



Alcopops makes the House see double: 'the proposed law' in section 57 of the Constitution

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Executive summary

- The government's proposal to re-introduce the alcopops bills has raised some questions about how 'identical' the bills must be to serve as a double dissolution trigger. These questions are made slightly more complex by the unusual legislative nature of the customs and excise arrangements.
- Section 57 (the double dissolution section), while not frequently considered by the High Court, is generally regarded as being significant not only to resolve differences between the chambers of Parliament but also to protect the interests of the Senate. Comparable provisions in other jurisdictions have a more clearly articulated process for resolving the question of how different the successive bills may be. Recommendations have been made that Australia should make similar provisions, however our Constitution is difficult to change.
- Considering what aspects of the 'the proposed law' must be identical requires consideration of the question 'to what is the phrase 'the proposed law' referring?'
- Rather than an identically worded bill the expression 'the proposed law' might be thought to focus on the final form of the resultant legislation, which is all that must be preserved as 'textually identical'. This focus could lead to a conclusion that the substantive provisions, rather than the more formal or technical provisions of a bill, are all that need be preserved as 'identical'. Thus a commencement date could be adjusted without violating the need to preserve the identity of the one 'proposed law'. However commencement dates do, on occasion, have a significance, and, since there is no mechanism for determining when such an adjustment should be given that significance, the safest path for a government will be to preserve absolute 'textual identity'.
- The argument that the surrounding circumstances of a Bill must be kept identical has been made by some commentators. This requirement is not apparent on the face of the Constitution and would introduce problems with its interpretation and parameters. In the course of the minimum three months between any bill's various introductions there will necessarily be a variety of social, political and possibly legal changes. It may be preferable to allow the Parliament to resolve any problematic issues arising from dated drafting than to have the High Court inquire into an inherently political matter, with the possible result that section 57 would be unable to apply to some bills and their reintroduction.

- It may be possible that the various stages of the alcopops legislation need not clash with the proposition that relevant arrangements should be identical.
- Changes in constitutional interpretation in the High Court mean that it is very difficult to predict the outcome of challenges to action under the section. An initial hurdle faced by any such challenge would require the establishment of the Court's jurisdiction of areas that may be more appropriately resolved through the political process, and while the Court may review any resultant legislation's validity, the one action that is unlikely to be challenged by the Court is the Governor-General's granting of a double dissolution.

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Introduction

The government's stated intention of reintroducing what has come to be known as 'the alcopops legislation' has created some interest in whether the reintroduction of the bills and any subsequent rejection could constitute a 'double dissolution trigger.'

This discussion takes place in the context of the Constitution's section 57 ('the double dissolution section'). This provision of the Constitution has produced very little judicial guidance on its interpretation. Indeed it has only been called on six times in our constitutional history.¹ In the face of this relative dearth of authority, this paper looks at the strengths and weaknesses of the various views currently being offered regarding the operation of the section, as well as identifying the few relevant authorities and indicative statements by the judiciary.

The current focus on the alcopops legislation may pass uneventfully, however the debate offers an opportunity to consider the operation of section 57 and its likely interpretation, and this can be expected to remain a topic of interest for some time to come.

Legislative Background to the debate

On 26 April 2008 the Taxation Commissioner published a notice of intention to propose an excise Tariff alteration, the Excise Tariff Proposal (No 1) 2008 (the Tariff Proposal). It said 'the alterations operate on and from 27 April 2008.' On 13 May 2008 the proposed Excise Tariff alteration was moved by motion in the House of Representatives.

On 11 February 2009 the Excise Tariff Amendment (2009 Measures No 1) Bill 2009 (the Excise Tariff Amendment Bill) and the Customs Tariff Amendment (2009 Measures No. 1) Bill 2009 (the Customs Tariff Amendment Bill) were introduced (collectively 'the original

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1. 1914 (1 bill) (Cook Liberal Government)
1951 (1 bill) (Menzies Liberal-Country Party Coalition Government)
1974 (6 bills) (Whitlam Labor Government)
1975 (21 bills) (Whitlam Labor Government)
1983 (13 bills) (Fraser Liberal-National Party Government)
1987 (1 bill) (Hawke Labor Government)

See further 'Simultaneous Dissolutions', Parliamentary Handbook of the Commonwealth of Australia, Twenty-ninth edition, 2002, pp 440–445, viewed on 1 May 2009 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22handbook%2Fhandbookparts%2Fparl_40_3%22. This publication gives the texts of the proclamations made by the Governor-General when dissolving both houses of Parliament, including reasons for the dissolutions. It includes dates of the rejection of each bill and the dissolution of Parliament, and also House of Representatives Practice, 4th ed, 2001, Chapter 13: Disagreements between the Houses, pp.443–468, viewed on 1 May 2009 <http://www.aph.gov.au/house/pubs/PRACTICE/4thpractice/4Ch13.pdf>

bills').² The original bills, which would have validated the Tariff Proposal, were passed by the House of Representatives on 25 February 2009. They were rejected by the Senate on 18 March 2009.

Further information on the Bills and their backgrounds, in particular their reliance on the *Excise Tariff Act 1921* (the Excise Tariff Act) and *Customs Tariff Act 1995* (the Customs Tariff Act), is available in the Bills Digest: <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd100.pdf>.

The original provisions of the two bills were relatively simple:

- The Excise Tariff Amendment Bill contained one operative item (item 1) which sought to increase the rate of excise imposed on alcopops under item 2 of the Schedule to the Excise Tariff Act from \$39.36 to \$66.67 per litre of alcohol.³ The commencement provision said 'This Act is taken to have commenced on 27 April 2008' (clause 2).
- The Customs Tariff Amendment Bill sought to amend Column 3 (the rates of duty column) in Schedule 3 of the Customs Tariff Act so that the rates accord with the Excise Tariff Act (i.e. an increase to \$66.67 per litre of alcohol).⁴
- The Customs Tariff Amendment Bill also sought to amend Column 3 in Schedules 5 and 6 of the Customs Tariff Act to show that the rate of duty for those various beverages originating from Thailand and the US is also \$66.67 per litre of alcohol.⁵
- The Customs Tariff Amendment Bill had the same commencement date: 'This Act is taken to have commenced on 27 April 2008' (clause 2).

The Customs Tariff Amendment Bill also contained, finally, an applications provision (item 34) which stated, for the avoidance of doubt, that the amendments apply in relation to goods imported into Australia on or after 27 April 2008, and goods imported into Australia before 27 April 2008, where the time for working out the rate of import duty on the goods had not occurred before 27 April 2008.

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2. It can be noted here that the Constitution requires in section 55 that these matters be covered in separate Bills: 'Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.'
 3. This would have affected 'other excisable beverages' not exceeding 10% by volume of alcohol. 'Other excisable beverages' are defined as any beverage containing more than 1.15% alcohol by volume, excluding beer, brandy or wine. (Schedule 1 of the Excise Tariff Act: Excise Duties item 2 and definitions given in the Schedule).
 4. The Customs Tariff Act uses the same basic definitions as the Excise Tariff Act.
 5. This particular mention is due to the relevant free trade agreements in place.

After the Bills were rejected by the Senate the continued collection of the excise was challenged in the Federal Court in *Suntory (Aust) Pty Ltd v Commissioner of Taxation* [2009] FCA 348.⁶ In essence the argument was that after the original bills had been rejected by the Senate, the Tariff Proposal should be viewed as ceasing to have effect. Without any legal basis supporting it, the argument ran, the excise was being illegitimately collected. In the course of the case there were general aspersions cast on the Excise Tariff Act – both for its endorsement of the general practice of collecting revenue without a sufficient legislative basis⁷ and also on section 114 of the Excise Tariff Act which protects the actions of officials collecting the excise.⁸ The case was stayed but is listed to be considered in greater detail after the first Tariff proposal fully ‘expires’ on 13 May 2009.

The case did not directly address the constitutional question of a double dissolution, however Justice Jagot did reflect on the possibility of just such an event when deciding to stay the case. She concluded that it was not the court’s role to second guess what the Parliament might finally do regarding the Excise Tariff Amendment Bill before the end of the relevant period and said:

...nothing in the [Excise Act](#) indicates that s 114 [which precludes action against excise officials] is excluded if the Senate declines to pass a Bill giving effect to an Excise Tariff alteration. If a motion has been moved in the House of Representatives there is an Excise Tariff alteration for the purposes of the Excise Act ... This is the ordinary meaning of the definition of Excise Tariff alteration in [the Act] and is consistent with the terms of s 114. It is also consistent with [s 57](#) of the [Constitution](#) which regulates disagreements between the House of Representatives and the Senate. [Section 57](#) of the [Constitution](#) contemplates that the proposed law may be re-introduced and makes such a re-introduction a condition precedent to a double dissolution. Accordingly, and adopting the Commissioner’s written submissions at [29]:

6. *Suntory (Aust) Pty Ltd v Commissioner of Taxation* [2009] FCA 348, 15 April 2009, viewed 20 April 2009, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2009/348.html>

7. Submissions by the Applicant included the following commentary:

In contrast, neither s.114 nor any other provision of the *Excise Act* renders the collection of money under a Tariff Proposal lawful. This gap has been recognised since 1961 and has never been filled: see Castles and Reid, “Taxation by Parliamentary Resolution – A Case for an Australian Provisional Collection of Taxes Act”, (1961) 35 Australian Law Journal 74, referred to by McHugh and Gummow in *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453 (fn 33)... (Amended outline of applicant’s submissions, filed in the Federal Court 28 April 2009, *Suntory (Aust) Pty Ltd ACN 001 628 780 v Commissioner of Taxation* NAS 319 of 2009).

8. Submissions by the Applicant included the following commentary:

Any ‘duty’ collected by the Executive in circumstances such as the present is done so *colore officii*. It is, in other words, a form of extortion by the Executive: *Wool Tops case*, Isaacs J at 463, Starke J at 460; *Mason v New South Wales* (1959) 102 CLR 108 at 139 per Windeyer J.

...the rejection of a Bill on one, or even more than one, occasion does not signal a definitive end to the parliamentary processes in respect of an Excise Tariff alteration proposal...⁹

This paper does not further consider the issues regarding the status of the customs and excise arrangements, but will confine itself to looking at aspects of section 57.

Subsequent Developments regarding the Bills

In April 2009 the Government announced plans to reintroduce the rejected legislation.¹⁰ The announcement, in brief, said the Government's intention was to:

- Introduce a new tariff proposal with effect from 14 May 2009, ensuring the alcopops measure remains in place into the future. The Government will then introduce legislation to confirm the measure in the same session of Parliament; and
- Introduce legislation to validate the revenue collected between 27 April 2008 and 13 May 2009.

On the basis of this announcement the Leader of the Opposition, Mr Turnbull, was reported to have commented that '[t]his bill cannot be a double dissolution trigger',¹¹ and again (the following day):

From what we've been told by the Health Minister, the bill she's proposing to introduce is a completely different bill from that one that was rejected by the Senate previously and so the double dissolution point doesn't arise.¹²

Subsequently the Shadow Attorney-General, Senator Brandis, gave a more detailed endorsement of advice from the Clerk of the Senate, Mr Evans, which suggested the mooted bill to confirm the Tariff Proposal's increased rates could not serve as a double dissolution trigger, given the likely passage of events intervening between the initial introduction of the bills and the subsequent re-introduction of the bills. Senator Brandis is reported as

9. *Suntory (Aust) Pty Ltd v Commissioner of Taxation* [2009] FCA 348 per Jagot J at [21].

10. Roxon, (Minister for Health and Ageing) and Swan, (Treasurer), *Government to re-introduce Alcopops Measure*, media release, 15 April 2009, viewed 1 May 2009, [http://www.health.gov.au/internet/ministers/publishing.nsf/Content/1B83AE695EDDB017CA257599001ED182/\\$File/nr040.pdf](http://www.health.gov.au/internet/ministers/publishing.nsf/Content/1B83AE695EDDB017CA257599001ED182/$File/nr040.pdf)

11. AAP, 'Alcopops legislation no double dissolution trigger: Turnbull', 16 April 2009.

12. Ryan, 'Turnbull refuses to budge on alcopops bill', *The Australian*, 17 April 2009, viewed 1 May 2009, <http://www.theaustralian.news.com.au/story/0,25197,25345000-2702,00.html>

commenting that '...it is not enough that there be identity between the text of the two bills. There must also be identity as to their legal effect.'¹³

Offering a different perspective on this matter we have the Treasurer, Mr Swan, indicating that the government has legal advice that the reintroduction of a bill could constitute a double dissolution trigger,¹⁴ and Professor George Williams, a prominent constitutional lawyer, expressing the opinion that the reintroduced bills could qualify as a double dissolution trigger.¹⁵

The High Court has never given an explicit ruling on this question of 'identity' so it will help to look at its text.

Section 57

Section 57 is reproduced here in its entirety (with emphasis added):

Disagreement between the Houses

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.

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.

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13. Milne, 'Alcopops poll turns into fizzer', *The Australian*, 20 April 2009, viewed 1 May 2009, <http://www.theaustralian.news.com.au/story/0,25197,25356215-33435,00.html>. We are also indebted to Senator Brandis for the information that Mr Evans' advice draws upon the view of the 'former First Parliamentary Counsel, Charles Comans QC'.
 14. Ryan, 'Turnbull refuses to budge on alcopops bill', reported that a spokesman for Mr Swan said 'The Government has advice that rejecting this reintroduced bill would be a double dissolution trigger'
 15. George Williams, 'Alcopops bill could be a trigger to dissolution', *Sydney Morning Herald*, 21 April 2009, viewed 2 May 2009, <http://www.smh.com.au/opinion/alcopops-bill-could-be-a-trigger-to-dissolution-20090420-acms.html?page=-1>

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.

There has been significantly less consideration of this section compared to other sections of the Constitution. A trio of more significant cases which did involve its consideration by the High Court arose out of the 1974 dissolution.¹⁶ These cases considered various issues and may have established various principles but did not consider the precise issue that has arisen in discussions about whether the alcopops legislation could provide the trigger for a double dissolution: that is how much identity is required between the original and subsequent bills to satisfy the requirement in the section that '*the proposed law*' is reintroduced into the Parliament after having been rejected by the Senate.¹⁷

In contrast to the Australian Constitution's provision the question of 'how identical' the bills must be (and who is to decide this) is specifically addressed in the United Kingdom's constitutional legislation (the *Parliament Act 1911* (UK)). Subsection 2(4) of this UK Act provides:

A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill or to represent any amendments which are certified by the Speaker to have been made by the House of Lords [in the second session] and agreed to by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance to this section.¹⁸

16. *Cormack v Cope* ("*Joint Sittings case*") (1974) 131 CLR 432, [1974] HCA 28, viewed on 1 May 2009, <http://www.austlii.edu.au/au/cases/cth/HCA/1974/28.html>; *Victoria v Commonwealth* (1975) 134 CLR 81; [1975] HCA 39 viewed on 1 May 2009, <http://www.austlii.edu.au/au/cases/cth/HCA/1975/39.html>; *Western Australia v Commonwealth* (1975) 134 CLR 201; [1975] HCA 46, viewed on 1 May 2009, <http://www.austlii.edu.au/au/cases/cth/HCA/1975/46.html>

17. Identity is defined variously as 'quality of being the same: late L. identits , f. L. idem same,' *Concise Oxford Dictionary of English Etymology*, 2003, and 'the fact of being who or what a person or thing is. • the characteristics determining this' *Concise Oxford English Dictionary*, Twelfth edition, 2008.

18. *Parliament Act 1911* (UK) (as amended by the Parliament Act 1949), viewed 6 May 2009, <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1069329>. This provision is cited

The state of Victoria has incorporated a similar provision into comparable legislation. In the final report of the Constitutional Commission in 1988 there was a recommendation that a similar provision be inserted into our Constitution, (that is, a provision permitting necessary amendments to the replicated bill due to the time which has elapsed).¹⁹ Given the difficulties Australia has experienced in achieving constitutional change by referendum there is limited practical scope for making these changes. This may be unfortunate in the light of the Constitutional Commission's view that 'in its present form, s.57 is detrimental to stable government.'²⁰

Purpose of Section 57

There are a number of different perspectives on the purpose of section 57. On one level it is obviously in place to resolve deadlocks between the two Houses. From its text its purpose is identifiable as resolving conflicts between the two Parliamentary chambers regarding proposed legislation which has been (re)introduced into the lower Chamber after subsequent rejections by the upper Chamber, the passage of a specified period, a double dissolution and a joint sitting. An overly technical reading of the provisions may undermine the legitimate purpose of this constitutional provision, but if the Court or the Parliament fail to engage with the requirements of the section the Senate could be left considerably weakened.

Stephen J's account of the matter in *Victoria v Commonwealth* has a certain poetry as he explains:

Few, if any, of the provisions of the Constitution occasioned so much debate as did s. 57. It is clearly an extraordinary provision, a measure of last resort, introducing the unusual concepts of dissolution of an upper House and of temporary abandonment of the bicameral system, and this for the purpose of resolving disputes between the two plenipotent chambers. It would be a distortion of the history of the Constitutional Conventions to regard that solution which s. 57 represents as involving no more than the simple and categorical remedy now suggested on behalf of the Commonwealth, that the will of the House should prevail and should do so without delay. It would indeed have been a simple task of draftsmanship so to provide, but s. 57 took no such form...

An examination of the operation of s. 57 discloses that it in fact involves no simple notion that the will of the House should prevail; instead it contains a subtle solution to deadlocks between the Senate and the popular House. It relies, after the first occurrence of deadlock, upon providing opportunity for second, and perhaps wiser, thoughts and for negotiation and

in Carney, 'Section 57 of the Constitution - The Sixth Double Dissolution', (1989) 18 *Federal Law Review* 178.

19. *Final Report of the Constitutional Commission* (1988) Vol 1, paras 4.682-4.683. Once again the author is indebted to Carney for pointing to the reference.
20. *Final Report of the Constitutional Commission* para 4.650. The Commission actually goes further and considers that '[Section 57] is also detrimental to the review function of the Senate because the Senate is put at risk if it rejects a bill.'

compromise between the chambers, likely to be stimulated, no doubt, by the prospect that should this be unavailing each chamber may untimely face the electorate following double dissolution. Should legislative harmony nevertheless elude the legislature, the majorities in each chamber proving irreconcilable, double dissolution may ensue and freshly elected chambers, reflecting the current feeling in the electorate, will then address themselves afresh to the task of legislation, having, as a last resort, recourse to the ultimate arbiter of a Joint Sitting should they, like their predecessors, again disagree.²¹

He points out that the history of the section could be seen to illustrate its success because it has been used so infrequently and the chambers returned have twice been 'likeminded majorities.'²² He goes on to reject the thesis that the section should be seen as allowing the lower Chamber's will to vanquish the upper Chamber:

Of course at a Joint Sitting the will of the House majority is likely to prevail over that of an opposed Senate majority because the members of the House will necessarily outnumber the senators two to one - s. 24. This will not necessarily be so if the Senate majority is substantial and the House majority a slender one but with the advent of proportional representation in Senate elections any large majority in the Senate is perhaps unlikely. The point to be stressed, however, is that the will that is likely to prevail is not the same will that was manifest in the passing twice over of the proposed law by the old House before the double dissolution; it is, rather the will of a newly elected House, reflecting the current feeling of the electorate, and not the will of the old House.²³

Gibbs J in the same case also pointed out that:

...the procedure which the section provides for the resolution of differences between the Houses does not necessarily mean that the wishes of the House of Representatives will eventually be given effect.²⁴

Barwick CJ, as he then was, perceived the purpose of section 57 as vital to the preservation of the federal system by protecting the bicameral power of the States through the restrictions on a double dissolution and the careful laying out of parameters on the power to create either the dissolution or the unicameral house. It is significant that the only way a dissolution of the Senate can be achieved is through a double dissolution under section 57. Barwick CJ outlined the importance of the Senate in this matter:

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21. *Victoria v Commonwealth*, per Stephen J at 168, [12].
 22. *Victoria v Commonwealth*, per Stephen J at 168, [13]. Harry Evans, (ed), *Odgers' Australian Senate Practice*, Twelfth Edition, chapter 21, viewed 5 May 2009, <http://www.aph.gov.au/SENATE/pubs/odgers/pdf/chap21.pdf>, provides a much more comprehensive account of the results of the various dissolutions.
 23. *Victoria v Commonwealth*, per Stephen J at 169, [14].
 24. *Victoria v Commonwealth*, per Gibbs J at 150, [16].

the Senate was intended to represent the States, parts of the Commonwealth, as distinct from the House of Representatives which represents the electors throughout Australia. It is often said that the Senate has, in this respect, failed of its purpose. This may be so, due partly to the party system and to the nature of the electoral system: but even if that assertion be true it does not detract from the constitutional position that it was intended that proposed laws could be considered by the Senate from a point of view different from that which the House of Representatives may take. The Senate is not a mere house of review: rather it is a house which may examine a proposed law from a stand-point different from that which the House of Representatives may have taken.²⁵

This attitude contributed to his belief that it was the High Court's duty to intervene in appropriate cases (see below).

In *Australian Federal Constitutional Law*, Colin Howard looks at the Senate in the light of different forms of bicameralism and the different ways it could have been constituted to reflect regional interests. He comments with respect to section 57 that:

Whatever form of bicameral legislature one adopts however, a question arises about occasions when the two houses, debating separately, fail to agree about the passage of legislation.²⁶

He reflects on the different approaches in the UK and the US – the UK's lower house is given 'unquestionable supremacy' whereas the US has no mechanism for resolving disputes between the houses, leaving it all to the political realities of negotiation. He then goes on to comment:

The deadlock provision in the Australian constitution is exceedingly ponderous and protracted, so much so indeed that it can be reasonably suspected of having the basic purpose not of resolving a disagreement but of prolonging it until the political circumstances change in such a way that the problem disappears rather than resolves itself.²⁷

Finally we have a reflection on the matter from Carney:

The concern one may have for the adequacy and flexibility of the procedure prescribed by s 57 for the resolution of deadlocks between the Houses is probably misplaced when it is realised that the mechanism of a double dissolution has not been used, nor is likely to be used in the future, as the democratic solution to a dispute over specific legislation, but is used instead as a means of obtaining an early general election. On that basis, there is a change in one's approach to s 57, from initially seeking an effective dispute resolution mechanism to now ensuring its exercise does not become too easy.²⁸

25. *Victoria v Commonwealth*, per Barwick CJ at 122, [48].

26. Colin Howard, *Australian Federal Constitutional Law*, Third edition, 1985, p. 97.

27. Howard, p. 97.

28. Carney, p. 186.

This critical perspective on the section is not entirely reflected in the case history. Clearly the then Government did want to pass the *Petroleum and Minerals Authority Act 1973*, which was the subject of significant subsequent litigation and, while there may well have been an ulterior motive, this need not invalidate the apparent desire to achieve passage of the bill for that Act. Similarly, should the alcopops legislation become part of a double dissolution process it may be that a challenge to the Senate is desired, but the pursuit of a political objective does not preclude the pursuit of a policy objective. Dual motivations may be possible in this field.

An understanding of section 57 as a mechanism which should protect the Senate impacts on judicial attitudes to both its interpretation and its justiciability (that is, whether a matter is a fit subject for a court to adjudicate), and these matters will be discussed below.

'[T]he proposed law'

The Constitution's reference to 'the proposed law' is not language in popular or current usage.²⁹ The reference may be synonymous with 'the bill', the expression in current use, however there are semantic differences. The constitutional phraseology focuses on the final outcome – the law as it will be, or at least the law as it is proposed to become. It is to the ultimate goal of a bill, the passage of functional legislation, that our focus is directed. 'The Bill' refers to a document before the Parliament. 'The proposed law' refers to its final purpose, identifying the entity before Parliament as a means to its end rather than by reference to its current form. One could argue this semantic distinction has implications for the form of identity which must be preserved by 'the proposed law' in order to qualify as a 'double dissolution trigger' upon its reintroduction.

The use of the definite article in the section's references to 'the proposed law' is designed to stipulate some form of identity, so that the specific proposed law is trackable throughout its progress towards consideration at a joint sitting. As Stephen J said in *Victoria v Commonwealth*:

The phrase "the proposed law" recurs throughout s. 57 and its meaning changes and acquires added content as the section unfolds its procedural pattern.... At each stage of this process "the proposed law" acquires an additional quality, that of having been subjected to whatever process that stage has involved.³⁰

Stephen J's analysis of the section's reference to a 'proposed law' indicates a focus on substance rather than form. The phrase 'the proposed law', with its various layers of meaning, raises the question of what aspect, exactly, of 'the proposed law' is required to be kept identical. 'The proposed law' is proposed to become an act – legislation which 'does

29. The Constitution uses 'the proposed law' in the body of the sections, having referred to 'the Bill' in their titles.

30. *Victoria v Commonwealth* (1975) 134 CLR 81; [1975] HCA 39 per Stephen J at 178, [35].

something', so should the emphasis be on the achievement of that 'something' – the eventual aim of the law, or should the emphasis simply be on the reproduction of the identical text?

A seminal consideration of section 57 by C K Comans, 'Constitution, Section 57 - Further Questions', was published in 1985 and concluded that not only is there a need for absolute identity of text but also that there was some additional need for identity of circumstance and legal effect regarding 'the proposed law'. This paper uses 'textual identity' and 'contextual identity' to distinguish these two senses of 'identity'.

Textual Identity

There are enormously weighty and seemingly uniform non-judicial commentaries that advise the text of the proposed law must be absolutely identical as between the bill passed by the House of Representatives and rejected by the Senate and the Bill re-introduced into the House of Representatives.³¹ At least three learned articles,³² Professor Williams and Mr Evans all agree that the text must be identical.

It is unlikely any lawyer would venture to disagree with this weight of opinion, however a common sense approach might query the wisdom of such a requirement. The argument might run that, while it is reasonable to require that there be no alteration to the contentious bill's substantive provisions, a prohibition on amending items of a more minor or technical nature, such as commencement dates, is less reasonable. This argument may seem more compelling because section 57 requires a passage of time to elapse between the various versions of 'the proposed law', so the commencement date's alteration could simply reflect the necessary passage of time that will elapse between the bill's introduction and any passage under section 57. Furthermore it would seem illogical not to allow this adjustment to the extent that the passage of time does not change substantively the final purpose or intent of 'the proposed law'. During this time the original commencement date may have passed and the Parliament would be faced with the oddity of considering legislation introduced with a commencement date already passed.

This scenario has indeed taken place. In 1983 a precedent was set whereby the Bill's literal identity was preserved by reintroducing sales tax bills with a commencement date that had

31. Carney supplies the following list: 'J Quick and R R Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 685; May, *Practice of the House of Representatives* (1981) 44; D Pearce, "The Legislative Power of the Senate" in L Zines (ed) *Commentaries on the Australian Constitution* (1977) 149; C K Comans, "Constitution, Section 57 - Further Questions" (1985) 15 *Federal Law Review* 241' at p 180.

32. Carney; Comans, 'Constitution, Section 57 - Further Questions' (1985) 15 *Federal Law Review* 241 and Geoffrey de Q Walker, 'Lining up the Bills: Preparing for a Double Dissolution Double Dissolutions and Joint Sitzings of Federal Parliament', Proceedings of the H.R. Nicholls Society, 2003.

already passed.³³ However this was not a judicially sanctioned oddity, rather the decision was taken by a cautious executive concerned to preserve its Bill intact as a reliable double dissolution mechanism. Its weight as a precedent or establishment of principle must, therefore, have a qualified effect.

In favour of the common sense approach one could argue that the formal provisions of a bill are indeed quite distinct from the Bill's substantive provisions. A commencement provision, while crucial to a Bill's entry into the functional world of Acts, becomes an anachronism once the date has been reached and the 'proposed law' is operational. Legislation is created and designed in order to achieve a legal effect – to do something. This distinct effect is what should be focussed on when contemplating 'the proposed law'. The formal provisions by which the Bill makes its passage into an Act are simply part of a vehicle whose sole purpose is to achieve the aim of an operative Act.

Most disputes between the Senate and the House may be about the wisdom of the bill's substantive provisions – the proposed Act, with commencement dates not being so significant or contentious and, following the common sense approach, they should therefore be open to adjustment. However there are exceptions to every rule, and in fact commencement dates could be crucial to a vote on a Bill. Recent debates as to when the proposed emissions trading scheme should commence provide a topical case in point: changing that Bill's commencement date could make all the difference to the Senate's attitude.³⁴ An alternative illustration could be constructed by contemplating legislation involving something like the Y2K bug, which could have involved some similarly critical timelines.³⁵ Commencement dates may matter, however technical and irrelevant they may be to most legislation.

One of the difficulties for this government in navigating the various dates and timelines of the alcopops legislation and tariff proposals is that they risk compromising the possible double dissolution trigger if they adjust the commencement dates of the alcopops legislation. The period by which they may want to adjust the reintroduced bill to avoid overlap between the bill collecting the first 13 months of revenue and the permanent change of the excise rate is

33. This was done by the Fraser Government, however they lost the subsequent election so were never able to introduce further legislation to remedy the oddity, as promised by Mr Howard, the then Treasurer. The events are described in Carney, 'Section 57 of the Constitution: The Sixth Double Dissolution' at 182.

34. See generally National Emissions Trading Taskforce, *Possible design for a national greenhouse gas emissions trading scheme: Final framework report on scheme design* [http://www.garnautreview.org.au/CA25734E0016A131/WebObj/NETTReportfromStateandTerritoryOfficials_Finalreceived14March2008/\\$File/NETT%20Report%20from%20State%20and%20Territory%20Officials_Final%20received%2014%20March%202008.pdf](http://www.garnautreview.org.au/CA25734E0016A131/WebObj/NETTReportfromStateandTerritoryOfficials_Finalreceived14March2008/$File/NETT%20Report%20from%20State%20and%20Territory%20Officials_Final%20received%2014%20March%202008.pdf), viewed 1 May 2009 and AAP, 'Might be best to dump ETS, says Garnaut', <http://www.news.com.au/story/0,27574,25342527-421,00.html> viewed 1 May 2009.

35. See further Y2K Information and Resources, viewed on 1 May 2009, <http://www.y2ktimebomb.com/>

more than the necessary delay caused to a bill by section 57. This situation can be used to illustrate one of the problems with allowing a change to any part of the text, however minor. Carney identifies this difficulty when he concludes that a reason not to allow 'minor amendments' is the consequent difficulty of defining what those 'permissible minor amendments' would be.

The difficulty of defining permissible minor amendments may be one reason for not allowing them.³⁶

Another reason to support strict textual identity may be found in one of the presumable purposes of section 57: the resolution of a specific deadlock. In this context there may be a need for the dispute between the houses to be well defined. It may be that only by freezing the bill can the section's complex procedure operate effectively, allowing time for contemplation and negotiation during the three month delay. If the conflict is not clearly defined then the resolution mechanism is less appropriate.

The question of textual identity is unlikely to reach the High Court for definitive consideration and pronouncement because any thwarted government looking towards a double dissolution is likely to take the safest course and keep textual identity along with any incongruous dates. It could then adjust any subsequent 'oddities' when, and if, they are returned to power after a general election has been held. This was the approach taken in 1983.³⁷

Contextual Identity

The complexities of the Customs and Excise arrangement with their imposition of duties based on Tariff Proposals moved in the House rather than through legislation considered by both chambers can obscure the more 'normal' aspects of the bills. There are arguments to be had as to the legality and wisdom of those customs and excise arrangements but the bills themselves should operate as would any other. It may help to consider the matter by a more simple analogy.

Suppose, to use an entirely hypothetical instance, the government introduces and passes through the House of Representatives a bill: the National Dental Services Bill,³⁸ the objects of which are apparent from the bill's name. This Bill fails to pass through the Senate. The government is firm in its pursuit of its aim and promises to reintroduce the Bill. However,

36. Carney p. 183.

37. See above n. 33. It is also of interest that, as Odgers' documents, it is only '[o]n three occasions the government advising simultaneous dissolutions has been returned to office; on only one of those occasions, 1974, did the legislation leading to the dissolutions become law' after a joint sitting. (Comparable legislation was subsequently enacted in another case). Odgers', p. 545.

38. It would have relied on its constitutional power to legislate for dental services in section 51 (xxiiiA).

before three months has passed a terrible viral infection blights the Australian community. The condition attacks the gums of sufferers so savagely that they are left toothless. During the following three months much of the population is affected and the government introduces a Bill which provides, via arrangements comparable to those that were to be made under the National Dental Services Bill, emergency (and temporary) dental care to sufferers of the condition and others coming into contact with it. This is passed through the Parliament without difficulty. If the Government reintroduced its original Bill it would be in a changed social, political and legal landscape. However the Bill would have an identical text and the government's intentions in reintroducing the Bill would be the same: to provide for a national dental service. There may be duplication in the services offered because of the Act having introduced temporary measures, however the permanent establishment of the Dental Service is the government's thwarted aim. If this entirely hypothetical Senate again failed to pass the Bill it would seem, on a natural reading of section 57, that the requirements for a double dissolution in that case had been filled.

To introduce a requirement for contextual identity, which is not stipulated in the text, would make it impossible to fill the conditions of section 57, not only in this hypothetical case but presumably in other, more plausible, cases, putting some Bills out of the reach of section 57. The necessary delay of three months before the section's provisions can come into operation will mean that there will necessarily have been changes in the social and political landscape, and in all probability changes in the legal landscape as well. These changes may impact on a bill more closely or more distantly, but, by definition the context in which a bill is reintroduced will be different.

The examples used by Comans in his article to suggest that contextual identity is necessary are illuminating. Some are minor – instances of an Act about to be amended by the double dissolution bill which, since that Bill's introduction, was amended by another Bill.³⁹ In those specific instances Comans thought the changes irrelevant and minor, but he points to the more serious possibility that a Board referred to in a double dissolution Bill could have changes made to it by other legislation in the meantime and could, therefore, not be the same Board to which the Bill would have originally applied.⁴⁰ He also contemplates a section which has been referred to in the original Bill but which could, in the intervening period, have been repealed or amended by other legislation.⁴¹

Similar to the problem with defining 'minor procedural amendments' discussed above with respect to 'textual identity' there are difficulties inherent in trying to create a clear definition of what would breach the contextual identity. As Comans comments:

39. Comans, pp. 246 and 247.

40. Comans, p. 247.

41. Comans, p. 247.

The impact of the intervening law would need to be considered in each case, and one can well imagine borderline cases.⁴²

The difficulty, if not the impossibility, of establishing what would constitute a relevant difference in circumstance or legal environment, and deciding whether any latitude should be given for more minor breaches of uniformity of circumstance could be said to illustrate the dangers of imputing conditions into constitutional provisions without having a clear text to work from. Since the only authoritative resolution of the matter could currently be made in the High Court it would render section 57 less than functional to require this contemplation in successive individual cases.

What if the hypothetical viral infection had hit 67 % of the population and resulted in a plethora of legislative changes, some of which had modified several of the legal settings into which the Bill would come into operation? Arguably this problem would be something that the legislature should deal with, and is not one which would require the High Court's ruling of unconstitutionality. If the government wishes to pursue the Bill through the joint sitting process should the Court stop this process with a retrospective interpretation of whether events fit the section's requirements?

The Court may be faced with choosing between allowing the Parliament to pass provisions which are not fully functional or which have an effect not originally intended, and a provision of the Constitution which cannot operate to allow a resolution with respect to certain bills in certain circumstances. It may opt to concede to the Parliament a right to create legislation with a drafting problem. The difficulties of amending the, admittedly inadequate, provisions in section 57 mean that the Parliament will have to accommodate the problems which arise. For the High Court to prevent the Parliament from undertaking its usual role in addressing such issues would, arguably, be an unfortunate outcome.

Legislation passed through a joint sitting which may refer to a no-longer-extant section or body could be compared with a drafting error in another bill. Were such a thing to happen in the normal course of events, subsequent legislation is used to remedy the problem. Furthermore the hypothetical intervening legislation which subverts the 'the proposed law's' purpose would have to be drafted by the government and passed by the same Parliament that is disputing the contentious bill. A government and its drafters generally seek to avoid such errors, although Comans also contemplates another polity (such as a State Government) changing its laws which may be referred to in the original Bill. Drafting errors may occur with any legislation, and a suggestion that these problems should be dealt with by a body external to the Parliament, such as the High Court, does not sit well with the High Court's traditional role, which does not include enquiring into the suitability of a bill's drafting issues or, more generally, a bill's appropriateness.

42. Comans, p. 247.

The application of section 57 to alcopops

The current discussions of section 57, in so far as they have been exploring how the section might apply to the 'alcopops legislation' has, of necessity, been entirely speculative since, as at the date of writing, the government has yet to table its foreshadowed legislation. The forms of the bills could vary and this will impact on the constitutional validity of relying on them as the basis for a double dissolution.

The government has suggested introducing a bill which would cover revenue already collected under the tariff proposal, to which it is understood the Senate may agree.⁴³ As Siobhain Ryan summarised the matter the government 'would be able to pass the bill validating the revenue raised for the past year, since the Opposition publicly committed last month to backing such a move.'⁴⁴ This heralded bill validating the collection of duties during the current Tariff Proposal –from 27 April 2008 to 13 May 2009 – will be referred to for the purposes of this paper as 'the validation Bill'.⁴⁵

The government has also foreshadowed the reintroduction of the original bill(s), presumably in the form of a verbatim reintroduction, which would include the Excise Tariff Amendment Bill's reference to collection from 27 April 2008 and the commencement dates of both bills which is, in both cases, 27 April 2008. For the purposes of this discussion they will be referred to as 'the permanent change bills'.

Unusual drafting issues arise because the periods of collection could overlap between the validation Bill and the permanent change bills – a non-standard legislative arrangement. This 'irregularity' need not, however, impair the functioning of these bills. The permanent change bills could be regarded as over-riding the validation Bill due to their subsequent chronological passage (more recent legislation over-rides incompatible earlier legislation). Alternatively the validation Bill could be drafted in such a manner that it could co-exist in its coverage of the same period as the permanent bill. So, for instance, a *temporary* imposition of the excise or a form of drafting which simply endorses the collection of revenue under the Tariff Proposal without seeking to permanently alter the tariff (for example a stipulative definition which simply identifies the relevant monies collected as those to be kept) would give the funds collection and retention a legislative base. The government's desire for a permanent adjustment of the excise rate would remain as an outstanding matter, and to achieve its legitimate legislative aim would still require passage of the permanent change bills. Arguably this could then be done without creating a clashing legal effect.

43. Roxon (Minister for Health and Ageing) and Swan (Treasurer), 'Government to re-introduce Alcopops Measure'.

44. Ryan, 'Turnbull refuses to budge on alcopops bill'.

45. To clarify this matter, there is no suggestion that the validation Bill could constitute a double dissolution trigger – it is clearly a novel Bill which has not previously been introduced. However it could impact on the Bill which could, for the sake of argument, be a double dissolution trigger.

The argument that the bills as originally introduced and rejected are not the same as the bills proposed for subsequent introduction on the basis that the government does not have the same intention depends on certain assumptions about the intention and motivation of members of Parliament which a court is unlikely to enquire into. The proposed law's purpose was to increase the customs and excise rate on alcopops. The reintroduced bill's purpose will be to increase the customs and excise rate on alcopops. So far they are equal. If there is some ulterior motive such as creating the conditions precedent for a double dissolution it would be a matter unsuitable for judicial enquiry and unlikely, therefore, to rule out the legislation, either on policy grounds or constitutionally speaking.

Constitutional Interpretation

Comans' analysis discussed above partially relied on the High Court's attitudes and comments over time and its likely position in the future. Not only does the Court's membership change but also the jurisprudential and attitudinal approaches of those members. Leslie Zines documents fluctuations over time in the Court's approaches in his influential text, *The High Court and the Constitution*.⁴⁶ In these fluctuations in the High Court's consideration of constitutional matters there may be a greater emphasis on a legalism which avoids 'consideration of practical consequences' and 'efficient social arrangements',⁴⁷ or there may be a more purposive approach. Another approach is that the text is read in a more transparent manner, avoiding imputing intentions and implications into the constitutional text and there could also be trends against a more formalistic approach. Several new appointments to the Bench make it impossible for anyone to reliably predict the approaches of the Court's members, were they to be faced with interpreting section 57 on the point of absolute identity of text or any implied requirement that there be identity of circumstance and context.

Zines identifies that approaches to the use of judicial precedent in a constitutional context are not uniform,⁴⁸ thus, even were there to be a judicial precedent in these matters, there could be no predicting whether the current Court would follow it.

The one conclusion that might be open is that today's Court is likely to view constitutional interpretation differently to the way that it did when Comans wrote, given constitutional developments since that time. The significance of the above is that it allows the argument that it would be neither unreasonable nor disrespectful to differ in one's conclusions regarding the section's likely interpretation from Comans and de Q Walker.

This paper has looked at a large number of hypotheticals. At the time of writing we do not know whether and in what form the government may introduce alcopops bills; we certainly do not know what attitude the High Court would take to interpreting the section in its

46. L Zines, *The High Court and the Constitution*, Fifth Edition, 2008.

47. Zines, Preface, pp. xii ff.

48. Zines, p. xv.

application to these hypothetical bills. The only conclusion which might safely be drawn is that this is an unpredictable contentious area, and, while there are reasons to follow Comans' logic, there are also good reasons why Professor Williams and the government's anonymous advisor could turn out to have 'the legally correct' interpretation of the section... a description that can ultimately only be appropriately applied to a determination by the High Court.

A consequent issue arises which is how far the High Court is prepared to involve themselves in resolving these highly charged and deeply political matters.

Justiciability

The interplay of the legal system and the Parliament is particularly complex in section 57 matters. It is likely to raise issues which are considered non-justiciable – matters in which it would not be suitable for the Court to intervene but which must be left to the Parliament and political processes to resolve. As McTiernan has commented 'The Parliament is master in its own household.'⁴⁹

It may be that, given section 57's central position in significant political conflicts, the body politic could benefit from the provision of clear guidance and determinative reasoning from the Court. The need to protect the integrity of the bicameral system could also be thought to put an onus on the judiciary to intervene. However matters arising under section 57 do not lend themselves to intervention by the courts, both because of the fora and players involved.

Once the Governor-General is provided with a statement from the Prime Minister that the conditions exist which warrant a double dissolution she could theoretically formulate her own legal opinion on the interpretation of section 57 and follow this in preference to the government's advice, but in reality this is entirely unlikely.⁵⁰ The then Governor-General, Ninian Stephens did provide a response and some commentary in correspondence with the Prime Minister in 1983, although he seems to have drawn back from taking a determinative position on the matter.⁵¹ As the history provided in Odgers' *Australian Senate Practice* shows, it has not happened that a Governor-General has refused such a request (and it seem unlikely it will). In the case of an egregious or manifest breach of the provisions of section 57 the Governor-General could conceivably choose to withhold the granting of a double

49. *Victoria v Commonwealth* per McTiernan at 138, [35].

50. It has become 'customary ... for prime ministers, when proposing simultaneous dissolutions, to stress the significance of the legislation involved.' And further '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".' p. 548

51. In Odgers' it is reported that 'Governor-General Stephen wrote that on the basis of precedents he should inter alia "pay regard to the importance of the measures in question". In the event, however, he disclaimed ability so to do: "... I am not myself in any position, from their mere subject matter and text, to form a view about the particular importance of any of them".' p. 548.

dissolution, but when it is a matter of reasonable interpretation on both sides of the argument it would be a possible breach of constitutional conventions for a Governor-General to prefer her own advice to that of the government.

After the dissolutions are granted a general election will necessarily follow, with its own curative effects, so the first opportunity for a judicial process to intervene is likely to be subsequent to the passage of 'the proposed law' at a joint sitting.⁵²

One of the most uniform findings of the Court and others is that the dissolution by the Governor-General is not justiciable. It may be found to have been granted on erroneous grounds, but it is not a suitable matter for judicial intervention at this point. As Barwick CJ summarised the matter in *Victoria v Commonwealth* in which the Court found the Governor-General's actions were an unchallengeable 'fait accompli':

The dissolution itself is a fact which can neither be void nor be undone. If, without having power to do so, the Governor-General did dissolve both Houses, there would be no basis for setting aside the dissolution or for treating it as not having occurred.⁵³

Furthermore, the High Court found in *Cormack v Cope* that the Governor-General was not a suitable defendant to the case attacking the proclamation of a joint sitting.⁵⁴

Subsequent to a dissolution, even if it were called on the basis of a bill which was found not to satisfy the requirements of section 57, the election will necessarily follow and will have its own remedying effect. The curative effects of a general election are likely to minimise the opportunity for judicial interpretation on the finer points of section 57's interpretation. As Jacobs J (albeit in the minority) argued:

I did not find it necessary to determine but expressed some doubt in *Victoria v. The Commonwealth* (the Petroleum and Minerals Authority Act Case) [1975] HCA 39; (1975) 134 CLR 81 at p 196 whether there is any place for adjudication by this Court in questions of procedure which arise or may be raised in relation to s. 57 of the Constitution and the working out of the procedures there laid down. That doubt has crystallized. The reason may be simply expressed in one sentence. The procedure prescribed leads to the expression by the people of their preference in the choice of their elected representatives, a preference expressed with the knowledge that a joint sitting of those representatives may need to take place, and no court in the absence of a clearly conferred power has the right to thwart or interfere with the people's expression of their choice. The people's expression cures any formal defects which may have previously existed. That is democratic government within the terms of the Constitution by which the people elected to be governed. The concern of

52. Certainly this was the outcome in *Cormack v Cope*, though there were differing views expressed on whether it was a necessary outcome or whether there could have been an intervention before the joint sitting.

53. *Victoria v Commonwealth* per Barwick CJ at 120, [39].

54. *Cormack v Cope* per Barwick CJ at 449, [5].

this Court is with the respective limits of legislative power of the Commonwealth and the States and with the application to legislation, State or federal, of the provisions of the Constitution in order to test the substantial validity of that legislation. There is no indication that the Court was empowered to superintend the legislative procedures, above all a legislative procedure which involves as a consequence the election by the people of their representatives and as a sequel thereto a particular form of further legislative process.⁵⁵

McTiernan J reflected along similar lines, both because of the supremacy of Parliament in its own sphere, and because he regarded section 57 more along the lines of a directive section than a binding provision whose breach would lead to fatal consequences for legislation passed at the joint sitting.

...I assent to the argument that the jurisdiction of the High Court, if any, is judicial and not political. So far, therefore, as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the Constitution.⁵⁶

...

In my opinion it is not within the judicial power of the Commonwealth, vested by s. 71 of the Constitution in the Court, to decide whether the recitals by the Governor-General in the proclamation dissolving both Houses were erroneous in fact or in law. "The crux of the matter," Frankfurter J. said in *Baker v. Carr* [1962] USSC 42[1962] USSC 42; ; (1962) 369 US 186, at p 287 (7 Law Ed 2d 663, at pp 726-727) , "is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade".⁵⁷

In contrast Barwick CJ, in the majority, has argued strongly that section 57's procedural stipulations are suitable subjects for judicial oversight:

... this Court is the guardian of the Constitution... Part of that Constitution provides for law-making processes. Section 57 is a notable example of that prescription. The Court, in my opinion, not only has the power but, when approached by a litigant with a proper interest so to do, has the duty to examine whether or not the law-making process prescribed by the Constitution has been followed...⁵⁸

He also asserted the right of the Court to intervene before a bill is given Royal Assent – a proposition which is not shared by his colleagues as much as the proposition that the Act itself can be challenged as invalid:

55. *Western Australia v Commonwealth* per Jacobs J at 275, [9].

56. *Victoria v Commonwealth* per McTiernan at 134, [26] (he was at the time quoting another judge with approval).

57. *Victoria v Commonwealth* per McTiernanJ at 135, [30].

58. *Victoria v Commonwealth* per Barwick CJ at 118, [35].

Whether the Court should intervene before the Bill has received the Royal assent is a matter which does not now arise. I have already expressed my opinion that the Court has power to do so.⁵⁹

While the Court may not be in a position to stop the dissolutions from taking place there is nevertheless strong authority that it can set aside as invalid a statute passed at a joint sitting if it is believed to have been improperly brought about.⁶⁰

The interplay of the Court and the Parliament and justiciability issues are perennial problems which are unlikely to resolve but will instead fluctuate. It should be noted that Barwick CJ was in the majority on most points decided in the trio of cases referred to, however eloquent the minority may have been.

Other Issues under section 57

There are many other issues of contention within section 57's provisions. Some have been given an answer by the High Court already, although this leaves open the question of whether that answer is challengeable and should it be regarded as definitive or preliminary, particularly given the dissenting voices in the minority.

To mention just a few of these issues: The measuring of the three months – whether it runs from the date of the bill's introduction into the House or the Senate's rejection of the bill; Whether the Governor-General has a discretion in granting the dissolution; Whether the High Court can intervene while a matter is properly before the Governor-General and the Parliament – whether they can declare invalidity before double dissolution bills have been given royal assent and whether they can so declare them after royal assent; Whether the dissolution and the proclamation convening a joint sitting can or should cite the relevant bills; What constitutes a rejection or failure to pass by the Senate (for instance does a statement of intent by the leader of the party in control of the Senate, along with consequent inaction by the Senate constitute a failure to pass) – what regard should the Court have to the political realities in the case of ambiguous behaviour by the Chamber?

These form a preliminary array of issues of interest in the pre-election phase. Then there are issues which have arisen or may arise in a post-election phase, such as: How many bills can be considered at a joint sitting; Which amendments and proposed by whom can the bicameral chamber consider? At what stage is it appropriate, if at all, for the Court to consider intervention? Should such action take place pre or post Royal Assent being given to a bill?

These are weighty issues which may still arise under section 57, and preliminary answers have sometimes been given by the High Court or in the literature used to guide the Parliament. Given the current realities of time and space there certainly is no scope to address them here.

59. *Victoria v Commonwealth* per Barwick CJ at 118, [35].

60. *Victoria v Commonwealth* and *Western Australia v Commonwealth*.

Conclusion

There can be few conclusive comments made regarding the operation of section 57, particularly with respect to the question of how much and what sort of identity the bill's text or context must have to comply with the section's provisions. Given its centrality to significant conflicts in the political field it is not surprising that a text which may have been thought by the founders to provide for a relatively straight forward process has been the subject of periodic controversy and on-going uncertainty. As outlined just previously the controversies regarding the section linger and might currently be thought to include the question of what, precisely, constitutes 'the proposed law's' identity.

Nevertheless when and if it falls to the Governor-General to determine whether to follow the Prime Minister's advice and call a double dissolution she is likely to grant the dissolution without any immediate legal impediment. Consequently such an action is likely to be regarded as a *fait accompli* until any results of a joint sitting emerge, at which stage the High Court might, or might not, endorse the view that not only must the text of the bill be identical, but also the circumstances under which it is introduced.

In the context of the immediate question of the alcopops legislation we see that if the government wants to subsequently rely on the reintroduced bill as a double dissolution trigger they would have good reason to leave the text unchanged, including commencement dates. The proposition that the surrounding circumstances of reintroduced alcopops legislation must also be identical in order for the legislation to qualify as a trigger for a dissolution is, however, problematic. The latter proposition would involve the introduction of a constitutional requirement not immediately apparent in the text of the Constitution and there would necessarily be few guidelines on how this requirement should be overseen. The criteria that could be used to judge compliance with this hypothetical need for identity would not be clear.

Library Publications on double dissolutions

George Williams, 'The Road to a Double Dissolution?', *Research Note 29* 1997-98
<http://www.aph.gov.au/library/pubs/rn/1997-98/98rn29.htm>

Sudip Sen, 'The Double Dissolution Process: Questions and References', *Research Note 45*,
2002-03
<http://www.aph.gov.au/library/Pubs/RN/2002-03/03rn45.htm>

Jack Richardson, 'Resolving Deadlocks in the Australian Parliament', in G J Lindell and Bob Bennet (eds), *Parliament : the vision in hindsight*, 2001

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