Chapter Three
The Answer to the Prime Minister's Section 57 Dilemma

Ray Evans[1]

I begin this paper with a quotation from Sir John Downer, who at the Adelaide Convention on March 29, 1897, when discussing the intractable issue of responsible government on the one hand, and the existence of a Senate with the power to deny supply to the Executive on the other, said this:

> "We only know responsible government through the evolution of centuries; but in this instance we will have evolved it not in centuries but in days. The result of this will be a good understanding between the two Houses, great mutual respect, and peace and happiness".

There hasn't been much mutual respect, peace and happiness between the House of Representatives and the Senate in recent years. Paul Keating, who really didn't have much to complain about as far as the Senate was concerned, famously described Senators as "unrepresentative swill".[2]

In his statement of 25 February, 2004, entitled *Australia's Demographic Challenges*, the current Treasurer, Peter Costello, discussed desired labour market reforms in the context of jobs for older people. He said:

> "A number of further workplace relations reforms are currently proposed: reform of unfair dismissal laws to minimise the impact on employment, particularly for small business; simplification of procedures for agreement-making; improvements to the remedies and sanctions against unprotected action; improvements to bargaining processes; and improvements to the processes for union right of entry to the workplace. These reforms have been blocked in the Senate".

Amendments to the *Workplace Relations Act* are one of the Bills which have been twice refused passage by the Senate. The procedure for resolving such deadlocks is prescribed in s.57 of the Constitution, the key elements of which are the simultaneous dissolution of both Houses and, if necessary, a subsequent joint sitting of both Houses where an absolute majority will carry the contested legislation.

Currently there are six "triggers" and three potential "triggers" which provide grounds for a double dissolution, and they are measures which are of prime importance to the Government. But it seems clear that the Prime Minister is not of a mind to follow through by calling a double dissolution. In the Government's Discussion Paper, *Resolving Deadlocks*, which was issued in the latter part of 2003, we find a number of suggested alternatives to s.57 described, every one of which suffers, in my view, from the difficulty that it would seriously fail in a referendum that would be required to amend s.57.

In preparing this paper I have read through the debates at the Conventions in Adelaide and Sydney in 1897, where this issue dominated proceedings and threatened to derail the Federation train. In their commentary,[3] *The Design of the Senate*, Brian Galligan and James Warden summarised the arguments which took place at these Conventions about the Senate, and its incompatibility with the doctrines of responsible government which had become entrenched in British constitutional practice during the 19th Century, and which had been transferred to the Australian Colonies at the same time. These debates were focused on the Senate's power with respect to appropriation and taxation bills. In 1975, of course, this issue became central when the Senate refused to pass supply.

In the 1890s there were two well defined and opposing views. The nationalists, Deakin,

Higgins and Isaacs, were strong for responsible government and saw the Lower House as the prime engine of the new polity, and they were hostile to the argument that the Senate should have the power to block supply or amend money bills. Higgins, in fact, was basically opposed to a Senate at all, unless it was elected on the same basis as the Lower House.

The States' righters, Baker, Downer, Braddon and Forrest, argued for a Senate with equal power to the House, including the power to amend money bills.

This division threatened the whole federalist project, and a compromise was necessary if Federation was going to succeed. The compromise, prescribed in Sections 53 through 57, does not, however, resolve the essential incompatibility of responsible government on the one hand, and a Senate with veto power on all legislation, including money bills, coming up from the House of Representatives, on the other. It is worth noting that this incompatibility is not present in the US Constitution, which reflects the state of English politics as it was thought to be practised in the 18th Century.[4]

The time which the Founding Fathers spent arguing about money bills, and the Senate's powers with respect to them, seems to us today a bit quaint, although it was a serious issue in 1975. Governments today take and spend 40 per cent, give or take a percentage point or two, of the citizens' income, and legislation which the current Senate has rejected includes measures to constrain spending on the Pharmaceutical Benefits Scheme, a budget item which is increasing annually by about 15 per cent. We are talking here about many billions of dollars annually, and nobody, to my knowledge, has argued that this action by the Senate is a serious attack on the doctrine of responsible government.

The difficulty faced by the Government is therefore a very real one, and it demonstrates very clearly the deep contradiction which the Founding Fathers identified, but could not resolve. It is the Government, not the Senate, which is accountable to the people at election time for its carriage of the nation's affairs. The doctrine of responsible government is embedded in our political culture, and is particularly pertinent in the fields of taxation and expenditure, where a Government (such as the Whitlam Government) which has been profligate, must, eventually, answer to the people. But we now have a Senate which, as I have mentioned, refuses to pass legislation in the particular policy area of health services, which has direct and massive budgetary implications.

On the other hand, it has become increasingly manifest that the Australian electorate prefers to have a Senate which the Government does not control. The Democratic Labor Party was the first political party to hold the balance of power in the Senate in the post-1949 era, and since June 30, 1964 no Government has commanded a majority in the Senate except for the Fraser years of 1976 until June, 1981, during which time a number of measures which had been resolutely blocked by the Senate during the Whitlam era, were duly enacted.

The 1967 referendum on breaking the nexus between the Senate and the House, a proposal which did not entertain any weakening of the Senate's powers, and which was supported by both major parties, was defeated soundly. The gap between votes for the major parties in House of Representative seats, and votes for the major parties in Senate elections, has widened steadily during the last twenty years.

Any political leader who believes that the Australian people will support a constitutional change which would result in a Senate with diminished powers with respect to the Executive, or which could be perceived to have that consequence, has, I believe, lost touch with public opinion. If the proposal for constitutional change were supported by both major parties, it would provide the minor parties with the opportunity for a real triumph, and if the referendum were held at the same time as an election, they would benefit electorally from such a contest.

The attempt by the Prime Minister to engage in dialogue with the Labor Party to produce bipartisanship on changes to s.57 was, in my view, doubly foolish: first, it gave Labor

bargaining power; and second, any success in producing bipartisanship would have, in my view, ensured failure at a referendum. The 1967 referendum on the nexus is pertinent in this context.

So we are back to the debates of the 1890s, where the commitment to responsible government clashed with the people's commitment to a Senate with powers which make responsible government a doctrine without substance.

This situation is the major cause of the Howard Government's predicament of appearing adrift and becalmed. There is no "third term agenda" because the Senate will not permit a third term agenda, and there will be no fourth term agenda, if the Howard Government is returned, for the same reason.

The Howard Government's problems have arisen not so much from the constitutional compromise of 1897, but because of changes to the number of Senators, and the method of deciding who wins a Senate seat at an election (none of which are constitutional matters). In my view it is beyond argument that the Senate, like the ABC, is no longer representative of mainstream Australian opinion on key issues affecting the nation and its future. This view is, predictably, strongly contested by some current Senators, but if major issues that have arisen in recent years and have come to the Senate for action of some kind are considered, it is apparent that opinion which is representative of the ABC usually triumphs over mainstream opinion. A recent example was the disallowance by the Senate of regulations which excised Melville Island (amongst many others) from Australian territory for the purposes of claiming refugee status. The fact that the Labor Party often supports the Greens and the Democrats on these issues, indicates that gnostic influences have made substantial inroads into Labor circles.

The current problem of the unrepresentative nature of the Senate arose from two separate events; the system of proportional representation which was introduced by the Chifley Government in 1948, and the enlargement of the Senate to 76 which took place under the Hawke Government, with the support of the National Party, in 1984. At a half-Senate election, therefore, the sixth position from every State can, and usually does, fall to minor party candidates, or to independents, whose success is due entirely to the way in which preferences flow as unsuccessful candidates are eliminated from the bottom of the heap. This preference flow can reasonably be described as a series of random events. Australia would have a more representative Senate if Senators were chosen randomly from the telephone directory, an argument supported by the fact that the people who seek election to the Senate from single issue groups, or religious sects such as environmentalists, are very far removed from mainstream opinion.

But it is they, not mainstream Australians, who, like Koko the Lord High Executioner of Titipu, find themselves "wafted by a friendly gale", "by a set of curious chances", into positions of great power. Unlike the major parties, who seek to win a majority of seats in the House of Representatives, they are competing for votes and electoral manpower exclusively from a small group of Australians, loosely described as the "chattering class" or, to use David Flint's term, "the élites"; or to use my own preferred description, the "gnostic classes". They also attract votes from the wider public because they are seen as a check on the executive power of the government of the day. Don Chipp's slogan, "Keep the bastards honest", was a brilliant appeal to this sentiment.

It is important to note that those Democrats who were closer to mainstream values have been pushed out, and that the Greens, who are the hard-line gnostics in this spectrum, are now triumphant; the Democrats seem to have lost that contest. This supports my thesis that the Greens' and the Democrats' constituency is comprised of the gnostic or chattering classes, and it is the contest for leadership of this sector which determines their behaviour.

There are further consequences which follow from electing six Senators at a half-Senate election. To win 3 out of 5 Senate positions a party needed 49.8 per cent of the vote.

Normally, with preference flows, 47 per cent was enough to get 3 out of 5. To win 4 out of 6 positions requires 56 per cent of the vote. For this to happen it would be necessary for one of the major parties to lose all interest in winning elections. This happened in the ALP in 1954, but there were unusual circumstances at that time.

A non-constitutional remedy to the Government's problems would be to cut the size of House and Senate to 120 and 60 respectively (i.e., return to the pre-1984 position); to shrink the ACT to a largely non-residential area containing Parliament House, the High Court, the Lodge, the War Memorial, etc (and abolish, as a consequence, its two Members and its two Senate positions); and to return the Northern Territory to South Australia (with a similar consequence for its two Senators). This would leave Australia with a higher than average politician per capita rating; it would be electorally popular; and would perhaps provide governments with the possibility of winning the Senate, particularly on issues of major importance. The current Senate, however, is unlikely to agree to such measures, and it would thus require a double dissolution, and a joint sitting, to pass them, and another double dissolution to bring the new numbers situation into effect. It is not likely therefore to appeal to a Government which is clearly reluctant to go down the double dissolution route.

It should also be noted that, following the introduction of proportional representation under Chifley, the double dissolution option has lost its potency. Of the present 76 Senators, 64 Senators would be quite confident, assuming their pre-selections are not in doubt, of returning to the Senate after a double dissolution. The last two Senators from each State might have cause for concern, but really only the last six would have cause to see their positions under threat. In the House of Representatives, however, out of 148 (currently 150) members, arguably 20 to 25 would see themselves as threatened, the majority from the government side.

Prior to 1948, the threat of a double dissolution did have real potency as far as the Senate was concerned. Today, the response of virtually all Senators, particularly from the fringe parties, is: "Make my day". And this fact permeates all political debate and calculation in Canberra.[5]

There is an option, however, which in my view would command sufficient support at a referendum for it to succeed, and would change behaviour in Canberra much for the better. This option, which was debated intensely in Adelaide and in Sydney in 1897, is to ask the people to decide the fate of deadlocked Bills directly through the referendum process itself.

Since a majority of voters in a majority of States will decide whether to change s.57 or not, then the same criterion will have to apply to deadlocked Bills, and I see no reason why that should not hold. Proposals for a simple majoritarian plebiscite, which were strongly supported by H B Higgins, and are now supported by the Democrats, will not find favour outside Victoria and New South Wales.

I would argue that deadlock is reached when the Senate fails to pass a Bill the second time after a three month interval, and I would not require an election to precede a referendum. I should also make it clear that, if the people pass the deadlocked Bill at a referendum, then that Bill becomes another Act of Parliament, which could be repealed by a subsequent majority of both the House and the Senate. It would not be a change to the Constitution.

It should be noted that, if the Prime Minister wants to have a referendum to change s.57, the current Senate does not have to pass the legislation required to hold the referendum. If the *Referendum Bill* fails to pass the Senate a second time, after a three month interval, the Governor-General can then, without further delay, issue the writs.

The conservatives of 1897 and 1898 found the proposal for a referendum to resolve a deadlock situation highly distasteful. However, as the following remarks of Richard O'Connor, then Attorney-General of New South Wales and subsequently Senator and Justice of the High Court, indicate, they were prepared to accept a referendum if there were no other course.

Thus, the Hon R E O'Connor (when speaking of entrenched deadlock between the House and the Senate):

> "If you come to a condition of that kind, then you are face to face with a very dangerous position of things. Although I am strongly opposed to any of these mechanical processes of bringing to a conclusion that which should only be concluded by discussion and the arbitrament of reason, at the same time I say that you may be brought face to face with a position in which these solvents will not be applicable. What is the position then? The position is one of danger, not only to what has been called here the federal principle, but to the union itself. You are face to face then with that position which brought about the terrible appeal to arms which took place in America. I do not suppose for one moment that any resort of that kind could be possible in this community of Australia.
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> "I am altogether opposed as a general rule to the process of referendum. I am altogether opposed to it certainly in the case of a unified state, and I am opposed to it in the case of this Constitution if there were any other way out of the difficulty. . . I am strongly opposed to the referendum for the reasons I have pointed out, if any other mode of settlement can be adopted". (p. 574)[6]

O'Connor went on to explain that he accepted the inevitability of a referendum to resolve a deadlock, but argued for the necessity of a double dissolution before a referendum could be held.

I understand that the Prime Minister, like Richard O'Connor, is strongly opposed to the referendum, but he has reached a position where, in order to put wind into the listless sails of his becalmed Government, he must either use s.57 as it now stands, or he must put a constitutional change regarding s.57 to the people which will enable him to move forward on those crucial issues, notably labour market reform, and on the costs associated with the health system, which are central to his political program, and to the integrity of the budget.

If he were to go for the referendum principle that I have outlined, I doubt that he would run the risk of bipartisan support from Labor. He would be able to hold the constitutional referendum well before the election which is due by March, 2005 (although that might be seen as opportunistic), and then combine the election with a referendum on the deadlocked Bills.

This proposal for resolving deadlocks will be criticised on grounds of cost, and on the grounds of too much democracy in our system of representative government. The cost issue should be addressed as part of the necessary reform required of our electoral processes, in which the technology of the 19th Century should be replaced with 21st Century computer technology, including the need to address electoral fraud. In any case, the costs of conducting a referendum are trivial when compared with the economic consequences of, for example, failure to reform our labour market regime.

The more profound issue of the need for intermediating institutions to run the nation's political affairs can be answered shortly, first, by reference to the USA, where referenda are much more frequent; where congressional terms are limited to two years; where the Senate has much greater powers of oversight and legislative initiative than the Australian Senate; and which, despite this surfeit of democracy is, curiously, the world's greatest power. Second, it cannot be forgotten that the present mess which now engages us is the outcome of the debates and deals done by our representatives, and certainly not approved by the people as a whole.

Third, we should not forget that the campaign for a republic, which culminated in defeat for the republicans in the glorious referendum of 6 November, 1999, foundered on the issue of direct election.[7] This question of direct election of a President is the same issue as that of the Senate versus responsible government, although here it is not the Senate which

diminishes or threatens the power of the Executive, but a directly elected President. In my view, it is now beyond argument that Australia will only agree to a republic if the people elect the President, as they do in the US, and I note that because the new Labor leader, Mark Latham, is on record as being a direct electionist, the republicans are seeking to put the republic back onto the political agenda.

The idea of direct participation in these matters now seems well entrenched in Australian political culture.

If Mr Howard were to go down the referendum road, and succeed ultimately in passing crucial legislation by direct appeal to the people, there can be no doubt that the political landscape in Canberra would change, and that Senators who now are extremely casual about vetoing legislation, might have a different attitude.

These measures, however, would leave intact the problem created by proportional representation, the election of 6 or 12 Senators at a time, and the consequent unrepresentativeness of the Senate.

One of the great lines from the debates of the 18th Century which has come down to us is:

"The Power of the King has increased, is increasing, and ought to be diminished".[8]

Today the King is powerless and the Prime Minister is more powerful than George III could have imagined. The Senate is a constraint on the power of the Executive, and I would like to see the power of the Senate increased, but only if the Senate were to become more representative of Australian opinion. That, in my view, can only happen if, as in America, Senators were elected one at a time. If we were to have eight year terms, with Senate elections every two years, that would provide for a small Senate of 24. If we could create another two or three States – North Queensland, New England, and perhaps the Riverina (including most of the Australian Capital Territory) spring to mind – that would mean 36 Senators. And, more remotely, if New Zealand were to come in as two States, that would provide 44 Senators.

Critics will deride these ideas as politically naive, and I'm aware that some of my colleagues view the proposal that New Zealand should come into the federation, given its record as a socialist, welfare state, as an extremely foolish idea. But Henry Parkes' great line at the 1891 convention in Melbourne, "The crimson thread of kinship which runs through us all" is still true, and the geo-strategic position in which we are placed in this part of the world, hasn't changed since the 1890s. In my view we should keep the New Zealand option alive. I also note that the two Prime Ministers met two weeks ago and committed to further economic integration, and that proposals for a common currency appear regularly. Whether the protagonists for a common currency are aware of it or not, a common currency denotes a common sovereignty (which is why the issue of Britain abandoning the pound sterling and adopting the euro is so important).

All political arrangements are flawed, but some less so than others. In my view the flaws that are embedded in the Westminster system of responsible government are most manifest when we look at the mess the United Kingdom now finds itself in with the European Union. This is not the occasion to traverse the history of this amazing abandonment of proud and successful nationhood, except to note that it was carried out, with gross deceit, by an arrogant political establishment that knew best what was right for Britain, and was insufficiently constrained by the checks and balances which we see throughout the American polity.

In Australia we have, in the last two decades, at last escaped from the protectionist delusions which enfeebled us for 80 years. The results are now clear to see. We need to move forward, now, to secure those gains; to reform the labour market; to reduce the size of the government take; to diminish the power of Canberra and revitalise the States. We need to do these things in order to make our future as a sovereign and independent nation more secure.

The Senate, as it now stands, is the lion in the path stopping us from going forward. Let us go forward, then, and put this thing to the test.

Endnotes:

1. The author is grateful to John Nethercote and John Roskam for comments on this paper. However, any mistakes or illusions are the author's responsibility.

2. Prime Minister Paul Keating, *Hansard* , 4 November, 1992:

   "Then you want a Minister from the House of Representatives chamber to wander over to the **unrepresentative** chamber and account for himself. You have got to be joking. Whether the Treasurer wished to go there or not, I would forbid him going to the Senate to account to this **unrepresentative swill** over there—

   "Opposition members interjecting—

   "Mr Speaker – Order! The House will come to order.

   "Mr Keating – where you are into a political stunt.

   "Mr Downer interjecting –

   "Mr Speaker – Order! The honourable member for Mayo will cease interjecting.

   "Mr Keating – There will be no House of Representatives Minister appearing before a Senate committee of any kind while ever I am Prime Minister, I can assure you".

3. Brian Galligan and James Warden, *The Design of the Senate*, 1986; *Commentaries on the Convention Debates 1891-1898*, Volume VI, edited by Greg Craven, Legal Books Pty Ltd, Sydney.

4. The events in Washington of September-November, 1995 are of interest in this context. In November, 1994 the Republicans had gained control of both Houses with a spectacular campaign, led by Speaker Newt Gingrich, based on a "Contract with America". In 1995, according to normal practice, President Clinton presented to the House the Executive's Budget "wish list". In response the House produced a Budget which was in accord with the Republicans' campaign platform. This Budget the President vetoed, as he did two successive compromise Budgets. Because the Republicans could not command a two-thirds majority in the Senate, the presidential veto was valid. Each time President Clinton exercised his veto he blamed Congress for failure to pass a Budget, and persuaded public opinion that Congress was at fault. In this way President Clinton destroyed Speaker Gingrich as a political force.

5. It is worth recalling that in the very early years of the first Howard Government, the threat of a double dissolution did appear to have potency. In particular, during the months preceding the passage of the *Workplace Relations Act* (September, 1996), when Peter Reith was negotiating with Cheryl Kernot, then leader of the Democrats, the Prime Minister explicitly and incomprehensibly ruled out a double dissolution election. Some years after, as a Labor front-bencher, Ms Kernot defended her policy position in those negotiations as being determined by the threat of a double dissolution.

6. Some additional quotes from the Adelaide Convention:
   Sir Joseph Abbott (NSW):

   "I do not want to allow the Senate to be dominated by the ministry of the day, but I want to see that body dominated by the people of the country. . . .If the people desire to dominate the Senate, they should have the right and power to do so; but how can it best be provided that they should have that power? Can it be done best by the referendum, or by a dissolution of the Senate?". (p. 568)

Sir George Turner (Vic):

> "I think that the feeling in Victoria is very strongly in favour of a referendum as the first expedient. . . . we will be prepared to accept. As a first trial, a double dissolution, and if that fails, then, we ought to be prepared to go a step further. . . . I feel very certain of this, that if we can go to our respective Colonies and say that after having fully discussed, considered, and fought out this subject, we have, practically, unanimously – as I hope it will be – come to the conclusion that there should be a mode of settling these difficulties, if unfortunately they do occur, by a double dissolution, and, if that fails, by a dual referendum, I think we shall have very little, if any, difficulty, in convincing the people we represent that they may fairly and reasonably adopt it". (pp. 634-5)

7. The campaign by the Hon Peter Reith, who fought the republicans as a direct electionist, was important in the defeat of the republican cause.

8. Attributed to John Dunning, later Baron Ashburton, in a debate in the House of Commons on 6 April, 1780. John Dunning, who lived from 1731 to 1783, was then a member of the House of Commons. The motion was termed "the Crown", not "the King". It was part of the concerted agitation led by Edmund Burke against the North Administration. The resolution was carried by 233 to 215. Dunning played a key role in the campaign. The elegance of the sentence is such that we can wonder whether Burke was responsible for it.