CHAPTER ELEVEN: JUDGES EXERCISE THEIR POWER

The disgraceful piece of political chicanery that is the Australian Senate voting system could only ever have been implemented with the approval of the Pharisees who lay down the law from the grandiose High Court building by Lake Burley Griffin in Canberra. I live on the other side of the lake in the suburb of Campbell. Until very recently our house had a view of the back of the High Court building, which view has recently been blocked by new buildings of flats and units in Campbell. That is just as well. It is an ugly building when viewed from the other side of the lake.

Readers are invited to visit that building. It is colloquially known as "Gar's Mahal" since Sir Garfield Barwick presided over its construction. He was the Chief Justice from 1964 to 1981 and the building was opened by the Queen in 1980. The building tells us what we need to know about the Australian High Court. It speaks of *power*. Everything about the building tells the visitor of the power of the Court. That, surely, is the reality. Our High Court is not about justice: it is about power.

Some cases are still about justice. For example, the High Court decided on Tuesday 7 April 2020 that there was reasonable doubt that Cardinal George Pell had committed the crime of child sexual abuse at Saint Patrick's cathedral in Melbourne late in 1996. Along with most commentators I thought that was the right decision – and Pell left Barwon prison a free man as a result.

This chapter, therefore, is about the political decisions made by the Court. As I have recorded in the second paragraph of the *Introduction* to this book, I began my public life as a political commentator with a contribution to *The Sydney Morning Herald* on 30 August 1957, the subject being Senate casual vacancies. Not yet a voter I was just 18 years old and a first-year economics student at Sydney University. I was, however, not merely interested in politics. I was also interested in constitutional law, albeit very much as a "bush lawyer". I admired the High Court then, essentially because I thought of the Court as the body which upholds the Constitution. That is understandable. Chief Justice Sir John Latham (1935-52) had given the Court a reputation for upholding the Constitution by the fact that his Court had struck down Labor's bank nationalisation during the *elected* term of Ben Chifley as Prime Minister (1946-49). The High Court then struck down the Communist Party Dissolution Act legislated during the first year of Menzies as Prime Minister for the second time. The date of that magnificent decision was 9 March 1951. Latham's was, indeed, a gutsy Court!

However, if I were to draw up a list of Chief Justices of Australia and ranked them in order of their greatness, I would not include Latham in my top three. The reason is that he was the *dissenter* in that case, surely the finest decision of the Court while he was its head. My list would place Sir Owen Dixon (1952-64) as the greatest Chief Justice, Sir Samuel Griffith (1903-19) second and Sir Anthony Mason (1987-95) third.

That would be a conventional listing among Court watchers. There would, however, be plenty of observers placing Mason first. His Court was notable for the fact that it took seriously the democratic values of the Constitution as illustrated by the words "directly chosen by the people". My reason for not subscribing to that "Mason-Dixon Line" is my refusal to contemplate Griffith being placed anywhere lower than first or second.

For those readers who wish to know of my admiration for the *Communism* case I recommend them to read the 1954 book by Professor Leicester Webb *Communism and Democracy in Australia: A Survey of the 1951 referendum* (F.W. Cheshire, Melbourne, 1954). My reading of it leads me now to nominate four favourite justices who did not become Chief Justice. They are Sir Wilfred Fullagar (1950-61), Sir William Deane (1982-95), Ian Callinan (1998-2007) and Dyson Heydon (2003-13). In

the case of Fullagar my reason for nomination is that he wrote the judgment of the majority six in the *Communism* case. My reasons for nominating Deane and Callinan will become clear later in this chapter. Fullagar's judgment in 1951 contained the oft-quoted comment that "Parliament cannot recite itself into a field the gates of which are locked against it by superior law." In other words, during a time of peace the Commonwealth Parliament could not use its defence power to think it had the power to ban the Communist Party. That is what the Communist Party Dissolution Act 1950 tried to do. It recited itself into a power the Commonwealth Parliament did not possess.

The reason why I list Heydon among my four is that he was a dissenter in several important cases. One of these attracted my interest and I wrote several articles about it in September and October 2013 for *The Canberra Times.* His dissenting judgment attracted my favourable comment. The judgment was handed down on Wednesday 31 August 2011 and is known as the *Minister for Immigration and Citizenship* case, alternatively (and popularly) as the *Arrangement with Malaysia* case. The best of my articles was published on Wednesday 7 September and titled "High Court minority opinion will be vindicated" to which the editor added "It recalls a famous dissent in a US Supreme Court case, Malcolm Mackerras writes". I did not say anything kind about the judgments of Chief Justice Robert French nor about the judgments of William Gummow, Kenneth Hayne, Susan Crennan, Susan Kiefel or Virginia Bell. I did, however, express admiration for the dissenting judgment of John Dyson Heydon which takes up pages 60 to 76 of the judgment for which I paid $39 when I went to the Canberra registry of the High Court to buy the judgment soon after its publication. I lack the space to explain here why I think Heydon's judgment has been vindicated.

Readers should understand why I have refused several offers to be a regular columnist for a newspaper. I never wanted to feel compelled to comment on some matter about which I had not given enough thought. Nor did I want to comment on any current matter about which my interest was not especially great. Consequently, as a mere bush lawyer I report here such opinions as I have had published under my name and such thoughts I have had which were not put to pen. Also recorded here are such actions as I have taken in pursuit of matters about which I have felt strongly.

It is in relation to the statement in my immediate past paragraph that I record my interest in the case of *Sue v Hill* in 1999. I thought about it and, at the time, was impressed by the dissenting judgments of Callinan and Michael Kirby (1996-2009). However, for reasons explained below, in the end I decided not to put into print the thoughts I had at the time. As readers will see from the concluding chapter of this book I now describe it thus: "The absurd idea that these are foreign powers is a concoction of the High Court in an infamous decision in June 1999 when Heather Hill, elected for Queensland in October 1998 with a quota in her own right, was not allowed to sit for even one day of her six-year term because she was born in London." In the current climate I go further than that, describing the judges as a bunch of highly-paid Pharisees who lay down the law from a grandiose and ugly High Court building in Canberra.

I have actually participated in the proceedings of the High Court only twice. The second was the more important occasion and I leave that to the end of this chapter. What I now want to do is explain why the Court I admired so much during the 1960s slipped in my estimation to the point where, in the 21st Century, I have frequently written the view that I am not a fan of the Court in any way. I admit it has made some decisions with which I have agreed, and I admit there is a need for such a body in our national life. In my opinion, however, it compares badly with the US Supreme Court. (One of the High Court judgments of which I have explicitly approved is discussed in the First

Appendix to Chapter Three. It was made by Justice Kenneth Hayne in February 2014 sitting as the Court of Disputed Returns.)

The Samuel Griffith Society consists of Australians who are interested in federalism and constitutional law. I joined the Society in 1996, have been a member ever since and participated in several of its conferences. Of all the people with whom I have had conversations about politics it has been members of the Samuel Griffith Society who have been the most critical of the High Court. That is the main feature which attracted me and caused me to join. The other reason was their defence of the Senate which caused me to think that in them I would find the people most well-disposed to my ideas about Senate reform. It is the period since 1996 which has caused me to become very disillusioned with the High Court.

The three cases which most excited my interest occurred while Malcolm Turnbull was Prime Minister. The first went in his favour – to my disgust, as I explain below. The second appeared at first to go against him – though that is not the way it eventually turned out. I was on his side on that one – or so I thought! The third went against Labor – except that half a million Australians went to the polls and reversed the decision, to Labor's delight. All three were bad judgments by the Court. The fact that all three were made by a unanimous Court did not in any way lessen either my hostility towards the Court nor lead me to have a favourable opinion of the judgments themselves.

My personal records tell me of the cases which interested me. When a judgment was handed down I would go to the Canberra registry of the High Court and buy a judgment. Thus, for example, I record that on Tuesday 31 October 2017 I visited the High Court building and paid $38 to the registry for the judgment handed down the preceding Friday, when I heard the news reported on television in Hanoi of all places. It is popularly known as the *Citizenship* cases. That was the judgment which ruled invalid the election of senators Scott Ludlam, Fiona Nash, Malcolm Roberts and Larissa Waters. It also sent Barnaby Joyce to a by-election in December 2017 for the reason that his election as member for New England in July 2016 was held to be invalid. He won the by-election handsomely which shows the difference between cases affecting the House of Representatives and those affecting the Senate. The senators had their seats confiscated by the High Court and that was that. Of the four Senate names listed above only Waters enjoyed a quick return. As shown by my second appendix to this chapter she was succeeded by Andrew Bartlett who resigned his seat late in August 2018. Waters filled that Section 15 casual vacancy. She was sworn back into the Senate on Monday 10 September 2018, having spent 14 months away from Canberra caring for her 18-month-old daughter Alia. At the May 2019 half-Senate election Waters was re-elected and Malcolm Roberts was elected to a term beginning on 1 July 2019.

Following on the heels of the New England by-election on 2 December 2017 came the Bennelong by-election of 16 December, essentially for the same reason. In both cases the disqualified member, Barnaby Joyce and John Alexander, respectively, was easily re-elected. While so many learned commentators praised that legalistic decision the electors of those electoral divisions cocked a snoot at the Court. In modern language the people said "up you" to the Court and its supporters, a very appropriate response! It is sensible to consider the Bennelong (Liberal) and New England (National) by-elections as a mini general election – so similar were their circumstances. The combined by-election votes were 110,843 (64.5 per cent) for the Coalition and 61,125 (35.5 per cent) for Labor. At the July 2016 general election the numbers were 118,177 for the Coalition (63.1 per cent) and 69,058 for Labor (36.9 per cent). So, there was a swing towards the Coalition of 1.4 per cent. That was a very poor outcome for Labor which had put enormous effort into getting good results in these

contests. My view is that the reason for such a poor pair of results was that Labor's federal politicians identified themselves with the judgment of the Court. Neither the Liberal Party nor the National Party identified themselves with the Court's judgment at that stage – and they reaped an appropriate reward! The voters of Bennelong and New England blamed the Court for creating such totally and hopelessly un-necessary by-elections.

The first occasion of my participation in the proceedings of the High Court came in 1988. My records of that case are voluminous. There is a simple reason. It was the first case in which I was *allowed* to participate. The judgment is dated 12 May 1988 and is titled "RE: SENATOR WILLIAM ROBERT WOOD". The 21-page judgment by Mason, CJ and Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ begins with an order which asks itself various questions to which it gives answers.

The first question was: "Whether there is a vacancy in the representation of New South Wales in the Senate for the place for which Senator Wood was returned?" To that the answer was: "There is a vacancy in the representation of New South Wales in the Senate for the place for which Senator Wood was returned."

The second question was: "If so, whether such vacancy may be filled by the further counting or recounting of ballot papers cast for candidates for election for senators for New South Wales at the election?" To that the answer was: "The vacancy may be filled by the further counting or recounting of ballot papers cast for candidates for election for senators for New South Wales at the election."

The third question was: "Alternatively, whether in the circumstances there is a casual vacancy for one senator for the State of New South Wales within the meaning of Section 15 of the Constitution?" To that the answer was: "There is no casual vacancy for one senator for the State of New South Wales within the meaning of Section 15 of the Constitution."

The judgment delighted me. Essentially it was because the Court did exactly what I had recommended. Consequently, I can place on my list of academic publications this one: "Submission to the High Court in Court of Disputed Returns Registry (No. C3 of 1988 Questions pursuant to section 377 of the *Commonwealth Electoral Act 1918* re Senator Robert Wood), pp. 11." I did not have a firm view on whether Wood should, or should not, have his seat confiscated by the Court but my firm view was that, if such confiscation did occur, the vacancy should be filled by a recount of the votes cast on 11 July 1987. I gave a variety of reasons why that should be done. The submission was dated 7 March 1988. It was contested so I wrote a further submission dated 11 March which reads as follows:

1. The submission by the Crown Solicitor for Queensland advocates a fresh popular election for the place of Senator Wood, who is disqualified in his view.

2. Under a system of "first-past-the-post" such a single person election is constitutional.

3. However, under proportional representation such an election would be unconstitutional because of the requirement of section 8 of the Constitution that "in the choosing of senators each elector shall vote only once".

4. It is submitted that each of 245,883 voters have already voted in the valid election of Senators Sibraa, Michael Baume, McLean, Gietzelt, Peter Baume, Richardson, Brownhill, Childs, Puplick, Morris and Bishop. Some 85 percent of voters have already voted once and their votes have been counted and effective. (The quota was 245,883).

5. To hold a single person popular election would allow those voters to vote twice, once in 1987 to elect their own major party senators and a second time in 1988 to swamp the minor party votes of Wood and Nile.

6. In that circumstance it would be unconstitutional to hold a fresh popular election for one place in the Senate only.

In relation to the merits of the question of disqualification the Court wrote:

On 28 January 1988 the Deputy Secretary of the Department of Immigration, Local Government and Ethnic Affairs wrote a letter to the President of the Senate stating that Senator Wood had applied for the grant of Australian citizenship, he being a British citizen who had not received Australian citizenship. On 3 February 1988 Senator Wood made an affirmation of allegiance and was granted Australian citizenship. At all material times prior to 3 February 1988 Senator Wood was a British citizen and was not an Australian citizen. The category of citizenship applicable to Senator Wood pursuant to the *British Nationality Act* 1981 (U.K.) does not appear and is immaterial. Nor does it appear whether, on 3 February 1988 or subsequently, Senator Wood renounced British citizenship in accordance with the provision for renunciation contained in s.12 of the *British Nationality Act*.

That was quite okay by me. Wood was an accidental senator, getting his seat through preference harvesting. Since he was on the Australian electoral roll solely by virtue of his British citizenship and since he was not an Australian citizen at the date of his nomination for election it seemed to me reasonable that he was disqualified from election. What mattered to me was the recount procedure which was established by the decision. I collected a booklet of it and the result was that the remainder of the term was filled by Irina Dunn who was second to Wood on the ticket for the Nuclear Disarmament Party in July 1987. Her Term expired on 30 June 1990 and she was not elected again at the half-Senate election on 24 March 1990. She stood as a candidate for the Greens and her first preference vote was 26,713, not nearly enough given that the quota for election was 476,878 votes. As I note in my supplementary submission (above) the quota in 1987 had been 245,883, it having been an election for 12 senators where only six were elected in 1990.

The recounting of votes was thus established as the mechanism for filling a certain kind of Senate vacancy. Such an idea was consistent with the requirement of Section 7 of the Constitution that senators be "directly chosen by the people". As I explain in Chapter 15 *Western Australia's Reform* this way is the *only procedure* for filling Legislative Council casual vacancies in Western Australia. That chapter explains why such is so.

If I was satisfied by the decision of the High Court in that case, I was not satisfied by their decision in the next case which I now relate. Following the resignation of Bob Hawke from his seat of Wills (Victoria) there was a by-election on Saturday 11 April 1992. The seat was won by Independent Phil Cleary who was re-elected at the March 1993 general election but lost the seat back to Labor at the March 1996 general election. However, there was an unusual circumstance unique to this case.

If Cleary's election had been allowed to stand then his first term as member for Wills would have ended on 8 February 1993. That was the date of dissolution of the 36th Parliament which had been elected on 24 March 1990. Every other House of Representatives member of that 36th Parliament saw her/his term expire on that day. Yet the records for Cleary show "Disqualified 25.11.1992. Re-elected 13.3.1993." That was the result of the High Court case *Sykes v Cleary* which I now describe.

One of the 22 candidates was a certain Ian Sykes. He polled dismally, getting only 364 first preference votes. The final result was a contest between Phil Cleary (who polled 41,708 two-candidate preferred votes) and the Labor candidate Kardamitsis who polled 21,772. Sykes was a vexatious litigant and took it to the Court of Disputed Returns. He succeeded in getting the by-election result set aside under Section 44 of the Constitution. The whole High Court judgment is voluminous but the judgment which appealed to me at the time – and ever since - was the dissent by Sir William Deane. He joined the other judges in holding that Cleary was disqualified by virtue of his holding an office of profit under the Crown – he was a schoolteacher employed by the Victorian Education Department – but was not disqualified by virtue of his owing allegiance to a foreign power.

The following information about Wills comes from Page 124 of my book *The Mackerras 1993 Federal Election Guide* which was published shortly before the 1993 election by the Australian Government Publishing Service. The candidates are listed in the order of their appearance on the ballot paper.

1992 By-election Result
Electors: 76,217

	First preferences		
Candidates	Party	Votes	%
Savage, Katheryne	Ind	1,660	2.60
Kardamitsis, Bill	ALP	18,784	29.44
Kuhne, Otto	Ind	35	0.05
Phillips, Richard	Ind	136	0.21
Kapphan, Will	Ind	34	0.05
Rawson, Geraldine	Ind	453	0.71
Delacretaz, John	Lib	17,582	27.56
Poulos, Patricia	Ind	61	0.09
Droulers, Julien	Ind	68	0.11
French, Bill	Ind	90	0.14
Potter, F.C.	Ind	30	0.05
Murray, John	Ind	54	0.08
Vassis, Chris	Ind	43	0.07
Cleary, Philip	Ind	21,391	33.53
Ferraro, Salvatore	Ind	221	0.35
Germaine, Stan	FPA	280	0.44
Walker, Angela	AAFI	577	0.90
Mackay, David	Dem	1,383	2.17
Lewis, Bob	Ind	216	0.34
Sykes, Ian	Ind	364	0.57
Kyrou, Kon	Ind	81	0.13
Murgatroyd, Cecil	Ind	258	0.40
Formal		63,801	93.62
Informal		4,348	6.38
Total		68,149	89.41
	Two candidate preferred		
Cleary	Ind	41,708	65.70
Kardamitsis	ALP	21,772	34.30

It is worth recording that at the March 1990 general election the two party votes were 38,708 for Hawke (57.93 per cent) and 28,116 for Delacretaz (42.07 per cent) so the by-election swing against Labor was 23.63 per cent).

The by-election information is useful, but one detail is missing. This was really a three-way contest so I should record the votes after only Cleary, Kardamitsis and Delacretaz were in the count. They are not important because Delacretaz was the last candidate excluded. In addition to the question of office of profit under the Crown the question arose whether Kardamitsis and Delacretaz were men owing allegiance to a foreign power. Kardamitsis was thought to owe allegiance to Greece and Delacretaz to Switzerland.

It is worth my while quoting slabs of the Deane dissenting judgment because his wise words are relevant to a later case. I am quoting from pages 126, 127 and 128.

> The petitioner contends that Mr Delacretaz and Mr Kardamitsis each came, at relevant times, within Section 44 (i)'s disqualification of any person who "is a subject or a citizen, or entitled to the rights or privileges of a subject or a citizen of a foreign power". Obviously, and this was not disputed, those words must be read down to some extent. Otherwise, to take an extreme hypothetical example, it would lie within the power of a foreign nation to disqualify the whole of the Australian Parliament by unilaterally conferring upon all of its members the rights and privileges of a citizen of that nation. . .
>
> It does, however, seem to me that the purpose which Section 44 seeks to attain and which "must always be kept in mind" would not have included the permanent exclusion from participation at the highest level in the political life of the nation of any Australian citizen whose origins lay in, or who has had some past association with, some foreign country which asserts an entitlement to refuse to allow or recognize his or her genuine and unconditional renunciation of past allegiance of citizenship. Accordingly, and notwithstanding that citizenship of a country is ordinarily a matter determined by the law of that country, the qualifying element which must be read into the second limb of Section 44 (i) extends not only to the acquisition of the disqualifying relationship by a person who is already an Australian citizen but also to the retention of that relationship by a person who has subsequently become an Australian citizen. A person who becomes an Australian citizen will not be within the second limb of Section 44 (i) if he or she has done all that can reasonably be expected of him or her to extinguish any former relationship with a foreign country to the extent that it involves the status, rights or privileges referred to in the sub-section.
>
> Mr Kardamitsis has been an Australian citizen since 12 March 1975 upon which day he surrendered his Greek passport to the Australian government and took an oath of allegiance that included "renouncing all other allegiance". Since then he has taken three further oaths of allegiance to this country, twice as a councillor and once as a Justice of the Peace. . .
>
> In my view, Mr Kardamitsis had, on the material before the Court, done all that he could reasonably been expected to do for the purposes of the Constitution and laws of this country to renounce and extinguish his Greek nationality and any rights and privileges flowing from it. . .

In other words, Deane came to the view, not shared by the majority, that both Kardamitsis and Delacretaz were qualified to be candidates. He took a generous view where the other judges took a restricted view.

Although I was interested in this case my interest, at the time, was academic only. I did not write anything about it. The reason was that the disqualification of Cleary did not affect the next election. If Cleary had been disqualified after winning the seat at a general election then a by-election would have occurred, exciting my interest. However, Cleary was disqualified in respect of a by-election win. A general election was due, so he rid himself of the impediments causing his disqualification as did Kardamitsis, and Cleary was then elected at the general election held on 13 March 1993.

When I wrote above that "the disqualification of Cleary did not affect the next election" that is not quite true. During the election campaign every other member of the House of Representatives was treated as being the sitting member. They could stay in their offices (both local and at Parliament House) until defeated at the general election or until retirement. However, Cleary was immediately kicked out of his offices which remained vacant until he was elected – at which point he resumed occupation of those offices.

One of the more sensible long-term commentators on the High Court is The Sydney Institute's Gerard Henderson. In an article on page 17 of *The Sydney Morning Herald* for Tuesday 1 December 1992, titled "March of the High Court Murphyites" he comments on the year 1992 with the statement that "this has been one of the most contentious years in the history of the High Court". He also notes:

> The worst offenders were Graeme Campbell (ALP, Kalgoorlie) who dismissed the court's full bench as "pissants" and Ron Edwards, also from Western Australia. . .Phil Cleary got into the act as well. He described his forced departure from the House of Representatives as a "sad and tragic day" for Australian democracy. It was, he declared, a "comic decision" which had led to a "comic tragedy".

Now I would have agreed with Cleary were it not for the fact that he was able to appeal to the electors of Wills to reverse the Court's decision. He did so appeal to those electors and they did, in effect, reverse the Court's decision. He served a full three-year term from March 1993 to March 1996.

I was delighted that Cleary won Wills again at the March 1993 general election. In addition to my own personal dissent on the citizenship question (along with that of Sir William Deane), I always had concerns about the High Court's interpretation of what an "office of profit under the Crown" meant. Since Cleary was on unpaid leave he did not, in my view, hold an office of profit under the Crown. It would have been different if he had been on paid leave. No doubt Cleary would have been mindful of the experience of Bill Wood. He was a state Labor member from 1969 to 1974 but was defeated in his seat of Barron River at the December 1974 Bjelke-Petersen sweep. He was then the unsuccessful Labor candidate for Leichhardt in 1975 and 1977. When he re-applied for his teaching job after losing in 1975 Joh Bjelke-Petersen vetoed it.

No disqualification occurred in respect of that 1993 general election. However, the same was not true of the next general election for the House of Representatives, held on 2 March 1996. The Division of Lindsay based on Penrith in Sydney's western suburbs, had been a new seat created at the 1984 redistribution. It was won by Labor's Ross Free in 1984, 1987, 1990 and 1993 and seemed to be a safe Labor seat. In 1993 the final vote had been 41,658 for Free (60.22 per cent) and 27,513

(39.78 per cent) for the Liberal candidate, Carolynn Bellantonio. However, that safety margin was illusory. At the 1996 general election Free was swept out of the seat by the Liberal candidate, Jackie Kelly, who secured a two-candidate preferred vote of 38,442 (51.58 per cent) to Free's 36,088 (48.42 per cent). That was a swing against Labor of 11.8 per cent.

Free and the Labor Party then decided to do something stupid. They challenged the result in the High Court sitting as the Court of Disputed Returns. They won in the Court but suffered a debacle in the by-election which the judgment of the Court created. The judgment was handed down by the Chief Justice, Sir Gerard Brennan, is dated 11 September 1996 and its title is *Ross Vincent Free versus Jacqueline Marie Kelly and Another.* The interesting thing about the case is that there were two grounds by which the general election result could be upset. Both concerned Kelly's eligibility to stand. One ground was that she was born in New Zealand and could thus be declared as owing allegiance to a foreign power. That ground was not pursued. The other was that she had been employed as a legal officer for the Royal Australian Air Force and thus held an office of profit under the Crown. Consequent upon the voiding of the March general election return the writ for the by-election was issued on 16 September 1996 for polling day on 19 October. The result was that Kelly received 40,037 two-candidate preferred votes (56.55 per cent) and Free 30,762 (43.45 per cent). So, since Free had last won the seat there was a swing against him of 16.77 per cent.

On Page 3 of the judgment Brennan wrote:

> It is now common ground that, by reason of Section 44 (iv) of the Constitution, Ms Kelly was incapable of being chosen as a member of the House of Representatives while serving as an officer of the RAAF at the time of her nomination as a candidate. That is the relevant time for determining whether a person is incapable of being chosen on any of the grounds specified in Section 44 of the Constitution. As Ms Kelly was incapable of being chosen as a member of the House of Representatives, an appropriate declaration of incapacity must be made.

The remaining 12 pages of the judgment deal with what should be done and the decision was that there must be a by-election. My reaction to the decision was that it would be a thoroughly good thing if Labor were thrashed. They *were* thrashed and I gloated afterwards. In an article on page 4 of *The Australian* for Monday 21 October 1996 I wrote as under. The title for the article was "A folly so profound, Labor could not see the backlash coming". The article reads:

> How does one explain the big win for Jackie Kelly? Simple really. Lindsay voters took a baseball bat to the cynicism of the NSW branch of the Labor Party and bashed mercilessly. It was a bashing which was long overdue but hitherto not administered. It had been so long delayed that people like me had not expected it, delighted though I am that it has come at last.
>
> If the Lindsay by-election had come as a consequence of, say, an expected death I have little doubt that Ross Free would have won handsomely on Saturday. Again, if that by-election had come about through a Court order in which some evidence of electoral cheating had been presented, then I think Free would have won. The total failure of the Labor Party to display any case for the need of this by-election is what wrecked their chances. . .
>
> In retrospect, Labor's decision to challenge the March victory of Jackie Kelly looks so stupid one can only wonder at their folly. Yet none of us commentators so described it at the

> time. We had become too taken up with the cynicism of politics. In launching that challenge Labor greatly underestimated both John Howard and Jackie Kelly. Which of the prime minister man or candidate woman did they underestimate the more? The woman, I would say. Labor, however, can take some comfort from this fact. Opposition leader Kim Beazley was one of the few people in his party who seemed to recognise the dangers involved. He emerges, therefore, as a man with good political judgment.

Consequently, after noting the result in Wills at the March 1993 general election and Lindsay at the October 1996 by-election I came to the conclusion that there was something quite democratic about causing a by-election when there was a disqualification. The electors would always reverse the decision of the Court and re-instate the original result which the Court should not have over-turned. Now that I can review the cases of Wills, Lindsay, New England, Bennelong, Braddon, Fremantle, Longman and Mayo taken together I conclude that the electors very wisely considered whether the Court was right or wrong. They decided the Court was wrong by punishing the party that most identified itself with a decision the public rejected. I call that phenomenon "the public respecting the result of the previous election." If the Court for some specious legalistic reason demanded the people vote again then they vote again – and re-state their previous decision.

As seen above the 1988 case of Robert Wood told me that if a candidate, not being an Australian citizen, were accidentally elected to the Senate it would be a democratic procedure to disqualify him or her and recount the votes as though he/she were not a candidate with his/her preferences distributed accordingly. However, that view did not help me much in considering the next case which arose in respect of the half-Senate election for which polling day was 3 October 1998.

The quota for election in Queensland was 286,251 votes. The top candidate for Pauline Hanson's One Nation Party was Mrs Heather Hill who polled 295,777 votes, being 278,305 above the ballot dividing line and 17,472 below the ballot dividing line, these last often being referred to as "personal votes". Consequently, she achieved a quota in her own right and thus was elected third of six senators for Queensland, to take their seats on 1 July 1999. The first elected was Jan McLucas (Labor), the second elected Warwick Parer (Liberal).

However, Pauline Hanson and her party had many enemies and two men, Henry Sue and, later in the proceedings, Terry Sharples petitioned the Court for an order that Mrs Hill was incapable of being chosen as a senator due to her owing allegiance to a foreign power, the United Kingdom. The case was decided on 23 June 1999 and became known as *Sue v Hill.* It resulted in Hill never being a senator. It also excited my interest enough to cause me to think I might write a newspaper article about it. In the end I decided not to burst into print, as I explain below. I have regretted that failure ever since. I was quite vocal in condemning the Court in private conversations and in one radio interview. I just wish I had a record of my then view in print.

Hill was born in the United Kingdom on 9 August 1960. As a consequence, she was a British citizen at the start of the *British Nationality Act 1981.* She migrated to Australia with her parents in 1971 and married an Australian citizen in 1981. In January 1998 she applied for and was granted Australian citizenship. At that time the Australian *Citizenship Act 1948* contained no requirement for the renunciation of foreign citizenship. So she was as fully loyal to Australia as was Phil Cleary in 1993, Jackie Kelly in 1996, Barnaby Joyce and John Alexander in 2017 and Justine Keay, Susan Lamb, Rebekha Sharkie and Josh Wilson in 2018. She was not in Wood's position of 1988 since he had been on the electoral roll but not an Australian citizen, as explained above.

The judgment of the Court was on page 2 being this, in short:

> Held, (1) by Gleeson CJ, Gaudron, Gummow and Hayne JJ, McHugh, Kirby and Callinan JJ dissenting, that the validity of an election or return could be disputed by petition under section 353 (1) on the ground of the incapacity of the senator or member returned to be elected. . .
>
> Held by Gleeson CJ, Gaudron, gummow and Hayne JJ, McHugh, Kirby and Callinan JJ not deciding, that a citizen of the United Kingdom was a subject or citizen of a foreign power within the meaning of Section 44(i) of the *Constitution* and hence incapable of being chosen or of sitting as a senator.

It is worth noting that academic scholars of the entire period of the Gleeson Court recorded (after Gleeson's retirement) that its most consistent voting coalition was Gleeson, Gaudron, Gummow and Hayne. This was an example of that. The position of the dissenters was best explained by Michael Kirby (1996-2009) this way on page 50, paragraph 279: "It follows that the Court of Disputed Returns has no jurisdiction to hear and determine the petition of either of the petitioners challenging the election of Mrs Hill as a senator." In other words the Senate should make the decision, not the High Court. Common sense told me of my agreement with that dissenting argument which was supported by McHugh and Callinan.

The press statement "from the Chambers of the Chief Justice" issued on decision day noted this: "The three members of the Court who held that there is no jurisdiction of the kind invoked did not, for that reason, go on to answer the remaining questions." In other words, they were not required to answer the big question as to whether the United Kingdom had become a foreign power. However, Callinan decided to do so, notwithstanding that his opinion was not, strictly speaking, a dissent on that point.

In many ways the judgment of Mary Gaudron (1987-2003) best expresses the majority view. Thus, on page 63, paragraph 158, she writes:

> It is not in issue that the requirements of Section 44 of the *Constitution* must be satisfied at the time of nomination. Nor is it in issue that, at that time, Mrs Hill had taken no step to renounce her British citizenship. The issue presented for decision is whether she had to. In this regard, it was put that, by reason of that special relationship between Australia and the United Kingdom, the latter is not a "foreign power". . .Alternatively, it was put that, having taken out Australian citizenship, nothing further was required of Mrs Hill to renounce her British citizenship.

Later Gaudron wrote (page 65, paragraph 165) of the majority view: "the notion is that 'the divisibility of the Crown' . . . is implicit in the Constitution". Four judges accepted that, Gleeson, Gaudron, Gummow and Hayne. Gaudron elaborates on page 69, paragraph 173, with these words:

> At the very latest, the Commonwealth of Australia was transformed into a sovereign, independent nation with the enactment of the Australia Acts. The consequence of that transformation is that the United Kingdom is now a foreign power for the purposes of Section 44(i) of the Constitution.

Earlier on Gaudron had noted the year of the Australia Acts to have been 1986. Callinan's judgment includes these passages on page 120, paragraphs 288 to 291:

> There is only one other matter to which I wish to refer. The petitioners (and the Commonwealth which supports them) acknowledge that at the time of Federation the United Kingdom was unquestionably not a foreign power. One of their primary arguments on the central question whether the United Kingdom is a foreign power is that, as time has passed, circumstances have changed, and the United Kingdom, by a process of evolution has now become a power foreign to Australia (the "evolutionary theory"). It is upon that argument that I wish to comment.
>
> The evolutionary theory is, with respect, a theory to be treated with great caution. In propounding it, neither the petitioners nor the Commonwealth identify a date upon which the evolution became complete, in the sense that, as and from it, the United Kingdom was a foreign power. Nor could they point to any statute, historical occurrence or event which necessarily concluded the process. . .The great concern about an evolutionary theory of this kind is the doubt to which it gives rise with respect to peoples' rights, status and obligations as this case shows. The truth is that the defining event in practice will be, and can only be, a decision of this Court ruling that the evolutionary process is complete, and here, as the petitioners and the Commonwealth accept, has been complete for some unascertained and unascertainable time in the past. In reality, a decision of this Court upon that basis would change the law by holding that, notwithstanding that the Constitution did not treat the United Kingdom as a foreign power at Federation and for some time thereafter it may and should do so now.

Had I been a justice of the Court I would have written a dissenting judgment along the lines of Callinan's comment. Mine, however, would not have been *mere observations* but a proper and ringing dissent on this point, asserting that any country having the same Sovereign as Australia could NOT be regarded as a foreign power. Consequently, not only the United Kingdom (of whose Parliament the Australian Constitution is an enactment and to whose Queen Australian federal members of parliament swear allegiance) but also New Zealand, Canada, Papua New Guinea, Solomon Islands, Jamaica, Barbados, Saint Kitts and Nevis and a couple of other Caribbean countries would find their citizens not requiring renunciation of that citizenship to be eligible to stand for the Australian Senate or House of Representatives. My judgment would, most certainly, have denied the notion that the divisibility of the Crown is implicit in the Constitution.

Given that I was aware of all these facts at the time, why did I not write a newspaper article on this decision? Since I thought the Court's decision on Hill was most unfair to her, surely it was my duty to express such an opinion loudly and publicly! Instead, because there was no actual need for me to do so, I allowed my hostility to Pauline Hanson to get the better of my normal decency and sense of fairness. I knew of the motivation for the case: its purpose was to damage Hanson and her party, in which it succeeded. The recount did give the seat to her party – but only in the form of a thoroughly ineffective man whose name has been forgotten. He served the full six-year term to which Hill was elected. My failure in this regard was a major sin of omission which I humbly confess to my readers. I am ashamed of myself that a combination of laziness and personal hostility caused me to fail in my duty as a public commentator.

In the 12th paragraph of this chapter (above) I record my interest in the *Citizenship* cases for which the decision was handed down late in October 2017. There was a sequel. Handed down on the morning of Wednesday 9 May 2018 was the Court's judgment in the *Gallagher* case. Consequent upon that judgment Senator Katy Gallagher (Labor, ACT) became the 11th senator in the 45th

Parliament to see her seat confiscated by the power of the Court. Later that day four members of the House of Representatives resigned their seats and by-elections were held on Saturday 28 July in the Divisions of Braddon (Tasmania), Fremantle (WA), Longman (Queensland) and Mayo (SA) in which the incumbents stood again. For a totally different reason there was also a by-election in Perth (WA).

Never before had five federal by-elections been held on the same day. Journalists immediately dubbed the event as "Super Saturday". During the eleven-week campaign I loudly and consistently predicted that "all four sitting members will be re-elected." I knew, of course, that I was technically wrong. They were like Cleary, Kelly, Joyce and Alexander. Like them they were kicked out of their offices, both locally and at Parliament House. However, I wanted to show my sympathy for them so I described them wrongly as "sitting members". They resumed occupancy of their offices when re-elected.

I objected to the *Gallagher* decision in an article which is quoted in full in my concluding chapter of this book. However, I admit that the judgments in this unanimous decision of the full High Court were well-written, the best-written being that of Justice Edelman from which I quote below. The essence of the Court's reasoning was their rejection of Gallagher's assertion that she had taken all reasonable steps to renounce her British citizenship which she had acquired by descent. Consequently, the Court reasoned that, since she was actually a British citizen at the time of her nomination, she was not eligible to be a candidate. The key words of the joint judgment were that the Constitution should not be given a construction that "would unreasonably result in some Australian citizens being irremediably incapable of being elected" as a senator or member of the House of Representatives. Such was not the case with British citizenship law, the Court asserted. Referring to an earlier case Edelman noted on page 20 that:

> This Court gave a telling example of a law having this unreasonable practical effect. That example was a law requiring renunciation to be carried out in the territory of the foreign power, where the citizen's presence in that territory could involve risks to their person or property. The telling nature of this example lies in the unreasonableness required to engage the constitutional imperative.

While all of that is true it does not deal with the objections to the decision which were recorded frequently in the media in May 2018. Essentially the Court found that anyone with dubious citizenship entering politics must produce a document from another country's government before taking part in the election. The burden on candidates was still to be significant, even if there was an exemption of the kind Edelman noted. This would act as a considerable disincentive to political aspiration and help to lower the standards of federal politics.

In my earlier discussion of the *Citizenship* cases I went on to demonstrate the popular mind by the illustration of the remarkably good performance of Coalition candidates at the New England and Bennelong by-elections. I interpreted that as the people saying "up you" to the Court and its supporters. I wrote: "The voters of Bennelong and New England blamed the Court for creating such totally and hopelessly un-necessary by-elections". What, therefore, am I to say about the by-elections created by the *Gallagher* case?

The two-candidate preferred vote percentage was 73.3 per cent for Labor in Fremantle against the candidate for the Liberal Democrats who secured 26.7 per cent. In 2016 there was a Liberal Party candidate who secured 42.5 per cent. So, the swing to Labor in Fremantle was 15.8 per cent. In

Longman Labor's by-election share was 54.5 per cent against the Liberal National Party candidate, a swing to Labor of 3.7 per cent. In Braddon it was 52.3 per cent against the Liberal candidate, a swing to Labor of only 0.1 per cent. In Mayo it was 57.5 per cent for the Centre Alliance candidate, a swing in her favour of 2.6 per cent.

My comments about these results were published on Tuesday, July 31. The editor of the *Switzer* website chose to give this title to my article: "Why the Saturday by-elections were entirely predictable". Here is the article in full:

> The Super Saturday of five federal by-elections produced results which were wholly predictable. During the eleven-week campaign I would often be asked for my predictions and I would always loudly reply that "all four sitting members will be re-elected." Of course, technically Susan Lamb was not the sitting member for Longman. Nor were the others in Braddon, Mayo and Fremantle. During a general election they would be called "sitting members" and keep their offices (both local and at Parliament House) until defeated. These members were, by contrast, kicked out of their offices which excited my sympathy for them, just as I was sympathetic to Phil Cleary in 1993, Jackie Kelly in 1996 and Barnaby Joyce and John Alexander late last year. As a matter of democratic principle I would have voted for all eight members of the House of Representatives and am glad all were easily re-elected, once in Cleary's case and four times in Kelly's case.
>
> Equivalent senators were not so lucky. I have compiled a list of eleven senators who were kicked out of their offices with dim chances of ever getting back into them. A further two (Heather Hill, One Nation, Queensland, in 1999, and Hollie Hughes, Liberal, New South Wales, in 2017) were never allowed even to serve a single day of the term to which they had been elected.
>
> A benefit conferred upon us by these eight registrations of the will of the people is that the apologists for the High Court may tone down the decibels of their propaganda. In any event I am entitled to assert that the people have spoken. They have agreed with me that the entire blame for the citizenship fiasco should be placed at the door of the grandiose and ugly High Court building by Lake Burley Griffin in Canberra.
>
> In my article posted on Thursday May 31, titled "Who will win the Super Saturday by-elections?" I wrote this" "My prediction is that Patrick Gorman (Labor) will win Perth and the other four will follow the pattern of New England and Bennelong in that the sitting member will be re-elected." I then gave the Liberal Party a 30 per cent chance in Braddon and a 20 per cent chance in Longman. That was followed by this paragraph: "Readers may be surprised that I should rate Braddon a better chance for the Liberal candidate than Longman. My explanation is simple: on the most recent state election vote Braddon is solid for the Liberal Party while Longman is solid for Labor."
>
> On Saturday night Lamb displayed a broader smile than Justine Keay – and well she might. Her party has given her a much better seat than was given to Keay. However, I think Keay deserves more hearty congratulations than Lamb who merely repeated the state vote federally. By contrast Keay raised the state vote substantially in a genuine rural seat. She is now one of the very few Labor members to hold a rural seat!
>
> Super Saturday forcefully demonstrated Labor's superior political skills. They are brilliant at expectation management. Anyone who knows anything about these seats knows that the

seat now named “Fisher” is the seat Mal Brough of the Liberal Party once held as “Longman”. That is why Brough won Longman in 1996, 1998, 2001 and 2004 but, after his defeat in 2007 in Longman (by then a much-weakened Liberal seat, due to successive boundary changes), returned as the member for Fisher in 2013. He won the same seat five times but with a different name. The seat now known as “Longman” is a natural Labor seat created, in effect, at the redistribution of Queensland federal electoral divisions in 2006.

Nevertheless, Labor spokespeople were able to persuade ignorant commentators that they were terrified of losing Longman but were quietly hopeful of winning Braddon. They knew all along that Braddon was the more likely loss.

Looking back over my articles I notice that one was posted on Thursday January 25 titled “Who’s to blame for the citizenship scandal?” It contained this paragraph: “My strong advice to the federal Coalition is not to pursue by-elections in the Labor-held seats they presently contemplate asking the High Court to cause, Braddon (Tasmania), Fremantle (Western Australia) and Longman (Queensland). If by-elections were to occur it would do the Liberal Party no good whatsoever for the same reason that by-elections in New England and Bennelong did Labor no good whatsoever.”

Before concluding my comments on by-elections caused by the High Court, I should note local polling and the betting odds. For three weeks prior to all of Bennelong, Braddon and Longman local polling consistently had all three seats on a knife edge. That caused news readers and commentators generally to say “too close to call” in all three cases - when they were not proclaiming all three to be going “down to the wire”! However, Newspoll had Labor ahead in both Braddon and Longman 51-49 on polling day itself. Thus, on Saturday July 28 the headline on the front page of *The Weekend Australian* told readers: “Labor holds narrow lead in key seats.” The betting odds narrowly favoured incumbents John Alexander and Justine Keay. Longman provided the contrast. Liberal National Party candidate Trevor Ruthenberg was narrowly favoured to defeat Susan Lamb. It is not surprising that her smile was the broadest on election night!

Pundit predictions are almost always driven by opinion polls or betting odds. It is not surprising, therefore, that most pundits expected Labor to lose one of the Super Saturday seats but not both. One pundit – always noted for caution in his predictions - thought it was like tossing two coins. There is a 50 per cent probability of one head and one tail but only a 25 per cent probability of two heads or two tails. He thought the most likely result was one Labor loss. After the result was known he wrote: “I was not alone in suggesting that the most probable result was that Labor would lose one seat, probably Longman in Queensland rather than Braddon in Tasmania. Both parties predicted the result would be very close and probably would not be known for days. Some government spokespeople exuded confidence, giving the impression they thought they would win at least one seat, while some Labor people were worried.” (The reference for this is John Warhurst in *The Canberra Times* for Thursday 2 August, pages 16 and 17. The title of the article was “The government has only itself to blame for Super Saturday: raising the stakes, then failing to deliver”)

As seen above all my predictions turned out to be correct. However, I admit to having been driven by wishful thinking – or rather I was driven by a conviction that a majority of voters in any Australian electorate would never be so lacking in self-respect as to allow a highly-paid bunch of Pharisees in Canberra to confiscate the seat of a member they had properly elected. They could not stop that confiscation – so bad luck for senators. For members of the House of Representatives, by contrast,

they could express their disapproval by re-electing that member. In all eight cases of this happening the member was easily re-elected.

I return to this subject later in the book. It illustrates one of my two objections to the High Court. It engages in judicial law-making of which these are the classic cases, as Callinan clearly recognised. My other objection is to the way the Court has so frequently allowed the Commonwealth Parliament to do things it should have been prevented from doing. Judicial law-making created a circumstance causing objectionable judgments of the Court under Chief Justice Susan Kiefel (those dated 27 October 2017 - popularly known as *Citizenship* – and that dated 9 May 2018 and known as *Gallagher*) the case with which I now deal caused an even more objectionable judgment of the Court under Chief Justice Robert French.

The judgment was handed down on Friday 13 May 2016 and is best described by the name of the challengers, Senator Bob Day (South Australia, Family First) and Mr Peter Madden, the lead Family First candidate in Tasmania in both 2013 and 2016. The only difference between the personnel of the two Courts was the Chief Justice difference, save only this: the retirement of French did not merely create the opportunity for Kiefel to be promoted within the Court. It also created the opportunity for Western Australian James Joshua Edelman to be promoted from his state's Supreme Court to the High Court, thus retaining the state-by-state distribution created by the departure of French.

The technical description of the judgment is *Day v Australian Electoral Officer for the State of South Australia: Madden v Australian Electoral Officer for the State of Tasmania (2016) HCA 20: S77/2016 and S109/2016.* I call it here simply *Day and Madden*. The precedent was set by *McKenzie* in 1984 but the result to which I really objected was in respect of *Day and Madden* in 2016. My hostility to the judgment in *Day and Madden* is what has prompted me to write this book.

I had the conviction throughout that the Commonwealth Electoral Amendment Act 2016 is unconstitutional due to its violation of Section 7 of the Constitution. That conviction caused me to start campaigning in 2013 against what I expected, correctly, would be a decision by the machines of three big parties to cherry pick between the three contrivances of the system then in place. I tried to persuade each of the non-Xenophon cross-bench senators to take it to the High Court in a challenge to be launched just as soon as it received the royal assent.

My greatest achievement in this whole campaign lay in persuading the Labor Party to oppose a measure which many people assumed it would support. Anyway, the legislation passed through both houses of Parliament on the afternoon of Friday 18 March 2016 and received royal assent later that day. Before I give more details, I should note that the debate in the Senate was very acrimonious between Labor and the Greens. It began at 1.30 pm on Thursday 17 March and continued until 1.30 pm the following day, a total of 24 hours of continuous sitting. The bill was carried by 36 votes to 23 with the Coalition, the Greens and Senator Nick Xenophon voting in favour and Labor and the other cross-bench senators voting against. Shortly after the Senate vote, the bill, as amended by the Senate, was passed by the House of Representatives with 81 members voting in its favour and 31 against. I was disappointed that the number opposing was as low as 31. It indicated that a number of Labor members privately wanted the bill to pass so they abstained – but not in a conspicuous way.

On Wednesday 23 March Senator Day launched his challenge to the legislation in the High Court and I gave our lawyers the final draft of my first affidavit supporting the challenge. Meanwhile Elizabeth Jackson of the ABC rang me at my university office on the afternoon of Friday 18 March. She had

heard I was predicting a High Court challenge by an un-named senator. She told me the interview would be played on the AM programme the following morning, Saturday 19 March. Here it is:

> Jackson: Veteran psephologist and visiting fellow at the Australian Catholic University, Malcolm Mackerras, says he won't rest until the new Senate voting legislation is struck down. Mr Mackerras has confirmed that details of a High Court challenge to the legislation will be made public next week. He says the Senate reforms are unconstitutional because, he says, they'll result in voters preferencing parties rather than individual candidates.
>
> Mackerras: This legislation that was passed yesterday is clearly unconstitutional. I describe it as breathtaking in its contempt for the Australian Constitution. And I think the only thing we can say is that I am confident in predicting that there will be a High court challenge, which will be launched quite quickly. And I will do everything I can to help that challenge so the High Court can strike this thing down as being unconstitutional, which I believe it to be.
>
> Jackson: Why do you say it's unconstitutional?
>
> Mackerras: Section 7 of the Constitution says: "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting as one electorate." Section 24 says: "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth." The words "directly chosen by the people" appearing in Section 7 and Section 24, in my opinion, command that the electoral systems must be candidate-based. Now what this thing does is to introduce a party list system. What I cannot stomach is the idea of the Liberal Party suddenly deciding to abandon the democratic values of the Australian Constitution and suddenly deciding to embrace Greens' principles, purely because it will help them to engineer the double dissolution they want and to get rid of the crossbench senators whom they dislike.
>
> Jackson: Who do you think will instigate the legal action?
>
> Mackerras: I am confident that a senator will do that.
>
> Jackson: Which senator?
>
> Mackerras: I am not willing to say. I am also confident in saying – well, I can tell you this much: I have just written an affidavit on my own behalf, which our barrister is considering. I am surprised at the amount of money we seem to be collecting for this, because we are going to be a better financed organisation than I had expected.
>
> Jackson: How are you raising that money?
>
> Mackerras: I can't tell you that because I can't tell you the person who is raising the money.
>
> Jackson: When are you expecting your legal challenge to become official?
>
> Mackerras: Some time next week. I am hopeful – and almost confident – that next week we will learn that there is a High Court challenge. It's a serious challenge. A very good barrister is involved; and I am willing to say whatever is needed to say to defeat this abomination.
>
> Jackson: Malcolm Mackerras

The next development occurred on Tuesday 22 March when I met Peter Madden who would become the Chief Executive Officer of "Three Million Voices", an organisation set up to help the High Court case. Madden had been the lead Family First Senate candidate in Tasmania in September 2013, and he invited me to be the Chairman of "Three Million Voices", an invitation accepted with alacrity. He introduced me to the webmaster of the outfit, Kevin Sargeant from Sylvania, a southern Sydney suburb. Kevin was quick to set up a blog to which I contributed the first article. Published on Thursday 24 March 2016 it was titled "A Pragmatism that Panders to the Powerful". That article has now been expanded into this book, published five years later!

I mention in passing that the name of Tasmanian Peter Madden of Family First appeared on pages 12 and 13 of the *Introduction* to this book. He came close to being elected a senator twice – in September 2013 and again in July 2016 – but I think it is now clear that he will never be a senator. The system has been changed and half-Senate elections have reverted to being normal again. Nevertheless, I remember him favourably as being the Madden in the case *Day and Madden*.

There was a directions hearing soon thereafter which did not last very long. My main memory of it was the impression given to me by Chief Justice Robert French to the effect that my affidavit would be discarded. He described it as "argumentative" as though that were a major fault! Our lawyers assured me that my impression was wrong. My affidavit would, they averred, be considered by the Court. For me the value of the day was in my meeting a variety of lawyers from Adelaide, Canberra and Sydney which included a black African woman by the name of Lucy Gichuhi who later became Senator Gichuhi, the first black African woman to serve in any Australian parliament. She succeeded Bob Day in April 2017, consequent upon him being disqualified by the High Court from being a candidate at the July 2016 Senate general election. His was the second case of the High Court confiscating a senator's seat during the 45th Parliament, the first being Rodney Culleton.

In the recount of votes on Thursday 13 April 2017 Labor's former senator, Anne McEwen, failed to win back the seat which had been hers until her 2016 defeat. The interesting feature of the recount, however, is that McEwen failed more badly against Gichuhi than she had failed against Day. In other words, there were some votes cast below the line which favoured Gichuhi but had not helped Day.

At my request I met Gichuhi in her Canberra Parliament House office for a proper conversation in August 2017 and I can record that she is a delightful woman with whom to have a conversation. She is a lovely lady who looks twenty years younger than her actual age. As I always do with new politicians I explained why I wanted to have a proper conversation but the interesting feature of it was that she asked me this question: "I am now an independent, Family First having folded up. How would you react if I were to join the Liberal Party?" I told her that I would not object. Being an independent she had every reason to think she had a moral and legal right to join any party. I told her that such an addition to the Liberal Party's numbers would be a real coup for that party, but it would also serve her own ambitions well. She then thanked me for the conversation and we talked about the land of her birth, Kenya.

On the afternoon of Friday 2 February 2018 there was a joint announcement from Malcolm Turnbull and Gichuhi that she had that day joined the Liberal Party. Photos were taken of the pair smiling at each other. She issued this statement:

> I have studied parliament, the parties and the crossbench in the nine months since entering the Senate. I have witnessed the contributions, strengths and weaknesses of each and every political entity. The process has led me to the conclusion that the Liberal Party is

> the closest in its core foundational values and principles to those that I aspire to in my own life. I have aligned my passions, my beliefs, and my understanding, voting according to my independent convictions and beliefs, as to what is best for the state of South Australia and the nation as a whole. I believe in the party system, private enterprise, reward for effort, individual dignity and freedom, and co-operation and mutual respect between government and citizens. Independence can be very good, but in my view interdependence is much better and I have chosen to join the Liberal Party team.

The Liberal Party had won four Senate seats in South Australia in July 2016 and Gichuhi's decision restored that number. The point is that the original four were Simon Birmingham, Cory Bernardi Anne Ruston and David Fawcett but Bernardi had (post-election) defected from the party which had given him his Senate seat. Nevertheless, if Gichuhi ever imagined that her joining the Liberal Party was a coup for her new party she was to be bitterly disappointed. She told me of her hope (which was an actual expectation) that she would be third on the Liberal ticket in 2019, third to Anne Ruston (first) and David Fawcett (second). However, the party's South Australian council of three hundred delegates met on Saturday 30 June 2018 and decided that the winnable third position should be filled by Alex Antic, a male Adelaide city councilor. Gichuhi was dumped to the unwinnable fourth position and duly defeated at the May 2019 half-Senate election. Her term expired on Sunday 30 June 2019.

Returning to Bob Day and the Liberal Party's legislation designed to rig him out of his seat, the full bench hearing began on Monday 2 May 2016 at 2.15pm, case Number S77 of 2016 between Plaintiff Robert John Day and two defendants from the federal government. They were the Australian Electoral Officer for the State of South Australia (First Defendant) and the Commonwealth of Australia (Second Defendant). Peter Madden joined the case, so the correct description is *Day v Australian Electoral Officer for the State of South Australia: Madden v Australian Electoral Officer for the State of Tasmania (2016) HCA 20: S77/2016 and S109/2016*. The full bench hearings lasted two days and I have decided to call this case *Day and Madden* for short.

Meanwhile media speculation was rampant that Malcolm Turnbull would visit Government House on the afternoon of Sunday 8 May to request a double dissolution for the following morning, Monday 9 May. The High Court could have struck down the legislation and announced its decision on the morning of Friday 6 May. That would have stopped Turnbull in his tracks. There would then have been a House of Representatives plus half-Senate election in November 2016 which is what I wanted. That would have pleased Day - as I explained to him at some length in our conversations. Furthermore, three other potential clients of mine, Ricky Muir (Victoria), Glenn Lazarus (Queensland) and Dio Wang (Western Australia) would then have been able to serve the full six years to which they were elected, from 1 July 2014 to 30 June 2020. Instead Muir, Lazarus and Wang were all defeated. The Liberal Party was delighted at that part of the election result, save only this: while the Liberals wanted Muir and Lazarus defeated, they never wanted to see that happen to Wang who joined the Liberal Party soon after his Palmer United Party collapsed.

The decision of the full High Court was handed down on Friday 13 May. My objection to that judgment is much the same as my objection to the judgment of the Kiefel Court in the *Citizenship* cases a year-and-a-half later in 2017 and the *Gallagher* case in 2018, two years later. In short, my objection to these three recent judgments is that the Court pays far too much attention to the precedents set by earlier High Court judgments and far too little attention to the intentions of the men who wrote the words being interpreted. Thus, the immediate effect of the June 1999 judgment

Sue v Hill was grossly unfair to Heather Hill who was not allowed to serve even one day of the six-year term to which she had been elected. I return to that case in the concluding chapter of this book.

In respect of *Day and Madden* my objection is quite emphatic. I reject that judgment. All it does in its 30 pages is quote the precedent of *McKenzie* plus a few other precedents giving support to its unanimous decision. All the cases quoted as precedents were determined by a single judge. In my *Introduction* I named the full-court judges and I name them again in this chapter. They were Chief Justice Robert French and justices Susan Kiefel, Virginia Bell, Stephen Gageler, Patrick Keane, Geoffrey Nettle and Michelle Gordon. What they did was read down the words "directly chosen by the people" to mean little more than that the people get a vote of some sort. The politicians may rig the system as much as they like to ensure that it is NOT candidate-based and the High Court would not care. Yet if the system is not candidate-based then the politicians who win their seats have not been directly chosen by the people. They have been appointed by party machines.

To those who say I am being unfair to the Court I say this: in practice the Senate voting method is a party machine appointment system that technically has a direct election option, but one that most parties actively, and with great success, discourage voters from using. The Court has ignored the system's blatant sidelining of the direct election imperative of Section 7 of the Constitution and ruled, on the basis that the unnecessarily onerous below-the-line option still exists (since 2016 with its deceitful instructions to the voter) that the system does not breach the Constitution. To those who say the new system is an improvement on the old I say: the slight improvement of the below-the-line option merely tells me that the politicians who designed it were very cunning in their design. In any event, as I demonstrated in my chapter *Extreme Vetting* the conclusion to which the public came was that Australians thought the changes to the voting system made Senate voting *more difficult* overall – hence the increase in the rate of informal voting for the Senate.

If the May 2016 judgment is not worth reading the *precedent most certainly IS worth reading*. That is why its full text is appended to this chapter. Its circumstances are hereby explained in terms of the wishes of the Hawke Labor government when it swept to power in March 1983 and the attitude of the Liberal Party to being swept out of power. Bear in mind that the Liberal Party had been in power for 30 of the previous 33 years, the exception being the three years of the Whitlam government from December 1972 to November 1975.

In matters of electoral reform, the Hawke government wanted three things. It wanted to increase the size of the House of Representatives from 125 members to 148. It wanted to reduce substantially the Senate informal vote and it wanted to introduce public funding of election campaigns. The Liberal Party wanted none of those things, so Labor had to get support from elsewhere. In the end it was able to combine its own Senate votes with those of the National Country Party to increase the size of the whole Commonwealth Parliament and with those of the Australian Democrats to get reform of the Senate voting system and public funding of political parties.

I made no secret at the time of my sympathy for Labor's position on all three subjects. In the end I found myself strongly advocating (without qualification) for Labor's achievement on the size of Parliament question and on public funding. On their Senate reform I supported their new system while expressing the strongest possible regret that it needed to be done in such a way. For that I blamed the Liberal Party for its bloody-minded approach which essentially amounted to the view that only governments dominated by the Liberal Party should be allowed to enact reforms to the electoral system. They did not shout such a view from the roof-tops. They took the alternative road

of concocting useful “democratic principles”, the most objectionable of which was the “principle” that a vote be considered informal unless EVERY square were numbered in correct sequence. In that regard the National Country Party supported the Liberal Party and took Liberal Party insults on other questions in their stride.

At the time I thought Labor’s new system was unconstitutional, but I was not in the business of promoting such a view. Nor was anybody else of consequence. However, when the 1984 election came along a certain Cyril John McKenzie, an ungrouped independent candidate for a Queensland Senate seat, took it to the High Court. He was willing to put his money where his mouth lay, and the result is the First Appendix to this chapter which I suggest readers study in detail. McKenzie conducted the High Court case himself in which he did an excellent job - but he did not get the verdict he wanted.

My view at the time was, and ever since has continued to be, that sympathy for Chief Justice Sir Harry Gibbs was/is in order. His judgment was ridiculous, but he was placed in an impossible position. He thought that the Senate election due the next Saturday should not be stopped over such an issue. On the other hand, he knew perfectly well that the new system was not one in which senators would be directly chosen by the people. Consequently, this absurd finding was concocted by him: ”. . .it is right to say that the electors voting at a Senate election must vote for the individual candidates whom they wish to choose as senators but it is not right to say that the Constitution forbids the use of a system which enables the elector to vote for individual candidates by reference to a group or ticket. . .”

In private conversation I describe the *McKenzie* judgment as “bullshit legalese”. Its effect was greatest in the way it gave power to the machines of big political parties. However, it was taken to the Court by an independent candidate who was ungrouped. He would have been more interested in the opinion on that situation rather than its effect on the power of party machines. Towards the very end of the judgment Gibbs expressed his view by writing: “In my opinion, it cannot be said that any disadvantage caused by the sections of the Act now in question to candidates who are not members of parties or groups so offends democratic principles as to render the sections beyond the power of the Parliament to enact”. That decisive, but telling, sentence in his ruling makes it clear that the High Court Chief Justice accepted that the Group Voting Ticket provision was consistent with section 7 of the Constitution, although it nevertheless remains of concern that his use of the term “. . .so offends. . .” might well disclose, and record, his having recognised *some* degree of offence to democratic principles.

My view on that is clear. McKenzie was an ungrouped candidate who received 86 votes. He told Gibbs of his view that the system mightily offended his democratic principles when a first preference vote for Senator Margaret Reynolds, Senator David McGibbon or Senator Ron Boswell could be recorded by placing a single 1 above the line in the square for the Labor, Liberal or National parties but to vote for McKenzie required the voter to number all squares consecutively from 1 to 28. Needless to say, all of Reynolds, McGibbon and Boswell were re-elected with a quota in her/his right. I agree with McKenzie. That unfairness *does so offend democratic principles* as to render the sections beyond the power of the Parliament to enact. Bear in mind that the Constitution requires the system to be candidate-based – as Gibbs recognised. In that circumstance this gross unfairness between candidates is extremely offensive to my democratic principles. In short, the *McKenzie* case was wrongly decided and should never have been accepted as a precedent.

Anyway, the election on the first Saturday of December 1984 went ahead, the new system proved to be remarkably successful and kept on operating with very little complaint all the way up to the last such election in April 2014, the details of which are given in my Chapter Three *Describing the Single Transferable Vote.* Australia was very well governed during that period and I kept the promise I made to myself in 1983 to defend that system at all times until a better system could be offered as an alternative. That better system is what I now propose in this book – it being the system that I first proposed as my reform as long ago as 1959.

For the practical reasons outlined above it remains my view that Sir Harry Gibbs should be defended over that judgment, notwithstanding its absurdity. What cannot, in my opinion, be defended is the fact that the French Court would take it as a precedent. That they did so perfectly illustrates my objection to the Australian High Court and its procedures. They chose that judgment in November 1984 rather than the clear intentions of the Founding Fathers when they wrote the key words "directly chosen by the people" in April 1897. That is why the French-Kiefel-Bell-Gageler-Keane-Nettle-Gordon judgment of May 2016 was so wrong.

There is an interesting personal story to add to that which I wrote in the paragraph above. In an earlier draft of this chapter I used "1900" which I then changed to "April 1897". In the late spring of 2017 my wife Lindsay bought for me a very generous Christmas present but at the last moment added a second present which she bought at an antiquarian book shop. This book is by David Eastman and titled *The Founding Documents of the Commonwealth of Australia*. It was published privately in 1995. He gave his address as 20 Jerilderie Court, Reid, an inner suburb of Canberra. The collection of the documents was done by Eastman as a prisoner, he having been convicted of the assassination of the local police commissioner, Colin Winchester, in 1989. (His conviction was later over-turned). It has on the last page the note: "Cheques should be made to David Eastman at $50 per copy, plus $5 per copy for packaging and postage." Anyway, the draft Constitution approved at Adelaide in April 1897 has a Section 9 which reads: The Senate shall be composed of six senators for each State, and each senator shall have one vote. The senators shall be directly chosen by the people of the state as one electorate. . ."

Early in this chapter I mentioned my joining the Samuel Griffith Society in 1996. One of the benefits of membership of that society is that one can get to have breakfast with some pretty distinguished lawyers. It just happened that in July 1999 the President of the Samuel Griffith Society was none other than Sir Harry Gibbs. I asked him if he would have breakfast with me at our common Melbourne hotel and, to my delight, he agreed. Over breakfast I asked him about this case. He told me that I was the first person to raise it with him. I told him of my view about his judgment and he readily agreed with me. He hated the fact of his need to give approval to the new system and we agreed that it was a tragedy for Australian democracy that such a need should ever have arisen. Where we disagreed was on this question: who was to blame? He blamed the Labor Party and I blamed the Liberal Party. However, I have no doubt that if he were alive today he would hate the present Senate voting system every bit as much as Labor's then system.

In my Chapter Seven, *Extreme Vetting,* there is clearly stated a principle of the JSCEM that private conversations cannot be published on their website without the permission of the other party. Such a stricture does not apply to a book like this. However, I do admit that there is a difference between Tony Abbott and Sir Harry Gibbs in this matter. If Abbott objects, he can denounce me. Being deceased Sir Harry cannot do that. However, I ask readers to take me at my word. It is in the public interest that my conversation with Gibbs be published.

In any event I admire the judicial career of Sir Harry Gibbs even if I do not include him among my list of the three greatest chief justices. He is admired too by the Samuel Griffith Society as illustrated by the fact that there is an annual Sir Harry Gibbs Memorial Oration. Permit me, therefore, to quote from Nicholas Cowdery in his Sixth Sir Harry Gibbs Memorial Oration delivered at Canberra on Friday 28 August 2015:

> It is customary when delivering a memorial oration to mention the person in whose memory it is given and I shall do so only briefly, because Sir Harry was the founder of The Samuel Griffith Society in 1992 and is well known to you all. Some of you, like me, are old enough to have appeared before him on the Bench or to have been associated with him in other ways.
>
> The Right Honourable Sir Harry Talbot Gibbs, GCMG, AC, KBE, QC was Chief Justice of the High Court of Australia between 1981 and 1987. He had a most distinguished career in the law as Justice of the High Court from 1970, on the Federal Court of Bankruptcy and on the Supreme Court of the ACT, on the Supreme Court of Queensland and as a Barrister practicing in Queensland after the Second World War. In retirement from the Bench he remained active, contributing to Australian society in many significant ways. I note, however, that the two most significant events in his long life occurred in Sydney, NSW – his birth in 1917 and his death in 2005. So, I am pleased to claim Sir Harry also from my State.

In my conversation with Sir Harry my sense of politeness caused me to refrain to say to him something else, a view which I now ask readers to consider. His statement in *McKenzie* that "No such indication, relevant to the present case, appears in the Constitution" is a falsification of history as I explain in my next paragraph. The indication which he asserted to be lacking was the very presence of the words "directly chosen by the people" appearing in both Section 7 and Section 24 of the Australian Constitution.

The words in question go back to northern summer of 1787 at Philadelphia, Pennsylvania. In that city in that year, meeting from May to September, the Founding Fathers of the USA drew up their Constitution. There were a few democrats among them but not many. Consequently, they decided that the Presidency, the Senate and the Supreme Court should *not* be democratic institutions. Where the democrats won was in respect of the House of Representatives. Thus, in the very first article there is a Section 2 which commands: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Australia's Founding Fathers were much better democrats than America's and they had the advantage of more than a century elapsing between their American equivalents and their good selves. Having noticed the anti-democratic tricks to which politicians get up they were determined to prevent our Commonwealth Parliament from implementing such tricks. Determined to ensure that Australian federal electoral systems always be CANDIDATE-BASED they caused the Australian words to be "DIRECTLY chosen by the people" where the American words were merely "chosen by the people."

Some people object when I say that the present Senate voting method is the worst of the six systems which have operated since 1901. My answer is to insist that it *surely is the worst.* The first four clearly complied with the Constitution because they were candidate-based. The two most recent, by contrast, clearly flout the requirement that senators be directly chosen by the people. Why, therefore, was the Labor-owned 1984-2014 system defensible while the Liberal-owned

present system is not? The answer is that there was a worthy motive for Labor's system. It was designed to make voting much easier and thus greatly reduce the informal vote. By contrast there was no worthy motive for the present system. It was driven by the greed of the four parties which collaborated in its concoction. I should, however, add a footnote to that view. Within the genus greed there is a species known as revenge. The Liberal Party was motivated by greed - like the other three parties who helped design this thing. However, the Liberal Party was also motivated by its desire to get its revenge on Ricky Muir who, in its view, had stolen a Senate seat from one of theirs, Senator Helen Kroger. In getting that revenge they also cost a number of their own senators their seats as well as that of Dio Wang to whom I made specific reference above. In the short term the Liberal Party was hoist on its own petard to a remarkable degree. However, in the 46th Parliament (consisting of senators elected in May 2019 plus those given long terms from the 2016 election) the Liberal Party was seen to have benefited greatly from its 2016 reforms.

The thing that *really* gets my goat about this system is the way it democratises and justifies the idea of deceitful instructions to voters. In some circumstances misleading instructions can be defended – more or less. For example, the ACT Hare-Clark system has misleading instructions on ballot papers. That is different. That is *the consequence of a genuine wish to save votes from being informal*. For the Senate, by contrast, the "savings" provisions were justified purely to save the collaborating parties (and their media cheer squad) from political embarrassment. There is absolutely no justification whatsoever for *any* "savings" provisions in federal law.

While it gave me enormous pleasure to see this appalling so-called "reform" so spectacularly backfire (at least in the short term) against its principal owner and designer, the fact still remains that the system is in place. Furthermore, there are still so-called "respected independent analysts" who defend it because they own it. I call them stasiocrats. How do I go about destroying the system? An important beginning must be with the High Court. That is why I have given so much thought to this chapter. Destroying the reputation of the big party machines is easy enough – but they still run the show, so their power remains intact. Damaging the reputation of the stasiocrats must be an important part of my crusade. My actual hope, however, is that they would come on board the band-wagon I hope to get rolling.

Back on page 215 I made reference to Gerard Henderson who I described as "one of the more sensible long-term commentators on the High Court" for a newspaper article of his published late in 1992. Soon after the *Citizenship* decision late in October 2017 he again justified that description. The article was published on page 22 of the *Inquirer* section of *The Weekend Australian* for 11 and 12 November and was titled "The High Court is brutally literalist, except when it's not". That article is worth publishing here in full and here it is:

> Every now and then the High Court overturns a past decision, most notably in the 1920 *Engineers* case where the Court rejected some decisions concerning constitutional interpretation made during the previous decade or so. It's possible, just possible, that future justices may reverse the Court's decision – sitting as the Court of Disputed Returns – in the recent *Citizenship* case. But this would be many years away in view of the seven-to-zip decision concerning the right of senators Matt Canavan, Scott Ludlam, Larissa Waters, Malcolm Roberts, Fiona Nash and Nick Xenophon along with New England member Barnaby Joyce to sit in the federal parliament. All except Canavan and Xenophon were ruled ineligible. In these two cases the Court had difficulty in establishing the senators' precise citizenship status.

Attorney-General George Brandis has described the decision as “brutalist” with respect to its strict interpretation of Section 44 of the Constitution. Others have referred to the decision of Chief Justice Susan Kiefel and her colleagues by the term “black-letter law.” The *Citizenship* case is certainly an example of black-letter law. Sure, the Court followed the majority 1992 case of *Sykes v Cleary* – in which Sir William Deane dissented. In the recent case, the Court specifically distanced itself from Deane’s judgment.

In doing so justices Kiefel, Virginia Bell, Stephen Gageler, Patrick Keane, Geoffrey Nettle, Michelle Gordon and James Edelman stated that “the approach to construction urged by the amicus (friend of the Court) and on behalf of Mr (Tony) Windsor gives Section 44 (i) its contextual meaning” subject to one qualification. The qualification referred to turns on the “constitutional imperative. . .that an Australian citizen not be prevented by foreign law from participation in representative government where it can be demonstrated that the person has taken all steps that are reasonably required by foreign law to renounce his or her citizenship.”

Otherwise, the Court was into the darkest of black-letter law in this case. For example, early in the judgment, the following statement is made: “There is evident force in the submission of the amicus that Section 44 (i) consists of only two limbs: the verb ‘is’ is used in Section 44 (i) only twice, and there is a comma followed by the disjunctive ‘or’ at the end of the first limb but not within the second limb.” Now, when the judges talk about the placement of a comma and the number of occasions a verb is used in a section that came into effect in 1901, that’s black-letter law. Yet it would be inaccurate to maintain that Kiefel presides over a Court packed to the brim with brutalist judges.

As the Court’s recent decision in *Robert James Brown v The State of Tasmania* demonstrates all is not brutalist black letter in the Kiefel Court’s judgments. In Brown’s case, six out of seven judges – Edelman dissenting – struck down some sections of the *Tasmanian Workplaces (Protection from Protesters) Act* because they “impermissibly burden” the “implied freedom of political communication contrary to the Commonwealth Constitution.” Around two decades ago, I was present when a young Australian asked a High Court judge how to find an implied freedom by reading the Constitution. His honour’s response was along the following lines: “Well, you can’t: it’s not there is words.”

Brown v Tasmania is an important case covering the right to demonstrate. Bob Brown, the former Greens senator, was arrested and charged after protesting against logging. The charge was not proceeded with but Brown challenged the validity of certain provisions in the legislation. This is a complicated case and it remains to be seen how the Court’s decision will affect the right to protest. But we do know that Brown welcomed the decision as putting “a brake on corporations” since he believes it will facilitate the right of protesters to disrupt business activity to protect forests. In any event, the majority of the Court found an implied freedom of political communication in the Constitution. In his dissenting judgment, Edelman stated that “however high the value that one puts upon a freedom of political communication, the constitutional area of ‘immunity from legal control’ does not extend to persons whose conduct is independently unlawful.”

The six judges who in Brown’s case found an implied freedom of political communication in the Constitution rejected Deane’s judgment in *Sykes v Cleary*. Deane had held that Section 44 (i) of the Constitution should “be constructed as impliedly containing a. . .mental

> element with the result that it applies only to cases where the relevant status, rights or privileges have been sought, accepted or acquiesced in by the person concerned." In other words, Deane held the view that, due to an implied right, citizenship of a foreign country could not be acquired merely by descent. However, this is not the law of Australia as interpreted by the High Court.
>
> In view of the historical difficulty in attaining a majority of Australians in a majority of states to support amending the Constitution, there is no option but to adjust to the law as interpreted by the Court. This may lead to a situation where, unbeknown to a politician, a foreign nation changes its citizenship rules and makes an Australian a citizen by descent and hence unable to be a member or senator in the federal parliament. The citizenship case is yet another disruption in our midst. But it has not been brought about by a High Court that is committed to black-letter law in all its decisions.

That is sensible. The Australian High Court is a black-letter law court when it wants to be. It is as simple as that. However, I would go further and say that the High Court takes into account the intentions of the Founding Fathers when it wants to – but not otherwise. That means the Australian High Court is an inferior version of the US Supreme Court. Both are un-elected independent law-making and policy-making bodies which are laws unto themselves. The difference is that the Supreme Court upholds American democratic values, but our High Court does NOT uphold Australian democratic values. It has written out of Section 7 the words which are the imperative - "directly chosen by the people" - thus turning the Australian Senate into unrepresentative swill. I elaborate on that description in Chapter 16.

The reality is that the High Court has been fanatical in enforcing *the High Court's Constitution* while, at the same time, failing in its duty to uphold *the People's Constitution*. Only a negligent High Court would write out the words "directly chosen by the people" from any section of the Constitution. Consequently, I now engage in a compare/contrast exercise between the cases of *Citizenship* (from which I dissent) and the November 1984 *McKenzie* case and the May 2016 case *Day and Madden*. This book is a *ringing dissent* from those decisions. I record that I agree with Henderson's view on *Citizenship* that "there is no option but to adjust to the law as interpreted by the Court" but there is no way I would accept the Court's nullification of the words "directly chosen by the people" in Section 7.

In my assessment we have been observing the machines of big political parties wage war against the Constitution. In that struggle the judges have been on the side of the machines when they should uphold the Constitution. However, when I say that in private conversation I am told by Court supporters that it is not the duty of judges to *uphold* the Constitution, merely to *interpret* it. If so, all I can say is that the Court has made some pretty bad interpretations over the past hundred years.

In truth I think of High Court judges as being the modern-day Australian Pharisees. They were the religious establishment in Palestine some two thousand years ago. Readers will know of the critique given by Jesus Christ of those elite figures of his day. In the Gospel according to Saint Matthew, Chapter 23, Verse 24, he refers to the Pharisees as "blind guides" who "strain at a gnat, and swallow a camel". So taken am I with that phrase I decided to look up *The Pillar New Testament Commentary,* (year of publication 1992), the chapter by Leon Morris on *The Gospel According to Matthew.* I record that the publisher is William Eerdmans Publishing Company of Grand Rapids, Michigan. This is the paragraph on page 583 which I quote:

> Again these guides are castigated as blind; for all their zeal they cannot perceive the right ways of God. With a humorous illustration Jesus pictures them as straining out the gnat, the point being that this little organism was "unclean" and therefore should not be consumed. But these same people gulped down the camel, the largest of the beasts normally found in Palestine and, in addition, also ceremonially unclean . . .They were pernickety in complying with the regulations about the smallest matters but were capable of neglecting much more important matters, things like those Jesus had just mentioned. In their eagerness to avoid a tiny defilement the Pharisees are polluted by a huge one.

My use of the word Pharisees to describe our High Court judges has created considerable annoyance to some friends who have read this chapter. I can see why. So, let me make this quite clear. I do not describe our judges as "hypocrites", nor do I call them "whited sepulchers", nor do I say they are "full of hypocrisy and iniquity". What, then, do I say? Simple! I say they are establishment figures who have swallowed the camel of a Senate voting system while they have strained out of the Senate a heap of gnats for which I give all the details in my Second Appendix to this chapter. The number of gnats so far is 13 and the details are shown of their names, state or territory from which elected, party, name of successor and date of recount. The original elections in question were held on 11 July 1987, 3 October 1998 and 2 July 2016. The table is titled, with deliberate provocation, as "Gnats Strained out of Senate by High Court's Enforcement of High Court's Constitution".

There have been periods in the history of the Parliament of the Commonwealth of Australia when there was no Senate, it having been dissolved along with the House of Representatives. The second most recent period consumed the months of June, July and August of 1987. The most recent period ran from mid-May to mid-August 2016. During that period these modern-day Australian Pharisees digested the camel they had swallowed in the case of *Day and Madden*. They also, presumably, gave some thought to the gnats they would strain out of the Senate elected on 2 July 2016.

Anyway, at the dissolution of the 45th Parliament on 11 April 2019 the following gnats had been strained out of the Senate. They are listed in the order of the confiscation (or resignation in expectation of confiscation) of the seats of senators or Senate hopefuls under the High Court's interpretation of Section 44 of the Constitution. They are Rodney Culleton, Bob Day, Scott Ludlam, Larissa Waters, Fiona Nash, Malcolm Roberts, Hollie Hughes, Stephen Parry, Jacquie Lambie, Skye Kakoschke-Moore and Katy Gallagher.

That makes eleven senators during the 45th Parliament alone. However, covering the entire period of the High Court discussed in detail in this chapter the number is 13 since we must add to the list the names of Robert Wood and Heather Hill. During that same period the number of members of the House of Representatives in equivalent situations has been eight. Is that not strange: the branch of the legislature with *twice* the number of members (151 compared with 76) had *half* the *number of confiscations?* The explanation lies in history. The electors of Wills in March 1993, Lindsay in October 1996, New England and Bennelong in December 2016 and Braddon, Fremantle, Longman and Mayo in July 2018 reversed the decision of the High Court as an act of rebuke to the Court.

The exceptional case is the by-election for Batman (inner city Melbourne) on 17 March 2018. In that case the member resigned in expectation that his seat would be confiscated by the Court. David Feeney was the Labor member. His resignation was an act of placing discretion and party loyalty above all other considerations. He was in so much trouble locally he clearly expected to be defeated at the next election whenever it may be held. So, he resigned his seat to give another Labor candidate a decent chance to retain the seat at a by-election. In July 2016 Feeney's vote after

preferences was 45,977 (51.03 per cent) while Alex Bhathal of The Greens had 44,124 (48.97 per cent). At the by-election the new Labor candidate, Ged Kearney, polled 46,446 votes (54.38 per cent) while Bhathal had 38,958 votes (45.62 per cent). So, there was a swing to Labor of 3.35 per cent. At the May 2019 election Kearney won the new seat of Cooper (essentially the old Batman re-named) with a large majority.

In my *Introduction* and again in my chapter *Extreme Vetting* I quoted Antony Green in his blog of 22 June 2015:

> Some have proposed to abolish the division of the ballot paper and return to making voters express preferences for candidates. The problem that advocates of this approach must face is that 98 per cent of voters have chosen to vote above the line. It would be an enormous education task to return voters to voting for candidates.

I quote that (for the third time) in part to say that the High Court has imposed a regime of extreme vetting of candidates for federal parliamentary office. Those aspiring for such service will simply have to accept the law as legislated by the High Court. While Section 44 should be repealed we all know it is not going to be - so everyone must comply with this judge-made law. Let me now explain the other reason why I quote Green again.

In the matter of Senate elections, the High Court has constitutionalised the patently unconstitutional. It has (effectively) written the words “directly chosen by the people” out of Section 7 and there is little hope of those words being restored – except that they are still there! We must look for whom to blame. It is no use blaming the stasiocrats: they are as powerless as the Proportional Representation Society of Australia, Chris Curtis and yours truly. Except that all of us still have a smidgin of soft power. The people to blame, therefore, are those who have *real power* – the politicians and the judges.

The big problem is High Court idolatry. The politicians have almost no credibility - but the judges do have credibility with the general public. The judges have made clear their intention to allow the politicians to engage in any piece of trickery they want to avoid the idea that senators should be directly chosen by the people. That is an idea the politicians refuse to contemplate unless they are forced into doing so. The politicians can go on forever contriving, re-contriving and deceiving voters and the High Court will not lift a finger to stop them. It really is up to us who operate outside politics and the judiciary to answer this question: “Who will guard the guardians themselves?”

First Appendix to Chapter 11

McKENZIE v COMMONWEALTH OF AUSTRALIA and OTHERS - (1984) 57 ALR 747

HIGH COURT OF AUSTRALIA
Gibbs CJ

27 November 1984
-- Canberra

Constitutional law -- Commonwealth -- Parliament -- Senate -- Elections -- Ballot paper -- Allocation of elector's preferences according to group ticket -- Whether Senators "directly chosen by the people" -- Whether disadvantage to independent candidates contravened constitutional guarantee of democratic elections -- Commonwealth Constitution ss 7, 16 -- (CTH) Commonwealth Electoral Act 1918 ss 124, 146, 209, 210, 211, 213, 214, 272, 353, Schedule,

M was an independent candidate in the Senate election for the State of Queensland scheduled for 1 December 1984. The Commonwealth Electoral Act 1918 (Cth) (the Act) provided that the Senate ballot paper was to be divided in two by a horizontal black line. Below the line the names of the individual candidates appeared, grouped in separate columns according to their party affiliations; independent candidates were also grouped together in columns. A box appeared opposite the name of each candidate and the Act permitted as one method of voting the numbering of all these squares in order of preference. There were also boxes above the black line, one above each of the columns in which the names of candidates belonging to the same political group appeared, but there was no box above those columns in which the names of unaffiliated candidates appeared. As an alternative to the numbering of the individual squares below the line the Act permitted the voter to mark one of the boxes above the line and, if this was done, the voter's preferences were distributed in accordance with the voting ticket(s) lodged by the group selected.

M sought a declaration that the provisions of the Act authorizing this form of ballot paper were invalid and an injunction to restrain the distribution of Senate ballot papers in Queensland. He argued that the Constitution required electors to vote for individual candidates and not for parties as was permitted by the Act and also that the disadvantage caused to independent candidates by the opportunity to vote for parties offended the democratic principles implicit in the requirement that the Senators for a State be "directly chosen by the people of the State".

Held, dismissing the application: (i) While the Constitution requires electors at a Senate election to vote for individual candidates, it does not forbid the use of a system which enables electors to vote for individual candidates by reference to a group or ticket.

(ii) Any disadvantage caused by the voting system established by the Act to candidates who were not members of parties or groups did not so offend democratic principles as not to satisfy the requirement of s 7 of the Constitution that the Senate be elected by democratic means.

> *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1 at 57-8 ; 7 ALR 593 at 633, per Stephen J, applied

Application

This was an application to the High Court of Australia for a declaration that sections of the Commonwealth Electoral Act 1918 (Cth) prescribing the form of Senate ballot paper for the election scheduled to be held on

1 December 1984 were invalid and for an injunction to restrain the distribution of ballot papers for the Senate election for

the State of Queensland.

The plaintiff appeared in person.

Dr G Griffith QC-SG and *W W Caldwell*, for the defendants.

Gibbs CJ.

The plaintiff, Mr **McKenzie**, is a candidate for election as a senator for the State of Queensland. By his statement of claim he claims a declaration that the sections of the Commonwealth Electoral Act 1918 (Cth), as amended (the Act), which authorize the use at a Senate election of a ballot paper in Form E in the schedule to the Act are beyond the power of the Parliament and an injunction restraining the defendants from distributing or making available to electors in the State of Queensland ballot papers in Form E in the Schedule to the Act. The practical effect of such an injunction, if it were granted, would be to prevent the holding of the election on 1 December.

The plaintiff argued his own case and did so very clearly. The submissions which he has made are understandable and by no means irrational. The provisions which he seeks to have declared invalid are of recent origin and, so he contends, place him, as a candidate who belongs to no political party, at a disadvantage in his bid for election.

By s 209(1) of the Act, ballot papers to be used in a Senate election shall be in Form E in the schedule. The form directs the voters to vote in either of two ways. The ballot paper is divided horizontally by a black line. Below the line, the names of the individual candidates appear with a square opposite each; above the line are squares intended to simplify voting for voters who wish to follow a group ticket. Provision is made by s 168 of the Act for candidates to claim to have their names grouped in the ballot papers. In printing the ballot paper the names of the candidates included in groups are to be printed before the names of candidates not included in groups but the order of the groups is determined in the manner provided by s 213, in effect by lot: s 210(a) and (c). Except as otherwise provided by the regulations, a square is to be printed on the ballot paper opposite the name of each candidate: s 210(f) and Form E. Where the names of candidates are included in a group and those candidates lodge with the Australian Electoral Office a statement in accordance with s 211 indicating their order of preferences or orders of preferences in relation to all the candidates, they are taken to have a group voting ticket or tickets, and a square is to be printed on the ballot papers for use in the election above the names of those candidates: s 211(4) and (5). Such square appears above the line dividing the ballot paper: see Form E. The voter may mark his vote either by placing numbers in the squares opposite the names of the candidates below the line or simply by placing the figure "1" or a tick or a cross in one only of the squares above the line: s 239. Where the paper has been marked in a square above the line, it is deemed to have been marked in accordance with the group voting ticket or tickets lodged by the candidates in the relevant group: s 272.

Further, by s 214, when a candidate is registered under s 146, and the name of "a registered political party" is entered in the register of candidates

in relation to that candidate, the name of that party shall be printed adjacent to his name on the ballot paper -- s 214(1). In the case of a group, the name of the party also appears adjacent to the square above the line -- s 214(2). Only an eligible political party may be registered -- s 124 -- and "an eligible political party" means "a Parliamentary party" (that is, a political party which has at least one member in the Parliament of the Commonwealth, or the Parliament of a State, or the Legislative Assembly of the Northern Territory or the Australian Capital Territory House of Assembly) or a political party other than a Parliamentary party that has at least 500 members -- s 123. A candidate who is not a member of a registered political party may, but need not, have the word "independent" printed adjacent to his name: ss 146(1)(c), 214(3)(b).

As the plaintiff has rightly pointed out, a candidate who is not a member of "a registered political party" may be disadvantaged because the name of the party, if any, to which he belongs will not appear on the ballot paper.

A candidate who is not a member of a group cannot take advantage of the simplified voting procedure which involves the marking of a square above the line. Indeed, there is no means provided, above the line, for recording a vote for such a candidate.

The question that now falls for decision is whether the provisions of the Act to which I have referred are open to objection on constitutional grounds. The plaintiff submitted, first, that electors who use the simplified system of voting will be voting for parties and not for candidates and that this will contravene s 16 of the Constitution which provides for the qualifications of a senator: it is right to say that the electors voting at a Senate election must vote for the individual candidates whom they wish to choose as senators but it is not right to say that the Constitution forbids the use of a system

which enables the elector to vote for the individual candidates by reference to a group or ticket. Members of Parliament were organized in political parties long before the Constitution was adopted and there is no reason to imply an inhibition on the use of a method of voting which recognizes political realities provided that the Constitution itself does not contain any indication that such a method is forbidden. No such indication, relevant to the present case, appears in the Constitution.

The second principal ground taken by the plaintiff is that it offends general principles of justice to discriminate against candidates who are not members of established parties or groups. Section 7 of the Constitution provides, amongst other things, that the Senate shall be composed of senators for each State directly chosen by the people of the State. I am prepared to assume that s 7 requires that the Senate be elected by democratic methods but if that is the case it remains true to say that "it is not for this court to intervene so long as what is enacted is consistent with the existence of representative democracy as the chosen mode of government and is within the power conferred by s 51(xxxvi)" of the Constitution to use the words of Stephen J in *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (1975) 135 CLR 1 at 57-8 ; 7 ALR 593 at 633.

In my opinion, it cannot be said that any disadvantage caused by the sections of the Act now in question to candidates who are not members of parties or groups so offends democratic principles as to render the sections beyond the power of the Parliament to enact. I am by no means satisfied

57 ALR 747 at 750

that s 353(1) of the Act, which provides that the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise, would prevent this court from interfering by injunction if a challenge were successfully made to the provisions of the Act on constitutional grounds. The case is distinguishable from *Berrill v Hughes*, recently decided by Mason J, which turned on statutory and not on constitutional considerations. Nor do I think that s 47 of the Constitution is relevant to the present case. Having regard to the conclusion which I have reached, however, those questions do not now arise.

For the reasons that I have expressed the injunction must be refused.

Order

Motion for injunction refused. State of claim struck out. Action dismissed.

Solicitor for the respondents: *Australian Government Solicitor*.

ANDREW BYRNES
BARRISTER

Second Appendix to Chapter 11: Gnats Strained out of Senate by High Court's Enforcement of High Court's Constitution

State/Territory	Date of Special Count	Disqualified Candidate	New Senator
New South Wales	8 July 1988	Robert Wood (NDP)	Irina Dunn (NDP)
Queensland	2 July 1999	Heather Hill (PHON)*	Leonard Harris (PHON)
Western Australia	7 March 2017	Rodney Culleton (PHON)	Peter Georgiou (PHON)
South Australia	13 April 2017	Robert Day (FFP)	Lucy Gichuhi (FFP)
New South Wales	6 November 2017	Fiona Nash (The Nationals)	Hollie Hughes (Liberal)*
Queensland	6 November 2017	Larissa Waters (The Greens)	Andrew Bartlett (The Greens) (a)
Queensland	6 November 2017	Malcolm Roberts (PHON)	Fraser Anning (PHON)
Western Australia	6 November 2017	Scott Ludlam (The Greens)	Jordon Steele -John (The Greens)
New South Wales	22 November 2017	Hollie Hughes (Liberal)*	Jim Molan (Liberal)
Tasmania	12 December 2017	Stephen Parry (Liberal)	Richard Colbeck (Liberal)
Tasmania	12 December 2017	Jacquie Lambie (JLN)	Steve Martin (JLN)
South Australia	15 February 2018	Skye Kakoschke-Moore(NXT)	Tim Storer (NXT)
Australian Capital Territory	18 May 2018	Katy Gallagher (Labor)	David Smith (Labor)

* Note that Heather Hill never served for even one day in the Senate. Hollie Hughes never served in the 45th Parliament but was elected in May 2019 to serve in the 46th Parliament. The notation (a) next to the name of Andrew Bartlett indicates that he resigned his Senate seat late in August 2018. Larissa Waters filled that section 15 casual vacancy. She was sworn back into the Senate on Monday 10 September, having spent 14 months away from Canberra caring for her 18-month-old daughter Alia.

Of the disqualified senators listed in the above table Larissa Waters, Malcolm Roberts, Hollie Hughes, Jacquie Lambie and Katy Gallagher were elected in May 2019 and are, therefore, members of the 46th Parliament.

NDP – Nuclear Disarmament Party
PHON – Pauline Hanson's One Nation Party
FFP – Family First Party
JLN – Jacquie Lambie Network
NXT – Nick Xenophon Team

Third Appendix to Chapter 11

Table 1: First Count of Senate Votes for Australian Capital Territory, General election 2 July 2016

Here is contained the two counts for the Australian Capital Territory in respect of the Senate general election held on 2 July 2016. To understand the count it is necessary first to see the ballot paper which is the Fifth Appendix.

The total formal vote was 254,767. Consequently, the quota was 84,923 which is the next whole number above one-third. In the list of candidates below note that the votes of Donnelly, Edwards, Gallagher, O'Connor, Haydon, Sesleja, Field, Hobbs, Kim and Bailey are the sum of the above-the-line and below-the-line votes. Only the full names of Gallagher, Smith, Sesleja and Hobbs are shown.

Candidates	First Preference Votes		Surplus Votes
Group A			
Donnelly (Liberal Democrats)	7,371		
Hennings (Liberal Democrats)	89		
Group B			
Edwards (Secular)	1,322		
Mihaljevic (Secular)	56		
Group C			
Gallagher, Katy (Labor)	95, 749	Elected (1)	10,826
Smith, David (Labor)	918		
Group D			
O'Connor (Rise Up Australia)	2,455		
Wyatt (Rise Up Australia)	68		
Group E			
Haydon (Sustainable Australia)	2,557		
Tye (Sustainable Australia)	121		
Group F			
Seselja, Zed (Liberal)	82,932		
Hiatt (Liberal)	1,683		
Group G			
Field (Animal Justice)	4,150		
Montagne (Animal Justice)	101		
Group H			
Hobbs, Christina (The Greens)	40,424		
Wareham (The Greens)	582		
Group I			
Kim (Christian Democratic)	3,011		
Tadros (Christian Democratic)	76		

Group J	
Bailey (Sex Party)	9,744
Swan (Sex Party)	352
Ungrouped	
Hay (Voteflux)	698
Hanson (Mature Australia)	308

Since the above statement is of first preferences there are no exhausted votes. The first distribution was of Gallagher's surplus after which the counts were as follows:

Candidates	Progress Totals	Surplus Votes
Seselja, Zed (Liberal)	83,000	
Hobbs, Christina (The Greens)	40,718	
Smith, David (Labor)	11,253	
Bailey (Sex Party)	9,761	
Donnelly (Liberal Democrats)	7,383	
Field (Animal Justice)	4,160	
Kim (Christian Democratic)	3,015	
Haydon (Sustainable Australia)	2,571	
O'Connor (Rise up Australia)	2,466	
Hiatt (Liberal)	1,701	
Edwards (Secular)	1,326	
Hay (Voteflux)	700	
Wareham (The Greens)	594	
Swan (Sex Party)	356	
Hanson (Mature Australia)	310	
Tye (Sustainable Australia)	123	
Montagne (Animal Justice)	103	
Hennings (Liberal Democrats)	91	
Tadros (Christian Democratic)	76	
Wyatt (Rise up Australia)	70	
Mihaljevic (Secular)	57	

Adding Gallagher's quota of 84,923 to all the above the total formal vote is 254,757 which is only 10 less than the total formal vote on first preferences. The missing 10 votes were lost by fraction. In the distribution of Gallagher's surplus there were no exhausted votes because every Labor vote above-the-line either elected Gallagher or transferred to Smith. By contrast, in Table 2 there are shown to be 92 exhausted votes in the distribution of Smith's surplus, for reasons explained in the lengthy paragraph below. In this first election candidates were excluded in this order: Mihaljevic, Wyatt, Tadros, Hennings, Montagne, Tye, Hanson, Swan, Wareham, Hay and Edwards. That left the count to be this:

Candidates	Progress Totals	Surplus Votes
Seselja, Zed (Liberal)	83,156	
Hobbs, Christina (The Greens)	41,768	
Smith, David (Labor)	11, 644	
Bailey (Sex Party)	10,748	
Donnelly (Liberal Democrats)	7,575	

Field (Animal Justice)	4,383
Kim (Christian Democratic)	3,135
Haydon (Sustainable Australia)	2,919
O'Connor (Rise up Australia)	2,710
Hiatt (Liberal)	1,764

Adding Gallagher's quota of 84,923 to all the above the total formal vote is 254,725, or 42 fewer votes than the total formal vote on first preferences, those votes having been lost by exhaustion or fraction. The last three exclusions were those of Hiatt, O'Connor and Haydon producing the final count set out below, at which stage there had been 127 votes lost by exhaustion and 32 lost by fraction.

Candidates	Progress Totals		Surplus Votes
Seselja, Zed (Liberal)	85,000	Elected (2)	77
Hobbs, Christina (The Greens)	42,682		
Smith, David (Labor)	12,593		
Bailey (Sex Party)	11,857		
Donnelly (Liberal Democrats)	8,251		
Field (Animal Justice)	5,419		
Kim (Christian Democratic)	3,883		

Table 2: Recount of Votes to Fill the Vacancy Caused by the Disqualification of Katy Gallagher

The total formal vote was 254,767. Consequently the quota was 84,923, which is the next whole number above one-third. In the list of candidates below note that the votes for Donnelly, Edwards, Smith, O'Connor, Haydon, Seselja, Field, Hobbs, Kim and Bailey are the sum of above-the-line and below-the-line votes. Only the full names of Smith, Seselja and Hobbs are shown.

Candidates	Preference Votes		Surplus Votes
Group A			
Donnelly (Liberal Democrats)	7,478		
Hennings (Liberal Democrats)	110		
Group B			
Edwards (Secular)	1,364		
Mihaljevic (Secular)	66		
Group C			
Smith, David (Labor)	92,328	Elected (1)	7,405
Group D			
O'Connor (Rise up Australia)	2,556		
Wyatt (Rise up Australia)	89		
Group E			
Haydon (Sustainable Australia)	2,688		
Tye (Sustainable Australia)	142		

Group F	
Seselja, Zed (Liberal)	83,541
Hiatt (Liberal)	1,850
Group G	
Field (Animal Justice)	4,244
Montagne (Animal Justice)	125
Group H	
Hobbs, Christina (The Greens)	43,026
Wareham (The Greens)	695
Group I	
Kim (Christian Democratic)	3,047
Tadros (Christian Democratic)	80
Group J	
Bailey (Sex Party)	9,899
Swan (Sex Party)	389
Ungrouped	
Hay (Voteflux)	723
Hanson (Mature Australia)	327

Since the above statement is of DEEMED FIRST PREFERENCES there are no exhausted votes. The remainder of my entries will, however, include some exhausted votes. The first distribution was of Smith's surplus after which the counts were as follows:

Candidates	Progress Totals	Surplus Votes
Seselja, Zed (Liberal)	84,417	
Hobbs, Christina (The Greens)	47,263	
Bailey (Sex Party)	10,489	
Donnelly (Liberal Democrats)	7,805	
Field (Animal Justice)	4,647	
Kim (Christian Democratic)	3,155	
Haydon (Sustainable Australia)	3,013	
O'Connor (Rise up Australia)	2,768	
Hiatt (Liberal)	1,869	
Edwards (Secular)	1,492	
Hay (Voteflux)	733	
Wareham (The Greens)	727	
Swan (Sex Party)	399	
Hanson (Mature Australia)	336	
Tye (Sustainable Australia)	146	
Montagne (Animal Justice)	129	
Hennings (Liberal Democrats)	113	
Wyatt (Rise up Australia)	92	
Tadros (Christian Democratic)	80	
Mihaljevic (Secular)	68	

Adding Smith's quota of 84,923 to all the above the total formal vote was 254,664. The missing 103 votes consisted of 92 lost by exhaustion and 11 lost by fraction. In this second election candidates were then excluded in the following order: Mihaljevic, Tadros, Wyatt, Hennings, Montagne, Tye, Hanson, Swan, Wareham and Hay. That left the count to be as set out below. Notice that when Gallagher's surplus was distributed there were no exhausted votes. The reason is that all the above-the-line primary votes for Labor with the number "1" in the party box automatically transferred to Smith. However, when Smith was the only Labor candidate left in the count some of those votes were deemed to have no preference beyond that of Smith. That is why 92 Smith primary votes exhausted. They were all above-the-line votes for Labor where the voter understood the rules, namely that the instruction was deceitful. The instruction was to vote by "numbering at least 6 of these boxes in the order of your choice" designed to create the impression of informality when the voter did not comply. The truth is that a single "1" above the line for Labor was formal and deemed to be a first preference for Gallagher and a second preference for Smith. In the second election (with Gallagher excluded) a single "1" above the line for Labor was deemed to be a single first preference for Smith. In other words the voter was deemed to have no preference beyond Smith. Here is the count at this stage:

Candidates	Progress Totals	Surplus Votes
Seselja, Zed (Liberal)	84, 536	
Hobbs, Christina (The Greens)	48,244	
Bailey (Sex Party)	11,126	
Donnelly (Liberal Democrats)	7,935	
Field (Animal Justice)	4,824	
Kim (Christian Democratic)	3,282	
Haydon (Sustainable Australia)	3,261	
O'Connor (Rise up Australia)	2,910	
Hiatt (Liberal)	1,959	
Edwards (Secular)	1,650	

Adding Smith's quota of 84,923 to all the above the total formal vote was 254,650. The missing 117 votes consisted of 92 lost by exhaustion and 25 lost by fraction. The last two exclusions were those of Edwards and Hiatt producing this final count:

Candidates	Progress Totals		Surplus Votes
Seselja, Zed (Liberal)	85,731	Elected (2)	808
Hobbs, Christina (The Greens)	48,924		
Bailey (Sex Party)	11,740		
Donnelly (Liberal Democrat)	8,254		
Field (Animal Justice)	4,986		
Haydon (Sustainable Australia)	3,555		
Kim (Christian Democratic)	3,345		
O'Connor (Rise up Australia)	3,141		

Adding Smith's quota of 84,923 to all the above the total formal vote was 254,599. The missing 168 votes consisted of 141 lost by exhaustion and 27 lost by fraction.

A Further Note on the Gallagher Case

The case that led to the recount described above was the last, and in my opinion most important of the citizenship cases. For that reason it deserves more study and some more detail about it beginning with the first page of the judgment, as follows:

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR KATY GALLAGHER

Re Gallagher
[2018] HCA 17
9 May 2018
C32/2017

ORDER

The questions referred to the Court of Disputed Returns by the Senate be answered as follows:

Question (a)

Whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation for the Australian Capital Territory in the Senate for the place for which Katy Gallagher was returned?

Answer

Yes.

Question (b)

If the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled?

Answer

The vacancy should be filled by a special count of the ballot papers. Any direction necessary to give effect to the conduct of the special count should be made by a single Justice.

Question (c)

What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?

Answer

Unnecessary to answer.

Question (d)

What, if any, orders should be made as to the costs of these proceedings?

Answer

Unnecessary to answer.

The first point to notice is that this is described by the Court as a "vacancy", not a "casual vacancy". The term "vacancy" has been used by the Court to describe every case in which a Senate recount is ordered, regardless of whether it be in a state or a territory. What is unusual here is that a territory is involved. Consequently section 122 of the Constitution applies. It reads: "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

Consequently my recommended reform is that the legislation governing territory representation should be amended to provide that *every vacancy* be filled by the recount method as described above. In my chapter 12 dealing with the situation of the Legislative Council in Western Australia it is noted that every vacancy there is filled by the recount method. The reason for such a situation is described in that chapter which will also contain a reference back to this Fourth Appendix.

Fourth Appendix to Chapter 11

Senate Ballot Paper 2016

Australian Capital Territory – Election of 2 Senators

You may vote in one of two ways

Either

Above the line

By numbering at least **6** of these boxes in the order of your choice (with number 1 as your first choice).

A	B	C	D	E	F	G	H	I	J
LIBERAL DEMOCRATS	SECULAR PARTY OF AUSTRALIA	AUSTRALIAN LABOR PARTY	RISE UP AUSTRALIA PARTY	SUSTAINABLE AUSTRALIA	LIBERAL	ANIMAL JUSTICE PARTY	THE GREENS	†CDP CHRISTIAN DEMOCRATIC PARTY (FRED NILE GROUP)	AUSTRALIAN SEX PARTY

Or

Below the line

By numbering at least **12** of these boxes in the order of your choice (with number 1 as your first choice).

A	B	C	D	E	F	G	H	I	J	UNGROUPED
LIBERAL DEMOCRATS	SECULAR PARTY OF AUSTRALIA	AUSTRALIAN LABOR PARTY	RISE UP AUSTRALIA PARTY	SUSTAINABLE AUSTRALIA	LIBERAL	ANIMAL JUSTICE PARTY	THE GREENS	CHRISTIAN DEMOCRATIC PARTY (FRED NILE GROUP)	AUSTRALIAN SEX PARTY	
DONNELLY Matt LIBERAL DEMOCRATS	EDWARDS David SECULAR PARTY OF AUSTRALIA	GALLAGHER Katy AUSTRALIAN LABOR PARTY	O'CONNOR Sandie RISE UP AUSTRALIA PARTY	HAYDON John SUSTAINABLE AUSTRALIA	SESELJA Zed LIBERAL	FIELD Deborah ANIMAL JUSTICE PARTY	HOBBS Christina THE GREENS	KIM David William †FRED NILE GROUP	BAILEY Steven AUSTRALIAN SEX PARTY	HAY Michael Gerard
HENNINGS Caveley LIBERAL DEMOCRATS	MIHAL-JEVIC Denis SECULAR PARTY OF AUSTRALIA	SMITH David AUSTRALIAN LABOR PARTY	WYATT Jess RISE UP AUSTRALIA PARTY	TYE Martin SUSTAINABLE AUSTRALIA	HUATT Jane LIBERAL	MONTAGNE Jessica ANIMAL JUSTICE PARTY	WAREHAM Sue THE GREENS	TADROS Elizabeth †FRED NILE GROUP	SWAN Robbie AUSTRALIAN SEX PARTY	HANSON Anthony

Fifth Appendix to Chapter 11

CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA - SECTION 44

Disqualification

Any person who:

(i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

(iii) Is an undischarged bankrupt or insolvent; or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.