

8.3 INSTRUMENT OF DELEGATION TO THE CHIEF EXECUTIVE OFFICER - COVID-19 CONTINGENCY PLANNING

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Trim No: 20/161361

Attachments: 1. Attachment 1 S5 Delegations CEO - Marked up [↓](#)
2. Attachment 2 S5 Delegations CEO - Clean [↓](#)

PURPOSE AND SUMMARY

With the onset and spread of COVID-19, Council may be faced with the situation that a quorum may not be able to be achieved at an ordinary council meeting or a special council meeting.

This report is submitted to enable continued Council operations and to consider the need to increase the exercise of delegated decisions to the Council's Chief Executive Officer (**CEO**).

Section 98 of the *Local Government Act 1989* (the **Act**) presently sets out the requirements for delegating Council's powers, duties and functions.

This report makes recommendations concerning the primary delegations from Council to the CEO.

The recommendation is to update Council's Instrument of Delegation to the CEO to include an additional schedule (**Schedule B**) which provides for:

- 1) increased financial authority; and
- 2) further delegation of Council's powers, duties and functions to the CEO

to enable continued Council operations, if Council is unable to form a quorum due to illness of Councillors or the need to self-isolate by Councillors.

These changes will allow the CEO to make decisions, detailed in the Instrument of Delegation in Schedule B, which are currently reserved to Council, if the need arises.

RECOMMENDATION

That in order to allow for the efficient continuation of Council business should the Council not be able to achieve a quorum at Council meetings, Council delegates additional powers to the Chief Executive Officer conditional on a quorum not being achievable and for that purpose Council resolves as follows:

1. **In relation to Council's Instrument of Delegation to the Chief Executive Officer:**
 - (a) there be delegated to the Chief Executive Officer the powers, duties and functions set out in the Instrument of Delegation to the Chief Executive Officer ("*Attachment 2*") (the **Instrument of Delegation**);
 - (b) the powers, duties and functions delegated to be exercised:
 - i) subject to any conditions and limitations specified in the Instrument of Delegation;
 - ii) in accordance with any policies or guidelines which Council may adopt from time to time;
 - (c) the Instrument of Delegation be sealed;

- (d) the Instrument of Delegation and Schedule A comes into force immediately when the Council seal is affixed to the Instrument of Delegation;
- (e) the Instrument of Delegation remains in force until Council determines to vary or revoke it;
- (f) Schedule A of the Instrument of Delegation remains in force until Council determines to vary or revoke it or it is revoked by the coming into force of Schedule B;
- (g) Schedule B of the Instrument of Delegation comes into force when a quorum of Council cannot be formed or maintained at an ordinary council meeting or special council meeting due to the absence of Councillors and remains in force until Council determines to vary or revoke it;
- (h) on the coming into force of the Instrument of Delegation, the Instrument of Delegation to the Chief Executive Officer dated 19 December 2018 is revoked.

That Council notes:

- the changes will come into effect directly following the passing of the resolution by Council and the Council seal being affixed to the Instrument of Delegation;
- Council will make available (where practicable) on its website, a list of decisions that would have been dealt with by Council, but were made under delegation due to Council being unable to form a quorum due to illness of Councillors or the need to self-isolate by Councillors;
- the CEO will (where practicable) consider and take into account the views of Councillors in making the decisions that would have been dealt with by Council at an ordinary council meeting or special council meeting, but for the coming into operation of Schedule B of the Instrument of Delegation; and
- the Instrument of Delegation, when in force, will be reviewed at least once every three months and that Council at an ordinary council meeting or special council meeting will resolve whether to vary, revoke it or leave it in place.

BACKGROUND

The proposed amendments to the Instrument of Delegation are discussed in further detail in the “Issues and Discussion” section. The following is intended to provide background information and context to assist Councillors in considering and reviewing the proposed amendments.

On 16 March 2020, the Premier of Victoria and Minister for Health announced that a State of Emergency would begin on 16 March at midday and be in force for four weeks to assist with measures designed to ‘flatten the curve’ of COVID-19 and give the health system the best chance of managing the virus.

On 23 March 2020, the Deputy Chief Health Officer (Communicable Disease) issued a direction under the *Public Health and Wellbeing Act 2008* (Vic) to prohibit the operation of non-essential businesses and undertakings in order to limit the spread of COVID-19.

Advice from the Victorian Department of Health and Human Services is that individuals should stay at home if they are sick. If unwell with flu-like symptoms, not to go outside their property or home, and not go to work, school or shops unless it is essential.

As a result of this advice from the Victorian Department of Health and Human Services, Council may not be in a position to form a quorum at an ordinary council meeting or special council meeting due to illness or the need to self-isolate.

Administrative

The proposed Instrument of Delegation is provided in marked-up versions (showing changes to the previous delegations) and clean versions, which incorporate the changes.

ISSUES AND DISCUSSION

There is a risk that due to COVID-19, Council may not be able to form a quorum due to illness or the need to self-isolate.

Under the Act, Councillors must observe a number of statutory requirements when voting at a Council meeting (section 90). For example, section 90(1)(a) provides that:

each Councillor present at a meeting of the Council and each member of a special committee present at a meeting of the special committee who is entitled to vote is entitled to one vote;

The phrase, “present at the meeting” is not defined in the Act, but it is likely to mean present in the room in which the meeting is taking place. In other words, a quorum can only be formed if Council members are physically present.

Furthermore, the *Local Government Act 2020* (the **new Act**) does not remove the limitations of physical attendance at meetings. Advice from Local Government Victoria is that the new Act retains the existing requirement that a Councillor must be present at a council meeting to be entitled to vote. Local Government Victoria advice is that:

“Present” means being physically present at the meeting. This requirement mirrors Parliamentary practice in which a Member must be present at a Division to vote. While there can be advantages for remotely located councillors to be able to participate in meetings without being physically present, this must be balanced against other considerations including the public transparency requirements on decision making by a publicly elected body.

No provision of the Act nor the new Act allows a council to be exempted from the requirement for Councillors to be present at a meeting of the Council, e.g. by allowing presence by electronic means. There is also no capacity to exempt or vary quorum requirements under either Act.

In response to the uncertainty in relation to the impact of the COVID-19 pandemic on Council’s future operations, it is proposed that if a quorum cannot be formed or maintained at an ordinary council meeting or special council meeting due to the absence of councillors, Schedule A of the Instrument of Delegation is revoked and Schedule B will come into operation. Schedule B of the Instrument of Delegation will continue in force until varied or revoked by Council.

The CEO can only exercise the additional powers, duties and functions in Schedule B if the CEO:

- forms the view that the exercise of the powers, duties and functions cannot be deferred until a quorum may be available; and
- considers and takes into account the views of Councillors where practicable to do so (noting that Councillors cannot direct the delegate with respect to the exercise of delegation, and that the delegate is not bound to exercise the delegation consistently with those views).

In the interests of transparency, Council will make available (where practicable) on its website, a list of decisions that would have been dealt with by Council at an ordinary council meeting or special council meeting, but for the coming into operation of Schedule B of the Instrument of Delegation.

In the interests of good governance, the Instrument of Delegation, when in force, will be reviewed at least once every three months and that Council at an ordinary council meeting or special council meeting will resolve whether to vary, revoke it or leave it in place.

Attachments 1 and 2 Instrument of Delegation to the Chief Executive Officer

The proposed amendments to the CEO's delegations are detailed in Table 1 below. The amendments are intended to ensure continued Council operations, if Council is unable to form a quorum due to illness or the need to self-isolate.

The Instrument of Delegation provides the CEO with the powers assigned to a Council by any Act or Regulation, and identify limitations to those powers as identified in the Schedules. Most notably, according to section 98(1) of the Act, Council cannot delegate the following powers, duties or functions:

1. the power of delegation;
2. the power to declare a rate or charge;
3. the power to borrow money;
4. the power to approve any expenditure not contained in a budget approved by the Council;
5. any power, duty or function of the Council under section 223; and
6. any prescribed power (noting that such powers have been prescribed).

Table 1: proposed amendments to the Instrument of Delegation

Item(s)	Change	Reason
4.1 making a local law under Part 5 of the Act; 4.2 approval of the Council Plan under s.125 of the Act; 4.3 adoption of the Strategic Resource Plan under s.126 of the Act;	No change	Requires community consultation under section 223 of the Act which is non-delegable under section 98(1)(e) of the Act.
4.4 preparation or adoption of the Budget or a Revised Budget under Part 6 of the Act;	Delegated to the CEO subject to the conditions in section 8.5 and 8.6 of the Schedule B of the Instrument of Delegation.	The proposed amendment, whilst not removing the requirement for community consultation under section 223 of the Act which is non-delegable under section 98(1)(e) of the Act, provides the CEO with the power to prepare or adopt the Budget or a Revised Budget under Part 6 of the Act.
4.5 adoption of the Auditor's report, Annual Financial Statements, Standard Statements and Performance Statement under Part 6 of the	No change	Requires community consultation under section 223 of the Act which is non-delegable under

Item(s)	Change	Reason
Act;		section 98(1)(e) of the Act.
<p>4.6 awarding a contract:</p> <p>(a) in relation to roads or drains or the procurement of insurance, to the value of \$1,000,000 (including GST) or more;</p> <p>(b) in relation to all other contracts or agreements, to the value of \$500,000 (including GST) or more;</p>	<p>Increase the CEO's financial delegation to award a contract to the value of \$20,000,000 (including GST) subject to the conditions in section 8.5 and 8.6 of the Schedule B of the Instrument of Delegation.</p>	<p>Council has 42 tenders at various stages. 23 of those tenders have a total value which is more than the CEO's current financial delegations. The increase in the financial delegation for the CEO is to ensure that Council's operations can continue.</p>
4.7 determining pursuant to s.37 of the Act that an extraordinary vacancy on Council be filled;	No change	No change, as the next council general elections will be held on Saturday 24 October 2020.
4.8 determining the level of cash in lieu of car parking payment under a town planning permit where a contributions plan has been implemented by Council;	No change	No change required, as Council has not implemented a car parking based contributions plan.
4.9 accepting an offer to purchase land from a discontinued road or a former reserve which vests in Council, where the proposed sale price determined in accordance with Council policy is greater than \$200,000 (including GST);	No change	Requires community consultation under section 223 of the Act which is non-delegable under section 98(1)(e) of the Act.
4.10 subject to section 4.9, the acquisition or disposition of a legal interest in land or buildings other than discontinued roads or former reserves which vest in Council, except where a lease is a renewal or variation of an existing agreement and the lease is consistent with the Council's Community Leases Policy (or similar approved policy) and the	Delegated to the CEO subject to the conditions in section 8.5 and 8.6 of the Schedule B of the Instrument of Delegation.	The proposed amendment provides the CEO with the power to acquire land and enter into leases, that do not require public notice, in a timely and effective manner.

Item(s)	Change	Reason
variation does not change the area of land occupied;		
4.11 deciding that all voting at an election or poll of voters is to be by means of postal voting under s.41A of the Act;	No change	On 4 February 2020, Council resolved that the 2020 election be conducted by attendance vote.
4.12 appointment of councillor or community delegates or representatives to external organisations; or 4.13 the return of the general valuation.	No change	Council should determine these matters.
5. if the issue, action, act or thing is an issue, action, act or thing which Council has previously designated as an issue, action, act or thing which must be the subject of a Resolution of Council;	Delegated to the CEO subject to the conditions in section 8.5 and 8.6 of the Schedule B of the Instrument of Delegation.	If Council cannot form a quorum, then the CEO may make a decision which was previously designated as an issue, action, act or thing which must be the subject of a Resolution of Council.
6. If the determining of the issue, taking of the action or doing of the act or thing would or be likely to involve a decision which is inconsistent with a: 6.1 policy; or 6.2 strategy adopted by Council; or	No change	The decision of the CEO will be made in accordance with any policies or guidelines which Council may adopt from time to time.
7. if the determining of the issue, taking of the action or doing of the act or thing cannot be the subject of a lawful delegation, whether on account of section 98(1)(a)-(f) (inclusive) of the Act or otherwise; 8. if the determining of the issue, taking of the action or the doing of the act or thing is already the subject of an exclusive delegation to another member of Council staff.	No change	Council does not have the authority to waive or relax statutory requirements made under the Act.

Item(s)	Change	Reason

FINANCIAL, RESOURCE, RISK AND ASSET MANAGEMENT IMPLICATIONS

The amendments to the Instrument of Delegation will reduce the risk of Council's operations not continuing from an inability to exercise powers, duties or functions under legislation or to enter into contracts in time. This will support service delivery and operational efficiency. It will ensure that operational matters are decided in a timely manner.

POLICY AND LEGISLATIVE IMPLICATIONS

In developing this proposal, consideration has been given to the potential of loss of quorum due to the impact of COVID-19.

The amendments to the Instrument of Delegation are made in line with the *Local Government Act 1989* and the *Local Government Act 2020*.

COMMUNICATION AND ENGAGEMENT

Internal consultations have been conducted to ensure that the amendments to the Instrument of Delegation are consistent with day-to-day work in Council.

LINK TO COUNCIL AND COMMUNITY PLAN

Theme Five: Informed and Engaged

A well governed Council that is committed to transparency and engages residents in decision-making.

OFFICER DECLARATION OF CONFLICT OF INTEREST

No officers involved in the preparation of this report have any direct or indirect interest in this matter. No officers involved in the preparation of this report have any direct or indirect interest in this matter.

CONCLUSION

With the onset and spread of COVID-19, Council may be faced with the situation that a quorum may not be able to be achieved at an ordinary council meeting or special council meeting. Increasing the delegations available to the CEO in that event reduces the risk of Council's operations not continuing from an inability to exercise powers, duties or functions under legislation or to enter into contracts in time.

It is recommended that Council approves the amendments in accordance with the Recommendation.