



# RESOLVING

# DEADLOCKS

Section 57 of the Australian Constitution contains the mechanism for resolving deadlocks over proposed laws between the two houses of our federal parliament. The Prime Minister recently released a discussion paper outlining possible changes to section 57, and is seeking public comment. *About the House* outlines the current system, the Prime Minister's proposals, and some of the reaction and alternatives that are being raised.

**C**risis. Deadlock. Early election. The headlines are predictable, and have been seen at some stage during almost every parliament in the last few decades. It's media coverage that happens whenever there is a protracted disagreement between the House of Representatives and the Senate over a law or laws proposed by the government.

That such disagreements occur under our system of adversarial politics is hardly surprising. It is especially so as the governing party or parties have not controlled the Senate and the House at the same time for more than 20 years and, in fact, for only eight of the last 45 years.

This is essentially the result of the House and the Senate being elected under differing electoral systems (see 'How they are elected' on page 31). As well as being elected via differing voting systems, in normal circumstances only 40 of the 76 Senate positions are up for grabs at an election (a 'half-Senate' election), while the entire House faces the voters at each election.

The House of Representatives is the chamber where government is formed. After a general election the political party (or coalition of parties) with the support of a majority of members in the House of Representatives becomes the governing party and its leader becomes the Prime Minister. Because of its majority, the government can be expected, ultimately, to have its way in the House on any matter it considers important. After the last election, the Liberal-National Party coalition held 82 of the 150 seats in the House of Representatives, and formed government.

Once the government proposes a law and passes it through the House of Representatives, it is then considered by the Senate. After the last election, the government parties held 35 of the 76 Senate seats—four short of a majority. Thus the potential exists for government legislation to be held up or defeated in the Senate by the combined non-government majority.

This was a circumstance anticipated by the drafters of the Constitution, who, in section 57, set out a constitutional procedure for solving disagreements between the Houses. That procedure is outlined in the box on the right.

In fact, it is rare for disagreements to be pressed past **phase one** of the process outlined in the box.

Most disagreements are solved via compromise or amendment, or through political pressure being applied which eventually leads to a change in the position of one party or another. The 'threat' of an early election can itself act as a pressure point.

For example a proposed law may be abandoned altogether if it is proving to be

unpopular, or changes altering a proposed law may be accepted by the government, such as in the recent cases of the Goods and Services Tax, and changes to the detention powers of ASIO.

## Section 57 – the existing process for resolving deadlocks over legislation

### Phase 1

1. The House of Representatives passes a bill.
2. The Senate rejects or fails to pass the bill in a form acceptable to the House.
3. At least three months pass.
4. The House passes the bill again.
5. The Senate again rejects or fails to pass the bill in a form acceptable to the House.

### Phase 2

6. A double dissolution election: The Prime Minister asks the Governor-General to dissolve the House and the whole Senate, and an election is held for the House and whole Senate (this cannot occur where an election for the House is already due within six months).

### Phase 3

(presuming the government is re-elected)

7. The House passes the bill again.
8. The Senate again rejects or fails to pass the bill in a form acceptable to the House.

### Phase 4

9. The Prime Minister asks the Governor-General to convene a joint sitting of the House and the Senate.
10. If an absolute majority of members and senators support the bill at the joint sitting, the bill is passed and can receive royal assent and become law.

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## Double dissolutions since 1901

There have been six double dissolution elections since 1901:

- 1914 – Government Preference Prohibition Bill: the deadlock was broken by the government losing its majority in the House as a result of the double dissolution election. The legislation was not reintroduced.
- 1951 – Commonwealth Bank Bill: the deadlock was broken by the government gaining a majority in both houses; the legislation was reintroduced and passed by both houses in the normal manner.
- 1974 – Six bills: the government was returned but the disagreement between the houses continued, resulting in a joint sitting at which the bills concerned were passed.
- 1975 – 21 bills: the bills concerned were not reintroduced in the new parliament\*.
- 1983 – 13 bills: the deadlock was broken by the government losing its majority in the House.
- 1987 – Australia Card Bill: the government was returned; the bill concerned was reintroduced and again passed by the House but ultimately not proceeded with.

*\*Unique circumstances applied in 1975 – following disagreement over the passage of a number of bills, the government was dismissed by the Governor-General and a ‘caretaker’ government installed to enable passage of appropriation bills. The caretaker government then requested a double dissolution and was elected at the ensuing election. The bills providing the technical grounds for the double dissolution were not those of the caretaker government seeking the dissolution, but those of the government dismissed by the Governor-General.*

Where the two houses remain in deadlock after ‘phase one’ and no political solution is reached, the bills concerned become known as potential ‘triggers’ for a double dissolution election.

If the Prime Minister decides, he can seek the calling of a double dissolution election from the Governor-General. As outlined in the box, a double dissolution election is **phase two** of the section 57 procedure outlined in the Constitution.

The difference between a double dissolution election and a normal election is that the whole Senate is ‘dissolved’, and all 76 Senate positions are up for election. A double dissolution election may not take place within six months of the due date of the ‘natural’ expiry of the House (which is three years after the House first meets following an election—thus the common reference to double dissolution elections as being ‘early’ elections).

Double dissolution elections have been called on only six occasions in the 102 years of federation. An outline of those six occasions appears in the box to the left.

The theory behind the double dissolution is that the disputed legislation in question is put to the people, and the electorate is presented with the opportunity to change the composition of the entire Senate, and/or the composition of the House (even changing government; this in fact occurred at two of the six double dissolution elections).

If the government is returned after the double dissolution election, then **phase three** of the section 57 ‘deadlock’ procedure is reached, with the government required to pass the bill through the House again if it decides to proceed with it.

If the Senate again disagrees to the bill, **phase four** is entered. The Governor-General—on the advice of the Prime Minister—may then convene a joint sitting of the Senate and House to enable the members and senators to vote together to finally resolve the matter. Of the six times a double dissolution has been called, only once has this final phase been reached (1974).

## Proposed changes

The Prime Minister’s discussion paper ‘Resolving deadlocks: a discussion paper on section 57 of the Australian Constitution’, presents two options for changing section 57. As with all changes to the Constitution, these would have to be approved at a national referendum if the government decided to proceed with them.

The Prime Minister’s paper argues two important changes have occurred since the Constitution was written which, combined, have “meant that it is virtually impossible for a government to obtain a majority in the upper house, no matter how large its majority is in the lower house”.

Those changes were the introduction of proportional representation for the Senate in 1948, and the increase (in 1983) of the number of senators elected at a half-Senate election from five to six.

“Until 1948, it is fair to say that the effective operation or otherwise of section 57 of the Constitution was largely an academic issue,” Prime Minister Howard said in the House when releasing the paper. “Prior to 1948, 13 of the 18 governments which had power in Canberra had majorities in both houses of parliament. The introduction of proportional representation in 1948 plus the enlargement of the parliament in 1983 have created a very different situation.

“Effectively, as I think people on both sides of the parliament know, with proportional representation this means in practice, although obviously not in theory, that the government of the day—absent a landslide victory never previously obtained in over 100 years of federation—will not be able to win a majority in both houses of parliament.”

In order to win four out of six Senate seats in any state at a half-Senate election, a party now needs to obtain more than 57 per cent of the vote.

The practical result of the greater difficulty in winning a majority in both houses is that legislative deadlocks are now much more likely than in the first part of the century.

“The consequence is,” the paper continues, “that 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.

“It is true that most of the government’s legislation is passed by the Senate. This is because most legislation is non-contentious.

## What are the current ‘triggers’?

There are currently six bills which meet the constitutional requirements to act as ‘triggers’ for the possible calling of a double dissolution election. They are:

- Family and Community Services Legislation Amendment (Disability Reform) Bill (No. 2) 2002;
- National Health Amendment (Pharmaceutical Benefits-Budget Measures) Bill 2002;
- Trade Practices Amendment (Small Business Protection) Bill 2002;
- Workplace Relations Amendment (Fair Dismissal) Bill 2002;
- Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002; and
- Migration Legislation Amendment (Further Border Protection Measures) Bill 2002.

The following two bills have failed to pass the Senate once, and have recently been re-introduced into the House:

- Broadcast Services Amendment (Media Ownership) Bill 2002; and
- Workplace Relations (Termination of Employment) Bill 2002.

Whether these bills join the list of ‘trigger’ bills will depend on whether they pass the House and again fail to pass the Senate. Another bill—the Telstra (Transition to Full Private Ownership) Bill 2002—has also failed to pass the Senate once, with the government already indicating it will seek to reintroduce the bill into the House a second time.

The text of all these bills and explanatory notes are available online at [www.aph.gov.au/bills](http://www.aph.gov.au/bills)

“The Senate’s record regarding legislation critical to the government’s reform agenda has been quite different. Here there is a pattern of frustration,” the paper says.

“In this context, constitutional reform is needed to rebalance the relationship between the two houses and to ensure that where the houses are deadlocked, the parliament as a whole may reconcile the difference as expeditiously as possible.

“Without such reform, governments will be unable to implement policies which have both a popular mandate and are essential to promoting good government.”

The Prime Minister outlined two possible options for change.

“The first would allow the Governor-General to convene a joint sitting of both houses to consider a deadlocked bill without the need for an election,” the Prime Minister said. “If an absolute majority of members and senators at the joint sitting voted in favour of the deadlocked bill, it would become law.”

This option removes the need for ‘phases’ two and three of the current process.

“The second option, which has become known as the Lavarch option—so named because it was suggested, perhaps not for the first time but certainly in the current debate, by Michael Lavarch, a former Labor Attorney-General and now Secretary-General of the Law Council of Australia—would allow the Governor-General to convene a joint sitting of both houses after an ordinary general election,” Mr Howard said. “Again, if an absolute majority of members and senators at the joint sitting voted in favour of legislation deadlocked in the previous parliament, it would become law.”

This option changes the current ‘phase two’, removing the need for a double dissolution election and instead requiring only a House of Representatives election or a normal House-plus-half-Senate election.

Reaction to the discussion paper was swift. Opposition Leader Simon Crean welcomed its release, but said the constitutional reform debate should be widened. He has proposed a joint select committee be established to progress the issues.

“We are talking about a major change that has the potential to take us forward, but I do underscore the importance of bringing the Australian people with us and I seriously ask the Prime Minister to consider the joint select committee again as a mechanism for the consideration of the broader context of constitutional reform,” Mr Crean said.

The specific proposals put by the Prime Minister received a less enthusiastic

welcome. Mr Crean described the first proposal as an “assault on the Senate”.

“It seeks to deny the Australian people the right to have a vote on the outcome of a deadlocked parliament, and that is why I do not believe it will be supported,” he said.

He went on to defend the Senate, and argued that the Senate was not a significant obstruction to the government. “Overwhelmingly, the Senate has operated as it was intended and as the Australian people want it to—not necessarily as a states’ house but as a house of proportional representation and a house not just of review but of checks and balances.

“The fact that the Australian people continue to vote differently for the Senate and the House of Representatives indicates also, I think, the importance of the role the Australian people see the Senate playing.”

Nevertheless, Mr Crean said the second model does deserve further consideration, but it is an “incomplete model”.

“The Prime Minister refers to it as the ‘Lavarch model’; it is not, because Michael Lavarch has made it clear that he would not support this option unless it also removed the Senate’s ability to block supply.

“Labor would be prepared to consult on and consider the Prime Minister’s second model, but only if it is accompanied by two other important reforms: the removal of the power of the Senate to block supply and the introduction of fixed four-year terms.”

Other reaction has included a proposal by the Australian Democrats to put disputed legislation to a binding plebiscite at the same time as each federal election.

“The Democrats are willing to back moves to give less power to the parliament only as long as that power goes to the people,” the Democrats’ response said.

#### Links

The Prime Minister’s *Resolving Deadlocks* paper can be downloaded from the website of the Department of the Prime Minister and Cabinet ([www.pmc.gov.au](http://www.pmc.gov.au)). The speeches made when the paper was released can be read in the House Hansard for 8 October 2003. Labor’s discussion paper can be read at [www.alp.org.au/media/1003/20005987.html](http://www.alp.org.au/media/1003/20005987.html) while the Democrats’ paper can be viewed at [www.democrats.org.au/docs/2003/0027](http://www.democrats.org.au/docs/2003/0027)

#### Public input and consultation

Members of the public have been invited to make written submissions on issues raised in the Prime Minister’s *Resolving Deadlocks* paper by 31 December 2003. Submissions, which the Department of the Prime Minister and Cabinet says can be as long or short as

people wish, can be sent via email to [constitutionalchange@pmc.gov.au](mailto:constitutionalchange@pmc.gov.au) or via mail to:

Constitutional Change  
Legal and Culture Branch  
Department of the Prime Minister and Cabinet  
3-5 National Circuit Barton ACT 2600

Additionally, a consultative group has been conducting public meetings to discuss the matters raised by the paper. The group is chaired by former Attorneys-General Neil Brown and Michael Lavarch, and Professor Jack Richardson. The schedule of public meetings is available on the website. ■

### How they are elected

#### The House:

Is elected under a system of single-member electorates. At the last election, the nation was divided into 150 geographically separate electoral divisions, each with around the same number of voters (an average of 84,000). These 150 divisions each returned one member, elected under a preferential voting system.

#### The Senate:

The Senate is comprised of 12 senators from each state, plus two from each of the ACT and Northern Territory. In the normal course of events, only half the senators from each state are elected at each election (for a six-year term), while the four territory senators face the people at every election. In effect, each state is a multi-member electorate, with senators elected under a system of proportional representation (a ‘quota’ of around 14 per cent of the vote will guarantee a Senate position for a candidate in a state; senators can be elected with a lower primary vote than this, after preferences are distributed). At a double dissolution election, this ‘quota’ is halved to around seven per cent.

These days, it is generally considered an impossible task for one party to win a majority in the Senate at a normal half-Senate election, with more than 57 per cent of the statewide vote required to secure four of the six seats up for grabs in any of the six states.

### What is the election timetable?

A double dissolution election may not take place within six months of the due date of the ‘natural’ expiry of the House, which is three years after the first sitting following an election. In the current case, the House, though elected in October 2001, did not sit until 12 February 2002—the House therefore ‘expires’ on 11 February 2005, and a double dissolution election would have to be called before 11 August 2004, and held on or before 16 October 2004. A normal House election must be held by 16 April 2005.