

ACT Legislative Assembly Casual Vacancy

Following the resignation of Mr Gary Humphries, MLA for Molonglo

Candidates Information

This information booklet is intended to summarise the electoral law relating to candidates standing for a casual vacancy in the ACT Legislative Assembly, but it is not a substitute for the law. Candidates and other interested persons are encouraged to consult the *Electoral Act 1992*.

Timetable

Publication of notice in the Canberra Times	28 January 2003
Close of applications for the casual vacancy	7 February 2003 (12 noon)
Declaration of candidates contesting the vacancy	7 February 2003 (12.30 pm)
Scrutiny commences (anticipated date)	7 February 2003 (3.00 pm)
Declaration of the poll (anticipated date)	10 February 2003 (3.00 pm)

Qualifications to stand for a casual vacancy

A person may apply to be a candidate for a casual vacancy if:

- the person was a candidate in the last election for the electorate in which the vacancy has occurred;
- the person was not elected; and
- he or she is an “eligible person”.

A person is an “eligible person” if:

- the person is eligible to be a Member of the Legislative Assembly (MLA); or
- the person would be eligible to be an MLA but for the fact that the person holds an office or appointment under a Commonwealth, State or Territory law or is employed by the Territory, the Commonwealth, a State or another Territory, and the person is entitled to any remuneration or allowance (other than reimbursement of expenses reasonably incurred) in relation to the office, appointment or employment.

To be eligible to be an MLA, subject to the following exceptions, a person must be:

- an Australian citizen;
- at least 18 years of age; and

- an ACT elector or entitled to be an ACT elector.

To be entitled to be an elector on the ACT electoral roll, a candidate must also have a current place of living in the ACT and have had a place of living in the ACT for at least the preceding month. (A candidate is not required to live in any particular electorate.)

A person is not entitled to be an elector if:

- because of unsound mind, he or she is incapable of understanding the nature and significance of enrolment and voting;
- he or she has been convicted and is under sentence for an offence punishable under Commonwealth, State or Territory law by imprisonment for five years or longer;
- he or she has been convicted of treason and has not been pardoned; or
- under the migration law he or she is the holder of a temporary entry permit or is an illegal entrant.

A person is not eligible to be an MLA if:

- the person is a member of the Commonwealth Parliament or the legislature of a State or another Territory;
- the person:
 - holds an office or appointment (other than the office of Speaker, Deputy Speaker, Chief Minister, Deputy Chief Minister, Minister or MLA) under a Commonwealth, State or Territory law; or
 - is employed by the Territory, the Commonwealth, a State or another Territory, or by a Territory authority or a body (whether corporate or not) established by a law of the Commonwealth, a State or another Territory;

and he or she is entitled to any remuneration or allowance (other than reimbursement of expenses reasonably incurred) in respect of the office, appointment or employment; or

- the person has been convicted of an offence related to bribery or intimidation under the *Electoral Act 1992* or the *Commonwealth Electoral Act 1918* within the preceding two years.

Do public servants or public office holders have to resign before contesting a casual vacancy?

A person who holds public office or employment is eligible to apply to contest a casual vacancy but is not eligible to be an MLA. Therefore, a candidate who holds public office or employment should resign from that office or employment before the official declaration of the election result if, following the counting of votes, that candidate is to be declared elected.

Any public office holders or public servants considering contesting a casual vacancy are advised to seek their own legal advice on their particular circumstances. In addition, advice should be sought from the relevant employer or Service as to whether such a potential candidate is under any obligation to take leave or to resign his or her office or employment under the relevant conditions of service.

When can a candidate apply to contest a casual vacancy?

Applications must reach the Electoral Commissioner before 12 noon on 7 February 2003.

How to apply to contest a casual vacancy

To contest a casual vacancy, a person must complete an application on the approved form provided by the ACT Electoral Commissioner.

Each candidate must sign a statement on the application form to the effect that the candidate consents to be an MLA if elected and declares that he or she is eligible to contest the vacancy.

Can an application be rejected?

Yes. The Electoral Commissioner will reject an application if (and only if) an application form has not been correctly completed in accordance with the Electoral Act. If an application is rejected, the Commissioner will give the person whose application is rejected a written notice setting out the reasons for the rejection.

Can an application be withdrawn?

Yes, an application can be withdrawn up until the time applications close (12 noon on 7 February 2003). After that time an application cannot be withdrawn.

Any person who has applied to be a candidate may withdraw his or her application by giving the Electoral Commissioner a written notice of withdrawal.

What happens if only one candidate applies to contest a vacancy?

If only one candidate applies to contest a vacancy, the Electoral Commissioner will declare that candidate elected. No ballot papers need be counted in this case.

What happens if more than one candidate applies to contest a vacancy?

If more than one candidate applies to contest a vacancy, the Electoral Commissioner will conduct a “count-back” of the vacating MLA’s ballot papers to determine the elected candidate.

What happens if no candidate applies to contest a vacancy?

If no candidate applies to contest a vacancy, the Assembly may choose a person to fill the vacancy. If the vacating Member was elected as a member of a registered political party, the new Member chosen to fill the vacancy must be a member of the same party as the vacating Member. If there is no member of the relevant party available to be chosen, or if the vacating Member was elected as an independent, the person chosen to fill the vacancy cannot be a person who has been a member of a registered political party within the 12 months preceding the filling of the vacancy.

How does the “count-back” process work?

A candidate is elected to fill a casual vacancy in the ACT Legislative Assembly by conducting a “count-back” of those ballot papers that contributed to the election of the vacating MLA, under the ACT’s Hare-Clark electoral system. The extract from the *Electoral Act 1992* included in this booklet shows the provisions relating to the count of preferences for an election and for a casual vacancy.

At the 2001 election, the distribution of preferences was conducted using a computer program. To facilitate this process, all of the preferences shown on all ballot papers were data-entered and stored in a database. This means that the count back to fill any casual vacancies can also be conducted using a computer program.

Using this program, the result of any casual vacancy can be known within minutes. When the program is started, it will prompt Electoral Commission staff to indicate which candidates are contesting the vacancy. After these names have been entered into the computer, the program will calculate the outcome and print the result.

The computer program follows the same steps that would occur in a manual count of ballot papers. These steps are outlined below.

The first step in a count-back is to isolate those ballot papers that contributed to the election of the vacating MLA. Where the vacating MLA was elected with a quota of votes on first preferences, the MLA’s ballot papers will have finished the scrutiny allotted to other candidates or will have been set aside as exhausted. These various groups of ballot papers will be identified by the computer program.

The second step is to distribute the ballot papers of the vacating MLA to those candidates who have indicated they wish to contest the vacancy, according to the first available preference on each ballot paper. For example, a ballot paper that was marked “1—Vacating MLA, 2—Blue”, would be counted to “Blue” (if “Blue” is contesting the vacancy). Similarly, a ballot paper that was marked “1—Vacating MLA, 2—Black, 3—Blue”, would be counted to “Blue” (if “Blue” is contesting the vacancy but “Black” is not).

Where the vacating MLA was elected with a quota of votes on first preferences, all the ballot papers used in the recount that show further preferences will have the same transfer value.

Some ballot papers may be exhausted at this stage if they do not show a valid preference for a contesting candidate.

The third step is to calculate the number of votes received by each contesting candidate.

The fourth step is to determine whether a candidate has enough votes to be elected. To be elected, a candidate must obtain 50% plus 1 (an absolute majority) of the number of votes counted to all the contesting candidates remaining in the count (excluding exhausted votes). If a candidate has an absolute majority, that candidate is successful and the scrutiny is complete.

The fifth step is only carried out if no candidate has an absolute majority. In this case, the candidate with the fewest votes is excluded, and his or her ballot papers are transferred to the remaining candidates. New vote totals are calculated for each remaining candidate.

The fourth and fifth steps are repeated until a candidate receives an absolute majority of votes.

Scrutineers

Role of scrutineers

Scrutineers observe on behalf of candidates the scrutiny conducted by electoral officials. Scrutineers have legal rights and obligations under the Electoral Act.

Candidates may not in any way take part in the conduct of an election — candidates may not be appointed as scrutineers.

As the counting process for casual vacancies is now carried out by computer, the opportunity for scrutineers to observe the scrutiny is restricted to observing the operation of the computer program. However, scrutineers were present while the ballot papers from the election were data-entered. This same ballot information will be used for the recount.

Scrutineers are entitled to inspect copies of the source code used to build the computer program for the counting of casual vacancy scrutinies. This code can be downloaded from the Elections ACT website. Data files showing the preferences recorded on each ballot paper at the 2001 election can also be purchased on CD-ROM.

Appointment of scrutineers

Candidates may appoint scrutineers to represent them at the scrutiny.

Candidates must appoint scrutineers by supplying a written notice to the Electoral Commissioner. Appointment forms will be made available for this purpose.

Each scrutineer must sign an undertaking in the approved form (attached to the appointment form) that he or she will not disclose any knowledge acquired during the scrutiny concerning the vote of any elector.

Limitations on numbers of scrutineers appointed

During the scrutiny, the number of scrutineers representing a particular candidate shall not exceed the number of officers conducting the scrutiny. At a computerised casual vacancy count, only one officer will be “conducting the scrutiny”, by operating the computer system. Consequently, candidates will only be able to appoint one scrutineer each to observe a computerised casual vacancy count.

Scrutineers Information Booklet

More detailed information concerning the rights, duties, powers and functions of scrutineers during the scrutiny are contained in the *Scrutineers Information Booklet*. This booklet also explains the method of voting, matters relating to formality and informality of ballot papers, and the scrutiny process.

Recounts

Recounts usually occur when the result of an election is very close, either at the discretion of the Electoral Commissioner or as directed by the Electoral Commission. A recount can be held at any time before the official declaration of an election result. A “recount” should not be confused with the routine rechecks of votes automatically carried out by the Electoral Commissioner.

A candidate may request a recount in writing to the Electoral Commissioner, setting out the reasons for the request. The Commissioner will only conduct a recount if he or she thinks fit. If the Commissioner refuses to conduct a recount on the request of a candidate, that candidate may appeal to the full Electoral Commission for a review of that decision.

Before recounting any ballot papers, the Commissioner will notify each candidate of the date, time and place fixed for the recount. An electoral officer conducting a recount has the same powers as if the recount was the original scrutiny, and may reverse any decision made in an earlier scrutiny.

Court of Disputed Elections

The validity of an election or a casual vacancy count may only be disputed by application to the Supreme Court sitting as the Court of Disputed Elections after the result of the count is declared. If any of the following matters in relation to an election or casual vacancy count is called into question, the validity of the election or casual vacancy count is to be taken to be in dispute:

- the acceptance or rejection of a nomination of a candidate by the Commissioner;
- the eligibility of a person to be nominated as a candidate, to be elected or to be an MLA;
- any matter connected with the printing or endorsement of ballot papers;

- any matter connected with the issue, or scrutiny, of ballot papers by an officer;
- any matter connected with electronic voting;
- any matter connected with the admission or rejection of declaration votes by an officer at the preliminary scrutiny.

The following persons are entitled to dispute the validity of an election or casual vacancy count:

- a candidate in the election;
- an elector entitled to vote at the election;
- the Electoral Commissioner.

Procedures for disputing an election or casual vacancy count are set out in detail in Part 16 of the Electoral Act and in rules of the Supreme Court. Any person contemplating a challenge should consult their own legal advisers.

More information

For more information on ACT Legislative Assembly elections, please contact the ACT Electoral Commission on (02) 6205 0033, or write to PO Box 272, Civic Square, ACT 2608, or email elections@act.gov.au, or visit the Commission's office at Allara House, Plaza Level, 48-56 Allara St, Canberra City or see the Electoral Commission's website at www.elections.act.gov.au.

Schedule 4 Ascertaining result of poll

(see s 185)

Part 4.1 Preliminary

1 Interpretation for sch 4

(1) In this schedule:

ballot paper means a ballot paper that is formal under part 12.

continuing candidate means a candidate, other than a successful candidate, an excluded candidate or a candidate who died before polling day.

count means an allotment of votes under clause 3 (1), 6 (3), 9 (2) (c) or 14 (2).

count votes, in relation to a candidate, is the number of votes calculated as follows (any fraction being disregarded):

$$BP \times TV$$

where:

BP means the number of ballot papers to be dealt with at a count that record the next available preference for the candidate.

TV means the transfer value of those ballot papers.

excluded candidate means a candidate excluded under clause 8.

next available preference means the next highest preference recorded for a continuing candidate on a ballot paper.

quota means the quota of an electorate for an election and is calculated as follows (any fraction being disregarded):

$$\frac{BP}{N + 1} + 1$$

where:

BP means the number of ballot papers for the election.

N means the number of positions to be filled at the election.

successful candidate means a candidate who is successful under clause 3, 4, 6, 9 or 14.

surplus, in relation to a successful candidate, means the candidate's total votes less the quota, if the resulting number of votes is 1 or greater.

total votes, in relation to a candidate, means the sum of all votes allotted to the candidate.

transfer value, in relation to a ballot paper, is—

- (a) in relation to the allotment of votes from the surplus of a successful candidate—
for ballot papers that specify a next available preference, subject to subclause (2), the value calculated as follows:

$$\frac{S}{CP}$$

where:

S means the surplus.

CP means the number of ballot papers counted for the candidate at the count at which he or she became successful and that specify a next available preference; or

- (b) in relation to the allotment of votes under clause 9 (2) (c)—
- (i) for ballot papers in relation to which votes were allotted to the excluded candidate under clause 3—1; or
 - (ii) for ballot papers in relation to which count votes were allotted to the excluded candidate under clause 6 (3) or 9 (2) (c)—the transfer value of the ballot papers when counted for the purpose of that allotment.

(2) If, but for this subclause, the transfer value of a ballot paper calculated in accordance with subsection (1), definition of *transfer value*, paragraph (a) would be greater than the transfer value of the ballot paper when counted for the successful candidate, the transfer value of that ballot paper is the lastmentioned transfer value.

2 Disregarding preferences

(1) This clause applies if effect is to be given to preferences indicated in candidate squares on a ballot paper under section 180.

(2) If the same number is marked in 2 or more candidate squares on a ballot paper, those numbers and any greater number shall be disregarded in determining the elector's preferences.

(3) If a number is missing from the series of consecutive whole numbers marked in the candidate squares on a ballot paper, the missing number and any greater number shall be disregarded in determining the elector's preferences.

Part 4.2 General

3 First preferences

(1) For each ballot paper recording a first preference for a continuing candidate, 1 vote shall be allotted to the candidate.

(2) For subclause (1), a ballot paper on which a first preference for a candidate who died before polling day is recorded shall be taken to record a first preference for the candidate for whom the next available preference is recorded.

(3) After the allotment of votes under subclause (1), each continuing candidate's total votes shall be calculated and, if the votes equal or exceed the quota, the candidate is successful.

4 Scrutiny to cease

(1) If, after a calculation under clause 3 (3), 6 (4) or 9 (2) (d), the number of successful candidates is equal to the number of positions to be filled, the scrutiny shall cease.

(2) If, after a calculation under clause 3 (3) or 6 (4) or after all the ballot papers counted for an excluded candidate have been dealt with under clause 9—

- (a) the number of continuing candidates is equal to the number of positions remaining to be filled; and
- (b) no successful candidate has a surplus not already dealt with under clause 6; each of those continuing candidates is successful and the scrutiny shall cease.

5 Scrutiny to continue

If the scrutiny has not ceased in accordance with clause 4 and—

- (a) 1 or more successful candidates have a surplus not already dealt with under clause 6—subject to clause 4, each surplus shall be dealt with in accordance with clause 6; or
- (b) there are no successful candidates with such a surplus—1 continuing candidate shall be excluded in accordance with clause 8 and the ballot papers counted for him or her shall be dealt with in accordance with clause 9.

6 Surplus votes

(1) Subject to clause 7, this clause applies in relation to the surplus of a successful candidate.

(2) Each ballot paper counted for the purpose of allotting votes to the successful candidate at the count at which the candidate became successful shall be dealt with as follows:

- (a) if it does not specify a next available preference—it shall be set aside as finally dealt with for this part;
- (b) if it specifies a next available preference—it shall be grouped according to the candidate for whom that preference is recorded.

(3) The count votes for each continuing candidate shall be determined and allotted to him or her.

(4) After the allotment under subclause (3), the continuing candidates' total votes shall be calculated and, if the total votes of a candidate equal or exceed the quota, the candidate is successful.

7 More than 1 surplus

(1) In this clause—

- (a) a reference to a successful candidate is a reference to a successful candidate with a surplus not already dealt with under clause 6; and
- (b) a reference to the earliest count is a reference to the earliest count at which a successful candidate obtained a quota.

(2) If there are 2 or more successful candidates, the surplus of the relevant candidate shall be dealt with in accordance with clause 6.

(3) For subclause (2)—

- (a) if only 1 successful candidate obtained a quota at the earliest count—that candidate is the relevant candidate;
- (b) if 2 or more successful candidates obtained a quota at the earliest count—the candidate who, of those candidates, has the largest surplus is the relevant candidate; or

- (c) if 2 or more successful candidates (*contemporary candidates*) who obtained a quota at the earliest count have the same surplus, being a surplus larger than that of any other candidate who obtained a quota at that count and—
 - (i) 1 of the contemporary candidates had more total votes than any other contemporary candidate at the last count at which all the contemporary candidates had unequal total votes—that candidate; or
 - (ii) there is no count at which all the contemporary candidates had unequal total votes—the contemporary candidate who is determined by the commissioner by lot to be the relevant candidate;

is the relevant candidate.

(4) If—

- (a) a person becomes the relevant candidate under subclause (3) (c) (ii); and
- (b) the ballot papers are recounted in accordance with section 187; and
- (c) the same candidates would, apart from this subclause, become the contemporary candidates once again under that subparagraph;

the person shall be taken to be the relevant candidate for subclause (2) in the recounting of those ballot papers.

8 Exclusion of candidates

(1) If clause 5 or 15 requires a candidate to be excluded, the candidate with the least total votes shall be excluded.

(2) If 2 or more candidates each have the same total votes, being fewer total votes than any other candidate and—

- (a) 1 of those candidates had fewer total votes than any other of those candidates at the last count at which all those candidates had unequal votes—that candidate; or
- (b) there is no count at which all those candidates had unequal total votes—the candidate who, of those candidates, is determined by the commissioner by lot to be the candidate to be excluded;

shall be excluded.

(3) If—

- (a) a person is excluded under subclause (2) (b); and
- (b) the ballot papers are recounted in accordance with section 187; and
- (c) that paragraph would, apart from this subclause, be applicable once again to the same candidates;

the person shall be taken to be excluded in the recounting of those ballot papers.

9 Votes of excluded candidates

(1) If a candidate is excluded in accordance with clause 8, the ballot papers counted for the candidate shall be sorted into groups according to their transfer values when counted for him or her.

(2) Subject to subclause (3), each group under subclause (1) shall be dealt with as follows:

- (a) if a ballot paper in the group does not specify a next available preference—it shall be set aside as finally dealt with for this part;

- (b) if a ballot paper in the group specifies a next available preference—it shall be grouped according to the candidate for whom that preference is recorded;
- (c) each continuing candidate’s count votes shall be determined and allotted to him or her;
- (d) continuing candidates’ total votes shall be calculated and, if the votes of any of those candidates equal or exceed the quota, the candidate is successful.

(3) The groups referred to in subclause (1) shall be dealt with under subclause (2) starting with the group with the highest transfer value and, subject to subclause 4 (1) or 15 (2), continuing in descending order until all the groups have been dealt with.

10 Setting aside ballot papers

If, after a calculation under clause 3 (3), 6 (4) or 9 (2) (d), the total votes of a candidate who became successful on that calculation equal the quota, the ballot papers counted for that candidate shall be set aside for this part.

Part 4.3 Casual vacancies

11 Application

(1) This part applies in relation to the vacancy in the seat of a former MLA that is to be filled by recount under section 194.

(2) For this part—

- (a) *continuing candidate* means a candidate within the meaning of part 13, but does not include a candidate who died before the recount for the purposes of this part began; and
- (b) the quota is calculated under clause 12; and
- (c) the transfer value is determined under clause 13.

12 Quota

(1) For this part, the quota, in relation to a count, is calculated as follows:

$$\frac{TVA}{2} + 1$$

(2) In this clause:

TVA means the sum of the total votes allotted to the continuing candidates at the count, any fraction being disregarded.

13 Transfer value

(1) For this part, the transfer value of ballot papers counted for the former MLA—

- (a) for a ballot paper dealt with at the count at which the former MLA became successful—is the value ascertained in accordance with subclause (2) or (3), as the case requires;
- (b) for a ballot paper dealt with at the count under clause 3—is 1; and
- (c) for a ballot paper dealt with at any other count—is the transfer value of the ballot paper when counted for the purpose of allotting count votes to the former MLA.

(2) If, at the count at which the former MLA became successful, $NCP \times TV$ was greater than or equal to $Q - N$ —

- (a) for a ballot paper that did not specify a next available preference—the value is calculated as follows:

$$\frac{Q - N}{NCP}; \text{ and}$$

- (b) for a ballot paper that specified a next available preference—the value is zero.

(3) If, at the count at which the former MLA became successful, $NCP \times TV$ was less than $Q - N$ —

- (a) for a ballot paper that did not specify a next available preference—the value is the transfer value of the ballot paper when counted for the purpose of allotting count votes to the former MLA; and
- (b) for a ballot paper that specified a next available preference—the value is calculated as follows:

$$\frac{Q - N - (NCP \times TV)}{CP}$$

(4) In subclauses (2) and (3):

NCP means the number of ballot papers counted for the former MLA at the count at which he or she became successful that did not specify a next available preference.

TV means the transfer value of a ballot paper when counted at that count for the purpose of allotting count votes to the former MLA.

Q means the quota for the election at which the former MLA was last elected.

N means the former MLA's total votes after the last calculation before that count.

CP means the number of ballot papers counted for the former MLA at that count that specified a next available preference.

14 Recount—first count

(1) If a ballot paper counted for the former MLA—

- (a) does not specify a next available preference—it shall be set aside as finally dealt with for this part; or
- (b) specifies a next available preference—it shall be grouped according to the candidate for whom that preference is recorded.

(2) The count votes for each continuing candidate shall be determined and allotted to him or her, and each continuing candidate's total votes shall be calculated.

(3) If, after the calculation under subclause (2), the total votes of a continuing candidate equal or exceed the quota, the candidate is successful and the scrutiny shall cease.

15 Recount—continuation

(1) If the scrutiny has not ceased in accordance with clause 14 (3) or subclause (2) of this clause—

- (a) 1 continuing candidate shall be excluded in accordance with clause 8; and
- (b) the ballot papers counted for that candidate shall be dealt with in accordance with clause 9.

(2) If, after a calculation under clause 9 (2) (d), a candidate is successful, the scrutiny shall cease.

16 Successful candidate is dead

(1) If the candidate who is successful on a recount is dead, the recount shall be conducted again.

(2) For subclause (1), a ballot paper on which a preference for that candidate is recorded shall be taken to record a preference for the candidate for whom the next available preference is recorded.

17 Multiple vacancies

(1) If there are 2 or more vacancies in the seats of former MLAs that are required to be filled by recount under section 194, the recounts shall be conducted in the order in which the vacancies occurred.

(2) If 2 or more of those vacancies occurred at the same time, the commissioner shall determine by lot the order in which the recounts are to be conducted.

(3) If—

- (a) a person is a candidate in relation to more than 1 casual vacancy; and
- (b) the person becomes a candidate in relation to those casual vacancies before the commissioner declares elected the successful candidate in relation to any of those casual vacancies; and
- (c) the person is successful in relation to 1 of those casual vacancies;

for the purpose of conducting the recount in relation to the casual vacancies other than the one in relation to which the person was successful, the person shall be taken not to be a continuing candidate.

Part 4.4 Deceased successful candidates

18 Application of pt 4.3

(1) If a successful candidate dies on or after polling day but before the declaration of the result of the election, the ballot papers counted for the deceased candidate shall be dealt with in accordance with part 4.3 as if they had been counted for a former MLA.

(2) In this part:

continuing candidate means a candidate other than a successful candidate, a candidate who died before the recount for this part commenced or a candidate who is excluded for clause 15.

19 Multiple deaths

(1) If 2 or more successful candidates die on or after polling day but before the declaration of the result of the election, the ballot papers counted for each deceased candidate shall be dealt in the order in which the candidates died.

(2) If 2 or more of those successful candidates died at the same time, the commissioner shall determine by lot the order in which the ballot papers for the deceased candidates are to be dealt with.