



**UPHOLDING AND STRENGTHENING PARLIAMENT'S
CONSTITUTIONAL FUNCTIONS:**

**THE ELECTION OF A NEW PRESIDENT OF THE NEW SOUTH
WALES LEGISLATIVE COUNCIL IN 2021:**

A CLERK'S EYE VIEW OF PROCEEDINGS

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Introduction

The election of a new President of the New South Wales Legislative Council in 2021 was extraordinary on many levels. The election, which commenced on Wednesday 24 March, was not completed until Tuesday 4 May. For 40 days and 40 nights the House was without a Presiding Officer and for much of this time was 'up on a long bell', not able to meet or be recalled. Three ballots were held, and two legal advices were tabled. In the absence of a declaration by the Clerk, the Leader of the Government declared a candidate elected after the first and second ballots, with that candidate escorted to the Chair by supporters, only to be removed by a vote of the House a little more than an hour later. These mere facts fail to capture the drama, colour, and intense pressure of these unprecedented proceedings for all participants. Some of the political story of the election has been outlined by Dr David Clune OAM in his article entitled 'An Unprecedented Election of a President,' published in the *Australasian Parliamentary Review*.¹ This paper focusses on the procedural aspects of the election.

Background

The NSW Legislative Council has been particularly active and assertive during the current 57th Parliament. Following the 2019 General Election, the Liberal-National Party Government was left with 17 seats in the 42 member House, five votes short of a majority once the Hon. John Ajaka MLC (Liberal Party) was re-elected President. (The Australian Labor Party Opposition has 14 seats and there are 11 crossbench members: 3 Greens, one Independent former Green, two Animal Justice Party members, two Shooters, Fishers and Farmers Party members, two One Nation members and one Independent formerly Christian Democratic Party member.) When former President Ajaka announced in February 2021 his intention to resign mid-term the following month, manoeuvring for his potential replacement commenced immediately. As outlined by David Clune, the Opposition and eight of the crossbench members (a total of 22 members in the 42 member House – i.e. an absolute majority – referred to hereafter as the non-Government majority) supported the then Deputy President Trevor Khan MLC (National) for the position of President. The non-Government majority wanted a President who they believed would be an 'independent, impartial chair' but did not wish to take the position for one of themselves as they would thus lose a number on the floor of the House. The Premier determined that the position should be held by a Liberal member and announced that the Hon. Natasha Maclaren-Jones MLC would be the next President. Deputy President Khan was unwilling to take the position without Government support.

The non-Government majority initially sought to send a message to the Government by successfully moving an amendment to Standing Order 12 (hereafter 'SO') in relation to the election of the President, by removing the need for a nominee to accept the nomination.² Despite this minor procedural change, which demonstrated where the numbers lay, the Premier continued to insist that Mrs Maclaren-Jones would be the next President and Mr Khan continued to decline the position without explicit Government support.

¹ Autumn/Winter 2021, pp 23-38.

² Legislative Council, *Minutes of Proceedings*, 17/3/2021, p 2012.

With the date of President Ajaka's resignation approaching, the Government maintained that Mrs Maclaren-Jones would be its only candidate for the position of President. The non-Government majority, meanwhile, was equally determined that the House would elect a Presiding Officer of its own choosing, and that the position was not in the gift of the Premier. Manoeuvring continued apace. Usually these matters are resolved politically, but not in this case.

Relevant Standing Orders

By way of historical background, contested elections for the position of President of the Legislative Council between 1933 and 1991 were dealt with by way of open voting on successive motions (divisions) until a candidate was elected with a majority of votes of the members present. The rules were set out in statute. In 1991,³ the *NSW Constitution Act* was amended to provide that the President was to be chosen in accordance with the procedures for choosing the President of the Australian Senate, until such time as the House adopted its own SOs dealing with the election of the President.⁴ A key feature of the Senate procedure is that the President is chosen by a secret ballot rather than a division. The Legislative Council eventually adopted its own SOs (12 and 13) for the election of the President in 2004.⁵

As noted above, in early March 2021, SO 12 concerning the Election of the President had been amended by a sessional order, but this had not resolved the impasse. In the event of more than one nomination for the position of President a ballot is held with the applicable rules set out in SO 13: 'Ballot'. SO 13 (as it applied in 2021) provided:

13 Ballot

- (1) When a ballot is required, the bells will be rung and the doors locked, as in a division.
- (2) When 2 members have been proposed as President, ballot papers will be distributed by the Clerks to all members in their places. Members must write on the ballot paper the name of the candidate for whom they wish to vote, and deposit it in the ballot box provided by the Clerk. The candidate who has the greater number of votes is to be declared elected President, and will be conducted to the Chair.
- (3) When 2 or more members have been proposed, the votes will be similarly taken and the member who has the greatest number of votes will be the President, provided that member has also a majority of the votes of the members present.
- (4) If no candidate has such a majority, the name of the candidate having the smallest number of votes will be withdrawn, and a fresh ballot will take place; and this will be done as often as necessary, until one candidate is elected as President by such a majority, and the member elected will be conducted to the Chair.

³ Following the failure of the Greiner Government to have its own candidate for the position of President elected in 1988.

⁴ So, in 1995, 1998, 1999 and 2003 the President was elected according to Senate Standing Orders.

⁵ The 2004 Standing Orders were initially adopted as sessional orders in 2003 for a trial period before being formally made as Standing Orders in 2004. The President was elected under Standing Orders 12 and 13 in 2007, 2009, 2011, 2015, 2017 and 2019.

- (5) If there is an equality of votes, the votes will be again taken, and if again there is an equality of votes, the Clerk will determine, by lot, which of the candidates, having the same number of votes will be withdrawn, as if the candidate had obtained the lesser number of votes.

Legislative Council SO 13 clauses 2 and 3 (as they applied in 2021) were similar but not identical to Senate SO 7 clauses 1 and 2.

7 Ballot

- (1) When 2 senators have been so proposed as President, each senator present shall deliver to the Clerk a ballot paper indicating the name of the candidate for whom the senator votes. The candidate who has the greater number of votes shall be the President, and be conducted to the chair.
- (2) When more than 2 senators have been so proposed, the votes shall be similarly taken, and the senator who has the greatest number of votes shall be the President, provided that senator has also a majority of the votes of the senators present.
- (3) If no candidate has such a majority, the name of the candidate having the smallest number of votes shall be withdrawn, and a fresh ballot shall take place; and this shall be done as often as necessary, until one candidate is elected as President by such a majority, and the senator elected shall be conducted to the chair.
- (4) If there is an equality of votes, the votes shall be again taken, and if again there is an equality of votes, the Clerk shall determine, by lot, which of the candidates, having the same number of votes, shall be withdrawn, as if that candidate had obtained the lesser number of votes.

Legislative Council SO 13 adds the words '2 or' to clause (3).

Non-Government majority strategy

As outlined by David Clune, the Opposition and their crossbench supporters were determined that the Legislative Council would choose its own President. The Leader of the Opposition and crossbench strategists, having studied SO 13, developed a strategy they were confident would force the Government to relent and nominate their preferred candidate. They would nominate an Opposition member but, with a number of members voting informally, neither the Government's candidate or the Opposition candidate would receive 'a majority of the votes of the members present,' and no-one would be able to be declared elected. Faced with another clear indication of the numbers in the House, and with the House not being able to proceed to the transaction of any business without a President, the Government would surely relent – that at least was the expectation of the non-Government majority.

One problem with this strategy was that the Clerk would be overseeing the election of the President and would be required to rule as to whether any candidate could be declared elected.⁶ This placed the Clerk in a difficult position that grew more difficult as events unfolded. Clerkly advice was therefore sought.⁷ In considering the question, my focus was on the requirement in SO 13(3) for a candidate to receive majority of votes of the members present, even where there are only two candidates (as per the addition of the words '2 or' to the Senate SO).

The first and second editions of *New South Wales Legislative Council Practice* and the *Annotated Standing Orders of the New South Wales Legislative Council* seemed clear on this point: that no candidate for the position of President will be declared elected unless they have a majority of votes of the Members present. The former Clerk of the Parliaments at the time the Legislative Council adopted SO 13 confirmed that it was the intention of the Standing Orders Committee and the drafters (i.e. himself and the then Deputy Clerk) that SO 13(3) intentionally qualifies SO13(2), so that a candidate will not be elected unless they have a majority of the votes of the members present. The requirement for a majority of members to vote in favour of a candidate for President was also explicitly stated in the debate on the 1991 legislation which ultimately led to SO 13.⁸ All of this was consistent with the principle that affirmative action in a legislative body must be supported by a majority, and the reality that if a member were able to be elected President without the support of a majority of members they would be liable to be removed at a subsequent sitting.

Representatives of the non-Government majority were advised that it would be unfortunate for the Clerk to be placed in the difficult position of having to make such a ruling, due to the uncertain and unprecedented consequences to follow. I nevertheless also confirmed that in the scenario they envisaged, I would rule that as neither candidate received a majority of the votes of the members present neither could be declared elected.

Calendar day 24 March 2021: first and second ballots

There were 42 members present when the House sat at 10.00 am on 24 March 2021. I announced receipt of correspondence from Her Excellency the Governor of NSW notifying the House of the resignation of the Hon. John Ajaka as President (he was to resign as a member a week later, having delayed his resignation as a member so as to be able to vote in the ballot for the election of his successor). I then called for nominations for the Office of President. Two nominations were received: the Government's nominee, Mrs Maclaren-Jones, and the Opposition's nominee, former President, the Hon. Peter Primrose MLC. Ballot papers were distributed to members in their places and members lodged their votes. The votes were counted, and the result of the ballot announced:

⁶ The authority for the Clerk to make rulings and maintain order during such elections in the Legislative Council is set out in SO 12 (1) which states that 'the Clerk will act as Chair of the House for the election of the President, and will have the powers of the President under the Standing Orders, while acting.'

⁷ The then Leader of the Opposition, the Hon. Adam Searle MLC, and crossbench strategists have given me permission to disclose in this paper the advice they sought and were provided.

⁸ Per the Hon. E Pickering MLC, *Legislative Council Debates (Hansard)*, 21/8/1991, p 256 and the Hon. T Moore MP, *Legislative Assembly Debates (Hansard)*, 22/10/1991, p 300.

The Hon. Natasha Maclaren-Jones – 20 votes

The Hon. Peter Primrose – 14 votes

Informal votes 8.

David Clune indicates that eight crossbench members (i.e. all of the crossbench apart from the two One Nation members and Reverend the Hon. Fred Nile MLC) had voted informally, 'so as to trigger a process that would lead to some collaboration and discussion about a consensus candidate.'⁹

I indicated to the House (effectively ruling) that, as neither candidate had received a majority of votes of the members present, neither candidate could be declared elected. This result not being completely unexpected, at the suggestion of the Leader of the Government, I left the Chair at 10.30 am until the ringing of a long bell.

At the request of the Leader of the Government and with the concurrence of the Leader of the Opposition, the bells were rung and the House reconvened at 2.35 pm. At this point, I made a brief statement about the situation in which the House found itself, and, drawing upon the *Annotated Standing Orders of the Legislative Council* and legal advice a predecessor had received in 1966, I indicated the practical necessity of a President being chosen as soon as possible meant that a fresh ballot was appropriate if the two candidates were confirmed as remaining before the House. (I was conscious at this point of the need to keep my remarks as concise and succinct as possible.) A second ballot was therefore held, producing the same result. At the suggestion of the Leader of the Government I again left the Chair at 2.52 pm until the ringing of a long bell. This time I explicitly stated that the bell would be rung when I had an assurance from both the Leader of the Government and the Leader of the Opposition that it was appropriate to do so.

There now having been two inclusive ballots it is fair to say that, as David Clune observes, 'there was an expectation that the Government would accept the political reality and put forward Khan as a compromise candidate.' This was not how it played out. There was apparently a half-hearted effort on the part of the Government to seek to persuade some crossbench members to change their position. With no resolution behind the scenes, eventually everyone went home on the Wednesday evening and returned on Thursday, the next scheduled sitting day, with the expectation that a new President would be elected and the House would proceed to business. To the frustration of the non-Government majority, the Leader of the Government declined to request the bells be rung at all that day. Later that evening, the Leader of the Government advised that the House would resume sitting on the next scheduled sitting day, 4 May. Given members (and Officers) had been on tenterhooks for two days, this advice gave everyone some certainty so as to be able to plan their other activities. However, it left the House 'up on a long bell' for 40 days, during which because the House was technically still sitting, the non-Government majority was unable to utilise the recall mechanism under SO 36.

⁹ 'An Unprecedented Election of a President', p 30, quoting Ms Abigail Boyd (Greens), *Legislative Council Debates (Hansard)*, 24/3/2021, p 20.

Legal advice

On 29 March 2021, the Leader of the Government hand-delivered to me correspondence attaching legal advice the Government had received from the Crown Solicitor¹⁰ suggesting that as its candidate, Mrs Maclaren-Jones, had received the greater number of votes in the ballot on 24 March, she should have been declared elected President. The Government issued a press release congratulating her on her election.

The Crown Solicitor took the view that because there were only two candidates, SO 13(2) was the operative Standing Order, and that as Mrs Maclaren-Jones had received the greatest number of votes she should have been declared elected President. The Crown Solicitor advised that SO 13 (2) and 13 (3) gave rise to 'an obvious tension.' The Crown Solicitor further advised that 'in these circumstances conventional principles of construction would suggest that paragraph (2) ought to be preferred.' It seems to me that she had taken the view that the words '2 or' in 13 (3) were somehow added in error and should be read down. She did this without recourse to any of the essential background to SO 13 outlined above.

Numerous members made it clear to me that they did not find the Crown Solicitor's advice in any way persuasive,¹¹ and that they were appalled by the Government's decision to issue a press release declaring its candidate to now be President.

Although extremely reluctant to seek legal advice on the interpretation of Standing Orders, having been presented with what I regarded as unconvincing advice from the Crown Solicitor, I agreed to seek my own confirmatory legal advice. I sought that advice from Mr Bret Walker SC.

Mr Walker's written advice was received on 27 April 2021.¹² It provided a fresh perspective on SO 13. Completely ignoring the reasoning of the Crown Solicitor, Mr Walker's advice accepts that SO 13 (3) applies where there are two candidates and that a candidate requires a majority of votes of the members present to be declared elected. However, he went on to explore the word "votes" in some detail. For Mr Walker a "vote" must be a valid vote and informal votes don't count as votes. Therefore, in calculating the requisite number required to be a majority of the votes of the members present, one must first discard any informal votes. In this case with eight informal votes discarded a majority of votes of the members present was 18 votes:

...the opening words, this time of SO13(3) bespeak the apparent application of the provision to this case – two candidates being within the category of “2 or more...”. But where 42 (ie 20 plus 14 plus 8) member were “present” and deposited ballot papers in the box, is the candidate with the “greatest” number of votes (i.e. 20 is greater than 14) to be declared elected, given that 20 is not a majority of 42? In my opinion, the answer is

¹⁰ Crown Solicitor's Office, Advice dated 29 March 2021, tabled in the Legislative Council – *LC Minutes of Proceedings*, 24/3/2021, p 2072.

¹¹ During debate in the House on calendar day 4 May 2021, the Leader of the opposition described the Crown Solicitor's advice as “patently absurd.” *LC Parliamentary Debates (Hansard)*, 24/3/2021 p 5.

¹² Bret Walker SC, Legislative Council Election of President: Opinion, 27 April 2021, tabled in the Legislative Council – *LC Minutes of Proceedings*, 24/3/2021, p 2072.

clearly “Yes.” Simply, the requisite “majority” is “of the votes of the members present.”
In this case, the votes of the members present numbered 34, of which 20 is a majority.¹³

Mrs Maclaren-Jones, having received 20 votes, should therefore have been declared elected President. Mr Walker concluded 'for the reasons I have expressed, the Clerk should proceed to arrange the appropriate declaration of election of a new President by reason of the first ballot or alternatively the second ballot.'¹⁴

Preparations for the sitting resuming on 4 May 2021

Although surprised by Mr Walker’s advice, I assumed that it would be accepted by the House as determinative. My mind, therefore, immediately turned to what the Clerk should do when they may have made a 'grave error'. I was reminded of Steven Reynolds’ 2013 paper entitled 'You have committed a great offence but have a weak answer for yourself: when Clerks make mistakes,'¹⁵ which commenced with the disturbing story of a Clerk who, having left words out of a writ was 'committed to the fleete' (i.e. a prison hulk), on the motion of the Lord Chancellor.

However, on this occasion, the non-Government majority quickly communicated that they were also unpersuaded by Mr Walker’s advice. As far as they were concerned, my own view of the legal advice was irrelevant. They indicated that as I had made my rulings on 24 March, it was now a matter for the House to decide whether to let those rulings stand or overturn them.

At this point, I had to carefully consider what I would do on the resumption of the 24 March sitting on 4 May. I did what every Clerk does in this sort of situation and consulted all the weightiest procedural tomes for precedents. On the one hand I was comforted by the precision and detail contained in *Odgers’ Australian Senate Practice, House of Representatives Practice* and the *Annotated Standing Orders of the Australian Senate*, and their detailed footnotes. On the other hand, I was disturbed to read the Hansard extracts that referenced the travails of Clerks during and subsequent to a number of highly controversial and procedurally testing elections of Presiding Officers. I read about the travails of:

- Charles Duffy CMG, Clerk of the House of Representatives in 1909 – who had to deal with a six-hour debate and proceedings on the election of the Speaker, which included having to put the question on a closure motion, which resulted in a tied vote and the Clerk purporting to exercise a casting vote,¹⁶ which led to a matter of privilege being raised and debated the following day including an effort to have the record of those actions expunged from Hansard.¹⁷
- Ernest Parkes CMG, Clerk of the House of Representatives in 1934 - who faced a one-hour debate and proceedings on the election of the Speaker. During this debate he was

¹³ Ibid, paragraph 7.

¹⁴ Ibid, paragraph 11(4).

¹⁵ *The Table*, 2013, pp 4-17.

¹⁶ *House of Representatives Debates (Hansard)*, 28/7/1909, pp 1669-1716.

¹⁷ *House of Representatives Debates (Hansard)*, 29/7/1909, pp 1808-1822. The House divided and the matter was resolved in the negative by 20 votes to 32 votes.

required to put the question on a motion that a particular member be no longer heard and to rule on a point of order with respect to that motion. He then declared the Speaker to be elected immediately on that motion being agreed to, on the basis that there was only one nomination before the House, notwithstanding another member seeking to then self-nominate for the position.¹⁸

- George Monahan CMG, Clerk of the Senate in 1932 – who faced a one-hour debate and proceedings on the election of the President. During the debate he was required to rule on numerous points of order about relevance, one of which was the subject of a motion of dissent, and a motion that the question of dissent required immediate determination.¹⁹ This debate gave rise to questions as to the authority of the Clerk during these proceedings, which were subsequently resolved by an amendment to the Senate Standing Orders in 1934, which explicitly provided that the Clerk while acting as Chair for the election of the President 'shall have the powers of the President under the Standing Orders whilst so acting.' The amendment was agreed on division (23 votes to 3 votes). During the debate on the amendment to the Standing Orders there was an acknowledgement by Senators that should the Clerk misuse those powers, or rule in a manner not in keeping with the view of the Senate, the Clerk's actions could be corrected by way of a motion of dissent ('if he offends he can be quickly called to order!').²⁰

Ultimately, I gained some useful guidance from these examples and on the basis of the Senate precedents and the 1934 debate, concluded that:

- there were in fact precedents for Clerks making rulings while in the Chair for the election of a Presiding Officer,
- once a ruling had been made it was a matter for the House to determine whether it accepted the ruling,
- if a Clerk had made an error or overstepped their authority in making a ruling it was for the House to correct the error by dissenting from the ruling, and
- there was a precedent for a motion of dissent being moved in relation to a ruling of the Clerk.

Proceedings on calendar day 4 May 2021 – the afternoon

At 2.30 pm on 4 May, some 40 days and 40 nights after the two ballots, the bell was rung for the resumption of the 24 March sitting. The Leader of the Government took a point of order that:

...[T]he ruling of the Clerk, that neither candidate had received a majority of the votes of the members present, was not consistent with legal advice received by the Government and by the Clerk of the Parliaments that Mrs Maclaren-Jones had been elected.²¹

¹⁸ *House of Representatives Debates (Hansard)*, 23/10/1934, pp 18-29.

¹⁹ *Senate Debates (Hansard)*, 31/8/1932, pp 3-10.

²⁰ *Senate Debates (Hansard)*, 1/8/1934.

²¹ *LC Minutes of Proceedings*, 24/3/2021, p 2072.

The Leader of the Government tabled the two legal advices and requested that, in view of them, the Clerk declare Mrs Maclaren-Jones elected President.

For the next 58 minutes the House debated the point of order and, in effect, cast judgment on my interpretation of SO 13.

The Leader of the Government, the Leader of the House and one of the One Nation members were critical of my position and said that I had erred. The Leader of the House said he thought my ruling had been 'palpably wrong.'²² The Leader of the Government referred to 'the rule of law' and stated that a decision not to declare Mrs Maclaren-Jones elected President 'would be a clear and intentional breach of SO 13.'²³

The Leader of the Opposition, the Hon. Adam Searle MLC, on the other hand, argued that:

[I]t is a matter for this House as to whether it accepts any ruling given by a Presiding Officer. It is a matter for this House. The Presiding Officer can have a ruling challenged, there can be a dissent motion or through not acting the House can signify that it has accepted the ruling of the Presiding Officer. All of us, I believe, were present on the occasion of the two ballots. The Clerk applied his understanding of the meaning of Standing Order 13, and it is the case that all members here voted and expressed their view on the presidency of this Chamber with a common understanding of what the standing orders meant.²⁴

He went on to identify three concerns with Mr Walker's advice on this matter:

- that under electoral law 'informal votes' are recorded as part of the total number of votes cast,
- that the advice would have the effect of disenfranchising eight members who cast their ballots on 24 March in accordance with the common understanding of non-Government and key Government members as to the treatment of informal votes, and
- that this would lead to a result whereby a person could be declared elected without the support of a majority of members.

He concluded by indicating that:

The Clerk gave all members advice about his understanding of Standing Order 13. The Government sought and received that advice, as did the Opposition and the crossbench. That advice might be right or it might be incorrect...The appropriate course of action is for the Clerk to leave this matter for the members of the House to determine, as happens with every ruling...The ruling made by the Clerk should stand unless or until it is challenged in the usual way.²⁵

²² *LC Parliamentary Debates (Hansard)*, 24/3/2021, p 10.

²³ *Ibid*, pp 12 & 5.

²⁴ *Ibid*, p 5.

²⁵ *Ibid.*, pp 6-7.

Debate became feisty. I had to call for order and rule on points of order about relevance and interjections. The glare of attention was not pleasant, although I am grateful that even those members who were critical of my position were respectful.

At the conclusion of the debate, I stated:

This is a serious and difficult matter, and I am only too conscious of the serious and appropriate manner in which the contribution of the Leader of the Government was framed. Following the ballots for the election of President on 24 March I stated, and in effect ruled, that I could not declare either of the candidates elected as they did not—based on my interpretation of Standing Order 13 and what I understood to be the interpretation of Standing Order 13 shared by a majority of members—receive a majority of votes of the members present. Today I note the apparent absence of consensus or concurrence from members with the course of action urged on me by the Leader of the Government. In the absence of such concurrence, I believe that in order to revoke or vacate my 24 March rulings and to make the declaration now sought by the Leader of the Government the House would need to dissent from those rulings of 24 March.²⁶

The Leader of the Government then suggested I again leave the Chair until the ringing of a long bell, 'to enable the Government to consider its position.'²⁷ A point of order was taken about the amount of sitting lost due to the two previous 'long bells' and an assurance was sought as to a more precise timeframe for the resumption of sitting and resolution of the matter. The Leader of the Government indicated that members would know by approximately 6 pm whether the Government had reached a concluded view.

During debate on this point of order, the Hon. Mark Latham MLC, who had otherwise addressed me as 'Returning Officer' stated:

I have great sympathy for the Clerk who is the meat in the sandwich. I make the observation that he had a chance to jump out of the two slices of bread by adopting the advice of Bret Walker. But that having been rejected, I will move the dissent motion because we do not have time to spare. The idea is that we will come back at 6.00 p.m. and then have another ballot. I will move the dissent motion here and now so we can get on with the business of determining whether the Chamber believes that the ruling is correct or incorrect and, if need be, electing a President.²⁸

Notwithstanding Mr Latham's preparedness to move a motion of dissent, the moment had passed because as soon as I ruled on the point of order regarding the time for the resumption of the sitting, I was required to vacate the Chair until the ringing of a long bell.

Apparently, before the House resumed the Government gave consideration to a number of legal options for resolving the problem it faced. Before the House resumed, I also narrowly avoided

²⁶ Ibid., p 11.

²⁷ Ibid.

²⁸ Ibid., p 12.

becoming locked in the adjacent Royal Botanic Gardens! But that is another story. What a day! And it was by no means over...

Proceedings on calendar day 4 May 2021 – the evening

While the bells were being rung for the resumption of the sitting (at 6.56 pm), it was unclear what would occur next. The gathering of a small number of members on the government benches, surrounding Mrs Maclaren-Jones, made me suspicious. Prior to the proceedings, just about every possible scenario had been workshopped and a variety of procedural logs (scripts) had been prepared at the request of various members.

Upon the resumption of the sitting, the Leader of the Government stated that, on the basis of the legal advice tabled earlier in the day, Mrs Maclaren-Jones had been elected President and should be conducted to the Chair. Mrs Maclaren-Jones was immediately taken from her place on the Government benches by two supporters and conducted to the Chair. Mayhem ensued.²⁹

Mrs Maclaren-Jones sought to convey the usual acknowledgements of a newly elected President and to read the prayers. Concurrently, members loudly interjected suggested that a 'coup' was taking place. Meanwhile the Leader of the Opposition sought the call to move the following motion:

Under standing order 77 as a matter of privilege suddenly arising:

- (1) That the taking of the chair by the Honourable Natasha Maclaren-Jones is disorderly, as she has not been declared elected as President as required under standing order 13(2).
- (2) That this House does not have confidence in the Honourable Natasha Maclaren-Jones as President.
- (3) That the Honourable Natasha Maclaren-Jones be removed from the Chair.

Initially, the Leader of the Opposition sought the call from me on the grounds that as I had not declared any member elected President – I was still 'in the Chair.' I addressed Mrs Maclaren-Jones and urged her to accept the motion and allow debate to proceed. To her credit, particularly in view of the sustained verbal attack she was facing, Mrs Maclaren-Jones allowed the debate to proceed and sought to allow members, including the Leader of the Opposition, to be heard. The Leader of the Opposition was vehement in his critique of the Government's actions:

No person can take the chair unless they have been declared elected by the Clerk. If the contention of the Government is that the Clerk should have declared someone elected, that is the motion that should be before this House—either a dissent in the Chair's ruling or a positive motion that the Clerk declared her elected as, for example, set out in the advice of Bret Walker. But the Government has not chosen that course of action. Why? Because it knows that no matter how much it tries to dress it up, this House has not elected the Hon. Natasha Maclaren-Jones as President. She does not have the confidence of this House. The point is that no person can sit in that chair and uphold the best traditions of this House and maintain order unless they have the confidence of this

²⁹ Masterfully transcribed by the NSW Parliament's Hansard team: *NSW Parliamentary Debates (Hansard)*, 24/3/2022, pp 13-23.

House—the acceptance of the House that they are the rightfully and duly elected President of this Chamber. What we have seen here is a stealing of the chair without being declared elected.

The Hon. Mark Buttigieg: Shame!

Mr David Shoebridge: The world's worst coup.

The Hon. Adam Searle: How on earth can you think that this is the right thing to do when there has been no declaration that she has won? Even if Mr Walker's advice was correct, as the Government maintains, the appropriate course of action would have been to move dissent or to move a positive motion that Mr Walker's advice was correct. The Government knows that it is a matter for this House to uphold or to set aside the rulings of any Presiding Officer, including that of the Clerk. This is a low point. Shame on the Leader of the Government and the Leader of the House for participating in this. Shame on the Hon. Natasha Maclaren-Jones for stealing the chair in this shameful manner. Shame on all those opposite who have participated and connived in this shoddy arrangement. Let us put this to an end, let us vote on this motion and let us have a ballot for President.

Crossbench members were no less outraged by the Government's actions. Ms Abigail Boyd MLC (Greens) was particularly direct:

The Government does not have the numbers in this House to tell us what to do. It is so offensive to democracy and to the way we run this House to have these bullying tactics. Now for this to happen, for this trespass against the presidency to occur where you just physically march a person in—that is the ultimate in forcing what you want to happen instead of actually having a discussion with people about what they might accept. That is why we are in the position we are in today. If there was any doubt about why I did not support the Hon. Natasha Maclaren-Jones being President, it was because I was concerned that she may not uphold the powers of the House in the way that I want her to in order to have the orderly running of this House. That has been put beyond doubt.

To sit in that chair against the clear will of the majority of this House shows that there is no respect for what this House is about, which is as a separate body to the Executive. We do not take our instructions from the Government and that is why this is such an important issue. I ask that we carry on, get on with this, go to a ballot and put in place somebody who has the consensus and acceptance of this House.³⁰

Mr David Shoebridge MLC moved an amendment to the motion to explicitly require the Clerk to proceed to a fresh election and call for nominations. Both the amendment and the motion as amended were agreed to on division (by 22 votes to 16). Having announced the result of the division on the motion as amended, Mrs Maclaren-Jones left the Chair, a little over an hour after having taken it.

In accordance with the express resolution of the House, I immediately called for nominations for President. On this occasion, the Hon. Matthew Mason-Cox self-nominated:

Mr Clerk, I certainly did not believe it would come to this. After the travails of the last 40-odd days where this House has ground to a halt and the unprecedented events we

³⁰ Ibid., p 20.

have seen in this Chamber tonight, we are all diminished. This House is a proud House of review. This House is a key plank in the system of responsible government in this State. The events I have seen unfold today have shocked me deeply. For you, Mr Clerk, it has been a personal tragedy in some ways to see this House behave in the way it has. It is probably time that we all reflect on what has happened. I appeal to everybody's better angels in the conduct of this place as we move forward. At this stage I too wish to reflect. I finish by simply subjecting my nomination to the will of the House.³¹

The Leader of the Government again nominated Mrs Maclaren-Jones. Debate was again robust and I was called upon to rule on further points of order, including about interjections. Nevertheless, there was a sense that everyone realised where the matter was heading and the drama was concluding.

At the risk of being self-indulgent, I include the following quote from Government backbencher, the Hon. Catherine Cusack MLC:

Mr David Blunt, I also thank you for your dignified conduct of these very difficult proceedings and I do regret that at times many members of this House have placed you in an impossible situation. The manner in which you have conducted yourself, with impartiality and with dignity, has been one of great effort in the tradition of the Clerks. It is so fundamental to our democracy that the Clerks do not wish to be the issue in the debate. I honestly believe in my heart that the advice that you gave to our House earlier was a profound effort on your part to ensure that the will of this House, which is your role and your passion, prevailed. I feel that we have seen a man who, throughout what I consider to be a fiasco, has conducted himself with tremendous dignity and intelligence and in the best interests of our Parliament. I ask every member of this Chamber to respect that, as it was not fair how much reverted to the Clerk.³²

At the conclusion of the debate a ballot was held and I subsequently announced the result:

The Hon. Matthew Mason-Cox MLC – 23 votes

The Hon. Natasha Maclaren-Jones MLC – 18 votes

I therefore declared Matthew Mason-Cox elected as President. He took the Chair, made his acknowledgements and read the prayers.

Subsequent proceedings and 'wash up'

At the suggestion of the Leader of the Government, the new President left the Chair until the ringing of a long bell. (The fourth time the House had risen 'on a long bell' during the 24 March 2021 sitting.) An hour later, a 'President's program' for the remainder of the sitting day having been circulated, the House resumed and got straight down to business, working through 54 items of business (largely formalities) before adjourning at 12.29 am.

³¹ The Hon. Matthew Mason-Cox has been a member of the Legislative Council from 2004, representing the Liberal Party and has formerly been a minister, and was a serving Committee Chair in May 2021. Ibid., p 27.

³² Ibid., p 30.

Given how difficult, protracted and heated these proceedings had been, it was remarkable how quickly the House resumed normal operations and the authority of the new President was recognised and respected. On 11 May, a week or so later, the Executive Government's acceptance of the outcome was confirmed when the President was able to report receipt of a commission, signed by the Governor on the advice of the Executive Council. This authorised President Mason-Cox to be a person before whom a newly elected member of the Legislative Council could take the pledge of loyalty or oath of allegiance.

A little over 12 months on, under the auspices of the new President, the body of Presidential rulings interpreting the Standing Orders and the Sessional Orders introduced in 2019 has been further expanded. The House continued to sit during the Delta and Omicron COVID-19 waves, with COVIDSafe sitting arrangements negotiated between all parties represented in the House.³³ More recently, the Procedure Committee has produced a consensus report on its comprehensive review of all the Standing and Sessional Orders. It recommended the adoption of new Standing Orders, which will consolidate and make permanent the 2019 changes which have enabled the House to be so active and assertive during the currently parliamentary term.

Mr Walker has continued his close association with the Legislative Council, providing verbal advice to President Mason-Cox and myself on a matter concerning money bills and to a Legislative Council Committee on a matter under inquiry. Finally, to the other person who was placed in an excruciatingly difficult position – Mrs Maclaren-Jones. Mrs Maclaren-Jones was appointed Minister for Families and Communities and Minister for Disability Services in December 2021. In that capacity, she was recently responsible for the enactment of a number of pieces of legislation dealing with disability services and child protection.

The new Standing Order 13

In March 2022, the Legislative Council's Procedure Committee reported on its comprehensive review of the Standing and Sessional Orders. Reference has already been made to the significance of this consensus report in consolidating and recommending the permanent adoption of the 2019 procedural reforms. Also included in the recommended new Standing Orders was an updated version of SO 13.

The new SO 13 makes three changes to the SO as it was framed in March 2021. Firstly, it includes a subtle but important re-ordering of the words concerning the votes required to be elected. The new wording is in the following order: A candidate must receive the '*votes of an absolute majority of members present*' to be elected President (emphasis added). Whilst, like me, the Committee did not express a view about the advice of Mr Walker referred to above, the new wording makes clear that, in the terms of that advice, in calculating the 'denominator', one must start by calculating the number that represents an absolute majority of the members present. A candidate then requires that number of votes to be elected. Secondly, the term 'absolute majority' is used, being 50 per cent plus one. Thirdly, the detailed provisions in paragraphs (4) and (5)

³³ Apart from the sitting day on 14 September 2021 which had to be abandoned due to the absence of any Minister: *LC Minutes of Proceedings*, 14/9/2021, p 2391. This extraordinary event and the outcomes that flowed from it will no doubt be the subject of a future Presiding Officers and Clerks Conference paper.

formalise and explicitly provide for the process for the election that was followed on 24 March 2021:

13 Ballot

- (1) A candidate must receive votes of an absolute majority of members present to be elected President.
- (2) When a ballot is required, the bells will be rung and the doors locked, as in a division.
- (3) Ballot papers will be distributed by the Clerks to all members in their places. Members must write on the ballot paper the name of the candidate for whom they wish to vote, and deposit it in the ballot box provided by the Clerk.
- (4) If more than two members have been proposed and no candidate receives the votes of an absolute majority of members present, the name of the candidate having the smallest number of votes will be withdrawn, and a fresh ballot will take place and this will be done until a candidate is elected as President by such a majority.
- (5) If after fresh ballots have been conducted under paragraph (4) no member receives the votes of an absolute majority of members present, the Clerk will call for fresh nominations and the procedures under paragraph (2) to (4) will be repeated.
- (6) After fresh nominations have been called under paragraph (5) and the procedures under paragraphs (2) to (4) have been repeated and no member receives the votes of an absolute majority of members present: (a) notwithstanding paragraph (1), if there is an equality of votes, the Clerk will determine, by lot, which of the candidates, having the same number of votes will be withdrawn, as if the candidate had obtained the lesser number of votes and the other member is declared elected, notwithstanding the member has not received the votes of an absolute majority of members present, or (b) if there is not an equality of votes the Clerk will again call for fresh nominations and this procedure will be repeated until either the President is elected by the drawing of lots by the Clerk under paragraph (6)(a) or a candidate receives the votes of an absolute majority of members present.
- (7) The member elected will be conducted to the Chair.

Conclusion and questions

In terms of the overarching theme for this session of the conference – upholding and strengthening Parliament’s constitutional functions – the election of a new President of the NSW Legislative Council in 2021 reinforced an important principle. Although a Premier/Chief Minister/Prime Minister may decide to put forward a candidate for the position of Presiding Officer, it is most certainly a matter for the relevant House of Parliament to choose its Presiding Officer. To be elected, a Presiding Officer must have the support of a majority of members of their House.

However, given how trying these proceedings were, and the impact they had on both members and officers, not to mention the fact that two sitting days were lost and the House was not able to be recalled for 40 days, I have thought long and hard about what I could have done differently

and any lessons for the future. The following are some of the questions I have considered and some of my reflections.

Was I mistaken in my interpretation of SO 13? Not in terms of the Crown Solicitor's advice to read down SO13(3), with which I fundamentally disagree. But what about in terms of Mr Walker's view that in calculating a majority of votes of the members present, one should first set aside any informal votes? I have never quibbled with the advice of Mr Walker before and doubt I will do so in future. However, my difficulty was that having given my advice, it having been relied upon by members, and my having effectively ruled on it, it was then a matter for the House and not me to determine how to respond to Mr Walker's advice. That was the firm view of a majority of members.

Should I have sought Mr Walker's advice pre-emptively when the Leader of the Opposition and crossbench strategists first sought my advice on their proposed strategy? The difficulty with that proposition is that I had considered SO 13 carefully also. Also, I am most uncomfortable with the idea of seeking legal advice on the interpretation of Standing Orders, the interpretation of which is not a simple matter of statutory interpretation but rather must involve consideration of purpose, historical background and precedent, and the nuances of the House in question. Should I have sought Mr Walker's advice at all given then my long-held view that the interpretation of SOs is not a matter of simple statutory interpretation? Perhaps I was forced into it by the paucity of the Crown Solicitor's advice and the strength of the opposition to its conclusions expressed by a majority of members.

At the initial point, when my advice was sought as to how I would rule if the non-Government majority adopted its chosen strategy, should I have more forcefully indicated that it was inappropriate to place the Clerk in the position of having to give such a ruling? Perhaps, but given the stakes, and despite the respect with which members do treat me, I suspect they would have proceeded anyway. Ultimately, as Clerk, I have a role in the election of the President under SOs 12 and 13 and the members would have expected me to undertake that role to the best of my ability, regardless of the level of discomfort involved.

Should I have 'taken the chance to jump out of the two slices of bread' by declaring the Government's nominee elected based on Mr Walker's advice and the point of order taken by the Leader of the Government? Had a majority of members, or their representatives, not made it clear to me that they rejected the advice and took the view that it was now a matter for the House to decide how to respond and not for me, I might have done exactly that. However, I was also conscious of the fact that I had given advice and members had relied on it and acted on it in good faith. I took the view that it would be inconceivable for a Clerk to give advice and then change one's mind and leave members 'hanging out to dry'. Surely, in that case, my position would have been untenable, at least from the point of view of serving and supporting a majority of members of the House. It was far better that I maintain a consistent position and see how events unfolded, including for my own position. Particularly because the course followed upheld an important principle: that it is a matter for the House, not the Premier, to choose its Presiding Officer.

Finally, a couple of thoughts for future Clerks of the NSW Legislative Council. Firstly, make sure you surround yourself with intelligent, loyal staff, because throughout this matter the support of the Deputy Clerk and all the staff of the Department of the Legislative Council was invaluable. Secondly, just as I learnt from watching my predecessors navigate excruciatingly difficult situations, if you want to be a Clerk you need to be prepared to take a position and stand your ground. Thirdly, when you do stand your ground on a really contentious matter, the issue is unlikely to be completely black and white, so you may find yourself in the unenviable position of ultimately having to take a position and stick to it in a situation where the alternative proposition is not also without foundation. Fourthly, once you have provided considered advice and members have relied on it, I do not believe it is viable to change your mind and leave those members 'hung out to dry'. Rather you need to see the matter through to its conclusion and accept wherever the chips fall, including for your own position. Fifthly, take care when collecting your thoughts walking in the Royal Botanic Gardens, as when it quickly gets dark late on an autumn afternoon the Gardens' staff lock the gates at a ridiculously early-hour and you risk getting locked in – not good if you want to avoid the impression of having run away from a difficult sitting experience.