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2016 SENATE ELECTORAL REFORMS IN THE HIGH COURT AND BEYOND

I Introduction

In 2016, the government implemented significant reforms to the Senate electoral processes when it passed amendments to the *Commonwealth Electoral Act 1918* (Cth) ('*CEA*'). Shortly after the passage of the amending legislation, Senator Bob Day challenged the amendments' constitutional validity in the High Court of Australia. In *Day v Australian Electoral Officer (SA)*,[1] the High Court unanimously dismissed the challenge. This case note explains the High Court's reasoning and considers how the decision reinforces existing constitutional principles regarding the Parliament's power to determine electoral processes. This case note then examines how the new system fared at the 2016 federal election, and concludes that, while Senate processes may still benefit from further reform, especially in relation to Senate casual vacancies, the 2016 reforms were a victory for Australian democracy.

II The Political Context

A *The 2013 Election and Calls for Reform*

From 1984 the *CEA* provided for ticket voting with full preferences above the line, and full preferential voting below the line. Under this system, electors who voted above the line did not have control over the preference flows, and effectively accepted the preferences determined by the voting ticket or tickets lodged by the particular group or incumbent senator. Electors had the option of voting below the line by expressing full preferences for all listed candidates. However, in the larger states this was a difficult and time-consuming task, and understandably one in which only a small fraction of voters engaged.[2]

The effect of this system was to allow parties to legally manipulate preference flows through group voting tickets. Micro-parties formed alliances and agreed to preference each other in their tickets ahead of any parties not part of the alliance. This meant

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1 (2016) 331 ALR 386 ('*Day*').

2 At the 2013 federal election, only 3.5% of formal votes were lodged below the line: Antony Green, 'How Voters Reacted to the Senate's New Electoral System' on *Antony Green's Election Blog* (11 October 2016) <http://blogs.abc.net.au/antonygreen/2016/10/how-voters-reacted-to-the-senates-new-electoral-system.html>.

that after members of a group who lodged a ticket were elected or excluded, their preferences would be funnelled to the other parties via a series of exchanges. The more parties that joined an alliance, the greater number of preferences to be allocated to the last remaining candidate after all others had been excluded or elected. This system produced unexpected results — most notably the election of the Australian Motoring Enthusiast Party's Ricky Muir to the Senate at the 2013 federal election after the party received just 0.51% of the primary vote.[3] Muir's election relied on preferences from 22 other parties.[4]

In response to concerns that micro-parties were 'gaming' the Senate by engaging in this so-called 'preference harvesting',[5] the Joint Standing Committee on Electoral Matters (JSCEM) was tasked with examining the Senate electoral system. JSCEM's interim report was released in May 2014 and contained the conclusion that 'the 2013 federal election will long be remembered as a time when our system of Senate voting let voters down'.[6] The JSCEM found that the current system allowed for conduct, which, though technically legal, 'distorted the will of the voter'.[7] The JSCEM made a number of recommendations to address the system's flaws, some of which were given effect in the *Commonwealth Electoral Amendment Act 2016* (Cth).

B *The Commonwealth Electoral Amendment Act 2016 (Cth)*

In February 2016, the Commonwealth introduced the Commonwealth Electoral Amendment Bill 2016 (Cth). The Bill was passed by the Senate, with some amendments, on 18 March 2016 after a marathon 40 hours of debate.[8] The *Commonwealth Electoral Amendment Act 2016* (Cth) abolished group voting tickets and compulsory full preferential voting, instead introducing a requirement that voters allocate at least six preferences above the line and 12 preferences below the line. According to the Explanatory Memorandum, the amendments aimed to 'provide

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3 Australian Electoral Commission, *First Preferences by Candidate — Vic* (18 October 2013) Virtual Tally Room — 2013 Federal Election <http://results.aec.gov.au/17496/Website/SenateStateFirstPrefs-17496-VIC.htm>.

4 Antony Green, 'Ricky Muir's Strange Path to the Senate' on *Antony Green's Election Blog* (7 August 2014) <http://blogs.abc.net.au/antonygreen/2014/08/ricky-muirs-strange-path-to-the-senate.html>.

5 'Calls Mount to End Senate "Gaming" by Micro-Parties', *The Australian* (online), 9 September 2013 <http://www.theaustralian.com.au/national-affairs/election-2013/calls-mount-to-end-senate-gaming-by-micro-parties/story-fn9qr68y-1226715365251>.

6 Joint Standing Committee on Electoral Matters, Parliament of Australia, *Interim Report on the Inquiry into the Conduct of the 2013 Federal Election: Senate Voting Practices* (2014), v.

7 Ibid.

8 'Senate Passes Voting Law Changes After Marathon Sitting' *The Sydney Morning Herald* (online), 18 March 2016 <http://www.smh.com.au/federal-politics/political-news/senate-passes-voting-law-changes-after-marathon-sitting-20160318-gnlvo3.html>.

confidence to voters that their vote goes to the intended candidate' and 'empower voters, returning control of their preferences to them'.[9]

The amendments also included generous saving provisions, which deemed ballot papers with at least one preference above the line or six consecutive preferences below the line to be a formal vote, to 'capture voter intent and reduce the risk of increased vote informality'.[10] Given that the previous system had been in place from 1984, and subsequently a very large majority of voters had opted to vote above the line, the savings provisions were included to reflect the policy that those who continued to vote in this way should still have their vote counted as formal — even if their choice would not have a 'long life' in terms of preference distributions due to vote exhaustion.[11]

III The High Court Challenge

Family First Senator Bob Day brought an application in the original jurisdiction of the High Court of Australia challenging the validity of certain provisions of the *CEA* as amended by the *Commonwealth Electoral Amendment Act 2016* (Cth). A second action (intended to be 'complementary' to the first action)[12] was then launched by a Senate candidate in Tasmania, Peter Madden, and a group of six electors from the other States and Territories. Given that the grounds of application and relief sought were substantially the same, French CJ ordered that the submissions in the Day proceedings stand as the submissions filed for the purposes of the Madden proceedings.[13]

Together, the plaintiffs raised five arguments:

1 The amended *CEA* prescribes two methods of voting, one above the line and one below the line, contrary to s 9 of the *Constitution*.[14]

2 The option of above the line voting for one or more registered parties or groups is an indirect method of election, contrary to s 7 of the *Constitution*.[15]

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9 Explanatory Memorandum, Commonwealth Electoral Amendment Bill 2016 (Cth) 2.

10 Ibid.

11 Ibid 8. In simple terms, a ballot paper is 'exhausted' when it has no more preferences marked next to candidates still in the count, and is excluded from the count.

12 Transcript of Proceedings, *Day v Australian Electoral Officer for the State of South Australia and Anor; Madden v Australian Electoral Officer for the State of Tasmania and Ors* [2016] HCATrans 85 (15 April 2016).

13 Ibid.

14 *Day* (2016) 331 ALR 386, 399 [38].

15 Ibid 401 [46].

3 The new form of the ballot paper and the provisions for above the line voting infringe a constitutional requirement of 'directly proportional representation' in the Senate.[16]

4 The new form of the ballot paper and the instructions are likely to mislead or deceive electors, and hinder or interfere with the exercise of a free and informed vote, and constitute a burden on the implied freedom of political communication.[17]

5 The new form of the ballot paper impairs the system of representative government.[18]

The consensus among constitutional law experts was that these arguments were likely to fail, with the challenge being described variously as 'not strong',[19] 'unpersuasive, and run[ning] counter to long-standing doctrine'[20] and, most decisively, 'doomed from the outset'.[21]

The High Court dismissed the application just 10 days after the hearing, ruling that, as expected, 'none of the … arguments has any merit and each can be dealt with briefly.'[22]

A *More than One Method of Choosing Senators*

First, the plaintiffs argued that the above the line and below the line voting system provided for in the amended *CEA* constitute two different methods of voting.[23] The plaintiffs argued this was contrary to s 9 of the *Constitution*,[24] which confers on Parliament the power to make laws prescribing the method of choosing Senators, which is to be uniform for all the States.[25]

16 Ibid 401 [51].

17 Ibid 402 [55].

18 Ibid 402 [57].

19 Anne Twomey, '*Day v Electoral Officer (SA)*: Senate Voting Reforms Under Challenge' (2016) 38 *Sydney Law Review* 231, 241.

20 George Williams, 'The Court Case that Could Derail Turnbull's Early Election Plans', *The Sydney Morning Herald* (online), 2 May 2016 <http://www.smh.com.au/comment/the-court-case-that-could-derail-turnbulls-early-election-plans-20160501-goj6h1.html>.

21 Tony Blackshield, 'A Day in Court' on Swinburne Institute for Public Research, *Inside Story* (20 May 2016) <http://insidestory.org.au/a-day-in-court>.

22 *Day* (2016) 331 ALR 386, 399 [37].

23 Ibid 399 [38].

24 Ibid.

25 *Constitution* s 9.

In characterising the voting process as involving two 'methods', the plaintiffs relied on the new definition of 'dividing line' in s 4(1) of the amended *CEA*.[26] Section 4(1) defines 'dividing line' as a line which separates the voting method described in s 239(1) (below the line voting) from the voting method described in s 239(2) (above the line voting). The Court dismissed this argument, stating that the statutory use of the word 'method' in the Act cannot determine the construction of the constitutional term.[27]

The Court considered the origins of s 9 of the *Constitution,* and noted the suggestion by Alfred Deakin at the Adelaide Convention in April 1897 that the term 'method' be used in favour of the narrower term 'manner'.[28] The Court also quoted a passage from Quick and Garran, who in their Annotated Constitution[29] expressly embrace the possibility that voters might have the option of expressing their voting choices in two different ways.[30]

Ultimately, the Court held that the purpose of s 9 was to provide a method for choosing Senators that was uniform across the States.[31] There could be 'more than one way of indicating choice within a single uniform system'.[32] Above the line and below the line voting have the 'common effect' that the voter is required to choose between named candidates, and the conferring of discretion on voters about the number of candidates chosen does not create more than one 'method' of choosing.[33] The narrow construction of 'method' advocated by the plaintiffs was rejected by the Court as imposing a 'pointlessly formal constraint on parliamentary power to legislate in respect of Senate elections'.[34]

B *Senators 'Directly Chosen' by the People*

Second, the plaintiffs argued that the above the line voting system is an indirect method of election, which contravenes the requirement in s 7 of the *Constitution* that the Senate be composed of senators 'directly chosen' by the people.[35] The plaintiffs contended that the *Constitution* requires that candidates be elected 'without the

26 *Day* (2016) 331 ALR 386, 396 [30].

27 Ibid. Chief Justice French alternatively put it during oral argument as the plaintiff's argument 'might be said to be a case of a statutory tail waving a constitutional dog': Transcript of Proceedings, *Day v Australian Electoral Officer for the State of South Australia and Anor* [2016] HCATrans 73 (24 March 2016).

28 *Day* (2016) 331 ALR 386, 399 [40].

29 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 426.

30 *Day* (2016) 331 ALR 386, 400 [41]–[42].

31 Ibid 400 [44].

32 Ibid.

33 Ibid 400 [45].

34 Ibid 400 [44].

35 Ibid 401 [46].

intervention of any intermediary or third party'[36] and, because above the line voting is done with reference to political parties, the system is unconstitutional.

The Court found the plaintiffs' assertion 'untenable'.[37] The requirement of a direct choice could exclude indirect choice by an electoral college or another intermediary,[38] but this situation was clearly distinguishable. The Court stated: 'A vote marked above the line is as much a direct vote for individual candidates as a vote below the line. To number a square above the line identifies the candidates appearing beneath that square below the line.'[39]

C *The 'Directly Proportionality Principle' and Disenfranchisement of Electors*

Third, the plaintiffs asserted, via a series of rather 'elusive'[40] arguments, that the new form of Senate ballot paper contravened a 'direct proportionality principle', disenfranchised electors and discriminated against minor parties.[41]

The plaintiffs argued that a 'direct proportionality principle' could be derived from s 7 of the *Constitution*, read together with ss 24 and 128 of the *Constitution*.[42] The Court tersely rejected this argument, stating that the principle of 'proportional representation' by reference to population is 'plainly not applicable' to the Senate, where each State has equal representation notwithstanding disparities in population.[43]

The plaintiffs argued that the calculation of the quota under s 273 of the *CEA* resulted in 'one seventh of the relevant State electorate being excluded from the count'[44] — that is, disenfranchised.[45] However, the Court rejected this argument, noting that the plaintiffs had not identified 'any relevant constraint on electors in the means

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36 Ibid.

37 Ibid 401 [50].

38 Ibid 401 [49] citing *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 21 (Barwick CJ), 44 (Gibbs J), 56 (Stephen J), 61 (Mason J).

39 *Day* (2016) 331 ALR 386, 401 [48].

40 Ibid 402 [52].

41 Ibid 401–2 [51]–[54].

42 Ibid 401 [51]. Section 24 of the *Constitution* relates to the nexus between the two Houses. Section 128 of the *Constitution* contains the requirement that voters in an affected State approve any alteration of proportionate representation of the State in either House.

43 *Day* (2016) 331 ALR 386, 401 [51].

44 Ibid 401 [52].

45 The quota is calculated according to the Droop system, by dividing the total number of first preference votes by one more than the number of candidates required to be elected and then adding one. At a half-Senate election for six vacancies, successful candidates need to attain one-seventh of the vote (14.3%): ibid 390 [10].

available to them for completing a formal Senate ballot paper'.[46] There was 'no disenfranchisement in the legal effect of the voting process.'[47]

The Court determined that the plaintiffs' true concern was that most electors would be enticed by the 'eye-catching appeal [of] a party vote' and would vote according to the above-the-line voting instructions on the ballot paper.[48] This would supposedly deprive them of the 'the opportunity to cast "a full and effective vote"'.[49] The Court held that while the plaintiffs' arguments focussed on the negative effects likely to be suffered by minor parties, the complaints were really just about the consequences of electors' voting choices, and had no constitutional basis.[50]

D *A 'Free and Informed Vote'*

Fourth, the plaintiffs argued that the Senate ballot paper was misleading, and burdened the implied freedom of political communication.[51] The plaintiffs asserted that the ballot paper 'fail[ed] to inform voters that an effective preferential vote require[d] voting for all candidates', and failed to describe 'the full range of voting options'.[52] In particular, the plaintiffs pointed to the omission in the ballot paper of any reference to the vote saving rules, which count the completion of one square above the line, or six squares below the line, as a formal vote.[53]

The Court found this argument 'fails at its threshold' because the ballot paper accurately reflects the statutory requirements.[54] The non-inclusion of the technical vote saving rules on the ballot paper was 'hardly surprising' and did mean that the ballot paper could be said to mislead electors.[55]

E *Representative Government*

Finally, the Court dismissed the plaintiffs last-ditch 'catch all' argument that the amended *CEA* impaired the principle of representative government.[56] The arguments under this heading were simply a more broadly stated rerun of the plaintiffs' earlier arguments, which had already been rejected by the Court.[57]

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46 Ibid 402 [53].

47 Ibid 402 [54].

48 Ibid.

49 Ibid 402 [53].

50 Ibid 402 [54].

51 Ibid 402 [55].

52 Ibid.

53 Ibid.

54 Ibid 402 [56].

55 Ibid.

56 Ibid 402 [57].

57 Ibid.

IV The Senate and the Constitution: Did We Learn Anything at the End of the Day?

The High Court's judgment is far from revolutionary. Nonetheless, it is useful to briefly reflect on the decision and consider how it reinforces the existing electoral case law.

A fundamental problem with the first three arguments put forward by the plaintiffs was that they 'sought to challenge features of the system that have existed since at least 1983.'[58] Indeed, Day's application implicitly contained what the Commonwealth Solicitor General described as a 'startling proposition' — that Day himself had not even been validly elected.[59] Before the High Court handed down its decision, Twomey argued that the most persuasive way to overcome this obstacle was to focus on the propensity of optional preferential voting to allow a significant number of votes to exhaust.[60] Twomey argued that, drawing on previous High Court jurisprudence on electoral participation,[61] the plaintiffs could argue that representative government is evolutionary and may only evolve in the direction of increasing public participation.[62] The 2016 amendments, by allowing the exhaustion of votes, arguably reduce public participation in the determination of the final Senate seats in each State.[63] While the plaintiffs did briefly consider the relationship between vote exhaustion and representative government in their submissions,[64] their failure to develop this line of argument further represents a missed opportunity to ascertain the Court's view on a more nuanced argument about representative government.

On the constitutional issues that were considered by the High Court, the decision serves to reinforce the existing principle that the Constitution allows the Parliament considerable latitude in determining the operation of the electoral system. The Court cited McHugh J's observations in *Mulholland v Australian Electoral Commission*[65] that 'the Constitution does not mandate any particular electoral system … the form of representative government, including the matter of electoral systems, is left to the Parliament'.[66] The Court in *Day* also cited the comments of Gummow and Hayne JJ in

58 Ibid 399 [37].

59 Transcript of Proceedings, *Day v Australian Electoral Officer for the State of South Australia and Anor* [2016] HCATrans 73 (24 March 2016).

60 Twomey, above n 19, 240.

61 *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

62 Twomey, above n 19, 240.

63 Ibid.

64 Day, 'Written Submissions of Plaintiff', Submission in *Day v Australian Electoral Officer for the State of South Australia and Anor*, Case No S77/2016, 5 April 2016, 15 (Argument E5).

65 (2004) 220 CLR 181 ('*Mulholland*').

66 *Day* (2016) 331 ALR 386, 393 [19] citing *Mulholland* (2004) 220 CLR 181, 207 [64] (McHugh J).

Mulholland that cautioned against elevating the requirement that Senators be directly chosen by the people to a 'broad restraint upon legislative development of the federal system of representative government'.[67] These principles 'weigh[ed] against the plaintiffs' arguments' in *Day*.[68] In *Mulholland*, Gummow and Hayne JJ recognised that 'extreme' examples (eg legislation mandating political party membership to qualify for election) would be unconstitutional.[69] However, other than such extreme cases, the legislature has the ability to determine matters relating to the electoral process. The Court's decision in *Day* confirms that the amendments to the *CEA* are matters within the Parliament's discretion, upon which the *Constitution* provides no basis for the judiciary to intervene.

The arguments in *Day* were evidently driven by political considerations rather than sound constitutional foundations. Consequently, little can be learnt from the case by way of constitutional principle. The plaintiffs' challenge was, legally speaking, entirely unsuccessful. However, as Blackshield has recognised, at the end of the day, the plaintiffs are likely to judge their success according to more diverse, political, criteria.[70] The High Court challenge attracted substantial media attention and ensured a continued spotlight on the Senate reforms. If this publicity allowed the plaintiffs' message — that in order to cast the most effective vote, electors should number as many squares as they can on the ballot paper — to be conveyed to some voters, then the plaintiffs might consider the challenge time and money well spent.[71]

V The Political Ramifications — The 2016 Election and Beyond

The new Senate electoral rules were put to test shortly after their commencement in the July 2016 double dissolution election. Of the 76-member Senate, the Coalition, Labor and the Greens won 30, 26 and nine seats respectively. A cross bench of 11 members was elected, consisting of four One Nation Senators, three Nick Xenephon Team Senators and four independents. Despite the cross bench having grown from nine to 11, Prime Minister Turnbull reported that he was satisfied that the Senate electoral reforms had 'absolutely worked'.[72]

67 *Day* (2016) 331 ALR 386, 393 [19] citing *Mulholland* (2004) 220 CLR 181, 237 [156] (Gummow and Hayne JJ).

68 *Day* (2016) 331 ALR 386, 393 [20].

69 *Mulholland* (2004) 220 CLR 181, 237 [156] (Gummow and Hayne JJ) quoting *McGinty v Western Australia* (1996) 186 CLR 140, 220 (Gaudron J).

70 Blackshield, above n 21.

71 Ibid.

72 Jared Owens, 'Malcolm Turnbull says Senate Electoral Reforms "Absolutely Worked"', *The Australian* (online), 5 August 2016 <http://www.theaustralian.com.au/national-affairs/malcolm-turnbull-says-senate-electoral-reforms-absolutely-worked/news-story/d7415a5667aeb71712e9edc89db52511>.

Following the election, complaints were aired that the election of some cross-bench Senators, especially the unexpected election of four One Nation senators, was a byproduct to the electoral reforms.[73] However, the figures indicate that the election of Pauline Hanson and her team was more a reflection of the genuine electoral choices of Queenslanders, through both Hanson's primary vote and preference flow, than the operation of the reforms.[74] Interestingly, despite Day's claims in the High Court that the reforms would essentially prevent his re-election, Antony Green's analysis indicates that Day was in fact the first person to win a Senate seat due to preferences.[75] Further, the claims that a vastly increased number of votes would be exhausted had been overstated.[76] The incidence of below the line voting almost doubled from 3.5% in 2013 to 6.5% in 2016.[77] A good example of the positive impact of the reforms in giving the power back to voters is in the election of Tasmanian Senator Lisa Singh, Labor's sixth candidate, who was elected ahead of the fifth placed candidate — the first time in decades that voters' own preferences reordered the candidates on a party ticket.[78]

In an ironic turn of events, Day resigned from political office in November 2016 following the collapse of his housing company.[79] In April 2017, the High Court held that Day's election to the Senate in July 2016 was invalid because he had an indirect pecuniary interest in an agreement with the Commonwealth, contrary to s 44(v) of the *Constitution*.[80] The High Court directed that the Australian Electoral Commission

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73 See, eg, Ben Raue, 'Senate Reform Did Not Cause the Return of Pauline Hanson. Here's Why', *The Guardian* (online) (6 July 2016) <https://www.theguardian.com/australia-news/2016/jul/06/senate-reform-did-not-cause-pauline-hanson-to-return-heres-why>, quoting former MP Craig Emerson's tweet: 'The LNP-Greens changes to Senate voting + double dissolution have breathed new life into Pauline Hanson's One Nation Party. Australia loses'. It is relevant to note that because the election was a double dissolution election, the quota was reduced from 14.3% to 7.7%, making it easier for a micro-party to win a seat.

74 Antony Green, 'How Voters Reacted to the Senate's New Electoral System', above n 2; Rosie Lewis, 'Federal Election 2016: Senate Result "Reflects Will of the People"', *The Australian* (online), 13 July 2016 <http://www.theaustralian.com.au/federal-election-2016/federal-election-2016-senate-voting-reflects-will-of-the-people/news-story/7d6b170e10f76b7df7bb6326d107c4df>.

75 Antony Green, 'South Australia Senate 2016 — Distribution of Preferences' on *Antony Green's Election Blog* (4 August 2016) <http://blogs.abc.net.au/antonygreen/2016/08/south-australia-senate-2016-distribution-of-preferences.html>.

76 Antony Green, 'How Voters Reacted to the Senate's New Electoral System', above n 2.

77 Ibid.

78 Ibid.

79 Stephanie Anderson and Matthew Doran, 'Bob Day Tenders Resignation as Family First Senator', *ABC News* (online), 1 November 2016 <http://www.abc.net.au/news/2016-11-01/bob-day-resigns/7983088>.

80 *Re Day (No 2)* (2017) 91 ALJR 518.

perform a special count of the Senate ballots in South Australia,[81] which led to the election of Lucy Gichuhi.[82]

Although the High Court's decision rendered Day's resignation ineffective, the circumstances highlighted another worthy topic of discussion on Senate electoral reform: the filling of Senate casual vacancies. Section 15 of the *Constitution*[83] provides that a State Parliament, in filling a casual vacancy, is limited to choosing the nominee of the party from which the former Senator had come. There is no requirement that the nominee stood for office at the previous election. Ricky Muir, the biggest target of the dissatisfaction about the proliferation of preference deals, has pointed out the incongruity: the meagre 0.51% of the primary vote he received in 2013 is still more than those Senators appointed following a Senate casual vacancy who were not on the ticket at the time of the election of the seat they took.[84] Muir raises a valid point. While reform of casual Senate vacancies may not be at the forefront of the current political agenda, it does raise serious questions about democratic legitimacy and warrants further consideration.[85]

VI Conclusion

The year 2016 saw the most significant reforms to the Senate electoral process in several decades. Already, the new system has endured a High Court challenge and has been applied in a federal election. The High Court challenge in *Day* revealed little we did not already know about the relationship between the *Constitution* and Parliament's powers to legislate in relation to Senate electoral processes. Of greater interest, however, are the political ramifications of the reforms now that the dust has settled from the 2016 federal election. Although the Senate system may benefit from further reform, particularly in relation to casual Senate vacancies, the 2016 reforms are a step in the right direction.

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81 Ibid.

82 Transcript of Proceedings, *In the Matter of Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the* Commonwealth Electoral Act 1918 *(Cth) Concerning Mr Robert John Day AO* [2017] HCATRans 86 (19 April 2017).

83 As amended by the successful constitutional referendum in 1977.

84 Rosie Lewis, 'Ricky Muir Hits out at Call for Senate Reforms', *The Australian* (online), 29 December 2015 <http://www.theaustralian.com.au/national-affairs/ricky-muir-hits-out-at-call-for-senate-reforms/news-story/e4a158c5934ba04720f8f1197d80c0e7>.

85 See, eg, Michael Maley, 'Senate Electoral Reform' on *AUSPUBLAW* (29 September 2015) <http://auspublaw.org/2015/09/senate-electoral-reform/>; Antony Green, 'Senate Casual Vacancies and the Impact of Constitutional Change' on *Antony Green's Election Blog* (6 December 2012) <http://blogs.abc.net.au/antonygreen/2012/12/senate-casual-vacancies-and-the-impact-of-constitutional-change.html>; John Nethercote, 'Senate Vacancies: Casual or Contrived?' (Paper presented at Seventeenth Conference of The Samuel Griffith Society, Coolangatta, 8–10 April 2005) 60.