

RESEARCH NOTE

No. 38, 14 May 2002

Restrictions on the Timing of Half-Senate Elections

Introduction

When may half-Senate elections be held? This Research Note suggests that Prime Ministers do not have as much freedom in this matter as public discussion would tend to suggest.

The Constitution

Section 13 of the Commonwealth Constitution states that 'The election to fill vacant [Senate] places shall be made within one year before the places are to become vacant'.

The implication of this is that polling for half-Senate elections may be held on any Saturday between 1 July and 30 June in the year before the expiry of Senators' terms on 30 June.

The Popular View

This is certainly the view of many observers. During the lead-up to the 2001 election, there was a great deal of speculation during April and May 2001 that Prime Minister Howard might hold the election as early as possible in July:

'A snap federal election as early as July 7 could give Prime Minister John Howard a lifeline ...'¹

'... calling an election for July 7 or thereabouts is increasingly looming as a solution to the problems that surround Howard'.²

'John Howard is considering an election in early July ...'³

'[July 7 is] the earliest possible date for an election ...'⁴

Alan Ramsey dismissed this speculation, stating that the Prime Minister would be 'in Washington

as George Bush's guest, not fighting an election campaign at home ...'. Nonetheless, he clearly thought a July poll was an option.⁵

Despite the confidence of these observers, there are strong constitutional grounds for supposing that their view was incorrect. ADFA political scientist, Malcolm Mackerras has been a seemingly lone exception to the general view.⁶

What is a Half-Senate Election?

It is relevant to this discussion to ask: what, exactly, is a half-Senate election? In 1907, during a High Court case relating to the filling of a Senate vacancy, Chief Justice Griffith found it necessary to define a Senate election. According to him, 'It is plain ... that sec. 13 [of the Constitution] was framed ... for the purpose of fixing the term of service of senators elected in ordinary and regular rotation. The term "election" in that section does not mean the day of nomination or the polling day alone, but comprises the whole proceedings from the issue of the writ to the valid return [of that writ]'.⁷

Griffith's view, if accepted, is central to the question of when half-Senate elections can, and cannot, be held.

The Earliest Date?

The commonsense view of the words, 'within one year' in s.13, would suggest that polling day must occur within those 12 months before the retirement of those Senators whose term is expiring.

If Griffith was correct, however, a Senate election actually begins when the various Governors issue the writs for the election of the State Senators (Territory Senators' elections are tied to the term of the House of Representatives, with the writs being issued by the Governor-General).

It would follow, then, that the Governors may not act prior to 1 July in the year during which the election must be held.

Even if half-Senate writs were to be issued on 1 July, the formal election process cannot be shortened. At least ten days have to elapse before the close of candidate nominations, and polling day cannot be earlier than 23 days after nominations close. It seems to follow, then, that no half-Senate election can be held during July at all, despite the journalistic views quoted above.

According to Malcolm Mackerras, former Chief Electoral Officer Keith Pearson once claimed to him that half-Senate writs could not be issued before 1 July, and suggested that this had been the view of electoral officials for many years.⁸ In a communication with the author, the Parliamentary and Litigation Section of the Australian Electoral Commission (AEC) has stated that, 'Given Griffith CJ's decision in *Vardon v O'Loughlin*, the AEC agrees that the only safe course is to proceed on the basis that the second paragraph of s.13 of the Constitution precludes the issue of writs for a half-Senate election more than a year before the date that the Senate places become vacant'.⁹

Griffith's words appear still to colour the official view.

It seems, therefore, that July half-Senate elections are not available to Prime Ministers.

It must be emphasised, though, that the same does not apply to double dissolution elections, as the July 1987 case indicated.

The Latest Date?

July is therefore precluded, but so also is June. Section 13 of the Constitution states that 'the term of service of a senator shall be taken to begin on the first day of July following the day of his election...' There seems no leeway for a term to begin on a later day.

Officially, a Senate result is not known until the writs have been returned.

The use for Senate elections of proportional representation, involves a long period of identifying and counting of votes, followed by distribution of preferences. This means that there are practical reasons why some Saturdays at the end of the twelve months in which a half-Senate election must be held, are not available for election day.

In 2001, the AEC conducted the Senate election on the basis of being able to declare all Senate results no later than the fourth week after polling day.¹⁰ In the event, the final writ to be returned (Victoria) was lodged on 7 December, 27 days after polling day.

In effect, therefore, whilst proportional representation remains the voting method for Senate elections and its counting takes so long, practical considerations will preclude June as being available for Senate elections.

Does it Matter?

Although it appears as if polling for half-Senate elections can be held at any time in the twelve months prior to the expiry of Senators' terms, this is not possible in practice. The months of June and July are not

available under our current arrangements. The fact that neither has been used (see Table), suggests that Prime Ministers have been well briefed on this issue—though it is clearly a matter about which there is some general confusion.¹¹

There are perhaps two important consequences of this state of affairs.

- Prime Ministers do not have quite as much time available for the holding of half-Senate (and presumably, simultaneous) elections as has been popularly supposed, and
- Were a Prime Minister to ignore the Griffith opinion and seek to call a half-Senate election for a date in July, it seems that such a decision would leave the action open to legal challenge.

Dates of Half-Senate Elections

January	–
February	–
March	1990, 1993, 1996
April	1910
May	1913, 1917, 1953
June	–
July	–
August	1943
September	1934, 1940, 1946
October	1937, 1980, 1998
November	1925, 1928, 1958, 1967, 1970, 2001
December	1903, 1906, 1919, 1922, 1931, 1949, 1955, 1961, 1964, 1977, 1984

1. P. Clack, 'Early election may be the lifeline PM's looking for', *Canberra Times*, 29 April 2001.
2. Bob Hogg, 'Howard's haunted house', *Age*, 10 May 2001.
3. Malcolm Farr, 'Howard considers July election', *Daily Telegraph*, 16 May 2001.
4. Phillip Hudson, 'Searching for a Saturday', *Age*, 24 May 2001.
5. Alan Ramsey, 'Clamour about an early election doesn't ring true', *Sydney Morning Herald*, 23 May 2001.
6. The author wishes to thank Malcolm Mackerras for giving him the germ of the idea for this paper.
7. *Vardon v O'Loughlin* (1907) 5 CLR 210.
8. Mackerras, oral communication to author.
9. Shawn O'Brien, Parliamentary and Litigation Section, to Australian Electoral Commission, 25 June 2001.
10. Australian Electoral Commission, http://www.aec.gov.au/pubs/candidates_handbook/counting.htm.
11. See also Rob Lundie, 'Timetable for the Next Commonwealth Election', *Research Note*, no. 37, Department of the Parliamentary Library, Canberra, 2002.

Scott Bennett
Politics and Public Administration Group
Information and Research Services

Views expressed in this Research Note are those of the author and do not necessarily reflect those of the Information and Research Services and are not to be attributed to the Department of the Parliamentary Library. Research Notes provide concise analytical briefings on issues of interest to Senators and Members. As such they may not canvass all of the key issues. Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.