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Double dissolutions: triggers, elections and proposals for reform

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Introduction

While the framers of the Australian Constitution agreed on the merits of a bicameral parliament comprising the House of Representatives and the Senate, the power of each House and the means for resolving disagreements between them were the subject of extensive debate. The double (or simultaneous) dissolution process as the means for resolving deadlocks between the Houses was an innovative solution by comparable western democratic standards of the time.¹

However, the domination of major political parties and the adoption of the proportional representation voting system for the Senate in 1948, among other factors, have significantly altered the relationship between the Houses. Governments are now less likely to hold a majority in the Senate, oppositions are more willing to assert the Senate's constitutional powers by blocking legislation, and governments are more willing to threaten the dissolution of both Houses if their legislative program is frustrated.

This background note provides a general overview of:

- the double dissolution process, including some unsettled issues
- 'triggers' for double dissolutions and legislation in the 42nd Parliament that could potentially constitute a trigger for a double dissolution election
- double dissolutions and elections
- the possible composition of the Senate following a double dissolution election, and
- proposals to reform the double dissolution mechanism in section 57.

This background note also complements and builds on previous work undertaken by the Parliamentary Library on the issue.²

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1. M Healy, *Deadlock? What deadlock? Section 57 at the centenary of federation*, Research paper, no. 2, 2000–01, Department of the Parliamentary Library, Canberra, 2000, p. 6, viewed 22 October 2009, <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP02.htm>
 2. For example K Magarey, *Alcopops makes the House see double: 'the proposed law' in section 57 of the Constitution*, Research paper, no. 32, 2008–09, Parliamentary Library, Canberra, 2009, viewed 22 October 2009, <http://www.aph.gov.au/library/pubs/rp/2008-09/09rp32.pdf>; S Sen, *The double dissolution process: questions and references*, Research note, no. 45, 2002–03, Department of the Parliamentary Library, Canberra, 2003, viewed 22 October 2009, <http://www.aph.gov.au/library/pubs/RN/2002-03/03rn45.pdf>; Healy, *Deadlock? What deadlock? Section 57 at the centenary of federation*; J Richardson, *Resolving deadlocks in the Australian parliament*, Research paper, no. 9, 2000–01, Department of the Parliamentary Library, Canberra, 2000, viewed 22 October 2009,

The double dissolution process

The term ‘double dissolution’ refers to a process whereby both Houses of Parliament are simultaneously dissolved and an election for all members of each House takes place. The process was established to resolve disagreements between the Houses over legislation in circumstances where a compromise cannot be achieved. In their early commentary on the Constitution, Quick and Garran noted that the process was ‘designed to ensure that a decisive and determined majority in the national chamber shall be able to overcome the resistance of a majority in the provincial chamber’.³ Following a double dissolution election the previous government may be returned by the electorate with a renewed mandate or replaced with a new government.

Section 57 of the Australian Constitution provides that:

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

<http://www.aph.gov.au/library/pubs/rp/2000-01/01RP09.pdf>; G Williams, *The road to a double dissolution?*, Research note, no. 29, 1997–98, Department of the Parliamentary Library, Canberra, 1998, viewed 22 October 2009, <http://www.aph.gov.au/library/pubs/RN/1997-98/98rn29.htm>

3. J Quick and R Garran, *The annotated constitution of the Australian Commonwealth*, Legal Books, Sydney, 1976, p. 339.

shall be taken to have been duly passed by Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.⁴

Section 57 provides for the following two-stage process for double dissolutions.

Stage one

The process commences if the House of Representatives passes a bill which the Senate

- rejects, *or*
- passes with amendments which are unacceptable to the House of Representatives, *or*
- ‘fails to pass’.

Stage two

If, after an interval of three months, the same bill is passed by the House again in the same or next session, and the Senate

- rejects the bill, *or*
- passes it with amendments that prove unacceptable to the House of Representatives, *or*
- ‘fails to pass’ the bill

then a double dissolution trigger is in place: under section 57 ‘the Governor-General may dissolve the Senate and the House of Representatives simultaneously’. Where the Senate rejects or fails to pass a bill, the interval (which may be longer than three months) commences when the bill is rejected or fails to pass and concludes when the bill, having been reintroduced in the House of Representatives, is passed by the House.⁵

In practice, the Governor-General’s power to dissolve the parliament is exercised on the advice of the Prime Minister—thus a trigger bill becomes part of a government’s political armoury in the period prior to the next election. If a government decides to act on a trigger bill and advise the Governor-General to dissolve the parliament, the Governor-General may

4. *Australian Constitution* section 57, viewed 22 October 2009, [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/1C1CA3B28FE7158ACA25728A00001A18/\\$file/Constitution_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/1C1CA3B28FE7158ACA25728A00001A18/$file/Constitution_WD02.pdf)

5. *Victoria v Commonwealth and Connor* (1975) 134 CLR 81.

seek further information in order to be satisfied that the conditions of section 57 have been met.⁶

If the Governor-General's power is exercised, the parliament is dissolved and an election is held for both Houses. Section 57 does provide, however, that a double dissolution cannot take place within the six months before the date of expiry of the House of Representatives by effluxion of time.

There have been only six double dissolution elections to date:

- 5 September 1914
- 28 April 1951
- 18 May 1974
- 13 December 1975
- 5 March 1983, and
- 11 July 1987.⁷

Previous case law on the double dissolution mechanism suggests that a Governor-General's decision to dissolve the parliament is not subject to judicial intervention,⁸ although in the 1975 High Court decision of *Victoria v Commonwealth and Connor Gibbs J* intimated that the Court could have the ability to 'intervene to uphold the Constitution and prevent an invalid proclamation for the dissolution of the Senate from being given effect'.⁹ In *Victoria v Commonwealth and Connor* also the Court indicated its willingness to review compliance with the requirements of section 57.

6. I Harris, ed., *House of Representatives Practice*, fifth edn, Department of the House of Representatives, Canberra, 2005, p. 455.

7. Department of Parliamentary Services, *Parliamentary Handbook of the Commonwealth of Australia 2008*, thirty-first edn, Department of Parliamentary Services, Canberra, 2008, p. 277, viewed 22 October 2009, http://parlinfo.aph.gov.au/parlInfo/download/handbook/newhandbook/2008-12-19/toc_pdf_repeat/Part%203%20-%20Elections.pdf;fileType%3Dapplication%2Fpdf

8. *Cormack v Cope* (1974) 131 CLR 432; *Western Australia v Commonwealth* (1975) 134 CLR 201.

9. *Victoria v Commonwealth and Connor* (1975) 134 CLR 81 at 157.

The Court has held that an invalid proclamation for a double dissolution (made, for example, on the basis of a bill that has not complied with section 57) will not lead to the negating of the dissolution itself, the subsequent election, or the new parliament that follows.¹⁰

Joint sitting

Section 57 further provides that if, after a double dissolution has taken place, the bill is again passed by the House of Representatives and the Senate:

- rejects the bill, *or*
- passes it with amendments that prove unacceptable to the House of Representatives, *or*
- fails to pass the bill

then ‘the Governor-General may convene a joint sitting of the members of the Senate and the House of Representatives’ in order to vote on the bill (there is no requirement that a joint sitting be convened). There has been only one joint sitting to date (in 1974). The High Court has held that a joint sitting may consider more than one proposed law.¹¹ In the case of a double dissolution being invalidly proclaimed, judicial consideration has raised the question of whether a law passed by the parliament at a subsequent joint sitting may itself be invalid.¹²

While enabling the government to precipitate an election and bring its disputed legislation before a new parliament, the process provided for in section 57 does not predetermine the outcome for the legislation. A government may not be returned following a double dissolution election, or it might be returned with a minority in the Senate. A close election result in the House of Representatives after a double dissolution combined with a government minority in the Senate could ultimately result in the disputed legislation being considered (and defeated) in a joint sitting.

Unsettled issues

There is some uncertainty regarding key terms and elements of section 57, including failure to pass and the uniformity of the proposed law.

Failure to pass

The term ‘fails to pass’ is not settled in law and its interpretation would depend upon the circumstances. An unreasonable delay in passing a bill could be an important consideration.

10. *Victoria v Commonwealth and Connor* (1975) 134 CLR 81.

11. *Cormack v Cope* (1974) 131 CLR 432.

12. *Victoria v Commonwealth and Connor* (1975) 134 CLR 81 (see for example per Barwick CJ at 120).

In 1951 the Commonwealth Bank Bill was subject to a prolonged debate in the Senate before being referred to a committee. Prime Minister Menzies deemed the delay as a ‘failure to pass’ the bill, with the Attorney-General and Solicitor-General both supporting this view.¹³ On the basis of the advice submitted by the Prime Minister, the Governor-General dissolved both Houses.

In its 1975 *Victoria v Commonwealth and Connor* decision, the High Court indicated that the Senate ‘is both entitled and bound to consider a proposed law and to have a proper opportunity for debate’,¹⁴ and that failure to pass involves such elements as delay and prevarication rather than normal consideration. Barwick CJ stated that ‘the word “fails” in s. 57 involves the notion that a time has arrived when, even allowing for the deliberative processes of the Senate, the Senate ought to answer whether or not it will pass the Bill or make amendments to it’, and that:

If that time has arrived and the Senate rather than take a stand merely prevaricates, it can properly be said at that time to have failed to pass the Bill ... it will be the conduct of the Senate itself ... which can have any relevance to the question whether, the situation having been reached where the Senate is called upon to give an answer on the Bill, it has failed to pass it.¹⁵

The uniformity of the proposed law

Under section 57 legislation that is reintroduced and passed by the House of Representatives following stage one of the double dissolution process may contain ‘any amendments which have been made, suggested, or agreed to by the Senate’. Apart from such amendments, however, the bill reintroduced and passed by the House of Representatives must be the original bill for double dissolution purposes.¹⁶

The precise nature of this uniformity has been subject to some debate. On one view, for example, both the text and legal effect of a bill, apart from any amendments made, suggested, or agreed to by the Senate, must be identical to that of the bill’s original iteration.¹⁷ Another view, however, holds that, while uniformity of text is necessary, uniformity of legal effect is not. On this view a bill that is textually identical to its original iteration will qualify as a

13. H Evans, ed., *Odgers’ Australian Senate Practice*, eleventh edn, Department of the Senate, Canberra, 2004, p. 546.

14. *Victoria v Commonwealth and Connor* (1975) 134 CLR 81 per Barwick CJ at 122.

15. *Victoria v Commonwealth and Connor* (1975) 134 CLR 81 per Barwick CJ at 122.

16. Harris, ed., *House of Representatives Practice* p. 455.

17. H Evans, ‘Alcopops tax bills—Constitution, section 57’, Attachment 2 – advice to Senator G Brandis 17 April 2009, Senate Procedural Information Bulletin, no. 231, , 12-14 May 2009, viewed 22 October 2009, http://www.aph.gov.au/senate/pubs/proc_bul/bull_231.pdf

trigger, regardless of other circumstances (such as the passage of other legislation) that may have intervened to change the legal effect of the bill.¹⁸

‘Triggers’ for double dissolutions

A bill that follows the double dissolution process in accordance with section 57 can constitute a ‘trigger’ for a double dissolution regardless of its subject or political significance. It is important to note, however, that a double dissolution is not inevitable once a trigger bill (or bills) is in place—there is nothing in section 57 which requires that after a trigger bill (or any number of such bills) has eventuated a double dissolution must automatically occur. Indeed there have been several occasions where there have been multiple trigger bills in place but no double dissolution election has transpired. For example, in mid-2003 there were five trigger Bills in place but no double dissolution occurred.¹⁹

In addition, there is judicial support for the proposition that there can be multiple trigger bills in place for the one double dissolution. In the 1974 High Court decision of *Cormack v Cope* Stephen J stated that:

One instance of double rejection suffices but if there be more than one it merely means that there is a multiplicity of grounds for a double dissolution, rather than grounds for a multiplicity of double dissolutions.²⁰

Further, the High Court has held that the power of the Governor-General to dissolve both Houses does not have to be exercised without undue delay once a trigger bill is in place.²¹

18. G Williams, ‘Alcopops bill could be a trigger to dissolution’, *Sydney Morning Herald*, 21 April 2009. For a further discussion of identity see K Magarey, *Alcopops makes the House see double: ‘the proposed law’ in section 57 of the Constitution*.

19. The bills were: Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 [No. 2]; Workplace Relations Amendment (Fair Dismissal) Bill 2002 [No. 2]; National Health Amendment (Pharmaceutical Benefits – Budget Measures) Bill 2002 [No. 2]; Trade Practices Amendment (Small Business Protection) Bill 2002 [No. 2]; Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 [No. 2]. Previous proclamations for double dissolutions issued by the Governor-General have set out the specific legislation under dispute. The proclamations are published in: Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia*, Department of Parliamentary Services, Canberra, 2005, pp. 446–51. The proclamation for the fifth double dissolution in 1983 referred to 13 disputed bills (all from 1981).

20. *Cormack v Cope* (1974) 131 CLR 432 at 469.

21. *Western Australia v Commonwealth* (1975) 134 CLR 201. See Gibbs J at 236–37, 238; Stephen J at 252–53; Mason J at 265–66; Jacobs J at 276–78; Murphy J at 288–89.

Progression of bills towards trigger status as at October 2009

There is currently no legislation before the 42nd Parliament that has qualified as a double dissolution trigger. Table 1 below lists current House of Representatives bills that have been rejected by the Senate once. The bills have passed the first stage in the process of becoming a trigger for a double dissolution. If any of the bills are reintroduced but not passed by the Senate after reconsideration, or are passed by the Senate with amendments unacceptable to the House of Representatives, the Government will have a trigger (or multiple triggers) for a double dissolution election. Table 1 does not reflect the level of disagreement over the bills and does not indicate the likelihood of any particular bill becoming a double dissolution trigger.

Table 1: Bills that have reached the first stage of the double dissolution process as at 22 October 2009

Bill	Intro House	Passed House	Intro Senate	Senate negatived
Australian Business Investment Partnership (Consequential Amendment) Bill 2009	12/3/09	17/3/09	18/3/09	16/6/09
Australian Business Investment Partnership Bill 2009	12/3/09	17/3/09	18/3/09	16/6/09
*Australian Climate Change Regulatory Authority Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Carbon Pollution Reduction Scheme (Charges-Customs) Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Carbon Pollution Reduction Scheme (Charges-Excise) Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Carbon Pollution Reduction Scheme (Charges-General) Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Carbon Pollution Reduction Scheme (CPRS Fuel Credits) (Consequential Amendments) Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Carbon Pollution Reduction Scheme (CPRS Fuel Credits) Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Carbon Pollution Reduction Scheme 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Carbon Pollution Reduction Scheme Amendment (Household Assistance) 2009	28/5/09	4/6/09	15/6/09	13/8/09

Table 1: Bills that have reached the first stage of the double dissolution process as at 22 October 2009 (cont.)

Bill	Intro House	Passed House	Intro Senate	Senate negatived
*Customs Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
*Excise Tariff Amendment (Carbon Pollution Reduction Scheme) Bill 2009	14/5/09	4/6/09	15/6/09	13/8/09
Fairer Private Health Insurance Incentives (Medicare Levy Surcharge) Bill 2009	27/5/09	2/6/09	15/9/09	9/9/09
Fairer Private Health Insurance Incentives (Medicare Levy Surcharge – Fringe Benefits) Bill 2009	27/5/09	2/6/09	15/9/09	9/9/09
Fairer Private Health Insurance Incentives Bill 2009	27/5/09	2/6/09	15/9/09	9/9/09
Horse Disease Response Levy (Consequential Amendments) Bill 2008	21/2/08	3/9/08	3/9/08	4/2/09
Horse Disease Response Levy Bill 2008	21/2/08	3/9/08	3/9/08	4/2/09
Horse Disease Response Levy Collection Bill 2008	21/2/08	3/9/08	3/9/08	4/2/09
National Fuelwatch (Empowering Consumers) (Consequential Amendments) Bill 2008	29/5/08	5/6/08	16/6/08	12/11/08
National Fuelwatch (Empowering Consumers) Bill 2008	29/5/08	5/6/08	16/6/08	12/11/08
Road Transport Charges (Australian Capital Territory) Repeal Bill 2008	13/3/08	19/3/08	19/3/08	19/3/08

* Denotes Bill reintroduced to the House of Representatives on 22 October 2009.²²

22. Sources: House of Representatives, *Daily Bills List, 42nd Parliament – 1st Session 2008 (final for 2008)*, House of Representatives, Canberra, 2008, viewed 22 October 2009 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillslst%2Fbillslst_bf06877e-3cf7-4693-9560-4435b66ebc99%22; House of Representatives, *Daily Bills List, 42nd Parliament – 1st Session 2008-09 (as at 21 October 2009)*, House of Representatives, Canberra, 2009, viewed 22 October 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillslst%2Fbillslst_c203aa1c-1876-41a8-bc76-1de328bdb726%22; Senate, *Bills List (as at 21 October 2009)*, Senate, Canberra, 2009, viewed 22 October 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22legislation/billslst/billslst_c5cb7dfd-6ea5-42d2-bea7-a4c40e628ce8%22

Some bills which have been rejected by the Senate do not count for the purposes of a possible double dissolution as they originated in the Senate (for example the Protecting Children from Junk Food Advertising (Broadcasting Amendment) Bill 2008). There are also, of course, bills that have passed the House of Representatives but have not yet been considered by (and may encounter difficulty in) the Senate.²³ The Senate has also rejected, and then subsequently passed, a number of other House of Representatives bills.

Double dissolutions and elections

The election of senators

Under the Australian Constitution state senators are elected for terms of six years, with rotation of senators being facilitated by half of the Senate facing a periodic election every three years.²⁴ Half of the current Senate commenced on 1 July 2008 (following the 2007 election) and their terms are due to expire on 30 June 2014. The other half of the Senate was elected in the 2004 election and their terms are due to expire on 30 June 2011.²⁵ Under the *Commonwealth Electoral Act 1918* (Cth) (CEA), the terms of the senators from the two territories are concurrent with the terms of the House of Representatives.²⁶

Under section 13 of the Constitution, following an ordinary periodic half-Senate election senators' terms are taken to commence on the first day of July following the election. However, in the case of double dissolution elections, senators' terms are taken to have commenced on the first day of July *preceding* the election.

In double dissolution elections the entire Senate stands for election instead of half the Senate as is the case at ordinary periodic half-Senate elections. As there is twice the number of senators to be elected in double dissolution elections, the quota of votes to elect each senator is halved.²⁷ The quota to elect one state senator at a double dissolution election is 7.7 per cent of the vote; the quota to elect two senators is 15.4 per cent of the vote; and so on.

23. One notable example is the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009. This Bill, the second version of a 2008 Senate Bill which was negatived by the Senate in March 2009, was introduced in and passed by the House of Representatives in March 2009. As of October 2009 it is before the Senate.

24. *Australian Constitution*, sections 7, 13.

25. The dates of expiry of senators' terms of service are available at: Senate, 'Dates of Expiry of Senators' Terms of Service', Senate website, viewed 22 October 2009, http://www.aph.gov.au/Senate/senators/sen_exp.htm

26. *Commonwealth Electoral Act 1918* (Cth) (CEA), section 42.

27. CEA, section 273.

The terms of senators following a double dissolution election

In order for the Senate to re-establish its usual staggered periodic election pattern after a double dissolution election, the Senate decides how the new senators will be divided into those who will serve a full six-year term and those who will serve a half-term of three years. The first part of section 13 of the Constitution provides authority to the Senate to determine its short- and long-term senators but does not prescribe a particular method for making such a determination:

As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of three years, and the places of those of the second class at the expiration of six years, from the beginning of their term of service; and afterwards the places of senators shall be vacant at the expiration of six years from the beginning of their term of service.²⁸

Conceivably, a party with a majority in the Senate could use its numbers to allocate all full term senators along party lines. In practice, however, following the first Commonwealth election in 1901 and each subsequent double dissolution election, the Senate has resolved to divide senators into two classes based on the numbers of votes gained by the elected senators (i.e. by the order of senators' election). Those with the highest number of votes in each state have been granted six-year terms and those with the lowest number of votes have been granted three-year terms. In 1901, following a motion moved by Senator O'Connor (Protectionist, NSW) the Senate resolved:

That, in pursuance of section 13 of the Constitution of the Commonwealth, the senators chosen for each state shall be divided into two classes, as follows:

1. There shall be for each State a roll recording the names of the senators for the State.
2. The name of the senator returned by the highest number of votes shall be placed first on the roll, and the name of the senator returned by the next greater number of votes shall be placed next, and so on in rotation.
3. The senators whose names are placed first, second and third on the roll shall be senators of the second class [six-year senators], and the senators whose names are placed fourth, fifth and sixth on the roll shall be senators of the first class [three-year senators].²⁹

While the voting system used to elect senators has changed twice since 1901, the method used to assign short- and long-term senators has largely remained the same.³⁰ Following a

28. *Australian Constitution*, section 13.

29. RE O'Connor, Senate, *Debates*, 4 July 1901, p. 2012.

30. The Senate was elected using the 'first past the post' system between 1901–1919, the 'preferential voting system' between 1919–1949 and the 'proportional representation' system

report of the Joint Select Committee on Electoral Reform, the CEA was amended in 1983 to provide for a recount of Senate ballot papers in a double dissolution election using the quota that would have applied in a periodic half-Senate election.³¹ The Senate could then use the recount and allocate six-year terms to those who would have been elected on the higher half-Senate quota. The government considered that this method would better reflect the proportion of votes cast, whereas the traditional system could have the effect of disadvantaging the major parties, as Senator Robert Ray explained:

We have a situation at the moment, after a double dissolution, where a Democrat can get 9.2 per cent of the vote and get a long term. Yet a major party can get 44 per cent of the vote and get only two long term senators. Clearly, the third person on the list would still have a much higher residual quota left than the Democrats. It is all to do with the definition of when they get elected.³²

The double dissolution election of 1987 offered the first opportunity to put the half-Senate quota method (the amended section 282 of the CEA) into practice. However, the government did not support using the new method at the time, primarily because the Senate had not resolved to use the method prior to the election.³³ An opposition motion to adopt section 282 was defeated and the Senate continued the traditional practice of allocating terms on the basis of order of election.³⁴ If the half-Senate quota method had been adopted at the time, the National Party would have gained three six-year senators (up from one) at the expense of the Democrats.

from 1949. Proposals for changing the method of determining the terms of senators have been made at various times. For example, the Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill 1950 provided for voters to exercise concurrent votes for short- and long-term senators. This Bill is discussed further below. A proposal for four-year maximum terms for members of both Houses was rejected at the referendum of 3 September 1988.

31. Joint Select Committee on Electoral Reform, *First report*, Australian Government Publishing Service, Canberra, 1983, p. 67; *Commonwealth Electoral Legislation Amendment Act 1983* (Cth). The Joint Select Committee also recommended a referendum to enable the method ranking senators to be prescribed in the Constitution so as to remove it from the political arena. This recommendation formed part of the Constitution Alteration (Terms of Senators) Bill 1984 which was rejected at the referendum of 1 December 1984.
32. R Ray, 'In committee: Commonwealth Electoral Legislation Amendment Bill 1983', Senate, *Debates*, 2 December 1983, p. 3220.
33. R Ray, 'Rotation of senators', Senate, *Debates*, 17 September 1987, p. 211.
34. The Senate resolved that: '(1) The name of the Senator first elected shall be placed first on the Senators' Roll for each State and the name of the Senator next elected shall be placed next, and so on in rotation. (2) The Senators whose names are placed first, second, third, fourth, fifth and sixth on the Roll shall be Senators of the second class, that is, the long-term Senators, and the Senators whose names are placed seventh, eighth, ninth, tenth, eleventh and twelfth on the Roll shall be Senators of the first class, that is, the short-term Senators'. Australia, Senate, *Journals*, No. 4, 17 September 1987, p. 65.

In anticipation of a double dissolution election in 1998, Senator John Faulkner moved that, following a double dissolution election, senators' terms would be determined using the half-Senate quota method.³⁵ While the Senate agreed to that motion, section 13 of the Constitution nonetheless enables the Senate to revert to the traditional approach to determining the terms of senators if it so chooses.³⁶

The timing of double dissolutions and elections

Section 13 of the Constitution provides that ordinary periodic half-Senate elections must occur within one year of the expiration of the Senate's term. The next periodic half-Senate election, therefore, cannot be held before 1 July 2010; only a double dissolution election, or an election for the House of Representatives alone, can be held earlier.

As noted above, section 57 of the Constitution provides that a double dissolution cannot take place within the six months before the date of expiry of the House of Representatives by effluxion of time. Section 28 of the Constitution also provides that the House of Representatives shall continue for no longer than three years from its first meeting, but may be dissolved sooner by the Governor-General. As the current House first met on 12 February 2008 it is due to expire on 11 February 2011. Therefore, the last possible date for the double dissolution of the current Houses is 11 August 2010.

The usual constitutional and legislative timetabling requirements for elections apply in relation to double dissolution elections. Under section 32 of the Constitution the writs for the election of members of the House of Representatives must be issued within ten days of the expiry of the House or the proclamation of its dissolution. Under section 12 of the Constitution the writs for the election of senators must be issued within ten days of the proclamation of the dissolution of the Senate.

Relevant provisions of the CEA in conjunction with the Constitution also mean that an election for the House of Representatives cannot be held any earlier than 33 days after the issuing of the writs and must be concluded no more than 68 days after the writs are issued.³⁷ The election must also be held on a Saturday. Practicalities are also a factor—for Senate elections, for example, the Australian Electoral Commission advises that following polling

35. J Faulkner, 'Election of senators', Senate, *Debates*, 13 May 1998, pp. 2649–2651.

36. B Bennett, 'Rotation of senators' Parliamentary Research Service, 12 November 1996, Senate Tabled Paper, 13 May 1998.

37. For a timetable on the election process, see R Lundie, *Australian elections timetable*, Background note, 2008–09, Parliamentary Library, Canberra, 4 June 2009, viewed 22 October 2009, http://www.aph.gov.au/library/pubs/BN/2008-09/Aust_elections.pdf

day five weeks are needed to allow for the receipt of postal votes, the distribution of preferences, and the return of the writs.³⁸

Example—May 2010 double dissolution election and subsequent election

As noted above, under section 13 of the Constitution, following a double dissolution election senators' terms are taken to have commenced on the first day of July preceding the election. If a double dissolution election were to be held in May 2010, senators' terms would be backdated to 1 July 2009. This would mean that the next periodic half-Senate election would need to be held between 1 July 2011 and 30 June 2012 in order to comply with the constitutional requirement in section 13 that senators are not to be elected more than 12 months before the expiry of their terms. The election for the House of Representatives would not need to be called until three years after it first met.

Therefore, in order to avoid having separate half-Senate and House of Representatives elections following a May 2010 double dissolution election, a simultaneous half-Senate and House of Representatives election would need to be held after 1 July 2011 but before 30 June 2012, cutting short the possible House of Representatives term by around one to two years.

Historical examples

1953 half-Senate election and 1954 House of Representatives election

As the 1951 double dissolution election was held in April, the terms for elected senators were backdated to July 1950. The next half-Senate election therefore had to be held between 1 July 1952 and 30 June 1953. The next House of Representatives election had to be held before 12 June 1954. Prime Minister Menzies could have sought the approval of the Governor-General for an election of the House of Representatives at the same time as the half-Senate election but decided against this option. It has been speculated that dissolution of the House was not requested due to the unpopularity of the Menzies government at the time.³⁹ The half-Senate election was held in May 1953; the election for the House of Representatives was held a year later in May 1954.

1977 election

As a result of the 1975 double dissolution election, held in December, terms for the elected senators were backdated to 1 July 1975. The next half-Senate election therefore had to be held sometime between 1 July 1977 and 30 June 1978, whilst the House of Representatives could sit until 16 February 1979. Prime Minister Fraser called simultaneous House of Representatives and half-Senate elections for December 1977 (approximately 14 months

38. Australian Electoral Commission (AEC), *Elections: Frequently asked questions*, AEC website, viewed 22 October 2009, http://www.aec.gov.au/FAQs/Elections.htm#next_election

39. B Brown, *Governing Australia: A century of politics, policies and people*, vol. 2, R J Brown, Nelson Bay, 2007, p. 51.

earlier than required for the House of Representatives). The early election was thought to be advantageous to the Fraser government as the Australian Labor Party (ALP) was still in disarray following the 1975 dismissal.

1984 election

After the double dissolution election of March 1983, senators' terms were backdated to 1 July 1982. The next half-Senate election, therefore, had to be held between 1 July 1984 and 30 June 1985. The election for the House of Representatives, however, did not have to take place until April 1986. In a similar decision to that of Prime Minister Fraser in 1977, Prime Minister Hawke decided to hold an early House of Representatives election in 1984 to coincide with the half-Senate election. The election of both chambers in December 1984 therefore meant that the House was dissolved approximately 16 months earlier than was constitutionally required.

1990 election

As the 1987 double dissolution election was held on 11 July 1987, terms for elected senators were only slightly reduced when backdated to 1 July 1987. This meant that the next half-Senate election needed to be held sometime between 1 July 1989 and 30 June 1990. The House of Representatives was due for an election before 14 September 1990. A simultaneous House of Representatives and half-Senate election was held in March 1990 (there was only a little over three months' difference between the expiry dates of the two chambers in any event).

Possible Senate composition following a double dissolution election

The composition of the Senate could be quite different to its current composition following a double dissolution election due to the halving of the quota required for the election of each senator. While the results of Senate elections are particularly difficult to predict, opinion poll information on voting intentions and historical voting patterns can be used as aids in considering a possible outcome of a full Senate election. In plotting a possible composition of the Senate following a double dissolution election, the following assumptions have been made:

- historical voting patterns would be broadly replicated at the double dissolution election for the Senate. An analysis of past election results for each state and territory highlights patterns in party support that can be useful in indicating future election outcomes. Trends that have been exhibited over the course of the past seven half-Senate elections have been used as the primary guide in considering a possible composition of the Senate.
- the distribution of preferences would broadly follow the 2007 Senate Ticket Vote order. The distribution of preferences often plays an important part in deciding Senate seats. As a double dissolution election has not been called, and it is unknown precisely which

candidates or parties would stand, predictions are best based on the preference deals that took place in 2007.

- no new high-profile independent or minor party candidates nominate for election to the Senate. If a new high-profile candidate were to nominate for election, the historical voting patterns and opinion poll data would not be reliable as an indicator of how they might fare.

The most recent poll on half-Senate voting intentions (April 2009) has also been used in considering a possible full Senate outcome.⁴⁰ The poll, which had a small sample size in most states, has been used as a secondary indicator of voting intentions.

Table 2 below sets out the composition of the current Senate by jurisdiction and party. Table 3 sets out a projected Senate composition following a double dissolution election based on historical voting patterns, previous preference distribution and the most recent poll data.

Table 2: Composition of the current Senate as at July 2009

Party/Alignment	Jurisdiction and no. of senators								
	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	TOTAL
Liberal Party	4	6	5	5	6	5	–	1	32
National Party	2	–	2	–	–	–	–	–	4
Country Liberal Party	–	–	–	–	–	–	1	–	1
Australian Labor Party	6	5	5	5	4	5	1	1	32
Family First	–	1	–	–	–	–	–	–	1
Australian Greens	–	–	–	1	2	2	–	–	5
Independents	–	–	–	1	–	–	–	–	1
TOTAL	12	12	12	12	12	12	2	2	76

40. Roy Morgan Research, 'ALP Senate support up 2.7% since 2007 election', Roy Morgan Research website, viewed 22 October 2009, <http://www.roymorgan.com/news/polls/2009/4370/>. The Roy Morgan poll is the only major poll to date that focuses specifically on the Senate.

Table 3: Possible composition of the Senate following a double dissolution election

Party/Alignment	Jurisdiction and no. of senators									
	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	TOTAL	Change
Liberal Party	4	4	3	4	6	5	–	1	27	-5
National Party	1	1	3	–	–	–	–	–	5	+1
Country Liberal Party	–	–	–	–	–	–	1	–	1	–
Australian Labor Party	6	5	5	5	5	5	1	1	33	+1
Family First	–	–	–	–	–	–	–	–	–	-1
Australian Greens	1	2	1	1	1	2	–	–	8	+3
Independents	–	–	–	2	–	–	–	–	2	+1
TOTAL	12	12	12	12	12	12	2	2	76	

Notable features of the above projection include:

- the Coalition, with a total of 33 senators, would lose four positions compared to its current representation in the Senate
- the ALP, with a total of 33 senators, would gain one position compared to its current representation in the Senate
- while the number of positions for both the Coalition and the ALP would change, both parties would have equal representation in the Senate
- the Australian Greens, with a total of eight senators, would gain three positions compared to their current representation in the Senate
- the Australian Greens would possess the balance of power in the Senate in their own right
- Family First would no longer be represented in the Senate, and
- Independent Senator Nick Xenophon's group would gain one additional position compared to its current representation in the Senate.

Needless to say, the actual composition of the Senate following a double dissolution election could vary considerably from the projection in Table 3 above (or indeed from the projections of other commentators).⁴¹

Proposals to reform the double dissolution mechanism in section 57

Over the years section 57 has been the subject of several reviews. Attention has been given to formulating alternative mechanisms, removing ambiguities, and minimising the potential for political misuse of the provision. Weaknesses in the section 57 mechanism are said to include:

- the lack of a requirement that trigger bills must be particularly urgent or important
- the absence of a time limit on calling a double dissolution following the qualification of a bill as a trigger
- the lack of a requirement that double dissolution elections must be contested in relation to the disputed legislation
- the lack of a distinction between money bills and other bills
- the absence of a limit on the number of trigger bills that a government can accumulate, and
- the absence of guidance on how the Senate's 'failure to pass' legislation should be interpreted.⁴²

Some previous reviews and proposed reform measures are noted below.

Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill 1950

Following the adoption of proportional representation for the Senate and the increase in the number of senators (from 36 to 60) in 1948, Prime Minister Menzies was concerned that governments would struggle to gain a majority in the Senate at double dissolution elections and thereby have an increased likelihood of further deadlocks.⁴³ To address this, the

41. The Australian Broadcasting Corporation (ABC) has also published an assessment of possible Senate results following a half-Senate and double dissolution election based on 2007 election data. See A Green, 'Double Dissolution versus Half-Senate Election: Which would be better for Labor in the Senate?', ABC website, viewed 22 October 2009, <http://blogs.abc.net.au/antonygreen/2009/07/double-dissolution-versus-halfsenate-election-which-would-be-better-for-labor-in-the-senate.html>; See also, M MacKerras, 'Goalposts shift but Labor safe', *The Weekend Australian*, 22 August 2009, p. 22.

42. These and other issues are summarised in Evans, ed., *Odgers' Australian Senate Practice*, p. 578.

43. R Menzies, 'Second reading speech: Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill 1950', House of Representatives, *Debates*, 4 May 1950, pp. 2217–18.

Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill 1950 provided for separate ballots for long and short-term senators, each competing for one of five places. The Bill also proposed that section 7 of the Constitution be amended so that the number of senators be divisible by two but not four, to ensure that the number of short and long-term places would always be an odd number so that a hung Senate would be a less likely outcome.

The Bill was referred to a Senate select committee which disagreed with the approach taken in the Bill and with its underlying assumptions. The committee considered rather that the existing method used by the Senate to divide itself into short and long terms should be recognised in the Constitution. It also considered that the constitutional arrangements for resolving deadlocks could be improved by:

- amending the Constitution to enable a joint sitting of the two Houses where a deadlock had arisen under section 57 or where a bill had not been passed by the Senate within six months of transmission from the House of Representatives (within two months in the case of money bills) so as to consider the dispute or the legislation, and
- removing ambiguity from the terms ‘fails to pass’ and ‘an interval of three months’.⁴⁴

The Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill 1950 lapsed at the 1951 double dissolution election.

Report of the Joint Committee on Constitutional Review (1959)

In its 1959 report the Joint Committee on Constitutional Review considered, *inter alia*, that the power of the Senate to obstruct the legislative program of the government was against the interests of responsible government:

The Committee considers it to be quite inconsistent with the principle of responsible government at the Commonwealth level that a party or coalition of parties returned with a clear majority in the House of Representatives and, for that reason, fully entitled and expected to form an effective government, may almost at once be unable to give effect to its policies because of party political opposition in the Senate, unless it threatens or obtains a double dissolution.⁴⁵

The Committee recommended that section 57 be repealed and proposed a new section 57 that provided different processes for money bills and other bills along with an option to have a joint sitting prior to a double dissolution. Elements of the proposed section 57 included:

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44. Senate Select Committee Appointed to Consider and Report upon the Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill 1950, Parl. Paper S.1, Canberra, 1950.
 45. Joint Committee on Constitutional Review, *Report from the Joint Committee on Constitutional Review*, Commonwealth Government Printer, Canberra, 1959, p. 23.

- for money bills, a deadlock would be deemed to arise if the Senate did not pass the bill within 30 days of transmission from the House of Representatives
- for other bills, a deadlock would be deemed to arise if the Senate did not pass a bill within 90 days of transmission from the House of Representatives and, if the bill was again passed by the House of Representatives, the Senate did not pass the bill within 30 days of transmission from the House for the second time
- once a deadlock was deemed to arise the Governor-General could convene a joint sitting or simultaneously dissolve both Houses
- a proposed law would be deemed to be affirmed at a joint sitting if it was supported by an absolute majority of members at the joint sitting and a majority of members from a majority of states, and
- if the disputed bill failed to pass at a joint sitting, the Governor-General could simultaneously dissolve both Houses.

The Committee also recommended a further series of detailed provisions in the proposed section 57 to cater for a situation where legislation under dispute failed in the Senate again following a double dissolution election.⁴⁶

The amendments proposed above were contained in the Constitution Alteration (Disagreement between the Senate and House of Representatives) Bill 1964. The Bill was introduced by the Opposition in the Senate but later lapsed without a second reading division being taken.

Australian Constitutional Convention (1973–1985)

The Australian Constitutional Convention commenced in Sydney in 1973. Delegates to the Convention comprised Commonwealth, state, and local government politicians, and their task was to reach a consensus on areas of the Constitution in need of change. A standing committee of the Convention, Standing Committee D, considered the operation of section 57. In 1983 the Convention adopted a draft new provision, section 54A, to enable the Governor-General to dissolve both Houses if the Senate rejected or failed to pass a money bill within 30 days of transmission from the House of Representatives. Such a bill would then receive Royal assent if it was passed by the House of Representatives alone following the double dissolution election.⁴⁷ The Convention considered that section 57 should continue to apply to non-money bills.

46. Joint Committee on Constitutional Review, *Report from the Joint Committee on Constitutional Review*, p. 33.

47. Australian Constitutional Convention, *Proceedings of the Australian Constitutional Convention*, vol. 2, Adelaide, 1983, pp. 82–83.

In 1983 Tasmanian Liberal Senator Peter Rae introduced a private senator's bill to advance the proposal of the Convention. Senator Rae's Constitution Alteration (Appropriation Bills) Bill 1983 was negatived in the Senate at the second reading stage on 13 October 1983.⁴⁸

Constitution Alteration (Double Dissolution) Bill 1983 (private senator's bill)

In October 1983 Victorian Liberal Senator David Hamer introduced the Constitution Alteration (Double Dissolution) Bill 1983. The bill provided that the power to call a double dissolution election under section 57 would lapse if not exercised within three months of the Senate's second failure to pass legislation. This would prevent a government from 'stockpiling' double dissolution trigger bills. The Bill was negatived in the Senate at the second reading stage on 13 October 1983.⁴⁹

Report of the Constitutional Commission (1988)

In 1983 the government established a six-member Constitutional Commission to undertake a wide-ranging review of the Australian Constitution. The Commission's 1988 final report recommended comprehensive changes to the Constitution including four-year terms for the House of Representatives and amendments to the deadlock mechanism. The Commission proposed a constitutional amendment to provide that money bills rejected or not passed by the Senate within 30 days, during the first three years of a parliament, would be presented for Royal assent. In the case of money bills rejected or not passed by the Senate in the fourth year of the parliament, the Governor-General would be empowered to simultaneously dissolve both Houses.⁵⁰

For non-money bills, the Commission recommended that section 57 be renumbered and amended so as to apply only to bills which can be amended by the Senate and to:

- provide that a simultaneous dissolution of both Houses following the second rejection of a bill by the Senate should only be possible in the fourth year of a term of the House of Representatives
- clarify the prerogative of the Governor-General and key elements of section 57 including rejection of bills and the three-month interval
- require, for agreement on disputed legislation at a joint sitting and passage, an absolute majority of members and senators and a majority of members and senators from a majority of states, and

48. Australia, Senate, *Journals*, no. 37, 13 October 1983, p. 383.

49. Australia, Senate, *Journals*, no. 37, 13 October 1983, pp. 383–84.

50. Constitutional Commission, *Final Report of the Constitutional Commission*, vol. 1, Australian Government Publishing Service, Canberra, 1988, p. 9.

- provide that the proposed law under dispute shall not lose its identity ‘if it contains only such alterations as are necessary by reason of the time which has elapsed since its introduction or which represent amendments made by the Senate’.⁵¹

Government discussion paper on resolving deadlocks (2003)

In 2003 the Howard Coalition Government produced a discussion paper on section 57. The paper argued that changes to the composition of the Senate over the years had reduced the ability of the government to deliver on its mandate:

... the Senate holds effective control over the legislative and policy agenda upon which the government of the day has been elected. In practice, the minority has assumed a permanent and absolute veto over the majority.⁵²

Furthermore, the discussion paper argued that section 57 ‘in its current form is not a workable means of resolving deadlocks’.⁵³ The paper proposed two reform options:

- enable the Governor-General to convene a joint sitting of parliament to consider disputed legislation following the second rejection by the Senate of a bill originating in the House (with a three month interval between each consideration in the Senate), and
- enable the Governor-General to convene a joint sitting of parliament, following an election for the House of Representatives or a House of Representatives and half- Senate election, to consider legislation that had previously been rejected by the Senate twice. The option of a joint sitting would become a ‘standard feature’ following ordinary elections.⁵⁴

In 2003 the government established the Consultative Group on Constitutional Change to consult and report on the issues raised in the discussion paper. In its 2004 report the Group concluded that both options would not succeed if put to a referendum at the time of reporting or in the near future.⁵⁵ The Group found that the first option garnered almost no support,

51. Constitutional Commission, *Final Report of the Constitutional Commission*, p. 10.

52. Department of the Prime Minister and Cabinet, *Resolving deadlocks: a discussion paper on section 57 of the Australian Constitution*, Commonwealth of Australia, Canberra, 2003, p. 6, viewed 22 October 2009, http://pandora.nla.gov.au/pan/79623/20080117-2207/dpmc.gov.au/conschange/discussion_paper/docs/resolving%20deadlocks.pdf

53. Department of the Prime Minister and Cabinet, *Resolving deadlocks: a discussion paper on section 57 of the Australian Constitution*, p. 7.

54. Department of the Prime Minister and Cabinet, *Resolving deadlocks: a discussion paper on section 57 of the Australian Constitution*, pp. 39–44.

55. Consultative Group on Constitutional Change, *Resolving deadlocks: the public response*, Commonwealth of Australia, Canberra, 2004, p. 9, viewed 22 October 2009, <http://pandora.nla.gov.au/pan/79623/20080117-2207/dpmc.gov.au/conschange/report/docs/report.pdf>

while option two attracted some limited support and could have ‘greater potential for success in the longer term’.⁵⁶ The Group suggested that, if reform was to be pursued, a comprehensive programme of public consultation and education would be required.⁵⁷

Summary

The prospect of a double dissolution will commonly receive attention when a government’s legislative program encounters obstruction in the Senate, particularly when high-profile or politically significant legislation is involved. This is a reflection of the status of the double dissolution as an element of a government’s political armoury. As the historical record indicates, however, double dissolutions are rare. Acting on a trigger bill to precipitate an election can be a risky proposition for a government as the result can be unpredictable. While there are currently no trigger bills for a double dissolution in the 42nd Parliament, there are several bills which have the potential to become ‘triggers’ in the future. The last possible date for the double dissolution of the current Parliament is 11 August 2010.

The double dissolution mechanism has also been the subject of a number of reviews over the years. One proposal common to several reviews has been the introduction of separate mechanisms for money and non-money bills, generally with a more expedited procedure in respect of money bills. Another proposal advanced by a number of reviews has been enabling the calling of a joint sitting to consider disputed legislation prior to a double dissolution and subsequent election.

To date, none of the proposals to amend section 57 have been put to the people at a referendum as is required by section 128 of the Australian Constitution. A significant impediment to amending the Constitution is the requirement in section 128 that a proposed amendment must be supported by both a majority of electors in a majority of states and an overall majority of electors across the country.⁵⁸ Without popular support in the community and bipartisan support among the major parties, it seems unlikely that a referendum on this matter would succeed.

56. Consultative Group on Constitutional Change, *Resolving deadlocks: the public response*, Commonwealth of Australia, Canberra, 2004, pp. 9–10.

57. Consultative Group on Constitutional Change, *Resolving deadlocks: the public response*, Commonwealth of Australia, Canberra, 2004, p. 10.

58. S Bennett, *The Politics of Constitutional Amendment*, Research paper, no. 11, 2002–03, Department of the Parliamentary Library, June 2003, viewed 22 October 2009, <http://www.aph.gov.au/library/pubs/rp/2002-03/03RP11.pdf>

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