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**LEGISLATIVE COUNCIL CASUAL VACANCIES
IN SOUTH AUSTRALIA**

Casual vacancies occur when a Member resigns or retires or dies, before the end of the term for which he or she has been elected. In the House of Assembly, a casual vacancy is filled when a new Member is elected by the voters of the electorate at a by-election, but in the Legislative Council a casual vacancy is filled when a new Member is chosen by an assembly of the Members of both Houses of the Parliament.

This paper addresses the following questions:

- What is the background to this procedure for filling vacancies in the Legislative Council?
- Who can be nominated to fill a casual vacancy?
- Who decides who will be nominated to fill the vacancy?
- Who votes on the nomination?
- Can someone who resigns from the Legislative Council and causes a vacancy, be nominated to fill their own vacancy?

In 1973 the Constitution Act (SA) was changed¹ so that the method of electing Members to the Legislative Council would be by proportional representation, with the whole of the State as one large electorate. Members are elected to the Legislative Council at general elections in which all electors across the whole State vote for each Legislative Councillor. The electoral system for the Senate is also proportional representation with the electors across the whole of South Australia voting to elect each of the Senators.

If a member of the Senate or the Legislative Council retires or dies part way through his or her term, filling that vacancy (a "casual vacancy") requires a process that would refer to the intention or the will of the electors across the whole State. We could refer to the intention of the voters at the time that the original Senator or MLC was elected, and either do a recount of the original ballot papers to see who would have won a seat if the vacating Senator or MLC had not contested the ballot², or simply appoint a replacement Senator or MLC from the same party. Alternatively we could refer to the current intention of the voters and conduct a by-election of all electors across the State. The first method would elect someone who was a candidate at the most recent election contested by the vacating Senator or MLC (and this person would probably be a member of the same party as the Senator or MLC). The second method would elect

¹ Constitution and Electoral Acts Amendment Act 1973 (No. 52 of 1973)

² This is the system used in Tasmania where proportional representation system is used to elect 5 Members to each electorate. When a recount is required, "only the ballot papers which were used to elect the vacating member are distributed". See <http://www.electoral.tas.gov.au/pages/electoral.htm>

a person who is certainly of the same party but is not necessarily a former candidate. The third method could elect anyone.

The method used in the Senate for filling a casual vacancy, is that the Parliament of the relevant State nominates a replacement Senator, from the same party as the vacating Senator.

When proportional representation with a single State-wide electorate was introduced for the Legislative Council in 1973, the South Australian Parliament adopted a practice based on that Senate procedure for filling casual vacancies: the Members of both Houses would meet together and vote to replace the Member with someone nominated by that Member's party. The South Australian Parliament

assumed that in relation to the choosing of members to fill casual vacancies, the long observed convention in relation to the choosing of members of the Senate would be observed, so that the person chosen to fill the casual vacancy will, so far as possible, be a person of the same political complexion as his predecessor.³

That particular "long observed convention" operated consistently in the federal sphere from 1952⁴ until 1975 but was then breached on two occasions. The first breach occurred when the NSW Liberal government appointed the IND CE Bunton to replace ALP Senator Lionel Murphy, who resigned mid-term.⁵ The second breach occurred when Senator Bert Milliner (ALP, Queensland) died later that same year, and the Queensland Parliament nominated an Independent, Albert Field, rather than the ALP's nominee Mal Colston.⁶

Whether the convention could be restored after such significant breaches, was debated at the Australian Constitutional Convention in 1976.⁷ The Constitutional Convention stopped short of recommending that the convention be adopted into legislation, but clearly reaffirmed the principle behind the convention.

Resolution No .9 of that Constitutional Convention read:

9. That this Convention affirms the principle that a casual vacancy in the Senate which occurs by reason of the death of a senator or disqualification or resignation of a senator caused by bona fide illness or incapacity should, in order to maintain the principle of proportional representation and the wishes of the people of the State at the relevant Senate election, be filled by a member of the same political party as the senator whose vacancy is to be filled but in reaffirming this principle the Convention recommends that the Constitution be amended to provide that the person elected by the Houses of Parliament of the State should hold office for the balance of the term for the senator whose place he is taking.

³ Hon AF Kneebone (Chief Secretary, ALP) second reading speech on the Constitution and Electoral Acts Amendment Bill (Council Elections), Legislative Council 21 June 1973 at p.91. "...it proposes that Legislative Council by-elections will not be held to fill casual vacancies in that House but those vacancies will be filled in a manner similar to the manner of filling casual vacancies in the Australian Senate."

⁴ From 1903 until 1946 there were 39 casual vacancies and of these 15 were filled by a person representing a different party from the outgoing Senator.

⁵ Australia. Parliamentary Library, Parliamentary Handbook of the Commonwealth of Australia, 30th ed., at p.439.

⁶ "Mr Field, who did not support Prime Minister Whitlam, voted with the Liberal-Country Party coalition to block key supply laws." See <http://www.whitlam.org/chronology/19750909.html>

⁷ Australia. Constitutional Convention, 1977, Minutes of proceedings and official record of debates of the Australian Constitutional Convention held at Wrest Point, Hobart, 27-29 October 1976, Government Printer, Melbourne. Quoted in the second reading speech to the Constitution Alteration (Senate Casual Vacancies) Bill, Senate Hansard 17 February 1977, at p.197.

The difficulty with legislating to put this matter beyond dispute, was that it would require an alteration to the Constitution, and that would involve the cumbersome machinery and expense of a referendum. But in 1977 the government had several changes which it wanted to make to the Constitution, so the casual vacancies amendments could be put through the Parliament and to referendum as part of a wider package of measures.⁸ After being approved at a referendum⁹ the Constitution Alteration (Senate Casual Vacancies) Act 1977, replaced section 15 of the Constitution, and put the convention into legislation. Section 15 of the Constitution Act now requires that the person chosen should be, as far as possible, from the same party as the Senator who is retiring (or is otherwise unable to complete his or her term) as follows:

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 when 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 there is no member of that party available to be chosen or appointed, be a member of that party.¹⁰

What would happen if the party no longer exists, has not been defined¹¹, and just months after the convention had been formalised federally, this precise situation arose. In 1977¹² Senator Steele Hall (SA) resigned from the Senate, having been endorsed in 1974 by the Liberal Movement, a party which by 1977 was no longer in existence. Given that nominations to fill a casual vacancy in the Legislative Council were to follow the procedure used to fill a Senate casual vacancy, the way that the South Australian Parliament dealt with this situation created a precedent for both procedures.

In 1976 the Liberal Movement had ceased to exist as a separate entity – there was argument about whether it had merged with the Liberal Party. Most members of the Liberal Movement had joined the Liberal Party of Australia; some had joined the Australian Democrats.

When Members of both Houses of the South Australian Parliament¹³ assembled to nominate Mr Hall's Senate replacement on 14 December 1977 two names were put before the Assembly of Both Houses: the Liberal Party nominated Dr Baden Chapman Teague on the grounds that Steele Hall had gone to the Senate as a representative of

⁸ The 4 measures were: simultaneous election of the Senate and the house of Representatives; casual vacancies; instituting a retirement age for Federal Court and High Court judges; and allowing voters in the Northern Territory and the ACT a vote on referenda.

⁹ 21 May 1977, Australia. Parliamentary Library, Parliamentary Handbook of the Commonwealth of Australia, 30th ed., at p.571. Approved by all six States with an overall majority of 73% voting for the change.

¹⁰ section 15 of the Constitution Act, as amended by the Constitution Alteration (Senate Casual Vacancies) 1977. The rather longwinded reference to "or in consequence of that vacancy and a subsequent vacancy or vacancies" is intended to "make it clear that section 15 is applicable to the appointment of a replacement of the replacement Senator." See the second reading speech on the Bill, Senate Hansard 17 February 1977 at p.197.

¹¹ Either in legislation or by convention. Odgers gives no guidance on this matter. See H Evans (ed) 2001, Odgers' Australian Senate Practice, 10th ed., Department of the Senate, Canberra.

¹² Resigned 16 November 1977. Australia. Parliamentary Library, Parliamentary Handbook of the Commonwealth of Australia, 30th ed.

¹³ Technically, these meetings, variously called a Joint Sitting of the Two Houses, Assembly of the Two Houses or Meetings of Both Houses, are not meetings of the Parliament; there is a Hansard record but it is published in the Parliamentary Papers series, not in the Official Record of Debates.

the Liberal Movement and that party had later merged with the Liberal Party. The ALP argued that there had been no formal merger of the two parties, and on that basis they nominated Janine Haines. They said:

[The] ...nomination should come from a member of the grouping in the Senate team in which Senator Hall ran. The other members of that group were the present member for Torrens in this House and the nominee at present, as I understand it, of the Australian Democrats, although I understand that she is not a member of their Senate team.

...The Government, after giving much consideration to this matter in an endeavour to do what is right and supported by the electorate, has come to the conclusion that it has no alternative but to support the nomination of the third member of that team. The Government concludes from what it has before it that that matter may be contested legally.¹⁴

In speaking to the nomination on the day, Mr Dunstan noted that the nomination did not have a clear legislative basis but was founded on "principle and precedent" and would "give voice to the views expressed by the electors at the election of the Senator".¹⁵

A ballot for the nomination took place and the government's nomination won.

While it was debated whether the casual vacancy should be filled by a person nominated by the Liberal Party or the Australian Democrats, no-one publicly voiced the possibility of Mr Hall being unsuccessful in Hawker and being re-nominated to fill the casual vacancy.

The ALP State government announced 3 days before the federal election that it would nominate Janine Haines to fill the casual vacancy in the Senate, effectively ruling out any possibility that Mr Hall could be nominated to fill his own vacancy. When the Assembly of Both Houses took place, the result in Hawker remained unclear (5 days later it became clear that Mr Hall had been defeated by less than 1000 votes).

When the Legislative Council President Frank Potter (LIB) died less than 2 months later on 26 February 1978, and Jessie Cooper (LIB) resigned in July 1979, no such difficulty arose. At the necessary Assembly of the Two Houses¹⁶, one Liberal Party candidate was nominated on each occasion and the convention that a member be replaced by a nominee from the same party, was acknowledged in both word and deed. (There was however no mention of the idea that the nominee might be the next person on the party's list and neither of the replacements – Trevor Griffin and Legh Davis - had been candidates at the 1975 election for the Legislative Council.)

At the 1979 Assembly, Premier Des Corcoran (ALP) indicated that the Government supported the thrust of the convention so strongly that he committed the Government to "examine the possibility of presenting legislation ensuring that the Constitution of this Parliament will provide that, in similar cases in future, it will be not just a

¹⁴ Don Dunstan (ALP, Premier), House of Assembly, 7 December 1977, p.1259. See also Joint Sitting of the two Houses for the Choosing of a Senator SA PP 143 of 1977-78.

¹⁵ Don Dunstan (ALP, Premier), transcript of the Joint Sitting (as above), at p.3.

¹⁶ Assembly of the Two Houses for the Election of a Member to fill a vacancy in the Legislative Council, SA PP 152 of 1977-78, and Assembly of the Two Houses for the Election of a Member to fill a vacancy in the Legislative Council, SA PP 138 of 1979.

convention but a requirement."¹⁷ The Liberal Party Leaders of the Opposition in both Houses emphasised their party's support for the convention but would not support putting the procedure into the Constitution Act.

Ren De Garis (LIB Leader of the Opposition in the Legislative Council) stated that a convention had been specifically chosen above legislation in 1973:

Much has been said about convention in relation to replacements since we in this Council have moved to a voting procedure involving proportional representation. When agreement was reached at a conference in relation to replacements, the matter of whether or not it should be written into the Constitution was canvassed at length. It was decided by both Houses of Parliament that it would be difficult, as far as the parties were concerned, to write something into the Constitution regarding replacements, and that it was better to leave it up to the integrity of members of Parliament in a convention of the Parliament.¹⁸

In 1981 Lance Milne (DEM) attempted to formalise the convention by inserting the following subsection into section 13 of the Constitution Act (SA):

(3) Where a vacancy in the membership of the Legislative Council is to be filled under this section, and the member, whose seat has become vacant, was at the time of his election publicly recognised by a particular party and publicly represented himself to be such a candidate, a person chosen under this section to fill that vacancy shall, unless there is no member of that party available to be chosen, be a member of that party nominated by that party to fill the vacancy.

The Bill was opposed by the Liberal Party and lapsed at the end of the session.

When the ALP Legislative Councillor Jim Dunford died in 1982, Mario Feleppa, an ALP candidate for the Council at the most recent election, was nominated to replace him.

Making the nomination, David Tonkin (LIB, Premier) stated that :

I am following the broad convention that has been established in recent years for filling casual vacancies in State and Federal Houses. Although this present procedure does not adhere strictly to that established previously (Mr Jim Hennessy was next in line in the Party's 1979 Legislative Council ticket) the government certainly has no desire to object in any way to the Labor Party's selection. On the contrary, it firmly believes that the delicate convention which has been established to fill casual vacancies in this place should not at any time be cast aside.¹⁹

Seconding Mr Feleppa's nomination, Mr Bannon (ALP, Leader of the Opposition) noted that

¹⁷ Mr Corcoran, 31 July 1979, Assembly of the Two Houses for the Election of a Member to fill a vacancy in the Legislative Council, SA PP 138 of 1979, at p.2.

¹⁸ as above, at p.3. But the Hansard record does not support this view. The clause was simply never an issue in the debate on the Bill and I cannot find any reference at all to the method by which Legislative Councillors would be replaced, apart from Mr Kneebone's assertion that it would follow the Senate procedure. The clause passed without discussion in either House at Committee stage. Finally it was not mentioned in the reports to the houses from the various committees of managers that were involved before the Bill could be passed by both Houses.

¹⁹ David Tonkin (LIB Premier), Assembly of the Two Houses for the Election of a Member to fill a Vacancy in the Legislative Council, PP 184 of 1981-82, at p.2. The remark in brackets relating to Mr Hennessy, is in the original.

...in making this nomination and in its being accepted without dissent by all Parties, we are in fact cementing a convention which has been established. Because that convention is not something provided legislatively in our Constitution, precedent becomes very important, so it is particularly welcome on this occasion that there is absolutely no problem in adopting the formerly established procedure in filling the vacancy, that is by in a sense giving effect of the attitude of the electors in presenting someone from the Party from which the former member came.²⁰

That was still not inserted into the Constitution Act, but the agreement existed and was acknowledged by the two major parties. What they acknowledged was that the party which had nominated the Member whose death or retirement caused the vacancy, should be able to nominate the replacement. It is not clear at all that the agreement required the party to choose the next person on the list from the previous election, although that had happened on some occasions.

The Bannon government had been elected in 1982 with the bare majority of 24 of the 47 House of Assembly seats and the support of an IND Labor Member (Norm Petersen in Semaphore), but during 1984 the safe Labor seat of Elizabeth had been lost to another IND Labor Member at a by-election so the government completed its term as a minority ALP government supported by two IND Labor Members. Going into the 1985 State election it looked like the safe ALP seat of Whyalla could also fall to an IND candidate - at the 1982 State election Max Brown (ALP) had retained Whyalla by only 1234 votes on a two party preferred basis against Peter Murphy (IND), and not only did Murphy intend to run again in 1985, but Max Brown had announced that he would retire, so any sitting member advantage to the ALP would disappear too.

The ALP badly needed to keep the seat and so they needed a popular candidate with a high profile in the area – Doug Elkins had been preselected but when it became clear that he was not the popular local candidate required, he resigned to take up a high-level union position. Frank Blevins was the obvious choice. His family lived in Whyalla and he had a profile in Whyalla through his 10-year career as a seaman and union official there. He had been elected to the Legislative Council in 1975 and was at that stage Minister for Agriculture.

The ALP proposed that Frank Blevins move from the Legislative Council to the House of Assembly. That was not an unheard-of thing – in 1973 at the end of his first term in the Upper House Keith Russack²¹ had moved to the House of Assembly to take over the seat of Goyder for the LCL. But Frank Blevins had not completed his Legislative Council term – he was only half way through it – and so his move to the House of Assembly would create a casual vacancy in the Legislative Council. What was new²² was that the ALP stated that if Mr Blevins was not successful in winning the Assembly seat he would be nominated to fill the vacancy caused by his own resignation from the Legislative Council.²³

²⁰ John Bannon (ALP, Leader of the Opposition), Assembly of the Two Houses for the Election of a Member to fill a Vacancy in the Legislative Council, SA PP 184 of 1981-82, at p.2.

²¹ Keith Russack was elected in 1970 to replace Colin Rowe who died halfway through his term. Russack's term would have expired at the election of 1973, so his decision to contest a House of Assembly seat did not create a casual vacancy in the Legislative Council.

²² Stephen Baker (LIB) noted that this had not happened before: "No one has attempted to gain a seat before in the House of Assembly and at the same time keep their options open in the Legislative Council, purely for political convenience." House of Assembly 8 May 1985, at p.4060.

²³ Reported in the Sunday Mail of 7 April 1985 ("Blevins may switch to save risky seat"); the Advertiser on 13 April 1985 ("Labor poll candidate is axed – painlessly"); the News of 7 May 1985 ("Bid to block Blevins seat switch"); ADV 8 May 1985 ("Blevins seat move set to pass"); NEWS 8 May 1985 ("Libs move against 'dual seat' option for Blevins"); ADV 10 May 1985 "Amendment

Through the months leading up to the State election in December 1985, both the ALP and Mr Blevins kept open the opportunity of nominating him to fill his own casual vacancy – even under pressure from the Liberal Party in the media Mr Blevins simply said that he would win Whyalla so he would not need a “safety net”²⁴. By contrast the Liberal Party and indeed the IND Labor Members in the House of Assembly saw the possibility of a party nominating a person to fill his own vacancy as opportunistic²⁵, manipulation²⁶ of the system and morally wrong²⁷.

In December 1984 the ALP government had introduced a Bill to amend the Constitution to provide for a four year term for the House of Assembly and to synchronise Legislative Council terms with those of the Assembly. The Bill also dealt with the order of retirement of Legislative Councillors when all 22 might be elected after a double dissolution, specified that a casual vacancy would not need to be filled if the person's term would be due to expire within 3 months, and specified procedural rules for any Assembly of both Houses meeting to elect a new Member to the Legislative Council. The Bill also contained a provision which formalised the convention that the party which had nominated a Member whose death or retirement caused a casual vacancy, should be able to nominate that Member's replacement.

13(5) Where a casual vacancy in the membership of the Legislative Council is to be occupied by a person chosen by an assembly of the members of both Houses of Parliament, and the member, whose seat has become vacant, was at the time of his election publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, the person chosen by such assembly to occupy that vacancy shall, unless there is no member of that party available to be chosen, be a member of that party nominated by that party to occupy the vacancy.

In debate on this last clause, Mr Griffin (LIB, Shadow Attorney-General) noted that the Bill still did not specify how a vacancy should be filled if the Member causing the vacancy was an Independent, or if the Member's party has ceased to exist or had merged with another party.²⁸ Ren De Garis (LIB) continued this point, arguing in favour of the Tasmanian practice under which the Electoral Commissioner provides a recount of the ballot papers from the election at which the vacating Member was most recently elected; the recount being conducted in such a way as to determine which other candidate would have been elected at that time if the vacating Member had not been a candidate.²⁹ He said “[t]hat does not mean, however, that the assembly will

may force Minister's resignation”); ADV 11 May 1985 (“Democrats block Lib. bid to close loophole”); ADV 20 May 1985 (“No doubt that I'll win Whyalla, says Blevins”); ADV 18 August 1985 (“Labor's grand election plan hits a hurdle”) and ADV 18 November 1985 (“Blevins resigns to run for Whyalla”).

²⁴ ADV 18 November 1985 (“Blevins resigns to run for Whyalla”).

²⁵ Martyn Evans (IND Labor), House of Assembly, 8 May 1985, at p. 4051: “..the amendments drafted by the Leader of the Opposition do not preclude an ambitious and dedicated bender of the rules from returning to the Legislative Council..”

²⁶ “My party believes that this scenario amounts to nothing less than manipulation of the Constitution for base political motives” Mr Olsen (LIB), House of Assembly, 8 May 1985, at p. 4010.

²⁷ Mr Peterson (IND Labor), House of Assembly, 8 May 1985, at p. 4021; “In my opinion any situation which guarantees a person a seat to which to return is wrong. If you are elected to the Legislative Council and then opt out, you are abandoning the will of the people who first put you there.”

²⁸ Trevor Griffin (LIB) Legislative Council, 27 February 1985, at p. 2897.

²⁹ Ren De Garis (LIB), Legislative Council, 28 February 1985, at p. 2998.

choose that person – not at all- but it informs the assembly who would be the next on the list in that election.”³⁰

Mr De Garis’s proposal was not incorporated into the Bill. Mr Sumner (ALP, Attorney General) argued that the Electoral Commissioner would be required to store ballot papers for up to 10 years, and be prepared to conduct a recount of about 900,000 ballot papers at a cost of about \$150,000, to provide information to the Assembly which it might not use. He accepted that the government’s proposed provision (formalising existing practice) would not give guidance to an Assembly faced with the task of replacing a Member who was not endorsed by a political party but argued that it was not designed to cover every possible eventuality. He said that “[t]he joint assembly does not work in a political vacuum, and obviously there would have to be some negotiations and discussions between the parties if an Independent was the cause of a casual vacancy.”³¹

By the time the Bill reached the House of Assembly, the announcement had been made that Mr Blevins would run for Whyalla. In this context, the debate about filling a casual vacancy in the Legislative Council became a debate about whether it should be permissible for a Member to fill his or her own casual vacancy. The provision to formalise the convention that a person nominated should be of the same party as the Member who caused the vacancy, was supported by all speakers – for many of them however it did not go far enough.

John Olsen (LIB, Leader of the Opposition) proposed to amend the Bill to add a provision requiring that a casual vacancy that arose at the time of a general election would be filled at the general election – that is, 12 Legislative Councillors would be elected, rather than 11, effectively denying the possibility of a Legislative Councillor being nominated to fill his own casual vacancy. (A casual vacancy under these circumstances would be to serve 3 or 4 years rather than 6 or 8 but there does not seem to have been any attention paid to the question of which of the 12 newly-elected Legislative Councillors would serve the short term.)

Martyn Evans (IND Labor) argued against Mr Olsen’s legislative solution, on the grounds that electing an extra person would lower the quota and would affect the chances of winning seats; to do this just before the close of nominations would be “quite unfair.”³² Instead of a legislative solution, Mr Evans proposed a political solution, namely that the Legislative Councillor in such a position should renounce his or her right to be nominated to the Council if he or she was not, in the end, elected to the Lower House seat. Mr Evans cited his own experience: he had nominated for ALP preselection for a byelection for the seat of Elizabeth but was defeated by Ray Roe who already held ALP preselection for the safe ALP seat of Briggs at the next State election.

“My opponent at that time had an option under Labor Party rules to retain his preselection for the seat of Briggs. In effect, that would have given him two bites at the cherry; the same sort of problem we are addressing tonight. That gentleman chose to renounce his option to return to the seat of Briggs. I believe that was a very appropriate and responsible course of action for him to take.”³³

³⁰ Ren De Garis (LIB), Legislative Council, 3 April 1985, at p. 3801.

³¹ Chris Sumner (ALP, Attorney General), Legislative Council, 3 April 1985, at p. 3803.

³² Martyn Evans (IND Labor) House of Assembly, 8 May 1985, at p. 4052.

³³ Martyn Evans (IND Labor) House of Assembly, 8 May 1985, at p. 4051; see also *The Advertiser*, 1 December 1984, “I’d put Elizabeth before Bannon, warns Evans” in which it is reported that

In the end, Martyn Evans won the Elizabeth by-election and Ray Roe not only lost preselection for the seat of Elizabeth but by renouncing his preselection in Briggs was thereby prevented from winning that seat too (Mike Rann came into the Parliament by winning Briggs for the ALP in 1985). Applying his own experience to the problem of a Member attempting to transfer from the Council to the Assembly, and wanting to keep open the option of a return to the Council if unsuccessful, Mr Evans stated that

If any Member of the Upper House attempts to return to that Chamber, having lost an election for the seat of Whyalla or any other seat, I would say that the people of South Australia would judge that action very severely. If that person does not renounce that right prior to the election, say for the seat of Whyalla, I would expect that the people of Whyalla would also judge him very severely, much the same as occurred in Elizabeth last December.³⁴

It was clear that the Liberal Party did not have the numbers to pass its proposal to elect 12 members at the coming general election rather than 11, so at the Committee stage that proposed amendment was dropped and another method was proposed:

...insert new subsection as follows:

(6) The person who formerly occupied a seat that has become vacant is not eligible to be chosen by an assembly of the members of both Houses of Parliament to supply that vacancy.³⁵

Although both the IND Labor Members would have agreed with the intention of this amendment, Mr Evans had said that he would not support a legislative change, and voted with the ALP government to defeat the amendment (Mr Petersen was absent). These unsuccessful amendments would all have attached themselves to the clause formalising the existing convention in relation to replacing a Member with someone from his or her own party. That clause, as passed by the Legislative Council, was then passed through the House of Assembly.³⁶

A further amendment was proposed:

insert new section 29(a):

“Subject to the fact that a member of the Legislative Council is not entitled to be elected or to be nominated as a candidate for election to the House of Assembly...”³⁷

That amendment too was defeated but Mr Evans then proposed an amendment:

43a (1) No member of the Legislative Council shall be capable of being nominated as a candidate for election as a member of the House of Assembly.

(2) No member of the House of Assembly shall be capable of being chosen by an assembly of the members of both houses of Parliament to supply a casual vacancy in the membership of the Legislative Council.³⁸

Mr Roe had “been endorsed for Briggs at the next State election (but) had decided to resign this and seek the Elizabeth seat...”

³⁴ Martyn Evans (IND Labor) House of Assembly, 8 May 1985, at p. 4051; the reference to Elizabeth in December 1984 was to his own election as an IND Labor candidate after having been defeated for ALP preselection for the seat.

³⁵ Proposed by John Olsen (LIB, Leader of the Opposition), House of Assembly 9 May 1985, at p.4146.

³⁶ House of Assembly, 9 May 1985, at p.4164.

³⁷ Foreshadowed by John Meier (LIB) House of Assembly 9 May 1985, at p.4169.

This amendment would require that a Member of either House resign before attempting to move to the other House, but it would not prevent a Member of the Council resigning to contest an Assembly seat and then being appointed to fill his own vacancy. Nonetheless the amendment was quickly passed and the Bill passed the Assembly.

When the Assembly's amendments were considered in the Legislative Council, Trevor Griffin (LIB, Shadow Attorney-General) proposed an amendment:

(3) The person who formerly occupied a seat in the Legislative Council that has become vacant shall not be capable of being chosen by an assembly of the members of both Houses of Parliament to supply that vacancy.³⁹

The ALP did not support this amendment. Chris Sumner (ALP, Attorney-General) argued that it might actually be a good idea for people to be able to move between chambers and cited the example of Senator John Gorton (LIB) who became Prime Minister and soon afterwards moved to the House of Representatives.⁴⁰ The amendment was defeated and the Bill passed the Legislative Council with Mr Evans' amendment intact.

On 15 November Frank Blevins resigned from the Legislative Council, creating a casual vacancy as his term was not due to expire for another three years. At the general election of 7 December 1985 he won Whyalla for the ALP. On 11 February 1986 George Weatherill was nominated by Premier Bannon (ALP) as the ALP's nominee to replace Mr Blevins. At the election of 7 December, Mr Weatherill had not been a candidate for either House; the ALP candidate next on the Legislative Council list had been Colleen Hutchison and she had failed by fewer than 2000 votes.⁴¹

New procedures were instigated for nominating a member to fill a casual vacancy which arose at the same time as an election; the question was whether the casual vacancy should be filled before the Houses sat for the official opening, or afterwards. In the end, the Assembly of Members of Both Houses was held before the official opening of the session (but on the same day).

None of the 47 House of Assembly Members would have been sworn in at this stage, nor would the 11 newly-elected or re-elected Legislative Councillors, so of the 68 Members attending the Assembly only the 9 continuing Legislative Councillors would have been sworn in at this stage. This necessarily raised the question of the validity of those Members who had not yet been sworn in, voting to elect a nominee to the casual vacancy⁴². The Chairman⁴³ of the proceedings (Don Hopgood) made the following statement:

³⁸ Martyn Evans (IND Labor) House of Assembly, 9 May 1985, at p. 4177.

³⁹ Trevor Griffin (LIB, Shadow Attorney-General), 15 May 1985, at p.4317.

⁴⁰ Senator Gorton was chosen as Leader of the Liberal Party on 10 January 1968, following the death of Mr Holt. As the Liberal Party was in government, he became Prime Minister on that day. He resigned from the Senate on 1 February 1968, and was elected to the seat of Higgins on 24 February 1968. See Commonwealth Parliamentary Handbook, at pp. 602, 636 and 715.

⁴¹ Mr Olsen refers to a candidate who had come within 3,600 votes; I can't see who this person would be. See Assembly of Members of Both Houses for the Election of a Member to fill a vacancy in the Legislative Council SA PP No. 142 of 1986, at p.2. Colleen Hutchison fell short of a quota by 1,920 votes.

⁴² None of the 47 of the House of Assembly Members would have been sworn in at this stage, nor would the 11 newly-elected or re-elected Legislative Councillors. So of the 68 Members attending the Assembly only the 9 continuing Legislative Councillors would have been sworn in at this stage.

I have taken advice on this matter and the advice...is that the assembly of members of both Houses of Parliament pursuant to section 13 of the Constitution Act is a separate and distinct entity from that provided under section 4 of the Constitution. The Joint Assembly is not the Parliament and the oath provisions under section 42(1) do not apply to it.

There is a further opinion that a member of Parliament becomes such when the writs for an election are returned. I also point out that there is an authority to support the transaction of business relating to the Parliament before the Parliament has been constituted, for example, the election of a Speaker by the House of Commons. I have before me opinions to this effect from the Solicitor-General and the Crown Solicitor.⁴⁴

In speaking to the nomination, both Mr Olsen (LIB, Leader of the Opposition) and Stan Evans (IND LIB, Davenport) noted that another ALP candidate had come very close to winning an Upper House seat, but stopped short of arguing that a party should be constrained in any way when making its nomination.

The question of who would be nominated if the vacating Member had not been elected as a representative of a party, has never been answered. The relevant section of the Constitution Act (SA) is (to repeat):

13(5) Where a casual vacancy in the membership of the Legislative Council is to be occupied by a person chosen by an assembly of the members of both Houses of Parliament, and the member, whose seat has become vacant, was at the time of his election publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, the person chosen by such assembly to occupy that vacancy shall, unless there is no member of that party available to be chosen, be a member of that party nominated by that party to occupy the vacancy.

In 1997 Nick Xenophon was elected to the South Australian parliament as an Independent. With three other candidates⁴⁵ he represented a group called "Independent Nick Xenophon No Pokies Campaign". When elected he was usually labeled "IND No Pokies" and no party was ever officially formed.⁴⁶ His group's position on the left hand side of the ballot paper near the groups of candidates representing the major parties (as opposed to the right hand side of the ballot paper near individuals running as IND candidates) was not an indication of party status, but of group status under the Electoral Act. He and the three other candidates had registered with the State Electoral Commission a desire to be recognized as a group, under s.58 of the Electoral Act. Recognition as a group under the Act entitled them to no more than a position on the left hand side of the ballot paper, with the parties. The Act does not define "group" – it has its ordinary meaning.

⁴³ Mr Hopgood had been appointed to Chair the proceedings, by the Governor's Proclamation announcing the Assembly of members of both Houses. SA Government Gazette, 9 January 1986, at p.18.

⁴⁴ Assembly of Members of Both Houses for the Election of a Member to fill a vacancy in the Legislative Council, SA PP No. 142 of 1986, at p.2. Unfortunately the opinions are not included in the PPs series.

⁴⁵ Bob Moran, Patricia Dean and Graham Craig

⁴⁶ see www.seo.sa.gov.au for a current list of parties registered with the State Electoral Commissioner.

On 16th October 2002, the Legislative Council granted Nick Xenophon two months' leave of absence on account of illness. In November it was reported that he was recovering well from open heart surgery⁴⁷ and by late December he was reported to be back at work in Parliament House.⁴⁸ Meanwhile there had been speculation that he would be forced to retire.⁴⁹ But who would replace him? He was not a member of a party. Would being a member of a group have the same effect for the purposes of s.13(5) of the Constitution Act?

In August 2000 there had been an attempt by someone⁵⁰ not associated with the No Pokies group, to register a No-Pokies Party as a political party with the State Electoral Commissioner. Nick Xenophon objected to this on the basis that there was already a No-Pokies Association, and the Electoral Commissioner's recognition of this Association's prior existence – even if it was not registered as a party with the Electoral Commissioner - gave the Association some standing. If Nick Xenophon had resigned during his term, his Association may have had standing to argue that they should be entitled to nominate a replacement. But would this standing have any effect? After all, they would not be arguing their case to the Electoral Commissioner; whether their argument would be accepted by the Government or the Opposition Members sitting as an assembly of the Two Houses is another question.

The question of who would be nominated to replace an Independent Member whose Upper House seat becomes vacant, has never been resolved in practical terms either in South Australia or at the federal level.

In 1987 something unusual happened in Tasmania in relation to a casual vacancy. Senator Don Grimes (ALP) resigned in April 1987 and at a joint sitting of the Tasmanian Parliament in May the ALP nominated John Devereux to succeed him. But the government (LIB) Members of the Tasmanian Parliament believed “that Mr Devereux is not a suitable person to represent Tasmania in the Senate”⁵¹; when a vote was taken it was tied, and was therefore lost.⁵² Another ALP candidate was nominated but his nomination letter was rejected as being non-compliant with the format required by the rules previously adopted for conduct of the meeting; John Devereux's name was put forward again but this was ruled out of order. The meeting adjourned, making it possible for nominations to be made in correct form, but the next scheduled day of sitting was 7 July; on 5 July the Federal Parliament was dissolved.

This is the only case where a meeting of the relevant State Houses of Parliament has nominated a person to fill a casual Senate vacancy but the meeting has failed to elect anyone. It is the only case where a party has validly nominated a person pursuant to section 15 of the Constitution Act, but the meeting has not chosen that person.

No similar situation has ever arisen in South Australia.

The point made very clearly at the Tasmanian meeting was that the Constitution requires a candidate to be nominated by the relevant party but this candidate can only

⁴⁷ “Heart surgery MP ‘too busy’ to quit”, Sunday Mail, 3 November 2002, p.32.

⁴⁸ “Surgery Success for anti-pokies MP”, The Advertiser, 24 December 2002, p.5.

⁴⁹ as above.

⁵⁰ Len Spencer

⁵¹ Mr Gray (LIB, Premier), Tasmanian Parliamentary Debates, House of Assembly, 7 May 1987, at p.1819. The objections to Mr Devereux were based on his support for Federal moves to prevent logging in National Estate areas. See “Joint Sitting of the Legislative Council and House of Assembly”, Tasmanian Parliamentary Debates, Vol IX, No 2, 8 May 1987 at pp1893 to 1919.

⁵² Following rules for such meetings presented to the Houses by the Premier, sent to a Joint Select Committee and then agreed to by both Houses prior to the meeting.

be elected by the members of both Houses of the relevant State Parliament, meeting together.

Whatever any one may think of the wording of section 15 of the Constitution, it certainly does not mean that the joint sitting should act as a rubber stamp. If two or more options are presented to the joint sitting, it must choose between them. If only one option is brought forward the word 'choose' means that the joint sitting must be free to decide whether to accept that option.⁵³

In the South Australian Legislative Council, casual vacancies occurred and were filled during the normal course of Parliamentary sessions, in February 1987 (Crothers replacing Chatterton, ALP); in August 1988 (Stefani replacing Hill, LIB); January 1988 (Ron Roberts replacing Cornwall, ALP). None of these new Members had been candidates for either House before being nominated to the casual vacancies they filled.

Subsequent to the 1989 State election, casual vacancies were filled in October 1990 (Pfitzner to replace Cameron, LIB) and August 1993 (Schaefer to replace Ritson, LIB). Dr Pfitzner had been the LIB candidate for the safe ALP seat of Price at the previous State election in 1989.

At the State election on 11 December 1993, both of the Legislative Council's Australian Democrat Members decided to contest House of Assembly seats. Mike Elliott stood for Davenport which looked as though it could be won by the Democrats with a swing of only 3 or 4% of first preferences⁵⁴, and the Leader of the Democrats, Ian Gilfillan, stood for Norwood, which seemed an optimistic goal from the beginning.⁵⁵

Mr Elliott's term had expired but Mr Gilfillan's was only half-completed so his decision to contest an Assembly seat meant the creation of a casual vacancy in the Legislative Council, and he did not rule out the possibility of being nominated to fill his own casual vacancy.⁵⁶ Others thought that perhaps Mr Elliott might fill it.

According to *The Advertiser*, "Mr Stan Evans said yesterday Mr Elliott had little chance of winning Davenport. He believed Mr Gilfillan would be beaten in Norwood, Mr Elliott would be beaten in Davenport and Mr Elliott would then be nominated to take over the remainder of Mr Gilfillan's term in the Upper House for the Democrats."⁵⁷

Neither Mr Elliott nor Mr Gilfillan won their House of Assembly seats, and after some time Mr Gilfillan made a decision not to seek Democrat nomination to fill the casual vacancy⁵⁸.

⁵³ Mr Gray (LIB, Premier), Tasmanian Parliamentary Debates, House of Assembly, 14 April 1987, at p 1346.

⁵⁴ In 1989 the LIB vote was 55.8% of first preferences, but the sitting LIB Member Stan Evans was retiring in 1993 and his son had been preselected by the Liberal Party. The remaining first preference votes were split between the ALP (23%) and DEM (19%) and an IND (2%).

⁵⁵ In 1989 the DEM vote in Norwood was under 11% of first preferences.

⁵⁶ Elliott to gamble on safe Lib seat", *The Australian*, 2 June 1993, p7. "Democrats put seats on line for revolution" *The Australian*, 12 November 1993; "The End of an Era?", Election '93 liftout p.3, *The Advertiser*, 10 December 1993.

⁵⁷ "Political move a gamble: Elliott" *The Advertiser*, 2 June 1993. See also Peter Lewis's grievance debate, House of Assembly 26 August 1993: "Mr Gilfillan has no desire to continue in Parliament, so what they will do is quite simply nominate Mr Elliott.."

⁵⁸ In mid-December Mr Gilfillan was reported as having "every intention" of asking for Democrat nomination ("Beaten Gilfillan may step down" *Sunday Mail*, 12 December 1993; "I'm not finished": Gilfillan, *The Advertiser* 13 December 1993) but he "announced his intention to quit

The Australian said that

The Democrats yesterday released the results of a membership postal ballot endorsing Mr Elliott, the sole nominee, to fill the Democrats' vacancy in the Legislative Council. The ballot also gave him the leadership over the new Upper House member Ms Sandra Kanck.

Mr Elliott, whose previous Upper House term expired with the old parliament, replaces Mr Ian Gilfillan as leader.

Mr Gilfillan, who created the vacancy by quitting mid-term to make his own unsuccessful bid for the Lower House, decided to stay out.⁵⁹

This decision was heavily influenced by a police investigation begun during the Norwood campaign, over claims that Mr Gilfillan had fraudulently claimed a country member's accommodation allowance while living in Norwood (it was announced almost a year later that no charges would be laid).⁶⁰ The impression given by media reports of the time, is that if the police investigation had not occurred Mr Gilfillan would certainly have been the Democrat nominee to fill his own casual vacancy.

Once again an Assembly of the Members of both Houses of the South Australian Parliament was summonsed by proclamation of the Governor, to meet just before the opening of the Parliament.⁶¹ Once again a single nomination was made, of a person (Mr Elliott) from the same party as the person whose resignation caused the vacancy, and once again that nomination was agreed to by the Assembly.

Lynn Arnold said that:

...it is the tradition of this Parliament that the opportunity is given to the Party from whom the vacancy came, to fill that vacancy. It is a tradition based on historical circumstances in Australia, particularly in 1975. There is another very important reason that must be borne in mind as to why that is a very sound tradition and correctly followed by this Parliament, namely that any other method of filling such a vacancy would be to dispute the public will.⁶²

Actually, it was no longer a matter of tradition or convention. The 1985 amendments to the Constitution Act now required that the party which endorsed the Member who caused the vacancy, would be able to nominate his or her replacement.

Mr Elliott's nomination was accepted and he was declared duly elected.

Three more casual vacancies occurred between the 1993 and 1997 State elections. All three were due to ALP Members choosing to retire. In October 1994 Terry Cameron replaced Chris Sumner, in September 1995 Paul Holloway replaced Barbara Wiese and in October 1995 Paolo Nocella replaced Mario Feleppa.

State Parliament" on 23 December "State Democrat leader to quit" *The Australian* 23 December 1993.)

⁵⁹ "Leader seeks larger role for Democrats", *The Australian*, 21 January 1994.

⁶⁰ "Gilfillan Inquiry document released," *The Advertiser*, 17 February 1994; "Rann backs refusal to reveal MPs' travel costs", *The Advertiser*, 26 September 1994; "Move to stamp out poll smear tactics," *The Advertiser*, 5 April 1995; "Democrats 'sunk' by Gilfillan issue," *The Advertiser*, 6 April 1995; "No criminal charges for Gilfillan" *The Advertiser*, 24 September 1994, p.5.

⁶¹ SA Government Gazette, 18 January 1994, at p.73.

⁶² Lynn Arnold (ALP, Leader of the Opposition), Assembly of Members of Both Houses for the Election of a Member to Fill a Vacancy in the Legislative Council, SA PP 170 of 1994, at p.4.

In 1996, a situation arose in relation to a Senator-elect, which provides the only instance in South Australian politics where a person has been nominated to fill their own casual vacancy.

Senator Jeannie Ferris was elected to the Senate by the voters of South Australia at the Federal election of March 1996. Her term was only due to start on 1 July 1996, and she was employed by Senator Minchin both before and after the election. But the Commonwealth Constitution states: "Any person who ...holds any office of profit under the Crown ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."⁶³

Senator-elect Ferris's employment with Senator Minchin was widely interpreted to be such an "office of profit under the Crown"; those who held this view questioned whether Senator-elect Ferris had validly been elected (and disqualification would result in a casual vacancy) or whether she had not been qualified to be elected (and therefore her election was void and a recount of ballot papers would be required to assess who would be validly elected). The Senate passed a motion referring the question to the High Court sitting as a Court of Disputed Returns.⁶⁴

Senator-elect Ferris resigned⁶⁵ her Senate position and was then nominated at a meeting of both Houses of the South Australian Parliament⁶⁶ to fill the casual vacancy created by her resignation. There was no other nomination and Ms Ferris was declared duly chosen to be a Senator.

A casual vacancy in the Legislative Council occurred in late 2000 when George Weatherill (ALP) retired; he was replaced by Bob Sneath (ALP) in October 2000.

Since the 2002 State election, there have been two casual vacancies which have been filled, both due to Members' retirement. Mike Elliott (DEM) retired and was replaced by Kate Reynolds (DEM) in February 2003, and Di Laidlaw (LIB) retired and was replaced by Michelle Lensink (LIB) in June 2003.

When the arrangements were being made for an Assembly of both houses to elect a replacement for Di Laidlaw, the government received advice from the Solicitor-General "that it is necessary for all members of both houses to attend an assembly under section 13."⁶⁷ Some Members with legal training disagreed with the Solicitor-General's opinion, but as the Legislative Council was not programmed to sit for several weeks and some Council Members were likely to be away, the government sponsored an amendment to the Constitution Act to put the question beyond dispute. This amendment, to validate the decision reached at an Assembly which may not have full attendance of all members,⁶⁸ was added to a Constitution Act Amendment Bill sponsored by Di Laidlaw herself, to make the language of the Constitution Act gender-neutral.

⁶³ Commonwealth of Australia Constitution Act, section 44 (iv).

⁶⁴ Senate Hansard 28 May 1996 at pp.1204 – 1235 and 29 May 1996 at pp.1250-1258. Motion to take effect from 14 July 1996 "should Ms Jeannie Ferris be a member of the Senate at that time."

⁶⁵ 12 July 1996

⁶⁶ Joint Sitting of the Two Houses for the Choosing of a Senator, SA PP 219 of 1995-96.

⁶⁷ Attorney-General Michael Atkinson, House of Assembly, 14 May 2003, at p.3008.

⁶⁸ Constitution (Casual Vacancies and Gender Neutral Language) Amendment Act 2003 inserted s.13(4) (fa) there is no requirement for all members of both Houses of Parliament to be present at a meeting of the assembly; and"

Two more casual vacancies were filled at an Assembly of Members of both Houses after the State election of 2006; one vacancy arose from the resignation of Angus Redford (LIB) in order to contest the House of Assembly seat of Bright, and the second arose with the death of Terry Roberts (ALP).⁶⁹

Angas Redford served in the Legislative Council from 1993 until 2006; he was re-elected in 2002 and by the time of the general election on 18 March 2006 he was only half-way through his Legislative Council term. His decision to contest the House of Assembly seat of Bright⁷⁰ to some extent repeated the situation which arose in 1985 and again in 1993.

Although this was the first time that a Liberal Party MLC had been in this position (Frank Blevins was endorsed by the ALP and Ian Gilfillan was endorsed by the Australian Democrats), there was once again a situation where a sitting Member in the Upper House had resigned⁷¹ half-way through his term, creating a casual vacancy at the same time as an election. And once again he would be entitled to be nominated by his party to fill the casual vacancy caused by his own resignation.

There is still no legislative barrier to a Member of the Legislative Council being nominated to fill his own casual vacancy, and indeed there is really no convention against it either. The Liberal Party protested in 1985 that it would be an opportunistic manipulation of the system if Mr Blevins (ALP) were allowed to fill his own casual vacancy, but does not seem to have made a similar protest in 1993 when Mr Gilfillan (DEM) proposed that he be allowed to do the same thing. And it would have been difficult for the ALP and the Democrats - given their support for Mr Blevins and Mr Gilfillan - to argue against Mr Redford being nominated to fill his own vacancy.

Nonetheless, Mr Redford said that if he did not win Bright "...and there is a significant swing against usit will be time for generational change, and for me it would be time to move on."⁷² This was interpreted to mean that Mr Redford would not seek the Liberal Party's nomination to fill the casual vacancy caused by his resignation from the Council, and indeed when, on 18 March 2006, he failed to win the Lower House seat of Bright he refrained from seeking nomination to the Upper House vacancy.

At an Assembly of both houses of the South Australian Parliament on 2 May 2006, Bernie Finnigan (ALP) was elected to take the place of Terry Roberts (ALP)⁷³ and Stephen Wade (LIB) was elected to replace Angus Redford (LIB).⁷⁴

Summary

There is now a legislative requirement at both the Federal and (South Australian) State levels, that a casual vacancy in the membership of the Upper House will be filled by a person nominated by the party which endorsed the original Member.

⁶⁹ Mr Roberts passed away on 18 February 2006.

⁷⁰ "Redford wins Bright vote," *The Advertiser*, 29 April 2005, at p.11.

⁷¹ Mr Redford resigned on 27th February 2006.

⁷² "Libs fear on 'safe' seat," *Sunday Mail*, 29 January 2006, at p.16: "If I don't win and there's a significant swing against us it will be time for generational change, and for me it would be time to move on. But I hope to win."

⁷³ Minutes of the Assembly of the Two Houses, held on Tuesday 2 May 2006, SA PP 185 of 2006.

⁷⁴ Minutes of the Assembly of the Two Houses, held on Tuesday 2 May 2006, SA PP 186 of 2006.

The legislation (both State and Federal) is silent on who can nominate a person if that original party no longer exists. When Senator Hall was replaced (1977) two nominations were made – one by the party which considered itself to be the continuing presence of the original party, and one by the government, which nominated the next available person on the ballot paper from the most recent election contested by the retiring Member.

The legislation (both Federal and South Australian) would allow the relevant party to make more than one nomination. The Tasmanian Parliament (Grimes, 1987) did not feel itself bound to accept the single nomination of the relevant party.

There have been several cases in South Australia where a Member of the Legislative Council has vacated his seat mid-term and contested a Lower House seat (Blevins, 1985; Gilfillan, 1993; Redford, 2006). There has been no legal impediment to that Member being nominated to fill his own casual vacancy, but none of those Members has been nominated.

There has been one case where a Senator has vacated her seat and has been nominated (and elected) to fill her own casual vacancy (Ferris, 1996).

Finally, anyone who has been elected to the South Australian Parliament (whether sworn in or not) can vote at a Assembly of the Houses to elect a Senator or MLC, and there is no requirement that every eligible Member should attend in order for the Assembly to be validly conducted.

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