A series of information sheets giving a basic introduction to the Senate and its work

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Disagreement between the Houses

... having called into existence two strong houses, and especially a senate the like of which will not be found in any constitution that is in existence, or has ever been in existence in the world, we ought to make provision for great, important, probably historical occasions when those two coordinate houses may be brought into serious conflict ... Now in an ordinary constitution, where we have an upper house not elected by the people, or not elected on the same basis as the lower house, that second chamber would be disposed to yield to the pressure of the lower chamber elected on a popular basis; but here, where we are creating a senate which will feel the sap of popular election in its veins, that senate will probably feel stronger than a senate or upper chamber which is elected only on a partial franchise, and, consequently, we ought to make provision for the adjustment of disputes in great emergencies.

Dr John Quick, Australasian Federal Convention, Sydney, 1897,
Official Record of Debates, p. 552.

The Australian Constitution provides for a bicameral system, where proposed laws must be agreed to by two differently constituted houses of parliament, as a safeguard against misuse of the law-making power. The Constitution also provides a method for resolving deadlocks which might arise in the event of a disagreement between the two houses. If the Senate twice fails to pass a bill from the House of Representatives, under certain specified conditions, the Governor-General may simultaneously dissolve both houses, in which case elections are held for all seats in both houses. This double dissolution procedure is the only exception to the rule of fixed terms for senators. If the deadlock persists after the elections the Governor-General may convene a joint sitting of the two houses to resolve the matter.

Constitutional provisions and their application

When the Constitution was in preparation, one of the major issues in contention was how to resolve deadlocks between the houses over legislation. Few constitutions in existence at that time contained any such mechanism: those which did mainly provided for conferences between the houses, reflecting practice as it had developed in the Congress of the United States. The procedure eventually adopted, and embodied in section 57 of the Constitution, was thus a major innovation in constitutional and bicameral practice. Part of the innovation was the possibility of dissolution of and general election for both Houses of the Parliament.

Section 57 of the Constitution as it relates to simultaneous dissolutions provides:

> 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.

Since Federation, section 57 has been activated on seven occasions: 1914, 1951, 1974, 1975, 1983, 1987 and 2016, to resolve deadlocks over legislation between the houses. On four occasions the government advising simultaneous dissolutions has been returned to office; on only one of those occasions, 1974, did the original legislation leading to the dissolutions become law, and, in that instance, after a joint sitting as provided for in paragraphs 2 and 3 of section 57. The legislation that lead to the 2016 dissolutions also became law, but only after amendments made in the Senate were agreed to by the House.

As a consequence of the seven simultaneous dissolutions, and the judgments of the High Court in three cases arising from the 1974 dissolutions, it is now possible to amplify the workings of section 57 of the Constitution so far as simultaneous dissolutions of the two Houses are concerned. The following observations can be advanced as influencing the use of section 57.

1. The interval of three months referred to in paragraph 1 of section 57 is measured from the Senate's rejection or failure to pass a bill.

According to the High Court, it is 'measured not from the first passage of a proposed law by the House of Representatives, but from the Senate's rejection or failure to pass it. This interpretation follows both from the language of section 57 and its purpose which is to provide time for the reconciliation of the differences between the Houses; the time therefore does not begin to run until the deadlock occurs'. (*Victoria v. Commonwealth*, 1975 7 ALR 2.)

2. Simultaneous dissolutions have been granted on several occasions where the proposed legislation has been deemed to have 'failed to pass' the Senate.

Where the Senate rejects a bill outright by voting against it, or amends it in a manner unacceptable to the House of Representatives, it is clear that such actions meet one of the criteria for a double dissolution specified in section 57. The situation is not so clear, however, in respect of those financial bills which the Senate may not amend but in respect of which it may request the House of Representatives to make omissions or amendments (Constitution s. 53). If the House does not accede to a Senate request and returns a bill unamended the Senate may repeat, or 'press', the request. It is a significant question, which has not been considered, whether the Senate in making or pressing requests for amendments to a bill could be said to have failed to pass it within the meaning of section 57. In that circumstance the Senate has not passed the bill with amendments. Certainly, if the Senate makes or presses requests it cannot be said to have failed to pass the bill until the House of Representatives has rejected the requests and the Senate has had an opportunity to reconsider them. In that respect the government appears to have been in error in declining to consider the Senate's pressed requests in relation to the Sales Tax Amendment Bills (Nos 1A to 9A) 1981 (see *Senate Debates*, 22 October 1981,

pp. 1547–8, particularly the statement by Senator Harradine that the action taken by the government in the House of Representatives 'was not only unconstitutional but also … ensured that the time clock for action to be taken under the dissolution provisions of section 57 of the Constitution could not run').

There is also some uncertainty in respect of the phrase 'fails to pass' used in paragraph 1 of section 57. If the Senate defers consideration of a bill till the next period of sittings, refers it to a committee, or debates it for many months, do any of these, singly or in combination, constitute failure to pass?

In 1951, following the second passage of the Commonwealth Bank Bill through the House, the Senate, after a second reading debate extending over several days, referred it to a select committee. This was said by Prime Minister Menzies to constitute 'failure to pass', a phrase which encompassed 'delay in passing the bill' or 'such a delaying intention as would amount to an expression of unwillingness to pass it'. The Attorney-General, Senator J.A. Spicer, wrote that the phrase, 'failure to pass', was intended to deal with procrastination. Professor K.H. Bailey, the Solicitor-General, considered, *inter alia*, that 'adoption of Parliamentary procedures for the purpose of avoiding the formal registering of the Senate's clear disagreement with a bill may constitute a 'failure to pass' it within the meaning of the section'. The Deputy Leader of the Opposition in the House of Representatives, Dr H.V. Evatt, had previously been reported in the press as saying that referral of legislation to a select committee, being clearly provided for in the standing orders of the Senate, was not a failure to pass.

In 1975, the High Court held that the proposed law creating the Petroleum and Minerals Authority had not, as claimed, 'failed to pass' the Senate on 13 December 1973 (the day the bill was received from the House of Representatives for the first time) and, as a result, it was declared not to be a valid law of the Commonwealth. The second reading was not, in fact, negatived a first time in the Senate until 2 April 1974. In its judgment, the High Court held that 'The Senate has a duty to properly consider all Bills and cannot be said to have failed to pass a Bill because it was not passed at the first available opportunity; a reasonable time must be allowed'. In so deciding, the majority observed that the opinions of individual members of either House 'are irrelevant to the question of whether the Senate's action amounted to a failure to pass' (*Victoria v. Commonwealth*, 1975 7 ALR 2.)

Since 1990 most significant or controversial bills have been referred to a Senate committee for examination and report. As this procedure is now an established part of the legislative process in the Senate it is unlikely that the referral of a bill to a committee would in itself now be regarded as a failure to pass in terms of section 57.

Since 1995 consideration of legislation introduced into the Senate has, unless specifically exempted, been automatically adjourned until the next period of sittings (standing order 111). On 20 May 1996 the government moved a motion to exempt the Telstra (Dilution of Public Ownership) Bill 1996 from the Senate's deadline for the consideration of bills but an amendment was moved to this motion to refer the bill to a committee for report by 22 August 1996. This amendment, which was passed on the following day, required the committee to consider a lengthy list of issues arising from the bill. It is fairly clear that this action by the Senate could not be held to be a failure to pass the bill within the meaning of section 57. The Senate could have refused to grant exemption to the bill and then referred it to a committee in the August sittings, and even this probably could not be held to constitute a failure to pass.

3. It is not necessary for the Houses to be dissolved without delay once the conditions of section 57 have been met.

According to the High Court:

> This interpretation follows both from the language of s. 57, which provides for express time limits in relation to other parts of the procedure laid down by the section but provides for none in respect to the interval between the Senate's second rejection of a proposed law and the double dissolution …

Inter alia, the Court observed that:

> "undue delay" would be impossible of determination by the court. (*Western Australia v. Commonwealth*, 1975 7 ALR 160.)

4. Not only is it not necessary for simultaneous dissolutions to follow a second rejection etc. by the Senate 'without undue delay', it is not usual for account to be taken of the currency of legislation when it is submitted as a basis for simultaneous dissolutions.

Thus, in 1983, Governor-General Sir Ninian Stephen simply noted that 'in the case of each of these measures a considerable time has passed since they were rejected or not passed a second time in the Senate.' (Governor-General to Prime Minister, 4 February 1983, Parliamentary Paper 129/1984, p. 43.)

5. There is no limit to the number of proposed laws on which simultaneous dissolutions of the Houses may be based.

The first dissolutions based on more than one bill occurred in 1974 (subsequently in 1975 and 1983). The High Court has ruled that: '… a joint sitting of both Houses of Parliament convened under s. 57 may deliberate and vote upon any number of proposed laws in respect of which the requirements of s. 57 have been fulfilled.' (*Cormack v. Cope*, 1974 131 CLR 433). As Justice Sir Ninian Stephen observed: '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.' (*ibid*., p. 469).

6. The political or policy significance of legislation is not material to a decision to accede to a request that both Houses be simultaneously dissolved.

This issue arose in 1914. The Opposition in the Senate, which contested the Governor-General's decision to grant simultaneous dissolutions, protested that the proposed legislation, the Government Preference Prohibition Bill, was not a vital measure and that the deadlock had been contrived. That the deadlock was contrived in a narrow sense cannot be disputed for this is clearly set out in a memorandum furnished to the Governor-General by Prime Minister Joseph Cook which stated that when it became 'abundantly clear' that the Opposition had taken control of the Senate, 'we [the Government] decided that a further appeal to the people should be made by means of a double dissolution, and accordingly set about forcing through the two short measures for the purpose of fulfilling the terms of the Constitution'. (Parliamentary Paper 2/1914–17, p. 3.) It has been customary subsequently for prime ministers, when proposing simultaneous dissolutions, to stress the significance of the legislation involved.

7. Even where the conditions for simultaneous dissolutions as prescribed in section 57 have been met, it is customary for advice to be provided to the Governor-General on the 'workability of Parliament'.

For example, prime ministers have argued that the government's legislative program was being delayed or thwarted, that good government and secure administration were extremely difficult, and that a dissolution of the House of Representatives alone would not necessarily resolve the situation.

Joint sittings

Simultaneous dissolutions of the two Houses of the Parliament do not necessarily ensure that the proposed law(s) in dispute between them will be settled. The two houses constitute distinctive reflections of electoral opinion and it is possible, particularly when public opinion is closely divided, that there will be different majorities in the two houses following simultaneous elections. The Constitution therefore provides a means of resolving disagreements which continue after simultaneous dissolutions. Paragraphs 2 and 3 of section 57 provide:

> If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.
>
> The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

The requirements for a joint sitting are thus that following simultaneous elections for the two houses, the proposed law must again be passed by the House of Representatives, 'with or without any amendments which have been made, suggested, or agreed to by the Senate'. If the Senate then rejects, or fails to pass the proposed law(s) or passes it (them) with amendments to which the House does not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

At the joint sitting the members present 'may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives'.

The joint sitting is empowered to consider amendments proposed by one house and not agreed by the other. To take effect these amendments must be affirmed by an absolute majority of the total number of senators and members of both houses. The wording of this provision concerning amendments presents some difficulties of interpretation, (see C.K. Comans, 'Constitution, section 57, further questions', *Federal Law Review*, 15:3, September 1985, p. 243). It has been argued that the provision does not allow the government to submit to a joint sitting completely new provisions which have not previously been considered by the Senate, as this would amount

to de facto unicameralism for any legislation following a simultaneous dissolution, and that therefore the provision refers only to amendments agreed to by the Senate and amendments proposed by the House in substitution for Senate amendments prior to the dissolution.

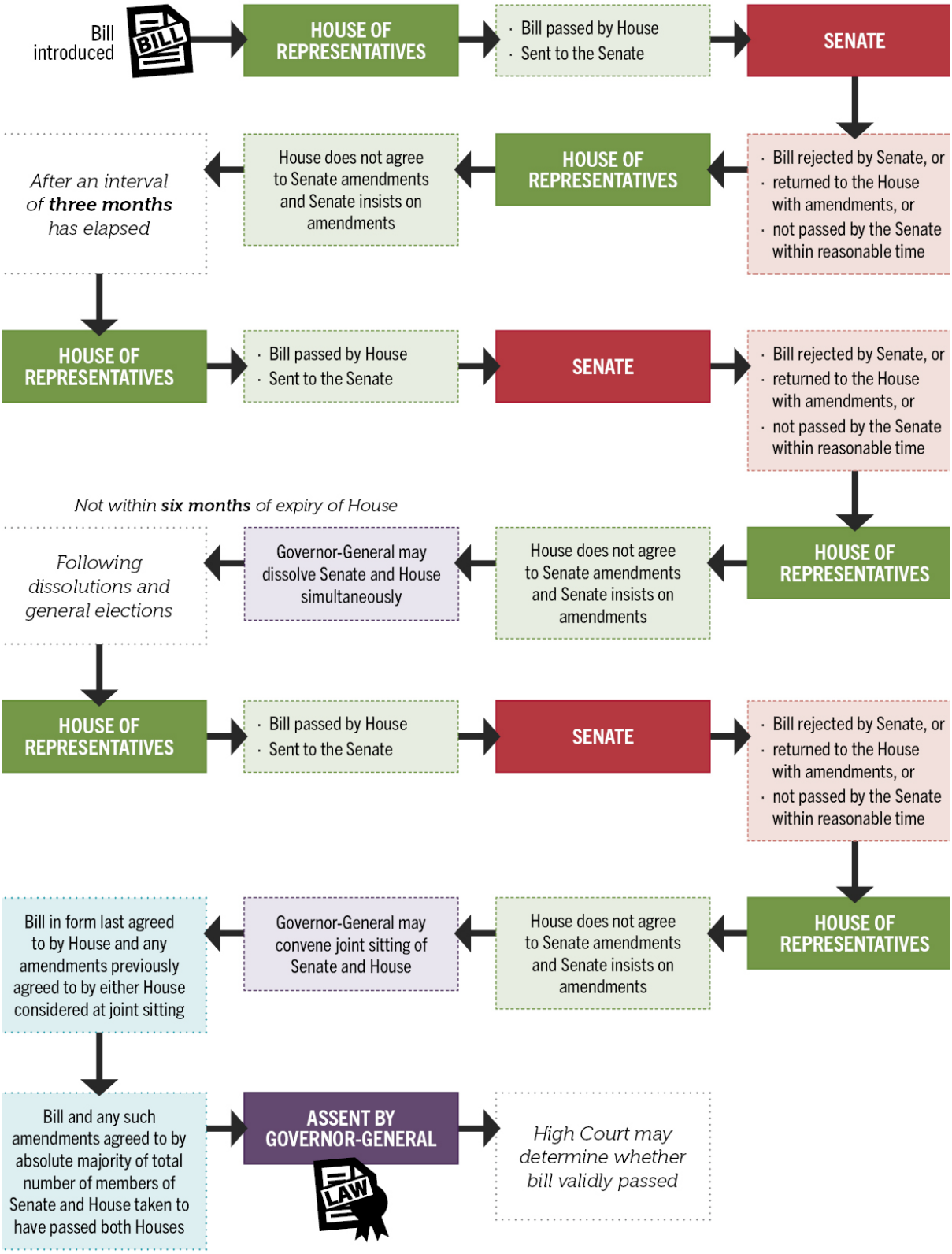
The proposed law itself, with the amendments, if any, must likewise be affirmed by an absolute majority of the total number of senators and members.

In the history of simultaneous dissolutions the consequent elections have brought the disputes decisively to a conclusion on four occasions: 1914, 1951, 1975 and 1983. On only one of these occasions, 1951, was the government whose legislation was at stake returned to office and in that instance it also secured a majority in the Senate.

On three occasions, however, the resulting elections have not been sufficient to resolve the fate of the legislation in dispute. In 1974, the Whitlam Government, although supported by a majority in the House, still lacked support for the disputed legislation in the Senate. As a consequence, a joint sitting was convened. Legislation passed at the joint sitting was subsequently challenged in the High Court and one bill was invalidated because it had not met the conditions of section 57. On the other occasion, in 1987, the bill in contention was abandoned by the government after the election. After the most recent simultaneous dissolution in 2016, the Turnbull Government narrowly retained its majority in the House but lacked a majority in its own right in the Senate. It secured the passage of the disputed legislation after amendments made in the Senate were agreed to by the House.

Joint sitting of the houses of the Australian Parliament in August 1974

Disagreement between the Houses



Source: *Odgers' Australian Senate Practice*,14th edn, Canberra, 2016 p. 771

... in the constitution as framed there is bound to be conflict between the two houses ... It is a contingency that a wise man would provide for so as to frame a constitution which will bend and not break. It would be a terrible state of affairs in future if we provided a constitution so rigid, that unconstitutional means would have to be adopted by the people to give expression to their wishes. Surely wise men entrusted with the task of framing a constitution ... would provide some constitutional means by which, in the face of inevitable conflict ... legislative deadlocks may be ended, and the people themselves may give expression to their opinions.

The Hon J.H. Carruthers, Australasian Federal Convention, Sydney, 1897, *Official Record of Debates*, p. 543

The executive government and simultaneous dissolutions

Section 57 of the Constitution was intended to provide a mechanism for resolving deadlocks between the two houses in relation to important legislation. By judicial interpretation, and by the misuse of the section by prime ministers over the years, it now appears that simultaneous dissolutions can be sought in respect of any number of bills; that there is no time limit on the seeking of simultaneous dissolutions after a bill has failed to pass for the second time; that a ministry can build up a 'storehouse' of bills which may be used to 'trigger' simultaneous dissolutions; that the ministry which requests simultaneous dissolutions does not have to be the same ministry whose legislative measures have been rejected or delayed by the Senate; that virtually any action by the Senate other than passage of a measure may be interpreted as a failure to pass the measure, at least for the purposes of the dissolutions; and that the ministry does not need to have any intention to proceed with the measures which are the subject of the supposed deadlock after the elections. By introducing a bill which is certain of rejection by the Senate on two occasions, a ministry, early in its life, can thus give itself the option of simultaneous dissolutions as an alternative to an early election for the House of Representatives. This gives a government a *de facto* power of dissolution over the Senate which it was never intended to have, and greatly increases the possibility of executive domination of the Senate as well as of the House of Representatives.

Further reading

- Rosemary Laing (ed.), Odgers' Australian Senate Practice, 14th edn, Department of the Senate, Canberra, 2016

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