Chapter Four
Senate Vacancies: Casual or Contrived?

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In December, 2001, barely one month after the general elections of November, 2001, it was reported that Duncan Kerr, member for Denison in the House of Representatives since 1987, and Minister for Justice in the Keating Government (1993–96), was thinking of resigning to contest a seat in the Tasmanian House of Assembly. He had recently lost his place on the Labor Party front bench and claimed to be disheartened by Opposition. He apparently had hopes of appointment to a ministry in the State Labor government should it be returned.

There was a brief controversy, in the course of which Kerr decided not to proceed. One reason was a concern that Labor would lose the seat in a by-election held so soon after an election. There were some grounds for fearing an electorate's wrath at a by-election not seen as justifiable in public interest terms. Such had been the fate of the Liberal Party in the Queensland seat of Ryan after former Defence minister, John Moore, resigned in February, 2001 after losing his portfolio in January, 2001. Later, in 2002 Labor lost the New South Wales seat of Cunningham when Defence spokesman and former Speaker of the House of Representatives (1993–96), Stephen Martin, resigned in August.[1]

These instances notwithstanding, it is relatively rare for House of Representatives seats to change hands at by-elections. Since May, 1977 this has occurred on eight occasions out of 39. In one of these, the Liberal Party claimed a seat previously held by the National Party (Groom, Qld, 1988). In another two cases the victors were, respectively, a local independent (Wills, Victoria, 1992) and a Green (Cunningham, NSW, 2002). In these two instances, and two others, the seat was eventually reclaimed by the by-election loser.

While it may be relatively rare for a House of Representatives seat to change hands at a by-election, it is something which, since 1977, can never occur when a casual vacancy arises in the Senate for reasons either of death or resignation. Had Mr Kerr been Senator Kerr, it is doubtful, though not impossible, that the controversy of early 2002 would have occurred. Indeed, some of the ambitious in the ALP might well have encouraged him to take his chances in the House of Assembly stakes whilst one of them settled smoothly onto the pinkish benches of the Senate chamber in Parliament House, Canberra, without any of the indignities entailed in having to seek the support of the electors for a place in the national legislature.

Filling casual vacancies: the 1977 referendum

The reason for this situation lies in one of three alterations to the Constitution approved at referendum in May, 1977 by majorities in all six States and with a national majority of nearly three and a half million votes. A new section 15 provided that henceforth a State Parliament, in filling a casual vacancy, should be limited in its choice to the nominee of the party (or the successor party where there had been organisational change) from which the former Senator had come. Moreover, the new Senator would inherit the entire balance of the term of the predecessor.

New s. 15 replaced an original provision whereby a State Parliament was not restricted in its choice of a new Senator to fill a vacancy. A Parliament's choice then held office until the next House and/or Senate elections, when the vacancy would be the subject of contest.

Casual vacancies since the 1977 referendum

The new s. 15 (and comparable provision for Territory Senators) has been anything but dormant. Indeed, it has had a major impact on the composition of the Senate — an impact which reflects adversely on the vital role which it plays in the Parliament of Australia. In the present Senate, prior to changeover on 1 July, 2005, there are no fewer than 31 of the 76 Senators who have entered under the auspices of the new s. 15 (or its Territory equivalent).

A small number of these entered to complete the remaining few months of a retiring Senator's term before commencing a term for which they had been elected. Most, however, arrived without the blessing of the electors of the State or Territory which they represent at either a periodical or, less likely, a general election of Senators following a simultaneous dissolution of both Houses under s. 57. (By contrast, only 18 of the 150 members – 12 per cent – of the House of Representatives dissolved in 2004 entered by way of by-election: the cases are not comparable because, by definition, these members could only take their seats after facing the electors.)

In the Senate's entire history there have been 126 casual vacancies; 59 of these have occurred since the 1977 change to the Constitution. Of these 59, only four were occasioned by death. In the previous 77 years there were 67 casual vacancies; 46 of these were the consequence of death. To some extent these figures may be explained by successive expansions of the Senate taking effect at the 1949, 1975 and 1984 elections respectively. But the scale and character of the change has been mainly the consequence of the 1977 alteration to the Constitution, combined with the generosity of the superannuation scheme introduced by the Whitlam Government and operating until 2004.[2]

In the House of Representatives, there have been 135 by-elections occasioned by death or resignation. Only 39 of these have occurred since 1977. Of these 39, only five have been a consequence of death. Previously most by-elections were the result of death (62 deaths; 34 resignations).

On a pro-rata basis, resignations from the Senate now run at almost three times the rate of those from the House. Included in this number are some cases of clear manipulation of the 1977 scheme. Senator Kay Denman (ALP, Tas), who leaves the Senate on 30 June, 2005, has had virtually twelve years in the chamber although she faced the electors of Tasmania but once, in 1998. Her good fortune stemmed from the decision of Senator the Honourable Michael Tate (now Father the Honourable Dr Michael Tate) to resign, after only five days into a new term in 1993, in order to take appointments as Ambassador to both the Netherlands and the Holy See. Former South Australian Liberal leader John Olsen came and went from the Senate during the early 1990s without ever meeting the electors. Belinda Neal (ALP, NSW) is another whose time in the Senate was unsullied by any visit to the polls. She was, however, defeated in attempting to win a House of Representatives seat.

The Senate's elective character vital to its legitimacy

Why should this situation be a matter of concern? The reasons fall into two categories. The first, and immediate, category relates to the integrity and legitimacy of the Parliament and, in particular, the Senate. Any dilution of the Senate's elective quality casts a shadow upon the authority with which it performs its extensive and comprehensive responsibilities in legislative and other parliamentary processes. The second set of reasons is what this course of events demonstrates about not only the dangers of tinkering with the Constitution, but also the capacity to do so effectively.

In general, it is a fundamental principle in Australia that membership of a House of Parliament or a legislative body should be accomplished through popular (democratic) election. This principle has had especial significance for the Australian Senate. The United States counterpart aside, few other second Chambers can rival the Senate's powers.

These powers have been validated, legitimised and reinforced by the fact that the Senate has always been, from its inception, an elected House. It is, in fact, the first second Chamber in the world to be elected on the same franchise as the other Chamber (in this case, the House of Representatives); since 1903 it has, like the House, been elected on the basis of a full adult franchise. From its earliest days the Senate has played an important role in the Parliament, and that role has grown and developed since introduction at the 1949 elections of proportional representation. To a great extent, when it is said that national governments in Australia are responsible to Parliament, it is to the Senate's contribution and achievement to which the observer must look for evidence to sustain the proposition.

The Senate's authority to fulfil its role under the Constitution thus has two foundations. The first is that it is an elected House. The second is that, because of proportional representation, its composition closely reflects electoral opinion (indeed, more so than the House of Representatives) and thereby enhances the representivity of the Parliament as a whole.[3]

It follows that anything which weakens the elective foundations of the Senate potentially weakens the Parliament and its authority to hold governments in Australia to account. This is the defining deficiency of the new s. 15 as it has operated in practice. The deficiency is aggravated not just because casual vacancies are filled by selection rather than election, as has always been the case, essentially for practical reasons, but because nomination is totally controlled by political parties. There is virtually no avenue of escape. The previous system at least ensured that the filling of a vacancy was remitted to the electors at the earliest subsequent opportunity.

A second, subsidiary deficiency in the new s. 15 is that it often augments the advantage of incumbency (recognising that incumbency is not invariably an advantage). This advantage is seen very clearly among the cross-bench parties. It is perhaps most visible, ironically, in the case of the Australian Democrats, who hardly wince when it comes to turnover of parliamentary representation by means of party selection rather than popular election. Of the 26 Australian Democrat Senators in the Senate since 1977, no fewer than eight have first entered via s. 15, seven before winning the support of electors at the polls. This number includes former party leaders Janine Haines, Janet Powell, Meg Lees, Natasha Stott-Despoja and Andrew Bartlett.

New section 15: the Constitution's "most prolix, legalistic and confusing section"

The second group of reasons for interest in the fate of the new s. 15 is what it tells us about altering the Constitution. The most eminent student of the Australian Parliament, Professor Gordon Reid, later Governor of Western Australia (1984–89), said it all when he wrote that the "seemingly simple change" in 1977:

> ".....replaced the original and succinct s. 15 with the Constitution's most prolix, legalistic and confusing provision. Ironically, the one-and-a-half pages of the new s. 15 lacked clarity, as was demonstrated when first it was needed".

The new s. 15 was first activated when the Parliament of South Australia had to replace former Liberal Movement Senator (and former State Liberal Premier) Steele Hall. Senator Hall had resigned to contest a seat in the House of Representatives for the Liberal Party, to which he had returned. The Liberal Movement had been dissolved, some of its remnants rejoining the Liberal Party, others heading for the newly-formed Australian Democrats founded by Liberal renegade Don Chipp. The latter was deemed to be the successor organisation, and the Senate place went to Janine Haines, who had been on the Liberal Movement ticket at the time of Steele Hall's election in 1975, rather than to the nominee of the Liberal Party.

Reid pointed out that the new s. 15 has "the effect of limiting the discretion of State Parliaments and State Governments in filling casual vacancies". This observation raises an important but unresolved question about the new s. 15 — namely, is a State Parliament necessarily compelled to endorse the nominee of the political party to which the previous Senator belonged?

In 1987, when the ALP in Tasmania proposed J G Devereux as successor to Senator Don Grimes on his appointment as Ambassador to the Netherlands, the Tasmanian Parliament, at the behest of Liberal Premier Robin Gray, voted down the nomination on the ground that the nominee would not represent Tasmania properly because of his views on environmental and conservation questions. Regrettably, the 1987 double dissolution elections intervened before events had run their full course, and Devereux went to the Senate with the blessing of the electors. He subsequently left the ALP and sat as an Independent, eventually resigning to contest a seat in the House of Representatives.

Did the Constitution need a new section 15?

The short history of the 1977 change: The impoverished draftsmanship of new s. 15 is only one side of the constitutional aspect. The other side is how necessary was amendment in the first place? Were the grounds which motivated its conception and presentation to the electors a sufficient justification?

The immediate cause of the change was the controversies over casual vacancies in 1975, the last year of the Whitlam Government. The first centred on replacement of Senator Lionel Murphy, following his appointment to the High Court, by Cleaver Bunton, a leading local government figure in New South Wales. Bunton was nominated by new New South Wales Premier, Tom Lewis. Shortly afterwards the Queensland Legislative Assembly (the only House in that State's unicameral Parliament), at the instance of National Party Premier Joh Bjelke-Petersen, and in the face of opposition from Liberal Party ministers in his government, selected Pat Field to replace the deceased Senator Bert Milliner in preference to Dr Mal Colston, the nominee of the ALP.

In this context the Bunton nomination is of more interest for it was, in some considerable measure, a self-inflicted wound with some relevant antecedent events. There had been several occasions previously when parliamentarians had gone to the bench of the High Court. In all but two such cases the appointment was followed by a by-election, which thus places a measure of discipline on governments making such appointments.

The first exception was O'Connor, a Senator. He was replaced by another protectionist from New South Wales, who served a few days before the vacancy came before the electors at the 1903 federal elections. The interim Senator was not a candidate at those elections, and in fact returned to the Legislative Council of New South Wales once his Senate membership lapsed. The other exception was John Latham, who left the House of Representatives at the 1934 elections in the expectation of appointment as Chief Justice when a vacancy in that office came to pass, as it eventually did after some delay the following year.

When a vacancy arose in the Court in 1972 there was reportedly a general inclination that it should be filled by another former Attorney-General, the Minister for Foreign Affairs, Nigel Bowen. The times were not, however, propitious. Bowen stayed in the House of Representatives and the place on the Court went to Anthony Mason, a member of the Court of Appeal in New South Wales and a former Commonwealth Solicitor-General. The rest, as they say, is history. (Bowen himself eventually went to the NSW Court of Appeal in 1973, and later became the first Chief Judge of the Federal Court; he was succeeded as member for Parramatta by Phillip Ruddock.)[4]

The circumspection of the McMahon Government might well have been emulated by the Whitlam Government in 1975. According to Tom Uren, the Murphy appointment:

> "…. came completely out of the blue …….. I could immediately see problems: Lionel had been elected to the Senate for six years but had served only eighteen months. I saw that if he were to be appointed to the High Court, six New South Wales Senators would have to retire at the time of the next half-Senate election and the ALP could gain only three of those places. Under normal circumstances five New South Wales Senators would have retired and we would have gained three out of five. Therefore, when Murphy went to the High Court, we stood to lose a seat and possibly fail to gain control of the Senate. We were literally giving the conservative forces at least one extra Senate position, which might have been the vital vote to give us a majority in the Senate at the next half-Senate elections".[5]
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> Uren continued:
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> "In Cabinet I argued strongly on this point, but also questioned what Premier Lewis would do concerning the casual vacancy: 'Who is to say that Lewis will appoint a Labor man to fill Murphy's vacancy?' ".[6]

Uren frankly admits that part of his concern was motivated by internal Labor politics, his fear that Murphy would probably be replaced by:

> "….. a right-wing Tammany Hall machine appointment, not a left-wing candidate. I was also worried that the position of the Left would then be weakened in the ALP caucus. Murphy's appointment created an imbalance in the caucus and on the federal executive".[7]

Lewis, for his part, would not have had much experience of filling Senate casual vacancies. In his time few vacancies came to the NSW Parliament, and

those that did so were a consequence of death or terminal illness. What he did have experience of was vacancies in the New South Wales Legislative Council, where there was no convention or practice about selection of someone from the party of the member who had died or resigned. In the words of Neville Wran's biographers, "[w]here single vacancies were caused by death or retirement, they were filled by the majority Party".[8] Only recently two vacancies had been engineered to expedite Wran's transfer from the Council to the Assembly without disadvantaging Labor. This manoeuvre was facilitated by appointment of a Liberal MLC to the Federal Bankruptcy Court bench, thus ensuring that, including Wran's resignation, there were two vacancies. The Commonwealth Attorney-General involved in the stratagem was Senator Lionel Murphy.

It is not surprising that Lewis was unmoved by Prime Minister Whitlam's invocations of conventions in an effort to have the Murphy vacancy in the Senate filled by a Labor nominee. What is surprising, given Whitlam's general disregard of conventions in so many fields of government, is that he should have based his case on so transparently infirm a foundation.

The two incidents in 1975 were not the first attempts to manipulate casual vacancies in party interest during the Whitlam period. The Coalition had its own grievances stemming from the previous year, when the Government sought to engineer an advantage for itself in the up-coming periodical elections of Senators by appointing long-term Senator Vince Gair, former Leader of the Democratic Labor Party, as Ambassador to Ireland, at his own suggestion as former Prime Minister Whitlam has lately disclosed.

With six rather than five vacancies to be contested in Queensland, Labor thought it had a chance of securing three seats, instead of two in the event that only five seats were at issue. Had the Whitlam tactic succeeded, it would inevitably have had the effect of changing voter preference as it had been expressed at the periodical election of Senators in 1970. But the manoeuvre was bungled, and instead of periodical elections for half the Senate, Australians went to the polls at double dissolution elections for the third time in their history.

Ironically, the advantage which Whitlam sought to secure for his own party with the Gair appointment was, as Uren pointed out, the same advantage he proposed to give to his opponents should a periodical election of Senators have taken place on 13 December, 1975, as would have occurred had the Governor-General accepted the advice which Whitlam unsuccessfully sought to submit to him on 11 November, 1975.

Did the Constitution need a new section 15?

The long history of the 1977 change: The events of 1974–75 brought the problem of filling casual vacancies in the Senate to a head. They manifested rather than created a long-standing, unresolved issue in the composition of the Senate, arising from the twin features of direct election by all eligible electors in a State, and the multi-member character of representation essential to capture the main streams of electoral opinion. Valuable as proportional representation is in reflecting a diversity of electoral opinion, it has a major defect in handling casual vacancies. None of the proponents of proportional representation has yet come up with a satisfactorily workable formula.

In the initial draft of the Constitution, Senators were to be chosen by State Parliaments, following the method then used in the United States. Under such a procedure the issue of filling a casual vacancy by a State Parliament would have

been simpler to the extent that there was no change in the selecting body. But when it was decided that Senators would be directly chosen by the people of the State, problems arose in filling a vacancy because, as explained by Quick and Garran:

> "[I]t was desired to have the vacancy filled by direct election as soon as possible; but the expense of holding a special election throughout the State was an obstacle".[9]

The actual convention debate does not contain much guidance on the matter, except some comment about perceived dangers of interim selection by the Governor, implicitly because it would be a party or faction decision, rather than by the Parliament as a whole. Characteristically, it was Alfred Deakin who put the view that there was no real difference between an appointment by the Executive and one by the Parliament as a whole![10]

It was also originally proposed that a new appointee would hold office for the "unexpired portion of the term". This was subsequently changed to provide for an election to fill a vacancy at the next election for the House of Representatives or of Senators, whichever was the earlier.

Quick and Garran explain at some length that under the original casual vacancy provision, the procedure:

> "..... is not regarded by the Constitution as the election of a successor . . . it is merely an *ad interim* appointment, in order to save the State from being short of a Senator, on the one hand, and to save the State the cost of a special election, on the other; the legislative appointee is not a successor of the deceased, disqualified, or resigned, Senator, but merely a temporary holder of the office, pending the election of a successor by the people of the State".[11]

In the 48 years from the inception of the Commonwealth to introduction of proportional representation for election of Senators, various practices prevailed in filling casual vacancies, and from time to time it was asserted that replacements should come from the same party as the deceased or resigned Senator. There was no convention, and sometimes parties with majorities in a State Parliament felt no inhibition about choosing one of their own to fill a place previously occupied by an opponent. The Peden Royal Commission on the Constitution observed, in 1929, that:

> "In some instances a candidate has been elected of the same party as the Senator whose place is vacant, although he has not belonged to the same party as the majority of the members of the State Parliament, but this system has not been generally followed".[12]

One attitude of interest in this period was that of Labor leader in New South Wales during the 1920s and early 1930s, Jack Lang. He took the view that casual vacancies should not be filled by anyone proposing to contest a forthcoming Senate election. In short, a Senator chosen under s. 15 should not be able to contest a periodical (or, indeed, a general) election of Senators with the advantage of incumbency.[13]

A foretaste of future manipulations occurred in 1917. The Prime Minister, W M Hughes, tried to build a majority in the Senate by securing the resignation of an anti-conscriptionist Senator and his replacement with one favourable to Hughes' situation – in particular, his desire for a resolution asking the Imperial Parliament to authorise an extension of the life of the Commonwealth Parliament, elected in 1914, and due to face elections before the end of 1917 in

the case of the House, and before 30 June, 1917 in the case of the Senate. As with the Whitlam Government's ploy with Senator Gair in 1974, the plan back-fired, and normal elections proceeded on 5 May, 1917.[14]

A major reason why any controversy about casual vacancies in this era was short-lived lies in the very lop-sided majorities mainly enjoyed by governments under the first two methods of electing Senators. "Control" of the Senate, or even party advantage, was practically never at stake, no matter how a casual vacancy was filled.

The proportional representation system introduced at the 1949 elections had the effect of ensuring that party representation in the Senate would closely reflect party voting strength in the electorate. In time this representative quality of the Senate voting system came to embrace not only the two major competitors for power nationally, but also various minor parties and interests.

Because of the closeness of voting in Australia, and the fact that this feature is to be found in all States as well as Australia-wide, the consequence has been a diametrical change from the situation in the first half-century of the Commonwealth. Majorities are no longer lop-sided. Even when they exist, they are usually paper thin (the largest margin of government over all others has been six, from 1975 to 30 June, 1981). Casual vacancies shifted from being largely peripheral contests about placemanship to matters of major import potentially affecting "control" of the Chamber.

Menzies was the first to be conscious of the impact of the new voting system on the Parliament as a whole, and the workings of s. 57 (the double dissolution provision) in particular. He understood the essential effect of the new method of choosing Senators: deadlocks would be more likely but, with proportional representation, it would be well nigh impossible to resolve them by resort to a double dissolution under s. 57. Australia's parliamentary system was now one of adversarial bicameralism, as would become increasingly clear in the next half-century.[15]

On 4 May, 1950 Menzies introduced the *Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill* 1950.[16] It included several measures which, it was hoped, would ameliorate the problems he believed were created by the combination of the Senate's virtually co-equal powers with the House, and the proportional method of electing Senators. Once passed by the House of Representatives, it went to the Labor-controlled Senate, which established a select committee to examine the proposed amendments to the Constitution. As the Government decided not to participate in the inquiry, it was an all-Labor body headed by former Chifley Government minister, Senator Nick McKenna of Tasmania.

The select committee's main preoccupation was the general measures being proposed to reduce the likelihood of deadlocks between the two Houses, but the Committee's review inevitably embraced the casual vacancy implications. It reported as follows:

> "Because of the added importance of casual vacancies as a result of proportional representation ensuring fairly evenly divided Senates, it is recommended that the constitutional provision for filling of casual vacancies be reviewed. . . . [T]he law should be amended to make it as nearly certain as possible that casual vacancies will always be filled by a new Senator of the same political complexion as his predecessor. The most satisfactory way to ensure this . . . is by a provision in the law that in the

event of a Senator ceasing to hold office for the expiration of his term any votes credited to him be transferred to the next in line, according to his ballot papers, and the candidate elected by a continuation of the count to serve until the expiration of the term, or until the election of a successor at the next election of Senators for the State, whichever first happens".[17]

While the Committee's message that a vacancy should be filled by someone of the "same political complexion" was heard, the other ideas it raised fell by the wayside. So also did its recommendation that s. 15 be amended "so as to empower the Parliament to determine by legislation how casual vacancies shall be filled".[18]

The Select Committee recommended no further action on the proposed changes to the Constitution. Menzies himself was content for the matter to be laid aside following the 1951 double dissolution elections, which yielded a small working majority for the Coalition in the Senate.

The Committee's ideas about handling casual vacancies were however kept alive by its secretary, J R Odgers, subsequently Clerk of the Senate (1964-79), in successive editions of *Australian Senate Practice*.[19]

The next episode in this long history arose on 12 December, 1951 when Western Australian Labor Senator R H Nash died. The Liberal Premier of Western Australia, D R McLarty, wrote, *inter alia*, to Menzies on 20 December, 1951 after the Liberal and Country League Executive had voted to replace the deceased Senator with one of their own members:

"The Liberal and Country League Executive met a few night[s] ago and carried a resolution agreeing to the appointment of an LCL candidate, but I got them to agree that I should first consult you before making any final decision.

"Whatever action we take in this case will be a precedent for the future, but even if we should appoint a Labor nominee there is no certainty that future similar action would be taken in such States as New South Wales, Victoria and Queensland.

"In the event of our appointing a Labor supporter, I would like to know if the Electoral Act would be amended to make provision for the filling of the vacancy by a candidate of the same Party, and as you are aware this action should not be delayed. You will also be able to inform me if such action could be taken by means of legislation, or is [it] a constitutional matter requiring a referendum?

"In the past we have in this State filled three Senate vacancies by parliamentary action but the question of proportional representation did not then arise".[20]

In a letter of 10 January, 1952 McLarty wrote, *inter alia*, to the other State Premiers:

"My opinion is that, in view of the fact that proportional representation is now the method of election to the Senate, a member of the same Party, nominated by the Executive of the Party, should be appointed when future vacancies arise through death or other causes".[21]

The McLarty Government nominated J A Cooke (ALP) to take Nash's place. Although much was subsequently made of the observance of the McLarty rule, it in fact had only limited effect in maintaining the party complexion of the Senate as expressed by the voters at periodical elections of Senators.

An example of its limited impact came in 1959, following Senator John Spicer's resignation on 13 August, 1956 to become Chief Judge of the Commonwealth Industrial Court. In accordance with the McLarty rules he was replaced by G C Hannan, on the nomination of the Bolte Liberal Government in Victoria. At periodical elections in November, 1958 there were thus six vacancies to be filled in Victoria because Spicer's term had only commenced on 1 July, 1956. The six places were divided evenly between Liberal and Labor.

Had only five places been at issue, the Liberal Party would have won three seats to two. Victorian representation in the Senate during 1959–62 was, as a consequence, 4 LCP, 5 ALP, and one DLP, instead of 5 LCP, 4 ALP and one DLP had Spicer not resigned. (As it was, the Government had a majority in the Senate from 17 February, 1959 as a consequence of filling of a casual vacancy in New South Wales, whereas from 1 July, 1956 until after the 1958 elections it had only had half the Senate. It was in this period that, for the first time in the Parliament's history, there were a number of bills – including one to establish the Reserve Bank of Australia – meeting the requirements for a double dissolution under s. 57, but none eventuated.)

The McLarty rule operated in modified form in late 1962 when newly-elected Labor Senator Max Poulter died. The Queensland Country Party–Liberal Government led by Frank Nicklin refused to accept the Labor nominee, A E Arnold, who had been third on the Labor Senate ticket at the previous Senate elections, because he had won his union post on a unity ticket involving Communist and ALP support. Labor eventually brought forward another unionist, George Whiteside, as a second candidate and he won the vote with Government support. When the vacancy was contested in a State-wide ballot at the time of the November, 1963 House elections, the seat went to K J Morris of the Liberal Party, thus distorting voter dispositions as expressed in the periodical elections of 9 December, 1961.

Another flaw in the McLarty convention was exposed in 1966, again in Western Australia. Between the calling of periodical elections of Senators on 5 December, 1964 and House of Representatives general elections of November, 1966, two Liberal Senators died – Senator Vincent on 9 November, 1964, and Senator Sir Shane Paltridge on 21 January, 1966. They were replaced by Senator J P Sim and Senator R G Withers respectively. Sim and Withers had to face the electors of Western Australia at the House of Representatives general elections of 26 November, 1966.

New legislation (the *Senate Elections Act* 1966) was passed to cover, *inter alia*, a situation where there was an election to fill a casual vacancy separately from periodical elections of Senators, and to cover election of two or more Senators in such circumstances. In particular, the legislation made it clear that there would only be one ballot, on a proportional representation basis, and not one ballot for each vacancy; this was a matter upon which there was reportedly extensive Cabinet and intra-party debate. The consequence, in the case of Western Australia in 1966, was that the Liberal Party would inevitably lose one seat. The reason for this approach, according to Deputy Opposition Leader Gough Whitlam, was the prospect of litigation if a proportional approach was not followed. Nevertheless, once again, voter preference as revealed in periodical elections would be altered.[22]

The Government's magnanimity was hardly admired. The deputy leader of the Democratic Labor Party, Senator Frank McManus, gloated:

> "[T]he Government, with singular unselfishness and without regard to Senator Withers, a member of one of its own parties, who is to be the sacrificial offering, is determined that there shall be a single election for the two positions, which will result, it would appear, in the Government winning one and the Australian Labor Party winning the other. . . .
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> ". . . I have noticed that in a number of Senate elections the Government has asked for a majority on the ground that it is vital that it should control the Senate. The Government can no longer say that. It can never use that argument any more, because it is now altering the law in such a way, I understand, as to ensure that whereas it could have had under the present law a 31 to 29 majority, under the amended law it will place itself in a position of having a minority".[23]

In another relevant observation, McManus pointed out that while the casual vacancy system would often work for the major parties, this would not be the case for cross-bench parties:

> ". . . [T]he effect of this Bill must inevitably be that in an election such as this, of the House of Representatives or the Senate, for a casual vacancy, a candidate of any party outside the major parties will not be able to be elected. Those are the facts of life. If a DLP Senator is elected under the proportional representation system in the future, and if he dies and the vacancy is to be filled, it is possible that the Parliament in the State from which he came will elect a DLP Senator for the period up till the next election. But it appears to me to be obvious that when that election comes only a representative of one of the major parties will be elected. So this Bill, in effect, is designed to ensure that in the case of casual vacancies at elections throughout the Commonwealth the candidate of the third party, the D L P, cannot be elected, even though that Party may have won the seat fairly and squarely at the general election. . . . It is unfair to the smaller parties. It is a denial of the system of proportional representation on which the Senate is supposed to be based".[24]

(This impact on cross-bench parties was certainly addressed in the 1977 referendum, and the Australian Democrats have taken extensive advantage of the facility thus offered.)

Those with concerns about the impact of the legislation on the Government's position in the Senate were vindicated. Notwithstanding its record-breaking but restless majority in the House, the Government found itself in a minority in the Senate, the consequence not only of the 1966 casual vacancy elections in Western Australia, but also the decision of South Australian Liberal Clive Hannaford to sit as an Independent. In the House it was forced to constitute a second Royal Commission on the sinking of HMAS *Voyager*. In the Senate, it was confronted with disallowance of regulations to increase postal charges. A deeper humiliation came later in the year, on the eve of periodical elections of Senators, when the Senate made an issue of use of the RAAF "VIP" fleet, and compelled the Government to table relevant documentation, including passenger manifests.[25]

When Prime Minister Harold Holt opened the Liberal Party's Senate campaign he said:

> "Although it enjoys a record majority in the House of Representatives, the Government is in a minority in the Senate. You may wonder why this is so. The immediate reason is the death last year [sic] of two Liberal Senators,

but the Senate is always close to an even division, because its members are elected by proportional representation, . . .".[26]

Meanwhile, the matter invariably featured in reviews of the Constitution. In the late 1950s a Joint Parliamentary Committee considered a range of constitutional matters, including inter-House issues. In its final report the Joint Committee wrote:

> "As the Committee has already reported to the Parliament, it sought a constitutional formula to require the Parliament or Governor of a State in making an appointment to fill a casual vacancy arising in the Senate, to choose some one who was a member of the same political party as the Senator whose place has become vacant. The Committee could not, however, find suitable language which would have covered all possible contingencies and, at the same time, avoided reference to political parties in the Constitution. ..... The difficulties proved to be insurmountable. . . .
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> "..... [I]t would be possible for an appointment under section 15 to disturb the balance of party strength in the Senate, as for instance, if a State Parliament should replace a former government Senator by some one belonging to an Opposition party. In the present period of proportional representation for the election of Senators, such a choice could be sufficient to deprive a government of its majority in the Senate.
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> "..... At this juncture, the Committee merely reiterates its view, expressed in the first Report, that all members who sat on the Committee thought the principle should continue to be observed without exception so that the matter may become the subject of a constitutional convention or understanding which political parties will always observe".[27]

It was upon the views of this Committee, of which he was a member, that Prime Minister Whitlam relied when championing the cause of a Labor replacement when Senator Murphy was appointed to the High Court.

In the wake of the events of 1974–75, the question of casual vacancies figured prominently on the agenda of the inter-parliamentary Australian Constitutional Convention when it met in Hobart in October, 1976. After a debate which featured many of the alumni of recent Australian political controversies, the Convention adopted the following resolution:

> "That this Convention affirms the principle that a casual vacancy in the Senate which occurs by reason of the death of a Senator or the disqualification or resignation of a Senator caused by *bona fide* illness or incapacity should, in order to maintain the principle of proportional representation and the wishes of the people of the State at the relevant Senate election, be filled by a member of the same political party as the Senator whose vacancy is to be filled. But in reaffirming this principle the Convention recommends that the Constitution be amended to provide that the person elected by the Houses of Parliament of the State should hold office for the balance of the term of the Senator whose place he is taking".[28]

This formed the basis of the alteration to the Constitution put to the electors the following May. The qualification about a resignation "caused by *bona fide* illness or incapacity" was, however, removed.

When the matter went to the voters they were told, in the YES case, that:

> "A YES vote . . . will ensure that your choice of Parties at a Senate election cannot be changed as a result of accident, resignation, illness, or death of a Senator.

"If the place, say, of a Liberal, Labor or National Country Party Senator becomes vacant, he will be replaced by another person from the same party.

"It is fundamental to your rights as a voter that representation in the Senate should always reflect the wishes of the electorate.

"A YES vote will guarantee your rights.

"It will confirm the principle that if a Senator dies or resigns, a Senator of the same political party will be appointed for the remainder of that Senator's term.

"A Yes vote will avoid the present situation under the Constitution where the balance of the Parties in the Senate can be altered against the wishes of the electorate".

The NO case criticised the proposed alteration to the Constitution on the basis that it would convert what had been:

".....an understanding that upon the occurrence of a *bona fide* vacancy, the State Parliaments would select a replacement Senator who was a member of the former Senator's party ..... [into] a rigid provision of the Constitution ..... [which was] very complex and will produce intricate questions of legal interpretation of great difficulty".

After traversing various problems of a practical nature, the NO case concluded with the observation that "[t]he result is a dangerous subversion of the State Parliament in favour of control by political parties".

J R Odgers, the tireless advocate of the method embodied in the new s. 15, commented in the sixth edition (1991) of *Australian Senate Practice* that the "matter was largely resolved" by the referendum.[29]

Why do Senators leave the Senate?

Another question to address in this study of casual vacancies is the circumstances in which Senators leave the Senate for reasons other than death.

1901–49: Prior to proportional representation the major cause of a casual vacancy was death. In this period there were 38 casual vacancies; 25 of these were the consequence of death. The remaining 13 can be accounted for thus: ill-health, one; absence/irregular attendance, two; integrity questioned, two; party pressure, one; to contest a seat in the House of Representatives, including after losing preselection for the next Senate election, four; acceptance of a Commonwealth appointment, one; acceptance of a State government appointment, two.

In these years, South Australia led the way with five such vacancies; there were none in either Queensland or Victoria.[30]

(This list does not include the Vardon/O'Loghlin case, which for a period fell within the ambit of s. 15. The previous election was, however, declared void and a fresh election for the single place held.)

(The comparable figures for the House of Representatives are that, of the 53 departures for reasons other than challenge or expulsion, 38 were occasioned by death and 15 by resignation.)

1949–77: In the first period of proportional representation, before the 1977 alteration to the Constitution, there were 29 casual vacancies, 21 of which were the consequence of death. In the Menzies/Holt years there were three resignations; one to accept a Commonwealth judicial appointment, another to fill a vacancy occasioned by the technical operation of s. 15, and a third to fill a vacancy caused by resignation of a terminally ill Senator.

Of the remaining five resignations, in the years after 1967, one was an age retirement; one was John Gorton's departure for the House of Representatives on his election as leader of the Parliamentary Liberal Party and his consequent assumption of the Prime Ministership; and three Commonwealth appointments, Dame Annabelle Rankin as High Commissioner to New Zealand, Vince Gair as Ambassador to Ireland, and Lionel Murphy to the High Court of Australia.

(In the House, the 43 by-elections during this period stemmed from 24 deaths and 19 resignations.)

In the years from 1949 to 1972, there does not appear to be any case where the Government sought to engineer a vacancy to enhance its strength in the Senate, even when it became increasingly unlikely that it would have a majority, or might even be in a minority. The Gair appointment in 1974 seems to be the first occasion since 1917 of a government actively seeking to cause a vacancy with the intent of improving its Senate position. It was not entirely unexpected. Speaking in the House of Representatives on 3 May, 1973, W C Wentworth (Liberal, Mackellar, NSW) spoke about an "engineered resignation of a Senator". Referring to Queensland and Western Australia, he said:

> " I do not know what will happen but I am ready to bet that the Labor Party will be making desperate efforts to engineer casual vacancies among long-term non-Labor senators for those two States".[31]

(In 1965, in New South Wales, the newly-elected Liberal–Country Party Government, headed by R W Askin, had the smallest of majorities in the Legislative Assembly. It appointed Abe Landa, a Minister in the previous Labor Government, as Agent-General in London. Its hope of winning his marginal electorate in a by-election ended in disappointment.)

1977 to the present — the age of resignation: Since the 1977 amendment, there have been 58 casual vacancies (including several Territory Senators); only four have been occasioned by death. (The comparable figures for the House demonstrate the same pattern – of the 38 by-elections, only five resulted from a death.)

As far as information is available, more than a quarter of those resigning from the Senate – 14 of the 54 – did so to contest House of Representatives seats, half of them successfully. Another two headed off to State Parliaments. Ten have gone immediately to government appointments (mainly diplomatic); one of these was to a State judicial post. Four took business posts. Perhaps 15 could be said to have retired on age or health grounds. Several resignations appear to have stemmed from internal party pressure. A small number – perhaps five or six – resigned a few months prior to completion of their term, not having sought re-election, or having been defeated. At least one resignation was on integrity grounds. And another resignation stemmed from an infringement of s. 44 of the Constitution; the vacancy was filled by the same Senator, who had been elected at a periodical election. (In the same year, a member of the House who infringed the Electoral Act had to face a fresh election.)

Can anything be done?

The history of new s. 15 of the Constitution is an example of Machiavelli's dictum in the *Discourses* that it is rare in human affairs that, in remedying one defect, we do not create another.

In the first decade after the Constitution had been altered in 1977 there was general satisfaction with new s. 15. The matter was studied by the

Constitutional Commission of the late 1980s. At the time there had been 13 casual vacancies, all but two the consequence of a resignation. It recommended no change except that Territorial Senators be treated in the same way as State Senators (as now happens). The Commission stated that it regarded the section as based on a "well understood" and "generally observed" convention:

> "[W]e regard the convention as meritorious given that it guards the democratic representation of parties in the Senate against disturbance by a Senate casual vacancy".[32]

Had use of the new s. 15 been sparing, and mainly a consequence of death, serious illness or a newly-elected Senator serving the last few months of the term of a retiring predecessor, it may not have been necessary to compose this essay.

But it is clear that there has been a great deal of latitude in the use of the new s. 15, a latitude not available to use so carelessly in the case of members of the House of Representatives. The consequence is that first entry to Australia's more prestigious House of Parliament, the Senate, is almost as much by party selection alone, and not by party selection as a prelude to popular election. The advantage of incumbency can be transferred in the Senate in a way which is impossible in the House of Representatives. This is notwithstanding the crucial importance of the Senate's elective character to the legitimacy with which it realises its significant responsibilities under the Constitution.

The complacent disposition of the Constitutional Commission has set the example. *Australian Senate Practice*, through its first five editions, was the advocate of what became the new s. 15. Its successor, *Odgers' Australian Senate Practice*, through five editions, has confined itself to discussing technical matters associated with the workings of the new s. 15, such as the timing of Senator Tate's resignation following the 1993 elections, five days after his new term commenced. The absence of analysis of the use of s. 15 (apart from an Appendix containing some details) is the more curious because the volume itself, in its exposition of the Senate's place in Australia's parliamentary system, rightly places much stress on the Senate's elected character.[33] Because of how the new s. 15 has been used it is not the Senate's representative character which is now in question, but its foundations as an elected House.

Another instance of neglect of this question came in 1999, the fiftieth anniversary of the first elections for the Senate using proportional representation. There was much to celebrate at the conference to mark this anniversary. But by then utilisation of the new s. 15, for reasons quite antipathetic to the reasons for its adoption, had become very clear. This is, indeed, the major weakness in the 1949 settlement for choosing Senators, but it attracted not a single paper – nor, it seems, a single mention – on the day.[34] Likewise, the ANU Democratic Audit, funded by the Australian Research Council, is not, so far, addressing the matter.

The immediate aim of this essay is no more than to call attention to the problem. But it is not easy to remedy. The new s. 15 has been entrenched in the Constitution, but it may only make sense while the present statutory scheme prevails. For example, it would be quite inappropriate if that scheme were replaced by one in which States were divided into Senate electoral districts, as has been recently proposed by former Federal Director of the Liberal Party, Andrew Robb, now member for Goldstein.[35]

A final consideration is the basic conundrum. For all the virtues seen in proportional representation, the handling of casual vacancies remains an

unresolved problem, even if it were possible to change the present system without resort to another referendum.. The view of the Northern Territory's Steve Hatton, as put to the Constitutional Commission, remains pertinent:

> "Despite problems with section 15 as it is, no possible changes amount to improvements without their own problems".[36]

The Commission itself observed:

> "We can see no change that will produce an impeccable and impregnable constitutional provision".[37]

Perhaps the best that may be hoped for is that the vigilance which compelled Duncan Kerr to withdraw from his shift to State politics will come to bear on the more indefensibly opportunistic resignations from the Senate.

But if there is no obvious path for reform where s. 15 is concerned, the same may not be said for what this example has to teach about constitutional reform in general. The change to the original s. 15, in particular, was ill-considered. And the argument about the matter deteriorated almost every time it was addressed after the first, relatively wide-ranging, examination by the Senate Select Committee on Deadlocks. As time passed the options narrowed rather than broadened. Convenience prevailed over principle.

It was a bad example of constitutional reform. Australians, once they make a change, are rarely sympathetic about revisiting it. But it is hard to imagine a stronger case for doing so than s. 15 in its 1977 form.

Endnotes:

1. On Duncan Kerr's proposed transfer to the Tasmanian State Parliament, see *Labor's Kerfuffle from Denison and back*, and Bruce Montgomery, *Dog day afternoon*, in *The Weekend Australian*, 19-20 January, 2002. Also relevant: *Members should serve full term*, in *The Canberra Times*, 16 January, 2002; *Kerfuffle leads to right conclusion*, in *The Age*, 17 January, 2002; *The Kerr muddle*, in *The Sydney Morning Herald*, 17 January, 2002.
2. For the purposes of this essay I have drawn on information in the *Parliamentary Handbook of the Commonwealth of Australia*, 29th edn, 2002, pp. 430–35; Harry Evans (ed.), *Odgers' Australian Senate Practice*, 11th edn, 2004, Appendix 7, pp. 699–701; and Joan Rydon, *Casual vacancies in the Australian Senate*, in *Politics*, XI (2), November, 1976, pp. 195–204, at pp. 202–04.

   Casual vacancies include cases where a Senator resigns but the vacancy is filled by election rather than selection by a State Governor or State Parliament. They do not include cases where an election is held to be void and the vacancy filled by other means. For example, the list does not include selection of J Vardon by the Parliament of South Australia on 11 July, 1907, subsequently held invalid by the High Court of Australia on 20 December, 1907; this vacancy was eventually decided at a special election on 15 February, 1908. It includes, on the other hand, Senator Gair's departure from the Senate in April, 1974, on the same basis that the list in *Odgers' Australian Senate Practice*, 11th edn, p. 700 includes Senator McMullan's resignation to stand for election to the House of Representatives, even though his successor was elected in the normal manner for Territory Senators.

3. On the contribution which the Senate makes to enhancing the representivity of the Australian Parliament, see J R Nethercote, *Representing People, not merely Majorities – an Analysis of Prime Ministerial views on the Senate*, Canberra, 1994.
4. Troy Simpson, *Appointments that might have been*, in *Oxford Companion to the High Court of Australia*, Oxford University Press, 2001, pp. 23–7, at p. 26.
5. Tom Uren, *Straight Left*, Random House Australia, 1994, pp. 390–1.
6. *Ibid*., p. 391.
7. *Ibid*., p. 391.
8. Mike Steketee and Milton Cockburn, *Wran — An Unauthorised Biography*, Allen & Unwin Australia, 1986, p. 61.
9. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1901 [1995], p. 435.
10. *Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April, 1891*, Legal Books, Sydney, 1986, pp. 603–4.
11. Quick and Garran, *op. cit*., p. 436.
12. *Report of the Royal Commission on the Constitution* (Chair: J B Peden), Canberra, 1929, p. 42.
13. See Geoffrey Hawker, "John Maurice Power" and "William Albion Gibbs", Ann Millar, *Biographical Dictionary of the Australian Senate*, vol. 1, pp. 70–1 and 72–4 respectively.
14. Geoffrey Sawer, *Australian Federal Politics and Law, 1901–29*, Melbourne University Press, 1956, pp. 149–50; L F Fitzhardinge, *The Little Digger 1914–1952*, Angus & Robertson, 1979, pp. 256–60.
15. See *Commonwealth Parliamentary Debates (CPD)*, vol. 196, 21 April, 1948, pp. 1002–3.
16. *CPD*, vol. 207, 4 May, 1950, pp. 2217–24.
17. Report of the Senate Select Committee on *Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill* (Chair: Senator N McKenna), PP S.1, 1950, para 180, p. xxxi.
18. *Ibid*., para 95, p. xix, and para 181, p. xxxi.
19. *Australian Senate Practice*, 1st ed., 1953, pp. 28–9; 2nd ed., 1959, pp. 30-1; 3rd ed., 1964, pp. 57-8; 4th ed., 1972, pp. 64-5; 5th ed., 1976, pp. 113-4.
20. The letter is published in Geoffrey Sawer, *Federation Under Strain, Australia 1972–1975*, Melbourne University Press, 1977, p. 199.
21. *Ibid*., p. 200.
22. For debate in the House of Representatives, see *CPD HR*, 22 September, 1966, vol. 52, p. 1173; and vol. 52, pp. 1873–4.
23. *CPD Senate*, 26 October, 1966, vol. 32, p. 1461.
24. *Ibid*., p. 1462.
25. On the vicissitudes of the Holt Government in 1967, see Ian Hancock, *The V. I. P. Affair, 1966–67*, Australasian Study of Parliament Group, 2004. Published as *Australasian Parliamentary Review*, vol. 18(2), Spring, 2003.

26. Harold Holt, *Federal Election 1967 — Opening Address*, 9 November, 1967, p. 4.
27. *Report from the Joint Committee on Constitutional Review* (Chair: Sir Neil O'Sullivan), Canberra, 1959, paras 287–8 and 291, pp. 42–3.
28. *Resolutions Adopted at the Australian Constitutional Convention*, Wrest Point, Hobart, 27–29 October, 1976, para 9, p. 3.
29. J R Odgers, *Australian Senate Practice*, 6th edn, Canberra, RAIPA, 1991, p. 163.
30. The analysis in this section is based on information contained in Ann Millar (ed.), *op. cit.*, and Ann Millar, *Biographical Dictionary of the Australian Senate*, vol. 2, Melbourne University Press, 2004.
31. *CPD HR*, vol. 83, p. 1661.
32. *First Report of the Constitutional Commission* (Chair: Sir Maurice Byers), vol. 1, AGPS, 1988, p. 315 and p. 320.
33. Harry Evans (ed.), *Odgers' Australian Senate Practice*, 11th ed., 2004, chapter 1, especially p. 8; and pp. 16-7 and pp. 131-6.
34. Marian Sawer and Sarah Miskin (eds), *Representation and Institutional Change – 50 Years of Proportional Representation in the Senate*, Papers on Parliament No. 34, Department of the Senate, 1999.
35. Andrew Robb, *A Philosophy of Liberalism*, in *IPA Review*, vol. 57, 1, March, 2005, pp. 28–9.
36. Cited, *First Report of the Constitutional Commission*, *op. cit.*, p. 319.
37. *Ibid.*, p. 321.