PARTY ENDORSEMENT AND SENATE VACANCIES
The Constitution and the *Commonwealth Electoral Act*

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Introduction

Before it was amended at a referendum held on 21 May 1977, s 15 of the Commonwealth Constitution gave State Parliaments nearly unfettered legal discretion when filling Senate casual vacancies.[1] But their choice is now restricted. If the original Senator was publicly recognised by a political party, and publicly represented him or herself as an endorsed candidate of that party when he or she was chosen, then the replacement must also be a member of that party.

Nowhere else in the Constitution are political parties mentioned. Nor, in 1977, were parties mentioned anywhere in the statute book; they existed solely as private associations.[2] In 1983, however, Federal Parliament amended

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1 References in this article to State Parliaments include State Governors, who are also are bound by s 15's party membership requirements when 'appointing' an interim Senator until the Parliament 'chooses' a replacement for the remaining term. Only Senators representing States are discussed. Although Territory Senators are replaced through an analogous method (except that if a Territory has Senators but no legislature, vacancies are filled by the Commonwealth Parliament), they raise no Constitutional issues, being prescribed by ordinary statute (*Commonwealth Electoral Act* 1918 (Cth) s 44). Although they could not, of course, choose a bankrupt or foreign citizen, State Parliaments enjoyed as wide a choice as the voters themselves did.

2 T Somes (1996) 'The Legal Status of Political Parties' in M Sims (ed) *The Paradox of Parties: Australian Political Parties in the 1990s*, Allen & Unwin, p 174. Three weeks before the 1977 referendum, Senator Jessop asked a prescient question: whether the amendment would require Senator Steele Hall to be replaced by another Liberal Movement member. Government Senate Leader Senator Reg Withers replied that 'should there be dispute[s] as to whether one belonged to a certain political party or not, or as to the definition of a political party, they would be matters [of fact] for a Court of Disputed Returns to settle...' (Senate Debates (Hansard), 3 May 1977, p 1070). That much was accurate, but Withers then claimed that 'since 1948 political parties have been mentioned in the *Commonwealth Electoral Act*', because Senate candidates can

the *Commonwealth Electoral Act* 1918 (Cth) (CEA) to enable parties to be registered for federal elections, and candidates endorsed by registered parties to be labelled accordingly on the ballot-paper.[3] But although the CEA and s 15 both reflect the same trend towards giving political parties explicit legal recognition,[4] the two do not neatly coincide – even when they use the same words, like 'endorsed'. Is it necessary, or sufficient, for a candidate to be 'endorsed' under the CEA to be considered 'endorsed' under the Constitution? The answer requires an examination of s 15's purpose, and of its practical operation in an election regulated by the CEA.

Section 15's Purpose

The original s 15

Section 15's purpose, before and after 1977, has always been to ensure that Senate vacancies are filled through the most convenient procedure that is in some sense democratic.

Although s 33 of the Constitution requires by-elections for House of Representatives vacancies, these would be costly for the Senate with its State-wide electorates.[5] The original s 15 therefore required a Senate 'by-election'

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be grouped on the ballot-paper. This claim is incorrect: a Senate group is not a 'political party' (see *Baldwin v Everingham* [1993] 1 Qd R 10 at 20 per Dowsett J). Independent Senate candidates can also be grouped (eg Brian Harradine and Kath Venn in Tasmania); whereas if a registered party endorses only one candidate, that person is relegated to the 'Ungrouped' column. Moreover, typically the replacement Senator will not even have been a candidate at the original Senate election.

The South Australian Solicitor-General's advice, given later in 1977, is more accurate: State Parliaments would be entitled to 'have regard to matters of common knowledge', to have a Select Committee take evidence, or even 'to inform themselves from contemporaneous newspaper reports' (*Advice to Acting Premier*, quoted in J Crawford, 'Senate Casual Vacancies: Interpreting the 1977 Amendment' (1980) 7 *Adel LR* 224, p 252). This question is of more than historical interest because, notwithstanding the 1983 CEA amendments, courts must still look at such factual evidence to interpret s 15, especially (but *not* solely) in relation to unregistered political parties.

3 Now CEA Part XI; inserted by *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) s 42. Each State and Territory also has legislation enabling political parties to be registered for State or Territorial (and often local) elections. These provisions are outside the scope of this article, but since they largely mirror the Commonwealth's legislation — and since Senate elections are almost wholly regulated by Federal law — they do not affect the conclusions.

4 Crawford (1980) p 237; C Sharman (1982) 'Diversity, Constitutionalism and Proportional Representation' in Michael James (ed) *The Constitutional Challenge: Essays on the Australian Constitution, Constitutionalism and Parliamentary Practice*, Centre for Independent Studies, p 97.

5 'It was desired to have the vacancy filled by direct election as soon as possible; but the expense of holding a special election throughout the State was an obstacle': J Quick and R Garran (1976) *The Annotated Constitution of the*

only if a House and/or half-Senate election occurred before the vacating Senator's term ended; meanwhile, the State Parliament could choose whoever it wanted as a replacement. From 1901 to 1948, this arrangement was tolerable, because Senators were elected by 'winner-take-all' majority voting. This ensured that every Senator was elected by the same State-wide majority as elected the State Parliament,[6] and that the 'quota' remained constant (a simple plurality before 1918, an absolute majority thereafter), whatever the number of seats vacant.

Political stability

However, after proportional representation (PR) was adopted for Senate elections in 1948, both aspects of the original arrangement – the State Parliament's unlimited discretion and the possibility of Senate by-elections – became politically unacceptable. The first aspect was unacceptable, because no longer were all Senators *meant* to represent a majority of the State's voters; it seemed unfair that death or resignation could arbitrarily let a State's governing party decide who should fill an opposing party's Senate seat.[7] The second aspect was discredited, because, under PR, the quota for a seat would fluctuate capriciously if casual vacancies were filled through by-elections, whether for a single Senate seat at a House election, or for an extra seat at a half-Senate poll. At worst, politicians could manipulate the timing of Senate vacancies in order to raise or lower the quota in their favour;[8] even without deliberate chicanery, by-elections would still disrupt the proportionate balance of Senate numbers.[9]

The 1977 amendment sought to close both loopholes by requiring replacements to belong to the same political party while allowing them to

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Commonwealth of Australia, orig 1901, Legal Books, p 435. Even in Tasmania, with the smallest area and population, a State-wide poll would involve nearly five times as many voters as a House by-election. But even if Federal Parliament legislated for State-wide House electorates or Senate electoral divisions – which s 7 of the Constitution allows – the methods of filling vacancies would not change.

6 However, a State-wide Senate poll might reflect a different majority from the State Parliament in joint sitting because of State electoral boundaries, an appointed Legislative Council, different federal and State voting patterns or splitting of votes.

7 By contrast, a by-election in a single-seat electorate enables the same majority that elected the original representative to choose the replacement.

8 Senator Withers praised the amendment as seeking to 'stop contrived vacancies ... and manipulated replacements', such as one 'attempt ... to create an artificial vacancy, which failed': Senate (Hansard), 4 May 1977, p 1096. Withers was referring to then Prime Minister Whitlam's attempt to create a sixth half-Senate vacancy (winnable for his party) by luring DLP Senator Gair into resigning to take up an ambassadorial post.

9 Nine such by-elections were held, in 1908, 1963, 1966 (four), 1969 (two) and 1972. All but one occurred after the change to PR.

serve out the remainder of the full term of the Senator they were replacing. The trade-off reflected a changed conception of representative democracy: preserving the original, proportionate election result is preferable to obtaining a fresh but potentially distorting electoral verdict.

Democratic legitimacy

The amended s 15 thus seeks to 'stabilise' parties' Senate numbers. Once determined by the voters at a half-Senate or double-dissolution election, these cannot be changed due to ill-timed deaths or resignations.[10] But it also seeks to ensure democratic legitimacy, by requiring a certain minimum of informed consent from the voters.

A party can 'claim' a vacancy only if the Senator publicly received, and accepted, that party's endorsement when elected by the voters. 'Endorsement' must be communicated through three agencies: *by* the party and *by* the candidate *to* the voters. A candidate cannot deceive the voters by winning a Senate seat under one party's banner then handing it to another.

But s 15 does not consider the political party the best 'trustee' for the voters left unrepresented if its endorsement of the Senator was not publicly communicated. In these cases, the State Parliament retains its full pre-1977 discretion, just as if the original Senator was not endorsed by any party at all.[11] The Constitution gives unendorsed Senators no control over the selection of their successors;[12] a State Parliament could quite legally replace Independent Senator Brian Harradine with, say, Clover Moore or even with a major-party nominee, notwithstanding that this would shift the Senate power balance no less than appointing a Field or Bunton. Presumably, the amendment's drafters believed Independent Senators would not leave behind an organisation with the continuity and public accountability of a political party, and that 'the Independents and the party-changers would be too few for any settled principle to be needed to cover them' and so omitted provision for them to avoid prolixity.[13] Section 15 thus enables parties to

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10 However, as Senator Mal Colston's case shows, the numbers can still change if sitting Senators defect from the party that endorsed them but remain in the Senate; hence calls for defecting Senators to vacate their seats automatically: S Jackman, 'Rats and Representation: Remedying the Colston Defect?' (1996) October/November *Current Affairs Bulletin* 23.

11 Contrast the *Electoral Act* 1992 (ACT) s 195(4):

> If (a) the name of the former MLA appeared on the ballot-paper for the last election as an independent candidate ... the person chosen [by the Legislative Assembly] shall be a person who has not been a member of a registered party at any time during the period of 12 months immediately preceding...

12 Contrast the Sydney University Students' Representative Council (SRC) Constitution, s 3(s): '...if the place of any representative becomes vacant, ... the Council shall fill the vacancy by appointing ... a member of the student body nominated by the vacating member...'. However, such appointments last only until the next by-election (which can be triggered by student petition): ss 3(h), 3(i).

13 G Sawer (1977) *Federation Under Strain: Australia 1972-1975*, Melbourne University Press, p 138. If so, the drafters successfully strained that particular

nominate replacements for publicly-endorsed party candidates, and State Parliaments to nominate replacements for other candidates.

Granted, this is not the ideal of democratic consent. In practice, voters' choice may be quite restricted; they may admire the candidate but dislike the party, or have misgivings about authorising it to later nominate a replacement who might not even have been named on the ballot. Nonetheless, s 15 is consistent with Australian law's (minimalist) definition of 'choice'.[14] Voters still have marginally more control over party numbers in the Senate than if those numbers could be changed at will by a State Parliament — elected in a campaign focusing on State, not federal, issues and therefore having no mandate to determine the political complexion of the Federal Parliament — whenever a vacancy occurs.[15]

The amended s 15 should be interpreted consistently with this purpose to the maximum extent that its language allows. Although the provision is still ambiguous in certain respects — and perhaps was deliberately left so[16] — as far as its party membership requirements are concerned, its language and purpose are sufficiently clear to illuminate its correct interpretation. The next question is how closely s 15 meshes with the party endorsement provisions of the CEA.

The *Commonwealth Electoral Act* 1918

Party registration

The CEA establishes elaborate machinery for parties to become and remain registered. Its main substantial requirement is a membership that includes 500 voters or one Federal, State or Territorial parliamentarian.[17] A party can be de-registered if it 'ceases to exist', falls below the membership threshold or goes four years without endorsing candidates in any election.[18]

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gnat while swallowing a camel, because they doubled s 15's length by including transitional provisions contingent upon the concurrent referendum proposal for simultaneous House-Senate elections, which was defeated. In any case, the amended s 15 does (impliedly) cover 'party-changers': see below.

14 *Judd v McKeon* (1926) 38 CLR 380; *Douglass v Ninnes* (1976) 14 SASR 377.

15 It is quite unpersuasive to argue that a State Government should not have to appoint a candidate selected by internal party processes when, without widespread disapproval, the party candidates for general elections are selected in much the same way.

Constitutional Commission (1988) *Final Report of the Constitutional Commission*, Australian Government Publishing Service, p 194.

16 For example, it is doubtful whether the amendment has changed the previous position that the High Court could not compel a State Parliament to meet and choose a replacement: *R v Governor of South Australia* (1907) 4 CLR 1497 at 1512 per Barton CJ. It appears that 'shall choose' in s 15 is still directory rather than mandatory: R D Lumb and G A Moens (1995) *The Constitution of the Commonwealth of Australia Annotated* (5th edn), Butterworths, p 73; Crawford (1980) pp 231–33.

17 CEA s 123.

18 Ibid, ss 136–138.

Plainly, parties registered under the CEA are only one subset of political parties *simpliciter* under the Constitution. Section 15 requires only that a party 'exist' and have at least one 'member available',[19] whereas the CEA's registration requirements are more onerous. Moreover, the CEA sets numerical criteria (500 members, four years), whereas s 15 would require the High Court to assess all the circumstances of each case.

Although they diverge, the Constitution and the CEA do not conflict on this point. The legislation requires registration as a precondition, not of a party's right to exist (whether for the purposes of s 15 or for lawful political activity generally),[20] but of a particular benefit granted by Parliament: ballot labels.[21] However, the position regarding endorsement is more complicated.

Party endorsement

Endorsed candidates of registered parties are designated on the ballot-paper with their party's name or 'ballot label'. The CEA, s 169B(1) contains three paragraphs specifying when a candidate is deemed so endorsed. Paragraphs (a) and (b) cover candidates nominated, or certified as endorsed, by the party's registered officer; paragraph (c) authorises (and impliedly directs) the Australian Electoral Commission (AEC) to satisfy itself, after making appropriate inquiries of the party's registered officer or otherwise, that the candidate is in fact endorsed by the party. As Dowsett J noted in *Baldwin v Everingham*:

> The question of party endorsement is obviously a very important matter specifically dealt with by the Act, clearly in the expectation that it will be possible for the Electoral Commission to determine whether or not a particular candidate has been so endorsed.[22]

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19 A party that has 'ceased to exist' by definition has 'no member available', but the reverse does not necessarily apply: a party may exist, and have active members, but none may be willing to fill the vacancy (eg a party like Greypower of which most members are past retirement age) or legally qualified to do so (the qualifications for a Senator being stricter than those for a voter).

20 'Nor could the Parliament legislate so as to prevent members of lawful political parties from being elected...': *Australian Capital Television (ACTV) v Commonwealth (No 2)* (1992) 177 CLR 106 at 227 per McHugh J. 'Lawful' would cover a wide spectrum, given the High Court's scepticism towards attempts to declare parties illegal: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. See also Kerri Elgar, 'The Legal Standing of Political Parties' (1997) 32(7) *Australian Lawyer* (August) 12, p 12, quoting Dr Ian Ward: 'parties are not required to register ... to run candidates at an election. Indeed ... for many parties — particularly ... single-issue or fringe groups — registration has few advantages'.

21 *CEA* s 169. Others may use the label 'Independent', but this would not appeal to candidates of unregistered parties. Moreover, it could be used as evidence that such a candidate was not publicly endorsed by that party for the purposes of s 15.

22 [1993] 1 Qd R 10 at 16.

Section 169B(1) includes, but is not limited to, the ordinary meaning of 'endorsed': the same ordinary meaning as s 15 incorporates. It is not hard to imagine a politician somewhere arguing that the vexed question of whether a Senator was 'endorsed' by a political party should be quickly, clearly *and conclusively* answered by looking at the Senator's party label on the ballot-paper.[23]

Put so crudely, the argument would fail, because adopting such a litmus test would unconstitutionally exclude unregistered parties from the benefits of s 15, a result which Parliament did not intend to legislate, and has no power to legislate. But the argument might be put in a more sophisticated form, confined to registered parties only. After all, Commonwealth law provides a method that a registered party and its candidate can easily use to publicly communicate the candidate's endorsement. Is it therefore reasonable to take the presence of a ballot label as proof that a candidate is (and the lack of one as proof that the candidate is not) 'publicly recognised ... and represented' as 'endorsed' by a particular political party as required by s 15?[24]

The answer is a qualified yes. The CEA cannot re-define the meaning of the Constitution, but can affect its operation. The ballot label is strong evidence of endorsement, but cannot be conclusive proof. The reason for this will emerge from a closer analysis of s 15.

The Elements of Section 15

Section 15 requires that the original Senator, 'at the time when [he/she] was so chosen', must have been 'publicly recognised by' the party as, and must have 'publicly represented' him/herself to be, 'an endorsed candidate of that party' before that party can claim that seat. This involves five distinct elements.

'Endorsed'

The *Macquarie Concise Dictionary* defines 'endorsed', in the Australian political context, as: '(of a branch of a political party) to select as a candidate for an election: *he's the endorsed Labor candidate for Bradfield'*. This definition has received recent judicial confirmation:

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23 Compare *Electoral Act* 1992 (ACT), s 195(2): 'If the name of the former MLA appeared on the ballot-paper for the last election as a party candidate, the person chosen [by the Legislative Assembly] to hold the vacant office shall be a member of the party who is nominated by the party.' Perhaps if s 15 had been amended after (rather than before) political parties received statutory recognition, the Constitution might have adopted a similar rule.

24 Compare the majority view in *Sykes v Cleary (No 2)* (1992) 176 CLR 77 that failing to take every step permitted by a foreign country's law to renounce its citizenship will disqualify a candidate under s 44(i) of the Constitution. As long as the foreign law allows any avenue of renouncing citizenship, failing to try that avenue will indicate 'acknowledgment of allegiance, obedience, or adherence to a foreign power'. By analogy, as long as Commonwealth legislation enables candidates and parties to take reasonable steps to publicly proclaim that the candidate is, or is not, endorsed by the party, failure to take such steps may be evidence that the necessary intention does not exist.

> In ... Australian political parlance ... a political party's endorsed candidate is the one it has formally, and in accordance with its rules of procedure, selected and adopted as the one it will publicly support as its own candidate.[25]

Section 15 does not appear to contemplate a candidate being endorsed by more than one party at a time, and the CEA explicitly limits a candidate to one party's ballot label.[26] Although the CEA does not control s 15's meaning, it does seem to reflect the same popular understanding which s 15 seeks to incorporate. In the United States, candidates are often 'endorsed' by parties that did not preselect them (and even by non-party organisations like the AFL-CIO),[27] but Australian political practice limits a candidate to being 'endorsed' by either one party, or by none. Moreover, s 15 would become unworkable if a Senator could be 'endorsed' by two or more parties at once. Must the replacement belong to all of those parties, or is one sufficient?[28] Considerations of practicability therefore confirm that s 15's drafters in 1977 intended to adopt the Australian rather than the US definition.

More crucially, the ordinary Australian usage of 'endorsed' also recognises that a candidate can be 'disendorsed'. Nothing in s 15 indicates that either the party or the candidate becomes *functus officio* after each consents to recognise or represent the candidate as endorsed. Instead, each presumably remains free to revoke the endorsement. But a disendorsement would have effect under s 15 only if publicised widely and early enough to ensure that the candidate was not publicly recognised and represented as endorsed at the time he or she was chosen. It would need to reach the same audience, since (by analogy with defamation law) 'the bane and the antidote must be taken together',[29] and it would need to reach the voters *before* they have 'chosen' the candidate.

How many voters must know about the disendorsement (any? all? more than half?) before the original endorsement is cancelled? Although a difficult question in theory, it is unlikely ever to trouble the High Court in practice. Most voters would learn of it simultaneously via the 6 pm news; the others would hear soon afterwards from neighbours, workmates or talkback radio. Few, if any, would be left unaware 24 hours later. Once a news story of such political drama breaks, especially at election time, it will quickly reach the entire nation.[30]

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25 *Barron v Townsville City Council* [1997] 2 Qd R 6 at 9 per Macrossan CJ and Lee J.

26 CEA s 169B(2).

27 Eg the small US Conservative Party might direct its party-line votes to the Republican candidate rather than nominate its own and risk splitting the vote under a first-past-the-post system.

28 The usual presumption that the plural includes the singular does not apply where it would 'change the character' of the legislation. See *Blue Metal Industries Ltd v Dilley* (1969) 117 CLR 651 at 658 per Morris LJ: 'Acquisition of shares by two or more companies is not merely the plural of acquisition by one.... It would presuppose a different legislative policy'.

29 *Chalmers v Payne* (1835) 150 ER 67.

30 The Hanson disendorsement by the Liberal Party (March 1996) and the Kernot

'Recognised by a particular political party'

Strictly speaking, s 15 does not require the candidate actually to be 'endorsed' by the party; merely *'publicly recognised'* by the party as its endorsed candidate. However, this semantic distinction makes little difference in practice, because 'endorsing' (like 'promising' and 'declaring') is a performative speech-utterance. If a party states that 'This party recognises Smith as an endorsed candidate of this party', then for all intents it *has* endorsed Smith as its candidate.

The thornier question is *which* particular officer or body is authorised to speak for the party when recognising candidates as endorsed. This would require the High Court to determine whether the particular party's rules have been followed. If the secretary of a party's local branch purports to declare Smith endorsed by the party, but the party's constitution specifies that only the state executive may preselect candidates, then Smith has *not* been '[recognised as] endorsed' by that party. The result would be otherwise if the party's rules did vest branch secretaries with control over pre-selection.[31]

'Represented himself'

As noted, s 15 requires endorsement to be communicated by the candidate as well as the party. Therefore, although its revocation usually involves a party 'disendorsing' its candidate, candidates can also 'disendorse' themselves, by resigning or defecting from the party. Again, this will short-circuit the operation of the party membership requirements, provided it is publicised widely and before the candidate has been 'chosen'. This could easily be done via classified newspaper advertisements. Moreover, a media release by the candidate would be newsworthy enough to get ample free publicity. As will be seen, disendorsing oneself would be a powerful weapon for a Senate candidate against the party.

'At the time when he was so chosen'

The 1977 amendment specifies that the original Senator's party endorsement when he or she 'was so chosen' determines the seat's 'party affiliation', if any. This codifies one interpretation of the pre-1977 custom, which the South Australian Parliament followed when it replaced Douglas Clive Hannaford with a Liberal Party nominee in 1967. Hannaford had been elected as a Liberal, but defected in mid-term to sit as an Independent, then resigned.[32]

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defection from the Australian Democrats to the Labor Party (October 1997) illustrate this. Although not all electors vote at the same time (see below), they would all hear the news at approximately the same time.

31 'The manner in which a political party will ... endorse a candidate is a matter for its own internal constitutional procedures': *Barron v Townsville City Council* [1997] 2 Qd R 6 at 9 per Macrossan CJ and Lee J.

32 Sawer (1977) p 134; Crawford (1980) pp 228, 231.

Determining Hannaford's party allegiance 'at the time when he was ... chosen' was easy. But the determination is more difficult if a Senator was disendorsed in the middle of the election campaign. The High Court has held that the time when a Commonwealth parliamentarian is 'chosen' (at least for determining eligibility under s 44) covers the entire period from the opening of nominations until the declaration of the poll.[33] Assuming that 'chosen' has the same meaning in s 15 as in s 44,[34] the 'time when [the Senator] was ... chosen' could extend over three to four weeks.[35] Disendorsement part-way through that time would seriously complicate the interpretation of s 15, whether or not the party is registered. As many as six different views could be taken as to when exactly a Senator is 'chosen' under s 15.

Entire election period Prima facie, the simplest view is that a candidate must be endorsed for the entire period after nominations open until the results are finally declared. This would be consistent with s 44, as well as parallelling s 15's own requirement that the replacement chosen must remain a party member for the whole period until taking office.

But consistency here is a hobgoblin, because this interpretation is excessively strict. In theory, it would deny the benefit of s 15 to a party that finalises its Senate preselections after nominations open, or whose candidate defects while the votes are being counted. Neither would further the aims of the 1977 amendment. If the voters' informed consent is necessary for a party to claim a seat, why is it not sufficient? They are hardly 'deceived' if a candidate is endorsed during the nomination period; they would be 'deceived' if a post-polling disendorsement had any effect under s 15. Section 44 is not a good analogy here, because its grounds of disqualification (eg 'office of profit') do not turn on what the voters know.

Overall perception With s 15's purpose in mind, the Court could take the broader view that what counts is the electorate's general perception, in all the circumstances, over the election period as a whole; no one **[in time]** is decisive. The Court might defend this view on the basis that voters 'choose' a candidate when they decide to vote for him or her, even if time passes before they cast their votes in accordance with their decision, and without regard to the electoral timetable laid down by legislation. Clearly, voters do make their decision some time (whether seconds, days or years) *before* their pencil marks the ballot-paper; the Court should therefore determine if the disendorsement occurred before this decision was made.[36]

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33 *Sykes v Cleary (No 2)* (1992) 176 CLR 77; *Vardon v O'Loughlin* (1907) 5 CLR 201 at 208 per Griffith CJ.

34 *R v Governor of South Australia* (1907) 4 CLR 1497 at 1509 per Barton J (meaning of 'vacancy' in ss 15, 21 and 47 may differ).

35 CEA s 157 stipulates between 22 and 30 days between close of nominations and polling day.

36 Compare the 'forming an intention' test to determine domicile, or the

This interpretation is flawed, because it is too subjective, especially when more objective alternatives are available. It would require the High Court to reach conclusions, with far-reaching political consequences, based on speculation. Must the time fixed for 'choosing' be before all, any or the majority, of the State's voters have made up their minds? How could a court ever quantify this? The very question to be asked is too nebulous for judges to answer to their own personal satisfaction, let alone to impose the answer as law.[37]

Some point in mid-campaign Alternatively, the Court might hold that some definite point in the campaign period, after nominations close but before polling day, is decisive. The time when ballots are printed might be selected, particularly if the view were adopted that ballot designations are necessary and sufficient evidence of 'endorsement', at least for candidates of registered parties. Another option, before it was repealed, might have been the three-day pre-poll electronic media blackout, since once such a blackout descends a party or candidate cannot easily retract an endorsement 'publicly'.

The fact that Parliament could and did repeal the pre-poll blackout, though, shows the flaw in selecting that as the decisive time. Because the time of 'choosing' affects a constitutional provision, it ought not to be so subject to manipulation by ordinary statute.[38]

Fixing the time of printing ballots as the cut-off would be even more suspect; it would make a constitutional right dependent on mere administrative decisions based on cost and convenience. Moreover, since ballot labels are irrelevant to unregistered parties, either subjecting them to the same cut-off date as registered parties, or exempting them from it, would be inequitable. Ironically, the time the CEA itself impliedly makes the 'cut-off' — the close of nominations, after which time disendorsement cannot affect the ballot label — is certainly not a contender, as a Senator is hardly 'chosen' when nominations close.

Election day A fourth interpretation could moderate the third by holding that the 'time of choosing' is the entire election period between close of nominations until election day. This interpretation seeks maximum consistency with *Vardon* and *Cleary* without producing absurd results.[39] As there is no record of exactly what time on election day a vote is cast, it would be simplest to draw the line when the polls open. Judicial notice would be

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absorption of an immigrant: *Potter v Minahan* (1908) 7 CLR 277 at 298–299 per Barton J.

37 Contrast the similar question of how many voters must know about the disendorsement (see above); in that case, the Court can safely assume that everyone will know soon after the story hits the news.

38 Fixing polling day as the point would not be open to this same objection, as it is not so easily manipulated; obviously polling has to start and finish at some time.

39 *Vardon v O'Loughlin* (1907) 5 CLR 201;

taken of the fact that many people are out shopping on election day and would miss any midday television or radio announcement that a party and its Senate candidate had parted ways.

The problem with this interpretation is that a potentially decisive number of pre-poll and postal ballots are cast before polling day.[40] If a candidate is disendorsed only days before the polling booths open, then many ballots will be cast in ignorance of the candidate's party allegiance. Again, this would undermine the aims of s 15. Even a small number of voters may be decisive in a Senate contest;[41] if these people might have voted differently had they known a particular candidate was going to be disendorsed, then the State's collective 'choice' of Senators will not be informed, as s 15 impliedly demands.

Before enough votes have been cast to affect the result The next alternative would ask how many pre-poll and postal votes were cast before the Senator's disendorsement was announced. If these were enough to potentially affect that Senator's election, then that disendorsement does not have any effect under s 15. This would be consistent with precedents of judges exercising their discretion to overturn an election having regard to the number of irregular votes.[42]

Again, however, the problem is uncertainty. There is no legal check to verify the time at which a postal vote was cast; it need only be postmarked before election day. It would also mean the cut-off time would vary for different Senators, depending on whether they are elected with a large surplus or scrape in on preferences. This weighs in favour of moving the cut-off time for disendorsement earlier still.

Before any pre-poll or postal votes have been issued The safest interpretation to adopt, therefore, is that a disendorsement must be publicly announced before any ballot-papers have even been issued — ie before any postal ballots have been sent out, or any pre-poll voting facilities have opened — to be effective under s 15. This would have the advantage of providing a clear, simple and uniform rule.[43]

The basic principle, in light of s 15's objectives, is that the time when a Senator is 'chosen' should extend as late as possible (so that the candidate's endorsement status is up-to-date) until the point where someone may have

40 Normally around 10% of the total, but as high as 20% for the 3 October 1998 poll because of long weekends in several States.

41 In 1974, the National Party won Queensland's last Senate seat by a margin less than 0.478% of the total valid votes. In 1990, NSW Liberal Senator Chris Puplick was defeated by just 0.147%.

42 *Fenlon v Radke* [1996] 2 Qd R 157 at 159 per Ambrose J; *Tanti v Davies (No 3)* [1996] 2 Qd R 602 at 662 per Ambrose J.

43 This is not inconsistent with the judicial function, because the High Court would be adopting such a rule to clarify, not to substitute for, the Constitution's requirement.

cast a vote based on that affiliation as it was known at the time. The sixth and last interpretation best gives effect to this principle.

'Publicly'

The endorsement (and, by implication, any subsequent disendorsement) must be communicated 'publicly'. 'Public' is a relative concept; ask the headmaster of Eton. In defamation law, a matter of 'public' interest within a particular community may cease to be 'public' if broadcast outside it.[44] Here, both its derivation (Latin *populus*) and its context in s 15 link the term to 'the people' by whom Senators are 'directly chosen' under the Constitution's s 7.

This is where the 1983 amendments to the CEA become especially relevant. A Senate candidate's ballot label is one obvious (though not the only) medium available for 'publicly' communicating endorsement to the people. However, four cases could arise where a ballot label, or lack of one, does not accurately indicate a candidate's party affiliation.

If the party is deregistered after its candidate is elected A party does not 'cease to exist' merely because it is de-registered. Thus, if a Senate candidate (a) is endorsed by a registered party, (b) is duly identified with that party's label on the ballot, (c) is elected and then (d) vacates office after that party has lost its registration, s 15's party affiliation requirements continue to apply.

If the party was unregistered when its candidate was elected By close analogy, it follows that the requirements also apply even when the party was not registered at the time when its candidate was elected.[45] Since s 15 does not allow direct discrimination against a party that 'exists' merely because it is unregistered, nor should it allow indirect discrimination against such a party on substantially the same ground. The lack of a party label for such a candidate indicates only that the party was not registered, not that the candidate was not endorsed by it.

If a candidate not endorsed by a registered party is designated as endorsed on the ballot Prima facie, one might assume that the position is different for registered parties; because their candidates can be labelled as endorsed on the ballot-paper, the ballot label should settle the matter. But the position is not so simple, because it is still possible that such candidates' ballot labels might not accurately reflect their endorsement status. There are two ways that form and substance could diverge: if a candidate not endorsed by a registered party is designated as endorsed on the ballot, and if a candidate endorsed by a registered party is not so designated.

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44 *Tisdall v Hutton* [1944] Tas SR 1.

45 Such candidates can win seats even when rival candidates have the advantage of party labels. The five Greens elected to Tasmania's House of Assembly in May 1989 were all listed on the ballot as Independents.

This first case could arise due to any of three reasons.

(a) The party's registered officer might nominate or certify a candidate who is not in fact validly endorsed according to the party's rules. CEA ss 169(1)(a) and (b) both appear to make the registered officer's fiat sufficient. The AEC is probably not authorised to look behind the registered officer's certificate to scrutinise its material validity. Instead, s 169B(1)(c) seems to exhaust the AEC's power to inquire into whether a candidate 'was in fact endorsed' by a party.[46] Thus, paragraph (c) can work only to a candidate's benefit; it empowers the AEC only to grant, not deny, the party label to a candidate. But if a party is divided by factional disputes, its registered officer might be tempted to ignore the rules and certify his or her own favourites.

(b) Even if the AEC determines that a candidate 'is in fact endorsed' by a party, it does not have the final word. The AEC's decisions under the CEA can be appealed to the Administrative Appeals Tribunal (AAT)[47] and reviewed by the courts. Even if the CEA did purport to give the AEC power to rule conclusively on candidates' endorsement,[48] it could control only benefits conferred by ordinary statute, such as ballot designations. Parliament cannot make a Constitutional requirement like s 15 dependent on administrative discretion without contravening s 71's separation of judicial power.[49] Although the High Court would no doubt consider the AEC's evidence and reasoning, it might well interpret the facts or the party's rules differently, especially if the rules are ambiguous, or essential facts (eg whether all members were sent preselection ballot-papers) are disputed.[50] Likewise, the High

46 This view is supported by English authority. In *Greenway-Stanley v Paterson* [1977] 2 All ER 663 [CA], the Court of Appeal held that a returning officer should not look behind a nomination form that appears correct on its face, because such inquiry is impracticable in the short time-frame of an election, and risks politicising the returning officer.

47 CEA s 121.

48 It is not hard to imagine the legislative and judicial interest in restoring the courts' traditional refusal to adjudicate on political parties' internal disputes. As Wootten J observed in *McKinnon v Grogan* [1974] 1 NSWLR 295 at 297:

> One can understand that judges, who feel so keenly the importance of ... being seen to stand apart from partisan politics, would be reluctant to see the internal factional struggles of political parties brought into the courts.

See *Cameron v Hogan* (1934) 51 CLR 358; but contrast S Lindsay, 'Jurisdiction to Review Expulsion from a Political Party' (1987) 16 *Melb ULR* 326.

49 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

50 Although in *Barron v Townsville City Council* [1997] 2 Qd R 6 at 10, Macrossan CJ and Lee J anticipated that 'whether or not a particular person is the endorsed candidate is likely to be a well-known matter, not in any way obscure or difficult to ascertain', this may be over-optimistic. It is intriguing to

Court might equally find that a candidate was in fact endorsed by a registered party, even though both its registered officer and the AEC denied it. Under s 15, such a candidate would be treated the same as a candidate of an unregistered party (see below). Although s 169B provides three alternatives designed to ensure that a duly-endorsed candidate can use the party's ballot label, it is possible that all three could fail.

(c) The CEA makes no allowance for the ballot's format to be altered once nominations close.[51] After that time, a disendorsement has no legal effect; the candidate still appears on the ballot with the party's label. A dramatic example occurred in March 1996, when Pauline Hanson was officially disendorsed by the Liberal Party of Australia, Queensland Division, as its House of Representatives candidate for Oxley. Because this occurred only two weeks before polling began, Ms Hanson was still designated on the ballot as a Liberal.[52]

If Ms Hanson had been elected to the Senate, not the House, under similar circumstances, and then vacated her seat in mid-term, would the Queensland Liberal Party 'own' that seat under s 15? The answer would depend on whether she had 'publicly' represented herself, and been 'publicly' recognised by the party, as an endorsed Liberal candidate. The party's State executive, with nationwide media publicity, said she was not, but the ballot-paper said she was. The likely answer in this case is that, despite the out-of-date ballot label (and other publicity, such as the *'Pauline Hanson* — Liberal' posters which allegedly were left deliberately intact), few if any Oxley voters would not have known about Hanson's disendorsement. Thus she would not have been 'publicly ... endorsed' under s 15.

However, the answer might vary under different circumstances, especially given that Senate candidates get less personal campaign publicity than House candidates, and over much larger electorates. The minimal attention most voters give to candidates 'below the line' on the Senate ballot-paper (apart from the team leaders) is a matter for judicial notice.[53]

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speculate how the AEC, the AAT or the High Court might have applied s 169B to the Labor Party after its acrimonious 1955 split which, some allege, resulted from unconstitutional 'stacking' of its Federal Conference. Contrast F Daly (1977) *From Curtin to Kerr*, Sun Books, ch 10, with BA Santamaria (1981) *Against the Tide*, Oxford University Press, ch 22.

51 CEA ss 169(3)(a), (b) (requests for party label to be printed on ballot-paper must be made 'before the close of nominations').

52 Australian Electoral Commission (1996) *Electoral Pocket Book - December 1996*, The Artworks, p 172.

53 Notwithstanding CEA s 216 (group voting tickets to be displayed). The High Court has taken notice of the two Houses' different voting systems: *Re Wood*

Although a party's or candidate's right to terminate endorsement does cease at some point (I argue above it is in when polling begins), that point cannot be the close of nominations or even the printing of the ballots. Even though these are the times at which it becomes legally impermissible or administratively difficult to remove the party label from the ballot-paper, fixing either one as the cut-off would give unregistered parties and their candidates a greater opportunity to terminate endorsement than their registered rivals. This would be unconstitutional discrimination according to recent High Court reasoning, which requires that all political parties — registered or unregistered, large or small, established or new, represented or unrepresented — should be treated equally.[54] Although the CEA does require that parties desiring the statutory benefits of registration must accept corresponding obligations (eg to have a constitution, to keep public accounts, and to tolerate AEC inquiry into their internal affairs),[55] constitutional rights cannot be made conditional in this way.

Paradoxically, although political parties have an implied constitutional right to disendorse Senate candidates at any time before polling begins, it may be a right they would prefer not to exercise. A party that disendorses its Senate candidate loses its right under s 15 to claim any subsequent vacancy, without necessarily decreasing the candidate's electoral chances. Because 95% of voters

(1988) 167 CLR 145 at 164 per Brennan CJ; and *Free v Kelly* (1996) 185 CLR 296 at 301-303 per Brennan CJ.

54 *ACTV v Commonwealth (No 2)* (1992) 177 CLR 106 at 132 per Mason CJ. Although s 15 itself impliedly discriminates against independent Senators, by confining its benefits to political parties, the *ACTV* precedent demands at least that it not discriminate between parties. Against this one might set a 'representation-reinforcing' doctrine, as espoused by JH Ely (1980) *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, that constitutional law should concentrate on protecting unpopular minorities, because, as long as the political process is democratic, larger groups can protect themselves through ordinary legislative bargaining. But this doctrine would not discourage judicial activism in enforcing s 15, because a large party also needs constitutional protection if it has a Senator vacate for a State where the Parliament is controlled by its opponents. Lacking such protection, the Labor party lost two Senate seats through hostile State Parliaments appointing non-Labor endorsed Senators to Labor casual vacancies in 1974-75, despite the fact that Labor was the party that normally polled the most primary votes in federal elections.

55 Compare Constitution of Germany, Article 21(1) (political parties must 'publicly account for the sources of their funds and for their assets' and their 'internal organisation must conform to democratic principles'); *Loftus v Attorney-General* (1979) IR 221 per O'Higgins CJ: 'If some regulation and control were not provided, genuine political action might be destroyed by a proliferation of bogus front organisations calling themselves political parties but with aims and objects far removed from the political sphere': JM Kelly (1984) *The Irish Constitution*, 2nd edn, Jurist Publishing, p 604.

vote according to Senate group-voting tickets, which cannot be altered in mid-campaign, a disendorsed candidate could still be elected on the strength of the party's 'above the line' support. Moral appeals for the candidate to withdraw or resign would probably go unheeded.[56] Rather than officially disendorsing the rebel, it might suit the party better to have new 'how to vote' leaflets printed, directing its supporters to mark their preferences 'below the line' and to put that candidate last. Even so, it is conceivable that an activist High Court might accept this as evidence that, in substance if not in form, the party had ceased to 'recognise' the candidate as endorsed. Conversely, a threat to 'resign endorsement' could be a powerful weapon in the candidate's hands.

Thus, there are at least three reasons why a non-endorsed or disendorsed candidate could be inaccurately designated as endorsed on the ballot-paper.

If a candidate endorsed by a registered party is not so designated on the ballot Like the preceding case, this scenario is also illustrated by an example from Queensland in 1996, although again (like Hanson) it did not involve a Senate candidate. In *Barron v Townsville City Council*,[57] the Queensland Supreme Court examined s 202(3) of the *Local Government Act* 1993 Qld (LGA) which provided, similarly to s 15, that '[t]he new councillor must be ... if the former councillor was, at the last filling of the office, a candidate endorsed by, or a nominee of, a political party — the political party's nominee'. Section 247 specified that a candidate 'endorsed by a political party must include that fact in the form of nomination'.

The Liberal Party challenged the Australian Labor Party-controlled Council's refusal to replace a vacating councillor with a Liberal nominee. This councillor had been preselected and endorsed (but not nominated) by the Liberal Party, had campaigned for election as one of its team of candidates, and had been included on the Liberal 'how to vote' card and other electoral publicity. But he had not been identified as endorsed by that party on his nomination form, and therefore was not labelled a Liberal on the ballot-paper.

Thomas J held at first instance that, if a political party and its candidate fail to comply with a legislative provision such as LGA s 247, enacted to avoid controversial inquiries into party preselections, they forfeit the benefit of 'party preference' in the filling of vacancies under s 202(3). He acknowledged that the vacating councillor would count as 'endorsed' under s 15 of the Commonwealth Constitution, but distinguished the 'elaborate and more specific scheme' of the LGA from the broad terms of the

56 When Robert Wood was disqualified on technicalities from the Senate in 1988, many in the Nuclear Disarmament Party expected that his running-mate, Irina Dunn, elected through a recount to replace him, would resign immediately so that Wood could reclaim the seat under s 15. However, this did not eventuate.

57 [1997] 2 Qd R 6.

Constitution.[58] However, on appeal, Macrossan CJ and Lee and Fryberg JJ held that the Liberal Party did have the right to nominate the replacement: s 247 'should not be regarded as sufficient to indicate that the nomination form is to be the exclusive source of ... information' about the candidate's party affiliation.[59]

While the first-instance and appellate judges differed over the effect of s 247, all agreed that a candidate may be 'endorsed' under s 202(3) although not identified accordingly on the ballot or nomination paper, despite the fact that here, the ballot-label system was established by the same law that granted the party a right to fill a vacancy. The same reasoning would apply *a fortiori* when 'party preference' is commanded by the Constitution itself but ballot labelling derives from a statute subordinate in force and later in time. As the High Court is unlikely to reject this reasoning, *Barron* will therefore stand as a persuasive analogy in the interpretation of s 15.

Conclusion

After examining the purpose of the 1977 amendment, and the machinery provided by the *CEA* as amended in 1983, the following conclusions can be drawn.

Although the *CEA* cannot re-define the meaning of the Constitution, it can affect s 15's operation by providing a mechanism (ballot labels) by which a candidate can be publicly 'recognised' and 'represented' as endorsed by a political party. However, a ballot label is only evidence, not conclusive proof, of such endorsement. Therefore, lack of a label does not mean a candidate was not 'endorsed', especially for unregistered parties (if *ACTV* is followed), and even for registered parties (if *Barron* is followed).

Conversely, the inalterability of the ballot under the CEA does not prevent either the party or the candidate from terminating endorsement at any time before the candidate is 'chosen' as a Senator. And candidates are 'chosen' (assuming they are elected) once any pre-poll or postal ballot-papers are distributed to voters. This interpretation gives maximum effect to the purposes for which s 15 was amended in 1977.

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