



## The Hon. Don Harwin MLC

Leader of the Government in the Legislative Council

Special Minister of State

Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts

Vice-President of the Executive Council

Mr David Blunt  
Clerk of the Parliaments  
Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Blunt

### President of the Legislative Council

I refer to the ballot conducted on 24 March 2021 for the vacant office of President of the Legislative Council.

As you know, on this occasion only two members, the Hon Natasha Maclaren-Jones MLC and the Hon Peter Primrose MLC, were proposed as President.

Standing Order 13(2) relevantly provides that:

**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.**

Accordingly, the Hon Natasha Maclaren-Jones MLC, being the candidate who received the greater number of votes in the ballot conducted on 24 March 2021, should be declared elected President.

I enclose legal advice from the Crown Solicitor which confirms the position. I intend to table the advice when the House resumes, noting that a member must be chosen to be President before the House proceeds to the despatch of any other business.

In the meantime, I respectfully request that you distribute the advice to members.

Yours sincerely

### The Hon Don Harwin MLC

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29.3.21



Crown  
Solicitor's  
Office

# ADVICE

**Privileged and confidential**

Dear Kate

## **Summary**

1. You seek my very urgent advice today relating to the ballot conducted for the vacant office of President of the Legislative Council on 24 March 2021.
2. In my view, Standing Order 13(2) applies in the circumstances of that ballot. It follows that the Hon. Natasha Maclaren-Jones, who received the greatest number of votes, ought to have been declared elected as President.

## **Background**

3. The office of President of the Legislative Council became vacant following the resignation of the former President, the Hon. John Ajaka, who submitted his resignation to the Governor on the morning of 24 March 2021.
4. The *Hansard* for the Legislative Council on 24 March 2021 records that, following the conduct of the ballot, the Clerk stated that:

"I announce the result of the ballot as follows: the Hon. Natasha Maclaren-Jones, 20 votes, the Hon. Peter Primrose, 14 votes, informal, eight votes. Honourable members, under Standing Order 13, in the absence of one of the two candidates receiving a majority of the votes of the members present, I am not in a position to declare either of the candidates elected."

5. The circumstances in which these eight votes were "informal" is not recorded in the *Hansard*. The Clerk then left the Chair until the ringing of a long bell.
6. The House resumed that afternoon, when a further ballot was conducted. The results of that ballot, as recorded in *Hansard*, were identical to the earlier ballot: the Hon. Natasha Maclaren-Jones received 20 votes, the Hon. Peter Primrose received 14 votes, and eight informal votes. The Clerk, similarly, stated that:

"Under Standing Order 13, in the absence of one of the two candidates receiving a majority of the votes of the members present, I am not in a position to declare either of the candidates elected."

7. The Clerk again left the Chair until the ringing of the long bell. I understand that the House has not yet returned.
8. You seek my very urgent advice on whether I agree that, in these circumstances, pursuant to Standing Order 13, the Clerk ought to have declared that neither candidate was elected as President.

## **Standing Orders 12 and 13**

9. Section 22G(2) of the *Constitution Act 1902* provides that a person "shall be chosen to be President of the Legislative Council" before the Council proceeds to the dispatch of any other business at its



first meeting following a periodic Council election; and “at any other time when the office of President of the Legislative Council becomes vacant.”

10. Section 22G(4) provides that the Standing Rules and Orders of the Legislative Council “may make provision, not inconsistent with this section, for or with respect to the manner of election of the President and associated matters”.
11. Standing Order 12(1) provides that, whenever the office of the President becomes vacant, 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. Standing Order 12(2) provides that a member, addressing the Clerk, may “propose to the House as President a member then present, and move that the member take the Chair of the House as President”.
12. Two members, the Hon. Natasha Maclaren-Jones and the Hon. Peter Primrose, were “proposed” to the House as President in this way. In accordance with Standing Order 12(3), a motion was made regarding each such member, that the member take the Chair of the House as President, and each member addressed the House. (I note that Standing Order 12(3) was amended by a sessional order on 19 March 2021, to remove the requirement that each member so proposed “express a sense of the honour proposed to be conferred on them”.)
13. Standing Order 13 relates to the conduct of a ballot where more than one member is proposed to the House as President. It provides that:

**“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.
- (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.”

**Analysis**

14. I have not considered whether the manner in which the ballot for the election of President was conducted could give rise to any matters that could be determined by a court. Whilst the conduct of the ballot relates to what could be regarded as a matter internal to Parliament, your question requires determining the correct construction of the Standing Orders, made pursuant to ss. 22G(4) and 15 of the *Constitution Act*. Your question therefore raises a legal question on which I am able to advise.
15. The drafting of paragraphs (2) and (3) of Standing Order 13 gives rise to an obvious tension.

16. Paragraph (2), when read by itself, is plainly applicable in the present circumstances, “[w]hen **2 members** have been proposed as President”. In accordance with paragraph (2) “[t]he candidate who has the **greater number of votes** is to be declared elected President, and will be conducted to the Chair”.
17. It would follow that the Hon. Natasha Maclaren-Jones, who received 20 votes compared to 14 votes for the Hon. Peter Primrose, would be required to be declared elected President.
18. On the other hand, paragraph (3) also appears plainly applicable, since it applies “[W]hen **2 or more** members have been proposed”. Paragraph (3) then provides that “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**”.
19. It would follow that neither member would be declared elected because, whilst the Hon. Natasha Maclaren-Jones had the greatest number of votes, she did not also have a majority of the votes of the members present, because eight members’ votes were recorded as informal.
20. It is difficult to resolve the tension between these paragraphs, in circumstances where two members were proposed. There is nothing at all in the text of paragraph (2) – particularly the requirement that the candidate who has the greater number of votes “is to be declared elected President, and will be conducted to the Chair” – to suggest that outcome is subject to, or dependent upon, anything in paragraph (3).
21. The history of the development and drafting of Standing Order 13, and its predecessors, is described in the *Annotated Standing Orders of the Legislative Council*, at pp. 38-41. I note that Standing Order 13 was made in 2004, and has not been amended by any current sessional orders. Immediately prior to its introduction in 2004, in accordance with the then s. 22G(4) of the *Constitution Act*, the President was to be chosen in accordance with the procedures for the election of the President of the Senate. I do not consider that this history assists in resolving the present question of construction.
22. I note that the authors of the *Annotated Standing Orders* state that “[t]he candidate who has the greater number of votes is declared elected President, provided that the member also has a majority of the votes of the members present” (p. 39). That statement is not qualified where only two candidates are proposed, so it may be assumed the authors preferred the view that paragraph (3) would prevail over (2) where only two candidates are proposed.
23. I also note, by contrast, that Professor Twomey, in considering Standing Order 13, states that: (*Constitution of New South Wales*, 2004, at p. 480; emphasis added)  
  
“**If two Members are nominated, the Member with the most votes is elected President.** If more than two Members are nominated, the Member obtaining a majority of votes is elected. If no candidate has that majority, the name of the Member with the smallest number of votes is withdrawn and a fresh ballot is held.”
24. I prefer the view, for the reasons that follow, that in the present circumstances paragraph (2) of Standing Order 13 applies in accordance with its terms. It follows, in my view, that the Hon. Natasha Maclaren-Jones, who received the greatest number of votes, ought to have been declared elected President and conducted to the Chair.
25. **First**, I do not see any way in which paragraphs (2) and (3) can be reconciled so that they can be read harmoniously. In my view they are irreconcilably inconsistent, in circumstances where two members



are proposed and a member receives the greatest number of votes but not a majority of the votes of members present.

26. In these circumstances, conventional principles of construction would suggest that paragraph (2) ought to be preferred, on the basis it is the more specific provision. Paragraph (2), of course, applies **only** to the circumstances where two members are proposed, whereas paragraph (3) applies to the broader circumstances where two **or more** members are proposed.
27. **Secondly**, the conclusion that paragraph (2) prevails is supported by other considerations having regard to the text and purpose of Standing Order 13 as a whole.
28. It appears significant that paragraph (2), which also applies in the circumstances of paragraph (3), provides that 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 "name of the candidate for whom they wish to vote" can, I think, only refer to one of the members who has been proposed as President in accordance with Standing Order 12.)
29. The purposes of Standing Order 13 should, in my view, be identified on the assumption that all Members present would - as apparently *required* by Standing Order 13(2) - cast a valid vote. Standing Order 13 should not readily be construed on the basis that, where two members are proposed, its purposes would be advanced by facilitating a scenario where members - who are present but choose not to vote, or to vote "informally" - could frustrate the outcome of the ballot process such that no member could be declared elected. Section 22G(1) of the *Constitution Act* requires that there be a President of the House, and the effect of s. 22G(2) is that the election of a President is, in effect, always required to be the first order of business of the Council.
30. Where all members who are present cast valid votes, and there are only two candidates, the candidate who receives the greatest number of votes will, of course, also receive the majority of the votes of the members present.
31. By contrast, the purpose of paragraph (3) is readily discernible in circumstances where *more than two* members are proposed. In these circumstances, it is entirely foreseeable that the member who receives the most votes may not receive a majority of the votes of the members present. In that event, paragraph (4), in order to facilitate a successful election, provides that the name of the candidate having the smallest number of votes will be withdrawn, and a fresh ballot will take place. This process can be repeated "as often as necessary", until the member who receives the most votes also commands the support of a majority of the members present.
32. **Thirdly**, paragraph (4) gives rise to a further difficulty, if it were concluded that paragraph (3) can be applied in accordance with its terms where only two members are proposed and circumstances such as the present arise.
33. Paragraph (4) applies "[I]f no candidate has **such a majority**", which must I think refer to the majority of the kind described in paragraph (3). It is instructive to consider how paragraph (4) were to apply if it were the case - contrary to my preferred view - that paragraph (3) applies in circumstances where only two members are nominated.
34. In that case, it would appear to follow that the procedure in paragraph (4) would then need to occur. In other words, "the name of the candidate having the smallest number of votes will be withdrawn". It would follow that only one candidate would remain, and would therefore be elected as President. It would not then, of course be necessary for a "fresh ballot" to take place, which would perhaps

give rise to a further question whether the application of paragraph (4) could be read down, so that it would not apply where only two members were proposed.

35. This difficulty in determining the proper application of paragraph (4) would, of course, not arise if paragraph (2) were applied in accordance with its terms.

36. If you have any further questions please contact either Tom Chisholm or me.

**Karen Smith**  
Crown Solicitor