

Constitution, Section 57: Comments on Article by George Williams*

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The article by George Williams¹ is not an adequate presentation of the point in issue about s.57.

The article begins with the claim that s.57 ‘is designed to enable a government in control of the House of Representatives to enact legislation in the face of a hostile Senate’. This interpretation of s.57 was submitted by the then government but explicitly rejected in the only substantive High Court judgement on the matter². The claim that ‘the intention of s.57 was to secure the effectiveness of the will of the House of Representatives in any event’ was rejected as ‘an unnatural reading of the section’ in favour of an interpretation of the section as ‘a means by which the electorate can express itself and perhaps thus resolve the “deadlock” which has been demonstrated to exist between the House and the Senate’. It is misleading to return to the erroneous notion that the purpose of a double dissolution is to ‘ensure that the will of the House prevails’.³

Similarly, the article claims that the High Court will ‘favour a course which will avoid it having to delve too deeply into the internal affairs of Parliament’. But delving into

* This paper was first published in *Constitutional Law and Policy Review*, August 1998.

¹ G. Williams, ‘The Native Title Amendment Bill 1997 (Cth): a double dissolution trigger?’, *Constitutional Law and Policy Review*, August 1998, p. 35.

² *Victoria v Commonwealth* (the PMA case) (1975) 134 CLR 81.

³ *ibid.* at 125–6 per Barwick CJ. See also Stephen J at 168–9.

the internal affairs of Parliament is precisely what the court did in its judgement on s.57. The argument that the processes set out in s.57 should be regarded as the internal affairs of Parliament was explicitly rejected. Having determined whether the Senate had failed to pass a bill, there is no reason why the High Court should refrain from determining whether there was a disagreement between the houses over amendments within the terms of the section.

The article glosses over the statement by Barwick CJ, the only justice to refer explicitly to the point in issue. It is worthwhile quoting the passage in full.

The expression in s 57 is ‘passes it with amendments to which the House of Representatives will not agree’. Those words would not, in my opinion and with due respect to a contrary opinion attributed to Sir Kenneth Bailey,⁴ necessarily be satisfied by the amendments made in the first place by the Senate. At the least, the attitude of the House of Representatives to the amendments must be decided and, I would think, must be made known before the interval of three months could begin. But the House of Representatives, having indicated in messages to the Senate why it will not agree, may of course find that the Senate concurs in its view so expressed, or there may be some modification thereafter of the amendments made by the Senate which in due course may be acceptable to the House of Representatives. It cannot be said, in my opinion, that there are amendments to which the House of Representatives *will* not agree until the processes which parliamentary procedure provides have been explored.⁵

The fact that a Chief Justice said this is less important than its conformity with appropriate parliamentary processes and the purpose of a s.57 of resolving genuine disagreements between the houses. George Williams’ article in that respect neglects the following points:

- The process of returning a bill to the Senate with the Senate’s amendments disagreed to is not merely a course which *may* be followed; it is the course which is regularly followed, hitherto, so far as I can tell, invariably, including in the case of the bill which provided the basis for the double dissolution in 1951. The treatment of the Native Title Bill is conspicuous in its departure from the normal process.
- Treating a bill in this way blurs the distinction between rejecting a bill and amending it. Amending a bill then becomes the virtual equivalent of rejecting it if the government chooses so to treat it. If the framers of s.57 had wanted to treat the amendments of a bill as the equivalent of rejecting it they could have spared themselves the trouble of expanding the section with the various phrases intended to accommodate disagreements over amendments.⁶
- If the government in the House of Representatives accepts some Senate amendments, as in the case of the Native Title Bill, how can it be said that there is a disagreement between the houses if the Senate has not been given

⁴ The opinion of the Solicitor-General now relied upon by the government and referred to by George Williams.

⁵ PMA case, 134 CLR at 125. Emphasis in original.

⁶ cf. Stephen J. *ibid.* at 168–9.

the opportunity to decide whether it is satisfied with the amendments accepted? It is fallacious to argue that the existence of a disagreement is revealed when the bill returns after a three month interval. In its second consideration of the Native Title Bill, which then included some of its earlier amendments, the Senate made different amendments in an attempt to reach agreement, and again the government accepted some of those amendments but did not provide the opportunity for the Senate to consider whether it was satisfied with those amendments.

These matters remind us that the purpose of traditional parliamentary procedures is to seek agreement. Section 57, in its references to amendments, contemplates that those procedures will be used in an attempt to reach agreement before the section is resorted to as a means of resolving a remaining disagreement. It must be remembered that what the framers had in mind was a system of legislation by representative assemblies, not a system of executive domination.

Even if all this is regarded as arguable, why would a government run the risk of going through the whole process of a double dissolution and a joint sitting only to have the legislation passed by that process found to be invalid? Why would a government not emulate the wise caution of its predecessor in 1951? The explanation for this risk being run has been suggested in the Senate: the Native Title Bill was treated in this way because the government was anxious to have the first stage of a double dissolution 'trigger' before the House rose for the Christmas break in 1997. It is the only plausible explanation so far advanced, and it means that the political timetable determined the course of action rather than sound legal advice.

Postscript

The Native Title Amendment Bill 1997 will now not provide a ground for a double dissolution.

Following negotiations between the government and Senator Harradine, the bill was again presented to the Senate and finally passed on 8 July 1998.

The way in which this was done is of some interest. The bill had been laid aside in the House of Representatives after some of the Senate's amendments were rejected by the government in the House on the second consideration of the bill. Laying a bill aside is usually regarded as terminating the proceedings on the bill. In recent times, however, the Senate has revived and passed bills which have been rejected at the third reading, which normally is regarded as a complete rejection of a bill. Taking a leaf from the Senate's book, the government revived the Native Title Bill in the House of Representatives, adjusted its response to some of the Senate's amendments, made some further amendments reflecting the agreement with Senator Harradine, and returned the bill to the Senate for reconsideration. After two days of debate and reconsideration of the various amendments, the Senate agreed to the action taken in the House of Representatives and, both houses having agreed to the same sets of amendments, the bill was thereby finally passed.

In adopting this course, the government temporarily forfeited its claim that the bill had met the conditions of s.57 for a double dissolution, because returning the bill to

the Senate suspended, as it were, the second stage of the 'trigger'. If the Senate had not agreed to the action taken in the House there would clearly have been a disagreement between the houses over amendments within the terms of s.57. Similarly, if the Senate had unreasonably delayed consideration of the revived bill, there would have been a failure to pass it. The government's claim that the bill had met the conditions for a 'trigger' would thereby have been considerably strengthened.