CHAPTER TWELVE: IS THE SENATE "UNREPRESENTATIVE SWILL"?

During the period when this book was being written I would find myself going to social gatherings and some long-lost acquaintance would ask me this: "Why are you out of the news these days? What are you doing with yourself?" I would reply to the effect that I am writing a book intended to be called *Unrepresentative Swill*. "Is it about the Senate? Or is it about the entire Parliament?" would be the next question. That surely indicates the extent of the discredit our federal politicians have brought upon themselves by their behavior. Many ordinary Australians now think of both the Senate and the House of Representatives as being unrepresentative swill.

The answer I give to the above question is that the book is about the Senate which, in my opinion, has been unrepresentative swill since 1984. This assessment is consequent upon the fact that the 1984 Senate election was the first to return senators under the present de facto party machine appointment idea sold to voters by above-the-line voting. It is a bad idea. The system has been patently unconstitutional since 1984. Those who say otherwise should read my chapter *Judges Exercise their Power*. Consequently, the present (Turnbull) system competes with the immediate past (Hawke) system for the description "worst ever" for the Senate. I think the present system gets the wooden spoon for this reason: at least there was a worthy motive for the system which applied from 1984 to 2014. At least Australia enjoyed good government while that system operated.

The description "unrepresentative swill" must be the most widely used expression ever uttered by Paul Keating who served as Prime Minister from 20 December 1991 to 11 March 1996, a period of four years, two months and 24 days. His Treasurer was John Dawkins and during question time in the House of Representatives on Wednesday 4 November 1992 questions were being asked about whether Dawkins should appear before the Senate Estimates Committee. Addressing the then Leader of the Opposition, John Hewson, and the then Liberal member for Mayo, Alexander Downer, this is what Keating had to say:

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

After some interjections Keating continued:

> You are into a political stunt. There will be no House of Representatives Minister appearing before a Senate committee of any kind while ever I am Prime Minister, I can assure you.

All the details are there on page 2549 of *Hansard* for that day. Journalists immediately went to work on Keating's language. They discovered that the then Macquarie Dictionary defined "swill" as "liquid or partly liquid food for animals, especially kitchen refuse given to pigs."

Labor leaders are better at invective than those of the Liberal Party. For example, Gough Whitlam once described Joh Bjelke-Petersen as "a bible-bashing bastard". Bill Shorten once talked about the "knuckle-dragging Neanderthals" of the Liberal Party who opposed federal funding for safe schools programs. However, those cases will not survive as part of the common language in the way Keating's "unrepresentative swill" has done. In any event I am determined to ensure "unrepresentative swill" does continue to be the Senate's description – until the Australian people are given a decent Senate voting system! If and when I achieve my objective I intend thereafter to discourage this description of the Australian Senate.

Keating was never asked for more detail to explain himself. However, I have no doubt about what he had in mind *which is not what I have in mind*. His "unrepresentative swill" curse to the Senate was securely based on the Labor idea of "one person one vote, one vote one value" being, in effect, the only democratic value that Labor espouses. In recent times this was best expressed by Graham Richardson who was a senator in Keating's time and is now a journalist for *The Australian* newspaper.

There was a Tasmanian state election on Saturday 3 March 2018. The election was called by the Liberal Premier, Will Hodgman, over the last weekend in January which means that the newspapers were full of commentary on Monday 29 January. On page 4 of *The Australian* for that day there was an article by Richardson headed "Rest of country to pay for promises" Here is most of that article:

> It has often been said that Federation was a plot against New South Wales. It was the biggest fish in the pond and the other fish banded together to limit the power of the biggest state. The Founding Fathers – and those doing the job were blokes – ensured that there was no way Sydney could call the shots. Unfortunately, they shot themselves in the foot. The structure of the Senate, embedded in their new Constitution, presented the dopiest example of this determination to clip the wings of the people of NSW. No gerrymander in history could beat the way the Senate was set up.
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> It was decreed that 12 senators would represent each state. The staggering legacy of this lunacy is that today the 500,000 people of Tasmania have the same voting power in the Senate as the approximately 7.5 million citizens of NSW. This is a world-class rort that has come back to haunt some of its perpetrators.
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> The Tasmanian election will be held on March 3. Premier Will Hodgman is the likely winner because, as he is now loudly proclaiming, only the Liberals can win government on their own. They hold 15 of the 25 seats and won the last time on the back of an alarmingly unstable and unconvincing Labor-Green coalition. It would be an amazing feat if the impressive Labor leader Rebecca White could pull an unlikely victory.
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> The problem is that a new Tasmanian government will do what every Tasmanian government has done. It will pass a grab-bag of policies it knows it cannot pay for. The other states, with the exception of the other basket case, South Australia, will pay to keep Tasmanians in the manner to which they have become accustomed. . .No matter who wins Tasmania, they will have their hands deep in your pockets and mine.

Readers will, of course, immediately notice an error of fact in that article. It was not decreed that 12 senators would represent each state. It was decreed that the number be six, with a House of Representatives of 74, or thereabouts. However, it is true that the number is now 12 per state with a House of Representatives of 151. Also, when he wrote "No gerrymander in history could beat the way the Senate was set up" he should have written "No malapportionment in history could beat the way the Senate was set up."

I should not quibble about these details. The fact is there is a Keating-Richardson view that the Senate is unrepresentative swill due to the malapportionment described by Richardson. Mine is the alternative view. The Senate is unrepresentative swill due to the fact that the voting system is flagrantly disobedient to Section 7 of the Constitution. Just as soon as the Parliament legislates a decent Senate voting system I would stop referring to the Senate as unrepresentative swill. In the meantime my historical description is that from 1901 to 1984 the Senate reflected the federal nature of our polity. Since 1984 the Senate has been unrepresentative swill.

In the United States there is a House of Representatives of 435 members and a Senate of 100. The broad idea of population as the basis of their House of Representatives is the same idea that we have for *our* House of Representatives. Likewise the Senate idea is the same in principle for the two countries. Yet no one disputes that a US senator has far more prestige than a member of the US House of Representatives. According to the Keating-Richardson view that should not be so.

Consequently, I quote below statistics which show the US Senate electorates to be far more malapportioned than those for the Australian Senate. Before giving detail it should be mentioned that the Australian statistics are taken from the Second Appendix to my chapter *Increasing the Size of Parliament*. The document in question shows the Determination of the Australian Electoral Commission and the total Australian population was shown to be 23,729,561 as at 31 August 2017. The equivalent US statistics are taken from the most recent US decennial census dated 1 April 2010 on the basis of which the Determination was made of the number of members for each state. The Total Apportionment Population on that date was 309,183,463.

In both cases I am quoting the statistics by which the number of members of the House of Representatives for each state was determined. In the Australian case the population of New South Wales was 7,797,791 which gave it 47 members. Tasmania's population was 519,050 which gave it five members. So, 15 people in NSW for every one Tasmanian gave NSW not quite ten times the number of members and the *same number of senators*. In the US the population of California was 37,341,989 which gave it 53 members while the population of Wyoming was 568,300 which gave it *just one member* of the House of Representatives. So, 66 Californians for every one resident of Wyoming gave California 53 times the number of members and the *same number of senators*. The malapportionment for the US Senate sure beats the way the Australian Senate was set up!

The reputation of the Australian Senate *is inferior* to that of the Australian House of Representatives. We know that by looking at the transfers between the two houses, discussed below. There would, however, be people who dispute that which I have just written above - but no one would dispute my next sentence. Without question the reputation of the US Senate is *superior* to that of the US House of Representatives. That the malapportionment is so great does not cause any American to describe the US Senate in disparaging terms. There are political scientists who dislike it intensely but that is all. There are policy wonks who dislike the prestige of the US Senate because it gives excessive voice to rural America. Any such disparagement, however, is washed away when data is collected on the pattern of transfers between the two houses.

Unfortunately I cannot give more than a guesstimate of the pattern of transfers in the 20th Century. My guesstimate is that for every one senator who chose to transfer to the House of Representatives there were four hundred representatives who preferred to be a senator than stay a mere representative. I have had great difficulty finding any cases of the reverse. The only cases I can find are these three. First comes the big one. Claude Pepper served as a US Senator from Florida for 14 years before losing his Democratic primary bid for re-nomination in 1950. He subsequently was elected to the US House and served there from 1963 until his death in 1989. He rose to be the Chairman of the House Rules Committee from 1978 until his death. That position was, at the time, thought to be the second most powerful in the House, the Speaker holding the most powerful. Consequently, although his transfer "down" was not from choice he did think it was the best move he ever made. Second, James Wolcott Wadsworth of New York left the Senate in 1927 and joined the House in 1933. Third, Alton Lennon (North Carolina) left the Senate in 1954 and joined the House in 1957. Lennon filled a casual vacancy in the Senate and then lost his party's primary for the Senate seat.

The 21st Century is easier to measure. So far there *has not been a single senator* choosing to transfer to the US House of Representatives. Not one! By contrast there have been 55 cases of representatives succeeding in their bid to transfer to the Senate. In the present Senate (as at March 2019) very nearly half (48 out of 100) of the senators had been representatives previously. Senate membership is more prestigious than that of the House of Representatives. If you are climbing the political ladder, as a House member it is likely that the next office you would seek is to be in the US Senate, or a governorship, or to be mayor of a big city. If you are a senator you would be eyeing the presidency.

For the record, as at March 2019, of the 48 senators that came from the House 29 are Republicans, 18 are Democrats and one is an independent who caucuses with the Democrats. That independent is Bernie Sanders. He was in the House of Representatives as member for Vermont for 16 years but in 2006 was elected as one of the two senators for Vermont. He was re-elected in 2012 and again in 2018. Therefore he is now in his third term as a senator in the 116th Congress. By the way Vermont is a small state so has only one seat in the lower house. It is, therefore, correct to refer to "the member for Vermont."

The position in Australia is set out in the Second Appendix to this chapter. The original of this table can be found on page 500 of the *Parliamentary Handbook of the Commonwealth of Australia, 2017* which was a record of the 45th Parliament published in 2017 by the Parliamentary Library, Department of Parliamentary Services. I updated it to add the cases of David Smith and Sarah Henderson. Smith transferred from the Senate to the House of Representatives in May 2019. Henderson was defeated in Corangamite at that election but was, in September 2019, appointed to fill the vacancy created by the resignation of Mitch Fifield (Liberal, Victoria).

I have decided to study this table only during the period when the Senate has been unrepresentative swill – from 1984 to the present. On the surface one would say that the transfers have been 14 cases up from the House of Representatives to the Senate and 13 cases of the reverse transfer, "down". That would suggest it is just as prestigious to be an Australian senator as to be a member of the lower house. It is true that we use the term "going down" from the Senate to the House but that is meaningless. When the Americans use the expression "going down" they mean it. The status of a US representative *actually is lower* than that of a senator. When we use the expression "going down" we do not mean it. All it means is that the Senate is the upper house while the House of Representatives is the lower house.

The statistics of my previous paragraph are misleading, as I now explain. The correct way to describe it is that 13 senators chose to give up their Senate seats to go into the House of Representatives. The biggest number is for *Labor* federal politicians, seven of them, considered in chronological order. Gareth Evans (a senator from 1978 to 1996) won Holt (Victoria) in 1996. Bob McMullan (a senator from 1988 to 1996) won Canberra (ACT) in 1996 and then Fraser (ACT) in 1998. Cheryl Kernot (a senator from 1990 to 1997) won Dickson (Queensland) in 1998. Belinda Neal (a senator from 1994 to 1998) attempted unsuccessfully to win Robertson (NSW) in 1998 and eventually won that seat in 2007. David Feeney (a senator from 2008 to 2013) won Batman (Victoria) in 2013. Matt Thistlethwaite (a senator from 2011 to 2013) won Kingsford Smith (NSW) in 2013. David Smith (a senator from 2018 to 2019) won Bean (ACT) in 2019.

The next biggest category is from the *Liberal Party*, of which there are four cases. Kathy Martin (who later became Kathy Sullivan) was a senator from 1974 to 1984 and then won Moncrieff (Queensland) in 1984. Allan Rocher was a senator from 1978 to 1981 and then won Curtin (WA) in 1981. Fred

Chaney was a senator from 1974 to 1990 and then won Pearce (WA) in 1990. Bronwyn Bishop was a senator from 1987 to 1994 and the won Mackellar (NSW) in 1994.

A unique case is Barnaby Joyce of the Nationals. His is the only case – ever - of a senator for one state successfully transferring to the House of Representatives in a different state. He was elected for Queensland in October 2004 (with a term beginning on 1 July 2005) and re-elected in August 2010. In 2013 he resigned from the Senate and won New England (NSW).

Now considered are the 11 *standard cases* of why representatives sometimes later became senators. *They are defeated in their House of Representatives seats*. I take them in chronological order. In 1969 Don Jessop (Liberal) was defeated in Grey (SA). In 1975 John Coates (Labor) was defeated in Denison (Tasmania). In 1980 Jim Short (Liberal) was defeated in Ballarat (Victoria). In 1983 three Coalition members were defeated in their seats. They were Michael Baume (Macarthur, NSW), Grant Chapman (Kingston, SA) and Grant Tambling (Northern Territory). In 1993 Robert Woods (Liberal) was defeated in Lowe (NSW). In 1998 Pauline Hanson (Independent) was defeated in Blair (Queensland). In 2007 David Fawcett (Liberal) was defeated in Wakefield (SA) and in 2013 Deborah O'Neill (Labor) was defeated in Robertson (NSW). In 2019 Sarah Henderson (Liberal) was defeated in Corangamite (Victoria).

Now I consider the three very unusual cases. Don Chipp was the Liberal member for Higinbotham (re-named Hotham) from 1960 until 1977 when he gave his House seat to another Liberal. His reason for moving to the Senate was clear. He had left the Liberal Party so knew he could not win any seat in the House of Representatives as a Democrat, of which new party he had become leader. He knew he could get a quota at a Senate election as a Democrat and he succeeded. The position of Chipp was, in principle, not particularly different from that of Hanson. The only difference was that Chipp transferred (virtually) immediately whereas Hanson foolishly gave up the Chipp option. She could have been a senator from July 1999 but, instead, waited for Malcolm Turnbull, Nick Xenophon, Richard Di Natale and Barnaby Joyce to resurrect her political career in the winter of 2016. They did that courtesy of the Commonwealth Electoral Amendment Act 2016 and the consequent double dissolution. Had it not been for that combination she would NOT have been elected as a senator in 2016. She would have been defeated at any half-Senate election in the spring of 2016 for precisely the same reason as she was defeated at the half-Senate election in the spring of 2001. The institution of the Group Voting Ticket produced that result in 2001 and, had the GVT been retained, the same would have happened in 2016. More detail on this point is set out in Chapter 8 *Malcolm's Failure*.

So the *two truly unusual cases* are those of David Hamer and Michael Ronaldson, both of the Victorian Liberal Party. I have never actually met Ronaldson so I cannot say why he was the member for Ballarat, elected in 1990 and retiring in 2001. All I know is that he was later a Victorian senator from 2005 to 2016. In the case of Hamer I asked him at the time why he behaved in so peculiar a fashion. He was the member for Isaacs (Victoria) from 1969 until defeated in 1974. Then he was again member for Isaacs from 1975 to 1977 at which election he gave his Isaacs seat to another Liberal. He was elected to the Senate in December 1977, began his term in July 1978, and retired in 1990. I asked him to explain such unusual behavior and he replied at the time: "I prefer to be a senator." I can see why an American member of the House of Representatives would transfer to the US Senate and I can see why an Australian senator would transfer to the Australian House of Representatives. All I can do is comment on the very unusual behavior of Hamer and Ronaldson.

There is a (rough) American equivalent of such unusual behavior. Gordon Humphrey, a US senator from New Hampshire, was elected in 1978 for two terms before retiring in 1990. In that year he

successfully contested *a seat in the New Hampshire Senate!* Talk about "going down", indeed. Humphrey subsequently ran in 2000 as the Republican nominee for governor of New Hampshire, which most seasoned observers think was his ultimate goal all along. Unfortunately for him, he lost his gubernatorial bid. Seasoned observers of US politics rate Humphrey's move from the US Senate to the New Hampshire Senate as the strangest move seen in US politics in recent times. It makes the Australians Hamer and Ronaldson look rational by comparison.

I wrote above that there are American political scientists who intensely dislike the malapportionment for the US Senate. The most recent case of that is the 2018 book by Steven Mulroy from the University of Memphis Law School. His book is published by Edward Elgar and titled *Rethinking US Election Law: Unskewing the System*. His first chapter is an introduction and his second deals with their undemocratic Electoral College for choosing the President. His third chapter deals with their undemocratic Senate and mourns what he calls "The Senate's Rightward Skew". On page 52 he mentions that popular election of senators was not intended by the Founding Fathers in 1787 but notes it later became so, resulting from various state initiatives. He goes on:

> But another feature remains which is almost as undemocratic: the fact that each state gets two Senators, regardless of population. As a result, California, with 38 million residents, has as much of a say on ratification of treaties, confirmation of Cabinet and Supreme Court nominees, and passing legislation as Wyoming, with under 600,000 residents. Under this system, a Vermonter has 30 times the Senate voting power of a New Yorker just over the state line.

After describing how this came about in 1787 from the resolution of big state-small state differences he continues, on pages 53 and 54:

> As noted above, the Great Compromise causes hugely unequal voting power among U.S. voters. Worse, the inequality has been growing. The underrepresentation of large-state voters and overrepresentation of small-state voters is much worse than at the time of the Founding. The gap between the populations of small and large states has grown with this country's overall population. The result is a disparity in voting power between states measured at 66 to 1 (i.e., between California, the largest population state, and Wyoming, the smallest). And with current demographic trends, it will only keep getting worse: by 2040, two-thirds of Americans will be represented by thirty per cent of the Senate.
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> This has a direct effect on legislation. The Senate passes legislation opposed by a majority of U.S. voters, and rejects legislation supported by a majority of U.S. voters. This, too, is getting worse. In 2017, the "Senate was increasingly casting votes in which senators representing a minority of the population were defeating senators representing most of America." As a percentage of all passing votes as of April 2017, "far more were approved by less than half of the country's population. . .than in any year prior." (Quotation details are given.)
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> The bias is not just toward small states. Because rural, sparsely populated states tend to vote Republican, and highly urban, densely populated states tend to vote Democratic, the Senate skews rightward out of all proportion to actual American voter sentiment. In recent decades, Democrats' biggest voter and population gains have been in California and New York, yet these states represent only four per cent of the Senate. . .

He then goes on to give details of the skew between men and women and between white people and those of colour. It all makes Australia's Senate look a picture of representativeness. All of which

brings me back to Australia. My underlying analysis is that Paul Keating was right for the wrong reason. It is not the malapportionment that makes the Australian Senate unrepresentative swill. If that had anything to do with the case the much more badly malapportioned US Senate would not be so well regarded. Consequently, the explanation is simple. There are peculiar cases like those of Hamer and Ronaldson but the great majority of politicians like to think of themselves as having been directly chosen by the people. In the House of Representatives the member is precisely that. The senator, by contrast, can engage in the *legalistic pretence* that he/she was directly chosen by the people. However, these politicians know in their hearts that they have been appointed to the Senate by the party machine.

The "unrepresentative swill" comment by Keating is, I think, properly dispensed with by the above analysis. Unfortunately it is the case that my explanation of *my use of that phrase* has not yet caught on. I hope it will catch on but before it does I need to deal with another way of using that expression. I have made it clear in earlier chapters that there are three unfavourite commentators who I have in my sights. In order of the offensiveness of their comments they are Antony Green, George Williams and Kevin Bonham. In the immediate aftermath of the 2016 election Green and Bonham put forward their suggestions for "improving" what they deemed to be the "good" Turnbull, Xenophon, Di Natale and Joyce system. While I do not oppose their suggestions I dismiss them as putting lipstick on the pig. I was inclined to be more charitable to Williams. He had, at least, correctly predicted the decision of the High Court to (in effect) display its approval of a system I consider to be unconstitutional.

Any favourable disposition I had towards Williams, however, disappeared when an article by him appeared in *The Australian* newspaper on Monday, 25 June, 2018, page 12. It was titled "Chaotic, Unrepresentative – our Senate is the Swill Keating Described". To that the editor's description of the article added "The rules have to change to stop this chaotic game of political musical chairs". I now quote that article in full, interspersed by comments of my own. It begins this way:

> Paul Keating once described the Senate as unrepresentative swill. Australia's most recent parliaments have borne this out. In 2013, the voting system was gamed to enable micro parties to win Senate seats with a miniscule share of the vote. This turned the election into a lottery. Parliament responded by rewriting the rules so that Senate elections better reflected the popular will.

I begin by disputing the third, fourth and fifth sentences above. To the extent I concede that there is any substance in the third sentence it is my admission that Ricky Muir stole a Victorian Senate seat from Helen Kroger. At the 2013-14 half-Senate elections the Coalition secured 37 per cent of the vote giving them 17 seats which was 42.5 per cent, an over-representation of 5.5 per cent. Had Kroger retained that seat then the Coalition would have won 18 seats, or 45 per cent, an over-representation of 8 per cent. Consequent upon those statistics (and many others) I assert that the great reform supported by Green, Williams and Bonham was driven by the greed of the Liberal Party and that of then Senator Nick Xenophon. The parliamentary numbers for it were given by the stupidity of the Greens and Nationals. The reform in question simply replaced the second-worst-ever Senate voting system by the worst-ever, the present system owned by the above parties, seven High Court judges and stasiocratic commentators like Green, Williams and Bonham. The present system is nothing more than a cynical re-contriving of the contrivances of the former system. That re-contriving was done to benefit the machines of big political parties. The article continues:

> Even larger problems emerged after the 2016 election that demand a parliamentary response. During the past two years, the Senate has been decimated by resignations and

> disqualifications due to section 44 of the Constitution. One in five senators has departed, including almost half of the 20 minor party members on the crossbench. This unprecedented turnover has generated instability and arbitrary results. It has also weakened party loyalty. Allegiances have realigned, and free agents have emerged in unpredictable ways that affect the balance of power. Enacting legislation resembles a random numbers game. Important bills pass or are rejected depending on who happens to be in the Senate at the time and where their party allegiance lies. The Senate has become chaotic and unrepresentative, and so is unable to fulfil properly its role of scrutinising legislation and holding the government to account.

There are plenty of assertions there from which I lack the space to dissent. They come strange from a man who (among others) owns the voting system which put these 76 senators in their places. Even more strange is his reference to the "disqualifications due to section 44 of the Constitution." Here is a man who in 1999 lauded the decision of the High Court in Sue v Hill which (being an important precedent) caused all these disqualifications. Furthermore, these resignations and disqualifications only changed the left/right balance in one case. Left-leaning Jacquie Lambie was elected in July 2016 *to a six-year term*. The last three years (2019-22) of that term is being served by the Liberal Party's Jonathon Duniam while in the short-term Steve Martin held her seat consequent upon the recounting of votes as ordered by the High Court. It did not take him long to join the Nationals - but it did him no good. He was defeated in May 2019 and his term expired on 30 June of that year.

The points I make above are important - but they do not hold a candle to the *real objection* I have to the commentary of Williams. That objection is to the way he has supported the pretence of the High Court that senators are directly chosen by the people. If they are directly elected it is quite irrelevant whether they change parties during their terms of six years or shorter. They have been directly elected under a candidate-based electoral system and the party should have no hold over them. The article continues:

> The disloyalty of our senators cuts to the heart of the role of the chamber. The Senate is a house of political parties that just happens to provide equal representation to each state. At the 2016 federal election, 93 per cent of voters marked their ballot paper above the line to preference a political party rather than a candidate. In doing so, voters determined the composition of the Senate as between parties while leaving it to the parties to choose their representatives for up to a six-year term.

In that passage Williams states the situation the wrong way round. Section 7 of the Constitution requires equal representation to each state. To say "that just happens" is to re-write history in a way that is plainly false. It does not just happen – it is commanded by the Constitution! The statement that "the Senate is a house of political parties" is equivalent to saying that "the House of Representatives is a house of political parties", save only this: the machines of big political parties have never seen the need to nullify the words "directly chosen by the people" in Section 24. By contrast, purely to suit the convenience of the machines of big political parties (and for no democratic reason) they have nullified the words "directly chosen by the people" in Section 7. The collaboration of politicians doing filthy deals, High Court judges giving bad interpretations of the Constitution (essentially because they are Pharisees and gutless wonders) and the propaganda pumped out by so-called "respected independent commentators" means it just so happens that members of the House of Representatives are directly chosen by the people while the Senate has its worst-ever voting system. Under that system voters are "educated" to understand that the purpose of their vote is just to distribute numbers of party machine appointments between political parties according to a PR-STV formula. That combination of contrivances makes the Australian Senate voting

system the most dishonest STV system in the world. For further elaboration on these points my reader is invited to read chapters 3 and 9 again. Their titles are *Extreme Vetting* and *Judges Exercise their Power*.

The statistic that 93 per cent of voters cast their votes above the line is, of course, correct. However, in quoting such a statistic Williams is simply repeating the trick to which Antony Green has descended of pretending that voters "choose" such a way of voting. For further elaboration on Green see the Introduction and chapters 3 and 9. This "choosing" by voters is nothing more than their response to the loathsome contrivances put on to the ballot paper by the machines of big political parties – three contrivances in the system owned by Labor (1984-2014) and four contrivances in the present system owned principally by the Liberal Party. This "choosing" did not "just happen". It is part of the manipulation process which I denounced in the Introduction to this book.

The Williams article continues:

> The fact the Senate is a house of political parties also is demonstrated when a senator resigns. There is no by-election for the seat, as occurs in the House of Representatives. Instead, the Constitution mandates that the casual vacancy is filled by a member of the party that won the seat at the prior election. Even where a senator shifts from one party to another, a vacancy caused by their resignation will be filled by the party to which they belonged when they were elected. It is understandable that party loyalties can break down and irredeemable conflicts arise. However, senators should pay a price for discarding the party that enabled their election. This is because in almost every case the people have voted for a party representative rather than the individual. As a result, the right course for a senator who has left their political party is to resign from parliament.
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> An example is Cheryl Kernot, who resigned her Senate seat in 1997 when she left the Democrats to join Labor. She is an honourable exception. Others have preferred to remain in the Senate, with the perks and power that go with it. Meg Lees remained in 2002 when she left the Democrats, as did Mal Colston when he left Labor in 1996. In the 44th Parliament, Jacquie Lambie left the Palmer United Party to become an independent and then formed her own party. John Madigan, the Democratic Labour Party's first federal member since 1974, did the same.

The trouble with all that is the simple fact it overlooks: under the dishonest system of above-the-line Senate voting which Williams owns (along with others) senators are deemed to have been "directly chosen by the people". Consequently, *senators should NOT pay any further price* for discarding the party that enabled their election. I say "further price" to indicate the simple fact that Meg Lees, Mal Colston and John Madigan were never elected again. *They did pay a price*. There is no case that they should have paid any further price.

In my first chapter *Celebrating a Century of Preferential Voting* there is a description of Section 15 of the Constitution as it read on the day of my first published political commentary. That was in *The Sydney Morning Herald* on 30 August 1957, published twelve years before Williams was born. In that chapter I describe how there were (very rare) Senate by-elections in former times. In my eighty years of living there were Senate by-elections in 1963, 1966, 1969 and 1972. Such by-elections were put to an end by the 1977 amendment to Section 15, supported by solid popular vote majorities in all states at that May 1977 referendum. The change was to ensure that a new senator serve the entire balance of the term of the senator being replaced. It also placed firmly into the Constitution

the practice which was followed religiously from 1952 to 1974 whereby the party of the departing senator was entitled to the seat. That practice had been a "gentlemen's agreement" which broke down. Consequently the Australian people decided to put it into the Constitution to stop politicians mucking about with what had been accepted as decent behaviour.

I remember that 1977 referendum very well indeed and I say this without qualification: there was *not a single advocate* of an affirmative vote on that question who ever suggested the change to Section 15 would ever become a way to undercut the requirements of section 7. The passage I quoted from Williams about by-elections creates that impression. Should any reader gain that impression I can assure you of my facts. The 1977 *amendment to Section 15 does not undercut Section 7*. Consequently the position is clear: senators should be directly chosen by the people. Casual vacancies are the only exception to that rule. The Williams article continues:

> Disturbingly, this trend has accelerated in the present parliament. Disloyalty has become so commonplace that it seems to be readily accepted among minor party members. The changes themselves are complex and bewildering. A seat held by the Jacquie Lambie Network now belongs to the Nationals, a Nick Xenophon Team senator is an independent, One Nation senators represent Katter's Australian Party and the United Australia Party, a Liberal seat is held by the Australian Conservatives, and Family First has lost its only seat to the Liberals. In the past, there have been fewer such examples and the case for reform has been weaker. It has been more important to preserve the right of a senator to shift their allegiance in accordance with their conscience. This, though, can no longer be tolerated. The unprecedented number of party defectors across the past two parliaments demands a remedy. Changing parties has become so routine it undermines the legitimacy of the Senate and its democratic function of expressing popular will.

Needless to say I acknowledge his facts are correct but reject the arguments for his reform. All I can say about Williams is that one must feel sorry for a man who is so disillusioned with a reform he owns. By contrast I am very proud of the fact that I do not own the system he now condemns. I do condemn that system but my remedy is very different to that proposed by Williams. His article concludes:

> Parliament should change its standing orders to remove the benefits and voting rights of senators who abandon their party without resigning from parliament. It also should reform the law. Where a person leaves the party that has enabled their election to the Senate, their seat should be vacated. The seat then would be filled by a member of their former party. These changes are needed to restore the proper functioning of the Senate and to rebuild public confidence in the parliament.

I reject all of that but feel obliged to ask Williams to predict whether the High Court would uphold the changes he proposes. His track record has shown he is very good at predicting the High Court's decisions. Surely he cannot seriously expect the High Court to agree with his outrageous proposals!

That article, however, has done a public service. It has told the world what stasiocrats are like. Green and Bonham are stasiocrats but they would never be so unwise as to let the cat out of the bag in the way Williams has done. All three men own this present system – but Green and Bonham are wise enough to suggest only trivial improvements to it. I would be willing to support those Green-Bonham improvements if the basic system were decent. Until the Australian parliament gives the people a decent system I treat the Green-Bonham improvements as putting lipstick on the pig. By contrast I reject totally the Williams version of the stasiocracy to which all three men basically subscribe.

I see this struggle as being a contest between stasiocracy and democracy. They are the stasiocrats and I am the democrat. It reminds me of the remark attributed to failed 1928 US presidential candidate, Al Smith, that all the ills of democracy can be cured by more democracy. Whether that is true of American democracy has long been contested. It is certainly true of Australian democracy so far as its Senate is concerned.

FIRST APPENDIX TO CHAPTER SIXTEEN

Senators Replaced during the 45th Parliament

Original Senator	State	Replacement	Mechanism Used
Christopher Back (Liberal)	WA	Slade Brockman (Liberal)	Section 15
George Brandis (Liberal)	Queensland	Amanda Stoker (Liberal)	Section 15
David Bushby (Liberal)	Tasmania	Wendy Askew (Liberal)	Section 15
Stephen Conroy (Labor)	Victoria	Kimberley Kitching (Labor)	Section 15
Rodney Culleton (PHON)	WA	Peter Georgiou (PHON)	Recount
Sam Dastyari (Labor)	NSW	Kristina Keneally (Labor)	Section 15
Bob Day (Family First)	SA	Lucy Gichuhi (Liberal)	Recount
Katy Gallagher (Labor)	ACT	David Smith (Labor)	Recount
Skye Kakoschke-Moore (NXT)	SA	Tim Storer (Independent)	Recount
Jacquie Lambie (Independent)	Tasmania	Steve Martin (Nationals)	Recount
David Leyonhjelm (Lib Dem)	NSW	Duncan Spender (Lib Dem)	Section 15
Scott Ludlam (Greens)	WA	Jordon Steel-John (Greens)	Recount
Fiona Nash (Nationals)	NSW	Jim Molan (Liberal)	Recount
Stephen Parry (Liberal)	Tasmania	Richard Colbeck (Liberal)	Recount
Lee Rhiannon (Greens)	NSW	Mehreen Faruqi (Greens)	Section 15
Malcolm Roberts (PHON)	Queensland	Fraser Anning (Independent)	Recount
Nick Xenophon (NXT)	SA	Rex Patrick (Centre Alliance)	Section 15

In the above table note that the party of the replacement is shown as it applied in the dissolution of the 45th Parliament. Be it noted that the table does not include Larissa Waters (Greens, Queensland) since she was a senator both on the first day of sitting and on the last day of sitting of the 45th Parliament. For a ten-month period in 2017-18, however, her seat was occupied by Andrew Bartlett (Greens, Queensland).

A check will need to be made in respect of Victorian Labor Senator Jacinta Collins who in March 2019 is reported to have left the Senate to run the National Catholic Education Commission. According to some reports her replacement, Rafael Ciccone (Labor), was sworn in on Tuesday 26 March 2019. That would mean he was a member of the 45th Parliament under Section 15. He is presently a member of the 46th Parliament, having been elected in May to a six-year term, 2019 to 2015

SECOND APPENDIX TO CHAPTER SIXTEEN

Members who have served in both chambers

Member	House of Representatives	Senate
Abbott, PP	1913-19	1925-29
Badman, AO	1937-43	**1932-37**
Baume, ME	1975-83	1985-96
Best, RW	1910-22	**1901-10**
Bishop, BK	1994-2016	**1987-94**
Chaney, FM	1990-93	**1974-90**
Chapman, HGP	1975-83	1987-2008
Chipp, DL	1960-77	1978-86
Coates, J	1972-75	1981-96
Dein, AK	1931-34	1935-41
Duncan-Hughes, JG	1922-28 and 1940-43	1931-38
Evans, GJ	1996-99	**1978-96**
Fairbairn, G	1906-13	1917-23
Fawcett, DJ	2004-07	2010-
Feeney, DI	2013-18	**2008-13**
Fitzgerald, JF	1949-55	1962-74
Gibson, WG	1918-29 and 1931-34	1935-47
Gorton, JG	1968-75	**1949-68**
Guy, JA	1929-34 and 1940-46	1949-56
Hall, RS	1981-96	**1974-77**
Hamer, DJ	1969-74 and 1975-77	1978-90
Hannan, JF	1913-17	1924-25
Hanson, PL	1996-98	2016-
Higgs, WG	1910-22	**1901-06**
Jessop, DS	1966-69	1971-87
Joyce, BTG	2013-	**2005-13**
Keane, RV	1929-31	1938-46
Kernot, C	1998-2001	**1990-97**
Leckie, JW	1917-19	1935-47
McBride, PAM	1931-37 and 1946-58	1937-44
McColl, JH	1901-06	1907-14
McMullan, RF	1996-2010	**1988-96**
Martyr, JR	1975-80	1981-83
Marwick, TW	1940-43	**1936-37**
Massy-Greene, W	1910-22	1923-25 and 1926-38
Neal, BJ	2007-10	**1994-96**
O'Keefe, DJ	1922-25	**1901-06 and 1910-20**
O'Neill, DM	2010-13	2013-
Pratten, HE	1921-28	**1917-21**
Rankin, GJ	1937-49	1949-56
Rocher, AC	1981-96	**1978-81**
Ronaldson, MJC	1990-2001	2005-16
Short, JR	1975-80	1984-97
Smith, D	2019-	**2018-19**
Storey, WH	1917-22	**1904-17**

Sullivan, KJM (Formerly Martin, KJ)	1984-2001	**1974-84**
Tambling, GEJ	1980-83	1987-2001
Thistlethwaite, MJ	2013-	**2011-2013**
Thomas, J	1901-17	1917-23 and 1925-29
Wilson, KC	1949-54 and 1955-65	**1938-44**
Woods, RL	1987-93	1994-97

Source: *Parliamentary Handbook of the Commonwealth of Australia, 2017*, 45th Parliament, Parliamentry Library, page 500. I have updated the information to May 2019. Where the Senate term preceded that of the House of Representatives Senate years are shown in bold – Malcolm Mackerras.

Add the case of Sarah Henderson who was the HR member for Corangamite (Victoria) from 2013 to May 2019 and then a senator from September 2019 when she replaced Mitch Fifield. She was sworn in as a senator on Thursday 12 September 2019. It was noted in the media that her being a senator changed the gender balance. Henceforth there were 38 men and 38 women in the Australian Senate.