

PRELIMINARY

Title and commencement

1.1 (1) These Rules are the Election Petitions Rules.

- [1.1.1] **History of election disputes** Election disputes in the Westminster system of government were originally dealt with by Parliament, and subsequently, by the courts. A short history of election disputes and the evolution of the “extremely special” jurisdiction conferred by art.54 of the Constitution is to be found in the decision of the majority in *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999. See also *Morgan v Simpson* [1975] 1 QB 151 at 161-4; [1974] 3 All ER 722 at 725-7.
- [1.1.2] **History of rules** The new *Rules* (Order 29 of 2003) came into force on 1 August 2003. Rules relating to election disputes were formerly to be found in the *Election Petition Rules* 1998 which came into force on 7 May 1998. Unusually, the new *Rules* do not expressly repeal the old. It is likely that the old *Rules* were impliedly repealed by the new.
- [1.1.3] **Rule-making power** The *Rules* were made by the Chief Justice under s.59(1), *Representation of the People* [Cap 146] which permits the making of rules “not inconsistent with this Act concerning the conduct of proceedings before the Supreme Court under [Part 16], the times and places of hearings and adjournment thereof as he shall consider proper”. Whether this is qualitatively different to the usual power to make rules for “practice and procedure” is uncertain and there appears to be at least superficial tension between the expression of this power and r.1.2.
- [1.1.4] **Rules to be read with Act** Section 59 of the *Representation of the People Act* also contains important and detailed procedural provisions.

(2) These Rules come into operation on 1 August 2003.

Purpose

1.2 The purpose of these Rules is to set out the procedures to be used in proceedings about electoral disputes brought in the Supreme Court under Article 54 of the Constitution and Section 54 of the Representation of the People Act [Cap 146].

- [1.2.1] **General observations** This rule generates a number of uncertainties. First, the purpose of the *Rules* is not, contrary to expectation and convention, expressed in the similar terms to the enabling power in s.59, *Representation of the People* [Cap 146], as to which see [1.1.3]. Second, the Rules are said to set out the procedures relating to disputes brought under art.54 of the *Constitution* and s.54 of the *Representation of the People Act*. Part 2 of the *Rules* (noting r.2.1) seems clearly designed to relate to the first part of this purpose – disputes under art.54 and s.54. Part 3, however, (noting r.3.1) is designed to relate to proceedings about disqualification and vacation – these have nothing to do with disputes under either art.54 of the *Constitution*, nor s.54 of the Act. Rather, this would seem to be a subject for *Members of Parliament (Vacation of Seats)* [Cap 174], which contains no rule-making power. See further [3.1.1].

ConPR r1.3
PaAR r1.3

Application of the Civil Procedure Rules

1.3 If these rules do not make provision for a matter relating to an electoral dispute proceeding, the Civil Procedure Rules apply to that matter.

- [1.3.1] **Rarity** The majority decision of the Court of Appeal in *Rarua v Electoral Commission* [1999] VUCA13; CAC 7 of 1999 noted that it will rarely be necessary to look beyond *Representation of the People* [Cap 146] and the (former) *Rules*. In *Samuel v Electoral Commission* [1998] VUSC 69; CC 33 of 1998, however, the Chief Justice drew from common law authority relating to the manner and nature of an application for a recount.

ConPR r1.4
PaAR r1.4

Overriding objective and case management

CPR r1.3

1.4 (1) The Supreme Court must give effect to the overriding objective, as set out in the Civil Procedure Rules, when it:

[1.4.1] **Prompt determination** In election matters it is important that disputes be determined quickly in recognition of the public interest in early finality of election outcomes: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999 (approving of *Senana v Navarathnyakee* [1954] AC 640 and *Arzu v Arthurs* [1965] 1 WLR 675). Accordingly, time limitations are likely to be quite strictly applied, as they were in *Tasso v Omawa* [2009] VUSC 1; EPC 1 of 2008.

[1.4.2] See CPR r.1.2 as to the overriding objective.

(a) does any act under these Rules; or

(b) interprets these Rules.

CPR r1.4(1)

(2) In particular, the Court must actively manage cases brought under these Rules, as set out in the Civil Procedure Rules.

[1.4.3] See CPR r.1.4(2) as to active case management.

Interpretation

1.5 (1) Some words used in these Rules have a particular meaning. These are defined as follows:

ConPR r1.5

"Court" means the Supreme Court;

[1.5.1] **Establishment of Supreme Court** The Supreme Court is established by art.49 of the *Constitution*. See further Part 4, *Judicial Services and Courts* [Cap 270].

"electoral dispute proceeding" means a proceeding under Article 54 of the *Constitution* about the validity of an election to Parliament;

"member" means a member of the Parliament of Vanuatu;

"petition" means a petition under Part 16 of the Representation of the People Act [Cap 146];

"Representation Act" means the Representation of the People Act [Cap 146];

"Seat" means a seat in the Parliament.

(2) The Notes in these Rules do not form part of the Rules and are for information only.

[1.5.2] The notes are not reproduced in this publication.

ConPR r1.6
PaAR r1.6
CPR r1.9

Forms

1.6 A reference to a Form by number is a reference to the form identified by that number in the Schedule at the end of these Rules.

- [1.6.1] In this publication forms for all annotated rules appear in the chapter "Forms".
- [1.6.2] **Formal defects** In this publication forms for all annotated rules appear in the chapter "Forms". See further rr.2.6(3), 18.9, *CPR* and s.37, *Interpretation* [Cap 132] as to formal defects. There are indications, however, that formal defects will be treated more strictly in election disputes owing to their serious nature. See for example *Tasso v Omwa* [2009] VUSC 1; EPC 1 of 2008; *Biri v Re Bill Ninkama* [1982] PNGLR 342 (noting that the statutory framework there also suggested greater strictness). It is further noted that r.40 of the former *Rules*, which stated that no proceedings shall be defeated for any formal objection, is omitted from the new *Rules*.

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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), 4.10(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].

VACATING SEAT AND DISQUALIFICATION TO HOLD SEAT

Application of Part 3

3.1 This Part applies to proceedings about whether a person validly elected to Parliament has vacated his or her seat or has become disqualified to hold his or her seat.

[3.1.1] **Validity of Part** This Part appears to relate to *Members of Parliament (Vacation of Seats)* [Cap 174] and not *Representation of the People* [Cap 146]. This creates difficulty because these *Rules* are made under s.59(1) of the latter (see also r.2). The former does not contain a rule making power. It is also noted that the long title of the *Rules* states (with emphasis added): “To set out the procedure for Petitions about the election of members to Parliament, *and about vacation of seats and becoming disqualified to hold seats.*” Though it is arguable that the rules in this Part could have been made in the inherent jurisdiction of the court (see CPR [1.1.2]), it is suggested that their validity should not be assumed.

[3.1.2] **Scope of Part** The *Members of Parliament (Vacation of Seats)* Act makes provision for the disqualification of holders of seats and for the vacation of seats. These consequences are automatic upon certain events taking place. Accordingly, the only conceivable dispute is whether one or more of these “trigger” events has taken place. Presumably a party could apply to the Supreme Court in its general jurisdiction for an appropriate declaration to resolve the dispute. This would not be an “electoral dispute” within the meaning of r.1.5(1). Accordingly, quite apart from questions as to the validity of this Part, it is doubtful whether any of the following rules have any application in any event. The annotations to this Part assume that the Part is valid *and* that a dispute about disqualification/vacation is to be commenced by petition in the way prescribed hereunder.

Starting Proceedings

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

3.2 (1) A proceeding under this Part is started by filing a petition in an office of the Supreme Court anywhere in Vanuatu.

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

[3.2.2] **Whether a “petition” is required** The definition of “petition” in r.1.5 is a petition under Part 16 of *Representation of the People* [Cap 146]. An issue under *Members of Parliament (Vacation of Seats)* [Cap 174] is different and so it is difficult to see that a petition is the appropriate process to initiate. See further [3.1.1], [3.1.2].

[3.2.3] **Time limit** See [2.2.2]. Of course, having regard to what is suggested in [3.2.2], the only applicable time limit would seem to be those contained in *Limitation* [Cap 212].

(2) The petition must be in Form 1.

What a petition must contain

ConPR rr2.3, 3.3,
4.3

3.3 (1) A petition must set out:

- (a) the member’s name, the seat held and when the member was elected to the seat; and
- (b) a request for a determination by the Court whether the member:
 - (i) has vacated his or her seat; or
 - (ii) has become disqualified to hold the seat; and

[3.3.1] See [3.1.2].

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

[3.3.2] See [2.3.2].

(d) any remedies sought.

[3.3.2] See [3.1.2].

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

(2) The petition must have with it:

(a) a sworn statement by the petitioner in support of the petition;
and

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

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

Parties

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

(a) the petitioner; and

(b) if the petitioner is not the member whose seat is affected by the petition, the member; and

[3.4.1] **General observations** It is difficult to imagine that the member holding a seat will seek an order effecting any of the outcomes in ss.1, 2 or 3 of *Members of Parliament (Vacation of Seats)* [Cap 174]. Otherwise see [2.4.1].

(c) the Speaker of the Parliament, unless the Court orders otherwise; 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.

ConPR r2.5

Filing

3.5 (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:

[3.5.1] See CPR r.18.5 as to sealing.

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

(b) tell the petitioner in writing of this.

(3) The Conference date must be between 14 and 21 days after the filing date.

- (4) The Court may reduce this period, either on application by the parties or on its own initiative.

Service

- 3.6 (1) The petition must be served within 7 days after the date of the first hearing on:

- (a) the member, if the petitioner is not the member; and

[3.4.1] **General observations** It is difficult to imagine that the member holding a seat will seek an order effecting any of the outcomes in ss.1, 2 or 3 of *Members of Parliament (Vacation of Seats)* [Cap 174].

- (b) the Speaker, or the Attorney-General on behalf of the Speaker.

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

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

ConPR rr2.8, 3.7,
4.8, 5.4

Conference

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

- 3.7 (1) At the first Conference, the Court may:

- (a) deal with any applications to strike out the petition; and
(b) order the respondent to file a response; and
(c) issue a summons under Rule 3.10; and

[3.7.1] This is perhaps a typographical error which should refer to r.3.8.

- (d) order that a person may be legally represented; and
(e) order that a person become a party; and
(f) fix a date for another Conference, if one is necessary, or fix a hearing date; and

CPR r6.4(2)(b)

- (g) 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) A response:

- (a) must not deny the petitioner's claims generally but must deal with each paragraph of the petition; and**
- (b) must be in Form 3.**

ConPR rr2.9, 4.9

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

CPR r11.15(1)

3.8 (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**
- (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.

(3) The summons must be in Form 4.

[3.8.1] **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.

Hearing

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

3.9 (1) The hearing of the petition must be in open court.

[3.9.1] 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.

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

*CPR r12.1(4)
ConPR rr2.10(4),
3.8(3), 4.10(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 respondents cross-examine the petitioner's witnesses;**
- (c) the petitioner re-examines his or her witnesses;**
- (d) the respondents 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 respondents re-examine their witnesses;
- (g) the petitioner makes a closing address;
- (h) the respondents 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.

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

ConPR rr2.11, 3.9,
4.12, 5.6

Judgment

CPR r12.11

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

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

[3.10.1] 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.

[3.10.2] 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

3.11 (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

[3.11.1] See further *CPR* Part 15.

- (b) make an enforcement order for the costs.

[3.11.2] 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.

- [3.11.3] **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].

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