CHAPTER THIRTEEN: CONCLUSION

Australia's Senate voting system was greatly improved when it was altered in 1948 to change from the previous winner-take-all basis to providing for counting votes by proportional representation using the Single Transferable Vote. Unfortunately, that excellent system was then – and later even more so – significantly distorted by extra provisions being superimposed upon it. These are what I call "the contrivances", three from 1984 to 2014, four since 2016. Consequently, our Senate voting system now sets out to confuse, deceive and manipulate the voters. It does that for the benefit of the machines of big political parties. They designed it and own it.

The Senate is thus rightly described as *Unrepresentative Swill*, the title of this book, but not for the reason Paul Keating coined that term in 1992. The sub-title of this book was originally intended to be *Australia's Senate Vote Disgrace* which is what I actually think. My advisers, however, thought that made me sound too extreme so I settled for *Australia's Ugly Senate Voting System*.

It is not only our federal politicians that should hang their heads in shame. There are others too, chief among them being the judges of the High Court, those Pharisees that hand down so many laws from the bench. They have given reputability to a system that should universally be regarded as disreputable. The purpose of this book, therefore, is to provide a *ringing dissent* from those judgments of the High Court that have ruled above-the-line voting to be consistent with the Australian Constitution.

The first big High Court case is entitled *McKenzie v Commonwealth of Australia and Others – (1984) 57 ALR 747*. That was a case I merely watched from a distance. The sole judge, the Chief Justice, the late Sir Harry Gibbs, expressed his judgment 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 the High Court Judge accepted that above-the-line voting was consistent with section 7 of the Constitution, although it remains of concern that his use of the expression ". . . so offends . . . "might well record his having recognised *some* degree of offence to democratic principles – just not enough for a judge who, for political reasons, decided to allow the new system to go into operation.

My view is clear. Cyril John McKenzie was an ungrouped candidate who received 86 votes. He told Sir Harry 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. I agree with McKenzie. That unfairness *does so offend democratic principles* as to render the sections beyond the power of the Parliament to enact. For that and other reasons described in my chapter *Judges Exercise their Power* I rule the *McKenzie* judgment to have been wrongly decided.

The second big case was the one in which I assisted. Its official title 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*. It was handed down on Friday 13 May, four days after the double dissolution that was put into effect on Monday 9

May 2016. In this book I have preferred to call these by their short names, being *McKenzie 1984* and *Day and Madden 2016.*

I seek to make the Constitution's words "directly chosen by the people" fully operative again by getting rid of all the contrivances associated with above-the-line voting. My objective is to allow the Senate's proportional representation counting system to work properly. That brings me back to the chapter *Judges Exercise their Power*. In that chapter I noted this: "The big problem is High Court idolatry".

Being my ringing dissent, Chapter11 *Judges Exercise their Power* is the most important chapter in this book. In it I also referred to the way in which the Pharisees, having swallowed the camel of this horrible Senate voting system, then proceeded to strain a dozen gnats out of federal parliament. For the record here is a list of the 12 gnats in the 45th Parliament who were "strained out" by the power of the judges of the High Court: Rodney Culleton, Bob Day, David Feeney (House of Representatives), Katy Gallagher, Hollie Hughes, Skye Kakoschke-Moore, Jacquie Lambie, Scott Ludlam, Fiona Nash, Stephen Parry, Malcolm Roberts and Larissa Waters. Eleven names in the above alphabetically arranged list were senators while Feeney was a member of the House of Representatives.

The second most important is Chapter 12 *Is the Senate "Unrepresentative Swill"?* Whether I like it or not, whether senators like it or not, the Australian Senate will always be known for that description. However, it will mean different things to different people. For Paul Keating and Graham Richardson it will bear that description due to the malapportionment – insignificant though it is compared with that of the US Senate. For George Williams it will bear that description because the voting arrangements are not sufficiently stasiocratic. For me, by contrast, I firmly intend to stop using that description once the electoral system is genuinely democratic.

Operation of the Sixth Australian Senate Voting System

The sixth Australian Senate voting system first operated at a Senate general election for which polling day was Saturday 2 July 2016. Its second operation was in respect of the periodical election for half the Senate for which polling day was Saturday 18 May 2019. That was the critical election. Its result proved beyond doubt the truth that I always asserted. The *Commonwealth Electoral Amendment Act 2016* was always nothing more than the Coalition rigging the system in its own favour.

Throughout the years 2013, 2014 and 2015 my campaign was against the *prospect* of it. Throughout the months of February, March, April and May 2016 I campaigned against the *legislation* for it. My campaign now is against the *whole idea of such an outlandish and dishonest system*. The best word now to describe it is the word used in the title of this book – UGLY.

The *Commonwealth Electoral Amendment Act 2016* introduced into Australian electoral law-making a wholly new idea. It is the concept of the noble politician that deceived the voter for the voter's own good - a bad notion to contemplate! There was nothing noble about the filthy deals that were done to get the required parliamentary majorities for the implementation of the system. The whole thing was driven by the greed of the collaborating parties that did deals with each other. Unfortunately, they won – at least in the short term.

The one aspect of it that greatly pleased me was the way in which it quickly backfired against three of the four collaborating parties. In the short term the only beneficiary was the fourth party, Nick Xenophon. He increased his Senate numbers from one (himself) to three, but then blew it with his quixotic bid to become a significant leader in the Parliament of South Australia. He failed spectacularly so I was at least able to commit the sin of *schadenfreude* – assuming it is a sin to take delight in the misfortune of such a disreputable collection of party politicians.

Now that the history books mark Malcolm Turnbull, Nick Xenophon and Barnaby Joyce as failed leaders the time has come to scrap the Senate voting system that was concocted by them and is surely the worst-ever Senate voting system, in addition to being the worst voting system to operate in Australia today. My reform would make a very worthy replacement – which is why I have written this book.

Thus far I have not mentioned the fourth collaborator, Richard Di Natale. He has retired but I am hopeful his party will one day endorse the reforms I propose. However, the big beneficiary has been Scott Morrison. Labor today has 26 senators, the same number as three years ago. The Greens have nine, the same number as three years ago. However, the Coalition has 36 where it had 30 three years ago. That is because (in net terms) the cross bench has six senators fewer. They were defeated or retired from the Senate in expectation of defeat. One was the independent Derryn Hinch. One was Senator Tim Storer, very much a man of the left. The other four were elected in 2016 from minor parties of the right. In net terms all six seats went to the Liberal Party. Those six new senators are, therefore, reliable supporters of the Coalition, contrasting with the unreliable senators they replaced.

How Does One Change the System?

There exists a significant degree of public support for my views – but I cannot really measure how much. The interesting case is the Proportional Representation Society of Australia. The members of the PRSA certainly stand upon a moral high ground, but I think it to be a *peculiar* moral high ground! Their definite view is that the *Commonwealth Electoral Amendment Act 2016* brought about an improvement to the Senate voting system, and that my scheme would be a further improvement. They assure me that they favour scrapping what they call "the above-the-line contrivance". Note the use of the singular. It is one contrivance in their view where I insist there are *four contrivances* in the Senate system.

The PRSA also advocates that a single first preference vote should - if that is all a voter is prepared to provide - always count as a formal vote. I reject that view, as does Chris Curtis. The PRSA does accept that it is permissible to instruct voters to mark preferences up to the number to be elected, because

- that avoids the theoretical, and constitutionally undesirable, possibility of fewer than that number of candidates names having preferences marked against them, and

- it is always desirable to encourage the marking of preferences in a transferable vote system, and to avoid it becoming a *de facto* first-past-the-post system.

It is to be noted that the Tasmanian Hare-Clark system requires five squares to be numbered for a vote to be formal, with five being the current number (since 1998) to be elected in each electoral division. When seven was the number to be elected (from 1959 up to, and including,

the 1996 election) the Tasmanian Hare-Clark system required seven squares to be numbered for a vote to be formal. The current ballot paper reads on the bottom: "Your vote will not count unless you number at least 5 boxes." The previous ballot paper did the same (in less felicitous language) in respect of seven-member divisions. In effect it said: "Your vote will not count unless you number at least 7 squares". Anyway, the point is that the Tasmanian voter is left in no doubt about the formality rules. That is as it should be. It is not the case with the current Senate ballot papers, which concentrate on indicating the voter's duty – as defined by the Parliament's law – and do not clutter the ballot papers with all the details of the law's concession rules with regard to formality, which include acceptance of a single tick or cross above the line, and are irrelevant to voters that wish to do their duty as defined.

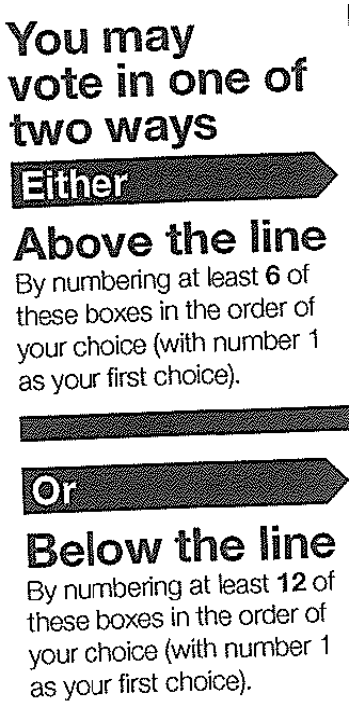
The contrivances of the Senate voting system have developed over time. My view is that the present four are really nothing more than dirty tricks played on voters by the machines of big political parties. The politicians (and their media cheer squad) claim that their reforms have been designed to help voters. I reject that claim. The politicians have been helping themselves by doing what their party machines require. Consequently, their ballot papers are voter-unfriendly but party-machine-friendly.

The PRSA advocates another feature of Hare-Clark, Robson Rotation. While I accept Robson Rotation where it now operates, I do not insist upon it. The PRSA also advocates the banning of "how to vote" material on polling day outside polling places, as each is the law of Tasmania's elections for both houses of its Parliament. I regard such material as simply being part of Australia's federal and mainland political culture.

However, I think that the most peculiar of the stances of the PRSA is its insistence that the present Senate system is democratically superior to the system whereby the Victorian Legislative Council is currently elected. I reject that view entirely, as does Curtis. The Victorian system needs reform along the lines outlined by me in my chapter *Victorian Exceptionalism* but, even unreformed, it is still better than the Senate system. Whereas the Victorian system is honest, that for the Senate is dishonest. The unreformed Bracks-owned Victorian system conforms to the requirements of the Victorian Constitution. The "reformed" Turnbull-owned Senate system is contemptuous of the requirements of the nation's Constitution.

The leaders of the PRSA are far too doctrinaire for my tastes. In conversation with them I find it most irritating when they dispute the word "deceitful" I use to describe the instructions on the Senate ballot paper – shown below. They suggest that imputing dishonourable motives to particular details of legislation serves little purpose, when the benefit of discontinuing the Group Voting Ticket has been achieved, albeit it only having been replaced by an arguably better, but still less-than-decent system, rather than the sought discontinuance of ANY above-the-line option.

They say I should use the words "incomplete" or "oversimplified". Both words are correct as are "inaccurate" and "misleading". Those words are far too weak for me to consider using. I



KNOW that the words are deceitful. The voter is deliberately intended to believe that certain types of votes are informal when in fact they are just as formal as those following the instructions. I invite readers to study those instructions and make up their minds about how they should be described. I should add that several individual members of the PRSA have told me they agree with me that the instructions are deceitful. I have yet to meet an ordinary member of the public who disputes my description of the instructions.

In any event I think I am making progress with the PRSA. On the night of Thursday, 12 July 2018 it was possible for me to persuade the ACT Branch of the PRSA to pass a motion supporting my reform proposal. The resolution adopted reads as follows:

> That the ACT Branch would support a change to the Senate voting system which would see the removal of above-the-line voting and only have optional preferential voting (similar to the voting system for the Tasmanian House of Assembly and the ACT Legislative Assembly). Under these conditions, the Branch could support an increase in the Senate membership to allow 14 senators per State and a corresponding increase in the size of the House of Representatives.

The precise wording of that resolution is interesting. It was drafted in consultation with PRSA members Martin Dunn, Julie McCarron-Benson and Stephen Morey. I think it shows that at least one branch of the PRSA recognises it is in the interests of all the parties (both major and minor) to have an odd number of Senate places to be filled at each periodic election of State senators - to avoid stalemates an even number facilitates - and that support for such improvement could advantageously be linked to a policy of such parties also to discontinue provisions for above-the-line voting. Raising that number from six to seven would increase the size of the Senate from 76 to 88.

The precise wording of that resolution illustrates the reluctance of PRSA members to encourage *any increase* in the number of politicians representing single-member constituencies. For as long as the present voting system for the House of Representatives stays in place it rankles with many PRSA members that an increase of 12 senators would

cause an increase of 24 members of the House of Representatives. However, the long-standing policy of the PRSA is to have above-the-line voting discontinued. Hence that branch's support for me in this case.

Further success with the PRSA then became my goal. It would, I thought, be highly desirable if the PRSA nationally adopted a resolution similar in its thinking to that of the ACT. I consulted with Victoria-Tasmania branch Secretary, Geoff Goode, who was PRSA National President from 1986 to 1994. He drafted for me a motion to put to the Victoria-Tasmania branch Council but was not able to get support there.

I then came to understand that my proposal might well run into more trouble than I had expected. One or two individual State branches might not be on the same page as me. There was, therefore, no point in the spending of my own money visiting all the branches when I may be rebuffed by one or two of them. So, I must content myself with success with the ACT Branch only.

It does not really matter. The long-standing national policy of the PRSA is to have above-the-line voting discontinued. It is also to have odd-numbered district magnitudes. This raises an interesting set of statistics about my reform proposals. At present Australia has a total of 837 politicians in 15 houses of parliament. Of those only 112 (76 senators and 36 in the WA Legislative Council) are chosen from even-numbered district magnitudes. If all my reform proposals were adopted, however, there would be between 870 and 875 Australian politicians of whom only four would be elected from even-numbered district magnitudes. The four in question are the two senators elected from the Northern Territory and the two from the ACT.

I know that there exists a significant number of members of the PRSA who agree with me more-or-less entirely. There also exists a huge number of members of the general public who agree with me entirely. These considerations illustrate both the strength and weakness of my position. The politicians make electoral laws, but they occupy the lowest moral ground possible to imagine. They do what is demanded by their machines. Those machines want to continue the system that is, *de facto*, a party machine appointment system - and not a genuine direct election. Yet the politicians *just might agree* to a decent Senate voting system in return for having an extra 24 seats in the House of Representatives justified by third-party validation.

Both the PRSA and I understand the reality of this. We both want the Senate reform I propose. A by-product of that Senate reform would be the creation of 24 more seats in the House of Representatives. Where I differ from the PRSA lies in the simple fact that I give that a higher priority than it does.

In any event my problem with the PRSA is trivial compared to my problem with the politicians that always place the short-term interests of their own machines ahead of all other considerations. During debate about the *Commonwealth Electoral Amendment Act 2016* I would frequently describe it as breathtaking in its contempt for the Constitution. I was accused of over-stating my case, but I continue to hold that opinion. Perhaps my alternative would be to accuse the politicians of contumacy, which is defined as "perverse and obstinate resistance to authority". The authority I have in mind is the Constitution. The problem there is the simple fact that the judges of the High Court regularly uphold the right of federal politicians to be contumacious.

In my *Introduction* I referred to the famous quip by Sir Winston Churchill: “The Americans can always be relied upon to do the right thing – but only after they have exhausted every alternative”. My hope is that I shall live to see the day when I am able to say this: “Australia’s federal politicians can always be relied upon to do the right thing – but only after they have exhausted every alternative”.