

## CHAPTER 4

### ELECTIONS

The *Constitution Act 1902* provides for a Legislative Council consisting of 42 members elected for two terms of the Legislative Assembly (eight years) and a Legislative Assembly consisting of 93 members elected for a term of four years, subject to earlier dissolution in special circumstances. The Council is constituted in such a way that the term of one-half of its members (21) expires at the end of each term of the Assembly. An election for 21 Council members, known as a periodic Council election, is held in conjunction with the general election for the members of the Assembly every four years.<sup>1</sup>

Periodic Council elections are conducted in accordance with the Sixth Schedule to the *Constitution Act 1902*, the *Parliamentary Electorates and Elections Act 1912* and any other laws which the Parliament may make, provided they are not inconsistent with the Sixth Schedule.<sup>2</sup> The Sixth Schedule, which covers both the system of election and method of counting votes for Council elections, is 'entrenched' in the *Constitution Act 1902*, in the sense that it cannot be amended or repealed without a referendum.<sup>3</sup>

#### THE LEGISLATIVE COUNCIL ELECTORAL SYSTEM

##### Term of service

Members of the Council are elected for two terms of the Assembly. A member's term of service expires on the day of the termination, either by dissolution or expiry, of the second Assembly following their election.<sup>4</sup> The term of the Assembly is fixed at four years, expiring on the Friday before the first Saturday in March of

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1 The historical development of the current electoral system is discussed in Chapter 2.

2 *Constitution Act 1902*, s 22A(1) and (5). The principal law governing the conduct of periodic Council elections, apart from the Sixth Schedule, is the *Parliamentary Electorates and Elections Act 1912*.

3 *Constitution Act 1902*, s 7A(1)(b).

4 *Ibid*, s 22B(2).

the relevant year.<sup>5</sup> The Assembly, however, may be dissolved earlier during its term in certain circumstances, set out in section 24B of the *Constitution Act 1902*, such as a vote of no confidence in the government.

The term of service of a member of the Council elected to fill a casual vacancy expires on the day the seat of the member would have become vacant had the casual vacancy not occurred.<sup>6</sup>

### Issue of writs

Periodic Council elections, and general elections for members of the Assembly, are held according to writs issued by the Governor.<sup>7</sup> The writs must be issued within four clear days after either the term of the Assembly has expired, or a proclamation dissolving the Assembly has been published in the Government Gazette.<sup>8</sup> The writ for a periodic Council election must not be issued until after the issue of the writs for the general election.<sup>9</sup>

The writ for a periodic Council election specifies the day for the taking of the poll, which must be the same as the day of the general election for the Assembly,<sup>10</sup> the date by which nominations must be made,<sup>11</sup> and the date by which the writ must be returned to the Governor.<sup>12</sup> The date by which the writ must be returned is a day not later than the 60th clear day after the writ was issued, or such later day as the Governor may direct.<sup>13</sup> The day for the taking of the poll is either:

- the fourth Saturday in March next following the expiry of the Assembly; or
- if the Assembly is dissolved, a day not later than the 40th day after the issue of the writs.<sup>14</sup>

The writ for a periodic Council election is directed to the Electoral Commissioner,<sup>15</sup> who is required to give public notice of the information it contains.<sup>16</sup>

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5 *Ibid*, s 24(1).

6 *Ibid*, s 22B(4).

7 *Ibid*, s 11A.

8 *Parliamentary Electorates and Elections Act 1912*, s 68 (Assembly writs) and s 74A (Council writs).

9 *Constitution Act 1902*, s 22A(3).

10 *Ibid*.

11 *Parliamentary Electorates and Elections Act 1912*, ss 120I and 74C(2).

12 *Ibid*, s 74C(2).

13 *Ibid*, s 74A.

14 *Constitution Act 1902*, s 24A.

15 *Parliamentary Electorates and Elections Act 1912*, s 74C(1).

16 *Ibid*, s 74D(1), (2).

## Adjournment, suspension of business and prorogation

The Council, unlike the Assembly, is a continuing House which does not expire and cannot be dissolved. However, in the period preceding an election, the Council is adjourned, its business is suspended by the *Constitution Act 1902*, and it is prorogued by the Governor, as outlined below.

On the last sitting day of the Council before the day of the expiry of the Assembly as determined by the Act, the Council resolves to adjourn to a stated day, which will be a specified day prior to the expiry of the Assembly. From the day of the expiry of the Assembly, to the day fixed for the return of the writs, the Council is not competent to dispatch any business, by virtue of section 22F of the Act.<sup>17</sup>

During the adjournment of the Council, it has been the practice for the Governor, on the advice of the Executive Council, to prorogue the Council to a specified date within the period provided by the *Constitution Act* for the return of the writs (see above).<sup>18</sup> It has also been the practice that, before the day appointed for the return of the writs, the Governor further prorogues the Council until the day of the first meeting of the Parliament, which must be not later than the seventh clear day after the day appointed for the return of the writs.<sup>19</sup> The effect of prorogation, as opposed to adjournment or suspension of business under section 22F, is to terminate all business pending before the Council.

A timeline showing the application of these various procedures in relation to the 2007 Council periodic election is set out in Appendix 5.

## POLITICAL PARTY REGISTRATION

The *Parliamentary Electorates and Elections Act 1912* provides for the registration of political parties in New South Wales. Registration entitles a party to funding under the *Electoral Funding Act 1981*,<sup>20</sup> the right to nominate candidates for elections,<sup>21</sup> endorsement of the party name on the ballot paper<sup>22</sup> and the right to distribute registered electoral advertising material.<sup>23</sup> Registration is not compul-

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17 *Constitution Act 1902*, s 22F.

18 See, for example, the *Government Gazette*, No 26, Special Supplement, 6 March 1995, p 1229; No 14, Special Supplement, 3 February 1999, p 389; No 36, Special Supplement, 31 January 2003, p 747; No 9, Special Supplement, 15 January 2007, p 157. Section 10 of the *Constitution Act 1902* provides that ‘the Governor may prorogue the Legislative Council and Legislative Assembly by proclamation or otherwise whenever he deems it expedient’.

19 *Parliamentary Electorates and Elections Act 1912*, ss 69 and 74B. This practice allows for provision to be made for possible delays in the count and declaration of the poll.

20 *Parliamentary Electorates and Elections Act 1912*, s 66FA; *Election Funding Act 1981*, s 59. Independent groups and candidates may also be entitled to funding under the *Election Funding Act 1981*.

21 *Parliamentary Electorates and Elections Act 1912*, s 81B(2)(a).

22 *Ibid*, s 83D(1).

23 *Ibid*, s 151G(8).

sory, and loss of a party's registration has no effect on the eligibility of a member of a party to become, or continue to be, a member of the House.

### Eligibility

The requirements for party registration were changed in 1999 under the *Parliamentary Electorates and Elections Amendment Act 1999*. The changes strengthened the criteria that parties must meet to gain and maintain registration.<sup>24</sup>

Under the 1999 changes, to be eligible for registration a party must have at least 750 members, and a written constitution setting out its platform or objectives.<sup>25</sup> The term 'party' is defined in the Act as:

[A] body or organisation, incorporated or unincorporated, having as one of its objects or activities the promotion of the election to the Assembly or the Council of a candidate or candidates endorsed by it or by a body or organisation of which it forms part.<sup>26</sup>

An application for registration of a party may be made to the Electoral Commissioner by the secretary of the party.<sup>27</sup> It must include the names and addresses, as enrolled, of the 750 members of the party on whom the party relies to qualify for registration.<sup>28</sup>

On receipt of an application, the Electoral Commissioner may carry out preliminary tests and inquiries to determine whether the party is an eligible party and the application is duly made. These may include any test for verifying the membership of the party, or a requirement for a written response from a specified percentage of the members relied on for registration confirming that they are in fact members of the party.<sup>29</sup>

If the Electoral Commissioner is satisfied the party may be an eligible party, and that the application may be duly made, the Commissioner must publish a notice of the application seeking any objections to registration, which must be received within 14 days of publication.<sup>30</sup> The Commissioner must not register the party until 14 days have expired and all objections have been considered.

24 *Parliamentary Electorates and Elections Amendment Act 1999*.

25 *Parliamentary Electorates and Elections Act 1912*, s 66A(1).

26 *Ibid*, s 3(1).

27 *Ibid*, s 66D(1).

28 *Ibid*, s 66D(2)(g).

29 *Ibid*, s 66D(4) and 66G(2A). These provisions were inserted by the *Parliamentary Electorates and Elections Amendment (Party Registration) Act 2002*, following the decision in *Save our Suburbs (SOS) NSW Inc v Electoral Commissioner of NSW* [2002] NSWSC 785. In that case, the Electoral Commissioner had refused to register the SOS party until he had received verification from a certain percentage of the 750 electors named in the application for registration. Burchett JA found that, in doing so, the Commissioner had superimposed an arbitrary requirement of compliance on the statutory criteria for registration, and ordered the Commissioner to register the party.

30 *Ibid*, s 66DA.

A party does not become a registered party under the Act until it has been registered for one year.<sup>31</sup> This requirement means that parties contesting an election must be registered for more than one year before an election. A party may not be registered in the period between the issue of the writ for an election and polling day.<sup>32</sup>

### Refusal of registration

The Electoral Commissioner may refuse to register a party in certain circumstances, such as:

- the party is not an eligible party;<sup>33</sup>
- the name of the party comprises more than six words, or is obscene or offensive;
- the name of the party is the same as, or may be confused with, the name of a registered party, or of a party currently represented in Parliament;<sup>34</sup>
- the name of the party is the same as the name of a party that was registered at any time during the previous four years, unless the application for registration has been approved by the last registered officer (or the deputy registered officer) of the previously registered party.<sup>35</sup>

### Continuing registration

Registered parties are required to lodge annual returns as to their continued eligibility for registration. If this requirement is not observed, the party's registration may be cancelled.<sup>36</sup>

### Cancellation of registration

The Electoral Commissioner may cancel the registration of a party if the party has failed to comply with a requirement concerning the lodgement of an annual

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31 *Ibid*, s 66FA.

32 *Ibid*, s 66F(1).

33 *Ibid*, s 66G(1).

34 *Ibid*, s 66G(3)(a)-(d).

35 *Ibid*, s 66G(3)(c)-(d), and (3A). This ground for refusing registration was the subject of dispute in *Candlish v Wasson* [2002] NSWSC 79. In that case, a party known as Pauline Hanson's One Nation (NSW Division) had been registered in 1998, but its registration had been cancelled in 2000, on the basis that registration had been obtained by misrepresentation (see s 66I(2)(d)). In 2002, a party with the same name applied for registration, but its application was refused on the ground that the approval of the relevant officer of the previously registered party had not been obtained. Grove J dismissed a summons challenging the validity of the decision to refuse registration, rejecting an argument by the plaintiff that the effect of cancellation of the previous party's registration had been that that party had never been registered.

36 *Ibid*, s 66HA.

return with respect to continued registration (see above),<sup>37</sup> or if the Commissioner is satisfied on reasonable grounds that:

- the party has ceased to exist, whether by amalgamation with another party or otherwise;
- the party is no longer an eligible party;
- the registration of the party was obtained by fraud or misrepresentation.<sup>38</sup>

## ELECTORAL ROLLS

The electoral rolls contain the list of electors entitled to vote in an election for the Assembly<sup>39</sup> and at a periodic Council election.<sup>40</sup> A separate roll is kept for each electoral district for the Assembly.<sup>41</sup>

A person is eligible for enrolment if the person is:

- 18 years of age or older;<sup>42</sup> and
- an Australian citizen, or a British subject who was on an Australian electoral roll on 25 January 1984.<sup>43</sup>

A person who is qualified for enrolment and who lives at an address, and who has lived at that address for the preceding one month, is entitled to have their name placed on the roll for that district.<sup>44</sup> No person may be enrolled for an address other than that at which they live.<sup>45</sup>

A person is not entitled to have their name placed, or retained, on any electoral roll if the person is:

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<sup>37</sup> *Ibid*, s 66HA(5).

<sup>38</sup> *Ibid*, s 66I(2). This issue arose in 2000 in relation to the registration of Pauline Hanson's One Nation party. Following investigations into the registration of the party, the Electoral Commissioner found that the registration of the party was obtained by misrepresentation, and determined that the registration of the party be cancelled pursuant to s 66I(2)(d). The Hon David Oldfield subsequently registered in 2002 the 'One Nation NSW Political Party'.

<sup>39</sup> *Ibid*, ss 20(1) and (2), 26. The rolls contain the name, residence, date of birth, occupation and sex of each elector: s 26(4).

<sup>40</sup> *Constitution Act 1902*, s 22: 'The persons who would, if a periodic Council election were a general election of Members of the Legislative Assembly, be entitled to vote at that general election, and only those persons, shall be entitled to vote at that periodic Council election'.

<sup>41</sup> *Parliamentary Electorates and Elections Act 1912*, s 26(1).

<sup>42</sup> *Ibid*, s 20(1)(a). Persons who are 17 years of age, and who are otherwise eligible for enrolment, are entitled to provisional enrolment, but may not vote until they turn 18: ss 33A and 20(3).

<sup>43</sup> *Ibid*, s 20(1).

<sup>44</sup> *Ibid*, s 33(1). However, there is special provision for continuing enrolment of overseas electors (s 20A), for the enrolment of spouses and children of overseas electors (s 20B), and for enrolment of itinerant electors (s 20C).

<sup>45</sup> *Ibid*, s 33(3).

- being of unsound mind, incapable of understanding the nature and significance of enrolment and voting;
- serving a prison sentence for 12 months or more;
- the holder of a temporary entry permit or a prohibited immigrant under the *Migration Act 1958* (Cth).<sup>46</sup>

Enrolment is compulsory for all eligible persons.<sup>47</sup> The rolls close at 6.00 pm on the day of the issue of the writs calling the election.<sup>48</sup>

The *Parliamentary Electorates and Elections Act 1912* prescribes who can have access to the electoral roll and electors' enrolment information.

A copy of the roll for each district is available for public inspection at the office of the Electoral Commissioner or at such other place or places as the Electoral Commissioner determines.<sup>49</sup> The Commissioner may also provide online access to information contained in the roll for a district for the purpose of allowing an individual to ascertain whether or not he or she is correctly enrolled for the district.<sup>50</sup> In certain circumstances the Commissioner must provide a list of electors and their particulars to every registered party,<sup>51</sup> member of Parliament<sup>52</sup> and candidate for election.<sup>53</sup> Such information may also be provided to other persons on request, if the Electoral Commissioner determines that the public interest in providing the information outweighs the public interest in protecting the privacy of personal information.<sup>54</sup>

## NOMINATION FOR ELECTION

### Eligibility

Every person enrolled as an elector is qualified to be nominated as a candidate for a periodic Council election, unless disqualified under the *Parliamentary Electorates and Elections Act 1912*<sup>55</sup> or the *Constitution Act 1902*.

Under the *Parliamentary Electorates and Elections Act*, members of the Commonwealth Parliament are incapable of being nominated for election to either House

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46 *Ibid*, s 21(c).

47 *Ibid*, s 34.

48 *Ibid*, s 50(1).

49 *Ibid*, s 31B. Such copy must not contain any particulars relating to a person's occupation: s 31B(5).

50 *Ibid*, s 31G.

51 *Ibid*, s 31C(1).

52 *Ibid*, s 31C(2)-(5).

53 *Ibid*, s 31C(6)-(7).

54 *Ibid*, s 31D. In such cases the person must provide an undertaking as to use of the information: s 31D(3). Offences for misuse of the information apply: ss 31E and 31F.

55 *Ibid*, s 81B(1).

of the New South Wales Parliament.<sup>56</sup> Further, dual nominations where a candidate has nominated more than once or in more than one House are void.<sup>57</sup>

There are no provisions in the *Constitution Act* which expressly disqualify a person from nominating for a periodic Council election. However, there are provisions which disqualify various classes of persons from membership of the House: section 13(1) (persons holding a contract or agreement for or on behalf of the public service of New South Wales); section 13C (members of the Assembly); and section 13B (persons holding an office of profit under the Crown or pension from the Crown during pleasure or for a term of years).<sup>58</sup> In addition, under section 13A(1), the seat of a member of the Council will become vacant if certain actions occur (for example, if the member is convicted of an offence punishable by imprisonment for five years or more). Chapter 5 (Members) discusses the qualification and disqualification of members in more detail.

Following amendments to the *Parliamentary Electorates and Elections Act* in 2006, the nomination of a candidate must be accompanied by a declaration as to whether the candidate has been convicted of a child sexual offence or the murder of a child, or has been the subject of proceedings for such an offence, or has been the subject of an apprehended violence order for the purposes of protecting a child from sexual assault.<sup>59</sup> A false declaration is punishable by imprisonment for up to five years.<sup>60</sup> The Electoral Commissioner is to make public all declarations received.<sup>61</sup> The Commission for Children and Young People is to audit the accuracy of declarations of candidates who are elected, and report on its findings to Parliament.<sup>62</sup>

### Nomination procedure

A candidate for a periodic Council election must be nominated by either the registered officer or a registered party which has endorsed the candidate, or a minimum of 15 persons each of whose names appears on an electoral roll.<sup>63</sup> Nominations must be submitted to the Electoral Commissioner after the issue of the writ and before noon on the day of nomination.<sup>64</sup> A nomination must be

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56 *Ibid*, s 81E.

57 *Ibid*, s 81D.

58 Persons employed in any public sector service are capable of nominating for election, but must resign from the service on being declared elected: *Public Sector Employment and Management Act 2002*, s 102 (replacing *Constitution (Public Service) Amendment Act 1916*, repealed). The term 'public sector service' includes 'the service of either House of Parliament, or the President or Speaker, or the President and the Speaker jointly' (s 3(1)).

59 *Parliamentary Electorates and Elections Act 1912*, s 81B(4A).

60 *Ibid*, s 81L. Conviction of an offence punishable by imprisonment for a term of five years (or more) will result in a member's seat becoming vacant under s 13A(1)(e) of the *Constitution Act 1902*, unless the conviction is overturned on appeal.

61 *Ibid*, s 81M(1).

62 *Ibid*, s 81N.

63 *Ibid*, s 81B(2).

64 *Ibid*, s 81B(3). The day of nomination is specified in the writ.



accompanied by a deposit of \$500, except for candidates forming part of a group of 11-21 members, in which case the deposit is \$5000 divided by the number of candidates in the group.<sup>65</sup> The deposit is returned if a candidate or at least one candidate in a group is elected, or if the candidate or group receives at least 4 per cent of the first preference votes.<sup>66</sup>

Two or more nominated candidates may lodge a nomination with the Electoral Commissioner to have their names included in a group on the ballot paper, in the order specified in the nomination.<sup>67</sup> If there are at least 15 candidates in a group, the nomination may include a request for a 'group voting square' on the ballot paper.<sup>68</sup> This is discussed below in the section on 'Above the line'.

As soon as practicable after receipt of a nomination, the Electoral Commissioner is to ensure that the candidate's name and the suburb, town or locality of the candidate's place of residence are displayed on the website of the New South Wales Electoral Commission.<sup>69</sup>

### **After the close of nominations**

At noon on the day of nomination, the Electoral Commissioner publicly announces that a poll will be taken and the names of the candidates. The same information must be published in a newspaper circulating in the State.<sup>70</sup> The Electoral Commissioner also holds a ballot to determine the order in which the groups of candidates are to appear on the ballot paper, and a ballot to determine the order in which candidates not forming part of any group are to appear on the ballot paper.<sup>71</sup>

## **POLLING**

Polling takes place between the hours of 8.00 am and 6.00 pm on election day.<sup>72</sup> The returning officer for each district arranges for the provision of booths or rooms for the conduct of the election at each polling place and for delivery of the ballot papers and electoral rolls.<sup>73</sup> Other facilities such as ballot boxes and writing implements for the booths are arranged by polling place managers.<sup>74</sup>

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65 *Ibid*, s 81F(1) and (1A).

66 *Ibid*, s 81F(3). The deposit is also returned if the candidate dies before the election or withdraws their nomination.

67 *Ibid*, s 81C(1).

68 *Ibid*, s 81C(1A).

69 *Ibid*, s 81B(8).

70 *Ibid*, s 81H(3).

71 *Ibid*, s 83B(1)(a) and (b).

72 *Ibid*, s 95.

73 *Ibid*, ss 85 and 89.

74 *Ibid*, s 86.

Candidates may appoint scrutineers to observe the proceedings at each polling place.<sup>75</sup> Scrutineers may not attempt to interfere with or influence any elector,<sup>76</sup> or disclose any knowledge as to how a person voted.<sup>77</sup>

## VOTING

Voting is compulsory for all eligible voters.<sup>78</sup> The penalty for failing to vote without sufficient reason is a maximum of \$25,<sup>79</sup> or 0.5 penalty units<sup>80</sup> if the matter is dealt with by a court.<sup>81</sup> Persons convicted of certain electoral offences, such as bribing an elector, are incapable of voting at the election in respect of which the offence was committed.<sup>82</sup>

An elector may vote at any polling place in the State.<sup>83</sup> Under certain circumstances electors may vote before the poll (pre-poll voting), by post (postal voting) or in declared institutions (such as nursing homes, retirement villages and hospitals) on polling day.<sup>84</sup>

At a poll for a periodic Council election, every elector is required to cast a vote for at least 15 candidates, but may vote for more than 15 if he or she chooses,<sup>85</sup> or vote for at least one group or party 'above the line' (see below).<sup>86</sup>

## BALLOT PAPER

The ballot paper for the Council has two parts: an upper part and a lower part, often referred to as 'above the line' and 'below the line'. Voters must vote either above or below the line. The form of the ballot paper, as set out in Schedule 4A to the *Parliamentary Electorates and Elections Act 1912*, is reproduced at Appendix 6.

### 'Above the line'

The section of the ballot paper 'above the line' consists of a series of 'group voting squares', each representing a particular group or party. To be entitled to a group voting square, a group must have at least 15 candidates.<sup>87</sup> The individual

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75 *Ibid*, s 90(1).

76 *Ibid*, s 90(2).

77 *Ibid*, s 135.

78 *Constitution Act 1902*, s 11B.

79 *Parliamentary Electorates and Elections Act 1912*, s 120C(1) and (2).

80 Currently \$55 plus court costs.

81 *Parliamentary Electorates and Elections Act 1912*, s 120F.

82 *Ibid*, ss 147-150.

83 *Ibid*, s 115(1).

84 *Ibid*; see Part 5, Divisions 9-11A.

85 *Ibid*, s 103(3); *Constitution Act 1902*, 6th Sch, cl 2(1).

86 *Parliamentary Electorates and Elections Act 1912*, s 103(4).

87 *Ibid*, s 81C(1A); s 3(1), 'group voting square'.

candidates to which each group voting square relates are listed underneath the square in the section of the ballot paper ‘below the line’.

If all the candidates to which a group voting square relates have been endorsed by the same registered party, the registered name of the party is printed adjacent to the square.<sup>88</sup>

Where candidates endorsed by different parties have requested a composite party name, that composite name is printed adjacent to the group voting square.

In 1999 amendments were made to the system of ‘above the line’ voting under the *Parliamentary Electorates and Elections Amendment Act 1999*. Before 1999, a vote ‘above the line’ was deemed to be a vote for the candidates listed in a ‘group voting ticket’ lodged by the relevant party with the Electoral Commissioner. In addition, only one vote ‘above the line’ could be recorded by each voter. However, under the 1999 amendments, group voting tickets were abolished, and the method of voting was changed. Currently, to vote ‘above the line’, a voter must write ‘1’ in one of the group voting squares. If this is done, a vote is taken to have been recorded for all the individual candidates listed on the ballot paper underneath the group voting square, below the line, in the order in which they are listed.<sup>89</sup> A voter may choose to record additional preferences for other parties or groups in the order of their choice, by consecutively numbering other group voting squares above the line.<sup>90</sup> This will record a vote for all the candidates listed underneath each of the group voting squares in which the voter has indicated a preference.

### **‘Below the line’**

The section of the ballot paper ‘below the line’ lists all the candidates individually in their respective groups. Candidates may be listed in groups,<sup>91</sup> if they have lodged a request with the Electoral Commissioner to be included in a group,<sup>92</sup> or may be shown as ungrouped. The order in which candidates within a particular group are listed is determined by the order in which they appear in the request lodged with the Electoral Commissioner.<sup>93</sup> The order in which groups appear on the ballot paper is determined by a ballot conducted by the Electoral Commissioner, as is the order in which ungrouped candidates are shown.<sup>94</sup>

Where a candidate has been endorsed by a registered party, and a request has been lodged by that party, the registered name of the party, or an abbreviation of

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88 *Ibid*, s 83H(2)(b).

89 *Ibid*, ss 103(4) and 129EA(1).

90 *Ibid*, ss 103(4), 129EA(2) and (3).

91 *Ibid*, s 83B(3)(b).

92 *Ibid*, s 81C(1) and (2).

93 *Ibid*, ss 81C(1) and (2), and 83(3)(d).

94 *Ibid*, s 83B(1)(a), (b) and (3)(b), (d).

that name, is printed on the ballot paper adjacent to the candidate's name.<sup>95</sup> A candidate who is not included in any group may request that the word 'Independent' be printed adjacent to the candidate's name on the ballot paper<sup>96</sup> or, if endorsed by a registered party, may have the party name printed adjacent to his or her name.

To vote 'below the line', the numbers '1' to '15' must be written in the squares opposite the names of 15 candidates in the order of the voter's choice. Votes may also be recorded for as many additional candidates as the voter wishes, by placing consecutive numbers beginning with '16' next to the remaining candidates.<sup>97</sup>

### COUNTING THE VOTES

After the close of the poll, the first preference votes recorded for each group are counted at each polling place in the presence of any scrutineers.<sup>98</sup> When the count has been completed, the ballot papers from each district are sealed in parcels and transmitted by the district returning officer to the Electoral Commissioner,<sup>99</sup> who is responsible for determining the result of the election in the manner prescribed by the Sixth Schedule to the *Constitution Act 1902*.<sup>100</sup> The procedure set out in the Sixth Schedule is summarised below.

The primary or first preference votes are counted and the total formal primary vote for all candidates is determined.

The quota of votes for election is ascertained by dividing the number of first preference votes for all candidates by 22 and increasing the result by 1. A candidate needs approximately 4.55 per cent of the total primary vote to obtain a quota for election. At recent elections, the quota determined by the application of this formula has been approximately 173,000 votes.<sup>101</sup>

Candidates with votes equal to or greater than the quota are elected. If all of the 21 vacancies have not been filled at this stage, the remaining stages of the procedure must be followed.

The surplus votes of each elected candidate are transferred to the remaining candidates in proportion to the voters' preferences, in accordance with the following procedure:

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95 *Ibid*, s 83H(1).

96 *Ibid*, ss 83E and s 83H(3).

97 *Ibid*, s 103(3).

98 *Ibid*, s 129B.

99 *Ibid*, s 129D(1).

100 *Ibid*, s 129G(1).

101 The quota at the 2003 election was 169,158 votes or approximately 4.3 per cent of the total primary vote. The quota at the 2007 election was 173,239 votes or approximately 4.5 per cent of the total primary vote.

1. A 'transfer value' is calculated by dividing the elected candidate's surplus votes by the number of first preference votes the candidate received, excluding any ballot papers which do not have a next available preference for any of the candidates remaining in the count.
2. The number of ballot papers received by the elected candidate showing a next available preference for each continuing candidate is determined. That number is multiplied by the transfer value of the elected candidate to calculate the total number of votes to be transferred from the elected candidate to each continuing candidate.<sup>102</sup>
3. A number of ballot papers, as determined above, is transferred from the elected candidate to each continuing candidate. The individual ballot papers making up this number are selected at random. Any continuing candidate who receives a number of votes equal to or greater than the quota is elected.

If fewer than 21 candidates have achieved the quota after the transfer of the surplus votes of the elected candidates, the candidate with the fewest number of votes is excluded. The excluded candidate's ballot papers are transferred to the continuing candidates next in the order of the voters' available preferences.

The process of excluding candidates with the fewest votes and transferring ballot papers to continuing candidates is repeated until all the vacancies are filled, or the candidates remaining equal the seats to be filled.

The count and the distribution of preferences under these procedures are nowadays conducted using the New South Wales Electoral Commission's computer system, developed specifically for this purpose.

## Recount

At any time before the declaration of the result of an election, the Electoral Commissioner may recount the ballot papers contained in any parcel, at the request of any candidate or on the Commissioner's own motion.<sup>103</sup>

## Declaration of the poll

As soon as practicable after the count has been completed, the Electoral Commissioner must announce the result of the election by notice, which must be published in a newspaper circulating in the State.<sup>104</sup> Before the declaration of the poll, ongoing information about the course of the count can be obtained from the Electoral Commissioner or on the Electoral Commission's website <[www.elections.nsw.gov.au](http://www.elections.nsw.gov.au)>.

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102 This is now all done by computer, although the process of counting ballot papers and transferring preferences still usually takes up to four weeks after each election.

103 *Parliamentary Electorates and Elections Act 1912*, s 129G(5).

104 *Ibid*, s 129G(3).

## RETURN OF WRITS

After the declaration of the result of a periodic Council election, the Electoral Commissioner endorses on the writ the names of the candidates elected, and returns the writ to the Governor by the date specified in the writ.<sup>105</sup> The date for return of the writ must be not later than the 60th clear day after the date of issue, or such later day as the Governor may direct by proclamation in the Government Gazette.<sup>106</sup> The writ returned to the Governor is then transmitted to the Clerk of the House for announcement of the names of the candidates elected when the House is first convened following the election.

As soon as practicable after polling day the Electoral Commissioner must enclose in a packet the parcels containing the ballot papers and seal up the unused ballot papers.<sup>107</sup> The Commissioner is required to keep this material safely for six months, or until the period for disputing the validity of the election has expired, or until the Court of Disputed Returns has determined matters referred to in a petition, whichever is the latest.<sup>108</sup>

## DISPUTED ELECTIONS OR RETURNS

Traditionally, it was the right of the Parliament to determine the qualifications and disqualifications of its members. However, in 1928 the Parliament transferred the power to determine the validity of any 'election or return' to the Court of Disputed Returns under section 155 of the *Parliamentary Electorates and Elections Act 1912*.

The *Parliamentary Electorates and Elections Act 1912* provides that the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns, and not otherwise.<sup>109</sup> The Supreme Court of New South Wales is the Court of Disputed Returns, and its jurisdiction may be exercised by a single judge.<sup>110</sup>

A petition disputing an election or return must be filed with the Prothonotary of the Supreme Court within 40 days of the return of the writ,<sup>111</sup> and be accompanied by the sum of \$250 as security for costs.<sup>112</sup> The petition must state the facts relied on to invalidate the election or return, contain a request for the relief the petitioner

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105 *Ibid*, s 129G(4).

106 *Ibid*, s 74A.

107 *Ibid*, s 129H(1).

108 *Ibid*, s 129H(3). Previously, the Clerk of the Council was responsible for keeping the ballot papers for the requisite time, but this position changed as a result of the *Parliamentary Electorates and Elections Amendment Act 2006* which included amendments to s 129H.

109 *Ibid*, s 155.

110 *Ibid*, s 156.

111 *Ibid*, s 157(e).

112 *Ibid*, s 158.

claims to be entitled to, be signed by a candidate at the election in dispute or a person who was qualified to vote, and be attested by two witnesses whose names and occupations are stated.<sup>113</sup>

The powers of the Court of Disputed Returns include the power to declare that any person who was returned as elected to the Council was not duly elected, to declare any candidate duly elected who was not returned as elected and to declare any election absolutely void.<sup>114</sup> If a person elected is declared not to have been duly elected, the person ceases to be a member of the House.<sup>115</sup> If a person is declared to have been duly elected, the person may take his or her seat in the House.<sup>116</sup> If an election is declared void, a new election is to be held,<sup>117</sup> the writ for which, in the case of a periodic Council election, may be issued by the Governor.<sup>118</sup> All decisions of the Court are final and there can be no appeal.<sup>119</sup> It appears that the denial of a right of appeal is designed to avoid protracted litigation leaving constituents unrepresented.<sup>120</sup>

If the Court finds that an elected candidate has committed one of a number of specified offences (bribery of an elector, treating or undue influence), it must declare the election of the candidate void.<sup>121</sup> However, if it finds that there has been any other illegal practice by the candidate, or any illegal practice by another person without the candidate's knowledge, the Court may only declare the candidate not to have been duly elected or the election void if it is satisfied that the result of the election was likely to have been affected, and that it is just that such a declaration be made.<sup>122</sup>

No election is to be declared void on account of any delay in the declaration of nominations, the polling, or return of the writ, or on account of the absence or error of, or omission by any officer, which did not affect the result of the election.<sup>123</sup>

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113 *Ibid*, ss 157(a)-(d), and 159.

114 *Ibid*, s 161(1)(v)-(vii).

115 *Ibid*, s 175(i).

116 *Ibid*, s 175(ii).

117 *Ibid*, s 175(iii).

118 *Ibid*, s 175.

119 *Ibid*, s 169.

120 See Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000, p 151. Carney suggests that the lack of appeal right does not prevent the Court of Disputed Returns from seeking clarification on questions of law by case stated to an appellate court. However, it has been argued that the right to appeal from the Court of Disputed Returns to the High Court of Australia in respect of errors of law is guaranteed by s 73 of the Commonwealth Constitution; see Orr G and Williams Q, 'Electoral challenges: judicial review of parliamentary elections in Australia', *Sydney Law Review*, Vol 23, No 53, 2001, pp 81-87.

121 *Parliamentary Electorates and Elections Act 1912*, s 164(1).

122 *Ibid*, s 164(3).

123 *Ibid*, s 167.

## ELECTIONS

In conducting its proceedings, the Court is to be guided by ‘the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not’.<sup>124</sup>

Any question respecting the qualification of a member already in the Council, or respecting a vacancy in the Council, may also be referred by resolution of the House to the Court of Disputed Returns.<sup>125</sup> This procedure and relevant precedents are discussed in Chapter 5 (Members).

### MEETING OF A NEW PARLIAMENT

After a periodic Council election and a general election of the Assembly, both Houses must be summoned to meet not later than the seventh clear day after the date appointed for the return of the writs.<sup>126</sup>

### CASUAL VACANCIES – THE LEGISLATIVE COUNCIL

#### Meaning of casual vacancy

A casual vacancy in the Council arises when a vacancy occurs in the seat of a member other than by reason of expiry of the member’s term. This will occur if a member dies, resigns, is expelled from the House, becomes disqualified from sitting as a member under the *Constitution Act 1902*,<sup>127</sup> or if the Court of Disputed Returns declares the member’s seat has become vacant.

To resign, a member must write to the Governor resigning his or her seat.<sup>128</sup> The member’s seat becomes vacant on receipt by the Governor of the member’s resignation.<sup>129</sup> The Governor informs the President that the member has resigned, and the President reports that fact to the House at the next sitting.

#### Nomination requirements

A person is not eligible to be nominated to fill a casual vacancy unless the person complies with section 22D(3) and (4) of the *Constitution Act 1902*.<sup>130</sup>

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124 *Ibid*, s 166.

125 *Ibid*, ss 175B and 175H.

126 *Ibid*, ss 69 and 74B. This does not mean that if the writs are returned earlier than required, the House must be summoned to meet before the seventh clear day after the date appointed for the return of the writs.

127 See Chapter 6 (Office Holders and Administration of the Council).

128 *Constitution Act 1902*, s 22J.

129 *Ibid*.

130 *Ibid*, s 22D(2).



**Section 22D(3)**

Section 22D(3) provides that a person is not eligible to be nominated to fill a casual vacancy 'if, were he a member of the Legislative Council, he would be disqualified from sitting or voting as such member'. As noted in Chapter 3 (Parliamentary Privilege), members expelled by the Council cannot fill their own vacancy as they would be disqualified from sitting or voting as a member.

The grounds for disqualification from sitting or voting in Parliament are set out in sections 13 to 13C of the *Constitution Act 1902* and section 81E of the *Parliamentary Electorates and Elections Act 1912*. These are discussed in more detail in Chapter 5 (Members).

**Section 22D(4)**

Section 22D(4) provides:

Where:

- (a) a Member of the Legislative Council was elected at a periodic Council election and was, at the time of his election, publicly recognised by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, and
- (b) the vacancy ... to be filled is in the seat of that Member or of the successor (whether immediate, intermediate or ultimate) of that Member,

a person is not eligible to be so nominated unless he is a member of that party, except where there is no member of that party available to be so nominated.

The effect of this section is that, if a member is elected to the Council as a representative of a particular political party and a casual vacancy arises in the member's seat, the vacancy must be filled by a person who is a member of the same political party. This is the case even if, by the time the vacancy arises, the member has resigned from the party and is sitting in the House as an independent or as a member of another political party.

A member who resigns to contest either a federal election or a by-election for a seat in the Assembly and is unsuccessful is eligible to fill his or her own vacant seat in the Council. However, this can only occur if the Governor delays the appointment of the date and time for the joint sitting to fill the vacancy until such time as the result of the election is known. This occurred in 2003 when the Reverend the Hon Fred Nile resigned to contest a seat in the Senate. He was unsuccessful in gaining a seat in the Senate and was later re-elected by a joint sitting of the two Houses to fill his own vacancy in the Council.<sup>131</sup>

As there is no definition of 'political party' in the *Constitution Act 1902* which would restrict the meaning of the term, the party membership requirement

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131 *LC Minutes* (21/10/2004) 1061.

imposed by section 22D(4) appears to apply even if the relevant party has ceased to be registered under the *Parliamentary Electorates and Elections Act 1912*, provided the organisation still exists,<sup>132</sup> or if the party has changed its name since the member being replaced was elected to the House.<sup>133</sup>

*The qualification of candidates for election to fill a casual vacancy*

Section 81B(1) of the *Parliamentary Electorates and Elections Act 1912* requires that a person must be enrolled as an elector in order to be qualified to be nominated as a candidate for a periodic Council election. To be enrolled as an elector, a person must be over 18 years of age, an Australian citizen, and resident in New South Wales for the previous month. However, section 81B(1) is expressed to apply to candidates for a 'periodic Council election', and makes no reference to candidates for election to fill a casual vacancy. Nor are there any other provisions which impose any requirement as to enrolment, citizenship, or residency, on candidates for election to a casual vacancy.<sup>134</sup>

It is possible that the absence of any comparable requirements in respect of such candidates is the result of an oversight when section 22D was inserted in the *Constitution Act 1902* in 1978, providing for the direct election of members of the Council by the people. The previous section 17B (now repealed) provided that a person was capable of being elected<sup>135</sup> to the Council if the person was:

- (a) an elector entitled to vote at an election of members of the Assembly (which necessarily incorporated the requirement as to New South Wales residency contained in the then section 20 of the *Parliamentary Electorates and Elections Act 1912*),

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132 Crown Solicitor's Advice, 'Filling of casual vacancy in a member's seat where the registration of the party which endorsed the member has been cancelled or changed', 13 March 2001.

133 A precedent involving change of party name occurred in 2002 in relation to the seat of the Hon Elaine Nile. Mrs Nile was elected at the periodic Council election in 1995 as a member of the Call to Australia (Fred Nile Group). Subsequently, the party changed its name to the Christian Democratic Party (Fred Nile) Group. In 2002, a casual vacancy arose in Mrs Nile's seat, and was filled by a member of the Christian Democratic Party (Fred Nile) Group.

134 This issue arose in 2000, when a long-time Queensland resident, Mr John Bradford, was preselected to fill a casual vacancy expected to arise in the seat of the Hon Elaine Nile, following Mrs Nile's announcement of her intention to retire from the House. Questions were raised as to whether Mr Bradford was validly enrolled as an elector in New South Wales, and in particular whether he had been living in the subdivision in which he was enrolled for one month before enrolment. Subsequently, it was reported that the Electoral Commissioner had investigated the matter and confirmed the validity of Mr Bradford's enrolment. However, it appears that, even if Mr Bradford had not been validly enrolled in New South Wales, he would not for that reason have been ineligible to be nominated to fill the casual vacancy. In the end, Mrs Nile did not retire at that time as she had announced, but did retire approximately two years later before the end of her term, when another candidate was chosen by the party, and elected, to fill the vacancy.

135 Before the amendments in 1978, members were elected to the Council by vote of the members of both Houses, both in the case of elections held following the expiry of members' terms, and in the case of elections to fill casual vacancies.

- (b) had been resident within the Commonwealth for at least three years,  
and
- (c) was a subject of the King.

In 1978, when provision was made for 'periodic Council elections', it appears there was a failure to maintain a qualification relating to enrolment as an elector in the case of elections for casual vacancies. Section 22C provided for a casual vacancy to be filled by the next available member of the Group at the periodic Council election which included the member whose seat was the subject of the vacancy. If no such person was available, in accordance with section 22D the vacancy was to be filled by a joint sitting of both Houses. To be a member of the Group referred to in section 22C, the person would need to have been qualified to vote at a periodic Council election (section 81B of the *Parliamentary Electorates and Elections Act 1912*). However, when the procedure in section 22C was unsuccessful and a person had to be elected at a joint sitting under section 22D, there was no requirement for a person to be enrolled as an elector. The problem was not addressed in 1991, when the provision for declaring the next member in the Group elected in section 22C was repealed, and provision made in section 22D for a casual vacancy to be filled only by an election at a joint sitting of both Houses.<sup>136</sup>

### Procedures for filling Legislative Council vacancies

Where a casual vacancy in the seat of a member of the Council arises, the Governor sends messages to both Houses of Parliament convening a joint sitting of the Houses to elect a person to fill the vacant seat.<sup>137</sup> The message specifies the place and date and time for holding the joint sitting.<sup>138</sup> More than one vacancy may be filled at one joint sitting.<sup>139</sup>

The joint sitting is held in the Council chamber, although it is not a sitting of the House. At the appointed time the President leaves the Chair until the conclusion of the joint sitting. The rules for the conduct of proceedings are set out in clause 12 of Schedule 4 to the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*. The rules provide:

- At a joint sitting the President or, in the absence of the President, the Speaker presides.
- For the purpose of filling more than one vacant seat, each vacant seat will be filled separately, by the votes of members present.

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<sup>136</sup> *Constitution (Legislative Council) Amendment Act 1991*, Sch 1(6) and (7).

<sup>137</sup> In January 1996, two casual vacancies arose while both Houses stood adjourned for the summer recess, *LC Minutes* (16/4/1996) 4. The Governor did not send a message convening the joint sitting until after the sittings of both Houses had resumed, *LC Minutes* (17/4/1996) 42.

<sup>138</sup> The date and time of the joint sitting are negotiated by the Clerk of the House in conjunction with the Leader of the House and the Cabinet Office.

<sup>139</sup> *Constitution Act 1902*, s 22E(3).

## ELECTIONS

- The motion that a person be elected as a member of the Council to fill a casual vacancy must be seconded.
- A member at the time he or she proposes or seconds an eligible person to fill a vacant seat may speak on the proposal for 10 minutes and no other person may speak at that time.
- If only one eligible person is proposed, the person is elected to fill the vacant seat without the question being put.
- If two or more eligible persons are proposed, the motion is put in respect of each of those persons in the order in which they have been proposed, and any member may speak to the motion.
- The motion that a person be elected is decided by open voting, with the presiding person only having a casting vote.

The standing orders of the Council apply to the proceedings, except where the rules in Schedule 4 apply.

At the conclusion of the joint sitting, the President resumes the Chair of the House, announces the name of the person elected to fill the vacant seat, and tables the minutes of the joint sitting. The person presiding over the joint sitting must write to the Governor advising of the person elected.

The person chosen at the joint sitting to fill the casual vacancy may not be sworn as a member until two days after their election.<sup>140</sup> If, before the person is sworn as a member, the person ceases to be a member of the political party of which membership was necessary to be eligible for nomination, the seat again becomes vacant.<sup>141</sup>

The validity of an election to fill a casual vacancy may be disputed by petition addressed to the Court of Disputed Returns.<sup>142</sup> The procedures governing such disputes are similar to those applying to disputed elections or returns following a periodic Council election, discussed above.

A list of casual vacancies in the Council since 1978 is shown at Appendix 7.

## CASUAL VACANCIES – THE AUSTRALIAN SENATE

### Section 15 of the Commonwealth Constitution

Casual vacancies in the Australian Senate are filled in accordance with section 15 of the Commonwealth Constitution, which was inserted in 1977. The main features of that section are:

- The person who is to fill the casual vacancy is to be chosen by the Houses of Parliament for the State for which the senator was chosen, sitting and voting together.

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140 *Ibid*, s 22E(1).

141 *Ibid*, s 22E(2). This provision is similar to s 15 of the Commonwealth Constitution.

142 *Parliamentary Electorates and Elections Act 1912*, ss 175I and 175J.

- The person chosen must be a member of the same political party as the senator they replace was at the time the senator was chosen.
- The person chosen to fill the vacancy holds office until the expiration of the term of the senator they are chosen to replace.
- If the State Parliament is not in session when the vacancy is notified to the State Governor, the Governor may, with the advice of the Executive Council of the State concerned, appoint a person to hold the place until the expiration of 14 days from the beginning of the next session of the Parliament of the State, or until the expiration of the term.<sup>143</sup>

The purpose of section 15 is to preserve as far as possible the representation determined by the electors in elections for the Senate.<sup>144</sup> The importance of such a requirement is highlighted by the fact that, before the insertion of section 15 in 1977, there were two occasions on which Senate vacancies in New South Wales were filled by candidates who did not belong to the same party as the senators being replaced.<sup>145</sup> However, while this particular problem has now been overcome, section 15 has not solved all problems in the filling of casual vacancies.<sup>146</sup> For example, in 1987, in a case involving a vacancy in the seat of a Tasmanian senator, the candidate endorsed by the relevant party failed to be elected at the joint sitting, and another member of the same party was nominated. Various arguments were advanced as to whether the particular party member preferred by the party should be accepted by the joint sitting. However, the joint sitting later adjourned without further voting, and the filling of the vacancy was overtaken by the simultaneous dissolution of the Senate and the House of Representatives, with the result that the issue was not ultimately resolved.<sup>147</sup>

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143 Since the insertion of s 15 in the Commonwealth Constitution, this procedure has been followed on three occasions in New South Wales: the appointment of Senator Puplick to replace Senator Cotton in 1978, Senator Sibbra to replace Senator McClelland in 1978, and Senator Tierney to replace Senator Baume in 1991. In each case, the appointed senator was later elected to fill the vacancy at a joint sitting. Before 1977, there were two occasions on which a similar procedure was followed in the filling of New South Wales Senate vacancies, the appointment of Senator Ormonde to replace Senator Ashley in 1958, and the appointment of Senator Cotton to replace Senator Spooner in 1958. As to the meaning of 'in session' in s 15, see Odgers JR (ed), *Odgers' Australian Senate Practice*, 6th edn, Robert Burton, Canberra, 1991, pp 149-150.

144 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 105.

145 In 1931, Patrick Mooney (Lang Labor Party) was elected to fill a vacancy in the seat of Senator Walter Duncan (National Party); in 1975, Cleaver Bunton (Independent) was elected to fill the vacancy in the seat of Senator Lionel Murphy (Australian Labor Party). However, in the period between the introduction of proportional representation for the Senate in 1949, and the case involving Senator Murphy in 1975, which led, in part, to the introduction of s 15, all States without exception filled vacancies by the appointment of senators belonging to the same political parties as the vacating senators: *Odgers*, 6th edn, pp 150-151.

146 *Odgers*, 11th edn, p 106.

147 *Ibid*, pp 106-107.

### Other eligibility requirements

The eligibility of a person to be elected to the Senate is subject to certain further requirements. To be qualified for election, a person must be at least 18 years old, an Australian citizen, and an elector qualified to vote or qualified to become such an elector.<sup>148</sup> Under sections 43 and 44 of the Commonwealth Constitution, a person is not capable of 'being chosen', or sitting, as a senator if he or she:

- is a citizen or subject of a foreign power;
- is attainted of treason, or has been convicted or is under sentence or subject to be sentenced for an offence punishable by Commonwealth or State law by a sentence of 12 months or more;
- is an undischarged bankrupt or insolvent;
- holds an office of profit under the Crown or pension during the pleasure of the Crown (subject to exceptions);
- has a pecuniary interest in any agreement with the Commonwealth Public Service (except as a member of an incorporated company of more than 25 people);<sup>149</sup>
- is a member of the House of Representatives.<sup>150</sup>

These grounds of disqualification apply at the time the replacement senator is 'chosen' by the State Parliament, that is, when the resolution is passed at the joint sitting of both Houses.<sup>151</sup> However, it has been argued that the most likely time to apply the grounds of disqualification in the case of a casual vacancy is when the replacement senator is nominated, in view of the interpretation given by the High Court in *Sykes v Cleary*<sup>152</sup> to the expression 'being chosen' within section 44 of the Commonwealth Constitution, which included the time at which a candidate is nominated for election.<sup>153</sup> By contrast, where a vacancy is filled by appointment by the Governor under section 15, it would seem that the grounds of disqualification apply at the time the appointee first sits in the Senate, because of the distinction drawn in section 15 between *choosing* and *appointing* a replacement, which appears to reflect the distinction between being *chosen* and *sitting* in the relevant provisions.

In addition to the disqualifications referred to above, a member of a State or Territory Parliament is not capable of being nominated for election to the Senate.<sup>154</sup> In addition, a person who has been convicted within two years of the election of certain offences relating to bribery and undue influence is not capable of 'being chosen' or sitting as a senator.<sup>155</sup>

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148 *Commonwealth Electoral Act 1918* (Cth), s 163.

149 *Ibid*, s 44.

150 *Ibid*, s 43.

151 Carney, above n 120, p 20.

152 (1992) 176 CR 77.

153 *Ibid*, p 21.

154 *Commonwealth Electoral Act 1918*, s 164.

155 *Ibid*, s 386.

### Procedures for filling Senate vacancies

Where a casual vacancy arises in the Senate, the President of the Senate writes to the Governor advising that a vacancy has occurred.<sup>156</sup> The Governor then writes to the President of the Council advising of the vacancy, and the President reports the Governor's message to the House when it next meets.

It is usual for the House to resolve to take the Governor's message into consideration on receipt of a message from the Assembly proposing a joint sitting to fill the vacancy. On receipt of such a message, the Council resolves to meet the Assembly at a joint sitting to be held in the Council chamber at a date and time specified in the Council's resolution.

At a joint sitting to fill a Senate vacancy, the first item of business is the election of a member to chair the proceedings. Previous practice has been for the Premier to move that the President of the Council be the President of the joint sitting and that, in the absence of the President, the Speaker act in that capacity. After the election of the chair, the practice has been for the joint sitting to adopt rules for the conduct of proceedings, on the motion of the Premier.<sup>157</sup> The main features of the rules adopted in recent years have been:

- The standing orders of the Council apply to the joint sitting.
- The member proposing any person to fill the Senate vacancy must state that the person is willing to hold the vacant place, and is a member of the same political party as that to which the senator vacating the seat belonged when elected.
- If only one person is proposed and seconded, the Chair must put the question 'That [name of person] be chosen to hold the place in the Senate rendered vacant by the resignation of [Senator]' and, if the question is passed in the affirmative, must declare the person elected.
- If more than one person is proposed, the person to fill the vacant seat must be chosen by open voting.
- In the case of an equality of votes in any division the Chair must give a casting vote.

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156 Section 21 of the Commonwealth Constitution provides that whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

157 This practice has been followed in all cases of Senate vacancies in New South Wales to date, except in the case of the vacancy arising following the resignation of Senator Lionel Murphy in 1975. In that case, the Houses adopted rules and agreed to the appointment of the President by separate resolutions passed before the joint sitting. At the joint sitting, a point of order challenging the validity of the rules was raised by the Leader of the Opposition, Neville Wran, but the President did not uphold the point of order, and the proceedings were conducted in accordance with the rules agreed by the Houses. See *LC Debates* (27/2/1975) 3994-4002.

## ELECTIONS

At the conclusion of the joint sitting, the President resumes the Chair of the House, announces the name of the person elected to fill the casual vacancy in the Senate, and tables the minutes of the joint sitting. The President also notifies the Governor in writing of the person elected.

A list of casual Senate vacancies for New South Wales is shown at Appendix 8.

### DEDICATED SEATS FOR ABORIGINES

In 1995 the Council referred an inquiry to the Standing Committee on Social Issues concerning the desirability of enacting legislation to introduce dedicated seats for Aborigines in the Parliament. The resolution referring the inquiry noted that at that time there had never been an indigenous member of the New South Wales Parliament.<sup>158</sup>

The Committee reported in November 1998. The principal conclusion reached by the Committee was that a number of steps would need to be taken before such seats could be introduced, including further consultation with Aboriginal people as to how such seats would operate.<sup>159</sup>

### CONCLUSION

Since 1978, members of the Council have been elected according to a system of proportional representation using optional preferential voting. For the purposes of the election, the whole State of New South Wales is a single electorate and all electors enrolled in the State are eligible and required to vote. These key features of the Council electoral system reflect important differences between the two Houses in relation to their respective constitutions and roles within the Parliament. The election of one-half of the members of the Council every four years ensures that the House and the Parliament as a whole reflect the views of the electorate at different stages, not just at the most recent election. The longer term of Council members allows for the development of expertise in legislative processes and public affairs, and for members to bring a longer term perspective to bear on matters before the House. It also facilitates a greater degree of independence from the executive government, with the Premier and the majority of ministers being drawn from the Assembly. Furthermore, the State-wide electorate, combined with a system of proportional representation, provides for the representation of a wide diversity of views and interests in the House, by enhancing the electoral opportunities of candidates other than the major political parties.

Appendix 9 shows the representation of parties in the Council since 1978.

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158 *LC Minutes* (20/9/1995) 173. However, at the 2003 general election an Aboriginal member, Ms Linda Burney, was elected to the Assembly as the member for Canterbury.

159 Standing Committee on Social Issues, *Enhancing Aboriginal Political Representation, Inquiry into Dedicated Seats in the New South Wales Parliament*, Report No 18, November 1998, p v.