CASUAL VACANCIES UNDER PROPORTIONAL REPRESENTATION

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Various systems have been tried or proposed for filling casual vacancies in legislative Houses elected by proportional representation. Because such Houses involve multi-member constituencies and representatives of a variety of views, the traditional by-election to elect a single member would not be sensible as the majority would win even seats previously held by minorities. Thus, various other methods of filling casual vacancies have been adopted. Some involve a new selection in the form of indirect election by continuing Members of Parliament ('MPs'), while others involve a process which does not require renewed political judgement such as re-examining the ballot papers from the general election. Several other methods of replacing departed members have also been used or proposed in Australia. This article outlines the features of all the systems, past, existing or proposed, and assesses them against a list of criteria which represent the desirable features of such a system.

I INTRODUCTION

In Tasmania in September 2019, the filling of a casual vacancy in the House of Assembly caused by the resignation of a Labor Member of Parliament ('MP') led to the seat's being filled by a former member of the Australian Labor Party ('ALP') who decided not to rejoin the party but to sit as an independent, thus significantly altering the party balance in that House of only 25 members.[1] This incident highlights that, whatever the excellencies of proportional representation ('PR') as a system for electing members of a representative assembly may be, '[i]t has always been recognised that the filling of casual vacancies is a major problem in any system of proportional representation' – to use the words of one of

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1 This case will be outlined further below; the successful replacement was Madeleine Ogilvie, and she replaced Scott Bacon.

Australia's pioneering political scientists, Professor Joan Rydon.[2] Reduced to a nutshell, the problem is that PR is a system for electing multiple people at once, whereas our time-honoured means of filling casual vacancies, the by-election, elects only one person and accordingly transforms a system designed to ensure the balanced representation of a spectrum of opinions into a winner-takes-all system.[3] Cashing this out in traditional party terms, a by-election might mean that a Greens Party or other minor party member, elected with perhaps 10% of the vote in a particular PR electorate, would be replaced by whichever of the two major parties predominates in that area.[4]

It is therefore not sensible to appeal directly to the electors to replace a departed member – the most obvious means of doing so. In Australia two types of methods have been adopted in recent times to meet this challenge: one is appointment of a successor by Parliament, preserving the elective principle indirectly, and the other is re-examining ballot papers from the election in question to determine who would have won without the departed member (as we shall see, there are in fact two competing methods of doing this, one of which is used in Tasmania). Each of these methods normally works reasonably well and in particular usually achieves the all-important aims of providing a more or less democratically legitimated successor while at the same time not distorting the will of the electors at the election – which largely means preserving the party balance chosen by them at that election. But there have been several cases in which one or other of these methods has not worked as desired, and there is also potential for further difficulties which have not yet happened. After an analysis of these various systems, this article will look at three further alternatives not currently practised in Australia – one of which even manages to square the circle by allowing for by-elections while ensuring that they do not distort the people's will – and will then conclude by attempting to build a list of the desiderata for systems for replacing departed members and evaluating each potential system against them.

Speaking generally, it can be said that casual vacancies occur when a validly elected member ceases to be a member by reason of death, resignation or disqualification after election.[5] Focusing on the federal rules, disqualification after election may happen, for example, because of non-attendance for two consecutive months in one session without leave or becoming subject to one of the other disqualifications such as bankruptcy or dual citizenship.[6] However, in principle

2 Joan Rydon, 'Casual Vacancies in the Australian Senate' (1976) 11(2) *Politics* 195, 200.

3 Compare with Tom Round, 'Party Endorsement and Senate Vacancies: The Constitution and the *Commonwealth Electoral Act*' (1998) 7(2) *Griffith Law Review* 297, 299–300.

4 In Tasmania, Australia's proportional representation ('PR') pioneer, by-elections were initially used, and they produced exactly this effect of distorting the party balance, as a result of which the method was rapidly changed: see, eg, Scott Bennett, 'The Fall of a Labor Government: Tasmania 1979–82' (1983) 45 *Labour History* 80, 81.

5 Expulsion is also a theoretically available means of rendering a seat vacant, but not at a federal level owing to the *Parliamentary Privileges Act 1987* (Cth) s 8.

6 See *Australian Constitution* ss 20, 45. (Section 38 makes a provision equivalent to section 20 for the House of Representatives, but as that House is not elected by PR it can be disregarded for present purposes.) See also Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016) 135, 137. Appendix 7 of that work also contains a list of casual vacancies from 1977 to 2016. A casual vacancy also arises if a senator-elect dies or resigns before

cases of disqualification at the time of election do not produce casual vacancies: the initial election of the disqualified person was invalid (or, as is sometimes said, the election has 'failed' in whole or in part) and the person concerned was in the eyes of the law never the holder of the seat in Parliament in the first place.[7] 'In such a case the provisions of section 15 of the federal *Constitution* have no application, for there was no senator whose place could become vacant'.[8] Such cases occurred frequently in the 45th Federal Parliament of 2016–19 with the discovery that assorted politicians had been dual citizens at the time of their election or were otherwise ineligible; they were solved, in relation to the Senate, by a re-count of the ballot papers ordered by the High Court of Australia as the Court of Disputed Returns.[9] Such a re-count, excluding the ineligible person, determines the true legal effect of the votes cast at the original poll and, unlike with a casual vacancy to which section 15 of the federal *Constitution* would apply, it is immaterial if the person who is elected as a result of such a re-count has ceased

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the commencement of the term: see the opinion of WK Fullagar KC and JA Spicer, 'Prospective Vacancy Caused by Death of Prospective Senator prior to Current Senator's Place Becoming Vacant: Whether the Place of the Elected Prospective Senator Has "(Become) Vacant before the Expiration of His Term of Service"' in James Faulkner et al (eds), *Opinions of Attorneys-General of the Commonwealth of Australia with Opinions of Solicitors-General and the Attorney-General's Department: Volume 3: 1923–45* (Australian Government Publishing Service, 2013) 523, 523–6; Laing (n 6) 136, 138 ff. But see PH Lane, *Lane's Commentary on the Australian Constitution* (LBC Information Services, 2nd ed, 1997) 78 ff (without engaging with these views and relying on the words 'before the expiration of his term of service'; but in the circumstances in question the vacancy does still happen before that expiration, merely also, but irrelevantly, before it starts).

7 However, the better view is that parliamentary decisions procured partly by votes cast by the person in Parliament cannot be challenged on this basis as they were given by a de facto member: see *Clydesdale v Hughes* (1934) 51 CLR 518, 528 (Rich, Dixon and McTiernan JJ).

8 *Vardon v O'Loghlin* (1907) 5 CLR 201, 210 (Griffith CJ for Griffith CJ, Barton and Higgins JJ). Section 156A of the *Electoral Act 1907* (WA) make this clear for that jurisdiction, but it would be so anyway. See, in relation to Victoria, Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 243. In New South Wales things are not quite so clear. Section 22D(5) of the *Constitution Act 1902* (NSW) provides that the joint sitting arrangements do not apply when 'a periodic Council election is declared void in accordance with law' but a joint sitting can also be held, under section 22D(1)(b), in the event 'that insufficient Members of the Legislative Council are elected at the periodic Council election next following the occurrence of the vacancy'. The former phrase would seem to be a reference to the election for the whole Council (see, eg, s 17(2)), while the latter seems at first sight to contemplate the unlikely event that there could be insufficient candidates. However, one reason why insufficient candidates would be named as returned by the electors on the writ is that one candidate was only apparently but not validly elected, being un- or disqualified. Then again, such an eventuality would normally be countered by the riposte that the true legal effect of the election must be determined and then the deficiency will be supplied by so doing (eg, through a re-count). Thus the words quoted about 'insufficient members' either refer to an extraordinarily unlikely event or are a clumsy way of referring to a possible one. There is no assistance on their meaning in Hansard or in Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) 133, nor has any such case ever arisen. However, section 175 of the now repealed *Parliamentary Electorates and Elections Act 1912* (NSW) (now the *Electoral Act 2017* (NSW) ss 229(1), (3)) does harmonise quite nicely with the 'clumsy' meaning, which is presumably the intended one, and accordingly a vacancy arising by the invalid election of a non-qualified person is to be treated in New South Wales as a casual vacancy.

9 The leading cases are *Re Culleton [No 2]* (2017) 263 CLR 176; *Re Day [No 2]* (2017) 263 CLR 201; *Re Canavan* (2017) 263 CLR 284.

to be, or even never was a member of the party that initially proposed the ejected person for election.[10]

Although, therefore, the most remarkable set of recent cases involving the departure of senators (de facto, if not de jure senators) does not raise the issue dealt with here, the issue remains an important one, and that is for three reasons. First, the recent case in Tasmania highlights the problem. Secondly, there has in recent times been a remarkably high level of turnover of senators between elections owing to resignations; at one stage, in the first half of 2005, two-fifths of all senators had not in fact been elected directly by the people but were instead filling casual vacancies pursuant to section 15 of the federal *Constitution*.[11] As we shall see, the system for filling casual vacancies in the Senate provides incentives for the parties to make use of the possibility of arranging interchanges given the usually low political cost of doing so. Thirdly, the number of votes recorded for minor parties rather than the two major parties in the Senate continues to be far above the level in past decades and this is reflected in their representation in the Senate.[12] While reforms to the voting system to the Senate that took effect in 2016[13] have largely eliminated the smallest of the small parties, minor parties and independents are still elected,[14] as indeed they should be in a system of PR. And not all States have adopted comparable reforms,[15] making it even more likely that smaller players will be elected. Independents cause particular difficulties for the resolution of casual vacancies given that, by definition, there cannot be a political party behind them to assist in the choice of a successor. Minor parties, too, can be fissiparous, producing difficulties with systems that assume a continuity in party allegiance over the life of a Parliament – which both systems currently used in Australia for filling PR casual vacancies do, although in different ways.

Part II of this article will analyse the law and practice around the existing Australian systems for filling casual vacancies in PR systems. In Part III, there will be a survey of some past and proposed systems for achieving that same goal,

10 *Re Kakoschke-Moore* (2018) 263 CLR 640, 650–3, 655 ff. The person elected must nevertheless, of course, have been at the time of the election, and must still at the time of the re-count remain eligible to be elected: *Re Nash [No 2]* (2017) 263 CLR 443.

11 John Nethercote, 'Senate Vacancies: Casual or Contrived?' (Conference Paper, Conference of the Samuel Griffith Society, 8–10 April 2005) 61.

12 Brian Costar, 'Options for the Senate's Voting System' (2014) 25(3) *Public Law Review* 157, 162–3; Nick Economou, 'Electoral Reform and Party System Volatility: The Consequences of the Group Vote Ticket on Australian Senate Elections' (2016) 31(1) *Australasian Parliamentary Review* 117, 119, 126; Ian McAllister and Toni Makkai, 'Electoral Systems in Context: Australia' in Erik S Herron, Robert J Pekkanen and Matthew S Shugart (eds), *The Oxford Handbook of Electoral Systems* (Oxford University Press, 2018) 763, 767; Ian McAllister and Damon Muller, 'Electing the Australian Senate: Evaluating the 2016 Reforms' (2018) 70(2) *Political Science* 151, 151 ff, 161–3. The growth in minor parties' votes may have stagnated at the 2019 election but there has certainly been no serious reversal of the long-term trend.

13 Upheld in *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1.

14 McAllister and Makkai (n 12) 769 (also true of the 2019 elections, although the crossbench was reduced in size at that election, as expected, given that the election was for only half the Senate, not for the whole Senate as at the double dissolution of 2016).

15 In Victoria, for example, under section 93A(2) of the *Electoral Act 2002* preferences are optional beyond the fifth preference if a voter votes 'below the line', but above-the-line voters still have their preferences distributed according to a group voting ticket (section 112B of that Act), making preference swapping among very small parties still possible.

including some systems in use overseas. Part IV of the article will attempt to develop, on the basis of our reflections on the merits and demerits of these various systems – for it would seem that no author has considered this question previously – a series of criteria for assessing the effectiveness of these various systems. That list will enable us to measure each system against the list of desiderata and come to conclusions about the relative strengths and weaknesses of a total of seven systems for filling PR casual vacancies, which will be reshuffled into three categories: those that require a new act of choice by the voters, those requiring politicians to make a choice and those which require only administrative steps rather than a fresh act of political judgement. The conclusion will be that it would be worth thinking about reviving a formerly used system and simply allowing parties to nominate replacements for casual vacancies without the intervention of any Parliament.

II CURRENT SYSTEMS

Seven Houses of Parliament in Australia use PR. Alongside the federal Senate, there are the Legislative Councils of New South Wales, Victoria and South Australia – all of which fill casual vacancies using the system of indirect election consisting in a selection by a parliament of a replacement – and three Houses where some system for re-counting the ballot papers is used: the Legislative Council of Western Australia, the House of Assembly (ie, the Lower House) in Tasmania and the sole House of the Australian Capital Territory's legislature.[16]

A Selection by Parliament

1 Basic Principles and History

The first group of PR Houses comprise four Upper Houses: the federal Senate[17] and the Legislative Councils of New South Wales,[18] Victoria[19] and South Australia.[20] These jurisdictions choose the method of indirect election. In the three States the electoral assembly consists of all the members of the Parliament in which the casual vacancy exists, whereas at federal level the State Parliament of the ex-senator's State reminds us of the original purpose of the Senate as the States' House by selecting the replacement senator in a joint sitting. In relation to the four Territory senators, who have shorter terms than the States' senators as they are all re-elected at every election for the House of Representatives,[21] section 44 of the

16 There is an interesting table in David M Farrell and Ian McAllister, *The Australian Electoral System: Origins, Variations and Consequences* (UNSW Press, 2006) 60 ff.

17 *Australian Constitution* s 15; *Commonwealth Electoral Act 1918* (Cth) s 44.

18 *Constitution Act 1902* (NSW) ss 22D–22E.

19 *Constitution Act 1975* (Vic) s 27A. The purported entrenchment of this section and its NSW equivalent is arguably valid according to Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 393 ff, and ineffective according to Taylor (n 8) 490. In this article I assume the correctness of the latter view.

20 *Constitution Act 1934* (SA) s 13.

21 *Commonwealth Electoral Act 1918* (Cth) ss 42–3.

Commonwealth Electoral Act 1918 (Cth) provides that the single-chamber legislature of each Territory is responsible for filling the vacancy.

It has not always been thus. Originally, when the Legislative Council of New South Wales was made directly elected in 1978,[22] the law provided for the principal method of filling casual vacancies to be simply taking the next available person on the party's candidate list, with the joint sitting only a fallback if that failed; the list method, however, was deleted in 1991 – allegedly for the following reasons, unsupported by much in the way of evidence:

> The method currently provided for in section 22C [namely, using the list] does not guarantee that casual vacancies will be filled by a person of the same political party as the politician originally chosen by the people. Our democratic system of government demands that such a guarantee should exist and for this reason the list system of filling casual vacancies is not considered fair or appropriate. … Strict safeguards are already in place to ensure that the member elected by the joint sitting is a member of the appropriate party. The method of filling casual vacancies will then be consistent with the method of filling casual Senate vacancies in the Parliament of the Commonwealth.[23]

It seems very odd, verging on perverse, to reject the party-list method for the reason stated in the first sentence quoted, given that it is usually well adapted to ensuring party succession and there was no case in New South Wales in which it had failed in that regard. Nevertheless the Bill to make the change was endorsed at the referendum held in conjunction with the State election in 1991, the main purpose of which was to seek the electors' endorsement of a modest reduction in the size of the Legislative Council rather than the method of filling casual vacancies and which therefore passed easily. It may be that the real motive force behind the change to the system for filling casual vacancies was the Reverend & Hon Fred Nile MLC and the need to have his support for the referendum. On the one hand, he had fallen out irreconcilably with the Hon Marie Bignold, a list replacement for a casual vacancy in his own party, and was no supporter of a casual vacancy system that did not allow for renewed party choice at the time of replacement; on the other, he feared for his re-election in 1991 and realised that his wife, also a Member of the Legislative Council ('MLC') but not up for re-election in that year, would if necessary be able to resign, effectively in his favour, under the 'Senate' system.[24]

In Victoria, the Constitution Commission, an expert body set up to recommend changes to the Victorian Constitution in the early years of the present century, rejected the re-count method for choosing replacements as used in Tasmania on the grounds that it required the retention of the ballot papers for a long period (a problem which disappeared a few years later thanks to computer-based storage

22 *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* (NSW).

23 New South Wales, *Parliamentary Debates*, Legislative Council, 14 March 1991, 983 (Edward Pickering). See also Twomey, *The Constitution of New South Wales* (n 19) 375, 390 ff.

24 Matthew Moore, 'Bignold May Fall to Nile Devilry', *The Sydney Morning Herald* (Sydney, 23 February 1991) 26; Alicia Larriera, 'Votes Aside, Nile Assured of Seat', *The Sydney Morning Herald* (Sydney, 28 May 1991) 23. In fact the Reverend & Hon Mr Nile was re-elected in 1991, but 13 years later, in 2004, he also filled his own casual vacancy after resigning from the Legislative Council to stand for the Senate and just missing out on election: Lovelock and Evans (n 8) 134; perhaps this further advantage of the 'Senate' rather than the 'next in list' system was also at the back of his mind.

systems for ballot papers or at least the votes signified on them) and because 'it makes the assumption that voters would have elected the next candidate on a recount if the vacating candidate had not stood at the original election. The result may be arithmetically correct but it does not necessarily reflect the voters' wishes had that in fact been the case at the original election'.[25] No example was given of any such case, and, as we shall see, this statement also is somewhat exaggerated.

At the federal level, and including the four Territory senators, there is also provision for interim replacements to be made by the executive. The Governor-in-Council in the States,[26] the Administrator-in-Council in the Northern Territory and the Chief Minister of the Australian Capital Territory ('ACT') may appoint an interim replacement if the legislature is 'not in session' when the vacancy is notified to the executive[27] and such appointments remain valid for 14 days after the commencement of the next parliamentary session. No equivalent exists or is needed for the three State Upper Houses.[28] This provision, copied from article 1, section 3, clause 2 of the *United States Constitution* as it stood in the 1890s,[29] was

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25 Constitution Commission Victoria, *A House for Our Future* (Report, 1 July 2002) 43.

26 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 437–8:

> These words ['with the advice of the Executive Council'] were inserted to make it plain that the provisional appointment of senators, though vested in the Governor of the State, as head of the State Executive, is not one which he should make according to his own personal judgment and discretion, but that it is, in fact, a political appointment to be made by the State Executive, according to the principle of ministerial responsibility. Such an appointment, made on the advice of a State ministry, having the confidence of the State Parliament, would probably be one which the Houses of the State Parliament would make if they were in session at the time. It may be pointed out, however, that even if the words at the head of this note had not been inserted in the clause the result would have been precisely the same; no State Governor would venture to make such an important appointment without the advice of his responsible ministers. The words have been inserted in strict conformity with constitutional usage; as the section creates a new power and function the addition of the words 'with the advice of the Executive Council' could not possibly involve an infringement of any established prerogative of the Crown.

This was worth saying at the time, for it was still only a few years since a dispute had broken out in Queensland about whether the Governor could exercise the prerogative of pardon on his own personal responsibility or it had rather to be exercised on advice: Justin Harding, 'Boots and All: The Benjamin Kitt Affair' (2000) 17(5) *Journal of the Royal Historical Society of Queensland* 228; ID McNaughtan, 'The Case of Benjamin Kitt' (1951) 4(4) *Journal of the Royal Historical Society of Queensland* 535.

27 This occurs under section 21 of the *Australian Constitution* in relation to State senators and under section 44(5) of the *Commonwealth Electoral Act 1918* (Cth) in relation to the Territory senators. While the Legislative Assembly of the Northern Territory can be prorogued (*Northern Territory (Self-Government) Act 1978* (Cth) s 22(1)), that of the Australian Capital Territory ('ACT') cannot, and there is only limited provision for its dissolution (*Australian Capital Territory (Self-Government) Act 1988* (Cth) s 16). There is therefore room for debate about what is meant by its being 'not in session', and section 44(7) of the *Commonwealth Electoral Act 1918* (Cth) only increases the puzzle by equating the meanings of words in section 44 with the meanings of words in section 15 of the *Australian Constitution*. Perhaps Parliament intended here to say that 'not in session' in both places means 'adjourned', although it cannot of course change the meaning of the *Australian Constitution*. Perhaps it meant that executive appointments can be made only when the ACT Assembly is dissolved – the only meaning that would keep it aligned with section 15. There seems no good reason for the existence of this puzzle in section 44.

28 See below n 132.

29 '… if Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies'. In 1913 the Seventeenth Amendment adopted the direct election of senators by the people, and the second paragraph of that Amendment now provides that:

controversial in the Convention Debates and opposed by Edmund Barton QC among others; its opponents thought it 'better that a vacancy should continue until the State Parliament met, rather than that the nominee principle should be allowed, even temporarily, to invade the Senate'.[30] The purpose of this anomalous provision for executive nomination is to ensure that each State can maintain its full complement of senators at all times; it was not unknown for State legislatures in the late 19th century to meet for only a few months every year, leaving long gaps when they were not in session; it would have been more difficult than it is nowadays to convene a very short sitting given the difficulties of travel from remote parts. In the party House, that the Senate has become equal State representation is not such a tremendous concern, but the absence of members can hinder the work of the Senate and, unless a pair is granted, distort the party balance in it, and that is why it makes sense for such a provision to be adopted for the four Territory senators also.

There is a dispute about whether section 15, by using the words 'not in session' to indicate the circumstances under which such executive appointments can be made, means simply 'not actually sitting, but adjourned', or only 'prorogued by the Crown'; in the 19th century legislatures were regularly prorogued after the end of a sitting year, putting an end to what is known as a session of Parliament, but nowadays the practice has largely (although not wholly) fallen out of use and the Houses usually merely adjourn on their own motion at the end of the year without any formal prorogation by the Crown.[31] If a State Parliament, for the purpose of section 15, is 'in session' unless it is formally prorogued by the Crown, even though it is not actually sitting and may not plan to sit for some months, then interim appointments by State executives cannot be made and either the Parliament will have to convene for a brief sitting or the vacancy will need to continue for some months.[32] The historical practice at the time of the drafting of the original

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> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

The US Senate is elected under rules established by the States, but none of them adopts PR.

30 Quick and Garran (n 26) 435. As the authors record, there was some discussion in the Conventions of the idea of holding immediate by-elections in the case of casual vacancies, but the cost and inconvenience were considered an obstacle. See also Geoffrey Sawer, *Federation under Strain: Australia 1972–1975* (Melbourne University Press, 1977) 129 ff. It is just as well that these obstacles existed, for otherwise the introduction of PR in 1948 – which is now an essential feature of the Senate as we know it and greatly contributes to its usefulness as a house of review – would have faced an irritating constitutional obstacle that could have been overcome only by a referendum, by accepting and living with the anomaly as best as might be or possibly by some constitutional sleight of hand such as an agreement among the parties that candidates would not be nominated to contest a seat 'belonging' to the other party (which would not have stopped the nomination of independents).

31 The distinction is explained in *R (Miller) v Prime Minister* [2020] AC 373, 394–5 (Baroness Hale PSC and Lord Reed DPSC for the Court).

32 There is a brief treatment of this question in James Thomson, 'Casual Senate Vacancies: Section 15's Continuing Conundrums' (1992) 3(3) *Public Law Review* 149, and it is also referred to briefly in Laing (n 6) 138–42.

section and the idea that technical terms generally have their technical meaning[33] suggest that the advantage lies with that stricter reading, despite the practical problems it causes. An authoritative determination on the meaning of this phrase in section 15 could be obtained:[34] if a senator were appointed by the executive in the disputed circumstances, the validity of the appointment could be referred to the High Court of Australia sitting as the Court of Disputed Returns under section 376 of the *Commonwealth Electoral Act 1918* (Cth), but as such appointments expire 14 days after the commencement of the next session of the State Parliament there might, depending upon the precise dates and how quickly the case came on for hearing, be a danger that the Court would refuse to co-operate and declare the question moot once the appointment expired. However, under section 47 of the *Constitution* the Senate could also determine the question directly and set a precedent and policy for future cases; reference to the Court is not compulsory, opinions could be obtained on the point to assist the Senate from authoritative sources such as the Solicitor-General and such action would probably be taken as sufficient for future cases by all concerned. A further constitutional way around this problem would be for the Houses of State Parliaments on adjournment for a lengthy period to provide, by resolution or in Standing Orders,[35] a power to their presiding officers to summon a joint session if a casual vacancy occurs.[36]

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33 Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 160–3.

34 In relation to the Territory senators only, the issue could also be resolved quite speedily by a simple amendment of the *Commonwealth Electoral Act 1918* (Cth) s 44. See also above n 26.

35 Compare with, eg, Legislative Assembly, Parliament of New South Wales, *Standing Orders of the Legislative Assembly*, April 2016, ord 47.

36 This appears to exist already in Queensland: see below n 65. For an interesting recent incident in Western Australia involving the method for recalling an adjourned Parliament so that a casual vacancy could be filled without such a power in one House's Standing Orders, see Nigel Pratt, 'Irreconcilable Differences and the Father of Reconciliation' (2017) 85 *The Table* 56. That article also indicates that the strict view of 'not in session' is taken in Western Australia.

It would also be useful if a lower quorum were provided, but as this is usually set out in legislation that will generally not be possible. However, there could be an understanding that metropolitan members are more easily able to attend than those from far-flung parts, and are thus expected to attend a brief sitting to approve a party's uncontroversial nomination for a casual vacancy. Some may be absent from Australia over a long adjournment, but it should not be unduly difficult to sound out members in advance about possible meeting dates to ensure that a quorum is reached. During the pandemic of 2020, some legislatures also experimented with remote attendance, and this may also be a way to expedite matters as long as it is quite certain that votes cast remotely are valid or at least that remote attendance counts towards a quorum. That is a matter for another day.

Apparently the South Australian government was at one point in receipt of advice from the Solicitor-General for that State to the effect that it was at least arguable that all Members of Parliament would need to be present at a joint sitting under the State Constitution for a valid choice to be made to fill a casual vacancy in the Legislative Council; hence the insertion of section 13(4)(fa) of the *Constitution Act 1934* (SA): South Australia, *Parliamentary Debates*, House of Assembly, 14 May 2003, 3008–15. It seems unlikely that any court would make such an impractical holding, but the fact that section 13(1) speaks of the power's being vested in 'an assembly of the members of both Houses of Parliament' – rather than, for example, the Houses themselves, as in section 15 of the *Australian Constitution* – would provide a foothold for such an argument. No other State's provision uses comparable language. See also below n 59.

2 Preserving the Party Balance

As is well known, section 15 of the federal *Constitution* was amended in 1977 – the last successful referendum to amend the *Constitution* – in order to attempt to ensure that the party balance in the Senate is maintained when casual vacancies are filled as a reaction to two cases in the 1970s when the previous conventional rule on this topic was flouted.[37] The three State Constitutions have all also largely followed suit, but with some differences. In order to illustrate them I quote now the core provisions of section 15 of the federal *Constitution* on this score:

> Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.
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> Where:
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> (a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and
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> (b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist);
>
> he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this *Constitution*.[38]

The equivalent provision in New South Wales provides that a member elected to fill a casual vacancy must not take the oath for two days and ceases to be a valid choice if expelled from the party in that period.[39] The other two States' Constitutions contain an equivalent of the first paragraph of section 15 but not the second. In the case of New South Wales and South Australia the resemblance to the core federal provisions in the first paragraph is great, but Victoria's *Constitution Act 1975* section 27A takes the trouble to re-draft them, adds a reference to the electoral law and the registration of political parties and also adds another rule about replacements for independent members which is found nowhere else:

> (3) Subsection (4) applies if a casual vacancy occurs in the seat of a member of the Council who was at the time that the member was elected endorsed as a candidate in the election by a registered political party the name of which was

37 See also Nethercote (n 11) 63–72; Sawer (n 30) 130–9, 181–96.

38 Sections 44(3) and (4) of the *Commonwealth Electoral Act 1918* (Cth) makes equivalent provision for the four Territory senators, with the exception that the concluding words are 'in accordance with sub-section (5)'.

39 *Constitution Act 1902* (NSW) ss 22E(1)–(2), which says 'ceases to be a member of the political party' in question, but expulsion is clearly what is in mind here. This section was enacted in 1978, when the Council was changed into a directly elected body; memories of Albert Patrick Field were then still fresh: see Sawer (n 30) 193 ff. The wording of this legislation, like that of the federal section 15, makes it unarguably clear that any purported swearing-in of such a member would be ineffective, but there is a big loophole: there exists no way of compelling the joint sitting to meet again in order to make an effective choice. See also below n 47.

printed adjacent to the name of the candidate on the ballot-paper under section 74 of the *Electoral Act 2002*.

(4) If this subsection applies, the joint sitting of the Council and the Assembly must choose a member of the registered political party referred to in subsection (3) nominated by that registered political party if the registered political party nominates a member of the registered political party for the vacancy who would otherwise be qualified to be elected a member of the Council.

(5) If subsection (4) does not apply, the joint sitting of the Council and the Assembly must choose a person who —

(a) would otherwise be qualified to be elected as a member of the Council and has resided in the region to which the vacancy relates for a period of not less than 12 months immediately before the joint sitting; and

(b) has not been a member of a political party at any time during the period of 5 years immediately before the joint sitting.

Subsection (4) differs substantially from the provisions of section 15: it requires the election of the nominee of the registered party as well as using the system for party registration as its base. No other jurisdiction's provision does so. As a result of this provision there is no need to provide, as the other jurisdictions' provisions do, for the case of there being no available nominee from a party, perhaps because the party has ceased to exist, for such an ex-party, having gone to meet its maker, will not of course provide a nomination. The provision makes it unnecessary to consider what exactly is meant by this word 'available' found in the other provisions, on which there is no authority.[40] Presumably, in such a case, some evidence of the registered party's cessation to exist will be presented to Parliament allowing it to choose someone other than a member of it. Nor is there a need for a provision dealing with rogue party members who are expelled shortly after being chosen to fill the vacancy, given that such persons will not be nominated by the party in the first place – this leaves South Australia as the only jurisdiction without an effective way of dealing with this possibility. Subsection (4) is a wordy way of saying that the party's nominee must be chosen and may have been worded in that way to account for the possibility, unlikely though it may be, that a party may provide more than one nomination.[41]

The provisions in subsection (5) dealing with independents are also unique to Victoria,[42] as is the further requirement in section 27A(7)(b)(ii) that the election of a replacement independent under that subsection, unlike a party member's

40 Nevertheless the matter has not as yet caused difficulty, the nearest approach to dispute being the case mentioned below n 51. Should the matter ever be seriously disputed in relation to a party that remains in existence, it would be prudent to collect statutory declarations from leading officers, but it is unlikely in the extreme that no member of an actually functioning party would be 'available' to become a Member of Parliament: even if the party were riven with factional disputes and unable to come to a decision on who its representative was, many members might be 'available' and the problem might rather be an embarrassment of riches. It is also possible that 'available' may embrace the idea of being qualified to be chosen, thus offering a partial solution to the dilemma in New South Wales pointed out by Twomey, *The Constitution of New South Wales* (n 19) 391. (A further means of solving that difficulty would be to read 'disqualified' in section 22D(3) as including the idea of lacking positive qualifications as well as possessing a positive disqualification.)

41 Under section 37(c) of the *Interpretation of Legislation Act 1984* (Vic), the words 'nominates a member' include the plural.

42 But see below n 69.

replacement, should occur with a three-fifths majority. The residence requirement exists because it was thought that a MP who is not directly elected should have a particular tie to the region concerned, whereas if the electors directly elect an out-of-towner that would be their prerogative.[43] The object of the three-fifths requirement is clearly to ensure that there is a bipartisan agreement on the identity of the replacement.[44] There is the potential for a clash here, however. It is not difficult to imagine circumstances in which the most suitable person to replace a former Member of the Legislative Council who was an independent, may live in some other part of Melbourne or in a country town that is just on the other side of a regional border and thus be ineligible. Independent candidates may be grouped on the ballot paper in Victoria[45] and in a South Australian case this proved the key to finding a replacement for an independent,[46] but Victoria's provision may result in the unavailability of that means of finding a replacement for a departed independent given possible changes of residence after a general election. It will not always be easy to find a replacement for an independent member and it is a mistake to restrict the choice in any way. The expert Constitution Commission had recommended a different principal criterion: 'the Parliament should place a heavy emphasis upon selecting a candidate with views similar to those of the departing member where the seat has been held by an independent member'.[47] It is difficult to see how such a thing could be required by a rule, but a non-justiciable appeal to Parliament to consider this aspect comparable to the 'principle of government mandate' in section 16A of the *Constitution Act 1975* (Vic) could have been added to the section and would have been a far better choice than the residence requirement. The three-fifths requirement is nevertheless a sort of proxy for this desideratum.

It is also noteworthy that a party which was too disorganised to come up with a nomination – perhaps it has collapsed and its principal offices remain unfilled, or it is riven by internal disputes – will also, at least once it is quite clear that it will not be nominating someone under subsection (4) (on which there are too many obvious possible evidential difficulties to elaborate), fall to be treated under subsection (5) which will then positively prohibit the choice of a member of that party! There is certainly an incentive here for parties to have speedy means of determining their nominee and (in all States except South Australia) also of expelling rogue members.[48]

It is easy to imagine that it might be impossible to reach the level of consensus required by subsection (5) and that accordingly a joint sitting will simply never be held, or, if it is held, will result in no successful election. All other jurisdictions

43 Victoria, *Parliamentary Debates*, Legislative Council, 27 March 2003, 628 (John Lenders).

44 Ibid. This requirement is valid: Taylor (n 8) 488.

45 *Electoral Act 2002* (Vic) s 69A(1).

46 Jordan Bastoni, 'The South Australian Legislative Council: Possibilities for Reform' (2012) 47(2) *Australian Journal of Political Science* 227, 234 ff; Andrew Parkin, 'Political Chronicles: South Australia' (2008) 54(2) *Australian Journal of Politics and History* 320, 323.

47 Constitution Commission Victoria (n 25) 44.

48 In the Australian Labor Party expulsion for standing against an endorsed member is automatic: see, eg, *Rules of the Australian Labor Party (Victorian Branch) 2017* r 5.14.1 <https://www.viclabor.com.au/wp-content/uploads/2017/07/Victorian-Labor-Rules-21-May-2017.pdf>.

lack any rule about independents, because it is simply too difficult to come up with any hard rule;[49] not all independents are grouped, and legislation in the future may abolish this option anyway. Equally there is no positive provision in any of these schemes, including the Victorian one, for selecting someone who more or less represents the views of a member from a party that has vanished since the election, including as a result of a merger.[50] To general approval in the late 1970s, the Parliament of South Australia took the view that the former member's allegiance at the time of election (ie, endorsement by the people) was decisive[51] and that the successor party should be asked to provide the nomination for the replacement.[52] Difficult factual questions may also arise when parties split to determine which is the 'true' successor, and only very limited assistance can be obtained from the register of political parties on such points.[53]

3 Problems with Enforceability

Most seriously, there is also no requirement in any of the four jurisdictions for a joint sitting to be held within any particular time, or within a reasonable time, nor of course for the parliamentary assembly to succeed in its task of selecting a replacement member. The lack of any timeline is a serious deficiency in these provisions. While success could hardly be required, particularly given the vast variety of unusual cases that may present themselves over the succeeding decades and centuries, it would have been a good idea to provide that a joint sitting must occur as soon as practicable, but in any event within, say, three months of the vacancy's arising – that being plenty of time for a functioning party to get its act together and choose its nominee.[54] Such a joint sitting would then at least be a forum for exerting political pressure to fill the vacancy correctly. The possibility of deliberate inaction was in fact raised in the debate on the Victorian provisions:

> Hon PHILIP DAVIS (Gippsland) – Again, for the record, is it not possible that where the balance of numbers in the chamber is critical the government of the day could refuse to convene a joint sitting?

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49 Round (n 3) 300 ff. There is also a detailed analysis of what the position is if a party candidate is disendorsed during the campaign but still achieves election as a de facto independent: at 309–11.

50 Lane (n 6) 77 ff. In 2020 Senator Cory Bernardi resigned after first leaving the Liberal Party to create his own party and then abolishing it owing to its lack of electoral success in 2019. However, as he had been originally elected as a member of the Liberal Party in 2016 the rules required a member of that party to replace him and no difficulty arose. Matters would have been far more complicated if he had been elected for his party in the first place and then killed it before his resignation.

51 This is, of course, the general approach of s 15, as witness the words 'at the time when he was so chosen'; the difficulty here was that the rest of the section did not apply because the party that existed when 'he was so chosen' had disappeared by merger.

52 James Crawford, 'Senate Casual Vacancies: Interpreting the 1977 Amendment' (1980) 7(2) *Adelaide Law Review* 224, 233–6, 245–52; Nethercote (n 11) 63. An earlier and slightly similar South Australian case may be found in Round (n 3) 305; Sawer (n 30) 133 ff.

53 See, eg, below n 116.

54 There is an interesting record of this process in Gwynneth Singleton, 'Political Chronicles: Australian Capital Territory' (2003) 49(2) *Australian Journal of Politics and History* 305, 308 ff. The incidents recorded there also show a combination of the two methods of replacement considered so far: a retiring senator was replaced by a member of the ACT legislature who then himself had to be replaced using the countback method.

> Hon JOHN LENDERS (Minister for Finance) – Hypothetically, you can draw whatever conclusions out of every piece of legislation you like. But, again, the government has modelled this on the federal Senate. I do not have at my fingertips the number of casual vacancies that have been filled in that time, but a government that refused to convene a joint sitting would deservedly be held in contempt by the Victorian public.[55]

Mr Lenders also raised an innovative solution to this problem:

> The only area where individual houses would be relevant is where one of them in an obstinate fashion would try to not have the joint sitting. The solution to that is that with goodwill, and following negotiation between the party leaders in the Assembly, the standing orders would be simply amended so that it happens automatically.[56]

Such a solution would not however be available in relation to the Legislative Councils of New South Wales and South Australia, where the joint sitting is convened by the Governor.

This is a serious problem: on two occasions Parliaments have gone on strike and refused to implement the spirit of the provisions. In the first instance, in 1987, the joint sitting was held in Tasmania but the State's premier refused to support the Labor nominee to replace the departed Labor senator for policy reasons and there was accordingly no successful candidate; the issue was resolved only by force majeure, the dissolution of the whole Senate shortly afterwards.[57] The second incident occurred in Victoria and here the miscreants belonged to Mr Lenders' own party despite his earlier strictures that 'a government that refused to convene a joint sitting would deservedly be held in contempt by the Victorian public'. In this case a casual vacancy was created by the resignation of a Victorian Nationals MLC who proposed to contest forthcoming federal elections. The Labor government was furious about the suspension of one of its senior ministers from the same State Upper House for failing to provide documents required to be presented to it by its resolutions, and as a result quite illegitimately and childishly retaliated by refusing even to schedule a joint sitting in order to provide a replacement for the departed MLC. This matter was resolved when, fortuitously, Victorian Senator Stephen Conroy of the ALP resigned and the State government was then forced to hold a joint sitting to replace him in the federal Senate, which it could not do without the co-operation of the other side, and of course such co-operation was understandably only forthcoming on condition that the blockade on replacing the Coalition's MLC was lifted.[58]

Before then, however, the would-be replacement MLC, Mr Luke Sullivan, started proceedings in the Supreme Court of Victoria seeking declarations that

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55 Victoria, *Parliamentary Debates*, Legislative Council, 27 March 2003, 626.

56 Ibid 628. Mr Lenders was also a leading actor in the first joint sitting under these provisions: Nick Economou, 'Political Chronicles: Victoria' (2009) 55(4) *Australian Journal of Politics and History* 598, 603.

57 GS and PA, 'Australian Political Chronicle: Tasmania' (1987) 33(3) *Australian Journal of Politics and History* 288, 288 ff; Laing (n 6) 139 ff.

58 Nick Economou, 'Political Chronicles: Victoria' (2016) 62(4) *Australian Journal of Politics and History* 620, 621 ff; Nick Economou, 'Political Chronicles: Victoria' (2017) 63(2) *Australian Journal of Politics and History* 297, 300. The joint sittings are in Victoria, *Parliamentary Debates*, Legislative Council, 12 October 2016, 4972; 25 October 2016, 5565.

Parliament was required to hold a joint sitting as soon as reasonably practicable or that the suspension of the government's MLC was not a hindrance to the convening of the joint sitting, along with an order in the nature of mandamus requiring the Premier to advise the Governor to convene a joint sitting – an entirely misconceived request given that in Victoria Parliament itself convenes a joint sitting and the Crown has no power to direct it when to hold one. The suits for declarations were, inevitably, dismissed given that they would involve the Court in intruding into the internal workings of Parliament.[59]

This case is therefore authority for what it was always reasonable to assume,[60] namely that there is no way in which the obligation to provide a replacement under this category of provisions can ever be enforced, and accordingly a serious defect in this scheme has been revealed. The federal amendments of 1977 solved the problem of appointments from the wrong party,[61] but they did nothing to make Parliament do its job at all – and it is too difficult to amend the federal provisions.[62]

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59 *O'Sullivan v Andrews* (2016) 50 VR 600 ('*O'Sullivan*'). The Court abstained from deciding the point relating to the Crown's power at 615 (Dixon J); but clearly no constitutional power in the Crown to convene any joint sitting exists. As Sawer points out, some small extra support for this conclusion can be obtained from s 11 of the *Australian Constitution* in relation to federal cases: Sawer (n 30) 19; but general principles about the relationship of Parliament and the courts are more than sufficient alone.
For the reason given in above n 36 there would be a slightly better argument for a declaration under the South Australian legislation: it would be arguable that a special assembly is created by their provisions that is separate from Parliament. Some support on this point could be obtained from *Doyle v A-G (NSW)* [1934] AC 511, 520, a case curiously not cited in *O'Sullivan* (2016) 50 VR 600, in which the legislation in question (see *Constitution Amendment (Legislative Council) Act 1932* (NSW) s 3, inserting *Constitution Act 1902* (NSW) s 17A(2)) referred to the electors as 'the members of the Legislative Council and the members of the Legislative Assembly voting as one electoral body and recording their votes at sittings of the respective Houses of the Parliament', and it was held that the 'electors' were acting in that capacity and not as Members of Parliament. It is more likely however that the courts would conclude that the assembly provided for by the South Australian legislation is merely another manifestation of Parliament.
O'Sullivan (2016) 50 VR 600 also disposes of the odd view of Professor PH Lane that a declaration could be issued requiring more than one candidate to be presented to Parliament: Lane (n 6) 78. This view reflects some views expressed politically: Nicholas Barry and Narelle Miragliotta, 'Australia' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, 2015) 204, 208; Sawer (n 30) 134 ff. But how could such a thing possibly be enforced? Press-ganging has been abolished.
A note on a much earlier attempt to have the courts adjudicate on this sort of question is in RD Nicholson, 'Anatomy of a Senate Vacancy' (1966) 38(1) *Australian Quarterly* 91, 93 ff, 101.

60 But see Crawford (n 52) 231–3, with an ingenious but overstretched argument.

61 This includes the case where a person is a member of the party concerned but the party does not want him, as occurred in 1975: see Sawer (n 30) 195.

62 The Senate has, however, passed resolutions in favour of the speedy filling of vacancies, although they have no legal effect: Laing (n 6) 140–2. Another step suggested by Michael Maley on the *AUSPUBLAW* blog is for a legislative provision for a countback or re-count of votes similar to the schemes used in the other three States that do not adopt the method presently being discussed, which would also have no legal effect but would be intended to put pressure on the Senate to appoint the candidate selected by that method: Michael Maley, 'Senate Electoral Reform', *AUSPUBLAW* (Blog Post, 29 September 2015) <https://auspublaw.org/2015/09/senate-electoral-reform/>. This would certainly be a possible means of exerting a degree of pressure, although it would not deter a determined State Parliament and sometimes the result would be of little use: the party in question may wish to appoint someone else, perhaps to preserve a factional or other balance, or the person next in line might have left the party in question or be unable or unwilling to serve.

However, the three States could amend their provisions to provide, for example, that there is an obligation to hold a joint sitting and receive nominations within a fixed time;[63] again no enforcement mechanism can be provided, but such a provision would at least allow some moral suasion to occur (and if a party were not ready with a nomination within the specified time, its representatives can simply move an adjournment to a suitable date). As the Hon John Lenders suggested, it would also be possible, including under the federal scheme, for standing orders to provide for the automatic holding of a joint sitting at a fixed time and for moral suasion to be exerted at that forum also.[64] Queensland, with the ease permitted to unicameral Parliaments, provides a time limit of 28 days for holding the joint sitting for Senate casual vacancies and for the time and date to be selected by the Speaker.[65]

A final question is whether a candidate who does not meet the party-based requirements of these four schemes can nevertheless be validly elected and sworn in. Professor Sawer is right to say that these provisions and their history 'strongly suggest that a person chosen to fill a casual vacancy in a way not complying with [their] terms would be disqualified from holding office as a Senator, but the new clause does not plainly say so'.[66] The most elegant remedy here is quasi-political

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63 See also above n 19. Such provisions could also be added to another Act such as the electoral legislation.

64 There is a near approach to this in the Western Australian Parliament's Joint Standing Orders Relating to the Election of a Senator to the Federal Parliament (Legislative Assembly, Parliament of Western Australia, *Standing Orders of the Legislative Assembly,* November 2017), which provide (at ord 1, as adopted 22 July 1903):

> Whenever Parliament has been informed by Message from His Excellency the Governor that the place of a Senator for the State of Western Australia has become vacant under Section 15 of the *Commonwealth of Australia Constitution Act*, a Motion shall be made that the President and Speaker do fix a day and place whereon and whereat the Council and Assembly, sitting and voting together, may choose a person to hold the place of the Senator whose place has become vacant as aforesaid. Such day shall be not more than fourteen days after the date of such Motion.

There is, however, no time limit for the motion itself. Standing Order 343 of the Tasmanian House of Assembly requires 'arrangements [to] be made with the Legislative Council for a Joint Sitting *not sooner* than Seven days after the receipt of the Governor's Message': House of Assembly, Parliament of Tasmania, *House of Assembly Standing & Sessional Orders and Rules*, August 2017 (emphasis added). There is an equivalent in Standing Order 329 of that State's Legislative Council: Legislative Council, Parliament of Tasmania, *Standing Orders: Legislative Council*, November 2010.

65 Legislative Assembly, Parliament of Queensland, *Standing Rules and Orders of the Legislative Assembly,* August 2004, ord 288. One possible loophole for the very unscrupulous would be to advise the Governor, having received a notification under section 21 of the *Australian Constitution*, not to pass this fact on to Parliament, in which case the 28-day period would not commence. It is to be hoped that no-one would ever stoop so low and that a colossal uproar would ensue if this trick were even considered.
South Australia's Joint Standing Order 16 mimics the simplicity of unicameralism by providing that the date of the joint sitting is to be fixed by the President of the Legislative Council, or the Speaker if he is absent, with not less than seven days' notice: Legislative Council, Parliament of South Australia, *Standing Orders of the Legislative Council Relating to Public Business Together with the Joint Standing Orders Agreed to by Both Houses,* August 1999. That too is a wholesome provision. Although it does not go as far as suggested in the text – there is no automatic convening of a joint sitting nor any time limit – at least a joint sitting can be convened at the instance of a politician who is less likely to be in the government's pocket.

66 Sawer (n 30) 195; Crawford (n 52) 225 clearly felt less doubt. In *Barron v Townsville City Council* [1997] 2 Qd R 6, the Court of Appeal of Queensland rightly had no hesitation in reviewing this question when a local council was involved, but appointments by Parliament are clearly in a different category.

anyway, rather than one administered entirely by the courts: the Senate should refuse to allow the swearing-in of the person clearly chosen in contravention of section 15,[67] taking the view that no valid choice has been made and the person has no more title to a seat in the Senate than a passer-by wandering into the chamber. In cases of doubt it could refer the question to a committee for factual clarification or even to the High Court of Australia under section 376 of the *Commonwealth Electoral Act 1918* (Cth).[68]

B Countback/Re-count Systems

1 Basic Principles and History

The problems with the parliamentary selection method just outlined are avoided by countback/re-count systems. In principle, these systems involve a re-examination of some or all of the ballot papers used at the principal election in order to determine which candidate would have been the preference of the voters had they known of the vacancy. The difference is that this process requires only administrative procedures to be followed; politicians are not needed to run the system, and accordingly the full panoply of administrative law remedies would be available in the unlikely event that the administrators refused to carry out their functions. When a major party's candidate is to be replaced these systems typically result in the election of the first person on the party ticket who is not already a member of the legislature. On the other hand, it may be that in the period since the principal election, which could be up to four years, changes have occurred which may render this method too less than ideal. Would-be replacements for the departed member must nominate to be considered for the vacancy,[69] which weeds out the unwilling or unable and provides an opportunity for public pressure to be exerted against the unsuitable, but events such as deaths and changes of residence or occupation rendering a person ineligible to sit,[70] as well as the filling of earlier casual vacancies and changes in party allegiance may conceivably lead to the

67 To take the federal provisions as an example: the name of the purportedly elected person would be certified by the State Governor (or Territory equivalent) to the Governor-General under section 15 (or section 44(6) of the *Commonwealth Electoral Act 1918* (Cth)); the certificate is then transmitted to the President of the Senate. The next stage is the taking of the oath under section 42. The question of eligibility should be raised as a matter of privilege before the oath is administered.

68 There is nothing in *Rudolphy v Lightfoot* (1999) 197 CLR 500 to suggest otherwise. In New South Wales section 253 of the *Electoral Act 2017* regulates the extent to which the Court may adjudicate on the results of joint sittings to replace a departed MLC. For a case from New South Wales in which a party member sued to obtain a ruling that she was available to be pre-selected as a candidate for a casual vacancy, see below n 92. See also above n 38, and assume that a person was appointed as a party member to fill a casual vacancy and the party disputed the status of the person as a member of the party; would collateral challenge to the prior expulsion of that person, for example, be available in that litigation? There seems to be no reason why not; if the accusation is made that a person was appointed invalidly because of lack of party membership, the matter would have to be determined, and such matters are now generally thought to be justiciable: see below n 92.

69 *Electoral Act 1907* (WA) s 156C(3); *Electoral Act 2004* (Tas) ss 226–9; *Electoral Act 1992* (ACT) s 192.

70 See, eg, above n 10. However, the *Electoral Act 2004* (Tas) s 227(2), showing little confidence in the ability of the island State to retain its population short of offering the inducement of a seat in Parliament, has the effect that changes of residence only will not disqualify and even interstaters could be elected. I do not know whether this has ever occurred. In the case of Madeleine Ogilvie, however, the unsuccessful runner-up in the countback had moved interstate and this provision ensured that he remained eligible.

election of someone who no longer supports the party for which the departing member was elected – as in Tasmania in September 2019. It is also possible that some better candidate may be at hand but unable to nominate because not on the ballot paper at the previous election. This system has the defects of its merits: because it operates more or less automatically, or at least without the need for political judgement, it does not allow for the intervention of human judgement should it ever produce an unwelcome result. Parties and independents will of course ensure, by the nomination of a sufficiently long list of candidates, that there are plenty of reserves, but there is no complete safeguard against events of the types mentioned.[71]

This type of system is used in three Australian jurisdictions: the Legislative Council of Western Australia, the House of Assembly of Tasmania and the single House of the ACT's legislature.[72] There are however important differences among these systems. In particular, the Western Australian system involves (as does the course commonly adopted when a candidate is found to have been ineligible at the time of election, although this does not produce a casual vacancy)[73] a re-count of all the ballot papers in the election – a sort of re-run of the election on the papers – with the departed candidate excluded and first and all subsequent preferences for that candidate allocated successively to the next highest candidate chosen by the

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71 *Electoral Act 2004* (Tas) s 232 provides, in summary, that a by-election may be held if a party has run out of available replacements and asks for one. This has never occurred and would of course be of use only to a party that could hope for a majority or if all parties with a hope of winning a seat at such a by-election agreed to leave the field clear for the affected party (see also below n 117). There was however a by-election in 1929 for reason to be mentioned in the text. The present law would no longer allow it in the circumstances stated there.

In the ACT the alternative procedure, also never used, in case of failure of the countback is selection by the legislature, with essentially the same provisions about selecting a member of the departed member's party as in the federal scheme and also the proviso that an independent must be replaced by someone who has not been a member of a political party for the preceding 12 months: *Electoral Act 1992* (ACT) s 195. If an independent member ever did need to be replaced in the ACT – there has not been one in the Assembly since 2001 – it is hard to say in the abstract whether this system would produce a better result or even how it could be decided to use it instead of the usual system; section 191(4) of the Act requires the Electoral Commissioner to determine whether it is 'practicable' to fill the vacancy by the usual method. It will always be 'practicable' to do so, unless all records (including computerised records) of the votes have been lost, but it may conceivably not be fair in everyone's view to do so – which is not, however, exactly what the legislation says.

In 2011 the ACT government, acting on a recommendation from the Electoral Commission, proposed extending the applicability of this fallback option to cases in which no member of the departed member's party was available: Scott Brenton, 'Political Chronicles: Australian Capital Territory' (2011) 57(4) *Australian Journal of Politics and History* 661, 665. Cf *Electoral Act 1907* (WA) s 156C(2) and below n 86; but the Electoral (Casual Vacancies) Amendment Bill 2011 did not proceed after the Liberal Party indicated opposition to non-elected members, which would probably have deprived the Bill of the necessary two-thirds majority; see the government's response to Standing Committee on Justice and Community Safety, *ACT Electoral Commission Report on the ACT Legislative Assembly Election 2008 and Electoral Act Amendment Bills 2011* (Report No 8, October 2011) in ACT Government, *Standing Committee on Justice and Community Safety Report into the Inquiry into the ACT Electoral Commission Report on 2008 Election and* the *Electoral Act Amendment Bills: Response by the ACT Government* (14 February 2012).

72 It is also used elsewhere. There is an interesting note on its transmission to Malta in New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 October 1921, 1107–8 (Thomas Ley).

73 See above nn 8–9.

voter. This variant thus involves notionally asking all the electors who their next preference would be after the departed candidate.

In Tasmania and the ACT, however, a system sometimes called 'countback' is used.[74]

> The Countback procedure is reasonably, but not impossibly complex. Suffice to say for the purposes of this discussion, it does not require all ballots cast in the election to be recounted in a bid to determine who received the next highest vote overall. The ballot papers counted in the countback are those relating to the person, who has vacated the role. In this case, therefore only the ballot papers that contributed to [the departed candidate's] election [are] counted in order to be redistributed to eligible candidates.[75]

Under this variation, it is not all the electors, but only those who voted for the departed member who are notionally asked who their preferred replacement would be.[76] With this system the result looks rather like the result for a single-member preferential seat; there is effectively no PR quota, for there is only one member to be elected (unlike the full re-run of the election under the other system of this type). Rather, there will be a certain number of votes (namely, the votes including any preferences received by the departed candidate) and the winner will be the person with an absolute majority of them.[77] This is generally faster than the full re-count for the simple reason that many fewer votes are involved than are needed for a full re-count involving all ballot papers, although in these days of computer-aided counts this is less of an issue than it used to be.

We might expect however that these two methods will produce the same result: the next candidate on the party's list will be elected. In Tasmania and the ACT however the 'Robson Rotation' complicates matters somewhat, as there is no uniform order of candidates' names within the party lists on the ballot paper; the order of names on each party's list varies among the ballot papers, of which there are thus several versions.[78] Just as in the general election, therefore, candidates for the casual vacancy will be reliant upon their own personal appeal to the voters rather than their position on a party list. As already mentioned in passing, in the Tasmanian Lower House in September 2019 an ALP member was replaced by one Madeleine Ogilvie, who had left that party since the election and decided not to rejoin it upon winning the countback for the replacement. Being on the more

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74 This is not the word used in the Tasmanian legislation, which sticks with 're-count', but it convenient to have a different word for this variation on the theme, and 'countback' is the word used, for example, by the PR societies on their websites: 'Filling Casual Vacancies after a PR-STV Election', *Proportional Representation Society of Australia (Victoria-Tasmania) Inc* (Web Page, 12 July 2019) <https://www.prsa.org.au/casu_vac.htm>.

75 *Fidge v Municipal Electoral Tribunal* [2018] VCAT 1654, [4] (Deputy President Lambrick) (emphasis omitted).

76 Marian Sawer, Norman Abjorensen and Philip Larkin, *Australia: The State of Democracy* (Federation Press, 2009) 114.

77 The procedure is set out in *Electoral Act 2004* (Tas) sch 6; *Electoral Act 1992* (ACT) sch 4 pt 4.3 (which still persists with the concept of a quota, but in this case the so-called quota is simply an absolute majority).

78 *Electoral Act 2004* (Tas) sch 3; *Electoral Act 1992* (ACT) sch 2; Malcolm Mackerras, 'The Operation and Significance of the Hare-Clark Electoral System' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (Centre for Tasmanian Historical Studies, 1995) 163, 164–8.

conservative side of the party and stating her preference for stability, she took her place as an independent on the Liberal government's side of the House.[79] It is however conceivable that some of those who gave preferences to her after Mr Scott Bacon, the departing member, did so because they supported her more conservative view of the world, and such people would probably not be disappointed by that result. Nevertheless it may safely be conjectured that not all of those who voted for Madeleine Ogilvie knew much about her; some may have simply voted for the next person on the ALP list as it appeared before them on their version of the Robson Rotation ballot paper; and her winning margin in the countback over the candidate who had continued his membership of the ALP was very small, only 201 of 10,866 votes originally cast for Mr Bacon.[80] The Tasmanian system had, until 2019, led to a remarkable uniformity in the replacement of departed members by members of the same party; the only other exception occurred in 1983, when Dr Norman Sanders of the Australian Democrats was replaced by the very well-known Dr Bob Brown in accordance with the votes recorded by the electors who had initially elected Dr Sanders; those electors had clearly voted by a narrow majority, after preferences, for Dr Brown as their second choice.[81] There has been no surprising result in the ACT; in every case a member of a party has been replaced by a member of the same party.[82]

In northern Tasmania in 1929, however, the ballot papers from the previous election had been destroyed in a flood, and when one ALP member resigned it was found impossible to use the prescribed system. Fortunately, at that time

79 Cameron Whiteley, 'Ogilvie's Pledge to Walk the Line', *The Mercury* (Hobart, 13 September 2019) 9; Cameron Whiteley, 'Ogilvie "Opens Door" for Libs', *The Mercury* (Hobart, 16 September 2019) 3.

80 Tasmanian Electoral Commission, 'House of Assembly – Division of Clark' (Recount, 10 September 2019) <https://www.tec.tas.gov.au/House_of_Assembly_Elections/Recounts/Results/2019/Clark-recount-190910.pdf?t=1700>; Cameron Whiteley, 'Maddy's Mind Made up', *The Mercury* (Hobart, 12 September 2019) 7.

81 See the list at 'Results of All Countbacks to Fill House Assembly Casual Vacancies, under the Tasmanian *Electoral Act*, for the 50 years from 1965 to 2015', *Proportional Representation Society of Australia* (Web Page, 12 August 2016) <http://www.prsa.org.au/tascava.htm#Sanders>; Mackerras (n 78) 172; Bennett (n 4) 81, who records two non-standard cases that are worth noting, but scarcely egregious: in 1953 one independent replaced another, and in 1961 an independent labour member was replaced by an ALP candidate. A recent case in which the Robson Rotation and the system for filling casual vacancies combined to produce a significant shift of the power balance *within* a party owing to the identity of the new member is to be found in Richard Herr, 'Political Chronicles: Tasmania' (2002) 48(2) *Australian Journal of Politics and History* 281, 281 ff. An anomalous by-election in 1929 will be mentioned shortly in the text.

A further anomaly is constituted by the electoral crisis of 1979 which resulted in a constituency-wide old-style by-election in Tasmania with all seats up for contest, but this does not affect the present topic as the election of the MPs concerned was declared void and special legislation was passed to provide for the by-election; but see on this episode *Electoral Amendment Act (No 2) 1979* (Tas); *Re Electoral Act 1907* [1979] Tas R 282; Bennett (n 4) 82; GAS, 'Australian Political Chronicle: Tasmania' (1980) 26(1) *Australian Journal of Politics and History* 116, 119 ff; RJKC, 'Political Chronicle January: Tasmania' (1980) 26(3) *Australian Journal of Politics and History* 433, 433; GA Smith, RA Herr and BW Davis, 'Tasmanian Politics 1979: Elections, Factionalism and the Electoral Crisis' (1980) 15(1) *Politics* 81.

82 A list of vacancies is in the 'fact sheet' available at Elections ACT, 'Casual Vacancies' (Fact Sheet, April 2020) <https://www.elections.act.gov.au/__data/assets/pdf_file/0009/831465/CasualVacancies.pdf>. Party allegiances are not stated there, but research indicates that in every case the departed member and the replacement were of the same party. A further vacancy occurring in 2017, after the publication of that fact sheet, was also filled by a member of the deceased member's party.

section 132C of the *Electoral Act 1907* (Tas), since repealed, allowed an old-fashioned by-election if the usual method for filling casual vacancies was 'for any reason whatsoever … impracticable'. One was duly arranged, but the conservative party of the day graciously agreed not to nominate a candidate, no-one else came forward either, and the ALP's nominee, one Major Thomas Davies DSO MC RE was elected unopposed.[83] Nowadays it would be unlikely that computer records, which should be well backed up, would be so vulnerable, which is just as well, as the Tasmanian law no longer permits a by-election in these circumstances.[84]

2 Adding Political Judgement as a Back-Up

As already noted, Western Australia uses a variant of this system under which there is a 're-count [of] the ballot papers used in the counting of votes at the original election',[85] not merely those ballots that contributed to the election of the departed member. As such a full re-run might theoretically cause continuing elected members to lose their places, depending on how preferences fall to be rearranged in the absence of the departed member, the legislation provides that the re-count has effect only for the purpose of finding a replacement for the departed member.[86] Uniquely, the Western Australian legislation also provides that if the parliamentary leader of the departed member's party informs the Electoral Commissioner 'that there is no available qualified person who is a member of that party' from the previous election's ballot who can fill the vacancy, then a by-election may be held instead (unless the next election is imminent, in which case the vacancy may simply remain unfilled).[87] This allows the parties some control through the exercise of political judgement and human intervention in situations in which party members may have left since the election, for the parliamentary party leader alone decides who is still a member of the party and thus available to fill the vacancy; but this 'last-gasp'[88] procedure would not, of course, be of much use to a minority party in the region concerned, unless it were possible to convince other parties with a chance of winning such a by-election not to contest it in the interests of fairness (as in Tasmania in 1929). Nor are voters likely to find an unnecessary by-election particularly attractive if, for example, they are forced back to the polls because a party has broken up acrimoniously since the election (as smaller parties are wont to do). In such a situation the minor party may face the choice between handing the seat to a major party at a by-election and handing it to

83 Tasmania, *Votes and Proceedings*, House of Assembly, 15 October 1929, 75; 'Electoral Sensation: State Ballot Papers', *The Examiner* (Launceston, 19 September 1929) 6; 'State By-Election: The Bass Seat', *The Mercury* (Hobart, 19 September 1929) 9; 'The Bass Vacancy: Major TH Davies Elected', *The Examiner* (Launceston, 7 October 1929) 8; 'Bass Assembly Vacancy: Major TH Davies Elected', *The Mercury* (Hobart, 7 October 1929) 8.

84 See above n 70.

85 *Electoral Act 1907* (WA) s 156D(4).

86 Ibid s 156D(9).

87 Ibid ss 156C(1)–(2), 156E.

88 Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 October 1986, 2913 (Malcolm Bryce, Minister for Parliamentary and Electoral Reform). See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 July 1986, 1433 (Malcolm Bryce, Minister for Parliamentary and Electoral Reform).

a now hated former ally via the usual re-count method. A better option, superior to this all-or-nothing choice, might be to allow party leaders to declare that individual previous candidates have left their parties and should no longer be considered for a vacancy. As we shall see in Part III(B) below, a similar rule exists in Germany and New Zealand, with the exception that it fastens on the objective fact of loss of membership rather than a party leader's decision. This too would be an important decision to be made if such a rule were ever contemplated as an add-on to a re-count/countback system to cope with cases such as Madeleine Ogilvie's in Tasmania.

There is a provision in Tasmania that at first sight is similar to that in Western Australia,[89] but it applies only if 'none of the candidates who were included in the same registered party group as the vacating Member are [sic] available to contest the vacancy';[90] thus it is, on examination, quite different: it does not take any account of the possibility that there may have been changes of allegiance and it does not give the parliamentary leader the sole say over who is 'available' as a replacement because it defines 'available' by wholly objective criteria as being unwilling to contest or ineligible to do so.[91]

It is an interesting question whether a party member at the previous election who stood under its aegis and otherwise remains eligible to fill a vacancy could mobilise the aid of the courts in Western Australia to prevent a declaration by a parliamentary party's leader that no-one is available to fill the vacancy and by implication that the person concerned is not available to fill a vacancy because of cessation of party membership. For example, there may be a dispute about the effectiveness of an expulsion from the political party concerned. Litigation between members of a political party in internal party disputes is no longer unknown.[92] There is now authority to the effect that the actual filling of a vacancy under the method of parliamentary selection, the 'Senate' method, is a matter in which the courts will not interfere out of respect for Parliament's internal proceedings,[93] but this is not quite that: it is a notice by the parliamentary leader to

89 See above n 70.

90 *Electoral Act 2004* (Tas) s 232(1)(b).

91 Under s 232(2)(b) of the *Electoral Act 2004* (Tas), a candidate is not available if:

(i) he or she provides the Commissioner with a statutory declaration stating that he or she will not be nominating to contest the recount; or

(ii) the Commissioner is satisfied that he or she is not eligible to contest the recount; or

(iii) at the close of nominations, a nomination for that candidate has not been accepted.

92 Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 115–26; Graeme Orr, 'Private Association and Public Brand: The Dualistic Conception of Political Parties in the Common Law World' (2014) 17(3) *Critical Review of International Social and Political Philosophy* 332, 338 ff; *Faehrmann v Van Vucht* [2018] NSWSC 397 (which involved a casual vacancy, but under the system in New South Wales; justiciability was not contested, and the question was not about the member's status as such, but whether she was disqualified from the pre-selection contest within the NSW Greens Party owing to the category of her membership). See also above n 67, and the voice of dissent from the long line of cases holding intra-party matters justiciable recently raised in *Setka v Carroll* (2019) 58 VR 659. (Mr Setka abandoned an appeal against this decision: Simon Benson and Ewin Hannon, 'Setka Forced out of ALP in Victory for Albanese', *The Australian* (Sydney, 24 October 2019) 1).

93 See above n 59.

the Electoral Commission which involves no action by Parliament itself. Both the Commission and the parliamentary leader would be available as defendants, and an attempt could be made using administrative law remedies to prevent the Commission from holding a by-election on the ground that the statutory precondition to doing so is not fulfilled. However, the legislation seems to confide the decision solely to the parliamentary leader – it is a decision about who is, in the words of the legislation, 'available'[94] to fill the vacancy, and the term 'available' is not otherwise defined. Given that political decisions of that type are for politicians to make and not the courts, there would be a strong argument for saying that the parliamentary leader is intended by the legislation to be the sole arbiter of who is 'available'.[95]

This option has, however, never been used. As far as can be determined[96] all casual vacancies in the Western Australian Legislative Council have also been filled by unsurprising successors from the departed member's party under the re-count (rather than countback) system. It is worth noting, however, that the preference of the Western Australian government that originally introduced this system was the 'Senate' system, but it found itself unable to propose that system without also committing to a referendum, because section 73(2)(c) of the *Constitution Act 1889* (WA) requires such a procedure for a Bill that 'expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people'.[97]

94 *Electoral Act 1907* (WA) s 156C(2).

95 Compare with *Stewart v Ronalds* (2009) 76 NSWLR 99, 112 (Allsop P).

96 The Western Australian Electoral Commission's website lists only re-counts from 2004, although the system was introduced by the *Acts Amendment (Electoral Reform) Act 1987* (WA). (Note however the re-drafting effected by the *Electoral Amendment Act 1990* (WA) for the reason given in Western Australia, *Parliamentary Debates*, Legislative Council, 4 December 1990, 8250 ff; 5 December 1990, 8495 ff. This is another example, in addition to that about to be provided in the text, of why legislation should not be hastily entrenched.) Accordingly the present author searched Hansard before 2004 using various keywords and found a few further re-counts, which, however, also uniformly resulted in the replacement by a member of the same party: see, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 18 March 1992, 163. Thus all re-counts have presumably been found.

97 Western Australia, *Parliamentary Debates*, Legislative Council, 27 May 1987, 1507; Legislative Assembly, 8 July 1986, 1433 (Malcolm Bryce, Minister for Parliamentary and Electoral Reform); 9 October 1986, 2912–14; 14 October 1986, 3031–3; 23 October 1986, 3514 ff. On the fate of proposals to hold a referendum see Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 1990, 6 (Sir Francis Burt, Governor of Western Australia); 17 September 1991, 4684 ff.
Apparently no such qualms were felt with respect to the *Constitution Act 1975* (Vic) ss 26(2), 27A, but as these were enacted by the one piece of legislation and also entrenched together by the same legislation (see s 18(1B)(b)) it is easy to argue that Parliament must have intended that *generalia specialibus non derogant*. The same method effects the reconciliation between sections 7 and 15 of the *Australian Constitution*. The entrenchment of the rule that Parliament must be 'chosen directly by the people' is valid: Taylor (n 8) 488.

III ALTERNATIVES

A Nomination by Party

New South Wales elected Lower Houses in 1920, 1922 and 1925 'in accordance with the principles of proportional representation'.[98] The conservative government that procured this change had been unable to agree upon a method of filling casual vacancies and left the matter unresolved before the 1920 election which, despite its change to the voting system, it lost.[99] Only seven months after that first PR election – and the deaths of two MPs alongside the appointment of two others by the new ALP government to government jobs which also vacated their seats[100] – did the new government settle upon a means for filling casual vacancies, which was embodied in the *Parliamentary Elections (Casual Vacancies) Act 1920* (NSW). This provided that casual vacancies should be filled by the most successful unelected candidate in the constituency in question who 'represents the same party interest as the late member' (section 4(a)). Under section 5, what 'party interest' the departed member represented was determined by the Clerk of the Assembly, having 'regard to the vote or votes (if any) of the late member on any motion or motions of censure during the present Parliament'. Once that was determined, section 6 applied:

> Nomination by party leader
>
> 6. The recognised leader of the party represented by the late member shall, by writing under his hand addressed to the Speaker, nominate the person who is entitled under the provisions of this Act to be elected in place of the late member.

The government considered but rejected a re-count method on the ground, or at least the stated ground, that it would involve counting the votes of electors who had since died or moved out of the district.[101]

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98 *Parliamentary Elections (Amendment) Act 1918* (NSW) s 3(i), inserting s 3A(1) into the *Parliamentary Electorates and Elections Act 1912* (NSW). A summary of the political background is in Michael Hogan, 'William Arthur Holman' in David Clune and Ken Turner (eds), *The Premiers of New South Wales 1856–2005* (Federation Press, 2006) vol 2 117, 135; Michael Hogan, '1920' in Michael Hogan and David Clune (eds), *The People's Choice: Electoral Politics in 20th Century New South Wales* (Parliament of New South Wales, 2001) vol 1 181, 183–9.

99 New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 1920, 1909; 28 October 1920, 2004 (Sir George Fuller).

100 After the passage of the *Parliamentary Elections (Casual Vacancies) Act 1920* (NSW), the four vacancies were filled in a job lot: New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 December 1920, 3675 ff. Of course, in the interval between the occurrence of the casual vacancies and the passage of the Act the Opposition's ranks were depleted by the three of its members who had thus been removed from Parliament. The fourth was the case mentioned at below n 106; none of the other nominations was controversial, but one nominee later died and produced a further casual vacancy: see below n 103. The numbers were very finely balanced in this Parliament, as can be seen from the seven-hour government of Sir George Fuller recorded in, eg, Anne Twomey, 'Advice to the Governor-General on the Appointment of Kevin Rudd as Prime Minister' (2013) 24(4) *Public Law Review* 289, 295 ff.

101 New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 1920, 2002. There is a generally excellent survey of the political background behind the casual vacancy provisions and many further references in Joseph Pernica, 'Electoral Systems in New South Wales to 1926: With Special Reference to Proportional Representation' (MEc Thesis, University of Sydney, January 1958) 278, 318–26.

Shortly after this system was adopted, and despite earlier assurances by the government that all electorates had been checked for this problem and it had been found that suitable substitutes existed in all cases,[102] a case occurred in which the Nationalist Party, the main conservative party of the day, ran out of replacements when an unsuccessful candidate in a constituency was appointed to a casual vacancy and then himself died,[103] and accordingly the *Parliamentary Elections (Casual Vacancies) Amendment Act 1921* (NSW) section 2 amended the rules to allow the party leader, in such a case, to nominate any voter to fill the vacancy, even one who had not stood for Parliament at the previous election.[104]

The government declared that it regarded each sitting independent 'as belonging to one party or the other' – a convenient argument as well as one that took little to no account of the third party in Parliament, the Progressive Party (essentially an ancestor of the Country Party). Criticism had already been expressed by the conservative Opposition of the principle of mentioning parties at all in legislation, it having introduced PR without providing any means for filling casual vacancies;[105] indeed, for conservative members who had hoped that PR would liberate them from party bondage and revive the good old days – then still well within living memory – of looser coalitions of like-minded individuals liberated from the power of the dreaded party machine,[106] this emphasis on party was a sick joke and another sign that the dream would not come true. Even aside from those hopes and general arguments of democratic principle, when non-aligned members started to produce casual vacancies still further practical weaknesses of the government's scheme became apparent.

The gods of history were indeed unkind to this scheme. Not only did one party run out of nominees, necessitating patching; it so happened that several tricky cases arose in which it was dubious what 'party interest' departed members, or those who would take their place, represented. For example, when an ALP member died there was a dispute about whether an unsuccessful candidate at the election was an independent or had truly represented the ALP at that election and thus was eligible to fill the vacancy.[107]

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102 New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 1920, 1898 (James Dooley, Colonial Secretary).

103 New South Wales, *Parliamentary Debates*, Legislative Council, 2 November 1921, 1307 (Edward Kavanagh). This occurred because that party nominated only as many candidates as it thought would be elected; of course, they did not know what procedure would be adopted after the 1920 election in case of casual vacancies: Archdale Parkhill, *Proportional Representation in the New South Wales General Elections: March 20, 1920* (Sydney & Melbourne Publishing, 1920) 19 ff.

104 With the end of PR these two Acts ceased to have effect: *Parliamentary Electorates and Elections (Amendment) Act 1926* (NSW) s 6; *Parliamentary Electorates and Elections (Further Amendment) Act 1927* (NSW) s 4. Perhaps as a result of uncertainty about whether the two Acts of 1920 and 1921 had in fact been repealed (as stated in the long title to 1926 Act and the marginal notes to the sections in the 1926 and 1927 Acts) or had merely ceased to have effect, they were formally repealed, possibly for a third time, by the *Statute Law Revision Act 1937* (NSW) s 2, sch 1 pt I.

105 New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 1920, 1900 ff.

106 Hogan, '1920' (n 98) 185.

107 An ALP candidate was expelled a few days before the poll for excessively left-leaning views and had not been readmitted on the occurrence of the casual vacancy which he claimed to be entitled to fill: New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 1920, 1902; 3 November 1920, 2114; 'Nearly a Crisis: Vacancies Bill', *The Sydney Morning Herald* (Sydney, 4 November 1920) 9; Paul

Still further trouble was in store. In late October 1920 the following exchange occurred in the Legislative Assembly in debate on the casual vacancies issue:

> Mr Loxton QC (Independent): Supposing Mr Brookfield resigned!
>
> Mr Dooley (Colonial Secretary, ALP): Do not talk about impossibilities.[108]

A few months later Percy Brookfield MP was shot at Riverton railway station in South Australia by a deranged gunman, whom he had heroically attempted to subdue, and died of his wounds in Adelaide – there then being no direct railway from his seat in Broken Hill to Sydney, he was returning to Sydney when this occurred.

Percy Brookfield had been a member of a party which has become known to history as the Industrial Labour Party ('ILP'), a more working class and left-wing sibling of the ALP; some of its members were admirers of the Bolshevik Revolution. Its precise relationship to the ALP was never completely settled, as some of its members were themselves unclear about that matter and its rise and fall occurred before the question was fully resolved, but the ILP had certainly arranged for its own candidates including Percy Brookfield to stand separately from the endorsed ALP candidates. Brookfield supported the ALP government in the hung Parliament of 1920–22 but was not a member of the parliamentary ALP. Yet when the casual vacancy caused by his death came to be filled, to much dismay among Brookfield's supporters and in Broken Hill the ALP declared that he had been sitting, for the purposes of section 5 quoted above, in its 'party interest' and arranged for an endorsed ALP candidate to replace him rather than the Industrial Labour candidate who had received almost all of Brookfield's preferences. The argument was that the ALP's man, Jabez Wright, had received more first preferences than any other unsuccessful candidate at the general election, but that was not the statutory test and could of course equally have given the seat to the most dyed-in-the-wool reactionary. As Brookfield had been the only Industrial Labour member in Parliament the scheme of section 6 of the Act could have been worked honestly only with difficulty anyway, as there was no longer a recognised leader or any member of it in Parliament, and it would have been hard to say, even if this fell within the meaning of section 6, who the recognised leader of the party outside Parliament was.[109] Then, in the last PR Parliament elected in 1925, the Labor government of Jack Lang targeted a 'harmless ratbag',[110] the Independent

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Adams, 'The Annihilation of the ILP: The Third Industrial Labor Party and the Sturt Vacancy' (2013) 105 *Labour History* 79, 84 ('The Annihilation of the ILP'); Hogan, '1920' (n 98) 213. And there were non-Labor independents who voted with both the non-Labor parties of the day: New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 November 1921, 1424 ff.

108 New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 1920, 2001.

109 See generally on this episode New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 August 1921, 27–30; 22 September 1921, 687; 24 November 1921, 2069 ff; Paul Robert Adams, *The Best Hated Man in Australia: The Life and Death of Percy Brookfield 1875–1921* (Puncher & Wattmann, 2010) 284–304; Hogan, '1920' (n 98) 210–13, 219; Adams, 'The Annihilation of the ILP' (n 107) 84, 86–9, 91.

110 Heather Radi, 'Kay, Alick Dudley' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1983) vol 9 538. This is certainly a better epitaph than that of another bit player in this drama, Tom Ley, whose entry describes him as a 'politician and murderer': Baiba Berzins, 'Ley, Thomas John' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10 97.

AD Kay, for appointment to the Metropolitan Meat Industry Board; first it checked with the Clerk that he would certify that Mr Kay had sat for its 'party interest' under section 5 given his record of voting with the government on motions of censure, and then, upon receiving a positive reply, appointed him to a government job and promptly replaced him with a Labor member to shore up its majority.[111] Again the casual vacancies system, by allocating independents and representatives of small parties to one side or the other in a dualist fashion, operated to the advantage of the major parties – and to the detriment of the will of the electors.

Aside from this effect, objection was also made to the principle of nominated members[112] – it must be remembered that at this time the Legislative Council in New South Wales was a wholly nominated body and further nominations of MPs were the last thing Parliament needed for its democratic credentials. Ridiculously, the ALP found itself proposing for the people's House the very system of nomination which it was bitterly opposed to for the other House. In March 1922 *The Bulletin* pointed out that there were now more nominees in Parliament than elected persons: the whole Legislative Council and the members appointed to fill vacancies in the Legislative Assembly outnumbered the elected members of the latter. 'In that respect', it said, PR, 'the freak system which was going to work such wonders has put the clock back half a century'.[113]

B Automatic Replacement by List or Election of Replacement Candidates at Principal Election

Automatic replacement using the party list is the system used in New Zealand for list seats and Germany for all seats. It was also originally used in New South Wales, as mentioned earlier.[114] The person next on the party list, if available, is simply selected without further ado; if that person is not available, the first available person further down on the list is chosen. Under this system the same result will usually be reached as with the re-count or countback in systems with fixed orders of lists (rather than the Robson Rotation) given that most people vote so as to give consecutive preferences to members of the same party in list order (this is, of course, also the effect of voting 'above the line' in systems which employ that method), but under this variation there is no need to trouble the electoral office to have a re-count or countback conducted; the next available

111 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 September 1926, 5–13; G Cann, 'Appointments: Department of Public Health' in New South Wales, *Government Gazette*, No 101, 30 July 1926, 3279, 3279; JT Lang, 'When AD Kay Caused a Split in the Labor Government', *Truth* (Sydney, 28 March 1954) 36 – in which Lang quotes the letter he received from the Clerk assuring him that Kay would be replaced by an ALP member if he resigned. See also *Metropolitan Meat Board (Removal of Member) Act 1927* (NSW) s 2; WT Ely, 'Appointments: Department of Public Health' in New South Wales, *Government Gazette*, No 103, 7 August 1931, 2846, 2847; *Meat Industry (Amendment) Act 1932* (NSW).

112 New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 1920, 1909 (Charles Oakes); 26 October 1921, 1103 (Thomas Bavin).

113 'Contortional Misrepresentation', *The Bulletin* (Sydney, 9 March 1922) 6. Possibly *The Bulletin's* figures were not quite right, as Hansard shows only 82 members of the Council in 1921 and 1922 while there were 90 members of the Assembly of whom seven were nominees. Nevertheless the point was well made.

114 See above n 22.

person on the list is simply chosen automatically. A complication would exist in the two jurisdictions with the Robson Rotation[115] in which there is no fixed order of the list on the ballot papers; the party would either have to adopt one for this purpose or some method of choosing among more than one possible replacement would have to be developed. For example, if there were more than one available replacement the party could be required to nominate one candidate from the list and would need to develop an internal process for deciding its choice. A further problem is that, for parties with strong factional systems, the automatic nature of this system of replacement might result in the upsetting of delicate factional arrangements.

As is well known, under the PR systems of Germany and New Zealand about half the members of the Lower House are elected in single-member constituencies while the other half are elected by a PR list system designed to ensure that the results of the single-member electorates correctly reflect the nationwide distribution of voting share among the parties. In New Zealand, if a constituency seat becomes vacant it is filled at a by-election, but the list seats are filled in the manner described from the list; in Germany by-elections never occur and both constituency and list seats are filled in case of vacancy from the PR list.[116] In both countries the legislation provides that a person who is to be a replacement from the party list must have remained a member of the party in question to be considered available for the vacancy; in neither country is any provision made for party splits, which might cause difficult questions about who the 'true' successors of the original party are.[117] In both cases also the vacancy remains unfilled if the list is exhausted, either because there are simply no names left on it or the remaining people have died, left their parties or refuse to participate (presumably this would also apply if a list candidate has become ineligible, but strangely neither country actually says so in its legislation).[118] In the case of factionalised parties the ability

115 See above n 77.

116 *Bundeswahlgesetz* [Federal Election Act] (Germany) 23 July 1993, BGBl I, 1993, 1288, § 48; *Bundeswahlordnung* [Federal Election Regulations] (Germany) 19 April 2002, BGBl I, 2002, 1376, § 84; *Electoral Act 1993* (NZ) ss 129–37. *Bundeswahlgesetz* (Germany) § 48(2) permits by-elections when a constituency member was elected without an accompanying list. This has never happened: email from Bastian Stemmer, German Federal Electoral Office, to Greg Taylor, 29 August 2019. By-elections also occurred in the early years of the Federal Republic (until 1953) before the existing rule was adopted.

117 Johann Hahlen in Johann Hahlen and Wolfgang Schreiber and Karl-Ludwig Strelen (eds), *Kommentar zum Bundeswahlgesetz* (Carl Heymann, 10th ed, 2017) 727 (Germany). In relation to Australia, one thinks of the small parties of today such as One Nation/One Nation NSW or the various Marxist parties as well as, on a much bigger scale, the Great ALP Split of 1955, after which the DLP claimed to be the legitimate successor of the pre-Split party.

118 This occurred in 2015 in Germany: after a resignation, the sole remaining Christian Democratic Union list member for the State of Brandenburg, Frau Andrea Voßhoff, declared that she was unwilling to become a member of the *Bundestag* (which would have required her to give up her post as Federal Data Protection and Information Freedom Commissioner) and accordingly the seat remained empty until the following elections: *Bundesanzeiger* [Federal Gazette] (Germany) 29 September 2015, B3. Clearly there is an incentive here to run very long lists and parties in Australia would have to do the same if this system were adopted. Indeed, memories of the numerous and unexpected disqualifications of the 45th Parliament already provide an incentive in our system to do this because otherwise a re-count upon disqualification might lead to the seat going to another party: see above nn 8–10. This might indeed have happened in the case of 'Senator' Bob Day, who had only one other person on his ticket, but fortunately she was eligible

of replacement candidates to refuse to participate may allow the correct faction's candidate to be chosen as long as one remains available on the list.

In Germany, the system was upheld as constitutional by the Federal Constitutional Court in 1957 on the basis that the prior existence of the rule that the list will also be used to find replacements in case of need made it tenable to see candidates on any list as chosen by those voting for that list to be replacements if necessary, and continued party membership was an objective qualification just like citizenship. However, it held, direct appointment by parties (as once occurred in New South Wales) would be unconstitutional as it would not constitute direct election in any sense and breach the requirement for that to occur in article 38(1) of the Basic Law.[119] In so holding the Court took the same position as we saw adopted in Western Australia, although there Parliament was to be interposed between the party's decision and the filling of the vacancy.

An interesting alternative once mooted for the constituency seats in Germany, and even approved at one stage in the Lower House only to be rejected by the Upper, is to have a replacement member elected at the time of the general election in case a vacancy arises. This would avoid the substitution of a local by a random out-of-towner who happens to be next on the list, although this is usually not a very serious problem in a geographically small country. The idea was rejected at the federal level in the end because it was thought difficult to find people interested in standing for such positions, and those who were seriously interested might merely make trouble for the actual member; there would also be problems if the replacement died or became ineligible; yet this system is practised in a few States.[120] However, no Australian PR House contains any single-member constituency seats alongside the PR seats and therefore this variation is not needed.

C By-Election Adapted to PR System

An intriguing idea for by-elections under PR systems was developed for Tasmania by Samuel Bird, owner of a coach-making business in Burnie, with the possible assistance of Arthur Anderson, an ALP Member of the House of Assembly, and one AF Crosby of Southampton.[121] Mr Bird, who later became

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to stand for Parliament, her Kenyan citizenship having lapsed, and could succeed him on the re-count: Transcript of Proceedings, *In the Matter of Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Mr Robert John Day AO* [2017] HCATrans 86. See also above n 70.

119 BVerfGE 7, 63, 72.

120 Hahlen and Strelen (n 117) 720. For example, the *Landtagswahlgesetz* [State Election Act] (Baden-Württemberg, Germany) provides, in § 1(2), for replacement candidates to be elected in each constituency alongside the main candidate, and § 47(1) provides that this is the principal means of replacing departed members, although there is also a back-up option if it fails: the most popular loser from the party in question.

121 The suggestion by Mr Crosby, first in time and possibly the source of the later suggestions, is recorded in an anonymous and brief article, 'Bye-Election Procedure' (1912) 5 *Representation* 22 (in which there is evidently a printer's error: in the fifth line it should be postulated that there are five, not three members). Mr Anderson's role is mentioned in 'The By-Election Problem', *The Examiner* (Launceston, 28 July 1914) 4; 'Proportional Representation', *The Examiner* (Launceston, 17 July 1915) 6; 'The Political Situation', *The Examiner* (Launceston, 31 March 1916) 4. This suggestion was also made in New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 November 1921, 1427.

Warden (ie, mayor) of Burnie,[122] was in favour of by-elections because 'a member of Parliament should be elected or chosen by the people',[123] and he outlined his scheme to the Select Committee on the by-elections problem in evidence on 1 July 1915.[124] The idea was to hold a by-election over the entire constituency of the former member, determine how the available seats should be divided on the by-election results and fill the vacant seat in order to achieve that division of seats. If, for example, at the general election Party A received three seats, Party B two and Party C one, and it is the elected candidate of Party C who has resigned or died, then Party C's by-election candidate would be elected as long as Party C at the by-election again obtains sufficient votes (a single quota) to elect a single member. If, however, Party C fails in that endeavour and the by-election results show that Party A now has four quotas, the vacant seat would go to Party A. Equally, if one of Party A's three members leaves, then Party A would need to poll as many votes as would be necessary to elect three candidates at a general election in order for its by-election candidate to win; if it failed and Party B now had enough votes for three quotas at a general election, the vacant seat would go to Party B. Obviously there would be a limit: if Party A's vote collapsed entirely, its two continuing members would not be unseated; and, if both Party B and Party C obtained a quota and thus the theoretical right to an extra member on the collapse of Party A's vote and at its expense, then only the party that won the higher number of votes could fill the single seat available as a result of the departure of the single member of Party A – something that may itself cause some discontent if such an extraordinary shift in voting patterns should ever occur.

A difficulty would arise in the case of independents; Mr Bird suggested seeking the endorsement of the previous member's nominators for an 'official' independent candidate. This of course would not work without their co-operation and agreement, which might not be forthcoming. However, in cases in which an independent member left Parliament it would seem possible to work out whether all independents combined received a quota and, if that is so and one of them needs to be chosen to fill the vacant seat, determine which of them is the most popular, distributing preferences solely among them if necessary. Parties might stand bogus independents, but in Tasmania such a trick would probably be soon discovered and people would not vote for them.

In earlier times by-elections were valued as, in the words of the United Kingdom Royal Commission on Systems of Election of 1910, 'valuable, if rough,

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Although the passage in question is not quite clear, Terry Newman, *Hare-Clark in Tasmania: Representation of All Opinions* (Joint Library Committee of the Parliament of Tasmania, 1992) 81, appears to attribute to Mr Bird the idea of countbacks (as well as stating, quite erroneously, at 16 that Catherine Helen Spence, being a woman, had no vote in South Australia in 1897). This is then picked up by Judith Homeshaw, 'Inventing Hare-Clark: The Model Arithmetocracy' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 96, 106. However, it is quite clear that the idea of the countback long pre-dates Mr Bird: see, eg, Parliament of Tasmania, *Report of Select Committee on the Electoral Bill 1914* (Report No 5) vol 73 no 12 8 ('Report of Select Committee').

122 See 'Death of Mr Samuel Bird', *The Advocate* (Burnie, 4 August 1951) 4; 'Half-Century's Community Service', *The Advocate* (Burnie, 6 August 1951) 4.

123 Report of Select Committee (n 121) 13.

124 Ibid.

tests of public approval or disapproval of the proceedings of the Government and useful indications of the trend of political feeling'.[125] Nowadays the feeling in favour of regular by-elections is much less strong,[126] for a number of obvious reasons such as the constant use of opinion polls (not always accurate themselves, but then a by-election is also not a sample of the whole electorate) and the extreme abundance of opportunities for the public to engage in free speech in general and easily contact their representatives in particular. Where PR constituencies are quite large (in Victoria, for example, 11 Assembly seats make up one Council PR seat; in the Senate, New South Wales and South Australia the constituencies are entire States) by-elections are also much more costly, disruptive and annoying affairs than single-seat by-elections.

Moreover, it would seem peculiar, in the case involving Party C just postulated, for it to be declared the winner of the sole seat on offer although its candidate might have received only a seventh of the votes after distribution of preferences – and even fewer primary votes.[127] The advocates of this system hoped, in such situations, that the parties unaffected by the vacancy would not contest the seat and by-elections would be largely unnecessary.[128] As we saw, this hope was realised in a different situation, and under a different system, in Tasmania in 1929, but we may be sure that it would not always be so, and even in cases where it was so there would need to be only one independent candidate, no matter how hopeless the prospects of election may be, to incur the cost and inconvenience of a by-election in a very large constituency.

A further suggestion sometimes heard is for each PR constituency to be subdivided into the same number of units as there are members for it, and for each member, in the order of election, to have the right to choose a sub-constituency. The sub-constituencies would then have the sole right to replace the member at a by-election if the need arises.[129] This idea is superficially attractive, but would end up with predictable consequences as those first elected chose the safest sub-constituencies, while it would also be unfair to members whose support was distributed fairly evenly over the whole PR constituency, most obviously Greens Party MPs as things currently stand.

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125 *Report of the Royal Commission Appointed to Enquire into Electoral Systems* (Cd 5163, 1910) 23 ('*Report of the Royal Commission*'). In Australia, see, eg, Archdale Parkhill, *Proportional Representation: Its Failure in New South Wales* (Sydney & Melbourne Publishing, 1926) 31 ff – although note that, as JT Lang was Premier at the time this was written, the statements about the need to test extreme policies may be particular to their time and place.

126 However, it can sometimes still be found, as in Australian Constitutional Convention 1974, *Standing Committee D: Report to Executive Committee* (Government Printer, 1974) 70; Scott Bennett, 'Inglis Clark's Other Contribution: A Critical Analysis of the Hare-Clark Voting System' (Conference Paper, Conference of the Samuel Griffith Society, August 2011).

127 'The By-Election Problem' (n 121) 4.

128 'Our Electoral System: Proportional Representation', *The Mercury* (Hobart, 3 July 1915) 6.

129 Joseph King, *Electoral Reform: An Inquiry into Our System of Parliamentary Representation* (T Fisher Unwin, 1908) 94, 99; New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 November 1921, 1425 (Edward Loxton); *Report of the Royal Commission* (n 125) 24.

IV ASSESSMENT

It is a curious fact that no writer of which the present author is aware has ever considered what aims a system for filling casual vacancies should pursue, or what criteria can be used to determine how meritorious such a system is. Legal scholars have not dealt with the question,[130] and political philosophers and scientists have often considered the nature and aims of democracy as a whole but have not, as far as can be ascertained, descended to notice this important question of detail in which many special considerations apply that do not arise more generally in discussing democratic virtues. The foregoing surveys of past, present and proposed systems for filling PR casual vacancies enable us to reflect upon the problem. We have seen that every system has its merits and defects – features we should want to copy if starting from scratch, and disadvantages that we would wish to avoid – and they can be developed into a list of the desiderata for a system for replacing departed MPs. Such a list, based on what we have seen so far, might look something like this:

1. The casual vacancies system needs to maintain the democratic nature of Parliament in general.
2. It must also accurately reflect the PR system's specific method of converting the popular will into seats in Parliament, with its capacity to allow for a spectrum of opinions to be represented.
3. Unless it envisages a new and direct expression of the voters' will, it should maintain the balance of political views settled by the voters at the previous election (or elections, for the three PR Houses consisting of members elected over two elections).
4. It must be flexible enough to cope with the infinite variety of possible circumstances that may present themselves, some of which may not be foreseeable at present.
5. It should be efficient, reasonably convenient, fairly easily operated and not excessively expensive.
6. Its rules should be clear, its operation transparent and public and its commands enforceable by some impartial body.
7. It needs to be reasonably decorous and dignified, in keeping with the importance to the polity of the election of a new MP.

It will immediately be apparent that it would be impossible to design a system that is guaranteed to meet all, or possibly even any single one of these goals completely and unfailingly. Indeed, voting systems themselves, such as PR, preferential voting and first-past-the-post voting, also exhibit various strengths and weaknesses; none satisfies perfectly every imaginable criterion for a desirable voting system (although in that field the problem is even more difficult as there is less agreement on the principal aims of a voting system – whether it is to maximise

130 The closest approach I can find is RRS Tracey, 'The Legal Approach to Democratic Control of Trade Unions' (1985) 15(2) *Melbourne University Law Review* 177, 199–201.

the spectrum of views represented or to anoint an unambiguous winner, for example). In our case too, however, the goals are to some extent in conflict with each other – not at all an unusual situation which in other fields is called a 'multi-objective optimisation problem': thus, a particular system may purchase efficiency (5) and enforceability (6) at the cost of accuracy in maintaining the voters' choices (3) or decorousness (7). To traduce another field of discourse: such a system would maximise the achievement of the teleological aims in the above list at the expense of the deontological. What we are looking for here, therefore, is the system that maximises the achievement of each of our goals to the greatest extent.

Up to this point the available systems have been categorised as existing systems, on the one hand, of which there are two if the countback/re-count method is considered a single method with two variants, and the five historical or mooted systems on the other. At this point, however, a different categorisation is needed: whether a system requires a new act of political judgement or not at the time of replacement. Two systems, Samuel Bird's by-election proposal and the by-election in a sub-constituency, require such an act by the voters. The Senate system and the nomination by party leaders practised in the New South Wales Lower House in the 1920s require a new act of judgement by one or more MPs (possibly assisted behind the scenes by party officials or even the subject of public debate, but the only legally effective decision is that of politician(s)). Finally, the countback/re-count system(s), the automatic list succession and the concurrent election of a replacement member at the general election require no fresh act of political judgement when the casual vacancy arises (leaving aside the occasional and rarely needed optional add-on such as the ability of a party leader to exclude one or more candidates from the previous election from contention for the casual vacancy because they have ceased to be members of the party, as discussed earlier in Part II(B)(2)).

Taking the two by-election methods first, the method of by-elections by sub-constituencies does not fare well under the first and second criteria as it would require minority members to adopt a sub-constituency in which they are also likely to be in a hopeless minority and thus deprive their parties of seats in the event of a casual vacancy. On the other hand, it is evident that the Bird method scores extremely well on our first and second criteria, and indeed on most of the others as well – but very poorly on the fifth. This is particularly so in the Senate and the Upper Houses of New South Wales and South Australia, where whole States would need to go to the polls specially. Such a thing has occurred[131] but was generally thought most undesirable. The colossal expense and inconvenience of holding by-elections in such circumstances is enough to ensure that the suggestion should not be taken up in those three jurisdictions despite its democratic merits. In the other jurisdictions things are not quite so clear-cut as only a fraction of each

131 Most notably in the wake of *Australian Electoral Commission v Johnston* (2014) 251 CLR 463, although there not just one member was to be replaced. The House of Representatives election of 1972 also saw an election for a single Senate seat in Queensland, as section 15 of the *Australian Constitution*, as it then stood, required a senator appointed as a result of a casual vacancy to be replaced at the next election for either House. Again, however, this was not an election for a single member given the concurrent Lower House election.

State's population would be required to vote. The idea could be adopted for the ACT Legislative Assembly, for example, where only about 60,000 people would be required to vote, or in the Tasmanian House of Assembly's electorates of roughly 75,000 people, compared to the figure of about 425,000 people who would need to turn out to the polls for an Upper House seat in Victoria. In the case of the Lower or single Houses in Tasmania and the ACT, the trouble could also be said to be justified by the greater importance of the election, being to the House that chooses the government, although, if the numbers are finely poised as they often are in such small assemblies, this would be offset by a fear of abrupt changes of government in mid-term and qualms about giving so much power to only a fraction of all voters at a mere by-election.

Here, unlike with other proposed systems which do not seek a new expression of the popular will, we should indeed need to take a stand on the question whether we really want to take advantage of the 'unless' clause in the third criterion above, square the circle and adopt a system that might lead to a change of government as a result of a by-election because the people's will has changed in mid-term. (Such events are admittedly also theoretically possible in Lower Houses with single-member electorates, but as they are often numerically rather larger the risk is much smaller.) The question is whether promoting the stability of the government is a further desideratum of a system for filling casual vacancies. This would seem a rather odd criterion for success, for a number of reasons: because the stakes are not normally quite so high in filling casual vacancies, because in democratic systems we should not fear the people's judgement, and because in a parliamentary system we should face up to the fact that a change in the parliamentary balance of power has real consequences. Opinions will vary on this point, but there will be many people opposed to the idea of changing governments by by-election, especially given that by-elections are often used for protest votes and those who did not participate in a change of government brought about by this process would rightly feel aggrieved. Changes of government, many will think, should be achieved by a collective act of the whole population squarely faced with the choice, not just a section of it. This consideration, combined with the cost and expense of holding by-elections even in smaller jurisdictions, will suffice, regrettably, to ensure that, despite its ingenuity, the Bird scheme is not a serious candidate for adoption in any jurisdiction.

The Senate-style system has mixed merits and scores reasonably well on most criteria but very well on none. It preserves the democratic nature of Parliament in a less convincing way than a by-election, namely by indirect election; it also, in the usual case, allows for the representation of minorities and preserves the PR spectrum. As it requires political judgement, it is flexible and can be used to cope with unusual cases. It is reasonably efficient, convenient and inexpensive, although less so when Parliament is not sitting and a vacancy must either be left unfilled[132]

132 This refers to the Senate only, not the three State Upper Houses that use the same system. Obviously, if State Parliament is not sitting there will be much less of a problem with not filling vacancies in it until it resumes, and it is unusual for Upper Houses to sit without concurrent sittings by the lower. A new MLC also could not take part in committee work, for example, unless appointed to a committee by the full House, and their constituency work is much thinner than that of members of the Lower House. I also

or a special sitting arranged. Perhaps its chief defect arises under criterion 6: it is hardly enforceable and indeed there is an easy way of avoiding its operation, namely by not holding a joint sitting at all or perversely refusing to agree on a candidate at a joint sitting, as has happened in two instances.

The ability to have members appointed to Upper Houses by politicians without facing the electors seems bad at first sight, but has a surprising advantage. It is sometimes criticised as insufficiently democratic,[133] but it can be used – as a pleasing side-effect rather than an aim of a system for filling casual vacancies – to mitigate one of the disadvantages of the system of responsible government, which confines the choice of ministers to about 100 to 130 people at the federal level, and many fewer in the States (namely, those on the government side of one chamber or other). Because transactional costs in replacing senators are usually low, and the risks of misfiring are small and calculable[134] despite the two cases of 'strikes' mentioned earlier, parties have some flexibility in moving senators in and out of the chamber and there is a noticeably higher rate of movement there compared to the House of Representatives.[135] This can be used to the advantage not merely of parties, but of the polity. Thomas Hare, the co-founder of the PR system used in Australia, says of a system of allowing the House itself to fill vacancies: 'Such an opportunity of bringing into the national assembly, and thereby to prominent and public notice, minds of especial eminence or promise, who had not sought, or not obtained, the popular suffrage, would sometimes be of no small value'.[136] After the 2019 federal election, for example, one unsuccessful high-profile and regionally based candidate for the House of Representatives in Victoria entered the Senate via a vacancy that had arisen because of an appointment to an ambassadorship, and in New South Wales another high-profile and regionally based unsuccessful candidate, this time for the Senate, was also appointed a few months after the election to a casual vacancy.[137] This facility enables us to reproduce the capacity that exists in the United Kingdom and Canada, thanks to their unelected Upper

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assume here, in relation to the Senate, that I was right to conclude above that interim appointments by the executive are not available unless Parliament has been formally prorogued.

133 Nethercote (n 11) 61 ff; Shauna Roeger, '2016 Senate Electoral Reforms in the High Court and Beyond' (2017) 38(1) *Adelaide Law Review* 243, 253.

134 Most obviously, the party of a departing senator will have nothing to worry about if it possesses a majority in a joint sitting of both Houses of the State Parliament in question and it can be sure of a majority in each House for a motion fixing the day and time of that joint sitting.

135 Narelle Miragliotta and Campbell Sharman, 'Managing Mid-term Vacancies: Institutional Design and Partisan Strategy in the Australian Parliament, 1901–2013' (2017) 52(3) *Australian Journal of Political Science* 351, 357 ff.

136 Thomas Hare, *The Election of Representatives, Parliamentary and Municipal: A Treatise* (Longmans, Green, Reader and Dyer, 4th ed, 1873) 200. The system proposed was to leave vacancies unfilled until there were four or five of them and then fill them by a PR vote of the House itself. In the smaller Houses of Australia this would leave vacancies unfilled too long.

137 Victoria, *Parliamentary Debates*, Legislative Council, 11 September 2019, 3104; New South Wales, *Parliamentary Debates*, Legislative Council, 14 November 2019, 97; Andrew Clennell and Rachel Baxendale, 'Mundine Emerges as Top Pick for Senate Seat', *The Australian* (Sydney, 30 May 2019) 4; Rosie Lewis, 'Fill Upper House Seats from the Regions: PM', *The Australian* (Sydney, 13 September 2019) 6; Andrew Clennell, 'Molan to Fill the Shoes of Sinodinos', *The Australian* (Sydney, 11 November 2019) 5. Note also the possibility of replacing oneself in a casual vacancy under this system: see, eg, Lovelock and Evans (n 8) 134.

Houses, of co-opting good people who have lost their seats at an election or will not stand.[138]

Nevertheless, the present effective lack of enforceability is a serious defect in the Senate-style system. Suggestions were made earlier for possible reforms to improve things on this front; there is more room in the three States for enacting improvements without the need for a referendum. It is however seriously worth considering the idea of having replacements nominated by party leaders (including extra-parliamentary leaders such as general secretaries and the like). It is true that this worked rather poorly in New South Wales in the 1920s, but since then two changes have occurred: parties are now registered and there is no difficulty in finding an organisation behind even the smallest of them, and in the Upper Houses in particular it is now very rare to find successful candidates standing alone as independents. Nowadays those who would once have been independents form a minor party such as the Jacqui Lambie Network or the Nick Xenophon Team given the multiple advantages of doing so (and this system would be one further such). It would also be possible to retain the Senate-style system for the vanishingly rare cases in which an independent without a party structure is elected or in case a party dissolves between the election and the casual vacancy. This would preserve the element of flexibility (criterion 4): a party could be given a month or two to nominate its replacement, failing which the Senate-style system would apply. Evidently though this method would face criticism as being insufficiently democratic and in keeping with the significance to the polity of the task at hand (criteria 1 and 7). It would make up for this on the other criteria given that it would clearly much more certainly ensure that the replacement occurs in accordance with the will of the voters so far as the party balance is concerned and it would be extremely efficient, cheap and convenient (criterion 5). After all, do voters really take any notice of joint sittings to replace their representatives in Parliament by someone who has been selected by a party machine? Why not cut out the middleman?

There remain the three methods which require no political judgement, all of which also score well on the efficiency/cheapness criterion and are easily enforced, but score more poorly on flexibility. As well as their quasi-automatic nature preventing the interposition of any political judgement, they also do not allow for anyone to be considered who was not a failed candidate at the previous election; there is no room to import stars who have not managed to win a seat in the other chamber.

Of the three systems, it is probably true to say that the least attractive of all would be the election of official substitute members at the general election. This is not even as efficient as it might appear given that the substitute member might

138 Thus, to take only the most recent of numerous possible examples, when the Rt Hon Zac Goldsmith MP, a Cabinet minister, lost his seat at the 2019 United Kingdom elections, the government he belonged to, having won the general election, announced that his valuable services would be retained by the expedient of conferring upon him a life peerage, converting him into the Rt Hon Lord Goldsmith of Richmond Park: United Kingdom, *London Gazette*, No 62885, 10 January 2020, 434. In his maiden speech in the House of Lords, his Lordship unconventionally referred to himself as 'a turd that will not flush': United Kingdom, *Parliamentary Debates*, House of Lords, 23 January 2020, vol 801, col 1183.

also die, change parties, become ineligible or refuse to take a seat. Subject to the possibility of a change of parties, it certainly appears democratic, but the practical objections to it canvassed earlier are stronger. The automatic list method has a stronger case in its favour, although, as noted earlier, it may cause disruption to factional arrangements and run into practical objections from serving politicians on that account, and it would require adaptation in systems with the Robson Rotation in which there is no single official ordering of the list. It can, however, be made somewhat less inflexible and inimical to the preservation of the party balance if accompanied, as it is in New Zealand and Germany, by a method of dealing with possible changes of party, namely the requirement that a proposed replacement should have retained party membership; as experience in New South Wales shows, it cannot guard against subsequent fallings-out – but no system can, nor, perhaps, should we have such an expectation of a system for filling casual vacancies.

With the Robson Rotation the re-count or countback method(s) require no such adaptation and have the added democratic bonus that the voters are notionally asked without the need for an election which candidate they would prefer rather than the next person on the list simply moving in without further ado. Experience in Tasmania and the ACT also shows that this system usually continues the party balance selected by the voters. Even in the case of Madeleine Ogilvie in 2019, there is a respectable argument that the party balance changed but only in accordance with the voters' wishes, although on balance, given the closeness of the result,[139] we concluded above that it is more likely that she was the beneficiary of ill-considered later preferences on the part of enough voters to make a difference to the result of the countback. In the Brown/Sanders case mentioned above there are very good reasons for thinking that the voters may well have been satisfied with the unusual replacement of one representative by the representative of another party, but it may well be otherwise if a candidate for a major party leaves the party after the election.

Although as yet few cases of this sort have arisen in which the system has produced the 'wrong' result, an innovation similar to that made in Western Australia[140] would also be worth considering in the other two jurisdictions in the interests of fulfilling criterion 3 more reliably: namely, a power in someone, perhaps a politician, to disqualify from the re-count/countback a candidate at the election who has not retained membership of the party in question. This would add the possibility of political intervention in anomalous cases to an otherwise 'automatic' system, but it would happen rarely and only if the initiative were taken by a politician – the system would not be fundamentally changed into another type of system. It will be recalled however that in Western Australia the party leader can only declare that there is no-one available who remains a member of the party and is otherwise eligible. The party leader can wipe everyone out in a nuclear attack but cannot pick off individuals surgically if there is more than one person in the field. It would be better if individuals could be targeted, as was suggested in

139 See above n 80.

140 See above n 86.

discussing the Western Australian system in Part II(B)(2) above. As in Madeleine Ogilvie's case, there may be multiple members of the party list at the previous election, only one of whom has left the party. It would also be necessary to decide, under this system, whether it is best to go for certainty and speed by confiding this decision to the party leader or for slow but sure fairness by allowing the courts to make it if any dispute arises.

V CONCLUSION

As would be hoped, this survey of the systems for filling casual vacancies in PR Houses shows that the two existing systems score fairly well. The difference of principle between the Senate-style system and the re-count/countback system is that the former does and the latter does not provide for political control of the process as distinct from its quasi-automatic operation. This has its advantages, both in the practical political world of deals and factions and in retaining flexibility in case of unusual events.

Nevertheless a consideration of the Senate-style system has shown that there are far too many loopholes that can be exploited by an unscrupulous operator to thwart the smooth running of the system and the continued expression of the people's will in Parliament. Suggestions have been made for minimising these problems, but none can do so completely and it is probably not possible to do so in any conceivable system of this type given that MPs can scarcely be compelled to vote for a candidate, even one who unarguably should occupy a vacancy as the undisputed choice of the affected party. If it is desired to allow politicians to be in charge of the process of organising replacements for departed colleagues, under present-day conditions it must be seriously questioned whether anything except a slight element of symbolism is gained by indirect election by Parliament and whether this is purchased at too high a price given that there is sometimes a temptation for the process to become a continuation of day-to-day political infighting rather than a constitutional process above the fray. Is there any reason – if the advantages of continued political control of casual vacancies are considered preferable to the automatic operation of a re-count/countback system or even, in smaller constituencies, direct replacement by the people via a Bird-style by-election – to retain the middleman rather than simply allowing parties to appoint their own replacements through the agency of some designated official such as a parliamentary leader or general secretary?