Roos, Oscar and Green, Kelly 2016, Going to a 'double d': the 2016 federal election and the Constitution, Alternative law journal, vol. 41, no. 3, pp. 165-168.

Published online at: https://www.altlj.org/publications/current-issue/product/994-going-to-a-double-d-the-2016-federal-election-and-the-constitution

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GOING TO A ‘DOUBLE D’
The 2016 federal election and the Constitution

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This year’s federal election was a special treat for those interested in Australian constitutional law and politics: it was our first double dissolution (or ‘Double D’) election for 29 years, and only the seventh in Australia’s political history. This article sets out the key Constitutional issues surrounding the 2016 election and its aftermath.

What is a double dissolution election?

A double dissolution election occurs when both Houses of the Commonwealth Parliament, the Senate and the House of Representatives, are dissolved prior to the election (hence: double dissolution), so that Australian electors get to elect both the entire House of Representatives and the entire Senate.

This differs from a normal federal election, when only the House of Representatives is dissolved. Consequently, at a normal federal election, Australian voters elect the entire House of Representatives but only half of the 12 senators representing each state, as well as the two senators representing the Australian Capital Territory and the two senators representing the Northern Territory.

The relevant provisions of the Constitution

Section 28 of the Constitution provides that “[e]very House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General”. Accordingly, each House of Representatives can last no longer than three years but can be dissolved earlier. Section 28 explains why, in Australia, we normally have a three year federal election cycle, with the occasional early election.

Section 13 provides that senators representing each state are elected for a fixed term of six years commencing on 1 July after their election, with half of those senators coming up for election every three years. The Senate is therefore different from the House of Representatives in that it exists continuously from election to election, whereas the House of Representatives is dissolved prior to each election.

Hence, a ‘normal’ federal election is when we elect the entire House of Representatives but only half the senators for each state. However, ss 13 and 28 do not explain how we might get to a double dissolution election. For that explanation, we have to go to s 57 of the Constitution and understand a little about the politics of the federation movement of the 1890s.

The key section — section 57

One of the more significant political problems confronting the federation movement was to draft a Constitution which would be acceptable to the colonists in the two most populous colonies (New South Wales and Victoria) and the four less populous colonies (Tasmania, South Australia, Western Australia and Queensland). Part of the solution was to create a Parliament which comprised a House of Representatives, where the number of members from each state would be based on the relative population of each state (s 24), and a strong ‘States’ House’ or ‘Senate’ (named after the Senate of the US which was designed with the same problem in mind), where the number of senators for each ‘Original State’ would be equal, irrespective of each Original State’s population (s 7).

However, this was not a complete solution. It was obvious to the framers that, just as had happened from time to time in the ‘bi-cameral’ colonial legislatures (which also had two houses), there would be times when the House of Representatives and the Senate would not agree on the passage of legislation, and that a mechanism would need to be inserted into the Constitution to break those legislative deadlocks. Hence s 57, which was drafted after the longest and most intricate debate of the 1897–8 Constitutional Convention, as a compromise between the perceived interests of the large colonies and the smaller colonies.

Section 57 is a complicated provision which provides for a simultaneous dissolution of both Houses where there is a deadlock in relation to a bill which has been initiated and passed by the House of Representatives but blocked by the Senate on two occasions, separated by an interval of three months. This interval allows for political negotiations, and for the Senate and the House of Representatives to reconsider their respective positions in relation to the deadlocked bill.

The 2016 Double Dissolution

The 2016 Deadlocked Bills

Although s 57 only requires one deadlocked bill, Prime Minister Malcolm Turnbull, in his advice to the Governor-General, relied on three: (i) the Fair Work (Registered Organisations) Amendment Bill 2014 (Cth); (ii) the Building and Construction Industry (Improving Productivity Bill) 2013 (Cth); and (iii) the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (Cth) (‘the Deadlocked Bills’).

What was the role of Sir Peter Cosgrove, the Governor-General?

Section 57 states that it is the Governor-General who dissolves both Houses. In reality, the role of the Governor-General in making that decision is minimal, consistent with the conventions of responsible government which normally require the Governor-General to act on the advice of the Prime Minister.

But the Governor-General may have some independent discretion, though the existence and scope of this remains unclear and controversial. There is considerable support for the view that the Governor-General is not bound to follow the advice of the Prime Minister, at least with respect to the existence of the conditions of fact required for a ‘deadlock’ as set out in s 57, such that she or he must be personally satisfied that those factual conditions exist. The correspondence between Prime Minister Turnbull and the
Governor-General, Sir Peter Cosgrove, concerning the double dissolution includes Sir Peter’s handwritten annotations on both the letter from the Prime Minister and the accompanying letter from the Attorney-General which indicate that he was satisfied that the conditions for a double dissolution were made out.

Two interesting legal twists

There were two interesting legal twists leading up to the double dissolution election. The first concerned the timing of the election and its impact on the budget and the second concerned changes to the Senate voting system.

The timing of the election and the budget

Section 57 provides that the simultaneous dissolution of both Houses ‘shall not take place within six months before the date of expiry of the House of Representatives by effluxion of time’. That expiry is dated from the day the House of Representatives first sits after a federal election, as ss 28 provides ‘[e]very House of Representatives shall continue for three years from the first meeting of the House’ (emphasis added). The House of Representatives elected at the September 2013 election first sat on 12 November 2013, which means that it was due to expire on 11 November 2016. Consequently, a double dissolution had to take place no later than 10 May 2016.

A problem for the government was that the Appropriation Acts supplying money to a number of government departments were only effective to 30 June 2016. Although the 2016–17 budget was due to be tabled in Parliament on 10 May 2016, a double dissolution on or before 11 May 2016 provided insufficient time to get interim Supply Bills through the Parliament for the ordinary services of government for the financial year beginning 1 July 2016 until after the election period. Consequently, the government brought the tabling of the budget forward one week to 3 May 2016 to allow sufficient time to get the necessary interim Supply Bills through Parliament (with the three interim Supply Bills passed by both Houses on 4 May 2016).

The change to the Senate voting system

Section 57 is usually (and perfectly legally) exploited for political gain by the government in power. In a double dissolution election campaign, the bill or bills that trigger the double dissolution ordinarily become only one of the issues around which the election is fought and frequently fade into the background, as happened, largely, in the 2016 campaign. One of the main political reasons for holding a double dissolution election, as opposed to a normal election, is that it allows the government to capitalise on its political popularity to elect a Senate which is dominated by senators aligned with the government (assuming that it is popular — deeply unpopular governments do not usually go to an early election, let alone a double dissolution).

The compulsion, however, is that at a double dissolution election, it is actually easier for minor parties and independents to be elected to the Senate, as the quota for election under the proportional representation system is effectively halved (remember: each state at a double dissolution election elects 12 senators not six). This effect was somewhat counteracted in the 2016 federal election by a new Senate voting system which was intended to prevent ‘preference harvesting’ by micro-parties. The government successfully negotiated these changes through the Senate (with the support of the Greens’ senators) on 18 March 2016. They require voters who vote above the dividing line on the Senate ballot paper (with 96.5 per cent of electors doing so in the 2013 federal election) to preference, by consecutive numbering, at least six groupings of candidates. Previously, voters voting ‘above the line’ were only allowed to select one grouping, such that their preferences were distributed according to complex group voting tickets negotiated as between the various political parties, including micro-parties who had succeeded in ‘gaming’ the system. This resulted in a number of senators being elected at the 2013 federal election with a very small first preference vote.

These changes to the Senate voting system were challenged by a Family First Senator from South Australia, Bob Day, but that challenge was expeditiously dismissed by the High Court, consistent with its previous decisions which gave the Commonwealth Parliament considerable leeway in prescribing the system of voting. In summary, the expression ‘directly chosen by the people’, which appears in both ss 7 (regarding the Senate) and 24 (regarding the House of Representatives), and the expression ‘the method of choosing senators’ in s 9, do not constitutionally mandate a particular voting system. What is required is that electors are presented with a ‘full and free choice between competing candidates for election’ and the method of voting for candidates is direct (as opposed to, for example, the electoral college system, which is used to elect the President of the United States).

The aftermath of the 2016 Double Dissolution election — what are the Constitutional issues?

The outcome of the 2016 double dissolution election was that the Coalition (which is comprised of the Liberal, National, Liberal National and Country Liberal Parties) was returned to government with a reduced majority in the House of Representatives. In the new House, 76 of the 150 elected members will commence their terms as members of the Coalition, which is sufficient to give the re-elected Coalition government a slender working majority, while the Australian Labor Party (with 69 members) once again forms the opposition. As for the 76 newly elected senators, the Coalition government is confronted, like most federal governments since World War II, with a Senate in which it does not have a clear majority. In the immediate aftermath of the double dissolution election, it is not entirely clear whether the changes to the Senate voting system achieved the desired prevention of ‘preference harvesting’ by micro-parties. This uncertainty will remain until a detailed rigorous analysis of preference distribution is undertaken. However, a preliminary assessment is that these reforms were successful in terms of controlling preference distributions so as to ensure votes were counted and distributed in a manner which more accurately reflected ‘the will of the people’.

There are a number of constitutional issues which surround the new Parliament as elected at the 2016 election.

The division of senators

Because all senators are elected at a double dissolution election (and normally only half the senators for each state come up for election every three years), there has to be some mechanism to divide the senators for each state into two classes, that is, six ‘short-term’ senators, whose terms will expire in three years, and six ‘long-term’ senators, whose terms will expire after the usual period of six years. Section 13 of the Constitution provides for this division, including a deeming provision that the duration of the term of service of state senators elected after a double dissolution election is back-dated to 1 July preceding the date of election (that is, for the 2 July 2016 double dissolution election, 1 July 2016). Notably, however, s 13 does not actually set out the rules that will be applied to divide the senators, leaving this up to the Senate.
There are two existing methods. The traditional method, which has been used by the Senate since the first federal election in 1901 (which also required a one-off division), is based on order of election, with the ‘first’ six senators for each State becoming long-term senators, and the remaining six becoming short-term senators. Since the introduction of proportional representation in the Senate in 1948, the traditional method can create serious anomalies which distort the election results. Consequently, provision for an alternative, fairer method, known as the re-count method, was inserted into the Commonwealth Electoral Act 1918 (Cth) in 1984. This amendment requires the Commonwealth Electoral Office to re-count the Senate ballot papers for each state, as if the election were a normal half-Senate election, to identify those six senators for each state who would have been elected if only six Senate seats for each state were up for election. It is presumed that the Senate will then adopt the results of the re-count so that it will class the 36 senators ‘elected’ in the re-count as long-term senators. Interestingly, in the first double dissolution election after the 1984 amendments in 1987, the Senate chose the traditional method and ignored the re-count method, probably due to the political self-interest of the Labor and Australian Democrat senators who could command the numbers in the Senate. Although the Senate had passed two (non-binding) resolutions since 1987 that it would, in future, use the re-count method, on 31 August 2016 the new Senate voted, once again, to adopt the traditional method, apparently because it favoured the senators who represent the major parties.

The fate of the Deadlocked Bills — a joint sitting?

Section 57 does not require a re-elected government to reintroduce the bill or bills that triggered the double-dissolution into the new Parliament. On the assumption that the re-elected Coalition government does introduce one or more of the three Deadlocked Bills into the Parliament, it is likely, based on the political make-up of the new Senate, that one or more of those Bills will fail to pass the Senate. For the second time in Australia’s history, we may then move to the penultimate stage of the s 57 procedure: a joint sitting. A joint sitting is a special sitting of Parliament where both Houses sit together and deliberate on the s 57 deadlocked bill (or bills) together. Normally, one would expect the will of the government to prevail at a joint sitting as it will normally have a clear majority in favour of the bill (or bills) in the House of Representatives and s 24 of the Constitution provides that, ‘as nearly as practicable’, the number of members of the House of Representatives shall be twice the number of senators. This is what happened at Australia’s only previous joint sitting in 1974. However, because the Coalition government was re-elected with such a slender majority, and because of the large and disparate number of senators elected to the new Senate from outside of the major parties, it is difficult to predict whether one or more of the Deadlocked Bills would pass at a joint sitting of the new Parliament. It is also important to note that nothing in s 57 compels the Prime Minister to advise the Governor-General to convene a joint sitting after a double dissolution election. In the face of implacable Senate resistance, the Coalition government may simply decide to abandon its attempts to enact the Deadlocked Bills in the current parliament.

The fate of the re-elected Coalition government — another early election?

The Constitution has virtually nothing to say about political parties and nothing at all to say about the office of Prime Minister. Who gets to be Prime Minister, and which party, or coalition of parties, gets to form a government, is determined by politics and the operation of unwritten (and unenforceable) rules known as constitutional conventions.

By convention, the party or coalition which commands a majority in the House of Representatives forms government and its leader becomes Prime Minister. With such a slender majority, there is always a possibility that the Coalition government will lose its majority during the course of the current Parliament through defections from the Coalition, or through the death or resignation of Coalition members and losses at any subsequent by-elections. This, in itself, would not precipitate an early election.

One possibility is that the Coalition government would seek to carry on as a minority government with the support on confidence and supply of a sufficient number of the cross-bench members (currently five); the second possibility, if it loses the confidence of a majority in the House, is that the Governor-General would call upon the Leader of the Opposition to see whether he or she can form a government with the confidence of the House. A motion of no confidence may be presented (usually by a member of the opposition) where the government is said to have lost the support of a majority of the House of Representatives. Such a motion is generally made expressly and accompanied by a direct vote of the House. In such circumstances, by convention, the Prime Minister is expected to resign or, alternatively, advise the Governor-General to call an early election. However, as the Governor-General, by convention, is required to act on the advice of the Prime Minister only while the Prime Minister retains the confidence of the House of Representatives, the Governor-General is not obliged to follow the advice to call an early election once the Prime Minister no longer retains that confidence.

However, as noted previously, our House of Representatives does not have a fixed minimum term (only a maximum term of three years), so the possibility of another early election cannot be ruled out. This may occur if the Parliament becomes so divided that neither the Coalition nor the Australian Labor Party can form a government. In such an extraordinary circumstance, the Governor-General may intervene by commissioning someone (most likely the previous Prime Minister) to advise him to call an early election and act in a ‘caretaker’ capacity until a new government can be formed after the election. Alternatively, and far more likely, an early election may occur where the Prime Minister chooses to call such an election for political reasons, for example, to capitalise on any resurgence in the popularity of the government.

However, the Constitution creates a political problem for any government who wishes to go to an early election. Section 13 provides that elections for state Senate vacancies can only be held in the last 12 months of the terms of service of the state senators. This means that no election in relation to the short-term senators who were elected on 2 July 2016 (and whose terms began on 1 July 2016) can take place before 1 July 2018. Consequently, if the Coalition government wants to go to an early election before 1 July 2018, then the election would be for the House of Representatives (and the four territory senators) only, and the elections for the Senate and the House of Representatives would become out of step, leading to a separate ‘half-Senate’ election — for the 36 short-term senators — in the period from 1 July 2018 to 30 June 2019. The last time Australia had a half-Senate election was 1970, and it was a political disaster for the then Gorton government, precipitating John Gorton’s loss of the prime ministership. The prevailing wisdom since then has been that governments should try to avoid desynchronising House of Representatives and Senate elections and the prospect of a half-Senate election at almost all costs.

There remains a final constitutional option open to the Coalition government: another double dissolution election! This would deal with the half-Senate election (political) problem detailed above, but it would be a complicated process. Section 57 does not provide
for a second double dissolution election. So the House of Representatives would have to go back to the beginning and initiate a bill which was blocked by the Senate, and then wait for an interval of three months before again passing the bill, and wait again for the bill to be blocked by the Senate, so that the bill could become a new double dissolution trigger. Assuming that these constitutional requirements could be met, the decision to go to yet another double dissolution election would be a matter ultimately for the Prime Minister, but again political wisdom would suggest that it would be fraught with risk. The Australian electorate can pass harsh judgment on any government which forces them to return to the ballot box early on repeated occasions.

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1. The anomalous position of the four ‘territory’ senators representing the Australian Capital Territory and the Northern Territory, whose terms expire with the dissolution of each House of Representatives, is a consequence of the Commonwealth Parliament’s broad powers under s 122 of the Constitution to make laws with respect to the territories and does not affect the basic composition of the Senate as a ‘States’ House: see generally Western Australia v Commonwealth (1975) 134 CLR 201 (‘First Territorial Senators Case’).
11. Commonwealth Electoral Act 1918 (Cth) s 239(2).
12. Commonwealth Electoral Act 1918 (Cth) s 272, as repealed by Commonwealth Electoral Amendment Act 2016 (Cth) s 28.
16. Day v Australian Electoral Officer for the State of South Australia; Madden v Australian Electoral Officer for the State of Tasmania (2016) 331 ALR 386, 401 [48]–[50].
22. Commonwealth, Parliamentary Debates, Senate, 15 September 1987, 96–97 (Senator Short). See also Green, above n 20.
23. Harry Evans and Rosemary Laing (eds), Odgers’ Australian Senate Practice (Department of the Senate, the Eleventh ed, 2012) 124.
25. The one exception can be found in s 15 of the Constitution which deals with casual Senate vacancies and was inserted in its current form following a successful 1977 referendum.
27. See generally IC Harris, BC Wright and PE Fowler (eds), House of Representatives Practice (Department of the House of Representatives, 5th ed, 2005) 316–9.
28. Ibid 47. See also Winterton, above n 5, 81–2.
29. The Governor-General would generally only bring about such a dissolution where Parliament cannot function and no alternative government can be formed by the leader of the opposition: Twomey, above n 26, 56–7.
30. Ibid 57.