

PROCEEDINGS ABOUT THE VALIDITY OF AN ELECTION TO PARLIAMENT

Application of Part 2

2.1 This Part applies to proceedings brought under section 54 of the Representation of the People Act [Cap 146] about the validity of an election to Parliament.

[2.1.1] Section 54 Section 54 (Elections only to be challenged under this Act) provides:

(1) *The validity of any election to Parliament may be questioned by a petition brought for that purpose under this Act and not otherwise.*

(2) *Every election petition shall be heard by the Supreme Court.*

[2.1.2] Applicability of s.54(1) to Constitutional complaints If a person wishes to complain about the validity of an election based on grounds amounting to a breach of the *Constitution* then it is doubtful whether s.54(1) would apply as art.53 of the *Constitution* provides an independent option which cannot be circumscribed by the Act. The procedure relating to such a constitutional complaint would be governed by the *Constitutional Procedures Rules* 2003.

Starting Proceedings

CPR r2.2, 2.3
ConPR rr2.2(1),
3.2(1), 4.2(1), 5.2(1)

2.2 (1) A petition must be filed in an office of the Supreme Court anywhere in Vanuatu.

[2.2.1] See CPR [2.3.1] for the location of offices.

[2.2.2] From when petition may be filed The purpose of a petition under this Part is to challenge to validity of an "election". This word is not defined in the *Constitution*, *Representation of the People* [Cap 146] (except to say that it includes a by-election) or the *Rules*. Section 57 of the Act provides that a petition "shall be presented within 21 days of the publication in the *Gazette* of the results of the election", but this does not expressly prohibit the filing of a petition before gazettal. Accordingly, a question arises as to when an election may first be challenged, noting that many election disputes complain about pre-polling conduct. The notion of an election as a process was discussed in *McDonald v Keats* [1981] 2 NSWLR 268 at 274. The question arose before a two member Court of Appeal in *In re the Constitution, Kalpokas v Hakwa* [2002] VUCA 12; CAC 6 of 2002 in the slightly different context of ascertaining the life of Parliament. The court held that the date of election (as the word was used in art.28(1) of the *Constitution*) meant the day appointed for the exercise of the right of voting by citizens. If that is also the appropriate meaning of "election" in the Act, then it would be possible to commence an election petition from the day on which voting takes place, ie. before any result is announced or gazetted. On the other hand, if it is open for the Act to create a limitation period specifying the latest time a petition may be filed then it must also be open to specify the earliest, regardless of the meaning of the word "election" in the *Constitution*. Perhaps a limitation of the latter kind is implied in s.54? In *Masive v Okuk and Kenderop* [1985] PNGLR 263 the Supreme Court of Justice held that the word "election" in a provision in similar terms to s.54 should be interpreted as meaning an election outcome. It should be noted, however, that this conclusion was complementary to a similar interpretation of the word in the *Organic Law*. The position in Vanuatu may not yet be settled.

[2.2.3] Time limit Section 57, *Representation of the People* [Cap 146] provides for a non-extendable 21 day limitation running from the publication of election results in the *Gazette* or, where applicable, running from the date of any alleged payment or reward. This prevents a petitioner from amending a petition to include new grounds unless the amendment is made within the 21 day period: *Jimmy v Union Blong Moderate Pati (UMP)* [1982] VUSC 21; CC 136 of 1982; *Jimmy v Rarua* [1998] VUCA 4; CAC 2 of 1999; *Naukaut v Naunun* [1999] VUSC 2; EP 31 of 1998. The Vanuatu authorities echo a long line of Commonwealth authority to this effect, commencing with *Maude v Lowley* (1874) LR 9 CP 165.

(2) A petition must be in Form 1.

(3) The Registrar must not accept the petition unless a deposit of VT 20,000 is paid when it is filed.

- [2.2.4] Validity of rule There is an arguable inconsistency between this rule and the Act in that s.56 requires such a deposit to be paid as security for costs but does *not* require the deposit to be filed at the same time as the petition, but only within the 21 day limitation period provided by s.57. Accordingly, a petition would be valid if filed without a deposit provided the deposit is subsequently paid within time. Accordingly, this rule is arguably *ultra vires* the rule-making power in s.59(1) of the Act and a fetter on access to the courts: See generally *Chester v Bateson* [1920] 1 KB 829; *R & W Paul Ltd v Wheat Commission* [1937] AC 139.

What a petition must contain

ConPR rr2.3, 3.3,
4.3

2.3 (1) A petition must set out:

(a) whether the person was registered to vote, or claims to have been a candidate, at the election; and

- [2.3.1] Standing See s.55, *Representation of the People* [Cap 146] as to eligibility requirements for bringing a petition. If a person wishes to complain about the validity of an election based on grounds amounting to a breach of the Constitution then it is doubtful whether s.55 would apply as art.53 of the Constitution provides an independent cause of action without standing requirements. It may not be open to the Act to limit the operation of this article. In any event, it is arguable that s.55, as a restriction on the ability of persons to have recourse to the courts offends art.5(1)(d) of the *Constitution*.

(b) the grounds on which the election is disputed; and

- [2.3.2] Statement of grounds The grounds on which a petition is based are different from the facts on which it is based: *Holloway v Ivarato* [1988] PNGLR 99 at 101-2. Accordingly, it is not sufficient merely to set out one or the other. What is required is for the petitioner to set out the grounds so as to enable the Court and the other side to be clear about what allegation is to be met: *In the matter of the Organic Law, Ijape v Kimisopa* [2003] PGNC 144.
- [2.3.3] Section 62 applications There is no right to a re-count pursuant to s.62 of the Act and this should not be sought as a remedy. A re-count is a discretionary interlocutory order which may be made by the court where a petitioner is claiming to be the successful candidate, even though not declared as such. There must be some evidence to enliven the court's discretion: *Samuel v Electoral Commission* [1998] VUSC 69; CC 33 of 1998. An application under s.62 which is merely a fishing expedition may lead to an order for indemnity costs: *Patunvanu v Charlie* [2004] VUSC 28; CC 152 of 2004. The reality, however, is that recounts have been ordered on the slimmest assertions: See generally *Serel v Principal Electoral Officer* [2008] VUSC 74; EPC 8 of 2008; *Worwor Channel v Brown* [2008] VUSC 75; EPC 3 of 2008; *Maliu v Principal Electoral Officer* [2008] VUSC 78; EPC 7 of 2008.
- [2.3.4] Striking out petitions. This may be done in the court's inherent jurisdiction. See further rr.2.6(3) and 2.9(1)(a). This occurred in *Tasso v Omawa* [2009] VUSC 1; EPC 1 of 2008.

(c) the facts on which the petition is based; and

- [2.3.5] Statement of facts The grounds on which a petition is based are different from the facts on which it is based: *Holloway v Ivarato* [1988] PNGLR 99 at 101-2. Accordingly, it is not sufficient merely to set out one or the other. What is required is for the petitioner to set out the facts sufficient to invalidate an election: *Tasso v Omawa* [2009] VUSC 1; EPC 1 of 2008. These will depend on the ground alleged: *In the matter of the Organic Law, Ijape v Kimisopa* [2003] PGNC 144; *Joel Paua v Nagle* [1992] PNGLR 563 at 564.
- [2.3.7] Section 61(1) allegations Petitions relying on s.61(1)(a), (b) or (d) of the Act must plead and prove that the behaviour complained of was or was likely to affect the result of the election: *In re Election Petition, Seru* [1984] VUSC 2; [1980-1994] Van LR 84; *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999; *In the matter of the Organic Law, Ijape v Kimisopa* [2003] PGNC 144; *In the matter of the Organic Law, Mond v Nape* [2003] PGNC 149. It is not sufficient merely to achieve an alteration in the number of votes, but with the same final result: *Samuel v Electoral Commission* [1998] VUSC 69; CC 33 of 1998; *In the matter of the Organic Law, Ijape v Kimisopa* [2003] PGNC 144; *Sope v Principal Election Officer* [2009] VUSC 62; EPC 6 of 2008 at [46]. The standard of proof is the balance of probabilities: *Sope v Principal Election Officer* [2009] VUSC 62; EPC 6 of 2008 at [43]; *contra: Lop v Isaac* [2009] VUSC 23; EPC 5 of 2008; *Taranban v Boedoro* [2004] VUSC 15; CC 149 of 2004 (both of which probably confuse, with respect, the principle that when assessing the probabilities the court will have in mind as a factor, to whatever

extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability: *Solomon v Turquoise* [2008] VUSC 64; CC 163 of 2006 & 29 of 2007 at [10] – [12]).

- [2.3.7] **Brevity** It is suggested that, like a statement of the case under the *Civil Procedure Rules*, the facts should be stated as briefly as possible. A fuller exposition of the facts ought to be contained in the sworn statement described in subr.(2)(a).

(d) an application for an order about service of the petition.

- [2.3.8] **General observations** This is presumably a reference to an application for the order contemplated by r.2.6(2)(b)(ii) to be made at the first conference. Section 58(2) of the Act provides that the Supreme Court “shall cause to be served a copy of the petition on any person whose election may be affected”. This is an obligation placed on the court independently of any such application and orders. It is difficult to understand the reason for this requirement which seems generally to be ignored without comment: See, for a recent example, *Sope v Principal Electoral Officer* EPC 6 of 2008 (filed 1 October 2008).

ConPR rr2.3(2),
4.3(2)

(2) The petition must have with it:

- [2.3.9] **Necessity of sworn statements** A petition which does not attach the requisite sworn statements is incompetent and may be struck out: *Tasso v Omawa* [2009] VUSC 1; EPC 1 of 2008.

(a) a sworn statement by the petitioner in support of the petition, setting out details of the evidence the petitioner relies on; and

- [2.3.10] See further *CPR* Part 11.

(b) any other sworn statements that support the petition.

- [2.3.11] **Meaning of “any sworn statement” and content** Though there is room for doubt, it is suggested that the requirement to include “any sworn statement” in support of the application is in fact a requirement to include **as many** sworn statements as are necessary to establish at least a *prima facie* case. Obviously a petitioner may not be able to provide **all** the evidence on which he will eventually rely at the time of filing. See for example *Tasso v Omawa* [2009] VUSC 1; EPC 1 of 2008.

- [2.3.12] **Voting data** Figures are material in demonstrating the likelihood of a result being affected and these will have to be the subject of evidence in an appropriate case: *Saracella v Morgan* [1962] VR 201; *In the matter of the Organic Law, Mond v Nape* [2003] PGNC 149. See further [2.3.7].

- [2.3.13] **Admissibility of returning officer reports** These were held to be admissible as “official reports” in *In re Petition by Louis* [1982] VUSC 23; CC 138 of 1982.

(3) A sworn statement must be in Form 2.

Parties

2.4 (1) The parties to proceedings under this Part are:

(a) the petitioner; and

(b) any person whose election is affected by the petition; and

- [2.4.1] **Meaning of “any person whose election is affected”** This means at least the successful candidate: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999.

(c) the Principal Electoral Officer, if the Court orders he or she is to be a party; and

(b) anyone else the Court orders at any time to become a party.

(2) The parties to the proceedings other than the petitioner are called the respondents.

Filing

2.5 (1) A petition is filed by lodging 4 copies of the petition and sworn statement with the Court.

(2) After the petition is filed and before returning sealed copies to the petitioner, the Court must:

[2.5.1] See *CPR* r.18.5 as to sealing.

(a) fix a date for the first hearing in the matter; and

[2.5.2] First hearing or first conference The paragraph requires that a date be set for a “first hearing”. This would appear to relate to r.2.6 (First Hearing). Rule 2.9 (Conference), however, appears to relate to the same event.

(b) tell the petitioner in writing of this.

(3) The first hearing date must be as soon as practicable and in any case within 21 days after the filing date.

First hearing

CPR r12.2

2.6 (1) The first hearing is to be in open court.

[2.6.1] Meaning of “first hearing” This is the hearing which, according to r.2.5(2)(a), must be fixed upon filing of the petition. Rule 2.9, however, which uses the term “first Conference” appears to relate to the same event.

[2.6.2] Meaning of “open court” See *CPR* [12.2.1] – [12.2.2].

(2) At the first hearing,

CPR r17.8(3)(a), (5)

(a) the petitioner must satisfy the Court that there is a foundation for the petition; and

[2.6.3] Onus on petitioner The onus is on the petitioner to lay a foundation for the petition on the basis of the sworn statements already filed: *Tasso v Omawa* [2009] VUSC 1; EPC 1 of 2008.

(b) the Court must make orders about:

(i) who is to be a party to the proceeding; and

(ii) service of the petition; and

[2.6.4] See r.2.3(1)(d) and s.58 *Representation of the People* [Cap 146].

(c) the Court must fix a date for the first Conference in the proceeding and write this date on the petition.

CPR r17.8(5)

(3) If the Court is not satisfied that there is a foundation for the petition, the Court must strike out the petition.

[2.6.5] See further r.2.9(1)(a) and [2.3.2]. This occurred in *Tasso v Omawa* [2009] VUSC 1; EPC 1 of 2008.

Service

2.7 (1) The petition must be served within the time, and on the persons, required by the order under Rule 2.6.

[2.7.1] See r.2.3(1)(d) and s.58 *Representation of the People* [Cap 146].

CPR r5.13(2)
ConPR rr2.6(3),
3.6(3), 4.6(3)

(2) The petitioner must file a sworn statement setting out details of the time and manner of service of the petition before the petitioner takes any further action in the proceeding.

Response

2.8 (1) A party to the proceedings who wishes to contest the proceedings must file a response within 14 days of being served with the application.

CPR r4.5(3)
ConPR rr2.8(2),
4.8(2)

(2) A response:

(a) must not deny the petitioner's claims generally but must deal with each paragraph of the petition; and

[2.8.1] See further *CPR* [4.5.3] as to this requirement.

(b) must be in Form 3.

ConPR rr2.8, 3.7,
4.8, 5.4

Conference

[2.9.1] Meaning of "conference" This rule relates to the "first Conference" which is a different term to that used in rr.2.5(2)(b) and 2.6, but would appear to refer to the same event.

CPR r6.4(2)(a), (b)

2.9 (1) At the first Conference, the Court may:

(a) deal with any applications to strike out the petition; and

[2.9.2] See further r.2.6(3).

(b) issue a summons under Rule 2.10; and

(c) order that a person may be legally represented; and

(d) order that a person become a party; and

(e) fix a date for another Conference, if one is necessary, or fix a hearing date; and

CPR r6.4(2)(b)

(f) make orders about:

(i) filing and serving sworn statements by the parties and their witnesses; and

- (ii) disclosure of information and documents, in accordance with Part 8 of the Civil Procedure Rules; and
- (iii) filing and serving written submissions and lists of authorities to be relied on; and
- (iv) giving notice to witnesses to attend the hearing; and
- (v) any other matter necessary to assist in managing the hearing of the petition.

[2.9.3] Function of conferences The function of conferences is, generally, to enable the court to actively manage the proceedings. See further CPR rr.6.2(1) and 6.4(1).

(2) If the petitioner is challenging the election on the ground that the petitioner had a majority of lawful votes, the Court at the first Conference may also order:

- (a) an examination of the counted and void votes; and
- (b) an examination of the counting of votes.

ConPR rr2.9, 4.9

Summons to disclose documents and information, produce documents and objects, etc

CPR r11.15(1)

2.10 (1) The court may at any time order that:

- (a) a summons be issued requiring a person to attend court to give evidence and produce documents or objects; and

[2.10.1] Disclosure of vote Section 65, *Representation of the People* [Cap 146] provides that no person may be compelled to disclose how they voted.

- (b) a person allow the Court to inspect an object and visit a place.

CPR r11.15(3)

(2) The order may be made at a party's request or on the Court's initiative.

[2.10.2] Curing deficiencies This rule may be used to obtain information to cure deficiencies in the petition: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999.

[2.10.3] Form of summons This must be in the form contained in Sched.6 to the Act: s.59(4), *Representation of the People* [Cap 146].

Hearing

CPR r12.2
ConPR rr2.10(1),
3.8(1), 4.10(1), 5.5

2.11 (1) The hearing of a petition must be in open court.

[2.11.1] See CPR [12.2.1] – [12.2.2] as to the meaning of “open court”. Note also the additional requirement under s.59(3), *Representation of the People* [Cap 146] that proceedings of the court be “recorded in writing.”

CPR r11.3
ConPR rr2.10(3),
4.10(3)

(2) Evidence in chief is to be given by sworn statement unless the Court orders otherwise.

[2.11.2] As to the circumstances which may justify departure see CPR [11.3.2].

CPR r12.1(4)
ConPR rr2.10(4),
3.8(3), 4.1o(4)

(3) The hearing is to be conducted as follows, unless the Court orders otherwise:

- (a) the petitioner makes an address opening his or her case and, if evidence is to be given orally, brings evidence in support of his or her case;
- (b) the respondent and anyone entitled to be legally represented cross-examine the petitioner's witnesses;
- (c) the petitioner re-examines his or her witnesses;
- (d) the respondent and anyone entitled to be legally represented make an address opening their case and, if evidence is to be given orally, bring evidence in support of their case;
- (e) the petitioner cross-examines the respondent's witnesses;
- (f) the respondent and anyone entitled to be legally represented re-examine their witnesses;
- (g) the petitioner makes a closing address;
- (h) the respondent and anyone entitled to be legally represented make their closing addresses.

ConPR rr2.10(5),
4.10(5)

(4) At the hearing the Court may:

- (a) ask questions of the witnesses; and
- (b) call witnesses on its own initiative; and
- (c) inspect an object and visit a place; and
- (d) take any other step necessary to further the enquiry into the petition and help the Court make a decision on the petition.

[2.11.3] See further s.59, *Representation of the People* [Cap 146].

ConPR rr2.11, 3.9,
4.12, 5.6

Judgment

CPR r12.11

2.12 (1) After the hearing the Court must give judgment, as set out in this Rule.

(2) The judgment must be announced in open court.

[2.12.1] See CPR [12.2.1] – [12.2.2] as to the meaning of “open court”.

CPR r13.1(1)

(3) The Court must state its reasons for making its decision.

[2.12.2] See further CPR r.13.1(1) and annotations.

CPR r13.1(4)

(4) The Court must ensure that copies of the judgment and reasons, are available to the public.

ConPR rr2.12, 4.13,
5.7

Enforcement and costs

2.13 (1) When the Court gives its judgment, or as soon as practicable after giving judgment, the Court must:

ConPR r3.10

(a) decide the question of costs; and

[2.13.1] See further *CPR* Part 15.

(b) make an enforcement order for the costs.

[2.13.2] See further *CPR* Part 14 and subs.(3).

(2) An enforcement order must set out how and when the Court's decision is to be enforced.

(3) Part 14 of the Civil Procedure Rules applies to the enforcement order.

[2.13.3] Deduction of costs from deposit The court may order that costs be deducted from the security deposit: s.56(3), *Representation of the People* [Cap 146].