

SENATE CASUAL VACANCIES: INTERPRETING THE 1977 AMENDMENT

1. Introduction

One of the three constitutional amendments approved by referendums on 16 February, 1977 was the Constitution Alteration (Senate Casual Vacancies). It omitted previous section 15 of the Constitution,¹ and substituted the following provisions.

"[1] If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

[2] Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless

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1. Previous s. 15 provided as follows:

"If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General."

According to Quick and Garran, *Annotated Constitution of the Commonwealth of Australia* (1901), 435, s. 15, which was modelled on an equivalent provision in the U.S. Constitution (Art. I s.3(2)), was adopted because of the expense of filling vacancies by popular election. But s. 15 was consistent with other provisions (ss. 7, 8, 10, 12) according to the States a considerable influence over the process of election of senators. These provisions were acceptable because of the prevailing view that the Senate would be a States' House rather than a party House. The U.S. provision has itself been superseded by Amendment XVII (adopted 1913), providing for new elections to be held to fill Senate vacancies; the State legislatures are empowered to make temporary appointments until that election. *Cf. Valenti v. Rockefeller* 292 F. Supp. 851 (1968); *affd.* 393 U.S. 405 (1969); *reh. den.* 393 U.S. 1124 (1969).

there is no member of that party available to be chosen or appointed, be a member of that party.

[3] Where —

- (a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and
- (b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist), he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution.

[4] The name of any senator chosen or appointed under this section shall be certified by the Governor of the State to the Governor-General."²

In some respects, at least, new s.15 is unusual. Its references to political parties are unprecedented in Australian constitutions, though not in Australian legislation.³ It makes detailed provision for contingencies such as a party ceasing to exist, or nominees ceasing to be members of a political party. It enacts a convention in terms repeatedly held to be either improper or impossible to draft.⁴ Since it seems certain that s.15 was intended to be and would be held to be justiciable,⁵ its interpretation is a matter of some interest, the more so since the first vacancy to be filled under it involved just such events as changing party affiliations and the dissolution of political parties. In this article, some problems of the interpretation of new s.15 will be discussed in the light of the debate over the vacancy caused by the resignation of Senator R. S. Hall in 1977.

2. Senate Casual Vacancies practice before 1977

(1) Senate Casual Vacancies before 1974

Before the introduction, in 1949, of proportional representation, the system of Senate elections usually resulted in the election for any one State of senators of a single party (or coalition). In these circumstances it might

2. Paragraph nos. have been inserted for convenient reference. Further paras. make transitional provisions (paras [5]-[7]), and provision consequent upon the Constitution Alteration (Simultaneous Elections) Bill, 1977. The latter Bill failed to be adopted, so that para. [8] is of no force.

3. *Infra* n. 81.

4. *Infra*, text to nn. 9-11.

5. S.A. *Parl. Paper* No. 143 (1978), 9 (H. R. Hudson, M.P.). Although it might be argued that issues arising under new s. 15 were "political questions" and so not justiciable, the whole purpose of the amendment was to alter a situation in which State Parliaments could choose whom they wished, without legal control or sanction. A constitutional directive to the State Parliaments which was not enforceable in the courts would not have added much to the previous situation of an unenforceable convention. In any event, arguments for non-justiciability based on the political nature of an issue have not enjoyed much success in Australia: see Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed., 1976), 34-35 for citations.

An analogous situation is enquiry into religious "doctrines, creeds, confessions, formularies and tests": the High Court in *A.G. (N.S.W.) ex rel. MacLeod v. Grant* (1976) 10 A.L.R. 1 showed as little hesitation as the House of Lords in *General Assembly of Free Church of Scotland v. Overtoun* [1904] A.C. 515 in inquiring into such controversial matters; cf. Gibbs J., *id.*, 11. Cf. however Murphy J., *id.*, 20-22, allowing only inquiry into cases which can be decided on "neutral principles of law" or which involve "fraud, collusion or arbitrariness." The *forum* for determining issues under s. 5 is of course a distinct question: see *infra* n. 57, and cf. Sawyer, *Federation under Strain, Australia 1972-1975* (1977), 195.

have been expected that State parliamentary majorities would take the opportunity afforded by old s.15 to appoint one of their own supporters to a vacancy caused by the departure of a senator of a different party.⁶ Nonetheless, as Rydon has shown,⁷ the argument that the replacement senator should be a member of the same party as his predecessor was usually advanced, and in some cases attended to.⁸

The introduction of proportional representation had important implications for s.15. As a Senate Select Committee pointed out in 1950:

"It may be that casual vacancies scarcely mattered in the past, because Senate majorities were usually large. But with the prospect of consistently fairly evenly divided Senates, due to proportional representation, casual vacancies take on a new significance."⁹

The Committee recommended that s.15 be repealed and that the Commonwealth Parliament be empowered to determine how future casual vacancies should be filled. They also recommended the adoption of some legal mechanism to ensure that casual vacancies be filled by a senator of the same political party as his predecessor. Since it was regarded as undesirable to mention political parties "either in the Constitution or in federal legislation", they preferred a system by which a departed senator's vote would be transferred to the next candidate on the ballot paper as indicated by the preferences on those votes.¹⁰ The effect of this system would have been that major parties would have nominated one or more 'reserve' candidates to be available to fill casual vacancies. Nonetheless the proposal had its problems: what if the 'reserve' candidate had died, changed his party allegiance, or was otherwise unavailable? Perhaps for these reasons, the Joint Committee on Constitutional Review in its 1959 Report rejected this solution. The Committee reported that, although it had attempted to frame an amendment, it could not . . .

"find suitable language which would have covered all possible contingencies and, at the same time, avoided reference to political parties in the Constitution. By way of illustration of the difficulties . . . it would have been necessary, in any constitutional alteration, to deal with possible cases of a vacating senator who joined another party after election, became a member of another party because that party succeeded the party in existence at the date of election or who, for that matter, was not a member of any party. The difficulties proved to be insurmountable."¹¹

6. E.g. the replacement in 1928 of Givens (Nat.) by McDonald (Lab.). Premier McCormack (Lab.) claimed to be "entitled to nominate a senator as we are in a majority here; but over and above that, we make a further claim that Labour in Queensland, particularly at the present moment, is not represented in the Senate": Qld., 151 *Parl. Debs.* (1928), 84.

7. Rydon, "Casual Vacancies in the Australian Senate", (1976) 11 *Politics* 195.

8. There were 39 casual vacancies between 1901 and 1949. 28 replacement senators were of the "same" party, including coalition party members elected with some support from the party of the departed senator. This is, however, an imprecise estimate because of fluctuations in parties, problems of cross-voting, etc. Of these 28, 11 were elected in States where a "different" party was in power, but in only 7 cases was the successful candidate supported or unopposed by the State Government. See Rydon, *loc. cit.* (*supra* n. 7), 202-204.

9. Commonwealth of Australia, Senate, *Report from the Select Committee appointed to consider and report upon the Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill* (1950) (P.P. No. 51), xix.

10. *Id.*, xx, xxxi.

11. Commonwealth of Australia, *Report from the Joint Committee on Constitutional Review* (1959), para. 287.

In fact between 1951 and 1959 eight Senate vacancies had been filled by nominees of the same political party: four of them were elected by State Parliaments controlled by a different party.¹² This consistent practice the Joint Committee may have thought reduced the need for formal constitutional amendment.

The practice owed its origin to an exchange of correspondence between State Premiers in 1951-1952, initiated by the Western Australian Premier D. R. McLarty.¹³ McLarty's proposal was that . . .

"in view of the fact that proportional representation is now the method of election to the Senate, a member of the same party, nominated by the Executive of the Party, should be appointed when future vacancies arise through death or other causes."¹⁴

The Premiers' responses had varied considerably. Only two unequivocally agreed.¹⁵ Another indicated his *personal* agreement, where the vacancy was caused by the death of the sitting member.¹⁶ McGirr (New South Wales) merely said that if the proposal could be made 'a permanent and binding one on all governments as well as on political parties now in opposition . . . it would be a good thing',¹⁷ a very equivocal endorsement. Playford (South Australia), in a curious and contradictory message, appears to have positively disagreed.¹⁸

As a result of these ambiguities and uncertainties, the correspondence, taken in isolation, is unimpressive support for a 'convention';¹⁹ but the point is that it was followed by a consistent practice, in the period between 1952 and 1974, of appointing members of the same political party to casual vacancies. That practice was followed in all Australian States: in each State on at least one occasion the departing senator was of a different party from the State Government.²⁰ The practice was unanimously recommended by the Joint Committee on Constitutional Review in 1959, although the terms of their recommendation appear to indicate that they did not regard the practice as yet a 'constitutional convention or understanding'.²¹ The view that the 'McLarty principle' had, at any rate by the 1960's, become a 'constitutional convention' is also supported by Odgers,²² and others.²³

12. See the Table in Odgers, *Australian Senate Practice* (5th ed., 1976), 107-108.

13. The correspondence in set out in Sawyer, *op. cit.* (*supra* n. 5), 199-202.

14. Letter of 10 January, 1952, *id.* 200.

15. Cosgrove (Tas.) letter of 16 January, 1952 ("I agree with your opinion"), *ibid.*; Gair (Qld.), telegram of 23 January, 1952 ("My government agrees with proposal . . . (R)epresentations should be made to Prime Minister to have necessary alteration to Constitution"), *id.*, 201. But as Sawyer points out (*id.*, 132), Gair's reply refers only to a "deceased Senator": it is not clear whether this partial response was deliberate.

16. McDonald (Vic.), letter of 29 January, 1952, *id.*, 201.

17. Letter of 18(?) February, 1952, *ibid.*

18. Telegram of 23 January, 1952, *ibid.*

19. *Id.*, 132-133.

20. There were 25 casual vacancies in this period; 11 of the departed senators (and therefore their replacements) were of parties not in government in the State. The figures are as follows: W.A. 6 (3); Tas. 1 (1); S.A. 5 (2); N.S.W. 4 (1); Vic. 6 (3); Qld. 3(1). See Odgers, *op.cit.* (*supra* n. 12), 107-108.

21. *Op. cit.* (*supra* n. 11), para. 291; *cf. id.*, (Interim) *Report from the Joint Committee on Constitutional Review* (1958), para. 60.

22. The conclusion that a convention existed was stated in the 3rd ed. of *Australian Senate Practice* (1967), 57; repeated in the 4th ed. (1972), 65. The term "practice" is used in the 5th ed. (1976), 106; *cf. id.*, 113-114.

23. Lumb and Ryan, *The Constitution of the Commonwealth of Australia Annotated* (1974), 44 ('recent precedents suggest the growth of a convention . . .'); but *cf.* their 2nd ed. (1977), 47 ('a practice was followed').

Before considering the 1975 vacancies and the constitutional amendment, some comments on the pre-1975 practice may be made. In the first place, in its original formulation the 'convention' was to apply to vacancies arising 'through death or other causes'.²⁴ Although some of the responses to the proposal referred only to vacancies caused by death,²⁵ in fact the principle was applied to vacancies however arising (including vacancies caused by the appointment of a senator to judicial or other office).²⁶

Secondly, the practice was followed of allowing the nomination of the replacement senator by the party in question, although on a few occasions more than one nomination was 'requested'.²⁷ On no occasion was a party member chosen against the wishes of the party.

Thirdly, on one occasion a senator had become an independent since his election. The view then taken by the State Government was that the relevant party affiliation was that at the time of the election.²⁸ But there was no case of resignation or death of a senator elected as an independent, or of a political party to which a departed senator belonged having ceased to exist since the relevant election. The application of the practice to such circumstances thus remained problematical.

(2) *Senate Casual Vacancies Practice before 1977*

These uncertainties, and the doubts expressed by some writers about the notion of 'convention' itself,²⁹ were emphasized by the events that followed the two casual vacancies of 1975. When Senator Murphy (Labor) was appointed to the High Court, the New South Wales Parliament (with a non-Labor majority) appointed an independent nominee, claiming to be justified by their view that the appointment was an improper one.³⁰ No such claim had been made when previous vacancies the result of political appointment had been filled,³¹ but, of course, it was argued that the previous appointments were not improper. In the second case, the Queensland (National-Liberal Party coalition) Government nominated a member of the Labor Party unacceptable to the Party: the nominee was automatically expelled from the Party in accordance with its constitution and took his

24. *Supra* n. 14.

25. *Supra* nn. 15, 16.

26. Of the casual vacancies between 1951 and 1975, only 5 were the result of resignation. The reasons for resignation were as follows: Spicer (1956), appointed Chief Judge, Australian Industrial Court; Spooner (1965), retired due to ill health; Gorton (1968), resigned to contest House of Representatives seat of Higgins, Vic.; Rankin (1971), appointed Australian High Commissioner to New Zealand; Prowse (1973), retired due to ill health. *Cf. Sawyer, op. cit. (supra* n. 5), 137-138.

27. For the 1962 Queensland case see *id.*, 134-135. An earlier instance occurred in Victoria in 1931: Rydland, *loc. cit. (supra* n. 7), 197.

28. South Australia, "Joint Sitting of the Two Houses for the Choosing of a Senator, 2 November, 1967"; Parl. Paper No. 98 (1967) (Laucke *vice* Hannaford). For comment see Sawyer, *op. cit.*, (*supra* n. 5), 133-134.

29. Comment (J.A.G.) [1963] *Public Law*, 401 (though the asserted convention discussed there is misstated); Munro, "Laws and Conventions Distinguished", (1975) 91 *L.Q.R.* 218, 234-235; Reid, in Evans, ed., *Labor and the Constitution 1972-1975* (1977), 243-245. Hanks, "Parliamentarians and the Electorate", *id.*, 166, 186-187 argues for a purely descriptive, not a prescriptive, use of the term 'convention', although he goes on to discuss the casual vacancies convention in a prescriptive way: *id.*, 187-190. The point is that one can never be criticized for failure to comply with a description: *cf. Coper, id.*, 213-214. And see esp. Sawyer, *op. cit. (supra* n. 5), ch. 9, esp. 191-192, proposing the retention of 'convention' only in limited circumstances.

30. *Id.*, 137.

31. *Supra* n. 26. But Sawyer points out that in none of those cases did the opposing party have a majority in the State parliament: *op. cit.*, 137.

seat as an independent. But again, the Queensland Parliament's demand for a choice of nominee was not quite without precedent,³² although since 1949 no Parliament had taken its assertion of a right to choose so far. In both cases the lack of clear definition of the 'convention' and the absence of machinery for adjudication assisted the State Parliamentary majorities in achieving their aim.

The 1975 casual vacancies have been fully discussed elsewhere.³³ Since they led directly to the deferral of supply and the subsequent dismissal and defeat of the Whitlam Labor Government, and since the deferral of supply was itself, on some views, a breach of convention, the criticisms of the notion of 'convention', referred to already, were given added force.³⁴ Even to those who accept the continued utility of the category 'convention', the events of 1975 clearly raised the issue whether this convention could have any continuing validity or (if 'validity' is the wrong word for a set of primary rules) acceptance. A Senate resolution³⁵ and debate in the Australian Constitutional Convention³⁶ failed to reaffirm the convention in unequivocal terms. Although a further vacancy was filled in accordance with the convention in 1976,³⁷ some writers doubted whether the convention had survived.³⁸

Standing Committee D, in its Report of 1 August, 1974, recommended that the Constitutional Convention reaffirm the "principle" in terms taken

32. *Supra* n. 27.

33. Hanks, *op. cit.* (*supra* n. 29), 183-190, and commentaries by Brazil (208) and Coper (213-214); Editorial, (1975) 49 *A.L.J.* 153 (arguing for the 'invalidity' of the convention as inconsistent with s. 15 of the Constitution itself: *sed quaere*); Sawyer, *op. cit.* (*supra* n. 5), 135-140; Odgers, *op. cit.* (*supra* n. 12), 105-107.

34. But the existence of a particular convention is sometimes at least a step in judicial reasoning. For a recent example see *Commonwealth v. Queensland* (1975) 7 *A.L.R.* 351, where a crucial step in the argument by which the High Court unanimously invalidated the Appeals and Special Reference Act, 1973 (Qld.) was the characterization of the Privy Council determining a reference as a 'court' exercising 'judicial power'. The Court based this characterization expressly upon the relevant conventions relating to the operation of the Judicial Committee: (1975) 7 *A.L.R.* 351, 359-360 *per* Gibbs J. (with whom Barwick C.J., Stephen and Mason JJ. agreed), 369-370 *per* Jacobs J. (with whom McTiernan J. agreed) ('a convention of the Constitution a departure from which need not even be contemplated'). *Cf.* Murphy J., *id.*, 377. An alternative argument, which would not have depended so starkly on the relevant conventions, would have been that Ch. III of the Constitution itself treated the Judicial Committee as a court.

35. Text in Odgers, *op. cit.* (*supra* n. 12), 106. A Government sponsored resolution referred to the 'long-established convention': the Opposition parties successfully amended this to refer to a 'practice'; this was not merely a dilution, since 'practice' is a descriptive term only. For the debate see 63 *Parl. Debs. (Senate)*, 111-129, 146-173. A further resolution (this time in the House of Representatives) relating to the 'Field affair' used both terms: see 96 *Parl. Debs. (H. of R.)*, 924-941.

36. *Proceedings . . . Hobart, 27-29 October 1976*, 115-120, 122-133. The original motion proposed that the Convention "affirm[s] the principle" in general terms. An amendment restricted the ambit of the "principle" to cases of "disqualification or resignation of a Senator caused by *bona fide* illness or incapacity". The amendment was agreed to by 48-39, with voting broadly on party lines: the amended resolution was then agreed to by 48-42, the opposition coming from a combination of those who thought the resolution went too far and those who thought it did not go far enough.

37. Victoria, 330 *Parl. Debs.*, 5624-5627 (7 December, 1976) (Lewis *vice* Greenwood). On that occasion the Liberal Party Premier referred to "a tradition" which had been "followed with members of all parties for a number of years" (*id.*, 5626). The Labor Acting Leader of the Opposition referred to "the long standing convention" (*ibid.*). The Leader of the National Party made no reference to this issue.

38. *Cf.* Lumb and Ryan, *op. cit.* (*supra* n. 23).

from the Joint Committee Report of 1959.³⁹ At the same time they rejected the system of transfer of preference votes which, as we have seen, had been recommended in 1951 as the best method of statutory implementation of the principle.⁴⁰ The Standing Committee found the drafting difficulties involved in any formal amendment 'insurmountable', and in the same way and for the same reasons as the 1959 Report made no recommendation for change. But at the 1976 Session at least some indication was given that the drafting problem might be solvable, despite an unhappy and inconclusive debate.⁴¹

3. The 1977 Amendment : Preliminary Issues

In fact the Commonwealth Government introduced the Constitution Amendment (Senate Casual Vacancies) Bill a few months later without further recourse to the Constitutional Convention. Opposition to the Bill was limited to a few senators.⁴² Perhaps the most substantial objection was that a constitutional amendment based upon proportional representation was undesirable since proportional representation could be changed by ordinary Act.⁴³ It was also said that the amendment did not cover the field, and in particular that it made no provision for the replacement of Independents.⁴⁴ Another more general criticism was that an amendment had repeatedly been said to be impossible to draft, although no convincing criticism was made of its actual terms.⁴⁵ Others have thought the drafting 'ingenious',⁴⁶ and the amendment was adopted in the May 1977 referendum with majorities in all States.

Generally, new s.15 is a comprehensive statement of the 'convention', in the most extensive form it could be said to have had in 1974. For example, it applies to casual vacancies however arising; no distinction is made between death or resignation through 'bona fide incapacity' and other causes of casual vacancies. This is in accordance with the practice before 1975, but goes further than the Constitutional Convention's resolution of 1976.⁴⁷ The requirement (s.15 para. [3]) that the nominee be a member of the 'particular political party' both at the time he is chosen and at the time he takes his seat in the Senate⁴⁸ will probably in practice lead to the

39. Australian Constitutional Convention 1974, Standing Committee D, *Report to Executive Committee* (1 August, 1974), 14.

40. *Ibid.*, and see the Report by Lindell and Riordan, *id.*, 68-70. Cf. Electoral Act, 1907-1976 (Tas.), s. 132A, which adopts this method of filling casual vacancies for the Assembly.

41. Senator Durack, *Proceedings . . . Hobart*, 27-29 October 1976, 129.

42. The Bill was unopposed in the House of Representatives: *Parl. Debs. (H. of R.)*, 16 February, 1977, 146-147. For debate in the Senate see *Parl. Debs. (Senate)*, 17 February, 1977, 196-197; *id.*, 25 February, 1977, 486-492.

43. *Id.*, 491 (Sen. Wright).

44. *Id.*, 488 (Sen. Harradine).

45. *Ibid.*, (Sen. Sir Magnus Cormack).

46. Sawyer, *op. cit.* (*supra* n. 5, 193).

47. *Supra* n. 36.

48. A person takes his "seat" as a senator upon taking the oath or affirming under s. 42 of the Constitution. However, s. 15 both before and after 1977 referred to the "place" of a senator, and new s. 15 para [3] appears to distinguish clearly between "place" and "seat". It would seem therefore that if a senator dies after his election but before taking his seat under s. 42, he has a "place" which becomes vacant for the purposes of s. 15. This should be so even if the senator's term has not yet commenced. But cf. Odgers, *op. cit.* (*supra* n. 12), 176 (where the distinction between "seat" and "place" is not taken). Such a result is desirable because it avoids the expense of a new election to fill the place (cf. *Vardon v. O'Loghlin* (1907) 5 C.L.R. 201, 216 per Isaacs J.) but even more because it avoids the distorting effect in a system of proportional representation of a special election for a single vacancy. But if a senator's election is for any reason declared void under the Commonwealth Electoral Act, 1918, Pt. XVIII, there

acceptance by the State Parliament of a single nominee of that party, since any other person could be expelled from the party before taking his seat.⁴⁹ As a result of these provisions the appointment of Bunton *vice* Murphy would have been illegal under para. [2]; the appointment of Field *vice* Milliner would not have been illegal, but would have been avoided under para. [3]. The amendment thus provides a striking example of the proposition that 'breach of a convention is likely to induce a change in the law'.⁵⁰

New s.15 also adopts the view taken in the Hannaford case in 1967⁵¹ that the political complexion of the departing senator is to be determined at the time of his election rather than at the time the vacancy occurs. This distinction, which was ignored in the 1976 resolution,⁵² is more consistent with the reason for s.15 and for the practice since 1949: that is, that the voters who elected the departing senator are entitled to continuing representation in the Senate.

One further preliminary point may be noted. New s.15 para. [1] adopts the language of old s.15 that the State Parliament "shall choose a person to hold the place". The view that this language imperatively requires an election is reinforced by contrast with the permissive language of the Governor's power to choose a temporary replacement ("may appoint a person . . ."). Moreover such a temporary appointment lasts only "until the expiration of fourteen days from the beginning of the next session of the Parliament of the State" (unless the term expires first). Neither old s.15, which also incorporated the fourteen day limitation, nor new s.15 expressly states that the choice should be made within the fourteen days (and clearly, in the unlikely event that para. [1] was construed to impose a duty to choose within fourteen days,⁵³ the time limit could only be directory: a choice made later than fourteen days after the beginning of the next session would be valid). But the consequence of failure to choose within that period is the lapse of the temporary senator's appointment, and a corresponding reduction in the State's Senate representation.⁵⁴ Since the purpose of s.15 is to maintain full State representation in the Senate,⁵⁵ the fourteen day limitation reinforces the argument that a duty is imposed on the State Parliament to appoint a successor.⁵⁶

That being so, a question arises how para. [1] could be enforced against a State Parliament which refused or failed to replace a departed senator. The

48. *Cont.*

has never been a "place" for the purposes of s. 15, and a new election must be held: *Vardon v. O'Loghlin* (1907) 5 C.L.R. 201. New s. 15 has not changed this position.

49. Such expulsion is already automatic in the case of the A.L.P.: e.g., Australian Labor Party (South Australian Branch), Constitution & General Rules (as amended to June, 1978), cl. 73. Cf. *Sawer, op. cit. (supra n. 5), 193-194.*

50. Marshall and Moodie, *Some Problems of the Constitution* (4th rev. ed., 1967), 36.

51. *Supra n. 28.*

52. *Supra n. 36.*

53. Such a construction would not in any event add much to the duty imposed by para. [1], since there is no time-limit within which the State Parliament must be convened.

54. S.15 para. [1] makes it clear that there can only be one "temporary" appointment since there is only one notification of the vacancy under s. 21.

55. Quick and Garran, *op. cit. (supra n. 1), 437.*

56. This is also the view taken by the then South Australian Solicitor-General, B. R. Cox, Q.C.: Opinion of (November) 1977, para. 6: "In my opinion, the language of the section . . . imposes on the State Parliament a constitutional requirement which it is obliged to exercise with all convenient speed upon receipt of the Section 21 notification." This opinion, which was tabled, appears as the Annex to this article, *infra.*

political balance in the Senate could be disrupted as much by the absence of a senator as by the appointment of a person of a different party. Moreover, circumstances can be imagined where even a relatively short delay (say, of a few months) could have significant consequences for a federal government which had lost control of the Senate as a result of the casual vacancy. The problem of enforcement could be a real one.⁵⁷

If the State Parliament is not in session when enforcement of the duty imposed by s.15 para. [1] is sought several difficulties arise. The State Parliament cannot comply with any duty imposed on it unless it is summoned to meet, and of course the power to summon is vested by the various State Constitutions in the Governor. It is established that mandamus will not lie against a State Governor to perform a duty to act in his capacity as such,⁵⁸ and in any event it is difficult to see how s.15 imposes any duty on him to do anything. Nor is it likely that the members of the State Executive Council could be required to advise the summoning of Parliament and a joint sitting. In *Tonkin v. Brand*⁵⁹ a declaration was granted that the defendants, members of the State Executive Council, should advise the Governor to issue a proclamation; but, even if correct,⁶⁰ the case is probably distinguishable since it depended on there being a legal duty imposed on the Governor: as we have seen, the relevant part of s.15 para. [1] makes no reference to the Governor at all.

*Cormack v. Cope*⁶¹ is the only other relevant Australian case. There, declarations and injunctions were sought against the Speaker and Clerk of the House of Representatives, the President and Clerk of the Senate, the Prime Minister and the Commonwealth Attorney-General *inter alia* to prevent the holding of a joint sitting under s.57 of the Constitution. The actual ground of decision (refusal to intervene in the legislative process

57. Under s. 183(1) of the Commonwealth Electoral Act, 1918, the High Court sitting as a Court of Disputed Returns has exclusive jurisdiction with respect to the "validity of any election or return". S. 183(2) deems the "choice of a person to hold the place of a Senator by the Houses of Parliament of a State or the appointment of a person to hold the place of a Senator by the Governor of a State" under s.15 to be an election for the purposes of s.183. Since the reference is to the validity of a choice or appointment already made, the question whether a State Parliament is obliged to make an appointment under s.15 (not, in any event, a matter of 'validity') would not be one for the Court of Disputed Returns. However, such a question would be within the High Court's original jurisdiction under s.30(a) of the Judiciary Act, 1903 (Cth).
58. *R. v. Governor of South Australia* (1907) 4 C.L.R. 1497; *Horwitz v. Connor* (1908) 6 C.L.R. 38; *Ex parte McWilliam* (1947) 47 S.R. (N.S.W.) 401. *Cf. Ex parte O'Donoghue* (1874) 2 N.Z.C.A. 495. On the rule that mandamus will not lie against the Crown see further Hogg, *Liability of the Crown* (1971), 12-15; de Smith, *Judicial Review of Administrative Action* (3rd ed., 1974), 494-495. On mandamus against Parliamentary officers see Campbell, *Parliamentary Privilege in Australia* (1966), 106.
59. [1962] W.A.R. 2.
60. A duty to issue a proclamation was imposed on the Governor by the Electoral Districts Act, 1947-1955 (W.A.), s.12. S.23 of the Interpretation Act, 1918-1957 (W.A.) provided that where statutory duties were imposed on the Governor by State legislation, the act required to be done "shall be done by the Governor with the advice and consent of the Executive Council". This provision was interpreted as imposing a duty on the members of Executive Council to give the appropriate advice: [1962] W.A.R. 2, 15-16 *per* Wolff C.J., 16 *per* Jackson S.P.J., 20 *per* Hale J. Since a declaration only was sought, it does not appear why the action was not brought against the Governor; but *cf.* Hogg, *op. cit.* (*supra* n.58), 22 n.59. Special leave to appeal to the High Court was refused on the ground that the proclamation had by then been issued, so that the matter was moot: [1962] W.A.R. 2, 23.
61. (1974) 3 A.L.R. 419.

where an effective remedy was available after the enactment of the proposed laws) is of no relevance here. However, if an injunction could be obtained against such defendants to prevent a joint sitting of the Commonwealth Parliament under the Constitution, there seems no very obvious ground for distinguishing an order of mandamus requiring equivalent State officers to hold a joint sitting of the State Parliament under the Constitution. The argument gains some support from *Cormack v. Cope*, but the decision was on an interlocutory application under unusual circumstances, and three judges expressly reserved the issues of the proper defendants and the appropriate order.⁶²

Even if the State Parliament is in session at the relevant time, the problems are similar: joint sittings are also summoned by the Crown. Despite *Cormack v. Cope*, there is no case of a coercive order requiring or prohibiting a Parliamentary sitting. Indeed, in *R. v. Governor of South Australia* Barton J., speaking for the Court, said of exactly this situation that . . .

“it is quite clear that this Court could not command those Houses to meet and choose a senator [under s.15].”⁶³

In *Tonkin v. Brand*, too, it was conceded that no coercive order was available in the circumstances.⁶⁴ It seems clear that the only available remedy would be a declaration that the members of the State Parliament were required to choose a replacement under s.15 para. [1].⁶⁵

4. The Hall Vacancy and the South Australian Joint Sitting

(1) Background

The 1970's was a period of political fragmentation of the non-Labor parties in South Australia. In particular, the South Australian Liberal Party was split by the formation of the Liberal Movement, first as a distinct group within the Party and then as an independent party. The Liberal Movement was led *inter alia* by R. Steele Hall, a former Premier of South Australia, and by R. R. Millhouse, a former Attorney-General in the Hall Government. For a time it enjoyed a substantial share of the non-Labor vote, although a degree of reform within the Liberal Party and the resolution of the long conflict over electoral reform meant that its long-term prospects were doubtful.⁶⁶ In the December 1975 Federal election, Steele Hall was re-elected as a Liberal Movement senator until June 1978.⁶⁷ But

62. *Id.*, 434 per Barwick C.J. (“difficulty in finding appropriate persons to enjoin”); 440 per Gibbs J. (“Little opportunity to consider whether the action is properly constituted as to parties”); 441 per Stephen J. (“I am not to be taken as affirmatively determining . . . the propriety of the joinder of the various defendants”).

63. (1907) 4 C.L.R. 1497, 1512.

64. [1962] W.A.R. 2, 15 per Wolff C.J., 16 per Jackson S.P.J., 20 per Hale J.

65. Such other (indirect) authority as there is supports this conclusion: see *Clayton v. Heffron* (1960) 105 C.L.R. 214, 233 per Dixon C.J., McTiernan, Taylor, Windeyer JJ.; cf. *Marks v. Commonwealth* (1964) 111 C.L.R. 549, 565 per Windeyer J. Cf. Sawyer, *op. cit.* (*supra* n.5), 30-31.

66. A statement of the Liberal Movement's political philosophies is contained in Hall and others, *A Liberal Awakening. The LM Story* (Adelaide, Investigator Press, 1973). For a good account of Liberal politics in South Australia during this period, see Jaensch and Bullock, *Liberals in Limbo. Non-Labor Politics in South Australia 1970-1978* (Melbourne, 1978). On the Liberal Party-Liberal Movement merger see *id.*, 140-149. See also Jaensch, *The Government of South Australia* (1977), index ref. “Liberal Movement”, and “The Split in the Political Right in South Australia: A Documentary Note” (1974) 9 *Politics* 87.

67. Mr. M. Wilson and Mrs. J. Haines were the other LM candidates on the Senate ticket.

negotiations for a settlement between the Liberal Party and the Liberal Movement were commenced. On 9 April, 1976 the State Council of the Liberal Party overwhelmingly approved those negotiations; a Special Meeting of the Liberal Movement's Standing Committee on 14 April also approved the negotiations but on a much narrower vote (61-42); they were presented at that meeting as proposals for a "merger" of the two Parties. On 30 April, "Heads of Agreement between Negotiators" for the two parties were concluded. These provided that the Liberal Movement would be dissolved and disbanded (cl.1), that Senator Hall and certain other M.P.'s would join the Liberal Party (cls.2-4), and made detailed provisions regulating preselection for the next election (cls. 9-10). Clause 5 provided that:

"Members of the Liberal Movement will be invited to join the Liberal Party and, upon making application for membership in the usual form, they will be entitled to be admitted as members without immediate payment of membership fees. Their membership of the Liberal Party will continue for the balance of the period covered by the residual value of their membership of the Liberal Movement."

And by clause 12 the Liberal Party disclaimed responsibility for any liabilities of the Liberal Movement.⁶⁸

On 1 May, 1976 a Liberal Movement General Convention, by 222 to 211 votes, approved Senator Hall's motion endorsing the Heads of Agreement and instructing the Management Committee to disband and dissolve the Liberal Movement. Again, the agreement was presented in terms as a merger, but the resolution made no reference to merger. Senator Hall subsequently rejoined the Liberal Party. However many of those opposed to this result, under the leadership of R. R. Millhouse, M.P., then formed the New Liberal Movement, a party intended to take over the political aims and the constituency of the Liberal Movement.

The New Liberal Movement (the New LM) was itself dissolved by resolution late in 1977 : many of its members joined the Australian Democrats, a national party formed in May 1977 again with broadly the same political objectives and appealing to a similar constituency.

Meanwhile, Steele Hall resigned as a senator in October 1977. The South Australian Premier announced the Government's nomination of Mrs. J. Haines as the replacement senator.⁶⁹

The position at the time of the Joint Sitting of 14 December, 1977 was then as follows. The Liberal Movement was still incorporated under the Associations Incorporation Act, 1956-1965 (S.A.). It still had a number of financial members (those who had omitted to cancel standing orders to the Party) and some debts, but it had not functioned as a political party since the meeting of 1 May, 1976. None of the protagonists was still a member. The New LM was also moribund : it had not been incorporated under the Associations Incorporation Act; it still had some debts and was in the process of winding up its affairs. The Australian Democrats was a functioning political party. Mrs. Haines, the Government's nominee, had been a member of both the Liberal Movement and the New LM, but was now a member of the Australian Democrats. The Liberal Party's nominee

68. In fact the LM was some \$27,000 in debt, with a declining membership.

69. S.A. *Parl. Debs. (H. of A.)* 7 Dec., 1977, 1258-1259.

had never been a member of any of the smaller parties. A Liberal M.P., Mr. Wilson, had been on the Liberal Movement ticket for the 1975 election with Senator Hall and Mrs. Haines, but had never been a member of the New LM or the Australian Democrats.

(2) *The South Australian Joint Sitting*

In announcing the Government's support for Mrs. Haines, the Premier relied upon an opinion of the then Solicitor-General, Mr. B. R. Cox Q.C. (now a Justice of the South Australian Supreme Court).⁷⁰ In the Opinion, and the debate which took place at the Joint Sitting⁷¹ on 14 December, 1977, four legal arguments can be detected, although many of the participants were ambiguous in their reliance on legal or political argument in support of their case.

First, it might have been arguable that the Liberal Movement itself still existed as a political party, so that if one of its few remaining members was "available to be chosen and appointed" then that person had to be appointed (and if not, then the Parliament's choice was not covered by section 15[2] at all). This possibility was discounted in the Solicitor-General's Opinion,⁷² and was not relied upon by any speaker at the Joint Sitting.

Secondly, it was arguable that the Liberal Movement had in some way merged or amalgamated with the Liberal Party so as to preserve in the "new" amalgamated party the entitlement to a replacement senator under section 15. This seems to have been the view taken by the Liberal Party itself, although repeated reference to the "spirit of the recent amendment" may indicate that this went more to the discretion of the Parliament (under the fourth argument, below) than to the operation of section 15 [2] as a matter of law.⁷³ The nearest approach to the latter view was taken by Mr. M. Wilson:

"the heads of agreement . . . allowed two members of the L.M. Management Committee to automatically take their place on the Liberal Party executive and it granted automatic membership to Liberal Movement members without payment of any fees up to the expiration of their Liberal Movement membership . . . The granting of such rights is indicative of a merger, and a merger it was. Throughout the Liberal Party former members of the Liberal Movement occupied executive positions in the branches . . . Further, four past members of the Liberal Movement contested the past State election as officially endorsed Liberal Party candidates. These things could not have happened if there had not been an official merger, which was seen as such and accepted as such by members of both Parties at that time."⁷⁴

Thirdly, it was possible that there had been in some mysterious way a transposition (as if by some public law equivalent of the *cy-près* doctrine) of the Liberal Movement's entitlement under section 15 [2], first to the New LM and subsequently to the Australian Democrats. Mr. Millhouse on one occasion came close to asserting this,⁷⁵ although his argument at the Joint Sitting was more a support of the Government's view.

70. *Annex, loc. cit. (supra n.56)*.

71. *S.A. Parl. Paper No. 143 (1978)*.

72. *Annex, loc. cit. (supra n.56)*, paras. 10, 11(3).

73. *Cf. S.A. Parl. Paper No. 143 (1978)*, 5, 6 (Tonkin), 8 (de Garis).

74. *Id.*, 7.

75. *S.A. Parl. Debs. (H. of A.) 7 Dec., 1977, 1259*.

Fourthly, it was arguable that the conditions for the operation of section 15[2] were simply not fulfilled, and that the Joint Sitting was therefore legally entitled to elect whoever it wished. This was the position taken (although tentatively) by the Solicitor-General, and adhered to by the Government. The issue then became one of discretion, unless the pre-1977 convention was in some way still relevant to the choice. (In fact, the frequent references to the spirit of the convention implied that it had in some way been strengthened by the adoption of new section 15, even in relation to situations not clearly covered by it). The Government's position was stated in the following terms by the Premier:

"In appointing a senator to fill the vacancy . . . it is important that this parliament maintain the precedents that it has set. It has constantly been the view of the South Australian Parliament that, in making appointments to vacancies in the Senate, it is requisite that we endeavour effectively to give voice to the views expressed by electors at the election of the Senator. We are, in effect, trustees for the electors, and it does not simply lie in our right to make a choice of anyone whom we choose . . . As far as we can ascertain on all legal opinion, the precise terms of the amendment do not apply to this election . . . Consequently, we have to return to the simple question of principle and precedent, and I believe that in all the circumstances, the nearest that we can possibly come to fulfilling those requirements is to nominate some other person who was on the original endorsed team with Senator Hall and who appears still to represent the body of opinion . . . of the electors at the time . . . It is on that basis that I nominate Mrs. Haines."⁷⁶

In the event, the Government nominee was duly elected. No action was subsequently taken to challenge the election. In retrospect, the dispute over the Hall vacancy may perhaps be regarded as a little local difficulty.⁷⁷ Nonetheless the issues raised are of considerable interest for the interpretation and application of new section 15, not least because of the extreme paucity of material on problems of the legal personality and continuity of political parties. In the rest of this article it is proposed to consider that material to see to what extent it could assist in resolving disputes over new section 15.

5. The Formal Structure and Legal Status of Australian Political Parties

Considering their importance, there is remarkably little material on the legal structure of political parties, either in Australia or the Commonwealth of Nations.⁷⁸ To a large extent this is because the central proposition as to the status of most parties is a resounding negative: like unincorporated associations in general, they have no status, no personality. Issues of membership, property and the like have been dealt with (to the extent that the law has intervened at all) by way of legal rules (contract, trust, etc.) not

76. S.A. *Parl. Paper* No. 143 (1978), 3.

77. Not for the first time in the history of South Australian constitutional *causes*: cf. Harris and Crawford, "The Powers and Authorities Vested in Him", (1968) 3 *Adel. L.R.* 303, 334.

78. See however Courtney, "Recognition of Canadian Political Parties in Parliament and in Law", (1978) 11 *Can. J. Pol. Sc.* 33, dealing mainly with Canadian federal parliamentary practice.

dependent on attributing legal personality to the party itself.⁷⁹ Thus political parties now are in a situation analogous to that of trade unions in the late nineteenth century, before the sequence of judicial decisions and legislation attributing legal personality to them, or treating them as entities for various purposes.⁸⁰ It is possible that this same process is occurring with political parties: despite a long-standing reluctance to refer to political parties in legislation, there is now a surprising volume of such legislation. Rather than a sharp break with tradition, new section 15 may be seen as a continuation of that trend.⁸¹

It is helpful to consider first the structure of Australian political parties under their own constitutional instruments, secondly, their status at common law, and thirdly, the extent and consequence of incorporation of political parties under State legislation.

(1) *Constitutions of Australian political parties*⁸²

The constitutional structures of Australian political parties are, with few exceptions, resolutely federal.⁸³ Where a party is organized at a national level, and not merely in one State, its organizational structure tends to involve a complex interlocking of State constitutions with the federal constitution. Thus membership of the party is invariably membership of the party in a State or Territory (and also, though with certain exceptions, in a

79. On unincorporated associations generally, see Lloyd, *The Law relating to Unincorporated Associations* (London, 1938); Ford, *Unincorporated Non-Profit Associations* (Oxford, 1959); Baxt, "The Dilemma of the Unincorporated Association", (1973) 47 *A.L.J.* 305; Afterman and Baxt, *Cases and Materials on Corporations and Associations* (2nd ed., 1975), ch. 1; Horsley, *The Law and Administration of Associations in Australia* (1976).

80. Lloyd, *op. cit.* (*supra* n.79), 63-91. But there are still uncertainties about the legal status of trade unions in Australia: *cf. Williams v. Hursey* (1959) 103 C.L.R. 30; *Moore v. Doyle* (1968) 15 F.L.R. 59; Report of the Committee of Inquiry on Co-ordinated Industrial Organizations, *Cth. Parl. Paper No. 220* (1974). For the Canadian position *cf. Orchard v. Tunney* [1957] S.C.R. 436; *International Brotherhood of Teamsters . . . v. Therien* [1960] S.C.R. 265.

81. This trend is most pronounced in Canadian practice: see Courtney, *loc. cit.* (*supra* n.78), and esp. Canada Elections Act, 1970 (18 & 19 Eliz. II c. 49) as amended by Election Expenses Act, 1974 (21 & 22 Eliz. II c. 51). The Act provides for the voluntary registration of political parties (s.13) (but registration may be withdrawn if the political party is not represented by at least 12 members in the House of Commons when the latter is dissolved: s.13(3)(9)); requires certain payments for election expenses to be made to a registered agent of such a party (s.13.1(7)(8)); *cf. s.70.1*; limits the amount of election expenses that can be incurred by such a party (s. 13.2); requires party funds to be audited (s.12.3) and financial returns to be made to the Chief Electoral Officer (ss.13.4, 13.5); limits campaigning by such parties to a 28-day period ending two days before the election (s.13.7); allows prosecutions under the Act against such parties in their own name ("and, for the purposes of any such prosecution only, the registered party shall be deemed to be a person"); requires the "political affiliation" of a candidate to be stated (s.23(2)(a)(i)); allows the name of a registered party to appear on the ballot paper (ss.23(2)(h), (4), 31(1), and entitles registered political parties to broadcasting time (s.99.1). There is provision for public financing of political parties in Israel: see Political Parties (Financing) Law, 1973; (1978) 13 *Israel L.R.* 118. Characteristically, what seems to be the only U.K. provision is a negative one: s. 33 of the Sex Discrimination Act, 1975 excepts political parties which make "special provision for persons of one sex only in the constitution, organization or administration of the political party" from the operation of s.29(1) of the Act. Australian references are more scattered and incidental: *cf. Crimes Act, 1914* (Cth.), s. 28; Extradition (Commonwealth Countries) Act, 1966 (Cth), s.10(2); Extradition (Foreign States) Act, 1966 (Cth.), s.4(4).

82. The brief review here is based on the present Federal and South Australian Constitutions and Rules of the parties listed. See further Walker and Watson, "The Party Organizations" in Mayer and Nelson, eds., *Australian Politics. A Fourth Reader* (1976), 441-460; Holmes and Sharman, *The Australian Federal System* (1977), 102-116.

83. *Id.*, 105, 109-111.

Branch or other smaller unit within the State).⁸⁴ In some cases that membership entails membership of the federal party as well, although in the Labor Party, for example, individual membership is strictly at State level : the federal party is simply a constitutional union of State and mainland Territory *Branches*.⁸⁵ Although the national governing body is usually given a substantial degree of control over the activities of State branches or parties,⁸⁶ that control is in some cases restricted to the *federal* activities of the latter.⁸⁷ In any event the national bodies are largely composed of delegates from the State organizations rather than persons elected directly from the membership. State parties retain a considerable degree of control over federal preselection, and, at least in the case of the major parties, substantial autonomy in the conduct of State political activities.⁸⁸ Federal funding is by levy paid through the State organizations rather than by any form of direct subscription.

(2) *The legal status of Australian political parties*

Unless a political party is incorporated under State or Territory legislation,⁸⁹ it is classified as an unincorporated association, a "non-person" before the law. Indeed, at least in Australia, the general rules about unincorporated associations have tended to be applied with particular strictness to political parties. The position may be summarised as follows:

1. Unincorporated political parties may not, as such, sue or be sued.⁹⁰ Actions have usually been brought by or against the committee members or trustees of such parties, and even then, formidable technical difficulties can be encountered.⁹¹

84. Cf. Australian Labor Party, Rules and Standing Orders (1977), rr. 4, 5; Australian Labor Party (South Australian Branch), Rules (1978), r. 5; Liberal Party of Australia, Federal Constitution (1974), Pt. V.; Liberal Party of Australia, South Australian Division, Constitution (1978), "Membership", cl. 1; National Country Party of Australia, Federal Constitution, cls. 3, 8, 30; National Country Party of Australia (S.A.) Inc., Constitution and Rules (1964 as amnd.), "Membership". The federal constitutions of two smaller national parties seem to establish a unified individual membership of "the Party": Australia Party, National Constitution (1978), cls. 1, 3, 4; Australian Democrats, National Constitution (1978), cls. 2.0, 4.1. But a distinct "Divisional" or "Branch" membership seems to be introduced in the State Constitutions: e.g. Australia Party (S.A.) Inc., Constitution (1974), cls. 1, 3; Australian Democrats (S.A. Division) Inc., Constitution, cl. 2.

85. R. 4 of the National Rules states that "The Party shall consist of State Branches . . ."

86. E.g. Australian Labor Party, Rules, r. 7(c).

87. E.g. National Country Party of Australia, Federal Constitution, cl. 26.

88. Indeed, they retain, in most cases, considerable autonomy with respect to federal pre-selection, Senate representation, etc.: e.g., National Country Party of Australia, Federal Constitution, cl. 19.

89. *Infra*, text to nn. 112-116.

90. *Young & Rubicam Ltd. v. Progressive Conservative Party of Canada* (Superior Court of Quebec, 1971, unreported), *Courtney, loc. cit. (supra n.78)*, 36. The question does not seem to have been canvassed in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, where the first plaintiff was an (unincorporated) political party. Latham C.J. stated that "The Communist Party is not shown to be a legal person and therefore is not a competent plaintiff." (*Id.*, 129). None of the other justices referred to the issue, but costs were awarded in favour of all the plaintiffs, including the Party. However, this may be explained by the fact that s.4 of the challenged Communist Party Dissolution Act, 1950 treated the Party *eo nomine* as an association, which it purported to dissolve. According legal personality to the Party for the purpose of challenging the Act would not, therefore, have been unreasonable. In the other cases cited in this article, the parties were individual officers or representatives of the association. And see O'Connor, "Actions against Voluntary Associations and the Legal System", (1977) 4 *Monash U.L.R.* 87.

91. Cf. Baxt, *loc. cit. (supra n.79)*, 311-314, and esp. Keeler, "Contractual Actions for Damages against Unincorporated Bodies", (1971) 34 *M.L.R.* 615.

2. An unincorporated political party may not, as such, own property, take a lease of premises, or the like.⁹² Thus in *Freeman v. McManus*, a lease to the "Australian Labor Party" of part of the Melbourne Trades Hall, which had been in operation for 28 years, was held to be legally ineffective. O'Bryan J. said:

"It is not disputed that the Australian Labor Party is a voluntary association of persons bound together for the formation of political objects. It is an unincorporated body and as such is not an entity known to the law . . .

[It was argued that . . .] the tenancy of these premises which on 29 January 1926 was granted to the Australian Labour Party was on 7 March 1957 lawfully surrendered by the creation of the Victorian branch of that party or by its Federal executive although in 1957 these executives represented a totally different body of members than those which comprised the party in 1926. This result could follow only on the basis that as time marched on the tenants were the members for the time being of a fluctuating body of persons the existence of whose rights and obligations as lessees at any given time is to be determined by reference to their membership or non-membership of the party. Such a lease or tenancy agreement is in my opinion unknown to the law."⁹³

These difficulties can only be surmounted by the appointment of trustees to hold the party's property on its behalf, or through the mechanism of a holding company (the shares in which would themselves have to be held by nominees in trust for the party).

3. Equally, contracts will have to be made with individuals acting on behalf of the party: the extent of the liability of these agents and of the members generally (together with problems of recourse against party funds) are still unsettled and raise difficult issues.⁹⁴

4. Bequests to unincorporated political parties are also likely to fail, unless the bequest can be interpreted as a gift to the members of the party for the time being,⁹⁵ an interpretation which, in the case of political parties, is unlikely to be adopted.⁹⁶ It is of course established that the general purposes of a political party are not charitable purposes.⁹⁷

5. Although the courts will sometimes intervene in the internal management of an unincorporated association where there is a breach of its rules, such intervention must be justified on one or other of the following grounds:

92. *Baxt, loc. cit. (supra n.79)*, 309-311.

93. [1957] V.R. 15, 18-19. *Cf. Watkins v. Hamilton-Wentworth C.C.F. Council* [1947] O.W.N. 791.

94. *Keeler, loc. cit. (supra n.91)*; *Baxt, loc. cit. (supra n.79)*, 309-310. *Cf. Graham v. Carpenter* (1925) 28 W.A.R. 66 (Fremantle District Council of the National League).

95. *Cf. Leahy v. A.G. (N.S.W.)* [1959] A.C. 457.

96. Thus in *Bacon v. Pianta* [1966] A.L.R. 1044 (Full H. Ct.), a bequest to the Communist Party of Australia for its sole use and benefit was held to be void. *Cf. Baxt, loc. cit. (supra n.79)*, 307-309 for criticism of the decision, and see further Keeler "Devises and Bequests to Unincorporated Bodies", (1963) 2 *Adel. L.R.* 336.

97. *Bacon v. Pianta* [1966] A.L.R. 1044. *Cf. A.G. v. National Provincial & Union Bank of England* [1924] A.C. 262 ("patriotic" purposes not charitable).

(a) Where the members of an association enjoy "some civil right of a proprietary nature", the court may well treat the rules of the association as constituting a contract between them, for breach of which damages or other remedies may be obtained. But political parties are unlikely to be organized in such a way, and in fact the constitutions of many Australian political parties expressly prohibit the distribution of party funds to the members, even upon a winding-up.⁹⁸ In *Cameron v. Hogan*, the plaintiff, a former Premier of Victoria and Leader of the State Parliamentary Labor Party, sought a declaration that his exclusion from the Party and his non-endorsement as a candidate for election were wrongful and *ultra vires* the rules of the Party. The declaration was refused. The High Court referred to . . .

"the general character of the voluntary associations which are likely to be formed without property and without giving to their members any civil right of a proprietary nature. These are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract . . .

Hitherto rules made by a political or like organization for the regulation of its affairs and the conduct of its activities have never been understood as imposing contractual duties upon its officers or its members. Such matters are naturally regarded as of domestic concern."⁹⁹

(b) However, the rules of the party have been consented to, and action purportedly based upon them but in fact *ultra vires* may therefore be tortious, as the Court recognized in *Cameron v. Hogan*:

"If the member whose expulsion has been invalidly resolved upon asserts rights arising out of his membership, it may be that those who, relying upon the attempted expulsion, resist the assertion, will be led into the commission of acts which are tortious because they lack the justification which a valid expulsion may give them. For this tort the member may then sue . . . But he cannot recover from the committee or the members for breach of contract."¹⁰⁰

(c) Thirdly, and, it seems, by way of qualification of the rigid rule of non-intervention laid down in *Cameron v. Hogan*, there has more recently been a tendency to intervene in cases of expulsion and the like when these have involved a violation of natural justice, or on other administrative law grounds such as acting for improper purposes or from ulterior motives.¹⁰¹

98. *E.g.*, Australia Party (S.A.) Inc., Constitution, Art. 8; Liberal Movement Inc., Constitution, Art. 43; Liberal Party of Australia, Federal Constitution, Art. 6; Liberal Party of Australia, South Australian Division, Constitution, Art. 126.

99. (1934) 51 C.L.R. 358, 370-371, 376 (Rich, Dixon, Evatt, McTiernan JJ.).

100. *Id.*, 372.

101. There is an increasing body of literature on these problems. See *e.g.*, Holden, "Judicial Control of Voluntary Associations", (1971) 4 *N.Z.U.L.R.* 343; Forbes, "Judicial Review of the Private Decision Maker: The Domestic Tribunal", (1976) 1 *Uni. W. Ont. L.R.* 123; Wex, "Natural Justice and Self-Regulating Voluntary Associations", (1972) 18 *McGill L.J.* 262; Morris, "The Courts and Domestic

Two recent English cases, both involving internal disputes with the Labour Party, may be instanced.

As a result of internal dissension in the Pembrokeshire Divisional Labour Party (P.D.L.P.), the National Executive Committee (N.E.C.) of the Labour Party in April 1968 resolved to suspend the activities of the P.D.L.P. and the right of its officers to handle party funds, and authorized the national agent to intervene in the dispute and to reorganize the P.D.L.P. In *John v. Rees*, Megarry J. held that since the principle of natural justice was not excluded by the Rules of the Party, and since those involved were not given notice of the N.E.C. proposals or an opportunity to be heard, the two resolutions were invalid. He said:

“Membership of a club or association is doubtless founded upon a basis of contract; but in many cases it is not merely a contract. Membership often gives the member valuable proprietary and social rights, and these, as well as the contract, would be terminated by expulsion . . . A “party” or a “club”, if unincorporated, is not an entity separate from its members; and action against the collective unit takes direct effect against the individuals comprising that unit . . . In these submissions, as throughout, I look to the realities and not to the labels. Further, without authority to support it, I can see no warrant for the view that the application of the principles of natural justice to dismissal or suspension should be withheld from honorary office and yet accorded to ordinary membership . . . Unless constrained by authority . . . I refuse to hold that the right to natural justice depends upon the right to a few pieces of silver.”¹⁰²

After determining that the Party’s Rules did not exclude natural justice, he concluded:

“Accordingly, the first resolution suspending the activities of the Pembroke Constituency Labour Party and depriving the officers of the right for the time being to handle the funds of the party fails to be tested by the standard of whether it was made in accordance with the rules of natural justice. Whatever may be said about the right to an unbiased tribunal, the process of giving notice of the charges and giving those concerned the right to be heard in answer to the charges was plainly not followed. Accordingly, in my judgement, the resolution was a nullity. It was effective neither to suspend the activities of the Pembroke Constituency Labour Party nor to deprive the officers of that party of their right to handle the funds.”¹⁰³

The application of natural justice to internal conflicts in a political party was again an issue in *Lewis v. Heffer*.¹⁰⁴ Internecine conflict in the Newham North-East Constituency Labour Party led to the issuing of no less than

101. *Cont.*

Tribunals”, (1953) 69 *L.Q.R.* 38; and de Smith, *Judicial Review of Administrative Action* (3rd ed., 1973), s.t. “Domestic Tribunals”. For a review of U.S. doctrine and practice see “Judicial Control of Actions of Private Associations”, (1963) 76 *Harv. L.R.* 983; and Note, “Judicial intervention in the conduct of private associations : bases for the emerging trend of judicial activism”, (1974) 4 *N.Y.U. Rev. Law & Soc. Change* 61.

102. [1970] 1 Ch. 345, 398-399, citing his own unreported decision in *Fountain v. Chesterton*, *The Times*, 20 August, 1968; 112 *Sol. J.* 690; [1970] 1 Ch. 399-400.

103. *Id.*, 401.

104. [1978] 1 *W.L.R.* 1061.

nine High Court writs. The N.E.C. thereupon intervened and suspended the Constituency Party's officials pending an inquiry. A proposal to suspend the plaintiffs' membership of the party pending the inquiry was dropped on legal advice. The Court of Appeal held that the N.E.C.'s intervention was a purely administrative one, performed in good faith and without any ulterior motive of preferring one faction in dispute to the other,¹⁰⁵ and that, since a full enquiry was assured, no requirement of natural justice attached to the interim suspension. Although *John v. Rees* was distinguished on this ground, it was made quite clear that natural justice would apply to any substantive inquiry. As Geoffrey Lane L.J. said:

"The further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone the more necessary it becomes to act judicially, and the greater the importance of observing the maximum *audi alteram partem*. It seems to me in the present case, so far as anyone can judge on the facts before us, natural justice does not demand that anyone should be invited to provide an explanation or excuse before that suspension was imposed."¹⁰⁶

It is by no means clear to what extent this extension of judicial intervention in the internal affairs of political parties would be followed in Australia. The High Court in *Cameron v. Hogan* was decidedly reluctant about intervention of this kind,¹⁰⁷ reluctance which on the whole is not shown in the English decisions.¹⁰⁸ Indeed, to the extent to which they are based on an assumption of *contractual* relations between members of a political party, *John v. Rees* and *Lewis v. Heffer* may be strictly inconsistent with *Cameron v. Hogan*, since it does not appear that there was any material distinction between the rules of the Australian Labor and British Labour Parties, or in the surrounding circumstances. But it is submitted that the English developments, though drawing support from the assumption of a contract in the terms of the Party's rules (an assumption which was apparently not disputed in those cases), are not wholly dependent upon such a finding, and that developments in the law governing domestic tribunals generally¹⁰⁹ make it desirable for the courts to exercise a residual supervisory control over the procedure adopted by political parties in making substantive decisions of expulsion and the like (unless such control is expressly excluded by the party's rules). The reality and importance of a member's interests in participation in a party deserve protection: procedural due process, or rather its common law equivalent, should not be made to depend on the right to a "few pieces of silver".¹¹⁰ On this view, *Cameron v. Hogan* might be distinguished on the basis that Hogan was seeking a substantive review of the merits of his case, rather than limiting his complaint to the way in which the decisions were taken.

105. *Id.*, 1073-1074 per Lord Denning M.R.

106. *Id.*, 1078-1079; cf. *id.*, 1073 per Lord Denning M.R., 1077 per Ormrod L.J.

107. Cf. O'Connor, *loc. cit.* (*supra* n.90), 111-115.

108. But cf. [1978] 1 W.L.R. 1061, 1077 per Ormrod L.J.: "No organization can survive a steady shower of writs and no organization can possibly be made to work by a series of injunctions"; 1079 per Geoffrey Lane L.J. See also *Calvin v. Carr* (1979) 22 A.L.R. 417, 429 (P.C.).

109. *Supra* n. 101.

110. Cf. Murphy J.'s reference to "fraud, collusion or arbitrariness" in *A.G. (N.S.W.) ex. rel. MacLeod v. Grant* (1976) 10 A.L.R. 1, 20-22.

6. Finally, the courts have been sensitive to the often highly controversial political issues or interests at stake in litigation involving political parties. Such sensitivity underlay the refusal to intervene in *Cameron v. Hogan*, but may have consequences in other areas of the law. Thus, in *Francis v. Herald and Weekly Times Ltd.*, an interim injunction against the State Executive of the Victorian Liberal Party was sought on the basis that the plaintiff's expulsion from the Party would prejudice the trial of a libel action involving the same issues. The injunction was refused: on the balance of convenience, the Party's interest in non-intervention in its internal affairs, and the plaintiff's voluntary submission as a member of the Party to properly conducted proceedings under its rules, were held to outweigh any possible prejudice to the eventual trial of the action.¹¹¹

(3) *Effects of incorporation under State legislation*

In the absence of judicial revolution which, in Australia at least,¹¹² is not to be expected, it follows that the lack of legal status of unincorporated political parties can create difficulties. But if legal personality is thought desirable, a party can take steps to acquire it, either under State Companies Acts,¹¹³ or, more likely, under the Associations Incorporation legislation which exists in three States and in some of the Territories.¹¹⁴ In return for complying with the requirements of these Acts (which are not particularly onerous),¹¹⁵ an incorporated association acquires the right to make contracts, accept bequests, to sue and be sued in its own name, to hold property, and so on. In South Australia, for example, four of the smaller parties are registered as incorporated under the Associations Incorporation Act, 1956-1965: these are (as at December 1978) the Australian Democrats (S.A. Division) Inc., the Australia Party (S.A.) Inc., the Liberal Movement Inc., and the National Country Party of Australia (S.A.) Inc. But it is significant that neither the Labor nor the Liberal Party is so incorporated, either at State or (it seems) at federal level.

One disadvantage of incorporation which may weigh with the larger parties is the extent to which it would require them to account publicly for their finances. Although the present legislation imposes minimal controls (compared, for example, with the accounting provisions of the Companies Acts), this situation may not continue.¹¹⁶

111. Gowans J, unrep. (17 March, 1978); noted (1978) 52 *A.L.J.* 336.

112. But cf. *Willis v. Association of Universities of the British Commonwealth* [1964] 2 All E.R. 39, esp. 42 per Lord Denning M.R.; Wedderburn, "Corporate Personality and Social Policy: The Problem of the Quasi-Corporation", (1965) 28 *M.L.R.* 62.

113. Horsley, *op. cit.* (*supra* n.79), Ch. III.

114. Incorporated Associations Ordinance, 1953-1977 (A.C.T.); Associations Incorporation Ordinance, 1963-1979 (N.T.); Associations Incorporation Act, 1956-1965 (S.A.); Associations Incorporation Act, 1964-1966 (Tas.); Associations Incorporation Act, 1895-1969 (W.A.).

115. See Horsley, *op. cit.* (*supra* n.79), 4-13 for a short account.

116. See the Incorporated Associations Bill (S.A., No. 87 of 1978), the apparent stringency of which provoked considerable opposition: the Bill will not be proceeded with pending the report of an Interdepartmental Committee. The Bill is apparently more restrictive in its enumeration of registrable associations than the present Act. It is not clear that a political party falls within any of the specific categories in cl. 14(1): are political parties formed for a "benevolent purpose" (cl.14(1)(a)), or for the purpose of "social activity" (in the phrase "sport, recreation, entertainment, amusement or social activity")? If not, then the permission of the Minister is required under cl.14(1)(i). Under s.4(f) of the Act, on the other hand, political parties are presumably permitted to incorporate as formed for promoting "any other useful object".

6. *Interpreting the 1977 Amendment*

In the light of this rather diverse material, it is proposed to consider some issues of interpretation of new section 15, in particular those arising from the Hall vacancy.

(1) *When is a political party not a political party?*

If the Liberal Movement Inc., which, as we have seen, was still in existence as an incorporated association at the time of the Joint Sitting, was also still in existence as a political party then no issue of merger could have arisen. However the Solicitor-General took the view that . . .

“The operation of the second paragraph of Section 15 connotes the continuing existence of the political party in question, and in my opinion that requires a continuing organization and activity if only on the most modest scale — something more, in other words, than a mere legal shell.”¹¹⁷

He concluded that the Liberal Movement Inc., though perhaps continuing to exist as an incorporated association, had ceased to exist as a political party for the purpose of section 15. This distinction between the reality of the existence of a party and its registration as an incorporated association is supported by section 25 of the Associations Incorporation Act, 1956-1965 which allows the Registrar to cancel the registration of an association if it appears that the association has “ceased to exist”.^{117a} Moreover, incorporation of a political party is in no way compulsory, and as we have seen not all parties are in fact incorporated. It would be extremely odd if the mere circumstance of incorporation could maintain an entitlement to Senate representation under section 15 of a defunct party.

It seems then that a political party is something other, or rather something over and above, its legal structure or organization. This seems to be Professor Sawyer's point in referring to the existence of a party as a matter of “objective fact”;¹¹⁸ the accepted legal non-existence of an unincorporated political association, and the purpose of section 15 in maintaining the continuing representation of continuing political parties, both support this view. It follows that even if one of the remaining financial members of the Liberal Movement Inc. in December 1977 had been “available to be chosen or appointed”, section 15[2] would not have required his appointment, or invalidated the appointment of a non-member of the Liberal Movement at that time.

(2) *Membership of a political party: “law” or “fact”?*

But if the existence of a political party is, *grosso modo*, a question of fact, that does not mean that the legal structure of a party, or its legal status under State legislation, is necessarily irrelevant. The provisions of a party's constitution are just as much matters of fact as the public recognition of its candidates. Two problems of membership may be mentioned, although neither was relevant to the Hall vacancy.

(a) *Party Membership — federal or State?*

The first problem arises from the distinctly federal organization of the major parties in Australia.¹¹⁹ In particular, as a matter of its Constitution

117. *Annex, loc. cit. (supra n.56), para. 11(3).*

117a. The Incorporated Associations Bill, 1978 (S.A.), cl. 39(1) is perhaps better drafted: the term used is “defunct”, which carries no such implication.

118. *Op. cit. (supra n.5), 193.*

119. *Supra*, text to nn. 83-88.

and Rules there is no such thing as individual membership of the *Federal Labor Party*. A candidate for federal election for the Labor Party is presumably a member of the Party in the State in which the election takes place. But section 15[2] requires the replacement to be a member of "that party" ("a *particular* political party") which publicly recognized the departed senator as an endorsed candidate.¹²⁰ Moreover the elaborate structure of federal electorate endorsement is contained in the State Rules, again involving selection by members from that State. In view of the continuing emphasis on the Senate as a House of State representation¹²¹ it is arguable that only a member of the *State* party may be chosen under section 15[2] in respect of a vacancy from that State. No doubt in practice this would present no problem, as a candidate from another State could readily become a local member beforehand. But the better view would seem to be that, for the purposes of section 15, irrespective of the internal structure of a party as a series of voluntary associations (whether or not separately incorporated), there is only the one, national party with an undivided membership. The strong constitutional links between federal and State parties support this view, as does the decision of the English Court of Appeal in *Lewis v. Heffer*.¹²² It is suggested then that any distinction drawn between party membership of different States is to be ignored for the purposes of section 15[2]: the "party" is an amalgamation of its constituent associations.

(b) *Party membership — the problem of expulsion*

In one respect, however, issues of strict law may affect the choice of a replacement under section 15[2]. Where expulsion takes place in breach of natural justice, the better view appears to be that the Court declares the expulsion invalid, so that the expelled candidate is still in law a member of the party.¹²³ As we have seen, it is unclear to what extent *John v. Rees* would be followed in Australia in relation to political parties, but it is possible to imagine cases in which a party might attempt to expel a member elected against its wishes by a State Parliament controlled by another party. For such an expulsion to be valid, and thus to avoid the election under section 15[3], the principles of natural justice would have to be complied with. The rule of automatic expulsion adopted by the Labour Party¹²⁴ presents no such difficulty, as no discretion exists, and no operative decision is required.

(3) *Merger of political parties and entitlement to a casual vacancy*

More relevant to the Hall vacancy is the question whether an entitlement to representation under section 15[2] can be preserved after the merger of the original political party with another. Clearly, section 15[2] presupposes the continuity of the political party between the relevant times, or, perhaps more correctly, the identity of the political party which recognized the departed senator at his election and the party to which the replacement is

120. There is no requirement that the departed senator be a member of the Party; the requirement of membership applies to the replacement.

121. See the discussion of this issue, in another context, in the two *Territories Representation Cases*: (1975) 7 A.L.R. 159; (1977) 16 A.L.R. 487. There the principle of popular representation won out narrowly over the principle of State representation in the Senate, in the second and decisive case only with the assistance of *stare decisis*.

122. See [1978] 2 W.L.R. 1061, 1071-1072 *per* Lord Denning M.R.; 1075-1076 *per* Ormrod L. (with both of whom Geoffrey Lane L.J. agreed).

123. *Cf. Calvin v. Carr* (1979) 22 A.L.R. 417, 425-427, *de Smith, Judicial Review of Administrative Action* (3rd ed., 1973), 209-212, 241-242.

124. *Supra* n. 49.

to belong. Can such identity be preserved despite the merger of that party with another? Other problems of "identity and continuity" can be imagined: no doubt an association retains its "identity" despite changes of name, or changes in the party constitution according to its rules.¹²⁵ But if a fundamental political tenet of the party were abandoned could a splinter group, adherent to the original and true faith, claim identity for itself or deny the entitlement of the aberrant majority party? In one well-known (but regrettably fictional) case the true succession of the (British) Liberal Party was held to be sustained by a single believer, a Mr. Haddock.¹²⁶ Real courts have inquired into similar issues in the not very distinct context of religion. Even allowing substantial discretion to the majority to change fundamental tenets of the organization may not wholly exclude such inquiries.¹²⁷ The vote on the Hall replacement was itself treated by some as vindicating the views of the opposing parties when the "merger" or "dissolution" of the Liberal Movement was decided on.¹²⁸

(a) *Merger under section 15: a "particular political party"*

In view of these uncertainties, it might well be preferable to preclude merged or amalgamated parties from claiming any continued entitlement under section 15[2] at all. The Solicitor-General's Opinion seems to cast doubt on whether such continuity of entitlement could ever be maintained upon an amalgamation.¹²⁹ The terms of section 15, with its repeated reference to a "particular political party", might also be regarded as impliedly excluding continuity after amalgamation or merger.

It is of interest that two of the State Associations Incorporation Acts expressly provide for amalgamation of associations. Thus s. 28 of the South Australian Act provides:

- "(1) Any two or more incorporated associations may by resolution of all the associations passed in accordance with the rules of each association respectively, become amalgamated together as one association without any division of the property of the associations.
- (2) Upon issue of the certificate of incorporation all property of the amalgamated associations shall vest in the association created by the amalgamation . . .
- (5) No amalgamation of associations shall prejudice any right of any creditor of or other person having any legal claim against any of the amalgamated associations and any such rights be [*sic*] enforced against the association created by the amalgamation."¹³⁰

Sub-sections (4) and (5) refer to "the association created by the amalgamation" as distinct from the "the amalgamated associations". Admittedly, sub-section (5) allows legal claims against one of the amalgamated associations to be pursued against the association created by

125. *A.G. v. Teece* (1904) 4 S.R. (N.S.W.) 347.

126. *In re Macalister* ("Which is the Liberal Party?") in Herbert, *Uncommon Law* (1935), 59-65.

127. *Cf. supra*, n.5.

128. *E.g.*, S.A. *Parl. Paper* No. 143 (1978), 4 (Millhouse).

129. *Annex, loc. cit.* (*supra* n.56), para. 11(1) ("even if there was an actual merger between those two parties, I think it doubtful whether the Liberal Party could accurately be described as the political party that endorsed Senator Hall in 1975. A change of name or of policy is one thing, amalgamation is another.")

130. *Cf. Associations Incorporation Act, 1964-1966* (Tas.), s.25. The Incorporated Associations Bill, 1978 (S.A.), cl.18, carries even less of an implication of "identity".

the amalgamation, but in terms which are as consistent with a statutory novation as with the assumption of legal continuity.¹³¹ Even this statutory recognition of the possibility of merger of associations lends tenuous support to the continuity argument.

For these reasons, it is submitted that the restrictive view is to be preferred: it follows *a fortiori* that mere ideological continuity, without constitutional or organizational continuity, is irrelevant for the purposes of s. 15[2], although it may be relevant to the residual discretion under s.15[1], and was of course regarded as such by the South Australian Government in their support of Mrs. Haines.¹³² But the effect of the restrictive view is to create an even more considerable gap in the "protection" afforded by s.15, and to give rise to all the problems of imbalance in Senate representation and abuse of State majority power which brought about the amendment to s.15 in the first place.

(b) The Hall vacancy : merger or miscegenation?

Assuming, however, that an entitlement under s.15[2] can survive an amalgamation, it must be clear that the "new" party is a continuation of its predecessors. It would follow that, although a political party under s.15 is not identified with its formal or legal structure, all steps that can be taken under that structure to preserve continuity and to establish the reality of merger must be taken. The constitutions of some political parties make express provision for merger:¹³³ unless these provisions were employed it is hard to see how a claim to continuity could be sustained. The same can be said of available legislative provisions. In the case of the Liberal Movement, even if the "Heads of Agreement" could be regarded as indicative of a merger,¹³⁴ it is significant that no steps were taken under the South Australian Act to carry out an amalgamation pursuant to s.28.¹³⁵ At the least, the failure to use available legal machinery to bring about a

131. No express provision is made regarding the continuance of claims of associations against other parties, although these might well be "property" transferred by virtue of sub.s.(4). Cf. Incorporated Associations Bill, 1978 (S.A.), cl. 18(5)(c) ("property"), (d) ("rights and liabilities").

132. *Supra* n.76.

133. Apart from general provisions for constitutional amendment, which could no doubt be used to bring about a merger or amalgamation, there are a number of specific provisions: e.g., Australia Party, Rules Accompanying the National Constitution (1978), r.6(f)(i); Liberal Party of Australia, Federal Constitution (1974), cl.3(g). The Labor Party Constitution and Rules contain no such provision. In one case, organic union with another party is expressly prohibited: National Country Party of Australia, Federal Constitution, cl.16: "The Federal Council shall not form with any other political organisation an alliance that does not preserve intact the entity of the Party."

134. The terms of the "Heads of Agreement" are, however, more consistent with the dissolution of the LM and the reintegration of its members in the Liberal Party, than with the merger of the two into a new party. They did not provide for automatic membership of Liberal Movement Members in the Liberal Party; rather, for a right to join the Party upon application (cl.5). They provided that the Liberal Movement Inc. was to be "dissolved and disbanded" (cl. 1); obviously no such dissolution was proposed for or carried out on the Liberal Party. Nor were the terms "merger," "fusion" or "amalgamation" used. Significantly, the Liberal Party was stated not to be "directly or indirectly responsible for any liabilities of the Liberal Movement" (cl.12), a provision which is quite inconsistent with amalgamation or merger, whether generally or under the Associations Incorporation Act.

135. Of course, the Liberal Party is not a registered association: it would have had to register first and then go through the s.28 procedure. That it did not, and that it did not assume Liberal Movement liabilities under an amalgamation (with the result that the Liberal Movement remained notionally and legally in existence until those liabilities had been paid off) nonetheless helps to confirm that the arrangement was not an amalgamation.

genuine merger would be strong evidence that no merger took place in fact.
 (4) *Section 15 and the problem of the "gap"*.

S.15[2] of course makes no provision for independents, but it seems that many other "pathological" situations of the rise and fall, the merger or fusion of political parties, will not be covered by its terms. It might be attractive to regard s.15[2] as establishing a controlled discretion, in such circumstances, rather than leaving the State Parliament with an unfettered choice; but s.15[2] is precise in specifying the extent to which the power to choose in s.15[1] is legally restricted by the principle of continuity of representation. Although s.15[1] could perhaps be held to confer only a limited discretion, it seems more likely that in such cases we are thrown back on the "convention". The value of the controversy over the Hall vacancy may well lie in the reaffirmation of the relevance of that convention, and of the principle of representation underlying it, even to the rather unusual and extreme cases in which it will now fall to be applied.

Annex

MINUTES forming ENCLOSURE to D.L.S. No. 1395 1977 TO THE HONOURABLE THE ACTING PREMIER

Commonwealth Constitution, S.15 — "particular political party" — resignation of Senator Hall

1. I refer to your memorandum of November 8 about the position of the Government and the State Parliament with respect to the filling of a casual vacancy in the Senate consequent upon the resignation of Senator Steele Hall.

2. Casual vacancies in the Senate are dealt with in Section 15 of the Commonwealth Constitution. The original section was wholly replaced by the Constitution Alteration (Senate Casual Vacancies) 1977 which came into force on July 29 last. The chief difficulty arising from Senator Hall's resignation relates to party identification, but there are several features of Section 15, as it now reads, that are worth drawing attention to, and it is convenient to deal with them first.

3. It is common knowledge that Senator Hall intends to stand for a House of Representatives seat at the forthcoming election, but I do not know whether he has yet resigned his place in the Senate. At any rate, I am informed that the Governor of South Australia has not yet received any notification of a vacancy from the President of the Senate pursuant to Section 21 of the Constitution. I think this is critical to the timing under Section 15. The second sentence of Section 15 says what can be done in the State when a vacancy has been notified. The first sentence, in apparent contrast, refers only to the fact of a vacancy occurring. I think the better view, however, is that no part of Section 15 can be put into operation until a formal notification has been received by the Governor under Section 21.

4. The power of the State Governor, with the advice of his Executive Council, to make an interim appointment pending a selection by a joint sitting of the Houses of Parliament of the State may only be exercised if Parliament is not in session when the vacancy is notified under Section 21. It is therefore not possible for the Governor to make such an appointment during a Parliamentary recess if the notification was received during a Parliamentary session but Parliament simply failed to fill the vacancy before the session ended.

5. Under the original Section 15, a Senator chosen to fill a casual vacancy held office until the expiration of his predecessor's term or until the next Federal election, whichever first happened. Under the amended section, however, the substitutionary Senator, chosen at the joint sitting, will hold the place until the expiration of the term of service in question, whether a Federal election intervenes or not.

6. The question arises whether a State Parliament is obliged to exercise its power under Section 15 or may simply leave the vacancy unfilled. In my opinion, the language of the section ("shall choose") imposes on the State Parliament a constitutional requirement which it is obliged to exercise with all convenient speed upon receipt of the Section 21 notification. (*Cf.* Quick & Garran, *Annotated Constitution*, 437: "It is a principle of the Constitution that the representation of States in the Senate should be maintained, as far as possible, with unbroken continuity, and that no State should be, for any time longer than absolutely necessary, short in its representation and consequently deficient in its political strength of the Council of States.")

7. I turn to the second paragraph of Section 15 and its application to the case of Senator Hall. I am informed that he was elected to the Senate in December 1975 for a term of three years which is taken to have begun on July 1, 1975 (*Constitution*, Section 13). I understand that at the time of his election he was publicly recognized by the Liberal Movement as being an endorsed candidate of that party and that he publicly represented himself to be such a candidate.

Compliance with Section 15 therefore requires that the person chosen or appointed to fill the vacancy caused by his resignation shall, unless there is no member of the Liberal Movement available to be chosen or appointed, be a member of that party.

The question, then, is whether the Liberal Movement still exists as a political party. If it does, and there are members of it available to be chosen or appointed (in the sense, I would understand, of being eligible and willing to sit), then one of those members must be chosen.

8. The history of the Liberal Movement and its possible successors since 1975 has been a chequered one. Whether the original party still exists is a question of fact which the joint sitting, and if necessary the courts, will have to determine in the way that facts are usually determined when there is a dispute about them — by considering all the available evidence and forming a judgment upon it. But in the present case, at least at the moment, there is an obvious difficulty in discovering just what those facts are.

9. The only formal documents that appear to be available at this stage are those filed in the Companies Office. The Liberal Movement was incorporated, apparently in 1973, under the Associations Incorporation Act. There is nothing on the Companies Office file to indicate that it has been wound up (Section 24) or its registration cancelled (Section 25), and I am not aware that any property it possessed has been transferred (Section 24) or otherwise disposed of (Section 23). The Registrar has not been notified of the formal amalgamation of the Liberal Movement with any other association under Section 28.

10. One might infer from this sparse material that the Liberal Movement still exists as a legal entity. However, whether it exists as a political party, with (financial) members, is another question, and for that the only material

before me is drawn from newspaper reports — the following quotations or summaries from reports in "The Advertiser" and the four photocopies attached:

Wednesday, April 7, 1976:

The Liberal Party and the Liberal Movement plan to merge
The LM's Leader (Senator Hall) will recommend to the LM members next week that his party be disbanded and that he return to the Liberal Party.

Thursday, April 15, 1976:

The Liberal Movement Standing Committee last night voted 61 to 42 in favour of a merger with the Liberal Party, . . . Senator Hall's motion "That the standing committee approved negotiations with the Liberal Party conclude a merger" . . .

Saturday, May 1, 1976:

Liberal Movement and Liberal Party leaders yesterday clinched agreement on terms for the parties to merge . . .

Monday, May 3, 1976:

A series of meetings this week will see the formation of a new Liberal Movement in SA politics.

Following the narrow passage of a motion by Senator Hall to dissolve the LM and merge with the Liberal Party on Saturday, the State leader of the LM (Mr. Milhouse) announced his determination to start afresh . . .

At Saturday's convention Senator Hall moved: "That General Convention endorses the decision made by Standing Committee on April 14 and instructs Management Committee to take all necessary steps to disband and dissolve the Liberal Movement subject to the completion of negotiations satisfactory to Management Committee."

During his address Senator Hall said:

"Today I am putting to you a motion to disband the Liberal Movement on the basis that its practical objectives are complete."

Friday, May 7, 1976:

Mr. Robin Milhouse last night officially formed his new LM party at a meeting of more than 180 supporters.

. . . "Only a party like the one we are forming tonight will be able to do that" (Mr. Millhouse).

11. If this material, so far as it goes, is reliable, then there would appear to be three possible arguments:

(1) *That the Liberal Movement merged with the Liberal Party so that it is appropriate that the Liberal Party should nominate Senator Hall's successor.*

It is not clear whether there was intended to be, or was, an actual organic union between the Liberal Movement and the Liberal Party, or whether following an agreement between certain representatives of the parties the Liberal Party lifted its ban on the Liberal Movement and Senator Hall and other members of the Liberal Movement thereon rejoined the Liberal Party. One would need to know precisely what decisions were made and what

agreements drawn up before being in a position to express an opinion on that question, and in the nature of things that kind of information is not generally available. However, even if there was an actual merger between those two parties, I think it doubtful whether the Liberal Party could be accurately described as the political party that endorsed Senator Hall in 1975. A change of name or of policy is one thing, amalgamation is another. (I doubt, for instance, whether the old Liberal and Country League could be identified with one or other of its amalgamating predecessors of the 1930's for the purpose of Section 15). As at present advised, I think any such claim by the Liberal Party would be hard to sustain.

- (2) *That the new Liberal Movement (if it still exists) or the Australian Democrats should supply the vacancy.*

The newspaper reports strongly suggest that the New Liberal Movement was a new party, and that it was not a case of the surviving minority in the Liberal Movement continuing the old organisation under another name. Again, it does not seem to be the case that the New LM simply became the South Australian branch of the Australian Democrats, but rather that the new LM was formally disbanded with most of its members joining the other party. On the information before me, therefore, I should not regard a claim by either the New LM (if it still exists) or the Australian Democrats to be the Liberal Movement for the purpose of Section 15 as at all strong.

- (3) *That the old Liberal Movement still exists with a member available to be chosen under Section 15.*

This argument assumes, of course, that there was not a merger between the Liberal Movement and the Liberal Party. The Companies Office file, as far as it goes, suggests that the old Liberal Movement survives as a legal entity, and it is quite likely that no-one troubled to go through the motions of dissolving the organisation when Senator Hall and his followers left it in May 1976. It is also possible that there were some members of the party who for one reason or another were not interested in joining either the Liberal Party or the New LM. So far as I know, however, there has been no activity by any such party rump over the past eighteen months. The operation of the second paragraph of Section 15 connotes the continuing existence of the political party in question, and in my opinion that requires a continuing organisation and activity if only on the most modest scale — something more, in other words, than a mere legal shell. The material before me suggests that the Liberal Movement now exists, if at all, only in name. I should therefore expect this argument to fail.

For these reasons I am at present of the opinion, formed solely upon the scant hearsay material to which I have referred, that the Liberal Movement has ceased to exist as a political party and that the second paragraph of Section 15 of the Constitution can have no operation in the selection of Senator Hall's successor. But I must emphasize, as strongly as I can, that there may well be facts unknown to me that would lead me to change this opinion. I just do not know.

12. It remains to consider the manner in which the South Australian Parliament should make its choice in this particular case. Members will have to inform themselves as best they can of the relevant facts in order to make their own judgment on the applicability or otherwise of the constitutional provision. For this purpose it would be open to them to have regard to matters of common knowledge, and that would include, at the least, the total absence from the political scene of the Liberal Movement, as such, since May, 1976. I think members would also be entitled to inform themselves from contemporaneous newspaper reports if that was the only information they could get. Anyone who claims that the constitutional provision can be given a practical operation in this case should be publicly invited to bring forward his evidence for the consideration of Members. It might be thought appropriate to refer the question to a select committee, especially if it were proposed to take evidence from witnesses. (It appears that witnesses may be compelled to attend and give evidence, at the Bar of either House or before a committee — Constitution Act, Section 39; Erskine May (19th edition), 685 ff. — but the adaption of those powers to a joint sitting would have to be considered). It is not possible to give any precise advice on these procedural questions at this stage.

13. There are a number of legal questions that would have to be considered in the event of a legal challenge to Parliament's choice of a successor to Senator Hall. My tentative view is that the provisions of the second paragraph of Section 15 of the Constitution are mandatory and not merely directory. (*Cf. Victoria v. Commonwealth and Connor* (1975) 134 CLR 81 on the nature of Section 57). I think also that a failure to comply with the constitutional requirement would be justiciable at the suit of a member of the party affected, probably in the Court of Disputed Returns (Commonwealth Electoral Act, Section 183) and possibly in other ways as well. But I have not looked into those questions with any thoroughness and I do not express a concluded opinion on them.

(B. R. Cox)
Solicitor-General