



**CROWN SOLICITOR**  
NEW SOUTH WALES

# Advice

## Filling of vacancies following the resignation of the Honourable Bob Carr

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**Prepared for:** LGC088 (Legislative Council) & LGA087 (Legislative Assembly) Parliament of NSW

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**Client ref:** D13/31435; Ronda Miller and David Blunt

**CSO ref:** 201303097 & 201303100 T08 Richard Kelly

## 1. Summary of advice

- 1.1 I am of the opinion that the Senate place which the Hon Bob Carr would hold from 1 July 2014 has not become vacant, with the result there is no casual vacancy with respect to that place able to be filled as a casual vacancy pursuant to s. 15, *Commonwealth Constitution*. As that place can only become vacant on or after 1 July (assuming an effective resignation occurs), the present casual vacancy in the place Mr Carr held and any casual vacancy in the place Mr Carr would hold will have to be dealt with separately.
- 1.2 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

## 2. Background

- 2.1 By letter dated 24 October 2013, the President of the Senate, Senator the Hon. John Hogg, wrote to Her Excellency the Governor of NSW, in the following terms:
- "Pursuant to the provisions of section 21 of the Commonwealth of Australia Constitution, I notify Your Excellency that a vacancy has happened in the representation of the State of New South Wales through the resignation today of Senator the Honourable Bob Carr.
- The resignation was expressed as applying in respect of the senator's current term which concludes on 30 June 2014 and also to the new term to which he was elected at the recent half-Senate election, commencing on 1 July 2014."
- 2.2 The President's letter was transmitted by the NSW Governor to the Legislative Council by way of a minute dated 28 October 2013, which stated as follows:
- "Her Excellency the Governor transmits to the Legislative Council copy of a despatch dated 24 October 2013, received from the President of the Senate, notifying that a vacancy has happened in the representation of the State of New South Wales in the Senate of the Commonwealth of Australia through the resignation of Senator the Honourable Bob Carr which occurred on 24 October 2013."
- 2.3 By letter dated 30 October 2013 from the Clerk of the Legislative Assembly and the Clerk of the Parliaments, I am instructed that consideration is currently being given to the holding of a joint sitting of the Legislative Council and the Legislative Assembly to fill the casual vacancy in the Australian Senate up until 30 June 2014, and possibly also the vacancy in the Senate for the six year term starting on 1 July 2014.
- 2.4 It is against the above background that my advice is sought.

### 3. Advice sought

- 3.1 On behalf of the Presiding Officers of the Parliament of NSW, my urgent advice is sought on the operation of s. 15 of the *Commonwealth Constitution* relating to the filling of casual vacancies in the Australian Senate.
- 3.2 The specific questions I have been requested to advise upon are:

"Is there any impediment to the Parliament of New South Wales filling not only the current casual vacancy in the Senate, but also the casual vacancy for the six-year term starting on 1 July 2014, at the one joint sitting? Alternatively, should the two casual vacancies be dealt with separately?"

### 4. Advice

- 4.1 On the material with which I have been provided I do not understand any doubt to arise with respect to the filling of the casual vacancy that has now arisen with respect to the Senate place formerly held by the Hon. Mr Carr, the term of which expires on 30 June 2014.
- 4.2 The issue remaining to be addressed is whether the purported resignation of the Hon. Mr Carr in respect of his six year term commencing on 1 July 2014, creates a casual vacancy in the Senate which may be filled by way of a joint sitting of NSW Parliament pursuant to s. 15 of the *Commonwealth Constitution*.
- 4.3 Before considering relevant case law and other authorities, I will briefly outline the relevant provisions of Pt. 2 of the *Commonwealth Constitution*.
- 4.4 Section 13 of the *Constitution* deals with rotation of senators and, after making provision for the division of senators into two classes with terms expiring after three and six years respectively, goes on to state that "afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service". Section 13 then goes on to relevantly state:
- "The election to fill vacant places shall be made within one year before the places are to become vacant.
- For the purposes of this section the term of service of a senator shall be taken to begin on the first day of July following the day of his election...."
- 4.5 Section 19 deals with resignation of senators, and provides as follows:
- "A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant."

4.6 Section 15 deals with casual vacancies, and relevantly provides as follows:

"If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together [...] shall choose a person to hold the place until the expiration of the term..."

- 4.7 The provisions of Pt. 2 of the *Constitution* do not deal directly with the circumstances in which a senator is elected to the Senate, but seeks to resign prior to the beginning of their term of service.
- 4.8 The question which arises for consideration in the present matter is whether the purported resignation of the Hon. Mr Carr in respect of his term commencing on 1 July 2014, means that the place he would hold has become vacant and is now able to be filled as a casual vacancy pursuant to s. 15 of the *Commonwealth Constitution* with respect to his Senate place commencing from 1 July 2014. I have not identified any case law which is directly on point with regard to this question. The High Court case of *Vardon v O'Loughlin* (1907) 5 CLR 201 dealt with the question of how a vacant place was to be filled in circumstances where an election of senators had been held, and the Court of Disputed Returns had subsequently determined that the election of one of them was void. In that case the High Court held that the Parliament of South Australia did not have power to deal with the vacancy as a casual vacancy within the meaning of s. 15 of the *Constitution*. The Court held that the Governor had sufficient authority for the issue of a supplementary writ.
- 4.9 In *Re Wood* (1988) 167 CLR 145, the High Court in a unanimous judgment held that a Senate candidate who was a British citizen and who had been elected to the Senate, was disqualified (as a consequence of their British citizenship) and as a result the Senate place had "not been filled in the eye of the law for he lacked the qualifications to be elected". In that case the High Court held that there should be a recount of the ballot papers for the purpose of filling the Senate vacancy. The Court held that there was no casual vacancy within the meaning of s. 15 of the *Constitution*.
- 4.10 While both cases above contain commentary on the operation of s. 15 of the *Constitution*, they are clearly distinguishable from the circumstances that arise in the present matter. In the present case, there is no suggestion that the election of the Hon. Mr Carr was in some way void or voidable, or that he was disqualified from holding office.
- 4.11 Circumstances with some degree of similarity to those arising in the present matter, occurred in the case of Senator John Barnes, who was elected in October 1937 to fill a Senate place which was to become vacant on 1 July 1938. However, he died on 31 January 1938, prior to commencing his term of service. These events did not give rise to contested litigation, but were the subject of an opinion dated 17 March 1938 prepared by WK Fullagar and JA Spicer, which is reproduced in "*Opinions of Attorneys-*

*General of the Commonwealth of Australia'* Vol. 3, Canberra 2013. The joint opinion addresses legal issues very similar to those arising in the present case and, while noting that the matter could not be regarded as being entirely free from doubt, the opinion expressed the view that the death of Mr Barnes did not create a casual vacancy for the purpose of s. 15 of the *Constitution*.

- 4.12 The reasoning provided in the joint opinion of particular relevance to the present case was as follows:

"Section 7 provides that the Senate shall be composed of Senators for each State directly *chosen by the people* of the State voting until the Parliament otherwise provides as one electorate...The senators shall be chosen for a term of six years and the names of the *senators chosen* for each State shall be certified by the Governor to the Governor-General. We assume that Mr. Barnes' name was so certified. By choice of the people he and his two colleagues *were elected to fill the places* which are to become vacant on the 1<sup>st</sup> July 1938 and for the purposes of section 13 the term of service of each of those senators 'shall be taken to begin on the 1<sup>st</sup> day of July following the day of his election'.

At the moment, in our opinion, there is no vacancy. A vacancy will happen on 1<sup>st</sup> July next, and it will be the duty of the President to 'notify the same to the Governor of the State in the representation of which the vacancy has happened' (section 21).

The place which then becomes vacant is not the place of one of the Senators who retire on the 30<sup>th</sup> June. Those places have been filled by election pursuant to the provisions of the Constitution (section 13), and one of them is *the place* which Mr. Barnes was elected to fill. On the 1<sup>st</sup> July, when the vacancy first arises, it is *not the place of the retiring senator* which becomes vacant, for on that day he is not and never has been entitled to a place. The person who was entitled to the place of a Senator on that date by choice of the people was Mr. Barnes. There is a vacancy *on that day* in *his place*, and that place has become vacant before the expiration of his term of service.

The matter can be approached this way. On 1<sup>st</sup> July 1938 the place of a senator becomes vacant. For section 15 to apply it is necessary that such vacancy should occur before the expiration of *his* term of office. It is therefore important to determine *whose place* becomes vacant. It is not the place of one of the retiring senators, because they all cease to have places on 30<sup>th</sup> June. Mr Barnes was elected to fill the vacancy which would otherwise occur on 1<sup>st</sup> July. Therefore on that date it is *his place* which becomes vacant, and as such vacancy has happened before the expiration of *his* term of service, the requirements of section 15 are satisfied."

- 4.13 The reasoning outlined in the above opinion is broadly consistent with that relied upon by my predecessor in an opinion of 25 March 1964, which was forwarded with your letter of instructions. That opinion deals with a vacancy arising in the Legislative Council as a result of the death of a re-elected Legislative Councillor, and therefore

considers the provision of State Legislation then in force rather than the *Commonwealth Constitution*. As you are aware, in that advice my predecessor stated:

"So far as the Member's term of office for twelve years commencing on 23<sup>rd</sup> April, 1964, is concerned, it is evident from the provisions of section 13(3) quoted above that no vacancy in this term of office will arise until immediately after the commencement of the term of office, that is to say, immediately after the first moment of 23<sup>rd</sup> April, 1964; and, as section 8 operates only "When...the seat of an elected member of the Council becomes vacant", the duty imposed by the section on the President to notify the Governor of the vacancy will only be discharged by the President notifying the Governor after the first moment of 23<sup>rd</sup> April, 1964; in other words, the notification under section 8 must be of an existing vacancy and not of a prospective vacancy."

- 4.14 The reasoning that a Senate vacancy does not arise, in the circumstances presently under consideration, until commencement of the new term of service receives support from other commentators. In *Lane's Commentary on the Australian Constitution*, 2<sup>nd</sup> edition (1997) at pp. 78-79, the learned author offers the following analysis:

"A 'vacancy' within s 15 – or within ss 19, 20, 37, 38 and 45 – refers to a situation in which (a) the place of a senator or member has been filled, and (b) there is a supervening event leading to (c) a vacancy. And it seems to me, furthermore, that there can be no casual vacancy within s 15 unless the senator-elect has actually entered 'the beginning of his term of service' (to adapt the phrase in s 13 para 1), for it is only thereafter that we can speak of a senator vacating that senator's place 'before the expiration of his term of service' within s 15 para 1." (*Footnotes omitted*).

- 4.15 As noted in the letter of 28 October 2013 seeking my advice, *Odgers' Australian Senate Practice* (13<sup>th</sup> edition), Chapter 4 "Elections for the Senate – Casual Vacancies" also includes the following relevant commentary:

"On 5 July 1993 Senator Tate, having just commenced a new term as a senator for Tasmania, resigned before taking his seat in the Senate. The resignation of Senator Tate before his swearing in did not affect the procedure for his replacement. Had he resigned before the commencement of his new term, however, this would have given rise to interesting questions. Presumably he would have had to lodge a sort of "double resignation", making it clear that he was resigning his place in respect of his term ending on 30 June and also in respect of his new term commencing on 1 July."

- 4.16 Note however that in the same Chapter and section *Odgers'* also states that the principles which have been observed in relation to the manner in which a Senator may resign their place include a principle that "a resignation may not take effect at a future time". There is some doubt in my mind as to how this requirement sits with the concept of a "double resignation" applying with respect to a term which has not yet commenced.

- 4.17 As noted by Fullagar and Spicer in their 1938 opinion, the matter cannot be regarded as being entirely free from doubt. For example, it might be argued that the words "before the expiration of his term of service" in s. 15 of the *Commonwealth Constitution*, do not imply that the term of service must have commenced. If that interpretation was applied, it could be argued that a position could become vacant before the term of service had commenced. Nevertheless, I consider this is a more strained interpretation of the relevant wording and I prefer the reasoning applied in the 1938 opinion considered above and (by analogy) in the 1964 opinion of my predecessor concerning a vacancy arising in the NSW Legislative Council.
- 4.18 Accordingly, I am of the opinion that the place Mr Carr would hold from 1 July 2014 has not become vacant as a result of his purported resignation and therefore it cannot be filled now as a casual vacancy. It follows, in answer to your first question that I consider there is an impediment to the Parliament of New South Wales now filling at the one joint sitting not only the current casual vacancy in the Senate, but also the place Mr Carr would hold from 1 July 2014. That place can only become vacant on or after 1 July 2014.
- 4.19 As the term relevant to the current casual vacancy will expire on 30 June 2014, it is not possible for it to be filled after 30 June 2014. It follows, therefore, in answer to the second question you have requested me to advise upon, that the filling of the current casual vacancy, and the filling of any casual vacancy that arises on or after 1 July 2014, will have to be dealt with separately.

Signed:



I V Knight  
Crown Solicitor