were, effectively, dual representatives:

⁴ Christopher Cuneen, *King's Men: Australia's Governors-General from Hopetoun to Isaacs* (Allen & Unwin, 1983) 109.

⁵ *Responsible Government in the Dominions* (Clarendon Press, 1912).

both the constitutional representative of the Queen or King, and agent of the British government. The conventional restraints upon the exercise of discretion by the Monarch regarding a Prime Minister's advice (so vividly illustrated in the British constitutional crisis) did not necessarily apply in Australia. Indeed, in the decade since federation, as Munro Ferguson knew, Governors-General had refused a Prime Minister's request to dissolve the House of Representatives three times (1904, 1905, 1909), following the government's loss of the confidence of the House.

But Cook's was a request for a double dissolution. The government had not lost the confidence of the House. And there were textual, not merely conventional, guidelines that appeared at least to offer guidance. Section 57 stated that following certain preconditions, 'the Governor-General may dissolve the Senate and the House of Representative simultaneously.' Just what did that 'may' signify?

Munro Ferguson had determined to satisfy himself personally that the conditions for a double dissolution had been met. In addition, he wanted to know that government had become unworkable, and that no alternative government could be formed. To satisfy the last, he proposed to consult with the Leader of the Opposition, Andrew Fisher. In London, George Reid had advised him that he could, and Munro Ferguson raised the idea with the Prime Minister. Cook was not happy, and the Governor-General gave way.

The proposal to consult with members of the High Court received a warmer response. Sir Samuel Griffith, Chief Justice of Australia (and leading member of the 1891 Federal Convention), was more than happy to be consulted. Griffith joined the Governor-General for lunch the day after the meeting with the Prime Minister, and at his request, prepared a memo setting out his own opinion of the scope of the section 57 power. He later wrote a second version of the memo, anticipating the tabling in parliament of the Governor-General's correspondence on this matter.

The Chief Justice wrote: 'An occasion for the exercise of the power of double dissolution under Section 57 formally exists whenever the event specified in the section has occurred, but it does not follow that the Power can be regarded as an ordinary one which may be exercised whenever the occasion formally exists': there was, that is, an apparent operational power, but in reality, a discretionary power. The power, the Chief Justice continued, was only to be exercised when the Governor-General was personally satisfied

after independent consideration of the case, either that the proposed law as to which of the Houses have differed in opinion is one of such public importance that it should be referred to the electors of the Commonwealth for immediate decision by means of a complete renewal of both Houses, or that there exists a state of practical deadlock in legislation as can only be ended in that way.

On these matters, the Governor-General could not act without the advice of his Ministers, but he was not bound to follow their advice. He was, Griffith concluded, an 'independent arbiter'.⁶

Cook did not deviate from his view that the opposite was the case. He considered the origins of section 57, and claimed that it was 'not reasonable to suppose that the framers of the Constitution intended to place the responsibility of granting or refusing the double dissolution upon the Governor-General personally – to place him in the invidious position of appearing to take sides with one House or the other, or with one political party or the other.'

When Munro Ferguson granted the dissolution, Cook chose to interpret this as a vindication of his own views. Munro Ferguson, on the other hand, considered his actions to be an exercise of his vice-regal discretion. Andrew Fisher, who held the 'independent arbiter' view (the Governor-General should 'read the Constitution... and act accordingly', he said) had chafed at the Governor-General's back-down on his proposal to consult the Opposition leader. However, although concluding that Munro Ferguson had improperly followed Cook's advice, he agreed with the decision. Everyone, it seems, got the result they thought they wanted.

The 1914 election

The outcome was another matter. Cook's confident strategy for gaining control of the Senate failed abysmally. With a 73.5 per cent voter turnout (in the days of voluntary voting), Labor attracted a 2.42 per cent swing and gained a convincing majority in the House of Representatives, winning 42 of the 75 seats. While Labor lost no seats, the Liberals lost six: five to Labor and one to the sole Independent MHR. Not only did Labor retain control of the

⁶ Don Markwell, 'Griffith, Barton and the Early Governors-General: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280.

Senate, it increased its control, winning 31 of the 36 Senate places. Cook, back as Leader of the Opposition, but ever cheerful, would describe the result as a “jolly good licking”.

The 1914 election returns strikingly illustrate the shift in Australian party politics that had occurred since federation: out of 75 House of Representatives electorates, only three offered any alternative to either Labor or Liberal. The alternatives were all Independents (including, in Victoria’s electorate of Kooyong, where the Commonwealth’s first female candidate, Vida Goldstein, stood as an Independent.)⁷ It is also striking that, in 13 of the 75 electorates, candidates (seven Labor and 6 Liberal) were elected unopposed. The two political parties, both relatively new, were now absolutely dominant.

The election had made something else clear: the deadlocked bill was dead in the water. There would be no prospect of its being reintroduced and no need for a joint sitting of the houses to resolve any further deadlock. So, had section 57 served its purpose?

The framing of section 57

What *was* the purpose of section 57? We can say that it was to provide a means of breaking deadlocks in the passage of legislation, but this describes only the problem that the section was intended to address. The other sense of purpose – what it represented in the minds of the framers – was never entirely settled. For one thing, a higher or ulterior purpose is difficult to put into words with practical application; and secondly, most significantly, the framers held many different objectives and understandings about the section’s purpose.

Was the section intended to ‘punish’ the Senate for repeated obstruction to an elected government (as Joseph Cook appeared to think)? Or was it intended to hold the House of Representatives or the elected government to account, forcing it to test public approval for proposed legislation, specifically legislation that was contrary to the interests of the States? Was it, in short, an affirmation of the ultimate sovereignty of the House of Representatives, or of the federal equality of the States? There was simply no consensus among the Constitution’s framers.

The need for such a provision was hinted at in the first federal Convention, in Melbourne in 1891. It arose in debate on the fiscal powers of the respective houses of

⁷ It was her fourth attempt, and she emerged as the runner-up, second to the victorious Liberal candidate, Sir R.W. Best who secured 18, 545 votes: Goldstein secured 10,264; E. W. Terry (Ind) 2,400.

parliament – an issue that was to be the most contentious and controversial of all. The equal representative of each state in the Senate, regardless of population (as in the United States), had raised some objections among the delegates from the more populous colonies, but it had been conceded relatively early. Indeed, without this concession, there would have been little prospect of accomplishing federation. But, legislative equality between the houses was not so easily conceded.

The Convention finally agreed that the Senate should have co-equal powers regarding all non-fiscal legislation, but would be prohibited from originating or amending money bills. However, it was permitted to recommend amendments, or to fail to pass such bills. (We see these arrangements now in section 53 of the Constitution.)

In 1891, debate on the Senate's power to suggest amendments to money bills, prompted Victorian delegate, Henry Wrixon, to raise the prospect of deadlocks between the houses. The Senate, at that time, was conceptualised as an appointed chamber, and the option of a double dissolution was therefore not available, but the recognition of tensions between the different principles embodied in the two houses was growing and already pushing delegates to offer procedural solutions. Wrixon suggested a provision: 'If the house of representatives decline to make an ... omission or amendment [as suggested by the Senate], the senate may request a joint meeting of the members of the two houses, which shall thereupon be held, and the question shall be determined by a majority of the members present at such meeting.' This procedure, he explained, would provide the 'means of securing finality, and ... settling a difference if it arises ... on such a critical measure as an appropriation bill'. The proposal was quickly negated. Sir Samuel Griffith (Queensland delegate) objected that Wrixon's scheme would mean that 'The senate need not ask for a joint meeting unless it likes, and it would not ask for it unless it counted heads and saw that it would have a majority; so that by his proposal the senate would be able to coerce the house of representatives.' He objected, he said, to any 'artificial means of settling differences between the two houses.'

Victorian delegate, Nicholas Fitzgerald, also objected to what he called 'mechanical' means, but he conjured up more honourable motives and nobler alternatives:

Can we have the great national life which we all say we shall call into existence by federation without an enhanced sense of national honor? Must not the two go

together; and if we have both, cannot we rely upon the proper spirit and motives which will actuate the members of both houses, and believe that questions of difference will not lead to confusion, and that the members of the federal parliament will not be governed by the consideration of party or personal politics, but by the interests of the country at large?

By the second federal Convention, however, with the Senate now conceptualised as an elected house, recognition of the need to provide for potential deadlocks had grown. Still, the debate got off to an unpromising start. At the Adelaide session of the Convention, NSW delegate, Bernhard Wise moved the first new deadlock proposal. It involved consecutive dissolutions; first of the House of Representatives and then, if the Senate again rejected the disputed bill, dissolution of the Senate. This arrangement, Wise said, would preserve the independence of the Senate on matters affecting state interests and at the same time secure dominance of the popular vote on national matters. At this stage, it was clear that the primary concern was the likelihood of deadlocks arising over money bill (as had happened in colonial parliaments). It was a view that persisted for many years in some quarters at least, and lent an interpretation to section 57, as intended specifically for such deadlocks.⁸

In this vein, responding negatively to Wise's proposal, Edmund Barton pointed out that the mixing of taxation measures with ordinary subjects in legislation was to be prohibited by the Constitution (now in section 55), and that a deadlock provision was therefore unnecessary. But Victorian delegate, William Trenwith (the one labour representative at the Convention) responded that deadlocks might also arise on non-fiscal bills. And this, increasingly was to be the tone of the Convention.

Indeed, late in the final session of the Convention, in discussion of the appropriate majority for a bill to pass at a joint sitting, Victorian delegate (and future High Court Justice), Henry Higgins, felt the need to remind fellow delegates to '[k]eep an Appropriation Bill in your mind'. This was, he said, 'the most awkward case [of deadlock] which can arise, and it

⁸ 'Sympathy' for this view was expressed in J. R. Odgers, *Australian Senate Practice* (2nd ed. 1959): J. E. Richardson, 'Federal Deadlocks: Origin and Operation of Section 57' (1958-1963) *Tasmanian University Law Review* 706, 712. This was, perhaps, also the public understanding. In 1949, following the Liberal Party's election victory, which left it without control of the Senate, the Melbourne *Argus* reported on speculation that a double dissolution election might soon follow. The preconditions for a double dissolution election, the paper claimed, began with the Senate's 'failure to pass a monetary bill in a form acceptable to the Government.' *The Argus*, 9 December 1949, 2.

is quite possible that it may arise.’ But, although appropriation and taxation bills were mentioned in debate with some frequency, this reminder did not prove influential.

Wise’s proposal for a consecutive dissolution was lost. Higgins then proposed a simultaneous dissolution. After this was defeated, Victorian delegate (also a future High Court Justice and first Australian Governor-General), Isaac Isaacs, joined by Victorian Premier, Sir George Turner, moved a new provision: that there should be a popular referendum on a deadlocked bill. If the bill were supported by the electors in a majority of states containing a majority of the population, then – the proposal went – it was to be submitted to the Governor-General for assent. This, too, was defeated.

Nothing on deadlocks was agreed at the Adelaide session of the Convention and the draft Constitution bill that was completed there did not include a deadlock provision. The various defeated resolutions, however, had effectively set out the broad alternatives: dissolution of both houses, either consecutive or simultaneous, following a deadlock; or a referendum on the disputed bill, to be submitted to a ‘mass’ or ‘national’ vote, or alternatively to a ‘dual’ vote, factoring both national and state majorities into the count.

The issue picked up steam in the break between Convention sessions. In the long debate that followed, in the Sydney session, in September 1897, and in the final session, in Melbourne, from January to March 1898, many different iterations appeared, some of which included a combination of several or all alternatives. The break between the Adelaide and Sydney sessions had been designed to allow the colonial legislatures to discuss the draft Constitution bill, and to make suggestions for amendment. Among the 300 or so suggestions, a good number of deadlock-breakers featured. The larger colonies tended to support resolving deadlocks by referendum, but the smaller were concerned about the prospect that a referendum would favour the more populous states, and they tended to support consecutive, conditional dissolutions.

At the Sydney session of the Convention, Sir John Forrest, Premier of Western Australia, vividly illustrated the preference for the consecutive dissolution. Everyone knows, he said, that

no case has arisen in Australia, nor anywhere else, in which the upper house has been the aggressor, forcing upon the lower house some measure of which it

disapproved... If any conflict occurs in the Commonwealth in the future it will be caused by the house of representatives trying to coerce the senate.

The House that causes the trouble, he continued, should be the one to go to the country. When 'people ... have had time to work off their angry passions' and 'cool down', if the government has been returned at an election of the House of Representatives, and the Senate still refuses to give way, then it can be sent to the country. Consecutive dissolution, Forrest concluded, would make the House 'much more careful,[and] much less eager to enter into conflict' with the Senate.

Higgins objected that Forrest's proposal 'simply makes the House of Representatives a catspaw in order to pull the nuts out of the fire'. He went on to explain his allusion. The proposal, he said, 'simply allows the members of the Senate to see by the voting in the different states which way the feeling ... is going, and they will know exactly then as to whether it is or is not worthwhile for them to face a dissolution.'

Gradually, however, support for the referendum proposal weakened. Consecutive dissolution gave way, albeit narrowly, to simultaneous dissolution. Support for a joint sitting to follow a dissolution now inched forward. Although Isaacs objected that a joint sitting would effectively create a unicameral parliament as an arbiter of disputes, this reasoning was not followed through, and the size of the majority that would count for the passage of a previously deadlocked bill at a joint sitting became the focus of debate. Finally, the provision was settled; the joint sitting was adopted, and the majority for the passage of bills was set at three-fifths of the members present. The survivor from an exhausting tussle, this last provision did not endure.

The Constitution Bill, as adopted at the conclusion of the Melbourne session of the Convention in March 1898, was sent for the voters' approval in referendums in four colonies that year. In New South Wales the referendum failed. While technically possible for federation to proceed with the agreement of three colonies alone, it was politically inconceivable for the others to go ahead without the 'mother colony'. A special Premiers' conference met in January 1899, and George Reid was now in a position to extract concessions from the other Premiers, making the Constitution bill more attractive to the voters of his colony. The primary concession – what the people of NSW really cared about – was that the Constitution should specify that the federal capital site, when chosen, must be

in NSW. But several other provisions in the Constitution had concerned Reid, an advocate of a stronger House of Representatives. One was the three-fifths majority in section 57. Reid now persuaded the others to substitute 'an absolute majority of the members of the Senate and House of Representatives', giving the House the decisive numerical advantage. Section 57 was finally finished. This was the version that went to the people in the new round of colonial referendums, this time successfully, in 1899 and in Western Australia, 1900.

Notwithstanding the multiple conflicting preferences expressed in the deadlocks debate, the Convention delegates had all agreed on one thing. They expected section 57 to be very rarely used. In this, they were proved correct. Although the threat of a double dissolution has been invoked with predictable regularity whenever the houses have clashed, the double dissolution experiment of 1914 would not be repeated for another 37 years. In particular since the introduction of proportional representation for Senate elections and the rise of minor parties, governments have often-enough faced a hostile Senate, but only five more double dissolutions have occurred (in 1951, 1974, 1975, 1983, 1987). This total of six represents less than 2 per cent of Australia's 44 federal elections.

Of the six double dissolutions, half resulted in return of the government; half in defeat. In one case alone (1951) did the returning government gain control of the Senate. If mastering the Senate is the primary motivation for contemplating a double dissolution, history suggests caution.

The year 1914.

The 1914 election was scarcely the major event of that year. A much larger, much more dramatic and tragic event was unfolding. The grant of the double dissolution occurred in peacetime; the election itself occurred one month after the declaration of war. Looking at the newspapers of that year, it is surprising – a little disconcerting even – to see how long it took before the realisation dawned, that government would be a different matter for the foreseeable future, and how little the imminence of war featured in the debates surrounding the election.

It did not go unnoticed, however. There were disagreements about preparation for war, reflected in the campaign speeches of the Prime Minister and the Leader of the Opposition concerning funding for Australia's defence. Cook proposed borrowing, to finance the expansion of Australia's defence capacity; Fisher described this approach as 'shameless',

a reflection of the Cook government's having squandered the surplus built up previously by the Fisher government. But these issues were swallowed up in lists of many other promises and policy commitments: from the government, expanded immigration, Commonwealth and State cooperation in managing the River Murray, a program to build transcontinental railways and achieve a uniform rail gauge, development of the Northern Territory and Papua, pension reform, construction of lighthouses, anti-trust measures and more (Cook also, interestingly, advocated Proportional Representation for Senate elections); and from the Opposition: tariff reform, anti-trust measures, the expansion of social welfare to provide for orphans, the establishment of a uniform rail gauge, and a reminder of the Fisher government's previous achievements, including the establishment of compulsory national military training.

It is unclear how much the declaration of war affected the election outcome. Andrew Fisher famously vowed during the campaign that Australia would 'stand beside our own to help and defend Britain to the last man and the last shilling', but there was no evidence that Joseph Cook thought otherwise. He, too, promised a commitment of all Australia's 'resources ... for the preservation and security of the empire.' By the eve of the election, the focus on the war had dramatically increased; war measures, including recruitment for the Australian Imperial Force, had already begun, notwithstanding that the parliament had been dissolved. Recognising that the normal grant of funds for government services would now not suffice, urgent alternatives were canvassed. The Governor-General consulted with members of government and the Chief Justice. The Chief Justice proposed a mechanism for recalling parliament⁹ or, alternatively, postponing the election. Cook, clearly untroubled by any intimation that a delay might have offered some advantage, wanted the election to proceed. And so it did.

On New Year's Eve 1914, the Adelaide Advertiser reflected on 'The Dying Year'. Nineteen fourteen, it observed, had begun well: 'The skies were blue and cloudless, and there were no portents to threaten that the black shadow of war and drought would fall athwart the fortunes of the State.' The coming of war, it said, had evaded even 'prophets with the keenest vision.' By December, many new war measures were in place: press

⁹ Markwell, note 6.

restrictions; bans on trading with the enemy; special measures governing the sale of wheat and other commodities; and financial measures, including an increase in taxation.

In the reporting of these developments, the fact that an event of such constitutional novelty and drama – the double dissolution – had taken place seemed insignificant.

Conclusion

Addressing the first federation Convention in 1891, Henry Parkes spoke of the as-yet imagined Senate as an upper house that should ‘have within itself the only conservatism possible in a democracy – the conservatism of maturity of judgment, of distinction of service, of length of experience, and weight of character.’ Almost no one foresaw the rapid rise of party interests in the Senate. One Queensland delegate in 1891, John Macrossan, was the first to predict this development, but his death two weeks into the Convention robbed him of a chance to persuade the others or to enjoy his vindication. At the second Convention, Alfred Deakin also predicted that the states’ house would be quickly transformed into a party house: ‘The contest [between the houses],’ he said, ‘will not be, never has been, and cannot be, between states and states ... It is certain that once this constitution is framed, it will be followed by the creation of two great national parties.’

The 1914 double dissolution, and the five that have followed, have been governed by party distinctions; the anticipated tug of war between national and state interests that shaped the complex debate at the federal Conventions over the framing of section 57, did not eventuate. We cannot, however, conclude that the section would have been framed differently, had this reality – which may, of course, alter over time – been realised. Two houses, both directly elected, with almost co-equal powers, but with different electorates and, since 1948, subject to different electoral systems, will always have the potential to differ, and those differences will always have the potential to turn into deadlocks.

Over the years, the unanswered questions in section 57 have been answered:¹⁰ ‘failure to pass’ may include delaying tactics as well as outright rejections; multiple bills may be stockpiled and together serve as double dissolution ‘triggers’;¹¹ the three months’ interval between the two rejections or failures to pass runs from the date of the Senate’s

¹⁰ See Sir Anthony Mason, ‘The Double Dissolution Cases’ in H.P. Lee and George Winterton (eds) *Australia’s Constitutional Landmarks* (Cambridge University Press, 2003).

¹¹ In 1914, 1951 and 1987, only one bill was listed in the Governor-General’s proclamation of the double dissolution; in 1974, there were six bills; in 1975, 21 bills; in 1983, 13 bills.

action; the bill or bills in question do not need to be on a matter of national importance, let alone confined to fiscal matters; the government does not need to have been rendered unworkable by the deadlock; a government can certainly ‘manufacture’ the conditions for a double dissolution. Governors-General have an undefined quantum of discretion over whether to grant a double dissolution (although possibly less than in the past); they may consult whom they like in reaching their decision. But, no Governor-General has ever refused a Prime Minister’s advice to dissolve both Houses.

Given the relative ease with which double dissolutions have been granted and the relatively low threshold for a deadlock to qualify as a section 57 ‘trigger’, and given that it is far from rare for bills to be rejected in the Senate, it is notable that there have been so few double dissolutions. Notable, but not surprising.

If there is one ‘lesson’ from the 1914 election, it is a simple one. A government cannot count on getting what it wants from a double dissolution. Like the delegates at the federal Conventions of the 1890s who laboured so valiantly over the wording of the section but who failed to achieve consensus over its rationale, the Australian public has never held a common position on its application. They have never risen up either to punish a recalcitrant Senate or to chastise an overbearing House of Representatives. They have never – as far as we can tell – decided how to vote in a double dissolution election by weighing up the virtues of the particular bill or bills that provided the trigger. They began in 1914 as they meant to go on: voting according to their party loyalties, and to their perception of the respective merits of the Government and Opposition of the day. Governments can never be confident that the Australian public shares their sense of the importance of particular policy measures, let alone of the frustrations encountered in inter-cameral politics. As Senator John Faulkner has written, ‘[v]oters are not swayed by government complaints about Senate obstruction.’¹²

Joseph Cook was necessarily a pioneer, and, in the event, a casualty of constitutional novelty. Still, he acted deliberately and had no one else to blame. At a dinner held in his honour a month after the election, he cheerfully quipped that the ‘jolly good licking’ his party had suffered would do them ‘no end of good’. There was ‘one consolation’ in changing

¹² Faulkner, ‘A Labor Perspective on Senate Reforms’, in Brian Costar (ed) *Deadlock or Democracy?: The Future of the Senate* (UNSW Press, 2000) 44.

sides of the House, he said: 'we have picked a job we all know about.' This is not a thought that other Prime Ministers might find consoling.

Senate Occasional Lecture – Helen Irving

Question — Thank you Professor Irving for that wonderfully enlightening lecture, I was wondering if you see any parallels between what happened in 1914 and the double dissolution in 1983. So what we had there was that Malcolm Fraser wanted to recommend a double dissolution so Sir Ninian Stephen as Governor-General wanted fuller and better particulars and that delay then allowed the Labor party to change leaders from Mr Hayden to Mr Hawke and I was just wondering, that process of seeking the further details, did somehow Mr Fraser wrongly assume that it would be automatically granted? And do you have any other aspects of 1983 that you could share with us.

Helen Irving — Yes, thank you. There are parallels of course, the gamble in both cases failed, the government lost and the Prime Minister was defeated. There were and have been over the years different views as to whether the Governor-General should satisfy him or herself in particular on the question on workability of government. In 1951, when Prime Minister Menzies advised Governor-General McKell to dissolve the Houses, he, Prime Minister Menzies who was himself a very experienced former constitutional lawyer, he advised that workability of government was not an issue that Governors-Generals should take into account and it seems that Governor McKell who, like all Governors-General wanted to take time to make up his own mind probably shared that view. In 1983, Governor-General Sir Ninian Stephen held the opposite view, he held and he has made it clear that he held the view that a Governor-General should satisfy him or herself not only that the technical preconditions have been satisfied but also that it's a question of unworkability of government. Malcolm Fraser had put the case that government was not so much that government was unworkable but that a double dissolution was needed in particular in what he saw as a critically difficult economic situation with the potential of unworkability and so it's not necessarily clear that Malcolm Fraser, I don't know, held the view or predicted that the Governor-General would simply exceed to his request, but certainly the delay, as you pointed out, allowed for the Labor party to change leaders in this very surprised tactic. 1914, a war gets declared, not quite the same as a change of political leader but a big surprise in terms of the strategy of the prime ministers. We also note that Malcolm Fraser is the one Prime Minister to have been brought into government through a double dissolution election and last government through a double dissolution election. That's surely a first, maybe a one and only.

Question — I was just wondering what you thought of section 57, do you think it is a good provision? Or do you feel that there are ways we could improve it? And is there any parallel overseas for a model which you think works better?

Helen Irving — That's a very big question. I don't really know enough to answer the second part of your question on whether there are good overseas alternatives. Each legislative system is very much shaped by the particular national context and one could say, well let's look at the House of Lords in 1911, the British constitutional crisis was ended then by the Parliamentary Act that very much restricted the House of Lords chance to obstruct bills and ultimately the House of Lords lost the power to reject money bills all together which had been the cause of the crisis, but focusing on the question of money bills would be an interesting one in terms of evaluating whether there is anything further that could be done with section 57, but constitutionally being realistic, anything that involved a referendum is extremely unlikely to be successful There have been over the years, many proposals coming from the constitutional convention of the 1970's. The Constitutional Commission which reported in 1988 proposals from a discussion paper produced for Prime Minister Howard, proposals which involved amending section 57 to make it less likely that the Senate would obstruct the House of Representatives or to provide an alternative procedure such as a joint sitting, which was as we saw initially proposed back in 1891 to resolve deadlocks, but as I said, the reality is that anything that required a referendum, that required constitutional alteration would be extremely unlikely to succeed and there have been a couple of referendums which have failed which have related to the Senate's relationship to the House of Representatives, not on section 57 itself but those referendums have also failed.

There are I'm sure, procedures that could be dealt with through standing orders or practices or conventions that might be adopted between the two Houses such as conferences of managers and so on which might minimise the likelihood of a disagreement blowing up into a deadlock that's certainly something that could be contemplated but as for the constitution itself I think we are pretty well stuck on section 57.