

2011

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

ELECTORAL (CASUAL VACANCIES) AMENDMENT BILL 2011

EXPLANATORY STATEMENT

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Electoral (Casual Vacancies) Amendment Bill 2011

Outline

The Electoral (Casual Vacancies) Amendment Bill 2011 enacts a number of amendments to the casual vacancy provisions of the *Electoral Act 1992* and makes consequential amendments to the *Aboriginal and Torres Strait Islander Elected Body Act 2008*.

This Bill provides that where a casual vacancy arises and the vacating member was elected as a party candidate, and no unsuccessful candidates from that party apply to contest the vacancy, the vacancy would be filled by the appointment method set out in section 195 of the Electoral Act.

The amendments arise from a recommendation made by the ACT Electoral Commission in its report on the conduct of the 2008 ACT Legislative Assembly general election.

Casual vacancies in the ACT Legislative Assembly are currently filled by conducting a count-back of the ballot papers used to elect the vacating member.

The count-back method of filling casual vacancies serves to preserve the integrity of the proportional representation aspect of the ACT's Hare-Clark system, as it enables the voters who elected the vacating member to choose that member's replacement. In practice, this has always meant that a vacating member of a particular political party has been replaced by a member of the same party, thereby retaining the party balance in the Assembly, which in turn reflects the will of the electorate at the relevant general election.

However, the Commission noted that the count-back method will only operate as intended to preserve the proportional outcome of the original general election where there is at least one candidate of the vacating member's party available to contest the vacancy. Should a party member resign, and at least one unsuccessful candidate from that same party is not available to contest the vacancy, under the current law that vacancy would be filled by a candidate from a different party, or by an independent candidate. Arguably, such an outcome would not deliver a representative result, and might serve to alter the balance of power in the Legislative Assembly.

To address this issue, the Commission recommended that the Electoral Act be amended to provide that, where a casual vacancy arises and the vacating member was elected as a party candidate, and no unsuccessful candidates from that party apply to contest the vacancy, then the vacancy would be filled by the appointment method set out in section 195 of the Electoral Act. This Bill is intended to give effect to the Commission's recommendation.

Section 195 of the ACT's Electoral Act currently provides for the situation where a casual vacancy occurs and it is not practicable to fill the vacancy by count-back at all. Such a situation could arise either because of a technical difficulty (such as, in the days before electronic counting, where some or all of the ballot papers were destroyed by accident) or because no candidates applied to contest the vacancy.

Under section 195, if a vacancy cannot be filled by count-back, there is a mechanism for the Assembly to appoint a replacement member from the same party of the vacating member, where the vacating member belonged to a party, or to appoint a candidate with no party affiliation where the vacating member was not elected as a party candidate. This method is similar to the Senate casual vacancy rules which, like the ACT's count-back rules, are designed to preserve the proportionality of multi-member election outcomes.

This Bill will extend the operation of section 195 as described above.

The Bill also makes consequential amendments to the *Aboriginal and Torres Strait Islander Elected Body Act 2008*, which applies various provisions of the Electoral Act to the conduct of elections for the Elected Body. The effect of these amendments will be to leave the existing Elected Body rules essentially unchanged, as political party candidates are not recognised in elections for the Elected Body.

Application of *Proportional Representation (Hare-Clark) Entrenchment Act 1994*

This proposed change to the casual vacancy rules is subject to the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (the Entrenchment Act). Section 4(1) of the Entrenchment Act provides that "This Act applies to any law that is inconsistent with any of the following principles of the proportional representation (Hare-Clark) electoral system: ... (l) where there are 2 or more eligible candidates in relation to a casual vacancy, the vacancy shall be filled by a recount of the ballot papers counted for the person who, at the last election before the vacancy occurred, was elected to the seat in which the vacancy has occurred." Section 5(2) of the Entrenchment Act provides that a law to which section 4 applies has no effect unless it is passed by at least a 2/3 majority of the Members of the Legislative Assembly, or passed by a simple majority of the Legislative Assembly and passed by a majority of electors at a referendum.

Consequently, to have effect, this Bill must be passed by at least a 2/3 majority of the Members of the Legislative Assembly, or be passed by a simple majority of the Legislative Assembly and passed by a majority of electors at a referendum.

Summary of clauses

Clause 1 - Name of Act

This clause names the Act as the *Electoral (Casual Vacancies) Amendment Act 2011*.

Commencement

This clause states that the Act will commence on the day after its notification in the Legislation Register.

Legislation amended

This clause states that the Act amends the *Electoral Act 1992* and makes consequential amendments to the *Aboriginal and Torres Strait Islander Elected Body Act 2008*.

New definition of *valid application*

This clause amends section 190 of the Electoral Act to define the term “valid application”. This term is used in amendments made by clause 8.

Notice of casual vacancy

This clause amends section 191(1) of the Electoral Act to insert a new requirement to provide that, before the Electoral Commissioner publishes a notice inviting applicants to contest a casual vacancy, the Commissioner must be satisfied that, if the former MLA’s name appeared on the ballot paper for the last election as a party candidate, there is at least one other person who was a party candidate for that party at the election who may apply to be a candidate for the casual vacancy.

The effect of this amendment is that, in a case where a party candidate is clearly not available to contest a casual vacancy following the resignation of a party MLA (for example, a case where a party stood two candidates in an electorate, and both candidates were elected), the Commissioner would not publish a notice inviting candidates to apply for the vacancy and the casual vacancy would not be filled by count-back of the ballot papers from the previous election.

Section 191(4)

This clause amends section 191(4) of the Electoral Act to provide that, where the Commissioner is not satisfied that it is possible to fill a casual vacancy by count-back in accordance with section 191(1), as amended by clause 5, the Commissioner is required to notify the Speaker.

This amendment has the effect of activating the procedure set out in section 195, which is the mechanism for the Assembly to appoint a replacement member where the count-back method is not able to be used.

Candidates for casual vacancy

This clause renames section 192 of the Electoral Act to reflect the altered procedures for filling casual vacancies to be introduced by clause 8.

Publication of candidates’ details

This clause omits existing section 193 of the Electoral Act and substitutes new sections 192A, 193 and 193A of the Electoral Act.

New section 192A provides for the publication of details of applicants for a casual vacancy, currently included in section 193, and includes an additional requirement, in the case where the former MLA was elected as a party candidate, for the Commissioner to publicly state whether at least one of the applicants was someone who was a party candidate for the former MLA's party at the election.

New section 193 provides that, if the Commissioner has received one or more valid applications to contest a casual vacancy, and in the case where the former MLA was elected as a party candidate, at least one of the applicants was someone who was a party candidate for the former MLA's party at the election, then the Commissioner must declare those applicants to be candidates for the vacancy. In this case, the vacancy would proceed to be filled by the count-back method set out in section 194.

New section 193A provides that, if the Commissioner has not received any valid applications to contest a casual vacancy, or in the case where the former MLA was elected as a party candidate, if the Commissioner has not received at least one application from someone who was a party candidate for the former MLA's party at the election, then the Commissioner must declare that there are no candidates for the vacancy. In this case, the Commissioner must publicly declare the reason why there are no candidates and inform the Speaker accordingly. The vacancy could then be dealt with under the appointment method set out in section 195.

Determination of candidate to fill vacancy

This clause substitutes new sections 194(1) and (2) of the Electoral Act as a consequence of the amendments made by clause 8. The substance of section 194 is not changed.

Assembly nominees

This clause amends section 195(1)(a) of the Electoral Act as a consequence of the amendments made by clause 8. The substance of section 195 is not changed.

New section 195A: Declaration of election

This clause inserts new section 195A of the Electoral Act to provide for a formal public declaration to be made by the Electoral Commissioner of the election of an MLA to fill a casual vacancy. This mirrors the requirement for a public declaration of the result of a general election included in existing section 189. Currently, the Electoral Act provides that the Commissioner shall declare the successful candidate elected to fill a casual vacancy, but does not explicitly state that the declaration shall be made publicly.

Dictionary, definition of *candidate*

This clause amends the Dictionary of the Electoral Act to update the definition of *candidate* as a consequence of the amendments made by clause 8. The substance of the definition is not changed.

Schedule 1

Aboriginal and Torres Strait Islander Elected Body Act 2008 – Consequential amendments

The *Aboriginal and Torres Strait Islander Elected Body Act 2008* applies various provisions of the *Electoral Act 1992* to the conduct of elections for the Elected Body and makes modifications to the applied Electoral Act provisions where appropriate.

Modifications [1.1] to [1.7] made by this Bill all have the effect of omitting the amendments of the Electoral Act made by this Bill that relate to party candidates contesting Legislative Assembly casual vacancies from applying to Elected Body elections. As party candidates are not recognised in Elected Body elections, these amendments are not appropriate to be applied to Elected Body elections. The effect of these modifications is to leave the substance of the current provisions related to casual vacancies for Elected Body elections unchanged.