



SPECIAL MEETING OF COUNCIL

TUESDAY, 2 MARCH 2010

11:00am till 3:00pm

Held at the Victoria Daly Shire Council Head Office.

This meeting is open to the public excluding confidential Council business.

Agendas available by the 1 March 2010, please contact

Rose Peckham on Rose.Peckham@vicdaly.nt.gov.au

or phone: 08 8972 0701 fax: 08 8971 0856



AGENDA

Victoria Daly Shire Special Council Meeting

11:00AM, TUESDAY 2ND MARCH 2010

VICTORIA DALY SHIRE COUNCIL HEAD OFFICE, 14
KATHERINE TERRACE, KATHERINE NT

Present

Apologies

Disclosure of interest – Councillors and Staff

Reports to Council

- | | | |
|---|--|---|
| 1 | Electronic Recording of Council Meetings | 3 |
| 2 | Mayors Performance | 7 |



VICTORIA DALY SHIRE COUNCIL

FOR THE SPECIAL MEETING OF COUNCIL 2 MARCH 2010

Report for Agenda Item No 1

Prepared by **Greg Arnott, Director, Corporate & Community Services**

Electronic Recording of Council Meetings

Purpose

To provide a council information pertaining to the recording of council meetings.

Background

The Local Government Act 2008 is silent on the recording of Council meetings however it does provide the following:

67 Minutes

- (1) The CEO must ensure that proper minutes of meetings of the council, local boards and council committees are kept.
- (4) A copy of the minutes must, within 10 business days after the date of the meeting to which they relate, be available to the public:
 - (a) on the council's website; and
 - (b) at the council's public office.

Note

Confidential matter may be suppressed from the material that is made publicly available under section 201.

- (5) A member of the public:
 - (a) may inspect without fee, at the council's public office, the copy of the minutes made available to the public; and
 - (b) may, on payment of the appropriate fee fixed by the council, obtain an identical copy of the minutes; and
 - (c) may, on payment of the appropriate fee fixed by the council, obtain from the CEO a certified copy of, or extract from, the minutes of a meeting.

61(9) Subject to this Act, and any by-laws regulating the procedure at a meeting, a

council may determine its own procedures.

It is not clear if a recording of a council meeting would form part of the minutes of the meeting and therefore would have to be made available to the public. Currently, minutes are recorded in accordance with the Local Government (Administration) Regulations which provides:

13 Contents of minutes of meetings

The minutes of a meeting of the council, a local board or council committee must, in addition to the information required by section 67(2) of the Act, include the following information:

- (a) the date, time and place of the meeting (including the time of opening and closing the meeting);
- (b) if the meeting is closed to the public, the time or times of the closure and the reasons for the closure;
- (c) the motions (including motions for amendments to motions) moved at the meeting and the names of the mover and seconder of each motion;
- (d) how the meeting deals with each motion;
- (e) if the meeting is adjourned – the date, time and place to which the meeting is adjourned.

14 Custody of records

- (1) The CEO is responsible for ensuring the proper custody of the council's records.
- (2) The CEO must ensure that the council's records are properly filed and indexed to facilitate access.

15 Access to records

- (1) Access is to be allowed to a council's records:
 - (a) as authorised or required by the Act or any other law in force in the Territory;
or
 - (b) as required for the conduct of the council's business or the proper discharge by members of the council, local boards and council committees of their duties as such.
- (2) A person must not allow access to a council's records except as provided in sub regulation (1).

The Information Act NT provides:

10 General principle of accountability for government information

- (1) Public sector organisations are to:
 - (a) make available to the public such government information as is reasonably possible;
 - (b) provide government information to the public promptly; and
 - (c) assist the public to ensure that personal information is accurate, complete and up to date.

The Information Act NT does apply to Local Government in the Northern Territory. It is not clear if a recording of a council meeting would be “government information” and if it was determined to be “government information” it would then be required to be stored and available to the public, including the media, upon request.

It is not clear if the intention to record meetings is so the recording can be used as a reference to ensure the minutes are a complete and accurate record of the meeting. The tapes could be retained until the minutes are accepted and made available to Councillors upon request. The tape recordings would not be made available to the public or third parties, except where required by law;

Currently in the Northern Territory (from what has been ascertained in the last 24 hours) only Alice Springs Town Council records its council meetings and West Arnhem records “addresses made to council” but not council meetings. We have not been able to ascertain if Alice Springs Town Council has any policy in respect to the recording of Council meetings.

Impact for Council

Councillors are reminded that the distribution of audio recordings of Council meetings via any means puts Council at increased risk in relation to possible claims for defamation, infringement of copyright, breach of privacy / disclosure of personal information, and publishing of offensive material. Council meetings are an open forum of statements, questions and answers, and occasionally statements are made that may be regarded as offensive or defamatory. When such statements are made during a Council meeting, the potential for damage is confined to those people in attendance at the meeting. However, if a recording of the meeting is available, the potential audience is larger, and this increases both the likelihood and the severity of potential liability.

There could also be privacy issues associated with the publication of any recording of members of the public sitting in the gallery or making submissions. Written consent may need to be obtained from all persons captured in a recording. If consent was refused, the recording may not be able to be used. This would have implications in terms of Council’s current practice of allowing members of the public to address Council at a meeting, even if they have not formally registered their intention to speak. The meeting would have to be adjourned or otherwise delayed to enable formal written consent to be obtained prior to any unregistered submissions being heard. Obtaining and keeping records of consent would all add to administrative workloads, costs and delays in meetings.

Council should obtain legal advice on the implications of recording meetings and the interpretation of the various pieces of legislation in respect to the records or information of council.

If council chooses to record this council meeting, it is our interpretation (without the benefit of legal advice) that the recording would be a public record and that the public, including the media, could request (or purchase) a copy of the recording after this meeting.

Recommendation

That further investigation of the implications of recording council meetings be undertaken, including the obtaining of a legal advice, and the findings be reported back to council.

Attachments

There are no attachments for this report.

VICTORIA DALY SHIRE COUNCIL

FOR THE SPECIAL MEETING OF COUNCIL 2 MARCH 2010

Report for Agenda Item No 2

Prepared by **Sandra Cannon, Chief Executive Officer**

Mayors Performance

Purpose

The CEO must convene a Special Purpose Meeting under Part 6.1, Section 59(a) of the Local Government Act, if 3 or more members request the CEO in writing to convene a meeting. Cr. Hennessy, Cr. Wooldridge and Cr. McTaggart requested a Special Meeting to discuss the Mayors Performance and taping meetings.

Background

Council had discussed this issue of the Mayors performance at the Council Meeting on Tuesday 16 February, in the confidential section. A motion of no confidence was unanimously past, with an instruction the Mayor should resign.

Legal and Departmental advice subsequently indicated both the procedure and motion were flawed. A Councillor can move a motion of no confidence but under the Local Government Act can not instruct a Mayor to resign.

The request for the meeting stated the specific business to be discussed is:

1. A discussion on the Mayor's performance.
2. A no-confidence motion to be put to the meeting, the motion is "That Cr. Wegener has failed to provide adequate leadership to the Victoria Daly Shire Council and no longer has the confidence or support of the Councillors of the Shire to continue in the role as Mayor and consequently the Councillors request that Cr. Wegener submit his resignation as Mayor of the Shire."
3. A discussion on the legal advice sought and received subsequent to our last meeting.
4. That all meetings of the Victoria Daly Shire Council be recorded and the taped transcripts retain as a verbal record of meetings, this is to include this meeting so this may need to be the first item on the agenda. The PCCGC recorded it's meetings and this equipment is available at the Shire Service Centre in Pine Creek.

Section 60 of the Local Government Act indicates:

"A special meeting may only deal with the business for which the special meeting was convened unless all members are present at the special meeting and unanimously agree to deal with other business."

Legal clarification has been sought which indicates business is defined as what is contained in the request by the Councillors. This means all agenda items can be discussed. A separate report has been written in regards to taping meetings and this has been placed first on the agenda. The other items relate to this report.

The legal advice is self explanatory. Council can continue to move motions of no confidence but it is still the Mayor's choice to resign. The Minister is the only person with the power to dismiss a Mayor under set criteria.

If Councillors believe the Mayor has breached the code of conduct or been involved in misconduct there are alternative processes and remedies outlined in the Act.

While the incumbent remains the Mayor he has the right to chair all meetings. Legal advice in regards to whether he has a "conflict of interest" in chairing this meeting is that there is no conflict and the Mayor can chair the meeting.

The Department and the Minister have requested they are kept informed. The Minister does have the power of establishing a commission of inquiry to inquire into the affairs of a particular council (Part 16.1 Section 21s). This is separate to an inquiry if a breach of the code is identified. I have indicated to the Department we are currently following due process and gaining correct legal advice to guide councillors. They have asked to be updated.

If the Mayor chooses to resign then he can remain a councillor.

If he resigns from both positions then a by-election needs to be called for the casual vacancy of a councillor.

In the case of the Mayor (Principle Member):

Section 46 (3) (b)

A casual vacancy occurs in the office of the Principle Member if the person holding the office of the Principle Member

(b) resigns from the relevant office by giving written notice of resignation to the CEO

If this occurs

Section 46 (4)

The council may make any appointment necessary to fill

(a) a casual vacancy in the office of a Principle Member

Impact for Council

Recommendation

Information be noted.

Attachments

- 1 Email dated 26 Feb 2010 T Anderson.pdf
- 2 Letter from T Anderson dated 19 Feb 2010.pdf
- 3 Departmental Advice 17 Feb 2010.doc

Sandra Cannon

From: Tom Anderson [TAnderson@williamforster.com]
Sent: Friday, 26 February 2010 2:35 PM
To: Sandra Cannon
Subject: Mayoral issues

Dear Sandra,

I refer to your further requests for advice concerning this matter following my letter of 19 February 2010 and our recent discussions.

You have asked me whether the Mayor has a conflict of interest with respect to any no-confidence motion put before the Council. Conflict of interest is defined in s.73 of the Act as being a "personal or financial interest in how the question is decided". As any motion of this sort which may be passed has no binding effect on the Mayor, it could not be said that he has a financial interest in the outcome. While at first glance it might be thought that he has a personal interest in the outcome, I am confident that his interest is not the sort contemplated by s.73. This part of the Act is concerned with pecuniary interests, not political interests. Therefore I do not consider that the Mayor would have a conflict of interest requiring him to absent himself from the meeting. As you have previously observed, he should be able to speak against any no-confidence motion relating to his performance as Mayor.

The Mayor is entitled to chair any special meeting, in accordance with s.61 of the Act. However, in these circumstances I see no difficulty with the Mayor relinquishing the chair to another councillor if he so desires.

In my letter of 19 February 2010 I did not address the effect of s.44(1) of the Interpretation Act. It reads, "*where an Act confers on any person or authority a power to make appointments to any office or position, the power shall be construed as including a power to terminate such an appointment or to remove or suspend any person appointed*". However, this only applies in the absence of a contrary intention in the Act in question. For the reasons given in my letter of 19 February 2010, I consider there is a contrary intention in the Act.

I trust this answers your further queries.

Tom Anderson
Barrister
William Forster Chambers

26 Harry Chan Avenue, Darwin NT
T 08 8982 4705 (direct)
M 0438 780 976
F 08 8941 1541
P GPO Box 4369 DARWIN NT 0801
E tanderson@williamforster.com
W www.williamforster.com

26/02/2010

Tom Anderson

Barrister

ABN: 31 467 204 195

William Forster Chambers
GPO Box 4369
Darwin NT 0801

19 February 2010

Ms Sandra Cannon
Chief Executive Officer
Victoria Daly Shire Council
PO Box 19
KATHERINE NT 0851

By email: sandra.cannon@vicdaly.nt.gov.au

Dear Sandra

No confidence motions and mayoral tenure

1. You have sought my advice with respect to a motion apparently passed at a meeting of the Victoria Daly Shire Council (the Council) on 16 February 2010 to the effect that the Council has lost confidence in the Mayor and required his resignation.
2. I am asked whether the motion was passed legally, if so, whether the Mayor is required to resign as a consequence, and whether the Mayor may resign as principal member of the Council but retain his position as an elected councillor.

Summary of advice

3. The process by which the motion was voted on was procedurally flawed. Therefore the vote in favour of the motion cannot be considered a valid resolution of the Council.
4. Even if the motion had been validly passed, the Council cannot dismiss the Mayor or force him to resign. That said, the Council may express its lack of confidence in the Mayor and ask him to resign.
5. If the Mayor was to resign, he may remain a member of council. In that event, the Council would simply appoint another of its members as Mayor.

Background

6. My understanding of the background to this matter is as follows.
7. The Council has 12 elected members (councillors). The Mayor was appointed by the Council, rather than being directly elected. A Deputy Mayor was also appointed by the Council.
8. The Council held a meeting on 16 February 2010. Towards the end of the meeting confidential business was dealt with. The Mayor declared a conflict of interest with respect to the final item for discussion relating to the purchase of a vehicle for the Mayor's use. The Deputy Mayor took the chair.
9. In the Mayor's absence, the Council voted to defer the item concerning a mayoral vehicle and voted instead to discuss the Mayor's performance. The Mayor was invited back into the meeting at this time, but the Deputy Mayor retained the chair. The Mayor was informed that the Council had voted to discuss his performance. A motion in three parts was then moved and seconded. Following debate, all councillors voted in favour of the motion, other than the Mayor.
10. In summary, the three parts of the motion were to the effect that:
 - (a) the Mayor no longer had the confidence or support of the councillors to continue in the role of Mayor;
 - (b) the councillors "instruct" the Mayor to submit his resignation as Mayor; and
 - (c) the Mayor cease acting in the capacity of Mayor on the passing of the motion.
11. To date, the Mayor has not resigned.

The Council was procedurally at fault

12. Section 61(9) of the *Local Government Act 2008* (the Act) provides that a council may determine its own meeting procedures, subject to certain minimum requirements set out in the Act. Consequently, the Council has adopted written procedures for Council meetings. They provide for agenda items to be advised in advance of a meeting (paragraphs 4 and 5). Items of business may be placed on the agenda at the start of a meeting, but only minor or urgent matters are usually accepted (paragraph 6). Neither of these occurred with respect to the issue of the Mayor's performance.
13. The procedures also provide that may be changed by resolution at a meeting (paragraph 27). In my view, this is intended to mean that the council may vote to amend its written procedures, not to simply abandon its procedures in the course of a meeting. As I understand it, the Council did not vote to amend its

procedures on 16 February 2010. It simply resolved to deal with a matter in a manner contrary to its written procedures.

14. Further, the matter was dealt with in confidential session. This may have occurred because the proposer of the matter considered that it should be dealt with as confidential business.
15. Regulation 8 of the *Local Government (Administration) Regulations* defines confidential business fairly broadly. Nevertheless, at first glance the subject of the Mayor's performance does not appear to be confidential. That said, it may fall within paragraph (c) (iv), "information that would, if publicly disclosed, be likely to prejudice the interests of the council or some other person".
16. "Interests" is not defined in the Regulations, but may include the reputational harm to the Council or the Mayor if the matter was debated publicly. However, it is doubtful that the matter could properly have been raised in confidential session.
17. In my view, the Council was procedurally at fault in dealing with the matter in the manner it did. Therefore the vote in favour of the motion cannot be considered a valid resolution of the Council.

The Council cannot instruct the Mayor to resign

18. Section 46 of the *Local Government Act 2008* (the Act) provides that the term of office of a Mayor concludes at the next general election, irrespective of whether the Mayor is elected or appointed by the Council. A vacancy occurs in the office of Mayor if the person holding the office ceases to be a member of the Council, or resigns. In either case, a council may make an appointment to fill the vacancy.
19. The Act provides two ways in which a Mayor or any member of a council may be dismissed from office prior to an election. In both cases, only the Minister may remove a member from office.
20. First, the Minister may remove a member from office on disciplinary grounds pursuant to s 83 of the Act in accordance with a recommendation made by a disciplinary committee for breach of a code of conduct, or if the member is convicted of an offence showing the member to be unfit to remain in office.
21. Second, the Minister may dismiss all members of a council from office pursuant to s 224 of the Act if serious deficiencies have been identified in the conduct of a council's affairs.
22. There is no other way a Mayor, or any member of a council, may be removed from office. Of course, a person automatically ceases to hold office in the circumstances described in s 39 of the Act, none of which it seems are immediately relevant here.

23. Therefore, even if the motion had been passed in a procedurally valid way, to the extent it purported to require the Mayor to resign or cease acting in the capacity of Mayor, it would have been of no effect.
24. That is not to say that the Council cannot pass a motion to the effect that the Mayor has lost the confidence of the Council in the performance of his duties. In my view, it may do so. But it cannot force the Mayor to resign by doing so. That is a matter for the Mayor.

The Mayor may resign but stay on Council

25. The Act does not expressly state whether an appointed Mayor may resign as Mayor but remain on council. In my view, he may.
26. Section 46(3) of the Act provides that a casual vacancy occurs in the office of Mayor if the person holding the office:
- “(a) ceases for any reason to be a member of council; or*
 - (b) resigns from the relevant office by giving written notice of resignation to the CEO.”*

27. This implies that a Mayor may resign from the office of Mayor, notwithstanding that he remains a member of council. If this interpretation was not intended, paragraph (b) would not have been included as s 39(1) details the circumstances in which a person ceases to be a member of a council, including by resignation (in paragraph (e)).
28. Further, I regard the difference in wording between s 39(1) (and s 46(3)(a)) and s 46(3)(b) as significant. Section 39(1) uses the words, “*hold office as a member of a council*” (s 36(3)(a) is similar), whereas s 36(3)(b) uses the words, “*resigns from the relevant (i.e. mayoral) office*”.
29. In addition, section 46(4) provides that a council may appoint a new mayor to fill a vacancy, subject to s 46(5) if, and only if, an elected mayor has resigned. These provisions imply that an appointed mayor is to be simply replaced by a further appointment, without the necessity to co-opt or elect a new member of council. It must therefore follow that an appointed mayor may resign but remain a member of council.

Possible scenarios

30. As is probably evident from my advice above, the following scenarios appear possible.
31. The Mayor may choose to resign. This may occur whether or not any no confidence motion is passed in accordance with the Council's meeting procedures at any future special or ordinary meeting. If the Mayor does resign, he may be replaced by another member of Council. He may resign as Mayor but remain a councillor.

32. The Mayor may choose not to resign, notwithstanding any no confidence motion or resolution seeking his resignation. He cannot be dismissed or forced to resign.
33. Any councillors who choose to resign from the Council, or who automatically cease to hold office by virtue of their unauthorised absence from future meetings (see s 39(1)(d) of the Act), may have to be replaced at by-election(s), if the vacancy arises more than 12 months before the next general election. Alternatively, new members may be co-opted to the Council (s 39(5)). However, a by-election will not trigger a new vote for mayor, even if all the other members of the Council are replaced at a by-election.
34. Please let me know if you require further advice in relation to this matter.

Yours faithfully,

Tom Anderson

From: Sandra Cannon
Sent: Wednesday, 17 February 2010 2:12 PM
To: VDSC Councillors; Ray Wooldridge
Subject: update

Dear All

I have informed the Department as per the resolution to ask for advice and a ruling. They gave me the information below. They stress this is not legal advice but a departmental view(it was given by Lee Williams who is a solicitor.) I have also send a brief requesting independent legal advice to Tom Anderson Barrister who was recommended by the department as someone who understands the local government act. I have stressed the urgency and hope to have his opinion by the end of the week. The Department view is

1.The motion has no merit, it is outside the law and cannot be enacted. It is a political statement only or a statement of unhappiness with a Mayor . A Mayors choice to resign is very clear in the act and cannot be made to happen by a resolution. I have also asked that we get a legal opinion on our procedure and if this was correct.

2 They were very clear they did not want a process of no confidence voting motions which could lead to a Mayor being forced to resign within the act as they learnt from other jurisdictions that this is often politically motivated and destabilises councils

3 They do not believe the councils rule is to performance manage either each councillor or a Mayor this is done by the electorate. If performance is not upto scratch they would show this at the next election. If councillors or a Mayor are either being corrupt or breaching the code of conduct this is a different matter and mechanisms are in place for this to be dealt with

4 The Mayor remains the mayor until he resigns

5 The councillors view that they would not work with him does not mean he must resign. Councillors can go about their daily business in their electorate without need to work with the Mayor. If they choose not to come to a formally called council meeting and use their vote on behalf of their electorate (as in the vote is not about supporting or not supporting the Mayor but voting on reports as to how they see best will fit the electorates wishes) ..then the rules of not turning up for two meetings would apply, which can lead to dismissal

6 They have differing views of whether a resignation of a Mayor means they also resign as a councillor and they and us are seeking further legal advice on this

7 We have also asked for information that if the Mayor chooses to resign the process in the interim, roll of deputy and we would elect a new Mayor

8 They also indicate the Mayor could report the process to the Minister as a breach of the code of conduct and ask that the independent panel investigates. A councillor also has this right.



SANDRA CANNON
Chief Executive Officer

p...08 8972 0704 f...08 8971 0856 m...0488 172
963

e... Sandra.Cannon@vicdaly.nt.gov.au

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