

Schedule 9A Countback elections

(Section 393C(1))

Part 1 Preliminary

1 Definitions

In this Schedule—

ballot-paper includes a vote record.

close of applications—see section 3(3) of this Schedule.

eligible candidate, in a countback election, means a person who has been declared by the returning officer under section 4(a) of this Schedule to have duly applied to be a candidate in the countback election.

non-participating candidate means a person who was a candidate at the original election and is neither an eligible candidate nor a previously elected councillor.

original election, in relation to a vacancy, means the ordinary election of councillors in respect of which the vacancy has occurred at which the vacating councillor was elected or in a case where the vacating councillor was elected under this Schedule, the councillor who was the predecessor (whether immediate, intermediate, or original) of that councillor, was elected.

previously elected councillor means a person who—

- (a) was elected as a councillor at the original election, or
- (b) was declared elected as a councillor under this Schedule after the original election.

returning officer means the person conducting the countback election in accordance with section 291A(4) of the Act.

vacating councillor means the person whose departure created the casual vacancy (even if that person never became a councillor).

Note. If a candidate who is nominated for election to a civic office in respect of a ward or area dies after the day when the poll at a contested election closes, but before the declaration of the election, the candidate is a “vacating councillor” even if that person never became a councillor by operation of section 233(2)(a) of the Act.

2 Notice of casual vacancy

Note. Section 285 of this Regulation requires the general manager of a council of the area to give notice of a casual vacancy to the Electoral Commissioner within 7 days of its occurrence.

- (1A) After a casual vacancy occurs that is to be filled by a countback election, the general manager of the council concerned must, in relation to an election administered by an electoral services provider, give notice of the vacancy to the electoral services provider within 7 days.
- (1) After a casual vacancy occurs that is to be filled by a countback election, the electoral services provider concerned (in relation to an election administered by an electoral services provider) or the Electoral Commissioner (in relation to an election administered by the Electoral Commissioner) must—
 - (a) give notice of the vacancy to the returning officer who conducted the election at which the person whose departure created the casual vacancy was elected or, if it is not possible for the returning officer to conduct the countback election, the substitute returning officer at that earlier election, or
 - (b) if not possible for that returning officer or that substitute returning officer to conduct the countback election, appoint a returning officer in accordance with the Act.

- (2) The notice under subsection (1) must be given or appointment made—
 - (a) in relation to an election administered by an electoral services provider—within 14 days of the electoral services provider being notified of the casual vacancy under subsection (1A), or
 - (b) in relation to an election administered by the Electoral Commissioner—within 14 days of the Electoral Commissioner being notified of the casual vacancy under section 285 of this Regulation.
- (3) Within 14 days of being given notice or being appointed, the returning officer who is to conduct the countback election must—
 - (a) arrange for the publication of a notice of the casual vacancy as follows—
 - (i) in relation to an election administered by an electoral services provider—on both the council’s website and the electoral services provider’s website,
 - (ii) in relation to an election administered by the Electoral Commissioner—on the websites of the Electoral Commission and the relevant council, and
 - (b) give notice in accordance with this section to each person (at the person’s last known address or by email to an email address specified by the person for the giving of notice of this kind) who, in the opinion of the returning officer, may be entitled to make an application under this Schedule in relation to the vacancy.
- (4) The notice under subsection (3) must—
 - (a) declare that a casual vacancy in the office of a specified councillor exists that is to be filled by a countback election, and
 - (b) advise that a person may apply to be a candidate in accordance with this Schedule, and
 - (c) specify the date and time that applications close, and
 - (d) specify the date, time and place for the conduct of the countback election, and
 - (e) advise that an eligible candidate is entitled to appoint scrutineers for the countback election, and
 - (f) give the contact details of the returning officer.
- (5) The date for the conduct of the countback election must be the date which in the opinion of the returning officer is the earliest practicable date to conduct the countback election, but is—
 - (a) at least 14 days after the date of the publication of the notice of the relevant council’s website, and
 - (b) not more than 49 days after the date of the casual vacancy occurring.

3 Candidates for casual vacancy

- (1) A person may apply to be a candidate in the countback election if the person—
 - (a) was a candidate at the original election, and
 - (b) did not withdraw the person’s nomination from, and was not elected at, that election, and
 - (c) is still eligible to be elected as a councillor at the close of applications.
- (1A) A person elected to the office of councillor or mayor at the original election, or at a countback election under this Schedule, who subsequently vacates the office by resignation or disqualification may not apply to be a candidate in a subsequent countback election.

- (2) An application under this section is to be made in the way approved by the election manager and must contain—
 - (a) a statement by the applicant that he or she consents to be a councillor if elected, and
 - (b) a declaration that the applicant is still eligible to become a councillor.
- (3) An application must be lodged with the returning officer before noon on the 10th day after the day on which public notice of the vacancy was given under this Schedule (the *close of applications*).
- (4) An applicant may withdraw his or her application by giving the returning officer written notice of withdrawal in the way approved by the election manager before applications close.
- (5) An application or a withdrawal of an application under this section may be made by electronic means approved by the election manager.

4 Publication of candidates' details

If one or more persons have applied to be a candidate in accordance with this Schedule, the returning officer must, as soon as practicable after the close of applications—

- (a) publicly produce all the applications and declare each person who has duly applied to be a candidate (the *eligible candidates*), and
- (b) arrange for a notice containing particulars relating to each candidate to be published on the website of the relevant council.

5 Determination of candidate to fill casual vacancy

- (1) If there is only one eligible candidate in relation to a casual vacancy, the returning officer must declare the candidate elected.
- (2) If there are no candidates in relation to a casual vacancy—
 - (a) the returning officer is to declare that there are no candidates and inform the general manager of the relevant council accordingly, and
 - (b) the countback election fails.
Note. Section 291A(5)(b) of the Act provides that if a countback election fails a by-election must be held to fill the casual vacancy.
- (3) If there is more than one eligible candidate in relation to a casual vacancy, a countback election must be conducted in accordance with Part 2.

6 Filling of multiple casual vacancies

- (1) If there is more than one casual vacancy to be filled at any time, the casual vacancy that occurred first is to be filled first.
- (2) If, in the opinion of the returning officer, it is impossible to determine which vacancy occurred first, the vacating councillor who was elected first (either at the same election or in point of time) is deemed to have left office before the other vacating councillor or councillors.
- (3) If it is still not possible to determine which vacancy occurred first despite subsection (2), the returning officer must determine which casual vacancy is to be filled first by an approved method of random selection (including by electronic means).
- (5) The returning officer may comply with section 5 of this Schedule in respect of a casual vacancy even while the returning officer or another returning officer is complying with that section in respect of another casual vacancy.

Part 2 Countback procedures

7 Casual vacancy to be filled by recount

- (1) The countback election is to be conducted by a recount of the votes on the ballot-papers used in the counting of votes at the original election and the result is to be ascertained in accordance with Schedule 5.
- (2) On the recount under subsection (1) a preference indicated on a ballot-paper for a previously elected councillor whose seat has become vacant is to be disregarded and the ballot-paper is to be treated as if the numeral indicating any subsequent preference had been altered accordingly.
- (3) If on the recount under subsection (1) a non-participating candidate is elected that election has no effect and the returning officer is to terminate that recount and repeat the procedure of recounting the votes on the ballot-papers until an eligible candidate is elected.
- (4) On a recount under subsection (3) a preference indicated on a ballot-paper for—
 - (a) a previously elected councillor whose seat has become vacant, or
 - (b) a non-participating candidate who has been elected on the recount under subsection (1) or on a previous recount under subsection (3),is to be disregarded and the ballot-paper is to be treated as if the numeral indicating any subsequent preference had been altered accordingly.
- (4A) If, on any recount under this Schedule, more than one candidate would be elected, the following applies instead—
 - (a) only one candidate is taken to be elected, being the candidate who has the highest number of votes,
 - (b) if 2 or more candidates have an equal number of votes—
 - (i) if the number of votes at the last count or transfer was unequal—the candidate who had the highest number of votes at the last count or transfer at which the candidates had an unequal number of votes is taken to be elected, or
 - (ii) otherwise—the elected candidate is to be determined by a method of random selection, including by electronic means, approved by the election manager.
- (5) A recount under this Schedule does not affect the election of a previously elected councillor and where a previously elected councillor is elected or excluded during a recount that election or exclusion has effect for the purposes of the continuation of the recount and for those purposes only.
- (6) If no recount under subsection (1) or (3) results in the election of an eligible candidate—
 - (a) the returning officer is to declare that the countback election has failed, and
 - (b) inform the general manager of the relevant council accordingly.

Note. Section 291A(5)(b) of the Act provides that if a countback election fails a by-election must be held to fill the casual vacancy.

8 Declaration of result

- (1) As soon as possible after the conclusion of the countback election, the returning officer must—
 - (a) inform the persons present of the result, and
 - (b) immediately notify the election manager of the result, and

- (c) inform the participating eligible candidates (in person, in writing, by facsimile, by telephone, by email, by text message or in any other way) as soon as practicable after the result is ascertained—
 - (i) of the result of the countback, and
 - (ii) when the returning officer's declaration under this section will be available for inspection at the office of the relevant council, and
 - (iii) that the information contained in a notice under subsection (5) is to be published on the election manager's website for at least one month.

Note. Section 353 (Recount) of this Regulation does not apply to a countback election.

- (2) The election manager is to approve of the returning officer's declaring of the countback election in writing as soon as practicable after the notification of the result.
- (3) The declaration is to be signed by the returning officer and is to state the number of votes recorded for each candidate and the names of the candidate declared elected.
- (4) After the election is declared—
 - (a) the election manager must deliver or send a copy of the written declaration to—
 - (i) the Secretary, and
 - (ii) the Chief Executive Officer of Local Government NSW, and
 - (iii) the relevant general manager, and
 - (iv) for an election administered by an electoral services provider—the Electoral Commissioner, and
 - (b) the general manager of the council must display the written declaration in a conspicuous position at the office of the relevant council.
- (5) The election manager must cause the information in the declaration to be published on the election manager's website for at least one month.

10 Application of other provisions

- (1) The following provisions of this Regulation apply to a countback election with all necessary modifications—
 - (a) section 337 (Scrutineers),
 - (a1) section 346 (Persons present at scrutiny and count),
 - (b) section 365 (Obstruction of election officials),
 - (c) section 368 (Persons present in polling place),
 - (d) section 369 (Misconduct by scrutineers),
 - (e) section 370 (Misconduct at polling place or pre-poll voting office).

Note. Section 329 (Can the holder of a civic office be dismissed?) of the Act applies to a person holding civic office who has been elected at a countback election.

- (2) For the avoidance of doubt, sections 353 (Recount), 354 (Who pays for the recount?) and 355 (Result of recount) of this Regulation do not apply to a countback election.

Part 3 Miscellaneous

11 Costs

Expenses incurred by the election manager in connection with a countback election are to be met by the council.