

Filling Casual Vacancies before 1977: an Appendix to *The Biographical Dictionary of the Australian Senate, Volume 3, 1962–1983*

By Harry Evans, Clerk of the Senate, 1988–2009

The filling of casual vacancies in the Senate under section 15 of the Constitution was much more complicated before that section was changed by referendum in 1977. This complication features in a number of biographies in the *Biographical Dictionary of the Australian Senate*.

Senators are elected for a fixed term of six years ending on 30 June of the relevant year. Half of the state Senate places are open to election every three years. In the event of a dissolution of both Houses to resolve a deadlock under section 57 of the Constitution, the fixed terms and rotation of places are set in place again.

A casual vacancy is one which arises because of the death or resignation of a senator before the end of the senator's term of office, and is distinct from a periodical vacancy, which occurs by effluxion of time and which is filled by a normal periodical Senate election. (As Senate elections are held before Senate places turn over on 30 June at the end of their terms, the periodical vacancies are immediately filled on 1 July by the senators elected to them.)

Under the old section 15 a casual vacancy was filled by an appointment made by the relevant state parliament, with the state houses sitting and voting together in the states with bicameral parliaments. If the state parliament was not in session when a vacancy occurred, the governor of the state could fill the vacancy for a period ending fourteen days after the next meeting of the state parliament. Usually, an appointment by a governor was subsequently 'confirmed' by the state parliament.

A senator appointed to a casual vacancy under these provisions, however, held office only until the next periodical Senate election or general election for the House of Representatives, at which the vacancy would be filled by the electors of the relevant state.

This resulted in Senate elections not only filling periodical vacancies, but also filling casual vacancies which had occurred since the last election. When House of Representatives elections were held separately from Senate elections there were sometimes Senate casual vacancies to be filled at the House elections.

The electoral law made provision for a serving senator, including a senator already filling a different casual vacancy, to seek election to a casual vacancy if the senator chose to do so. Thus, a senator serving a term which ended on 30 June next occurring after the next election, in addition to seeking re-election to a normal six year Senate term beginning on

the day after that 30 June, could also seek election to a casual vacancy that was to be filled at that election and the term of which lasted for the three years beyond that 30 June. (This was referred to as a 'long casual vacancy', as distinct from a 'short casual vacancy' that ended at the 30 June next occurring after the election.)

Therefore, a senator appointed to fill a casual vacancy, who wished to remain in the Senate would have to contest that vacancy at the next Senate or House of Representatives election, and could be defeated for that vacancy by another serving senator or by another candidate.

The legislation provided for a serving senator to contest a casual vacancy by lodging a contingent resignation from the place already occupied by the senator. The resignation was expressed to take effect only if the senator was successful in winning the casual vacancy at the election. The constitutionality of this provision for contingent resignations was very dubious. It could be strongly argued that, under the relevant provision of the Constitution, a resignation of a senator took effect upon receipt by the President of the Senate or the Governor-General in the absence of the President, and could not have effect on a contingent or prospective basis. The constitutionality of the provision, however, was not challenged.

The effect of these provisions is well illustrated by the cases of senators Nancy Buttfield and Gordon Davidson. A South Australian senator died in 1961 while holding a term ending on 30 June 1965. The state Parliament chose Gordon Davidson to fill the vacancy. He held the vacancy, however, only until the general election later in 1961. A serving senator, Senator Nancy Buttfield, whose term was due to end on 30 June 1962, having failed to win a further periodical Senate place, won the casual vacancy and replaced Senator Davidson in that vacancy. The vacancy created by her contingent resignation, for the place which lasted until 30 June 1962, was then filled by the South Australian Parliament by the appointment of Gordon Davidson.

The new section 15 of the Constitution, substituted by referendum in 1977, simply provides that any casual vacancy is filled until the expiration of the term of the vacating senator by the state parliament, or temporarily by the state governor until the state parliament is in session, without any requirement for the vacancy to be contested in a subsequent election before the end of the term.