

Investigation into the transparency of local government
decision making

December 2016

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Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my
Investigation into the transparency of local government decision making.

A handwritten signature in black ink, appearing to read 'Deborah Glass', with a stylized flourish at the end.

Deborah Glass OBE

Ombudsman

15 December 2016

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Foreword

“Sunlight is ... the best of disinfectants.”

US Supreme Court Justice Louis Brandels, 1856-1941

This investigation arose from a single complaint about a decision made in a closed council meeting – a practice that we found to be widespread across Victoria. Some complaints resonate as a theme: local councils continue to account for some 25 per cent of jurisdictional complaints to my office – more than 3,400 last year. People complaining to my office about council decisions periodically refer to the decision being made “in secret” or “behind closed doors” as evidence to support their concerns. I tabled the report into the original complaint in June 2016, but this has been a far wider investigation, looking at the transparency of decision-making within local government in Victoria.

Why does transparency matter? Simply put, secrecy breeds suspicion. Decisions made behind closed doors, not published on council websites or otherwise exposed to the public gaze, make people suspicious about whether the decision was fair or, where money is involved, whether it is a good use of public funds. While there are legitimate and sometimes unavoidable reasons why some matters must remain confidential, and the public interest in transparency must be balanced against other interests including the privacy of individuals, transparency has long been regarded as one of the best tools for combatting corruption and increasing public confidence in government.

Transparency is also a human rights issue: our right to have the opportunity, without discrimination, to participate in public affairs.

My investigators took evidence from a wide variety of council staff, CEOs, Mayors and councillors across metropolitan, rural and regional Victoria. Our witnesses, some of whom we have de-identified for their protection, were strikingly open about the problems they faced in their decision-making structures and processes. I thank them for their honesty and assistance to my investigation.

First, this investigation recognises the complexity of the transparency picture: whether a council meeting is open or closed is only a part of it. Measuring transparency is not as simple as counting the number of closed meetings – decisions are made in a wide variety of forums and a council with few closed meetings may have delegated most of its decisions to staff or committees who do not publish the outcomes.

Overall, we found that councils were not engaging in widespread, deliberate, secretive behaviour. But there was evidence of poor practice across councils large and small, urban and rural. It was encouraging that some of that practice changed while we were carrying out the investigation – for example, councils have started giving more thought as to whether meetings should be closed.

The law as it stands is little help, with the Local Government Act in many instances providing inadequate or outdated transparency requirements, leaving it to local laws adopted by each council to govern individual council processes. It is not surprising then that council transparency is a random matter across the State – some councils have embraced it, with innovations such as web-streaming council meetings, while others have moved to restrict public access. For the most part, despite pockets of good practice, we found that transparency was a box to be ticked with minimum requirements, not a principle to be welcomed.

Victoria not only has an inconsistent approach to transparency within its own borders, we are also well below most other states – New South Wales, Queensland, South Australia and Western Australia all have stronger transparency requirements in key areas of local government than Victoria.

What also emerged sharply from the interviews and discussions was the impact of the sometimes fraught, and occasionally toxic, relationship between councillors and council CEOs on decision-making. My investigation was not into councillor conduct, and much of the evidence we received about councillors could not be dealt with by my office. But there can be little doubt that this relationship has a bearing on transparency. When councils are concerned about recording meetings because they fear defamatory statements by councillors, or councillors are so mistrustful of a CEO that their financial delegation is minimal, this has an impact on the way decisions are made, how they are recorded and how accessible they are to the public.

It is beyond my jurisdiction to investigate the nature of local democracy, but these issues cannot be ignored. At the least, a state-wide Councillor Code of Conduct is needed, supported by a mandatory training program, to ensure that elected representatives can play their part appropriately.

Transparency should not be a postcode lottery. The government is presently carrying out a major review of the Local Government Act, which I welcome, and which needs to address this vital issue. I encourage that review to not only set a higher minimum standard for openness than exists at present, but to ensure consistent guidance on the many matters raised in this report. Victoria should be leading, not lagging, on best practice.

Much like its kissing cousin justice, democracy must also be seen to be done to ensure legitimacy in the eyes of the public. Transparency must be a cornerstone of local government practice, not merely a box to be ticked.

Deborah Glass
Ombudsman

Executive summary

Background

1. Almost 25 per cent of all jurisdictional approaches to the Victorian Ombudsman are about local government. Members of the public who complain to the office sometimes express concern that decisions are being made 'behind closed doors' or 'in secret', presenting this as evidence to support their concerns.
2. The level of concern shown in these complaints is readily understood by taking into account the role of the 79 councils under the Local Government Act. They provide essential services to their communities across areas such as health, planning and building control, economic development, waste management, parks and libraries. They are also businesses employing over 50,000 people which are collectively responsible for billions of dollars of public spending, infrastructure and assets each year.
3. It is not surprising that a community reliant on this array of services is suspicious of closed council meetings and predisposed to wonder how their rates are being used. Every decision to close a council meeting to protect a specific interest comes, to some degree, at the expense of the broader public interest in being able to hold elected representatives to account. Meeting closures can therefore decrease public trust in council decisions – particularly those which are already controversial. This investigation was prompted by those concerns.
4. More so than at the State and Federal level of government, local councils provide the opportunity for citizens to influence the decisions that affect their lives and communities. Transparent decision making therefore supports accountability, encourages high performance and builds public confidence in councils and their processes. Individuals will not always agree with their council's decisions, but transparent decision making allows them to understand their council's reasoning and it can address any suspicions of impropriety.
5. In September 2015 the government announced its intention to review the Local Government Act; this investigation is intended to inform the aspects of that review which relate to transparency.
6. The investigation considered councils' decision making in the context of their obligations under the Local Government Act, as well as their local laws and policies. We surveyed each of the 79 councils about the transparency of their decision making, then selected 12 councils across metropolitan, regional and rural Victoria for closer examination.
7. The investigation also considered whether councils were acting compatibly with the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

Decisions made in open meetings

8. Open council meetings give the public an opportunity to see their elected representatives at work. Providing easy access to council meetings encourages attendance and interest in council activity, which in turn improves the transparency and accountability of decision making.
9. However, accessibility is no longer simply about ensuring physical access to the council chamber. As the public becomes increasingly used to engaging with organisations and receiving information through digital media, it is essential that councils keep pace with these expectations, while ensuring that more traditional methods, such as visiting council offices, are still available¹.
10. The investigation identified the following factors which have an impact on the accessibility and transparency of decision making in open meetings:
 - notice of meetings
 - availability of agendas²
 - timing and location of meetings
 - live streaming/broadcasting of meetings
 - notices of motion³
 - public participation⁴
 - debate in chamber
 - *en bloc* voting/consent agendas^{5 6}
 - record keeping.
11. Councils are, for the most part, adhering to the requirements for ordinary council meetings as laid out in the Local Government Act. Many of these requirements are covered by the local laws of individual councils, some of which are poorly drafted, and lead to widely differing practices. For example, *en bloc* voting, the practice of a number of separate matters being passed using a single resolution, is used by some councils. While it can be utilised for reasons of efficiency it is not consistent with transparency principles and should not be used where third party interests are involved, such as to decide planning matters. In at least one case, council records do not alert the public to this practice occurring⁷.
12. In many instances the only way for the public to see their council in action is to attend the chamber. Other councils have embraced technological innovations such as live streaming of council meetings⁸.

Decisions made in closed meetings

13. The Local Government Act requires that councils make their decisions in meetings open to the public, subject to exceptions set out section 89(2). This subsection includes a number of broad provisions such as discussions of contractual matters, as well as a general provision to close a meeting to avoid prejudice.

1 Practice example – Greater Bendigo City Council – page 26.

2 Practice example – Cardinia Shire Council – page 28.

3 Case study – Warrnambool City Council – page 32.

4 Case study – Boroondara City Council – page 40.

5 Practice example – Cardinia Shire Council – page 47.

6 Case study – Darebin City Council – page 49.

7 Practice example – Cardinia Shire Council – page 47.

8 Practice example – Alpine Shire Council – page 59.

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14. While councils are, for the most part, closing meetings in accordance with the minimum requirements of the Act, the broad discretion provided by section 89(2) is insufficient to support transparency. The investigation found that out of the three most common grounds in section 89(2) for closing meetings, more than half of the 79 councils use this general provision. All too often meetings are closed without any consideration of whether the discussion of the particular matter in public would cause any harm to the council or any person.
 15. There is also evidence of its use to shield councils from embarrassment arising from councillor behaviour during meetings⁹.
 16. Council practices also vary considerably in how contractual issues are handled. Some councils decide almost all contractual matters in open meetings, and protect commercially sensitive material in attachments that are kept confidential. However other councils automatically close meetings to consider any contractual matters. The amount of information subsequently released about contracts following closed sessions is also highly variable¹⁰.
 17. Most documents relating to closed meetings are also exempt documents under the *Freedom of Information Act 1982*.
 18. The key transparency requirement around meeting closures is that the reason for closing the meeting must be recorded in the minutes. Despite this, some councils failed to identify which section of the Act they closed meetings under or placed the reasons for closure in the confidential minutes. One council made no reference at all to section 89(2) when closing meetings.
 19. The Local Government Performance Reporting Framework, a mandatory system of performance reporting by Victorian councils, includes a transparency indicator which is based solely on the percentage of decisions councils make in closed meetings. While this is a useful means of drawing attention to meeting closures, it does not necessarily provide an accurate comparator without consideration of the wider processes and decision-making structures at each council, including the level of staff delegation and any release of information after a closed meeting.
- ## What happens outside meetings
20. Even when decisions are made in an open and minuted council meetings the full story of how and why a decision is made is not always told.
 21. There are a range of unseen factors¹¹ which can impact on council decision making, which can be divided into two broad categories:
 - unseen influences on decisions
 - tacit agreements or arrangements reached outside council meetings, including during briefing sessions for councillors.
 22. The legitimate factors influencing council decisions and councillor opinions which are made clear to the public and evidenced in minutes are generally:
 - officer reports and advice
 - formal and informal community consultation
 - advice and recommendations from advisory committees or experts presented to council debate in the council chamber.

9 Case study – Frankston City Council – page 76.

10 Practice example – Tenders and transparency – page 69.

11 Table 9: Unseen influences on council decisions – page 90.

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23. Many of the unseen influences on council decisions are linked to councillor conduct and some, such as conflict of interest, are well documented in previous reports by this office. These influences may present risks to the transparency of council decision making and include councillor portfolios; wards; undeclared personal interests; intimidating councillor behaviour; undeclared external influences; factions/ bloc voting¹²; and councillors influencing officer reports¹³.
24. While councillor conduct is beyond the scope of this investigation, it undoubtedly has an impact on transparency. A uniform Code of Councillor Conduct with associated mandatory training is needed to support a culture of transparency and accountability.

Delegated decision making

25. Elected councillors cannot be expected to decide all matters in formal meetings. The Local Government Act provides for councils to delegate most decision making to special committees, the CEO or other council staff. This reflects the experience that the vast majority of decisions are uncontroversial, do not raise policy considerations and should be made as efficiently as possible. However this can have implications for transparency.
26. Under the Local Government Act, subject to certain exceptions, council decisions and associated records are required to be made public, but there are no such requirements for decisions made by a delegate. Whether councils take active steps to publish decisions made under delegation is at their own discretion, and related documentation is generally subject to the *Freedom of Information Act 1982*.
- ## What happens elsewhere
27. Other jurisdictions have more prescriptive and stringent transparency requirements in some areas – particularly in relation to meeting closures. States such as Queensland, New South Wales and South Australia impose meeting closures to additional constraints such as:
- requiring consideration of the public interest in making a decision to close a meeting
 - prohibiting consideration of the risk of embarrassment or adverse criticism of council, councillors or council staff in deciding whether to close a meeting
 - only allowing a meeting to be closed to the public if its council members consider it necessary to close the meeting to discuss the specified matter or to preserve the relevant confidentiality, privilege or security
 - prohibiting resolutions (other than procedural) from being passed in closed meetings
 - requiring greater detail to be provided in relation to the reasons for closure of a meeting.
28. In relation to briefing sessions for councillors, other states have specific legislation and guidance materials aimed at deterring agreement or consensus being reached by councillors in briefing sessions and other fora outside council meetings.
29. Western Australia has also legislated to require councils to allocate time for public questions at every meeting.

12 Perspectives – page 109.

13 Case study – Seeing the way the group lies – page 96.

Conclusions

30. An active and ongoing commitment to transparency is critical to good governance in all aspects of council business. The visibility of this approach has the power to strengthen councils' relationships with their communities and enhance trust.
31. When councils make decisions on behalf of their communities and the information related to those decisions is not made accessible to the public, this reduces community confidence that council is acting in the public interest. The exceptions to openness should be limited and applied with great care.
32. The investigation found that measuring the transparency of a council's decision is complex. It is not simply a matter of looking at the number of decisions made in closed meetings; the overall decision making structure of the council must be taken into account when assessing commitment to transparency.
33. Nor does a council's level of compliance with the basic legislative requirements for transparency in the Local Government Act provide a complete picture. The Act allows councils to utilise a diverse range of decision making structures, and the basic legislative framework for transparency can be adhered to by councils in a range of different ways.
34. Although Victorian councils are not engaging in widespread, deliberate, secretive behaviour, the investigation found examples of councils across metropolitan, rural and regional Victoria failing to give sufficient attention to transparency or to balance it appropriately with the need for efficiency. With so many different council decision making structures and processes, the degree of transparency of local government decisions that any particular community may receive is widely divergent, dependent on municipality, councillor group and at times, ad hoc procedural decisions.
35. This calls for a greater commitment to transparency in legislation. The new Act should set a higher minimum standard for openness than exists at present, and consistent guidance is needed for all councils across Victoria on the key processes underpinning transparency raised in this report.

Background

36. Over the past 10 years, the Victorian Ombudsman's office has published 18 reports involving local government or councillor conduct. Issues have ranged from complaint handling to conflict of interest, improper conduct and poor governance and decision making.
37. Complaints about local government continue to account for almost 25 per cent of all jurisdictional approaches to the Victorian Ombudsman's office, with more than 3,400 approaches about local government dealt with by the office during the past closed financial year. Members of the public who complain about council decisions occasionally mention the fact that decisions are made 'behind closed doors' or 'in secret' as evidence to support their concerns.
38. In September 2015, the Victorian Government released a discussion paper outlining its commitment to review the *Local Government Act 1989*. The Victorian Ombudsman's submission to this review raised concerns that:
- Secrecy in government can create conditions in which improper conduct and poor administration can flourish. It also fuels suspicions of wrongdoing and erodes community trust.
39. At that time, the Victorian Ombudsman was investigating a decision made by the City of Casey about a special charge scheme, tabled in Parliament in June 2016. In this case, the council made an important decision adversely affecting community members in a council meeting that was improperly closed to the public¹⁴. Aspects of that case demanded a broader examination of the local government sector's approach to transparency.
40. Victorian Ombudsman officers met with stakeholders and researched council policies and practices on meeting closures. Based on the findings, a separate investigation into the transparency of decision making in local government was commenced.
41. It was timely to reflect on the issue of transparent decision making in the context of the proposed review of the Local Government Act and it was evident that the community's knowledge of transparency practices was limited.
42. It is intended that the evidence obtained during this investigation inform the current Local Government Act Review, a comprehensive review of the Local Government Act commenced by the Victorian Government in 2015.

Complaints about local government continue to account for almost 25 per cent of all jurisdictional approaches to the Victorian Ombudsman's office, with more than 3,400 approaches about local government dealt with by the office during the past closed financial year.

¹⁴ Following the report, the Minister for Local Government appointed a Municipal Monitor under s223CA of the Local Government Act to monitor the Council in accordance with specified terms of reference. The Municipal Monitor's report, released in August 2016, noted 'the positive action taken by the council in improving governance process, practices and associated policies in respect to the Ombudsman's recommendations and concerns'.

The investigation

43. On 2 March 2016, the Victorian Ombudsman wrote to the Hon Natalie Hutchins MP, Minister for Local Government, advising her of the intention to conduct this investigation. She also notified the Chief Executive Officers and Mayors of each of the 79 Victorian councils.

Authority to investigate

44. The Victorian Ombudsman's authority to conduct own motion investigations is derived from section 16A of the *Ombudsman Act 1973*. As 'public statutory bodies' under Item 13 of Schedule 1 to the Ombudsman Act, local councils are authorities within our jurisdiction. As 'specified entities' under Item 15 of Schedule 1, members of council staff are also within jurisdiction.

Terms of reference

45. The terms of reference for the investigation were to consider council actions that ensure decision making is transparent and balanced against the need for efficiency and any specific obligations to maintain confidentiality. The areas of focus were:
- the closure of council meetings and special committee meetings to the public
 - the handling of confidential matters
 - the nature and quality of audio and visual records of meetings and the public's ability to access records
 - the scope and exercise of delegated council functions/powers and administrative actions; and the reporting of these to council and the public
 - the nature and content of information discussed in 'assemblies of councillors'.

46. The terms of reference also noted the need to observe other supportive factors that promote transparency and accountability in local government decision making, such as the overall structures governing decision making and various processes related to meetings.

Legislation

- *Local Government Act 1989* and related regulations
- *Charter of Human Rights and Responsibilities Act 2006*.

Methodology

47. The investigation involved two stages.

Stage one: overview of 79 councils

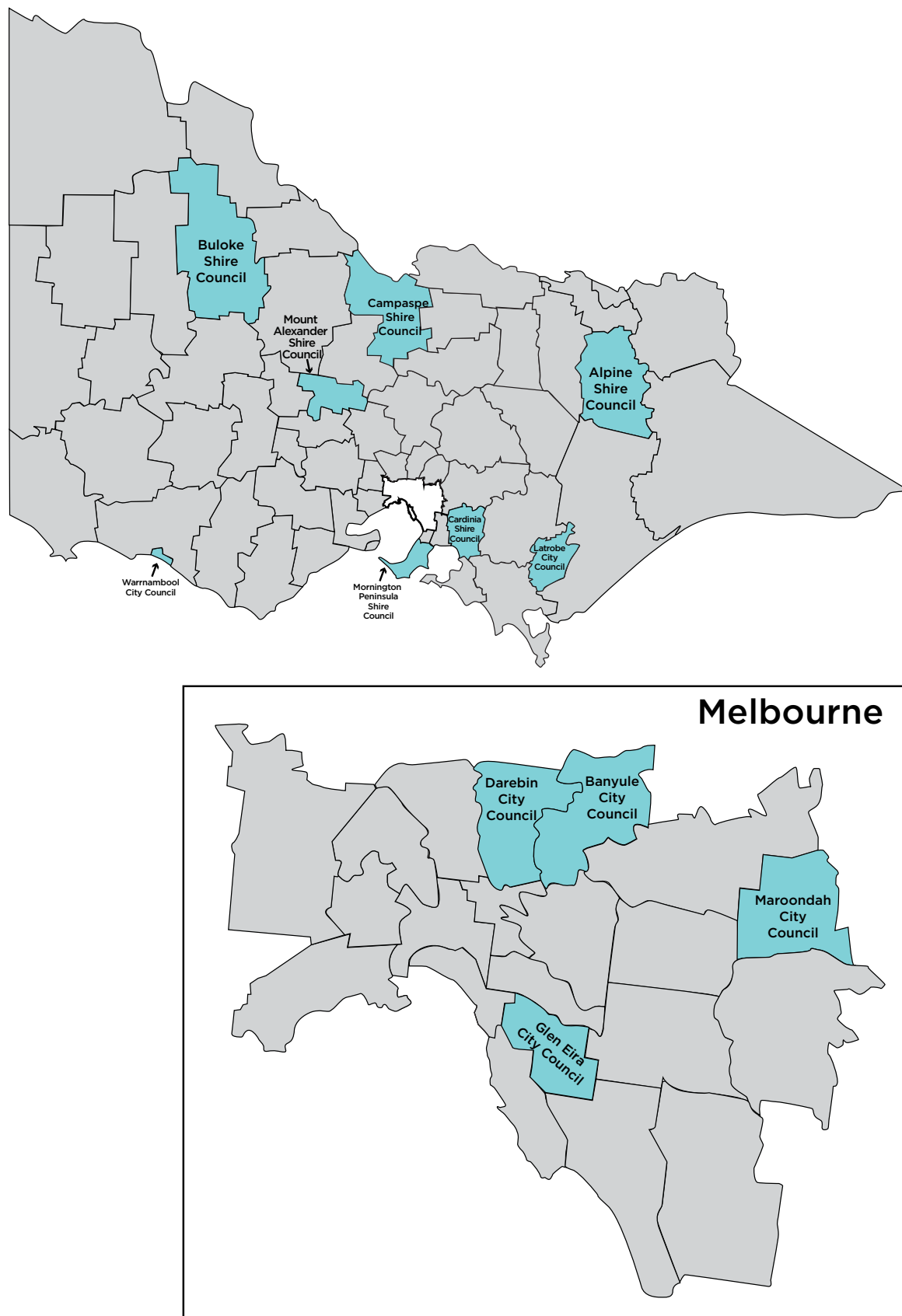
Stage one involved:

- consideration of:
 - the Local Government Act and related regulations
 - Local Government Performance Reporting Framework data (LGPRF)
 - Local Government Act Review documentation, including submissions to the review
 - submissions to the Victorian Ombudsman following the media release about the investigation
 - relevant media.
- meetings with:
 - 26 past and current councillors, Mayors and council staff, including CEOs and governance officers
 - local government peak bodies, including the Municipal Association of Victoria (MAV); Local Government Professionals (LGPRO); Victorian Local Governance Association (VLGA)

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- Agencies including the Local Government Investigations and Compliance Inspectorate (LGICI); Local Government Victoria (LGV); the Victorian Auditor-General's Office (VAGO) and the Acting Victorian Freedom of Information Commissioner.
 - ten telephone conferences with former and current councillors; Mayors; CEOs; governance officers; and other council staff.
 - a written survey of the 79 Victorian councils.
 - development of a rationale to select a group of 'focus councils' to examine further detail in relation to transparency policies and practices. A sample size of 12 councils was decided on in order to allow examination of a range of different types of councils in different locations. Using the Victorian Local Government Comparator Groups¹⁵, two small shire, two large shire, two regional city, two interface and four metropolitan councils were included.
 - the 12 councils were also selected based on the results of the initial survey; public submissions to the Local Government Act Review; complaints to the Ombudsman; and the 2014/15 LGPRF transparency measure data. The selection process considered whether these sources of evidence indicated that councils had policies and/or practices warranting further examination in the areas of:
 - notification and recording of meetings
 - public participation in council meetings
 - closure of council meetings
 - use of delegations
 - special committees.
 - The 12 focus councils were:
 - Alpine Shire Council (small shire)
 - Banyule City Council (metropolitan)
 - Buloke Shire Council (small shire)
 - Campaspe Shire Council (large shire)
 - Cardinia Shire Council (interface)
 - Darebin City Council (metropolitan)
 - Glen Eira City Council (metropolitan)
 - Latrobe City Council (regional city)
 - Maroondah City Council (metropolitan)
 - Mornington Peninsula Shire Council (interface)
 - Mount Alexander Shire Council (large shire)
 - Warrnambool City Council (regional city).

¹⁵ For further explanation of the Victorian Local Government Comparator Groups see: <https://knowyourcouncil.vic.gov.au/___data/assets/pdf_file/0009/29439/DOC-15-313642-Victorian-Local-Government-Comparator-Groups-2015-FINAL.pdf>.

Figure 1: Stage two: examination of 12 focus councils



Stage two: examination of 12 focus councils

Stage two involved:

- an examination of the 12 focus councils about the following issues:
 - notification and promotion of council meetings
 - decisions made in open meetings
 - decisions made in closed meetings
 - factors outside meetings impacting on the transparency of decision making
 - records of decisions and the accessibility of those records to the public
 - committees and their role in decision making.
 - further detailed written enquiries to the focus councils and a consideration of the documentation provided in response.
 - face-to-face interviews with 36 CEOs, Mayors and Governance Managers (or their delegates) of the focus councils at their council offices
 - interviews and enquiries with other councils outside the focus group to obtain further evidence about specific transparency issues or practices.
 - a review of the legislation and practices of local councils in other states.
48. The assessment and management of nine complaints also arose from the investigation, two of which were referred to the Independent Broad-based Anti-corruption Commission for assessment under the *Protected Disclosure Act 2012*.

Survey data

49. This report contains a number of data tables and related commentary primarily based on responses to the survey of the 79 councils undertaken between March and May 2016. Where data was requested from councils in the survey, it was for the period 1 July 2014 to 30 June 2015.
50. The data is based on self-reporting by councils in response to specific questions. Responses have not been verified using other sources of evidence. In some cases, the data may not be consistent with evidence obtained and set out elsewhere in the report. There are a range of possible reasons for this, including differences in how councils have interpreted each survey question and changes to policies and processes made after the survey.
51. While the data is not based on a comprehensive review of the documents and practices of each council, key aspects have been included in the report in summary form as they provide a useful indicator of policies and practices across the sector.

Standard of proof and procedural fairness

52. In reaching the conclusions in this report, the standard of proof applied is the balance of probabilities.
53. In accordance with procedural fairness obligations under the Ombudsman Act, all relevant witnesses were provided with a reasonable opportunity to respond to relevant parts of this report. All responses have been considered and the report has been amended and/or their responses included where appropriate.

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54. It is in the public interest to, as much as possible, identify the officers, councillors and councils referred to throughout this report. However, in some cases, there are risks to the wellbeing or safety of persons involved that outweigh the public benefit of identifying them. For this reason, some quotations and case studies have been fully de-identified.
55. In accordance with section 25A(3) of the Ombudsman Act, any persons who are or may be identifiable from the information in this report are not the subject of any adverse comment or opinion and
- we are satisfied that it is necessary or desirable in the public interest that the information that identifies or may identify those persons be included in this report; and
 - we are satisfied this will not cause unreasonable damage to those person's reputation, safety or wellbeing.
56. Where witnesses are referred to by title in this report, it is the title they held at the time of the interview.

The Victorian Ombudsman's role under the *Charter of Human Rights and Responsibilities Act 2006*

57. The Victorian Ombudsman has a unique role under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) that articulates the rights, freedoms and responsibilities of all people in Victoria. The Victorian Ombudsman has a role under the Charter to enquire into or investigate if decisions and actions by agencies within jurisdiction, including local councils, are compatible with the rights set out in the Charter.
58. Local councils regularly deal directly with their communities. At a minimum, councils must ensure their decisions, actions, policies and services consider and are compatible with human rights; local laws are interpreted and applied consistently with human rights; and councillors and council officers act in a manner respecting human rights.
59. This investigation considers whether councils give proper consideration to the public's right to 'freedom of expression'¹⁶ and to 'take part in public life'¹⁷ when making decisions; whether they allow genuine public participation in and access to council decisions. Of course, these rights must be balanced with the need to respect the 'right to privacy and reputation'¹⁸.
60. Participation may also be influenced by the public's ability to access the decision making process, which may also raise discrimination issues under section 8 of the Charter, 'recognition and equality before the law'. A range of other rights may be engaged. Of particular concern is that any limitation of a human right is demonstrably justifiable under the Charter.

¹⁶ *Charter of Human Rights and Responsibilities Act 2006* section 15(2).

¹⁷ *Charter of Human Rights and Responsibilities Act 2006* section 18(1).

¹⁸ *Charter of Human Rights and Responsibilities Act 2006* section 13.

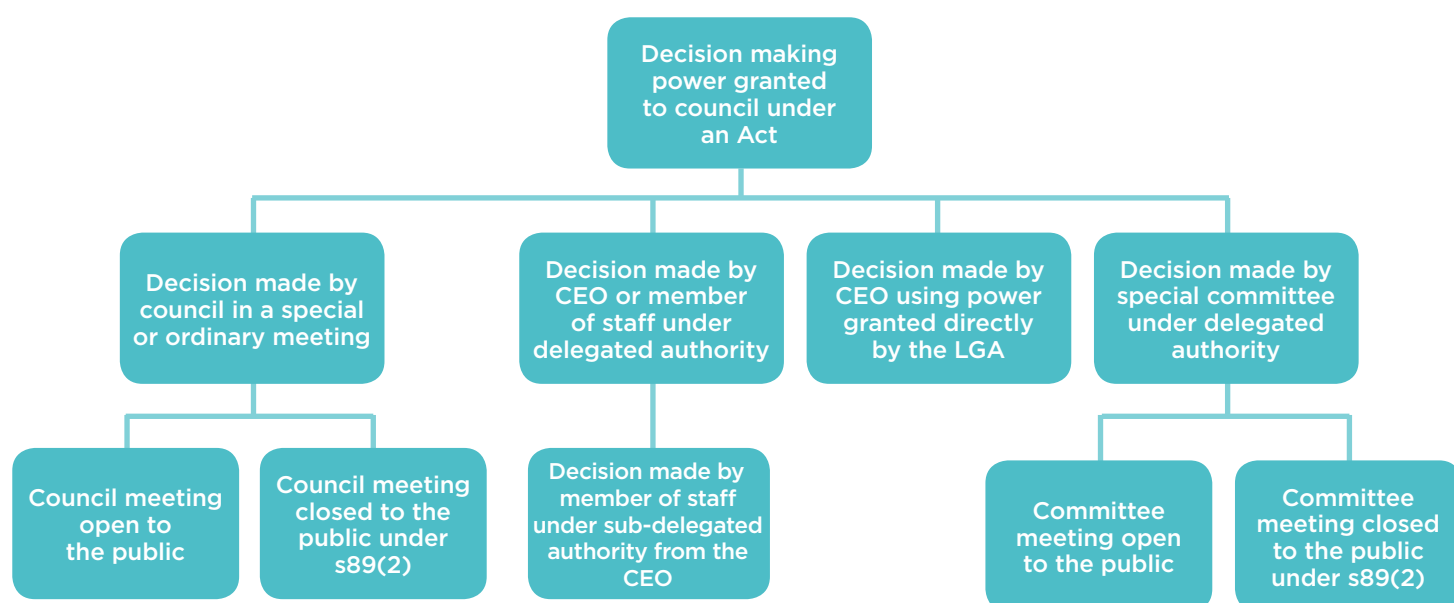
Local government in Victoria

61. Local government existed in Victoria prior to its separation from the colony of New South Wales in 1851. The Local Government Act provides the framework for the establishment and operation of councils. Since 1989, the Local Government Act has been extensively revised and subject to more than 90 amendments, resulting in hundreds of individual changes.
62. The 79 Victorian councils provide services for their communities in the areas of health; planning and building control; business and economic development; waste and environmental management; and human and community services. They are also businesses employing more than 50,000 people, spending more than \$7 billion on service delivery and \$2 billion on infrastructure each year and managing \$70 billion-plus in public assets.
63. The Minister for Local Government oversees the system of local government in Victoria with the assistance of Local Government Victoria, a division of the Department of Environment, Land, Water and Planning.

Machinery of local government decision making

64. Councils are bodies corporate established under the Local Government Act. While councillors are elected to their positions, they are still bound by the requirements of the Local Government Act when making decisions on behalf of the community.
65. The Local Government Act requires that councils decide matters by majority vote at 'ordinary council meetings' or 'special council meetings', which are open to the public. A council may only close a meeting to the public to consider specified types of confidential matters.
66. Councils can resolve to delegate some of their decision making powers to individual staff or committees, such as:
 - the CEO
 - a member of council staff
 - a special committee¹⁹.

Figure 2: Council decision making framework



¹⁹ Local Government Act 1989 section 86.

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67. The investigation looked primarily at decision making by councils in council meetings. However, it is important to note that most decision making is delegated to council CEOs and staff who make decisions in accordance with council policies and procedures.
68. Councillors are given information at briefings by council staff regarding issues to be decided at upcoming council meetings. Their opinions may also be informed by a range of other sources, such as contact with members of the public and reports from advisory committees of council.
69. The Local Government Act contains minimum standards for meeting governance, including that public notice must be given of council meetings; they must be open to the public; and minutes of meetings must be created and available for public inspection. It also requires councils to create local laws governing council meetings and special committee meetings²⁰. Some councils also have additional policies or guidelines regulating specific areas of meeting procedures or governance.

The importance of transparency and accountability in local government

70. It is the role of councils to 'provide governance and leadership for their local communities through advocacy, decision making and action'²¹. They make decisions on a wide range of matters affecting individuals, groups and large geographic areas²² and every year, collectively control the use and expenditure of billions of dollars in public funds and infrastructure.
71. Section 3C(1) of the Local Government Act states:
- The primary objective of a Council is to endeavour to achieve the best outcomes for the local community having regard to the long term and cumulative effects of decisions.
72. In seeking to achieve this primary objective, a council, 'must have regard to' the facilitating objective 'to ensure transparency and accountability in Council decision making'²³.

20 Local Government Act 1989 section 91(1).

21 Local Government Act 1989 section 1(4).

22 Under the Local Government Act 1989 and a range of other pieces of legislation such as the Planning and Environment Act 1987, Road Management Act 2004 and the Domestic Animals Act 1994.

23 Local Government Act 1989 section 3C(2)(g).

73. Transparent decision making in local government promotes a positive and productive relationship between councils and communities and allows citizens to have a greater sense of ownership of and connection with their council activities. More so than at any other level of government, local councils provide the opportunity for citizens to engage with decision making directly affecting their homes and communities. Transparent decision making in local government supports accountability, encourages high performance and also increases public confidence in councils and their processes. Individuals will not always agree with council decisions, but transparency allows them to understand their council's reasoning and can address any suspicions of impropriety in the decision making process.

74. Councils are elected to represent and care for the interests of their communities and, as such, those communities have the right to clearly see how councils are exercising the powers and responsibilities entrusted to them.

75. In a submission to the Local Government Act Review, one member of the community described it this way:

The community should be able to hold local councils to account about the services they provide. To do this, the community need information about decisions local councils are taking and how local councils are spending public money.

Transparent decision making in local government promotes a positive and productive relationship between councils and communities and allows citizens to have a greater sense of ownership of and connection with their council activities.

Decisions made in open council meetings

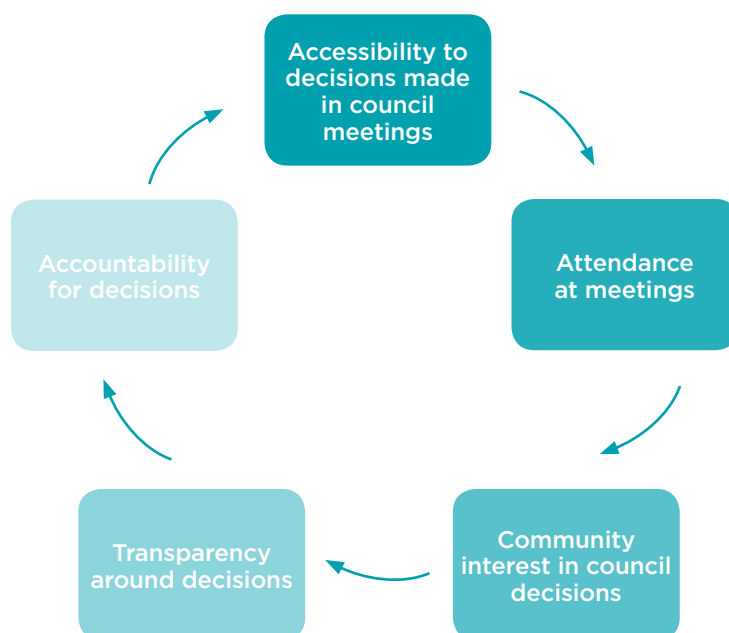
76. The Local Government Act requires a decision of council to be made by resolution in a meeting which is 'open to members of the public'²⁴ unless the meeting has been closed to the public under section 89(2), or the decision has been delegated to a special committee or a member of council staff.
77. Open council meetings give the public an opportunity to see their elected representatives in action. Providing easy access to council meetings encourages attendance and interest in council decisions, which in turn improves transparency around the decisions made at those meetings and the accountability of council for its decision making.

78. However, not all decisions made in meetings open to the public are equally transparent. The following factors have an impact on the accessibility and transparency of decision making in open meetings:

- notice of meetings
- availability of agendas
- timing and location of meetings
- live streaming/broadcasting of meetings
- notices of motion
- public participation
- debate in chamber
- *en bloc* voting/consent agendas
- record keeping.

These factors are discussed in detail below.

Figure 3: Transparency cycle



²⁴ Local Government Act 1989 section 89(1).

Meeting types

79. This chapter of the report deals with ordinary and special council meetings, collectively known as 'council meetings'. Most of the transparency requirements applying to council meetings also apply to special committee meetings. Special committees are discussed separately in the section of this report titled 'Special committees'.
80. The difference between ordinary council meetings and special council meetings is set out in section 83 of the Local Government Act, which states:
- The Council may hold –
- (a) ordinary meetings at which general business of the Council may be transacted; and
 - (b) special meetings at which the business specified in the notice calling the meeting may be transacted.
81. Ordinary meetings are council meetings which are held regularly to deal with general business. Of the 12 focus councils, seven hold ordinary council meetings on a monthly basis and five on a bi-monthly basis. Special council meetings are called on an ad hoc basis to deal with specific issues.

Notice of meetings

82. Under the Local Government Act, a council must give 'public notice' of council meetings. The notice must be published in a local newspaper and also on the council's website, at least seven days before a meeting. Section 89 of the Act states:
- (4) Unless subsection (4A) applies, a Council must at least 7 days before the holding of –
- (a) an ordinary council meeting; or
 - (b) a special council meeting; or
 - (c) a meeting of a special committee comprised solely of Councillors – give public notice of the meeting.
- (4A) If urgent or extraordinary circumstances prevent a Council from complying with subsection (4), the Council must –
- (a) give such public notice as is practicable; and
 - (b) specify the urgent or extraordinary circumstances which prevented the Council from complying with subsection (4) in the minutes.
83. Section 3 defines 'public notice' as:
- a notice published in a newspaper generally circulating in the municipal district of the Council chosen for the purpose by –
- (a) if the notice is required to be given by the Council, the Council;
84. Section 82A(2)(a) requires that any public notice required to be given by the council is also published on the council's website.

Table 1: Notice of Council meetings

Council	Notice of Council meetings			
	At least 7 days notice of			
	Ordinary meeting		Special meeting	
	in newspaper	on website	in newspaper	on website
Alpine				
Ararat				
Ballarat				
Banyule				
Bass Coast				
Baw Baw				
Bayside				
Benalla				
Boroondara				
Brimbank				
Buloke				
Campaspe				
Cardinia				
Casey				
Central Goldfields				
Colac Otway				
Corangamite				
Darebin				
East Gippsland				
Frankston				
Gannawarra				
Glen Eira				
Glenelg				
Golden Plains				
Greater Bendigo				
Greater Dandenong				
Greater Geelong				
Greater Shepparton				
Hepburn				
Hindmarsh				
Hobsons Bay				
Horsham				
Hume				
Indigo				
Kingston				
Knox				
Latrobe				
Loddon				
Macedon Ranges				

Manningham				
Mansfield				
Maribyrnong				
Maroondah				
Melbourne				
Melton				
Mildura				
Mitchell				
Moir				
Monash				
Moonee Valley				
Moorabool				
Moreland				
Mornington Peninsula				
Mount Alexander				
Moyne				
Murrindindi				
Nillumbik				
Northern Grampians				
Port Phillip				
Pyrenees				
Queenscliffe				
South Gippsland				
Southern Grampians				
Stonnington				
Strathbogie				
Surf Coast				
Swan Hill				
Towong				
Wangaratta				
Warrnambool				
Wellington				
West Wimmera				
Whitehorse				
Whittlesea				
Wodonga				
Wyndham				
Yarra City				
Yarra Ranges				
Yarriambiack				

KEY	Yes		No		Varies		N/A		Unclear	
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Notes: The Local Government Act requires seven days 'public notice' to be provided for council meetings unless 'urgent or extraordinary circumstances' prevent compliance. The 'urgent or extraordinary circumstances' must be recorded in the minutes of the meeting. In many cases, council responses stated that where seven days 'public notice' was not provided, they complied with this requirement.

85. Responses to the survey conducted of the 79 Victorian councils indicate that most councils are adhering to public notice requirements for ordinary council meetings in the Act. As shown in Table 1, the majority of councils advised that they provide at least seven days notice to the public of both ordinary and special council meetings in both newspapers and on their websites. Most councils which advertise their meetings on their websites also indicated that they do so via direct link from their website homepage.

86. In its background paper titled 'Transparency and Confidentiality in Council Decision Making', the Local Government Act Review identified that – in relation to the requirement for council meeting notifications to be published in a locally distributed newspaper – most councils comply by publishing a list of meeting dates once a year. The prevalence of this practice was confirmed in responses to the survey. The paper stated that, as '[n]early everyone discards their local papers within a short period, it is open to question whether this is the best way to advertise meetings'²⁵ and suggested that publishing dates on websites is a more effective form of advertising.

Unclear local laws – public notice

87. Section 91 of the Local Government Act states:

- (1) A Council must make local laws governing the conduct of meetings of the Council and special committees.
- (2) Except as provided in this Act and subject to any local laws, the conduct of meetings of a Council is in the Council's discretion.

88. Section 111(2) also states that a local law 'must not be inconsistent with any Act or regulation'.

89. The investigation reviewed local laws relating to the conduct of meetings for each focus council (and also those of some councils outside that group). We identified provisions relating to public notice requirements in four of the 12 focus councils' local laws which have the potential to mislead council staff and councillors using them as to their obligations under the Local Government Act. The examples below illustrate this. While the requirement to provide at least seven days public notice of a meeting or 'specify the urgent or extraordinary circumstances which prevented the Council from complying' is clear in the legislation, none of these local laws clearly explain this. In each case, reliance on the local law alone could be misleading.

Campaspe:

2.3 Notice of Meeting – Public

Reasonable notice of Council Meetings must be given to the public by advertising in local newspapers generally circulating within the municipality and on the Council website.

Advertising can be done as a schedule of meetings either annually or at various times throughout the year, or just prior to each meeting unless extraordinary circumstances exist.

Reasonable notice of Council Meetings is considered to be at least 48 hours before a meeting.

Mount Alexander:

9. Dates and Times of Meetings

(1) The date time and place of all Council meetings are to be fixed by the Council and reasonable notice of the meetings must be provided to the public.

(2) The Council may change the date, time and place of any Council meeting which has been fixed and must provide reasonable notice of the changes to the public.

²⁵ The Local Government Act Review, Transparency and Confidentiality in Council Decision Making, Background Paper #4, December 2015.

...

11. Reasonable Notice

(1) To enable reasonable notice of Council meetings to be given to the public, the Council must prepare a schedule of meetings annually and arrange publication in a local paper either:

- a. of the schedule of meeting dates, at various times of the year; or
- b. of a particular meeting, just prior to that meeting.

(2) Where meeting dates are changed under sub-clause 9(2) or a special meeting is called, details should be published in a local paper unless time does not allow this to occur (in which case the posting of a notice setting out the details must be displayed on a notice board at the Council Offices and on the Council website).

Warrnambool:

21. Notice of a Meeting to the Public

(1) Seven (7) days-notice of Council meeting must be given to the public by advertising on the Council Website and in a local Newspaper generally circulating within the municipality unless time does not permit.

(2) Advertising can be done as a schedule of meetings either annually or at various times throughout the year, or just prior to each meeting unless extraordinary circumstances exist.

(3) Reasonable notice of Council Meetings is considered to be a least forty-eight (48) hours before a meeting.

Latrobe:

16.4 Reasonable notice²⁶ of each Ordinary and Special Meeting must be provided to the public. Council may do this for Ordinary Meetings by preparing a schedule of meetings annually, twice yearly or from time to time, and arranging publication of such schedule in a newspaper generally circulating within the municipal district and/or on Council's internet website either at various times throughout the year, or just prior to each Ordinary meeting.

90. As demonstrated in the case study on page 91 in this report titled 'Airing dirty linen in public', officers may be relying on local laws for governance advice, without reference to the Local Government Act. Where local laws contain insufficient detail or are misleading, this has the potential to lead to legislative non-compliance. It also raises questions around the drafting and quality assurance processes being used by councils when creating local laws.

Promotion of council meetings

91. A number of councils noted in their survey responses that they went over and above the minimum public notice requirements outlined in the Local Government Act and advertised meetings using a variety of media. Some of these are social media, newsletters, notices at council offices and emails to interested parties.
92. One example of this is the Greater Bendigo City Council, which advertises its meetings through eight different media outlets including newspaper, the council's website, radio and TV. It also promotes its meetings through social media. Meeting notifications appear on its Facebook page and Twitter feed.

²⁶ No definition of 'reasonable notice' was provided in the local law.

Practice example: promotion of meetings through social media

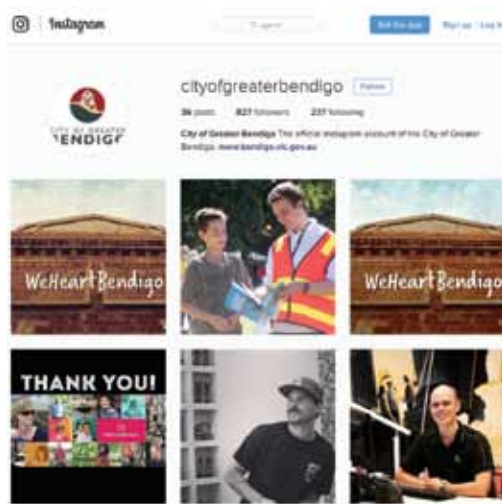
Greater Bendigo City Council promotes its council widely, using various forms of social media, such as Instagram and YouTube.



Facebook



YouTube



Instagram



Twitter

The Greater Bendigo City Council states that it has been steadily increasing its use of electronic media over the past four years and that this has resulted in increased attendance at, and viewers and listeners to, council meetings. The council self-reports attendance at approximately 30 or 40 people per meeting. Two or three media outlets also attend.

-
93. Other councils reported low attendance at meetings, and a low 'care factor' amongst the community. A witness from Maroondah City Council said:

We have very few people usually in attendance at the council meeting.

...

We often Facebook things in there, you know a council meeting on tonight, we often get "who cares" back, but you know, anyway.

...

As much as we'd love to think that people are really interested in what we do, they don't give a rip on the whole.

94. However the witness and the CEO of Maroondah City Council both said the level of public attendance was not an issue because the press attended and reported on meetings.

Agendas

95. The public release of a council's meeting agenda prior to a meeting creates transparency around the decisions that are to be made and has an impact on whether members of the public choose to attend/view/listen to that meeting, or read the minutes after they have been published.
96. The types of matters considered at meetings vary between councils depending on the delegations councils have in place and their individual policies and practices. Generally, CEOs are primarily responsible for setting meeting agendas. Although it is not a legislative requirement, all 79 councils surveyed said that they provide an agenda to the public prior to ordinary and special meetings.
97. Submissions to the Local Government Act Review raise the issue of agendas being released too close to council meetings. As a result, the public may not get an opportunity to properly consider the agenda and officer reports before the meeting. One submitter said:
- In the City of Greater Bendigo [sic] copies of draft Agendas and Council minutes are provided 2 days prior to the meeting for residents and the public to prepare for Council Meetings and respond to any business arising at the meeting. This timeframe is inadequate. I would recommend that a standard be provided where all Councils should provide draft copies of agendas and mins at least 10 working days prior to council meeting to enable the public additional time...'
98. In response to the draft investigation report, the Greater Bendigo City Council said:
- It is more accurate to say the public is given two and a half days' notice of the agenda for the ordinary meeting of the Council, although the newly installed Council has now changed this to five days, including the weekend. In terms of transparency most items on the agenda have already been through a consultation phase ... in which case the issues are already known to the public; or the agenda may include matters that are to be released for a period of consultation, not decision; or matters already part of a separate process in addition to inclusion on the Council meeting agenda. Therefore, the time the agenda is available to the public is [a] little less relevant.
99. Another submitter to the Local Government Act Review said:
- Council, in so many areas, is not being responsible, coming to the fore, and being open, honest, and transparent. Even simple things like only giving the public access to Council Meeting Agendas one business day prior to the meeting are a frustration ...

Whitehorse Ratepayers and Residents Association Inc Submission to the Local Government Act Review

100. In response to the draft report, Whitehorse City Council advised that its agendas are made available to the public on its website at midday on the Friday before the Council meeting on the following Monday commencing at 7.00pm. It also said:

Our council reports and agendas are prepared based on officer professional advice which has been developed with appropriate community input and consultation, for example Town Planning reports are prepared after objectors and developers have been brought together in a forum to discuss differences and to seek common ground before the agendas are published. This example is to demonstrate that the availability of council agendas and reports on a Friday before a Monday meeting provides reasonable public notice, because affected parties have previously been consulted in the formulation of the Council reports and recommendations.

101. The length of time required for councillors and the public to review an agenda depends on its length and complexity. The focus councils' agendas varied in length from meeting to meeting and between councils. The agendas reviewed by the investigation were between 48 and 1160 pages long. Out of the 12 focus councils surveyed, four released their agendas to the public six days in advance of the council meeting. Seven councils released the agenda three or four days prior to the meeting and one council did not provide a response. Two councils released their agendas midday Friday for the council meeting on Monday evening.

102. When asked if he thought lengthy agendas were a hindrance to councillors getting across issues, the CEO of Latrobe City Council said:

That's probably the big issue that we've got here. Our agendas are somewhere between 700 and a 1000 pages so to expect councillors to read that becomes difficult and that's on a three week cycle. Then they've got their briefing papers on the two other Mondays, so huge amount of reading.

...

They raise concerns from time to time that agendas are quite full. And we're the fourth largest regional council in Victoria so we've got a lot of business going on... if you want to do less business you might need some more delegations... it's about what's the council comfortable with.

Practice example: Cardinia Shire Council agendas released six days before meetings

Witnesses from Cardinia Shire Council said that they recognise the importance of providing the meeting agenda to councillors and the public sufficiently in advance of council meetings.

The CEO of Cardinia Shire Council stated that councillors receive the agenda a 'week and a bit' in advance. This gives councillors an opportunity to 'come to a position ... in terms of what's being presented to them' prior to the council meeting.

Cardinia Shire Council also provides the agenda to the general public six days in advance of its meetings. The result is that 'residents, or businesses or whoever' have more time to review the agenda and approach the council if they have an issue. At interview, the CEO said:

So that gives them more time to talk to councillors or more time to talk to us. So it's a systems and process thing for me that you... put in place to make sure everyone has got a fair and equitable opportunity to be briefed ... and raise issues.

Timing and location of meetings

103. Most councils hold their council meetings on weekday evenings, allowing both councillors and members of the public who work during ordinary business hours to attend. The main drawbacks of this arrangement are that community members who do not work regular business hours are likely to have difficulty attending and that meetings have the potential to run late into the night on some occasions. This can diminish accessibility.
104. A number of councils have taken action to make council meetings more accessible, holding them at different locations such as at town halls in smaller townships on a rotating basis, rather than solely at the main civic centre. Of the 12 focus councils, Cardinia Shire Council, Mornington Peninsula Shire Council and Mount Alexander Shire Council each hold meetings in different locations. Where councils are responsible for a large geographic area, such a practice is a means for councils to improve accessibility to community members.

Live streaming/broadcasting

105. Live streaming is another way for councils to increase the public's accessibility to council meetings, particularly for people who find it difficult to physically attend. It allows the public to watch council decision making live, rather than hearing or reading about decisions after they have been made.
106. In response to our survey, 10 out of 79 councils indicated that they live stream their ordinary council meetings on the internet. The CEO of Alpine Shire Council, one of the councils which live streams its meetings said, 'I can see nothing but good from it, it's a symbol that we actually care about transparency'.

107. Witnesses from other councils which do not live stream their meetings expressed interest in this practice at interview, but some also raised concerns about technology and cost. For example, when asked whether Maroondah City Council had considered live streaming, the Mayor said:

That's been suggested on a number of occasions.

...

Modern technology and councils don't always get along and I know that it's been looked into...but we need to drag ourselves out of the last century and get some gee - whizzy things happening. I think live streaming ... would be a bit of fun.

108. Live streaming is not the only way to provide live access to council meetings - another medium being employed is radio. Since 2011, the Greater Bendigo City Council has been broadcasting its meetings live on local community radio station, Phoenix FM.

Notices of motion

109. A 'notice of motion' is a formal notice by a councillor of their intention to propose a resolution to be voted on at a council meeting. While the CEO generally has responsibility for determining the matters on the agenda for each meeting, the notice of motion process is a direct way for a councillor to ensure a particular matter is brought before council. When used appropriately, notices of motion can aid transparency.
110. The Local Government Act does not make any reference to notices of motion. However, nine of the 12 focus councils' local laws provide some guidance on the process.

111. A number of Mayors interviewed for this investigation said they believed the notice of motion process was useful and that they had not seen it used inappropriately. However, other witnesses identified governance risks and provided examples of what they considered to be inappropriate usage. The most significant were:

- decisions being made without adequate background information or officer reports
- councillors making budgeting decisions through notices of motion outside the agreed annual budget
- councillors using notices of motion to involve themselves in operational matters
- dissatisfied councillors using notices of motion to cause disruption
- preparation of notices of motion draining council resources
- inappropriate notices of motion about matters outside the powers of council
- councillors using the notice of motion process for 'political grandstanding' or to inappropriately progress their personal interests.

112. If councillors use notices of motion to circumvent ordinary planning and decision making processes, the risk is that decisions are made quickly - without public knowledge, adequate research, or adequate explanation and documentation of the reasons for a decision.

113. The Good Governance Guide has been produced by the Municipal Association of Victoria, Victorian Local Governance Association, Local Government Victoria and Local Government Professionals to promote good governance in local government. It provides the following guidance on notices of motion:

Using notices of motion appropriately ...

[A notice of motion] can be a useful way for a councillor to raise an issue, which doesn't require advice or a lot of consideration on a council agenda. For example, it might involve asking the council to recognise a significant achievement of a local community member which is already generally well-known.

The downside of using notices of motion for significant issues is that it doesn't generally allow the second (gathering information) and third stages (forming an opinion) of the decision making process to work effectively. If a notice of motion is seeking a decision, this doesn't allow adequate time for advice to be provided or for councillors to consider and determine what extra information they may need. If a councillor uses a notice of motion for a significant item, it's best that the motion request a report for a subsequent meeting.

114. Evidence obtained indicates that in some cases, notices of motion are being used by councillors contrary to the above advice and to the detriment of transparency.

Notices of motion which diminish scrutiny and transparency

115. The risk of decisions being made by councillors through notices of motion without adequate background information or officer advice, was raised by a number of witnesses at interview.

116. The nine focus councils which have local laws relating to notices of motion each specified a timeframe for submitting notices of motion to the CEO prior to a meeting, varying between three and 10 days. Depending on the complexity of a matter and the workload of council staff, these timeframes may not necessarily be sufficient for council staff to investigate the matter and provide advice to council.

117. One former CEO said:

The use of [notices of motion] had always worried me, that a policy or a major issue could just be dealt with [clicks fingers] like that. Yeah I think the local law might have specified that the [notice of motion] had to be provided to me within a certain timeline, 24 hours or 48 hours or something. And I then had to circulate it round if it was legally correct. So that just meant if it was not going to break the law or something. So that would come and they would virtually just use the numbers to push that through. No paper or report, no investigative work, no opportunity to think about something for the others- just bam! There it is. And ... at the end of the day they had the [majority]. And that might be the set up policy or to change a strategy or ... quite profound decisions. And I thought was a gross misuse of power.

118. A council witness identified that the notice of motion process can make it hard for councillors to make an informed decision. She said:

... the amount of information provided to all councillors to make that decision may be inadequate because a notice of motion typically would come in ... a week before a council meeting. They have limited information compared to a council report and supporting documentation, so it would be very difficult I think, for the rest of the councillors to make an informed decision.

119. One Governance Manager said that notices of motion are 'a tactical tool' used by councillors as 'a last resort'. He said that instead of relying on officer reports to make decisions, when a matter is raised via a notice of motion councillors rely on debate within the chamber to resolve the matter. Unless debate is summarised in minutes (which at most councils, it is not) or meetings are audio recorded, there will be no record of debate and the reasoning it exposes.

120. Another area of risk highlighted by witnesses was decisions made through notices of motion which allocate funding or alter the council budget. These decisions are made outside the usual planning and public consultation processes for the annual budget²⁷. While a decision to spend public money made through the notice of motion process may be clear in the minutes of the meeting, the reasoning and assessment of any public benefit is often not. One council witness said that notices of motion move 'away from a very transparent process around the projects and the budget to one over here that's obviously trying to advantage different wards'.

121. The following is an example of a notice of motion which directly affected budget, carried at an ordinary meeting of the of Banyule City Council on 23 September 2013:

That Council allocates a one off budget allocation to a maximum value of \$8,900.00 to prepare Watsonia Shopping Centre for the Watsonia Motor Show on 9 November 2013.

122. In this instance, the notice of motion diverted funds from the budget for a one off payment relating to an event in the ward of the councillor who moved the motion.

123. In response to the draft report, the councillor who proposed the motion stated that the context in which the notice of motion was raised is important to note. He said it had been raised to seek a relatively minor variation to the endorsed 2013-14 budget noting that council had only become aware of the need for investment to support an economic development initiative of the Watsonia Trader's Association (their motor show) after the budget process had been concluded.

²⁷ Section 129 of the *Local Government Act 1989* requires councils to give public notice of proposed annual budgets and gives the public the right to make submissions in relation to them.

124. One council witness gave evidence that some notices of motion, particularly those relating to the allocation of funds, may be misused and subject to insufficient scrutiny. They said:

It's misused, it's abused. We're seeing budgeting through notice of motion ...

125. They went on to explain that in the six months leading up to an election, notices of motion, regarding some funding matters, do not go through the same amount of debate:

That's what we have found in the lead up to the election... no matter how much money I am saving behind the scenes, it can just be whooshed away and no one can vote against the [popular community agency] and it's just poor decision making. I don't know how you tighten that, I keep thinking about it, it's worse in the six month lead up, no doubt.

126. The following case study is an example of a change of council policy made via notice of motion without an officer report. In this case the motion was passed by a slim majority and there were also questions around councillor conflict of interest.

Case study: Warrnambool City Council – Notice of Motion for free parking

On three separate occasions, in 2013, 2014 and 2015, a councillor of the Warrnambool City Council, put forward notices of motion proposing to waive parking fees in various carparks in Warrnambool during the peak summer season.

On the first two occasions he raised these motions, they were lost. But when he raised the matter a third time at an ordinary council meeting on 5 October 2015, the motion was passed²⁸.

Allowing free parking in Warrnambool's main CBD carparks over the summer holiday period was a change in policy with financial implications for the council.

No officer's report was tabled in relation to the matter. Therefore, the minutes of the meeting do not contain any explanation for the reasons for the decision, nor any assessment of the financial implications or the benefit to the community arising from the change in policy.

The CEO at Warrnambool City Council said at interview that notices of motion were sometimes used to implement measures that were not in the council budget or plan. He said this was due to what had at the time been 'weak' provisions in local laws in this area.

On 2 May 2016, the Warrnambool City Council resolved to make a new local law regulating meeting procedures, the *Governance (Meeting Procedures) Local Law No 1 2016*. The new local law contains additional requirements around notices of motion, such as:

... a Notice of Motion must call for a Council report if the Notice of Motion:

- (a) substantially affects the level of Council services;
- (b) commits the Council to expenditure in excess of \$5,000 and that has not been included in the adopted budget;
- (c) establishes or amends a Council policy; or
- (d) commits the Council to any contractual arrangement, as determined by the Chief Executive.

(6) Where a Notice of Motion is likely to commit Council to significant expenditure not included in the adopted budget then the Notice of Motion must only call for referral to and for Council's consideration as part of its future year's annual budget and public submission process.

These new requirements will aid informed decision making and transparency around the reasons for decisions such as the one referred to in this case study.

²⁸ The councillor who raised the notice of motion operates a retail business in the Warrnambool CBD. In relation to the 2013 and 2014 motions, the councillor declared an interest in matter prior to the vote and left the chamber. On the third occasion the motion was moved, the councillor did not declare a conflict, but moved and voted on the motion.

Media headlines

Cr: Give shoppers free CBD parking

- *The Standard*, 9 December 2013

New bid for free off-street summer parking in Warrnambool

- *The Standard*, 4 October 2014

Third time lucky: free parking plan passed

- *The Standard*, 5 October 2015

Regulating the use of notices of motion

127. Each of the 12 focus councils have different practices in relation to notices of motion, and while some have local laws regulating the process, the level of detail in them varies. The majority of focus councils have some provisions aimed at guiding appropriate use of notices of motion. For example, seven councils allow the CEO to reject a notice of motion for reasons such as being too vague, unclear or defamatory. However, fewer have adopted provisions, such as those implemented by Warrnambool City Council, aimed at restricting policy decisions from being made by notice of motion or ensuring adequate time for officer reports to be prepared. Campaspe Shire Council is one example of another council which has taken this approach. *Its Local Law no. 1 – Meeting Procedures* states:

6.11 Notices of Motion

- a) A Notice of Motion must be in writing, dated and signed by the intending mover and lodged with the Chief Executive Officer no later than 12 noon at least ten (10) business days before the meeting.
- b) A notice of motion will only be accepted if it:
 - i) Does not relate to a matter in respect of which Council has no power to act
 - ii) Does not substantially change the levels of Council services
 - iii) Does not commit Council to significant expenditure not included in the adopted budget
 - iv) Does not declare a rate or charge
 - v) Does not establish or amend Council policy
 - vi) Does not commit Council to any contractual arrangement
 - vii) Is not defamatory, indecent, abusive or objectionable in language or substance
 - viii) Provides sufficient detail to ensure the motion is implementable
 - ix) Is not against public order or safety

...

e) Where a Notice of Motion seeks to substantially affect the level of Council services, commit Council to significant expenditure not included in the adopted budget or commit Council to any contractual arrangement, then a formal report must be prepared and presented to Council in response to the Notice of Motion. Where practicable the report should be presented to the next Ordinary Meeting of Council.

128. While not required by its local laws, the investigation identified that Mount Alexander Shire Council has adopted the practice of listing both 'rationale' and 'officer comments' with respect to each notice of motion in its meeting minutes. This increases the transparency around decisions brought before council through the notice of motion process.
129. Two councils within the focus group do not allow notices of motion. These are Mornington Peninsula Shire Council and Maroondah City Council. Mornington Peninsula Shire Council advised that while councillors are not able to directly place an item on the agenda, they are able to request an officer's report be presented to council.

130. Similarly, at Glen Eira City Council, instead of a notice of motion process, councillors are able to make a request for a report. The CEO said that council should be fully informed before making a decision. Another witness from Glen Eira City Council said they run a 'no surprises policy' and that 'there's plenty of evidence around here and at other councils of how [notices of motion are] used for political purposes'. They said that through this 'request for report' process, officers can have input and then the councillors can analyse it as a group and make a 'fair decision'.

131. However, some community members do not agree with this approach. A submission to the Local Government Act Review states:

Notice of motion procedures should be mandatory for all city councils ... without this provision our councillors have no formal process by which they may place an item on the agenda for a council meeting ... In Glen Eira the meeting agenda is formed solely by CEO.

132. Following interviews with Victorian Ombudsman officers, the CEO of Banyule City Council raised concerns about the lack of guidance on notices of motion available in the local government sector. In an email to this office, he stated:

In researching the clauses of other councils it was found that there is no effective definition or guidance about what constitutes an NOM or when councils should use NOMs ... Guidance in this area from either the Ombudsman's Office or Local Government Victoria would be helpful.

Public participation at council meetings

133. Public engagement in council decision making processes increases the level of scrutiny, transparency and public understanding around decisions. The public can participate in council decision making in a variety of ways. There are often formal public consultation processes which occur before significant council decisions and a range of informal communications take place between councillors and constituents day-to-day on particular issues.

134. While the Local Government Act does not contain any general requirements for public participation in council meetings²⁹ (other than that they be open to the public), council responses to the survey indicate that all councils have some kind of public participation in their council meetings. The investigation examined these processes and their impact on the transparency of decision making.

Public engagement in council decision making processes increases the level of scrutiny, transparency and public understanding around decisions.

²⁹ However, section 223 does provide the right for the public to make submissions on specified matters.

Table 2: Public participation in council meetings

Council	Ordinary meeting					Special meeting				
	Ask questions	Make comments	Make presentation	Submit documents	Other	Ask questions	Make comments	Make presentation	Submit documents	Other
Alpine										
Ararat										
Ballarat										
Banyule										
Bass Coast										
Baw Baw										
Bayside										
Benalla										
Boroondara										
Brimbank										
Buloke										
Campaspe										
Cardinia										
Casey										
Central Goldfields										
Colac Otway										
Corangamite										
Darebin										
East Gippsland										
Frankston										
Gannawarra										
Glen Eira										
Glenelg										
Golden Plains										
Greater Bendigo										
Greater Dandenong										
Greater Geelong										
Greater Shepparton										
Hepburn										
Hindmarsh										
Hobsons Bay										
Horsham										
Hume										
Indigo										
Kingston										
Knox										
Latrobe										
Loddon										
Macedon Ranges										

KEY	Yes		No		Varies		N/A		Unclear	
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Council	Ordinary meeting					Special meeting				
	Ask questions	Make comments	Make presentation	Submit documents	Other	Ask questions	Make comments	Make presentation	Submit documents	Other
Manningham										
Mansfield										
Maribyrnong										
Maroondah										
Melbourne										
Melton										
Mildura										
Mitchell										
Moira										
Monash										
Moonee Valley										
Moorabool										
Moreland										
Mornington Peninsula										
Mount Alexander										
Moyne										
Murrindindi										
Nillumbik										
Northern Grampians										
Port Phillip										
Pyrenees										
Queenscliffe										
South Gippsland										
Southern Grampians										
Stonnington										
Strathbogie										
Surf Coast										
Swan Hill										
Towong										
Wangaratta										
Warrnambool										
Wellington										
West Wimmera										
Whitehorse										
Whittlesea										
Wodonga										
Wyndham										
Yarra City										
Yarra Ranges										
Yarriambiack										

Notes: Where councils specifically referred to 'petitions'; 'joint letters'; 'statements'; 'addressing council on planning permits'; 'representations'; or 'submissions' in their free text responses as public participation processes in addition the specified categories, these have been categorised as 'other'. Councils with a 'varies' response in relation to special meetings generally indicated that whether the particular type of participation was allowed depended on the subject matter of the meeting.

The objective of public question time

135. One form of public participation in decision making offered by most councils is public question time during council meetings. Seventy-five councils allow the public to ask questions at ordinary council meetings, with the remaining four allowing some other form of public participation such as presentations or the submission of documents. Thirty-two councils also said they allow public questions in special council meetings, with another six allowing questions depending on the circumstances.

136. Interviewees were asked what they considered the purpose of public question time during meetings to be and about its relationship to decision making. Interviewees provided various opinions on the value of public question time and its impact on transparency. There were two main themes which emerged. These were that question time:

- is an opportunity for the community to influence decision making
- can provide further insight into the rationale behind decision making, but does not or should not influence council decisions.

137. A former Mayor said that when he was on council there was 'no prohibition on any member of the public coming along and getting up and asking that question ... and [he] allowed it to happen for as long as necessary'. He felt that the community has a right to come to meetings and participate. He said 'why can't someone just turn up and ask a question of one of the representatives?'

138. A number of witnesses thought that question time did not influence council decision making and that community consultation or councillors 'pressing the flesh' and providing information to the community though other forms of public engagement had a bigger impact. The CEO of Cardinia Shire Council said that they get a small group of regulars who attend most council meetings. He said that most of the questions 'could have been resolved with a quick call to the council' but there are regulars who dominate question time. However, he went on to say that 'if you took [public question time] away there would be uproar even though not many people actually use it'. The Mayor from another council said that public question time is 'from a previous time where you didn't have the same opportunities'. He said that question time is no longer as relevant as it once was because the public can now contact the council by telephone or email with queries much more readily.

139. While some council witnesses said they did not think it was appropriate for question time to influence a resolution at a meeting, other interviewees said question time should and did have an impact on councillor decision making. Some provided examples of questions asked at public meetings which they believe influenced a council decision.

Public question time – local laws, policies and practices

140. All of the 12 focus councils allow public question time during ordinary council meetings and a review of their local laws showed that all except Alpine Shire Council's contain some guidance or restrictions on question time³⁰. The framework provided by each of the local laws varied. Appendix 5 contains a summary of how the 12 focus councils run question time and demonstrates the diversity of practice.

³⁰ However witnesses from the council advised at interview that the council does conduct question time at meetings, without any restrictions.

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141. At interview, one council officer said that although residents 'love attending the meetings ... including the elderly', public question time can be abused. Other witnesses spoke about the potential impact of public question time on the efficient running of meetings. One also raised an issue with security and public question time at meetings:

We have had to call the police ... we have had some issues where it's been probably not safe and we could do more without security. And that is the other downside of public question time, because we're not sure who's going to turn up, and they start asking a question that's perhaps, you know, not in the public interest.

142. To minimise incidents such as this and other perceived abuse by the community, councils have applied a number of restrictions to public participation such as requiring questions on notice, restricting time to speak and only allowing questions on certain topics. One council witness stated that councils had to be sure that they were balancing democratic rights of residents with the ability to run an orderly council.

143. Twenty-five out of 79 councils indicated that public questions must be submitted to council prior to the meeting³¹. The amount of time required varies. A number of councils require the question to be submitted by 12pm on the day of the meeting. Several also allow the question to be submitted immediately prior to question time commencing, or 10 minutes before. However, at the other end of the spectrum, one council requires the question to be provided to the council seven days prior to the meeting.

144. Of the focus councils, nine require notification of the question prior to the meeting. One, Campaspe Shire Council, allows questions to be submitted within 10 minutes of meetings, while the Alpine Shire Council and Mount Alexander Shire Council allow questions from the public gallery without notice. When asked how well this approach works at Alpine Shire Council, the CEO indicated that it was not without challenges, but said the council was reluctant to change procedures unless it became an excessive drain on resources.

145. At interview, the CEO of Maroondah City Council explained that requiring questions on notice improves the quality of responses because the council has an opportunity to research questions before providing an answer. He said:

Prior notice is the only way to do it to guarantee that you will actually get a meaningful response every time.

146. He also said that requiring questions to be submitted prior to the meeting lowers the likelihood of a 'Dorothy Dixier' scenario.

147. One council witness said that the council they currently work at does not require questions on notice, but that they had experience at councils which do required questions in advance. They said:

... the down side of that is that if someone wants to turn up on the night, then they can't necessarily ask a question ... Having questions in advance means you can give a more informed answer, so there's pros and cons.

148. In response to the survey, seven councils said that they restricted questions by placing time limits on them³². Of the focus councils, six councils had time limits on questions, and a further three restricted the duration of question time.

³¹ This number is based on responses in the free text section of survey conducted during the investigation. This may not an exhaustive list.

³² This number is based on responses in the free text section of survey conducted during the investigation. This may not an exhaustive list.

149. For example, Maroondah City Council allows 15 minutes in total for public question time in each meeting. However, at interview, the CEO stated that council was flexible with this restriction. He said that the limitation was 'council giving an indication that we're not going to spend the whole night dealing with [public] questions'. The Mayor explained that she thought that 15 minutes was sufficient because they do not get many questions at meetings. She said:

We had two public questions on Monday night and that was a bit of a surprise.

150. Another focus council, Glen Eira City Council, originally placed no limitations on question time, which witnesses indicated resulted in long meetings. They have recently changed procedures to restrict each questioner to two questions which are to be less than 150 words. The questioner must be present to read out the question.

151. A former Mayor said at interview that he does not agree with timing restrictions. He said:

It's that cutting people off at three minutes without hearing those things which is a real concern.

...

If you're not confident of having members of the public pushing issues with you, you can hide behind the local law and cut them off at three minutes or councillors should to learn to be a bit braver ... you need to be brave enough to take criticism, hear alternate views without having locked yourself into a position behind closed doors and pretend you're going through ... too often it looks like they're just going through the motion.

152. A common restriction to question time is placing a limit on the number of questions asked. For instance, in the case study below, Boroondara City Council made the controversial decision to change its public question time policy.

Case study – restricting question time and the public response (Boroondara)

In May 2015, Boroondara City Council changed its meeting procedures in relation to public question time. It restricted the number of questions an individual could ask to 11 per person, per year, which is an average of one question per meeting. Questions are also required to relate to an agenda item or have been the subject of a prior written enquiry to a councillor or a member of council staff, which has received a written response from a councillor or a member of council staff.

The change prompted 52 written submissions and nine people spoke directly to the council about the issue. It also resulted in a number of submissions to the Local Government Act Review and a complaint to this office. This demonstrates how important question time can be to the community.

Councillors voted 7:3 to place these restrictions on question time. The Mayor was one of the three councillors who voted against the change. She is quoted in the Leader Community News on 1 May 2015, stating:

I'm philosophically opposed to this change. The fact is we've only had two residents over the past 12 months who have asked more than 11 questions.

However, other councillors said placing restrictions on question time was not about reducing democracy as the public are able to meet with councillors personally or call and discuss issues one on one, rather than in a public forum³³.

³³ Greg Gliddon, 'Decision to put foot down on 'vexatious' questioners passed with debate at Boroondara, Leader community News (online), 1 May 2015 < <http://www.heraldsun.com.au/leader/inner-east/decision-to-put-foot-down-on-vexatious-questioners-passed-with-debate-at-boroondara/news-story/bca10daa23a2341529c0ff6701a6b4e8>>.

In response to the draft report, the City of Boroondara said:

Public question time at the City of Boroondara provides members of the public with an opportunity to engage directly with Council on any subject matter. In this sense, members of the public can raise directly with Council, matters which they believe warrant the attention of councillors.

However, members of the public have many mechanisms at their disposal to engage with councillors. For example, members of the public can make a submission about an agenda item at either the Urban Planning Special Committee or the Services Special Committee meetings. This provides the public with an opportunity to directly engage with their elected representatives prior to a decision being made. This is not comparable with the majority of Victorian councils and should be considered in the context of your discussion of Boroondara's public question time procedures.

Before matters are listed for consideration at a Council meeting they have (where appropriate) already been through a community consultative process. This allows the public to have input on key issues, prior to a decision being made by Council.

In the years since public question time was included on the agenda for Council meetings, councillors and council officers have become more accessible than ever before to the community.

Councillors and the Council administration can be contacted directly by post, phone and email. There are also a variety of opportunities to engage with councillors and council officers via Council's social media (e.g. Twitter and Facebook) or online blogs. There are also unprecedented opportunities to generate public debate on Council issues through electronic or social media opportunities offered by local community groups and media outlets. This suggests that the importance of public question time is perhaps waning.

At the City of Boroondara, public question time is not intended to be an opportunity for members of the public to express their opinion or position on a particular issue, or seek to enter into a public debate but rather to ask a question or questions of their elected representatives.

Media headlines

Decision to put foot down on 'vexatious' questioners passed with debate at Boroondara

- Progress Leader, 1 May 2015

Council to limit questions

- Moorabbin Glen Eira Leader, May 2015

153. In contrast to Boroondara City Council, which requires that questions relate to an agenda item or a matter which has previously been responded to in writing by a councillor or a member of council staff, Darebin City Council prohibits questions on agenda items. The Mayor said the reason behind this was:

Well, quite simply we think it's better to have a debate there and then for the matter with no preconceived opinion or view formed prior to that debate occurring.

154. He later stated 'that these changes were recommended by the Municipal Monitors appointed by the Minister'.

155. The Executive Manager Corporate and Governance Performance of Darebin City Council said the rationale behind this restriction is that councillors do not want to pre-empt any debate that is going to happen later in the night by answering a question to a resident before they have discussed it or made a decision. This is because question time is at the beginning of the meeting, before other agenda items.

156. Another witness from Darebin City Council said that the purpose of question time was not to influence a councillor to vote in a particular way. He said that in the past, during election time, council meetings have had a 'rent-a-crowd' and the gallery can have 10 people who ask the same question. He said:

They can contact us, they can email us ... there's plenty [of ways to raise issues] so we're not depriving [them of] being allowed to ask questions, we're far from it.

157. This view is different from that of a number of others interviewed who consider one purpose of question time is for the public to have its voice heard and considered when councillors are making decisions.

158. In order to increase efficiency where multiple questions are asked about the same issue, Brimbank City Council has included a clause in its local law that states:

69. Question time
(14) Like questions may be grouped together and a single answer provided.

159. In March 2016, Darebin City Council changed its question time processes so that the public has to submit questions prior to the council meeting. Previously questions were asked 'from the floor' but according to a senior council officer, the process needed to be changed as 'councillors were using it through organised community groups to come in and ask inappropriate questions on operational issues'. They also said the change was to make meetings more efficient. According to the Mayor, the change was made to ensure that the response given by councillors was more detailed.

160. The Mayor said that some people found the change 'not very democratic' as it 'disallowed people from participating in a process'. He said:

We've recently as of Monday this week [18 July 2016] asked questions to come from the floor again, providing they understand what they can ask [and] how they can ask so it doesn't damage anyone's reputation.

161. Interviewees' views on the necessity of restrictions on question time varied. Some believed restrictions were necessary to run council meetings efficiently. One Mayor said their council has restrictions in place to prevent meetings getting 'completely hijacked'. Others believed restrictions were not necessary and that answering community questions was part of the role. A former Mayor who said:

I think it's driven by Mayors and Councillors being afraid of engaging in the tough conversations.

Placement of question time in the meeting

162. Most of the focus councils hold public question time at the beginning of council meetings. However, four hold question time at the end of the meeting. One former CEO said one reason for having public questions at the end was that 'then most of those questions would become redundant because all the resolutions would have already been made'. He went on to say that asking a question at that stage may be 'confusing or irrelevant' but where the matter is of significant public interest, there would have already been a public consultation process anyway.
163. One Mayor said their council holds question time at the beginning of the meeting so the public can 'leave if they want'. Another interviewee also said having question time at the 'front end of a meeting' improves accessibility for the public, 'so they don't have to stay until the end of the meeting as happens in some councils'. If public question time is going to have any influence over a decision being made at a meeting, the timing must be prior to a resolution being made by the council.

Recording of question time

164. Ten of the 12 focus councils record public questions and answers in meeting minutes. Alpine Shire Council does not make a written record of questions, but it does provide public access to audio-visual recordings of its meetings, including public question time. Banyule City Council was the only council that does not record public questions and answers either in the minutes or an audio record of the meeting.

165. Warrnambool City Council's *Local Law No. 1 - Governance (meeting procedures)* states that the questions must be recorded in the minutes as an official record:

36. Public Question Time

...

(11) The name of the questioner, the question and the response must be recorded in the Minutes, as an official record of the questions submitted to the meeting.

Debate in chamber

166. Debate between councillors can show the rationale behind decisions being made in meetings. By observing debate, the community can see how and why council has come to a decision. The Good Governance Guide states that 'robust debates about complex issues are a feature of a healthy democracy'. Debate is one way for councils to be more transparent.
167. A review of the focus councils' local laws found that the majority of councils allow for debate after a motion has been moved and seconded, if there is an objection to the motion. The procedures allow for the mover, seconder and any objectors to speak to the motion. Some councils give all councillors an opportunity to speak to the motion. Three of the 12 focus councils' local laws state that adequate debate must occur for contentious issues.
168. Buloke Shire Council's *Local Law No. 18* states:
72. Debating the motion
- (3) Adequate debate is required where a matter is contentious in nature. In such a case, every Councillor should be given an opportunity to debate.
- (4) A motion has not been sufficiently debated if opposing views (where they exist) have not been sufficiently put not so much the number of those who have spoken but whether all minority opposing views have been put.

169. A Deputy Mayor of one council said that the councillors try to have the same conversation that they have in the briefing sessions in the council chamber:

Do we air our thoughts about what we're thinking [in a briefing session]? The answer would be yes, that's part of that conversation I guess. The trick is to make sure we continue to have that conversation out there for the public to hear and see ... I know some councils don't have any conversations. They put all the motions one to 10 up ... does everyone agree? Yes. There's no conversations about it. I think that is not appropriate of an elected official.

170. Several CEOs and former CEOs said at interview that a lack of debate in the chamber may be an indication that decision making is occurring in briefing sessions. This is discussed in the section of this report titled 'Councillor briefings' on page 93.

171. Of the debate in the chamber, a former CEO said, '[y]ou've got to plan. It's a bit of a performance. There's got to be a bit of a performance going on so the public are educated'.

172. Maroondah City Council's *Local Law No. 12* states that adequate debate must occur when an issue is contentious. However, interviewees from that council said that not a lot of debate occurs in the council chamber. The Mayor said she could see how the process could be seen as rubber stamping as they do not have the same open and frank discussion in chamber that they have in briefing sessions. She said councillors have argued 'many, many times over the years' about how to bring more discussion to the chamber because it is 'good for the community to see who's thinking what and how and why'. The CEO related the lack of debate to low public attendance at council meetings. He said 'if there is nobody there to witness the debate and people [are] only doing it for theatrics, what's the point?'.

173. The CEO of Maroondah City Council also raised the issue of 'grand standing' by councillors. Councils' local laws establish a framework for councillors to speak to or debate motions. In most cases, debate must be relevant to the motion, speaking time frames are applied and points of order set out. This type of guidance and its effective application by the Chair during meetings is one way to limit political grand standing.

***En bloc* voting/consent agenda**

174. There are a number of councils that vote on agenda items *en bloc*. *En bloc* voting is the practice of adopting multiple recommended resolutions using a single resolution. There is no mention of *en bloc* voting or consent agendas in the Local Government Act or regulations, nor is there any advice on the practice specific to Victorian local government.

175. There are two main ways *en bloc* voting can occur during a council meeting:

- The council operates what is commonly known as a 'consent agenda' where all items are voted on and passed together, in a bloc, unless a councillor specifically asks for an item to be withdrawn for debate and separate resolution.
- The council ordinarily votes on each item separately, but on occasion, they group similar items together to be passed with a single resolution.

176. *En bloc* voting may lack transparency as:

- consensus may be reached on *en bloc* matters outside open council meetings or individual councillor votes may be (or at least appear to be) predetermined.
- the absence of public debate on items voted *en bloc* may have an impact on the transparency of the reasons for a decision.
- some minutes do not identify which matters are decided *en bloc*.
- in some circumstances, *en bloc* voting may be inconsistent with common law requirements for procedural fairness.

177. Further, a number of councils are deciding matters *en bloc* without any basis for this in their local laws.

178. Of the 12 focus councils, three allow *en bloc* voting. One of those, Cardinia Shire Council, operates a consent agenda as a matter of routine. The other two focus councils that vote *en bloc*, do so occasionally. Darebin City Council said it voted *en bloc* once in 2016 and Banyule City Council said it has voted *en bloc* three or four times in the past 12 months.

179. At least six other councils outside the focus group were identified as voting *en bloc*³⁴. Three run a consent agenda and three vote *en bloc* on occasion, if reports or items are similar or if the meeting is running late.

180. Of the councils identified that vote *en bloc*, only two have a written policy or local law about the process.

Consensus/predetermination

181. At least three councils operate a consent agenda, where all matters are decided *en bloc*, unless items are withdrawn by individual councillors. This means that after councillors have received and read the agenda papers and recommendations; but prior to the commencement of the meeting, they must tell council staff whether they intend to vote against an item. For example, at Cardinia Shire Council, councillors are asked to individually contact the Governance Manager or CEO about which items they wish to withdraw before midday the day before the council meeting.

182. Other councils decide which matters will be dealt with *en bloc* in a group setting. One council decides which items will be withdrawn at a briefing session just before the council meeting. At interview, the CEO of Maroondah City Council provided an example of this type of arrangement occurring in the past:

In the early days they would get together over dinner and decide *en bloc* which items were ok. Then say at the beginning of a meeting 'I move all the recommendations on items 1 to 25 excluding 3 and 4', and they go bang, and they're all gone, no discussion, nothing. Typically with a comprehensive committee system underpinning it.

183. However, he went on to say that he hadn't 'witnessed [*en bloc* voting] for many, many years'.

³⁴ These councils were identified incidentally during the course of the investigation – this number may not be exhaustive.

184. An agreement being reached by the councillor group collectively outside a meeting about which items on the agenda will be voted on *en bloc* potentially conflicts with the requirement for decisions of council to be made in formal council meetings which are open to the public. This issue of reaching an agreement on agenda items outside meetings is discussed further in the section of this report titled 'Agreements reached outside meetings'. However, even where councillors decide individually which items they wish to withdraw for debate (for example by contacting the CEO via email), this can mean or at least create the perception, that councillors are entering the meeting with a closed mind about how they will vote.

Absence of debate

185. Evidence obtained during the investigation suggests that voting *en bloc* is intended to be used by councillors as a way of dealing efficiently with matters that they do not believe require debate.

186. One of the risks of operating a consent agenda and voting for items *en bloc* is that public perception of decisions may be that they were not properly considered. Members of the public may miss out on hearing debate which may help them understand the decision. The Manager of Council and Customer Services at the Macedon Ranges Shire Council said:

We had a council meeting recently which was over in about 10 or 15 minutes due to the 10-12 agenda items being adopted *en bloc*. Whilst not a common occurrence it was not a good look, with potentially people walking away sceptical of the rigour of debate and consideration of the issues.

He said:

Issues where there are diverse and differing views are rigorously debated at council meetings, however, if there is no differing opinion the council will often adopt a series of matters *en bloc*. Whilst this is an efficient way to manage the business of council the people attending a council Meeting will be unaware of the opportunities that councillors have had prior to the formal council meeting to discuss the matter and inform themselves of the issues.

Most matters that come before council will have been the subject of councillor Briefings (i.e. an Assembly of Councillors) and our reporting cycle enables councillors to preview reports and ask questions (obviously they cannot change officer recommendations) however they have ample opportunity prior to the formal council meeting to inform themselves on a matter. The general public doesn't see all that. What they see is a group of people gathering at 7 o'clock, once a month, and in 30 seconds through a procedural motion they adopt a series of items *en bloc* – i.e. adopting the officer recommendation across a dozen or more items, of which many are significant. The perception arguably could be that – 'well it's just a rubber stamp, they're not giving due consideration to these items in a public forum'. We need to be mindful of this.

Practice example – Cardinia Shire Council: consent agenda

Cardinia Shire Council operates a consent agenda at both council meetings and Town Planning Committee meetings. A review of the ‘items for withdrawal’ documents between January and July 2016 shows 62% of items were decided *en bloc*.

The agendas for council meetings state:

Ordinary Business

Councillors have advised of the matters on the agenda that they wish to discuss or debate. All other items will be adopted without discussion.

However, members of the public only find out which items have been withdrawn for debate at the beginning of the meeting.

Councillors receive the agenda and meeting papers 10 days before a meeting. They are asked to inform the Governance Manager, CEO or Mayor by midday the day before if there are any items on the agenda they would like to debate and vote on separately. However, the Mayor said that there is capacity for last minute withdrawal of items on meeting night.

A review of council documents found a range of matters being decided *en bloc*, including planning matters and approval of key policy and budget documents. At interview, the CEO said he believed about 70% of items are decided by consent:

I think you'll get a council who want to discuss everything ... I've always questioned whether that's an appropriate thing. Or do you concentrate on the things that really need debate and should be discussed and given appropriate time ... We have an exception agenda and the council will discuss those items that they really want to discuss. And the ones that they're happy with and there's no issue with, they'll just go through on that basis.

Similarly, the Governance Manager did not consider the absence of debate in relation to *en bloc* items was an issue. He said:

The council is there to transact its business at a Council meeting. It's not there to have a community debate on every issue. You're there to make a decision ... There's plenty of other avenues for community debate and discussion.

Keeping a record of *en bloc* votes

187. Section 93(6)(a) of the Local Government Act requires that the minutes of a council or a special committee meeting ‘contain details of the proceedings and resolutions made’.
188. Of the nine councils identified as voting *en bloc*, seven which matters were dealt with *en bloc* in the meeting minutes. The Cardinia Shire Council does not record resolutions to pass matters *en bloc* in its meeting minutes. The minutes do not give any indication that the council operates a consent agenda or which items were decided *en bloc* during the meeting. Each resolution is listed separately as though it were subject to an individual vote.
189. It is possible that other councils are voting *en bloc* and not recording this in their minutes, as record-keeping practices such as those at Cardinia Shire Council make this impossible to identify from the public minutes of meetings.

***En bloc* voting and good administrative decision making**

190. There is potential for *en bloc* voting to breach common law procedural fairness requirements. Procedural fairness rules aim to ensure decision makers act without bias when making a decision and give all relevant parties the opportunity to be heard.
191. Local Government Victoria's 2013 guide *Ensuring Unbiased Democratic Council Decision Making: Principles to Guide Good Practice* notes that some decisions made by councils:
- affect the rights and interests of a person, a business or a corporation specifically and in a way that is greater and more direct than the effect the decision might have on the community as a whole.
192. These types of decisions are subject to common law rules of procedural fairness in addition to any legislative requirements. A decision that affects rights and interests may be, for example, a resolution to grant or refuse a planning permit for a specific project.
193. Legal advice obtained by the Local Government Association of South Australia about *en bloc* voting warns against the practice, particularly where the rights and interests of third parties are affected. It explains the rules of procedural fairness require that such decisions:
- are free from bias (or perceived bias) on the part of the decision maker, that people who will be affected by the decision are provided the opportunity to express their views to the decision maker and that the decision making body has regard to all relevant considerations.
 - ...
 - There is a risk that where a council makes decisions *en bloc*, attention may not be (or at least may be seen not to be) given to all relevant considerations and the requisite opinion may not be formed and/or incorporated into the resolution ... One motion moved *en bloc* cannot validly incorporate, by resolution, an opinion that may address a number of separate unrelated decisions.
194. The advice notes that, due to these issues, some decisions made *en bloc* may be subject to legal challenge.
195. The minutes of a number of councils were analysed to determine the types of matters being decided *en bloc*. At Whittlesea City Council, approximately 50 per cent of planning matters considered at council meetings are decided *en bloc*.
196. In response to the draft report, Whittlesea City Council said it had been *en bloc* voting for over 20 years and that the 'practice is used to facilitate the efficient processing of Council business'. It also advised the following in relation to its *en bloc* voting process:
- The council agenda is circulated to councillors seven (7) days before the council meeting to allow councillors adequate time to consider the matters listed for consideration.
 - Councillors have the opportunity before the council meeting to raise queries with council officers and to consult with affected residents and ratepayers on matters listed in the agenda.
 - Councillors do not inform council officers before the meeting on reports they proposed to adopt '*en bloc*' or debate at the meeting.
 - At the commencement of General Business, the Mayor calls on each councillor to indicate if they have a question on any report or wish to discuss any report.
 - Any items not identified by councillors for questioning or discussion are then moved '*en bloc*' and the '*en bloc*' resolution is recorded separately against each of the subject items in the council minutes.
 - Items resolved '*en bloc*' are, by implication, items which councillors agree on and so not wish to debate.

- Members of the public in the gallery are informed before the meeting on the ‘*en bloc*’ process. If the matter they are interested in is adopted ‘*en bloc*’, they are informed of this by members of staff immediately after the *en bloc* motion is passed to ensure that they understand the outcome on their item.

197. The case study below shows Darebin City Council deciding *en bloc* a large number of planning matters affecting the rights of individuals. It is an example of a submitter initially being denied the opportunity to be heard regarding a planning application which was decided on *en bloc*. While it is not possible to say conclusively that this would not have occurred if the items had been voted on separately, the risk of such errors occurring increases where matters are not given individual procedural attention.

Case study – Darebin City Council: *en bloc* voting on planning matters

The Darebin City Council Planning Committee, which consists of the whole councillor group, met on 11 April 2016 to decide 17 planning applications. Of these applications, 12 were carried by a single *en bloc* resolution, accepting the officers’ recommendations for each item.

The motion was initially tied 4:4, but the Mayor, who is also the Chairperson of the planning committee, cast the deciding vote to carry it.

The items decided included approval of Item 5.2, an application for construction of two residential dwellings in Thornbury. An objector to this application had registered to speak against it at the meeting, but, despite being present in the gallery, the objector was never offered the opportunity to be heard.

At the next planning committee meeting on 26 April 2016, a new resolution was passed, deleting any reference to Item 5.2 from the previous resolution and giving the objector the chance to be heard before the application was re-decided. The minutes of the meeting state that:

The error arose from the objector being incorrectly listed to speak against an agenda item that was considered later in the agenda and after the decision was made on the agenda item that was the subject of their objection.

At interview the Chairperson said the decision to vote on *en bloc*, ‘was probably decided...in order to expedite [proceedings on] the night, because there were quite a few items for consideration’.

The Chairperson was asked at interview, if the planning matters had been voted on separately, whether the failure to hear the objector might have been called to the council’s attention at the time. He said, ‘No, no. I don’t know. Possibly, possibly, I can’t speculate’.

While Darebin City Council does not have a routine practice of voting *en bloc*, it appears to have a history of voting *en bloc* when an agenda becomes lengthy. A report prepared by the Municipal Monitor of Darebin City Council in May 2015 states:

I am also concerned that in an attempt to address all items on the agenda the practice of adopting reports “*en bloc*” is becoming the norm rather than the exception. On two occasions this practice was agreed before the meeting, thereby pre-determining outcomes that should be determined by debate in the chamber.

198. Most matters examined by this investigation which were decided *en bloc* were decided unanimously. The tied vote in the above case study leaves open to question whether any of those individual planning applications would have had a different outcome if each had been voted on separately. It also raises questions about whether all relevant matters were considered about each item or if the desire of councillors to pass some items had any bearing on the decision in relation to others (i.e. a decision based on irrelevant considerations). At interview, by way of explanation, the Chairperson said, 'I was allowed to use my casting vote and I thought, I'll use it'.

Record keeping

199. Records of council meetings are important because they provide the community with access to information about current and historical issues, debates and decisions made by their elected representatives. Clear and accurate records ensure a council can be held accountable for the decisions it makes on behalf of the community.

200. Council responses to the survey show that the record keeping practices for council meetings in Victoria vary. All councils keep minutes of their meetings, as required by the Local Government Act. Some also keep audio records or audio-visual records, but not all release these recordings to the public. A smaller number of councils provide immediate access to their ordinary council meetings by live streaming and radio.

Minutes

201. Minutes are the formal record of council decisions. The requirement to keep minutes of meetings and make them available to the public is one of the key transparency measures in the Local Government Act. Section 93 states:

(1) The Council must keep minutes of each meeting of the Council.

(2) The minutes of a Council meeting must be submitted to the next appropriate meeting of the Council for confirmation.

(3) The Chairperson of a special committee must arrange for minutes of each meeting of the committee to be kept.

(4) If subsection (3) applies, the Chairperson must submit the minutes of a committee meeting to the next meeting of the committee for confirmation.

(5) If the minutes are confirmed the Chairperson at the meeting must sign the minutes and certify that they have been confirmed.

(6) The minutes of a meeting of the Council or a special committee must –

- (a) contain details of the proceedings and resolutions made;
- (b) be clearly expressed;
- (c) be self-explanatory;
- (d) in relation to resolutions recorded in the minutes, incorporate relevant reports or a summary of the relevant reports considered in the decision making process.

202. Regulations 12(b) and (c) of the *Local Government (General) Regulations 2015* require that all minutes of council and special committee meetings held in the previous 12 months (other than those relating to closed meetings) be made available for public inspection.

203. The investigation did not identify any significant issues in relation to council compliance with the above requirements; however, it did identify some variations in the detail being recorded by councils in minutes.

204. While most minutes only recorded officer reports, motions carried or lost and procedural matters such as councillors leaving and returning to the chamber, some minutes included additional detail such as:

- public questions and answers (e.g. Mornington Peninsula Shire Council and Mount Alexander Shire Council)
- the names of the councillors who spoke to each motion (e.g. Maroondah City Council)

- routinely recording councillors who voted for and against a motion, irrespective of whether a division was called (e.g. Warrnambool City Council)
- a written summary of the debate of various items (e.g. Monash City Council).

Officer reports

205. Officer reports are produced by council staff to inform councillors and the general public about the matters on the agenda. They usually contain data, issues, options and a recommended resolution in relation to an agenda item. The reports must be included or summarised in the minutes of the meeting.

206. Officer reports contained in minutes can affect the transparency of decisions made in council meetings. Where a recommended resolution is adopted with little or no debate, or where a council does not audio record its meetings, officer reports may be the only public record of a council's reasoning for a decision. Maribyrnong City Council identified the importance of officer reports in its survey response, stating:

Openness and transparency in Council decision making is important in ensuring that good governance practices are achieved. Part of this openness and transparency relates to the quality of the officer reports which are prepared for Council as part of the decision making process. Reports of a high standard will clearly detail the purpose of the report, provide the background, discuss the key issues and make an officer recommendation that is clear and succinct. These reports to Council are primarily for councillors to base their decision but also serve an important role in providing information to the community about the reasoning for officers arriving at a recommendation.

207. Poor quality officer reports affect the public's ability to understand reasoning behind decisions made. At interview, the CEO of Latrobe City Council indicated that the quality of officer reports was an issue at his council, saying:

We've been trying to focus on improving the quality of our executive summaries to get the key information as quickly as possible in front of [the councillors]. Then they can deep dive as they need to.

208. In order to produce high quality reports, staff must be able to provide clear and unbiased advice without fear of repercussions when councillors disagree. The Good Governance Guide states:

The administration should ensure that the [officer] report contains professional and 'frank and fearless' advice. The report should not reflect the personal views of those providing or receiving advice, nor try to manipulate councillors' opinions in a particular direction. It should genuinely and impartially evaluate the effectiveness of the proposed recommendations.

...

Councillors must also not try to influence recommendations in order to further their own aims.

209. Section 76E(2)(d) of the Local Government Act is also relevant, as it prohibits councillors seeking to direct officer reports. It states:

A Councillor must not direct, or seek to direct, a member of Council staff ... in relation to advice provided to the Council or a special committee, including advice in a report to the Council or special committee.

Table 3: Record keeping – council meetings

Council	Ordinary meeting	Special meeting	Ordinary meeting	Special meeting	Ordinary meeting	Special meeting	Ordinary meeting	Special meeting
	Minutes created		Audio created		Visual created		Live webstream	
Alpine								
Ararat								
Ballarat								
Banyule								
Bass Coast								
Baw Baw								
Bayside								
Benalla								
Boroondara								
Brimbank								
Buloke								
Campaspe								
Cardinia								
Casey								
Central Goldfields								
Colac Otway								
Corangamite								
Darebin								
East Gippsland								
Frankston								
Gannawarra								
Glen Eira								
Glenelg								
Golden Plains								
Greater Bendigo								
Greater Dandenong								
Greater Geelong								
Greater Shepparton								
Hepburn								
Hindmarsh								
Hobsons Bay								
Horsham								
Hume								
Indigo								
Kingston								
Knox								
Latrobe								
Loddon								
Macedon Ranges								

Council	Ordinary meeting	Special meeting	Ordinary meeting	Special meeting	Ordinary meeting	Special meeting	Ordinary meeting	Special meeting
	Minutes created		Audio created		Visual created		Live webstream	
Manningham								
Mansfield								
Maribyrnong								
Maroondah								
Melbourne								
Melton								
Mildura								
Mitchell								
Moir								
Monash								
Moonee Valley								
Moorabool								
Moreland								
Mornington Peninsula								
Mount Alexander								
Moyne								
Murrindindi								
Nillumbik								
Northern Grampians								
Port Phillip								
Pyrenees								
Queenscliffe								
South Gippsland								
Southern Grampians								
Stonnington								
Strathbogie								
Surf Coast								
Swan Hill								
Towong								
Wangaratta								
Warrnambool								
Wellington								
West Wimmera								
Whitehorse								
Whittlesea								
Wodonga								
Wyndham								
Yarra City								
Yarra Ranges								
Yarriambiack								

KEY	Yes		No		Varies		N/A		Unclear	
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Table 4: Records of council meetings released to the public

Council	Minutes released to the public				Audio released to the public				Visuals released to the public			
	Ordinary meeting minutes available		Special meeting minutes available		Ordinary meeting audio available		Special meeting audio available		Ordinary meeting visual available		Special meeting visual available	
	on website	for inspection at office	on website	for inspection at office	on website	for inspection at office	on website	for inspection at office	on website	for inspection at office	on website	for inspection at office
Alpine												
Ararat												
Ballarat												
Banyule												
Bass Coast												
Baw Baw												
Bayside												
Benalla												
Boroondara												
Brimbank												
Buloke												
Campaspe												
Cardinia												
Casey												
Central Goldfields												
Colac Otway												
Corangamite												
Darebin												
East Gippsland												
Frankston												
Gannawarra												
Glen Eira												
Glenelg												
Golden Plains												
Greater Bendigo												
Greater Dandenong												
Greater Geelong												
Greater Shepparton												
Hepburn												
Hindmarsh												
Hobsons Bay												
Horsham												
Hume												
Indigo												
Kingston												
Knox												
Latrobe												
Loddon												
Macedon Ranges												

Manningham												
Mansfield												
Maribyrnong												
Maroondah												
Melbourne												
Melton												
Mildura												
Mitchell												
Moira												
Monash												
Moonee Valley												
Moorabool												
Moreland												
Mornington Peninsula												
Mount Alexander												
Moyne												
Murrindindi												
Nillumbik												
Northern Grampians												
Port Phillip												
Pyrenees												
Queenscliffe												
South Gippsland												
Southern Grampians												
Stonnington												
Strathbogie												
Surf Coast												
Swan Hill												
Towong												
Wangaratta												
Warrnambool												
Wellington												
West Wimmera												
Whitehorse												
Whittlesea												
Wodonga												
Wyndham												
Yarra City												
Yarra Ranges												
Yarriambiack												

KEY	Yes	No	Varies	N/A	Unclear
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Notes: 'not applicable' indicates records of that type are not created by the council; 'no' indicates records of that type are created, but not made available to the public through the specified medium.

210. Councillors exerting influence on the content of officer reports, directly or indirectly, has the potential to obscure the reasons for council decisions.

The following case study is an example of councillors' interactions with staff impacting their provision of advice without 'fear or favour'.

Case study - Frank and fearless advice

During the investigation we identified one council where witnesses reported problems with council officers providing 'frank and fearless' advice due to concerns about the reactions of councillors.

Interviewees at this council that the content of officer reports had been influenced by councillors' reactions to advice they did not agree with. One officer said:

If we get into frank and fearless advice, [if] we give [the councillors] frank and fearless advice and they don't like it, you'll soon know.

Another witness said that some councillors:

... insist on everything that goes to council meeting must go to a briefing first. So that's their way of influencing what occurs. And they make it really clear what they don't want ... [You] couldn't prove that they were influencing an officer but you are left with no doubt about what they have said ... It is hard to get officers to give the frank and fearless advice ... [In one case] the first four versions of [a] report were a disgrace... because [council staff] knew what the councillor wanted ... and they were just writing a report for him.

The CEO said that reporting without 'fear or favour' is also influenced by the relationship between the council and council staff. At interview, they said:

Because we have a divided council here ... most critical decisions [are carried by only one] vote.

To be in my position, you only need one to change and it goes the other way. It's one thing I've come to understand, how fraught the role of CEOs are. So my professional standing is potentially at risk because one councillor might not like a decision I make.

Two interviewees reported witnessing an incident where a staff member gave advice to the council that was different from the outcome councillors were seeking. One said:

... they went to town on [the officer] ... It went on for, what, 10 minutes of pretty steady almost abuse. That's why things aren't [audio] recorded.

...

It was, 'How dare you try and overturn a decision of council?' and that wasn't what [the officers] were trying to do, they weren't trying to overturn, they were trying to give [the councillors] information.

Another council witness said they had very little confidence in the reports that were being provided to the councillors for consideration. They said:

Officers [are] there to do their job, not there to manipulate things and change things around, it's to produce the facts. It's up the council to decide what they want to do with it.

The witness also said that after some changes in personnel, the current group of councillors and staff have a much better working relationship. However, the impact of the previous fraught relationship was evident in interviews with current councillors and staff.

211. A number of interviewees from other councils said that they had knowledge of councillors attempting to influence staff recommendations in reports. One CEO said that although contact between councillors and officers can be helpful to 'get council business done', from time to time, councillors can try to influence officers. He said:

So it's common enough for the technical experts ... to have conversations with the officers as to what's the best way to do this or how can we do that, things like that. But I wouldn't pretend that I haven't had a feeling that from time to time it becomes more than that, that the influence is there.

212. At interview, a witness from the same council said they were concerned that councillors 'convinced the officers' that a section in an officer report was incorrect. Although the witness said that 'it is a matter of speculation', they believed the report was altered 'by management at the request of the councillors'.

213. The CEO of the Glen Eira City Council said she had not witnessed pressure applied by councillors on council staff to change recommendations. She said if councillors did not accept the recommendations of her staff, their recommendations would not be changed but staff would prepare 'alternate recommendations' which were formally recorded.

214. A number of other CEOs said they have taken steps to prevent councillors influencing officer reports by limiting councillor access to council staff. The CEO of Latrobe City Council said:

We've got a process to limit councillors' access to council officers, basically drawing a line at the management level ... The risk is for a councillor to direct a junior officer ... something we are always keeping a watchful eye out for.

215. Nine of the 12 focus councils have written guidance to limit councillor access to council staff. For example, the Councillor Code of Conduct at Alpine Shire Council states:

Councillors will work as part of the Council team with the Chief Executive Officer and other Council employees. There must be mutual respect and understanding between councillors and officers in relation to their respective roles, functions and responsibilities. For this team approach to be successful, councillors must:

- Accept that their role is one of advocacy, policy development and leadership rather than management and administration.
- Acknowledge and accept that the Chief Executive Officer is responsible for employee matters.
- Request information and advice (other than calendar items, vehicle, and accommodation or conference/training bookings) through the CEO, directors and other councillors.
- Acknowledge the requirements of section 76E of the Act and not use their position, or seek to, improperly direct or influence Council employees in the exercise of their duties or functions or to gain an advantage for themselves or others.

216. One interviewee from a council with restrictions in place said he thought councillors were aware of the limits but continued to put pressure on staff:

I think councillors know their responsibilities and limits, but don't always stick to them. Where an officer might think that they're being pressured by a councillor, a councillor will see that as politics.

Audio and Visual Recordings

217. While there is no statutory requirement to do so, a growing number of councils audio record or audio-visually record their meetings. While 43 councils audio record their ordinary meetings, only 16 make the recordings available to the public on their websites. Fourteen of these 43 indicated in their survey responses that they delete recordings after the minutes of meetings have been confirmed. Two said they do not publish audio recordings on their websites, but charge fees (\$15 and \$20 respectively) to members of the public who request a copy.

Why some councils maintain audio-visual records

218. Evidence obtained from the survey and interviews with witnesses identified a variety of benefits of audio or audio-visually recording council meetings:
- to provide the public, including those unable to attend meetings in person (e.g. due to other commitments or geographical location), with access to decision making by the council
 - to encourage wider community involvement in council meetings
 - to assist in the preparation of complete and accurate minutes
 - to verify minutes where specific issues of accuracy are raised
 - to provide transparency and accountability
 - to reduce the need for voluminous minutes
 - to deter unprofessional behaviour and increase the quality of debate
 - to ensure local media reporting of what happens in meetings is 'a little bit more honest'.
219. Witnesses from councils that do have audio or audio-visual recording in place were generally positive about the practice, even though viewer numbers were not necessarily high.

The Deputy Mayor of the Alpine Shire Council said:

I was actually surprised who listens and watches it to tell you the truth. Someone came up to me the other day and said, "Oh, that's great. I watch it."

[I asked] "Why do you watch it?"

[He said] "I watched the question time."

And I never would have thought that this resident would even think about getting online and watching it. So, people really like it.

220. The Mayor of Cardinia Shire Council said:

I know for some of our senior residents they like it [audio recording] because they couldn't probably get to meetings and, you know, I don't think we're smashing the airways by millions of people listening to us. It might be good to go to sleep to. But I think in just having it, it shows anyone in the public that we're not afraid if you're not here listening, we're not afraid for you to know what we've said.

221. The CEO of Maroondah City Council said:

[T]he way I approached it [at a non-metropolitan council I previously worked for] because of the nature of the ... disparate communities and so on, the idea of having that as a record of the way in which the discussion's occurred, the manner in which it was dealt with, the fact that people had little opportunity to attend personally meant that there was value in doing that for them. Whether they took it up or not is another matter. In the metropolitan area ... accessibility is not such an issue.

Why some councils do not maintain audio-visual records

222. This investigation also identified a range of reasons why councils may be choosing not to keep audio or audio-visual recordings. These were:
- the costs associated were not worth the perceived benefits
 - a lack of interest from the community
 - poor acoustics in the council building
 - an inability to install equipment due to the heritage status of the council building

- it would be an impediment to robust debate as councillors may self-edit to prevent themselves looking foolish
- it could lead to grandstanding by councillors, which could detract from issues
- the risk of offensive remarks by councillors being recorded and causing the public to lose respect for councillors and the council
- legal risks to council posed by defamatory remarks by councillors or members of the public.

Cost and technology

223. In survey responses, a number of councils, particularly smaller ones, referred to the venues being unsuitable for recording, or the prohibitive costs of technology. However, evidence from councils about the type of technology which can be used and the costs involved shows there are a range of options available. Some councils indicated the cost of setting up audio-visual recording and livestreaming can be in excess of \$40,000. However, recording audio only for podcasting or uploading to the council's website after the meeting can be much cheaper.

224. The Governance Manager at Cardinia Shire Council advised that it previously webcasted its meetings but discontinued this due to a lack of insurance for defamation. He said council has now moved to podcasting council meetings, which was much more cost effective. He estimated the cost of setting up the podcasting system to have been approximately \$2500, with minimal ongoing costs. However, he noted that when the council held meetings at locations other than council offices (to facilitate accessibility for community members in different parts of the municipality) the cost of recording the meeting significantly increased as the council needed to engage a professional to make the off-site recording.

Practice example: Alpine Shire Council – Recording and livestreaming of meetings

Alpine Shire Council livestreams its ordinary council meetings and publishes the recordings on its website. At interview the CEO said the council had initially obtained a quote for a new audio system for between \$20,000 and \$25,000. However, he said:

We bought an audio system that was [\$1300] on Ebay from a [council in another state] ... that is the only way that we could actually introduce [it] ... [T]here's many shire councils that I understand are spending thousands of dollars on recording a meeting. We have a \$1300 total cost installation camera in there, that we press the button on an iPad and it streams to YouTube.

...

Metro councils, some are spending thousands of dollars per meeting, it's like YouTube is there ... It's a great archive, people know how to use it, this costs us nothing.

...

[W]e record two ways. We record ... live to YouTube but we also have a localised [short-term] backup here.

Offensive behaviour and defamation

225. Debate is part of the decision making process during council meetings. However, if elected representatives make personal comments that harm another person's reputation during debate, they may risk action being taken against them for defamation. One reason identified for not publishing audio-visual records was the perceived risk that councillors could make defamatory comments during meetings and that publication of recordings of those meetings may subject the council to the legal risk of a defamation action.

Decisions made in closed meetings – Section 89(2) of the Local Government Act

226. The primary way the Local Government Act supports transparent decision making is by requiring decisions of council to be made in meetings open to the public. The Act also allows for meetings to be closed to the public in a limited range of circumstances.

227. Section 89 of the Act states:

Meetings to be open to the public

(1) Unless subsection (2) applies, any meeting of a Council or a special committee³⁵ must be open to members of the public.

(2) A Council or special committee may resolve that the meeting be closed to members of the public if the meeting is discussing any of the following –

- (a) personnel matters;
- (b) the personal hardship of any resident or ratepayer;
- (c) industrial matters;
- (d) contractual matters;
- (e) proposed developments;
- (f) legal advice;
- (g) matters affecting the security of Council property;
- (h) any other matter which the Council or special committee considers would prejudice the Council or any person;
- (i) a resolution to close the meeting to members of the public.

(3) If a Council or special committee resolves to close a meeting to members of the public the reason must be recorded in the minutes of the meeting.

228. Where a meeting is closed under section 89(2), it can be referred to as an ‘in camera’, ‘confidential’ or ‘closed’ meeting. Meetings or parts of meetings closed to the public under section 89(2) of the Act are referred to in this report as ‘closed meetings’.

229. Section 77 of the Local Government Act is also relevant to closed meetings. It creates a framework for confidentiality around information and documents considered in those meetings.

Confidential information

(1) A person who is, or has been, a Councillor or a member of a special committee, must not disclose information that the person knows, or should reasonably know, is confidential information.

Penalty: 120 penalty units.

...

(2) For the purposes of this section, information is confidential information if –

- (a) the information was provided to the Council or a special committee in relation to a matter considered by the Council or special committee at a meeting closed to members of the public and the Council or special committee has not passed a resolution that the information is not confidential; or
- (b) the information has been designated as confidential information by a resolution of the Council or a special committee which specifies the relevant ground or grounds applying under section 89(2) and the Council or special committee has not passed a resolution that the information is not confidential; or
- (c) the information has been designated in writing as confidential information by the Chief Executive Officer specifying the relevant ground or grounds applying under section 89(2) and the Council has not passed a resolution that the information is not confidential.

³⁵ Section 89(2) also applies to any ‘special committees’ with delegated powers of council. Special committees are discussed further in the section titled ‘Special committees’ on page 114.

230. Section 77 deems documents and information from closed meetings to be confidential, unless confidentiality is specifically lifted by a resolution of council. It also makes disclosure of any such information a criminal offence.

231. Most documents related to closed meetings are 'exempt documents' under the *Freedom of Information Act 1982*. Section 38 of the Freedom of Information Act provides a general exemption for information made confidential by other Acts (such as section 77 of the Local Government Act).

38 Documents to which secrecy provisions of enactments apply

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

232. Section 38A provides a specific exemption for documents relating to closed council meetings:

38A Council documents

(1) A document is an exempt document if it is –

- (a) the official record of any deliberation or decision of a closed meeting or part of a closed meeting (other than the official record under section 89(3) of the Local Government Act 1989 in the minutes of a meeting of the reason for closing a meeting to the public);
- (b) a document which, in the opinion of the principal officer of a council, has been prepared for, or will be used for, consideration of any matter by the council at a meeting, that in the opinion of the principal officer, is likely to be a closed meeting of the council;
- (c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b);

- (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of a closed meeting (other than the official record under section 89(3) of the Local Government Act 1989 in the minutes of a meeting of the reason for closing a meeting to the public) or of a meeting that is likely to be a closed meeting;
- (e) a document that is ancillary to, associated with or accompanying a document referred to in paragraph (a), (b), (c) or (d).

(2) Subsection (1) does not apply to a document by reason of the fact that it was submitted to a closed meeting of a council for its consideration or is proposed to be so submitted if it was not brought into existence for the purpose of submission for consideration by a closed meeting.

233. While the wording of section 89 of the Local Government Act, when read alone, gives councils the discretion to close a meeting to discuss any of the types of matters listed in section 89(2) without limitation, the overarching objectives of a council also need to be considered. Section 3C of the Act states:

Objectives of a Council

(1) The primary objective of a Council is to endeavour to achieve the best outcomes for the local community having regard to the long term and cumulative effects of decisions.

(2) In seeking to achieve its primary objective, a Council must have regard to the following facilitating objectives –

...

- (g) to ensure transparency and accountability in Council decision making.

Section 89(2) and community perceptions

Secret \$80 million council vote for high-rise next to Queen Victoria Market

– *The Age*, 20 December 2016

THE NEW operator of the Palais Theatre in St Kilda will be decided in secret and behind closed doors after tonight's Port Phillip Council meeting ...

– *Caulfield Glen Eira Leader*, 24 May 2016

Hidden agenda for secret council meeting

– *Frankston Times*, 20 June 2016

... It's all part of the arrangements secretly agreed to by the council under its new \$66 million garbage contract, let behind closed doors at Wednesday night's council meeting ...

– *South Gippsland Sentinel-Times*, 21 July 2016

Secret Whittlesea Council meeting triples Whittlesea Community Connections' rent

– *Whittlesea Leader*, 10 November 2015

... The council made its decision behind closed doors ...

– *Geelong Advertiser*, 11 August 2015

Secret Glen Eira Council vote approves guards with guns in public parks

– *Caulfield Glen Eira Leader*, 7 December 2015

234. Closed council meetings can generate suspicion within the community. Meeting closures can decrease public trust in council decisions – particularly those that are already controversial. Every decision to close a council meeting to protect a specific interest comes, to some degree, at the expense of the broader public interest in being able to hold elected representatives to account for the way they are exercising the power entrusted to them.

235. The recent Victorian Ombudsman report *Investigation into Casey City Council's Special Charge Scheme for Market Lane*³⁶ is an example of a council failing to adequately consider the interests of the community when deciding to close a meeting. In this case, the council inappropriately used section 89(2) to exclude the public from a meeting, during which it decided to increase the interest rate payable by a group of ratepayers in a special charge scheme. Despite this decision increasing the financial burden on the group of ratepayers, the closure of the meeting meant that the council's reasons for its decision were kept confidential. Ultimately, that investigation concluded that the decision to increase the interest rate was unreasonable and unjust. The use of section 89(2) was inappropriate and resulted in the decision being largely free from public scrutiny³⁷.

³⁶ Victorian Ombudsman, June 2016.

³⁷ Following the report, the Minister for Local Government appointed a Municipal Monitor under section 223CA of the Local Government Act to monitor the council in accordance with specified terms of reference. The Municipal Monitor's report, released in August 2016, noted 'the positive action taken by the council in improving governance process, practices and associated policies in respect to the Ombudsman's recommendations and concerns'.

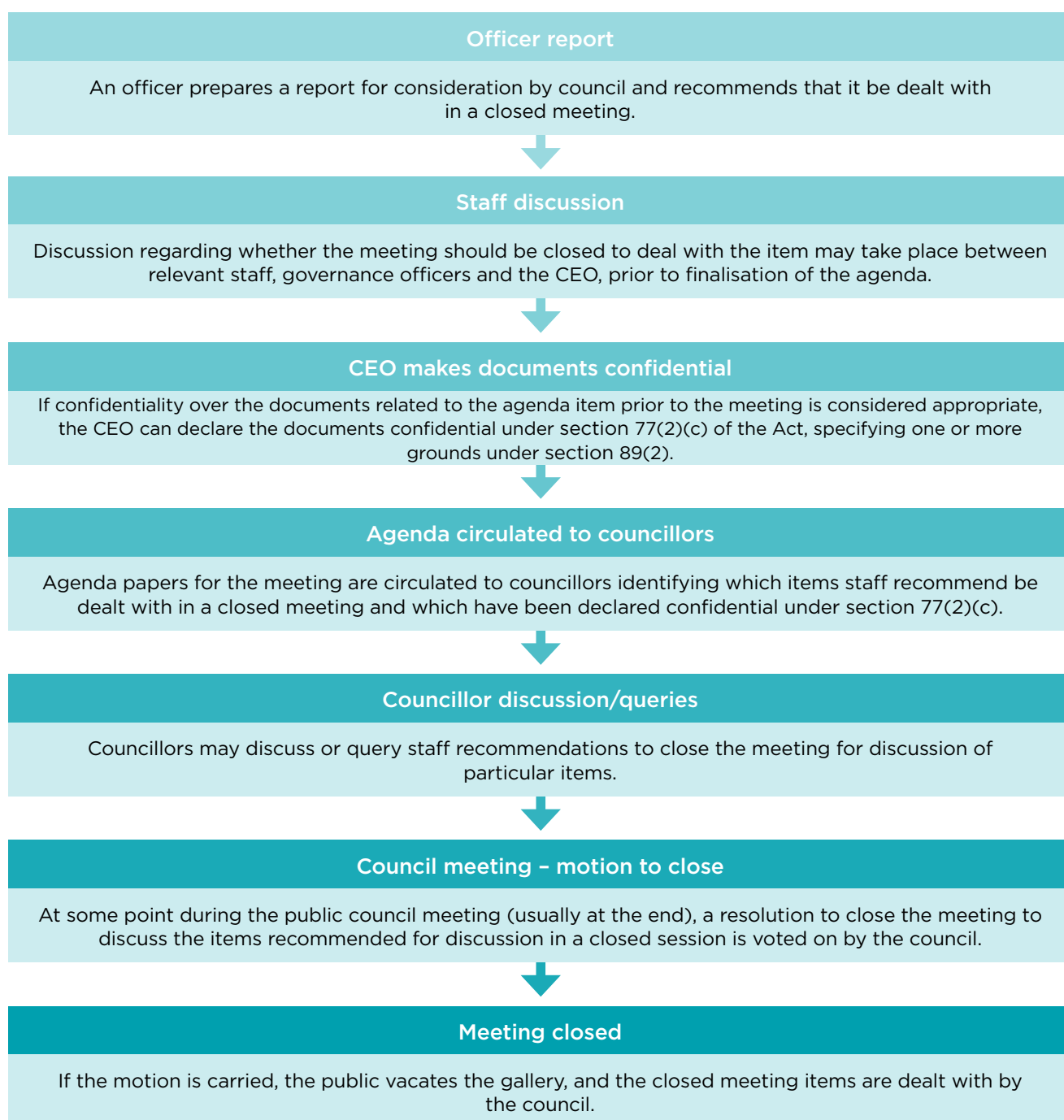
How a decision to close a meeting is made

236. The Act requires a decision to close a meeting to be made by a resolution of council³⁸.

The investigation examined processes leading to a resolution to close a meeting and the role played by both staff and councillors in these processes.

237. Documents obtained from and interviews with focus councils indicate the process is generally as follows:

Figure 4: Decision making process for meeting closure



³⁸ Local Government Act 1989 section 89(2).

238. As shown above, council staff and the CEO are usually involved in the process to decide to close a meeting. However, the elected council is responsible for deciding whether information placed before it remains confidential. Once a CEO has declared documents confidential and others have recommended closure of the meeting to discuss them, it always remains open to the council:

- to resolve not to close the meeting³⁹, and/or
- to resolve that the report, resolution or any other information relating to the item is not confidential⁴⁰.

239. The discretion to close a meeting ultimately rests with councillors. Witnesses from some councils, however, suggested that discussions about the rationale to close particular agenda items generally took place between officers and that councillors were not usually involved.

240. The following are responses of interviewees when asked whether councillors questioned staff recommendations to close meetings:

No ... I've never had that reaction and I don't think in the whole four years I've seen that at all

- a Mayor

No, not in my 10 and half years

- a Mayor

Councillors don't question what's going into confidential, at all ... they're not giving that any consideration. They're leaving that to the CEO to determine. I don't think they've ever questioned it

- a Governance Manager

'Oh well there might [be] a question, a query ... it usually might only come from one or two councillors, and the other [councillors are] pretty compliant. We've got a quite a - we'll call them experienced councillors that are used to a culture of confidentiality'

- a Mayor

'No, look to be honest ... no offence to [the councillors], they take the guidance from us'

- a CEO.

241. Some reasons offered by witnesses for the lack of councillor questioning were that councillors were 'familiar with the process', that the items to be dealt with in closed meetings were 'pretty stock standard things' and that confidentiality was 'generally self-evident' or 'obvious'. However, comments by witnesses indicated that councillor understanding of section 89(2) may be a factor in some cases.

242. There were varied views from witnesses at focus councils as to whether councillors had a good understanding of sections 89(2) and 77. One Governance Manager explained that 'some of [the councillors] take a literal interpretation to what confidential is i.e. it's confidential because you've stamped it confidential'. One Mayor said, 'if it gets on pink paper⁴¹, then that's it'. The Mayor of Mount Alexander Shire Council gave the following response when asked why papers from councillor briefing sessions were confidential:

Well - good question. I mean according to the Local Government Act not all of it has to be ... Why should some of it be? Because the CEO says it is ... Because it's easier to make it all [confidential] rather than just ... some.

³⁹ Local Government Act 1989 section 89(2).

⁴⁰ Local Government Act 1989 section 77(2)(c).

⁴¹ Some councils print agenda papers for closed items on pink paper to indicate confidentiality.

243. The following are examples of comments made by witnesses, when they were asked whether they considered councillors had a good understanding of section 89(2):

I don't think so. I don't think they would – they know that it's all in relation to what's in the Act. The actual detail of the Act I don't think they have a full appreciation of.

– a Governance Manager

I think some of them don't and some of them do.

– a Mayor

Some of them understand, some of them don't, others don't care.

– a Governance Manager

I think they're guided mainly by the CEO as to what he would consider to go [in a closed meeting].

– a Governance Manager

Probably not, probably not, but ... that's probably ... a fault of how the Act is probably written in the sense that ... councillors don't actually spend a lot of time with understanding each item, each clause of the Act but ... they're probably relying on the professional advice and direction of our officers and our governance department in why these are being considered and why they need to be considered in a confidential manner.

– a Mayor

I don't think councillors in general have any sense that they might be able to close a meeting.

– a Mayor

244. One councillor from a council outside the focus group, when asked about their familiarity with section 89(2) in relation to the closure of a meeting said:

I leave that to our officers. Yeah, I leave that to our officers. I mean, that's what they are employed for. They've got very big salaries. A lot more than I do. That is their role.

245. In response to the draft report, one CEO said:

Generally it seems by the quotes that the councillors aren't fully aware of the reasons why a meeting can be closed or it appears that they are disinterested. My opinion is that most councillors see the decision to close a meeting as an operational issue and therefore something that they shouldn't be involved in. Councillors are continually reminded that they are not to get involved in operational issues.

Vacating the gallery

246. When and how councils vacate the public gallery for closed meetings varies. In some cases this has an impact on transparency, or the perception of transparency.

247. Most councils tend to deal with section 89(2) items at the end of their ordinary council meetings, to allow the public to leave after the public portion of the meeting concludes. Others deal with section 89(2) items at the beginning of the meeting. Some councils, however, have practices that further separate confidential items from the usual public meeting process. For example, on one occasion Cardinia Shire Council dealt with its confidential matters in a closed meeting just prior to the open meeting and at a separate location, while Warrnambool City Council (as described in the case study below) has a special committee to deal with confidential agenda items.

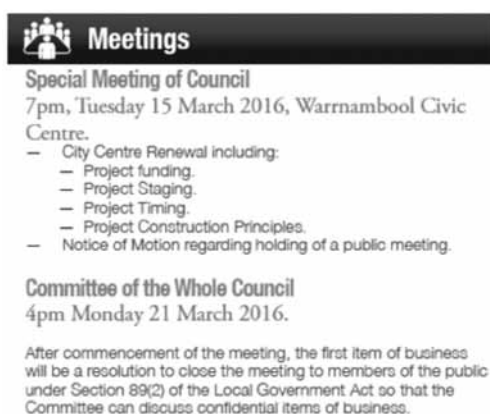
Practice example: Special committee for section 89(2) matters

Unlike the other focus councils, Warrnambool City Council does not deal with items closed to the public under section 89(2) in ordinary council meetings. Instead, it has established a section 86 committee⁴² called the 'Committee of the Whole Council' to deal with these matters. The committee consists of all councillors and operates in much the same way as a council meeting, except that it meets on a different night and always commences with a motion to close the meeting under section 89(2).

Warrnambool City Council has been operating its Committee of the Whole Council since 2005 and it has delegated power to:

perform any duty or function or exercise any power of Council relating to any of the matters described in section 89(2) of the Local Government Act which the Committee has resolved should be discussed while members of the public are not present.

Committee of the Whole Council meetings are publically advertised, as required by the Act⁴³. The following advertisement appeared in a local newspaper on 12 March 2016:



The advertisement is a black and white notice. At the top, it has a header with a small icon of three people and the word 'Meetings'. Below this, it lists two types of meetings: a 'Special Meeting of Council' on Tuesday 15 March 2016 at 7pm, and a 'Committee of the Whole Council' meeting on Monday 21 March 2016 at 4pm. The council meeting notice includes a list of topics: City Centre Renewal (funding, staging, timing, construction principles) and a motion regarding public meetings. The committee meeting notice states that after commencement, the first item of business will be a resolution to close the meeting to the public under section 89(2) of the Local Government Act 1989.

Meetings

Special Meeting of Council
7pm, Tuesday 15 March 2016, Warrnambool Civic Centre.

- City Centre Renewal including:
 - Project funding.
 - Project Staging.
 - Project Timing.
 - Project Construction Principles.
- Notice of Motion regarding holding of a public meeting.

Committee of the Whole Council
4pm Monday 21 March 2016.

After commencement of the meeting, the first item of business will be a resolution to close the meeting to members of the public under Section 89(2) of the Local Government Act so that the Committee can discuss confidential items of business.

The notice does not describe the matters to be discussed, the reasons for the meeting closure, or specify where the meeting will take place (unlike the notice for the special meeting of council listed above). A member of the public should be able to attend the part of the meeting where the resolution to close it is voted on and the reasons for closure are explained, this is not made possible by the contents of the notice. In addition, the notice does not allow for the possibility that the motion to close the meeting may not pass and the public will be allowed to remain in the gallery.

Council does not publish the non-confidential parts of agendas or minutes on its website in relation to Committee of the Whole Council Meetings. It produces one set of minutes for the meetings, which are confidential, and as a result the resolution to close the meeting specifying the reason for closure of the meeting does not form part of any document available to the public.

The council does, however, report some outcomes of the contract decisions made in the Committee of the Whole Council meetings via the News section on its website. Two such news items related to the outcome of tenders were identified during this investigation.

The wording of council's *Governance (Meeting Procedures) Local Law* does not clearly outline the constitution and status of the Committee of the Whole Council. It states:

15. Meetings Closed to the Public

In accordance with 82(2) [sic] of the Act, Council may resolve that a Council meeting referred to as a 'Committee of the Whole Council' be closed to the public.

Further enquiries with the council about this issue revealed that the most recent delegation to the committee which the council resolved to seal (following legal advice that previous delegations to the committee should be clarified) could not be located by the council. It is unclear whether the delegation was sealed.

42 A 'special committee' established under section 86 of the *Local Government Act 1989*. See the section titled 'Special committees' on page 114 for further information about special committees.

43 *Local Government Act 1989* sections 89(4) and (4A) require at least seven days 'public notice' (as defined in section 3 of the Act) to be given for notice of special committee meetings comprised entirely of councillors unless 'urgent or extraordinary circumstances' prevent compliance.

Most common reasons for closure – section 89(2)

248. The 79 local councils were surveyed about which of the nine provisions of section 89(2) they most frequently used to close a meeting. As shown in figure 5 below, the majority of councils most frequently close their ordinary meetings to discuss contractual matters.

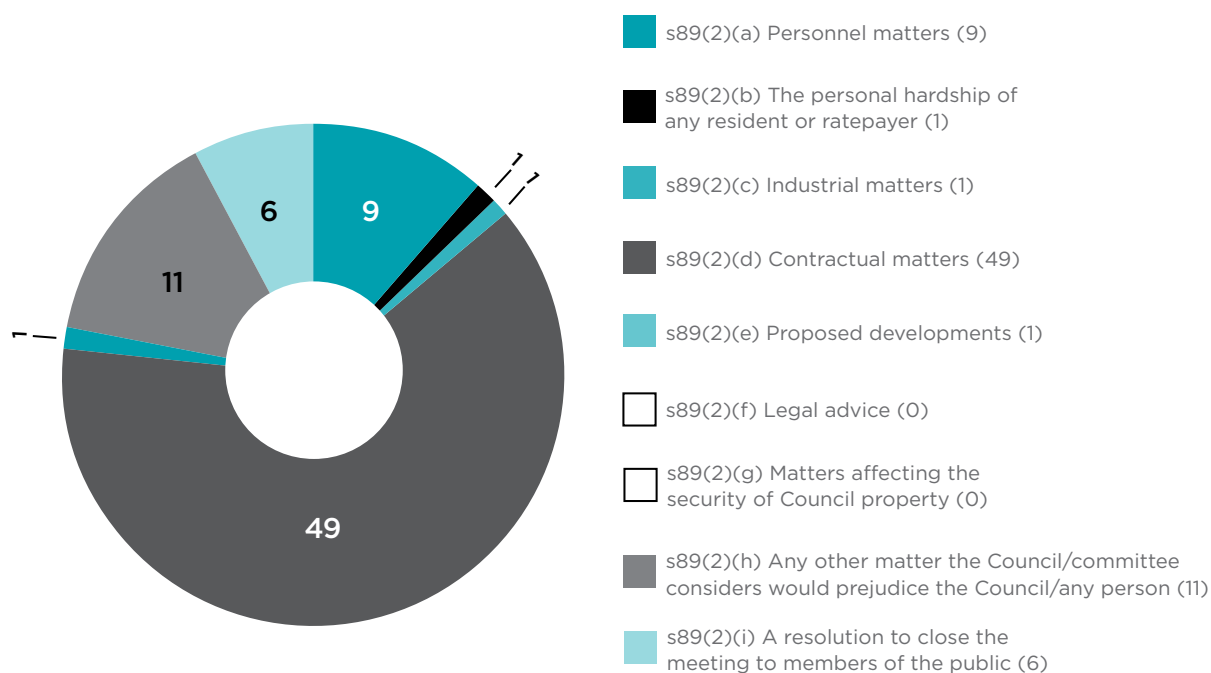
249. Forty-nine councils nominated section 89(2)(d) (contractual matters) as the provision they most often used to close meetings. Another 16 said it was the provision they used the second or third most frequently. 'Personnel matters' and the 'any other matter which the Council or special committee considers would prejudice the Council or any person' were also identified as being in the top three most frequently used for 40 and 46 councils, respectively.

Contractual matters

250. Section 89(2)(d) is a broad provision allowing councils to close meetings to discuss 'contractual matters'. The wording permits closure to deal with any type of matter involving any contracts, irrespective of the nature or content of the discussions.

251. The evidence is that council transparency around contractual matters decided in council meetings varies considerably.

Figure 5: Reasons for entering closed council meetings in 2014-15*



*The number of councils that reported the provision as the one they used most frequently to close ordinary meetings in 2014-15. This chart is based on 79 survey responses (one council indicated no ordinary meeting closures in 2014-15 in their response).

Practice example – Tenders and transparency: a comparison

A review of a sample of minutes⁴⁴ from meetings of the 12 focus councils compared the information each council released publically about contracts awarded during those meetings. The results of this review are shown in Appendix 3.

Five approaches were identified from the review:

1. The resolution to award the contract (including key details of the contract⁴⁵), is made in an open meeting. The officer report and recommendation about the tender are available in the public agenda prior to the meeting and usually in the public minutes after the meeting. The details of unsuccessful bid amounts and a comparative assessment of tenders is provided to councillors in a separate confidential document which forms an attachment to the minutes and is not released to the public.
2. The resolution to award the contract is made in a closed meeting, but key details of the contract are released when the meeting re-opens and are recorded in the public minutes. The tender evaluation report and any related officer reports form part of the confidential agenda/minutes and are not available to the public.

3. The resolution to award the contract is made in a closed meeting and key details about the contract are subsequently made public by means other than the minutes, such as press release or through a council Internet tender portal. The tender evaluation report and any related officer reports form part of the confidential agenda/minutes and are not available to the public.

4. The resolution to award the contract is made in a closed meeting with key details about the contract being made available to the public upon request following execution of the contract. The tender evaluation report and any related officer reports form part of the confidential agenda/minutes and are not available to the public.

5. The resolution to award the contract is made in a closed meeting and no information about the contract is released to the public.

While most councils ultimately released⁴⁶, or declared non-confidential the key details of each contract⁴⁷, the method of release and the amount of additional information provided varied significantly between councils.

44 One public tender awarded by each council during a five month period between 1 December 2015 and 31 April 2016 was used for comparison. The contracts were valued at between \$400,000 and \$1,900,000.

45 Such as the contract amount and the name of the successful tenderer.

46 Or intended to release but failed to do so due to administrative oversight.

47 The name of the contract, the name of the contractor and the value of the contract.

252. The CEO of a council which generally deals with contractual matters in open meetings said:

[The] reasons people do [contractual matters] confidentially is then they say well, we can tell council everything, everything can go into [the public agenda]. When you bring it into public you then of course have to start to deprive [them of] information.

...

Now some councils deal with that by providing information [in] briefings... So you might say, 'here is the report, but by the way, here are all the tender documents'. Everything is free to review and here's our scoring matrix for you to review and here's all of its details ... which is probably reasonable in my view and then I think you could still provide nearly all of the report in the public forum, just by anonymising it ... And then ... you get companies saying well, this is a theory, that companies will complain that it tells their competitors how much they're quoting. But to me ... that's part of public tendering. Like ... your competition ... know what your quoted price was.

253. Evidence provided by other witnesses at interview indicated that some councils take a more cautious approach to contractual matters, due to concerns about possible commercial disadvantage to both the council and contractors arising from public discussions.

254. The Director Corporate Services from the Buloke Shire Council said:

[A]ctually – it's important that [contractual matters] do go into closed session. I previously worked at [another council] where they even took contracts to open council and then you had to a whole lot of work to disguise, actually what was – so even though it was apparently open, it still had to be disguised for ... commercial reasons. Otherwise you weren't going to get contracts in. And I also would think that a number of those contracts that they did accept in open session would have actually had higher prices because it was going into open session, that you would have got it, if it was in a closed session. So I think there's – there is a really important point not to take certain things into open council because it might actually cost the community to do so.

He also said:

Contract reports are decided in closed council with the resolution then being released in the ordinary minutes. Council must be wary of commercial in confidence with regards to financial matters. In smaller communities where there is less competition for contracts it is important to keep financial details confidential.

255. A former CEO raised concerns about the risk of councillors making derogatory comments about contractors if contracts were discussed in open council meetings. They noted that even if contractors were de-identified in the discussion, there was still potential for them to be identified after the contract was awarded. He said:

[S]o it seems to me that's a good example where we haven't thought through very clearly in local government, the government hasn't ... how to structure the business so that we can be more transparent but we don't make inappropriate, adverse comments about someone's capability without good reason.

256. Another former CEO said:

[C]ouncillors want to debate some issues associated with commercial situations or contractual situations, but feel constrained in case they're sued or they overstep the bar and give out some sort of privy information. And they are genuinely confused about what they can and can't do. I think there is a real educational issue associated with that aspect of the Act.

257. When asked about his council's understanding of confidentiality about commercial matters, another CEO said, 'it varies, there's not a lot of understanding with some [councillors]'.

258. Section 89(2)(d) of the Local Government Act allows for closure of council meetings to discuss contractual matters without limitation. However, the Freedom of Information Act provides more specific guidance on the type of commercial information which can be protected from public release by public agencies under that Act. Section 34 states:

Documents relating to trade secrets etc.

(1) A document is an exempt document if its disclosure under this Act would disclose information acquired by an agency or a Minister from a business, commercial or financial undertaking and the information relates to –

- (a) trade secrets; or
- (b) other matters of a business, commercial or financial nature and the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.

(2) In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations –

- (a) whether the information is generally available to competitors of the undertaking;

...

- (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
- (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls – and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

259. This provision requires consideration of the public interest and disadvantage before access to documents can be withheld. This is not the case with section 89(2), which only requires the council to consider the broad character of the document and not the consequences of disclosure. The evidence obtained by the investigation indicates that at some councils, 'automatic' closure of meetings where a contractual matter is to be discussed has been occurring.

Case study - Contract for construction of civil works contracts

On 30 May 2016, Banyule City Council closed an ordinary meeting to discuss awarding a contract for construction of civil works projects. In relation to this item, the public minutes of the meeting state:

Closure of Meeting to the Public

That in accordance with Section 89(2) of the Local Government Act 1989, Council close the Meeting to members of the public and adjourn for five minutes to allow the public to leave the Chamber prior to considering confidential item 11.1⁴⁸.

A review of the confidential minutes from the closed meeting relating to item 11.1 was undertaken. These minutes contain:

- a general description of the contract tendered
- a list of the tenderers
- a list of the contractors recommended for appointment to a panel
- a resolution to award the contract to the recommended tenderers and authorisation to execute the contract (and extend the contract based on satisfactory performance).

The minutes contain no reference to tender amounts or any comparative analysis of tenderer bids.

When asked about the reason for confidentiality, the CEO of Banyule City Council said:

I've always reserved [sic] on the side of caution on the basis that...maybe I had an experience once where somebody had a crack at the Council, I can't remember. But, on the basis of ... maybe I've treated it more like a privacy on behalf of [the contractor's] situation.

When asked why this matter had been dealt with in a closed meeting, the Mayor said, '[w]ell, I just think anything to do with contracts has automatically been put in confidential and the one you showed me there, I can see in retrospect why it, there's no great drama'.

Following interviews, the CEO advised that the council intended to review the need to consider certain reports - particularly those relating to contracts and tenders - in closed meetings, with a view to reducing the number of reports considered as confidential.

⁴⁸ The public minutes do not give any indication of the reasons for the decision to close the meeting.

260. Some witnesses from other councils also gave evidence indicating that closing meetings to discuss contractual matters had become routine. When responding to a question about how the decision to close a meeting is made, one Governance Manager said:

I guess because the three [officers involved in making the decision] have you know, been in local government for so long. You know sometimes you don't necessarily re-think it. Do you know what I mean? Like you kind of figure oh it's going to be a commercial matter and that's the way it is.

261. When asked if they thought genuine consideration was given to whether meetings should be closed to discuss contractual matters, the manager said:

I think it's because we've done it for so long, we just – we know that if it's a tender matter ... [w]e know there's been a competitive process in place and we know there's at least one or two businesses that have applied for the tender. So we just automatically go, oh that's in camera. You know, we just kind of know that and there's another template for that. And so at the very start of when officers ... generate the report on that – for that tender, it will be automatically populate 'in camera' at the header. So we've kind of systematised the whole process as much as we can, so that we're applying the same decision making consistently.

The 'catchall' provision

262. Section 89(2)(h) allows a council to close a meeting to discuss 'any other matter which the Council or special committee considers would prejudice the Council or any person'. There is no further guidance in the legislation about how 'prejudice' should be interpreted. The provision allows a council to close a meeting to discuss a matter it considers should be kept confidential, but which is not covered by any of the other seven, more specific provisions.

263. This provision has been identified by more than half of councils as one they use most frequently.

'I guess because the three [officers involved in making the decision] have you know, been in local government for so long. You know sometimes you don't necessarily re-think it. Do you know what I mean? Like you kind of figure oh it's going to be a commercial matter and that's the way it is.'

A council Governance Manager

Case study – South Gippsland Shire Council: Closed meeting to consider sale of public land

The community says NO....again and again and again.....

There was one month over Christmas provided by South Gippsland Shire Council for community members to make a written submission regarding the Strategic Land Review which sees 6 out of 23 properties proposed for sale across the shire coming from Venus Bay. During this time, community members gathered together to say NO...DO NOT SELL OUR OPEN SPACES!!



Now the time for submissions has passed and Council will decide in a CLOSED MEETING on 9th February which blocks are on the chopping block. Community members are outraged about the sales in general, but in particular about the secretive nature of the decisions made about our shared resources.

Excerpt from 'Matter of Fact', A free monthly newspaper for Venus Bay, Tarwin Lower and District published by the Venus Bay Community Centre. Vol 9. Issue No.2. February 2016.

The newsletter excerpt above refers to a closed meeting of the South Gippsland Shire Council's Special Committee for the Strategic Review of Land Holdings 2015-16. The committee met on 9 February 2016 to hear public submissions on the sale of 23 parcels of council-owned land. The minutes of the meeting state that the meeting was closed under section 89(2)(h) to allow the committee to 'consider, hear and determine submissions'⁴⁹, 'a matter that the special committee considers may prejudice the persons making the submissions'.

The council has advised that it used section 89(2)(h) to close the meeting for the following reasons:

- Public land sales can be sensitive and contentious, particularly in small communities, where they can have a significant and ongoing impact on the harmony between residents.
- Strong advocates with views about the land sales may display behaviours intimidating to those with alternate views.

- In this context, some submitters had raised concerns with the council about speaking to their submissions in public.
- There was potential for some 'commercial-in-confidence' information to be disclosed in submissions.

The resolutions from the closed committee meeting were made public at the next public ordinary meeting of council on 24 February 2016.

The council has subsequently advised that it is mindful of community concerns about the closure of this type of meeting, and that it has trialled a new approach where the hearing of submissions takes place in a closed part of the meeting, but the consideration and resolutions occur in an open meeting. The council advised this approach worked more effectively and that council 'aims to continue to refine and trial how land sales matters are heard and considered as transparently as possible, while protecting the safety and wellbeing of community members' and complying with legislation.

⁴⁹ Submissions were being heard in accordance with section 223 of the *Local Government Act 1989*.

264. This case study shows a council using section 89(2)(h) in circumstances which do not clearly fall within any other provision of section 89(2). However, other evidence indicates that not all councils interpret or use section 89(2)(h) in this way. For example, Maroondah City Council routinely uses section 89(2)(h) to discuss tender evaluations⁵⁰, whereas most other councils use section 89(2)(d) (contractual matters).

265. An analysis conducted by the Latrobe City Council of its closed meeting items between February 2014 and February 2016 identified a number of types of matters routinely being considered in meetings closed under section 89(2)(h) such as:

- adoption of minutes
- adoption of Assembly of councillors records
- audit committee minutes
- consideration of requests for community funding/grants/ sponsorship
- nominations for awards
- appointments to boards/committees
- councillors' quarterly expenses reports⁵¹.

266. In relation to the use of section 89(2)(h), A witness from one council said:

[T]he focus by the Ombudsman has actually been really good for [the council] ... but we have had a lot of push back. One particular councillor has no time for officer comment. Now there is actually a discussion about whether [a matter] should be [dealt with in a closed meeting]. It has also got us to clean up some old fashioned mechanisms for opening and closing.

267. Some witnesses raised concerns about the potential for misuse of section 89(2)(h). On its broadest interpretation, it would allow a council to close a meeting to discuss any matter it considers would cause any harm, detriment or disadvantage to any person, however minor, irrespective of any public interest in disclosing the information. As one former Mayor suggested at interview, a 'devious' council could 'get away with murder' by using section 89(2)(h).

268. Some witnesses gave evidence of councillors attempting to misuse section 89(2)(h). One council officer said that they provided advice to a councillor group that a particular item should be dealt with in an open meeting, based on the Local Government Act and the practices of other councils. The officer stated that they were chastised by councillors for their advice and the matter was heard in a meeting closed under section 89(2)(h). Another witness described a council closing a meeting despite receiving legal advice that the matter should not be dealt with in a closed meeting.

269. The potential for councils to use section 89(2)(h) to close meetings to the public to avoid embarrassment to individual councillors or the council is also apparent and is illustrated by the following case study. As discussed in the section of this report titled 'Jurisdiction comparison', on page 130 equivalent local government legislation in other jurisdictions specifically prohibits any consideration of embarrassment to councils or councillors when making a decision to close a meeting.

50 On the basis that it may prejudice tenderers commercial interests to discuss their rates in public.

51 Latrobe City Council now makes its councillor expenses reports publically available.

Case study – Frankston City Council: airing dirty linen in public

On Wednesday 8 June 2016, three councillors from Frankston City Council called a special meeting of council⁵² for Wednesday 15 June 2016. The memorandum to the CEO calling the meeting stated that its purpose was to consider and resolve upon 'Media and Communications'. It also specified that the meeting 'is closed to the public pursuant to 89(2)(h) of the Local Government Act 1987 [sic] as it is considered that the matter discussed may prejudice the Council or any other person'.

Five of the nine councillors attended the meeting and the minutes show that the following resolution was carried unanimously:

That Council:

- 1 – Notes the report⁵³
- 2 – Notes the recent media comments (including social media) are unacceptable and damaging to Council and may warrant further discussions when all Councillors have the opportunity to be present.
- 3 – And accordingly develops a communications/social media policy to guide Council and Councillors in their use of social media.

The minutes do not contain any resolution to close the meeting to the public under section 89(2). Witnesses confirmed that no resolution to close the meeting was passed, due to a procedural oversight, but that no members of the public were present.

Hidden agenda for secret council meeting

– *Frankston Times*, 20 June 2016

A CLOSED meeting between five Frankston councillors took place last Wednesday (15 June) in an apparent attempt to silence four councillors who decided not to attend the meeting.

The meeting was not listed on council's website and councillors met behind closed doors to discuss changes to council's media and communications policy.

While communication was high on the meeting attendees' minds last week, council was not willing to communicate the reason for the meeting.

When asked for a copy of the Special Meeting agenda council's media and communications department advised late on Friday that since the meeting was "a closed meeting" no information, including the reason for the meeting, would be provided to the public ...

⁵² Section 84 of the Local Government Act allows at least three councillors to call a special meeting of council by written notice to the CEO specifying the date and time of the meeting and the business to be transacted.

⁵³ The agenda for the meeting consisted of an officer report containing information about social media policies at other organisations and a copy of the council's Code of Conduct for discussion.

The Mayor, the Acting CEO at the time the meeting was called and one of the councillors responsible for calling the meeting were interviewed. They were asked why they had intended to close the meeting to the public under section 89(2)(h). The witnesses advised that the meeting was called in response to comments posted on social media by some councillors which other councillors considered to be inappropriate and 'slandorous'. The councillor who called the meeting said:

I said this is getting completely out of hand. I said we need to have a meeting. We need to get these people, get them in that room and rip the stuffing out of them over this. Just rip the stuffing out of them. I said this has gone on too long.

The councillor said he had not initially been concerned about whether the meeting was held in public, but that he ultimately agreed with the advice of the Acting CEO⁵⁴ to close the meeting. The councillor explained:

You have to ask yourself, in the public interest, what does this serve? If it's going to be a bloody, messy procedure, if it's going to be surgery and there is going to be a bit of blood all over the joint, why do you invite everyone in to see that and witness it?

The councillor further noted that the situation would be likely to attract negative media coverage, which would generate negative responses from the community and neighbouring municipalities which could do the city 'a lot of damage'.

Similarly, the Mayor advised that the meeting had been closed because, 'you don't air your dirty linen in public when you're having a hard discussion'. He also referred to the likelihood of negative media attention, potential prejudice to the council's reputation, and prejudice to the persons about whom the inappropriate comments had been made if those comments were repeated at a public meeting.

The evidence provided by the Mayor and the Acting CEO indicated that the Acting CEO initially stated that the matter should be dealt with outside a formal council meeting (such as a briefing). However, the Mayor felt that because it was going to be a 'difficult conversation', it needed to be a formal meeting so that as Chair, he could exercise some control over councillor behaviour using the rules of the chamber. He said '[in] very hard discussions ... you need the rules of the chamber to basically make sure they don't personalise matters'.

The Acting CEO said that following receipt of the notice calling the special meeting, he was unsure about the reason for it. He sought clarification from councillors and understood that the matter to be discussed was about comments made on social media by two councillors.

It appeared to him that the debate would focus on the actions and comments of two councillors and it had the potential to lead to heated and personal debate. His advice was, therefore, that the meeting be closed to the public as it had the potential to cause reputational damage to both the council and councillors, and that this would likely prejudice the council or councillors.

54 The officer interviewed was Acting CEO at the time the meeting was called, but was not Acting CEO at the time the meeting took place the following week.

Public notice

On Thursday 9 June 2016, after receiving the memorandum from the councillors calling the special meeting, the council published the following notice on its website:



The council advised that notices informing the public of the meeting may also have been posted at the council's offices.

The Local Government Act requires at least seven days' notice of a council meeting via publication in 'a newspaper generally circulating in the municipal district'⁵⁵ and on the council's website⁵⁶ unless the minutes of the meeting specify 'urgent or extraordinary circumstances' that prevent the council from complying⁵⁷. In this case, six days' notice was provided on the website only and no urgent or extraordinary circumstances are specified in the minutes. Neither the Acting CEO or the two councillors were aware of non-compliance with the notice requirements.

The Acting CEO said he believed he had complied with the public notice requirements in the council's local law and that it had been reviewed by a law firm with expertise in local government.

A review of the local law confirms that its requirements for public notice fall short of the requirements imposed by the Act. The Local Law states:

Reasonable notice of each Ordinary Meeting and Special Meeting must be provided to the public. Council may do this:

a. for ordinary meetings by preparing a schedule of meetings annually, and arranging publication of such schedule on Council's website and in a local newspaper either at various times throughout the year, or prior to each ordinary meeting; and

b. for any meeting giving notice:

(i) in at least one local newspaper or daily metropolitan newspaper;

(ii) on its website; and

Unless time does not allow this to occur in a newspaper, in which case the posting of a notice setting out the details must be displayed on Council's website and the entrance of the Council Chambers and Civic Centre.

The local law did not contain any reference to the statutory requirement to provide at least seven days' notice to the public of a council meeting, nor the requirement for 'urgent or extraordinary circumstances' to exist and be recorded in the meeting minutes where compliance does not occur.

The council advised that the officer who provided advice on governance, was on maternity leave when these events occurred. When the officer went on leave in April, her position was not backfilled. The issue of local law failing to clearly articulate statutory meeting notice requirements is discussed further in the section of the report titled 'Unclear Local Laws – Public Notice' on page 24.

⁵⁵ Local Government Act 1989 section 3.

⁵⁶ Local Government Act 1989 section 82A(2)(a).

⁵⁷ Local Government Act 1989 sections 89(4) and (4A).

270. In response to the draft report the Frankston City Council said:

With regard to the construct of the Local Law, I have obtained legal advice that confirms that “The Governance Local Law is not intended to be [the] exclusive source of Council’s obligations relating to meetings.” As such, the criticism of the Local Law may be seen as overstating the need for the Governance Local Law needing to refer to what is already set out in the *Local Government Act 1989*

Notwithstanding this, I do acknowledge that the process for calling the Special Meeting on 9 June 2016 was not in full compliance with the *Local Government Act 1989*.

In order to remove any misunderstandings or misreading, I will be recommending to Council that specific provisions around giving notice of meetings be include in its forth coming review of the Governance Local Law.

Recording reasons for closure

271. In order to increase transparency around closed meetings, when a council resolves to close a meeting under section 89(2), the Local Government Act requires that, ‘the reason must be recorded in the minutes of the meeting’⁵⁸. However, no further explanation is provided in the Act about the level of detail that should be provided regarding the reason for closure. Nor does the Act specify whether ‘the reason’ should be recorded in the confidential minutes or the public minutes of the meeting⁵⁹.
272. The results of the survey in the table below indicate widely varying practices in the recording of reasons to close meetings and the level of detail provided. Only 20 of the 79 councils indicated that they provide any detail beyond the relevant paragraph of section 89(2).

⁵⁸ *Local Government Act 1989* section 89(3).

⁵⁹ Note: Section 38A(1)(a) of the *Freedom of Information Act 1982* excludes the record of reasons for a decision to close a meeting from being considered as an exempt document under the Freedom of Information Act, evidencing government intention that records of reasons should be accessible to the public.

Table 5: Reasons for closure recorded

Council	Closed meetings – reasons for closure						
	Reference to s89(2)	Reference to s89(2) paragraph	Additional information provided	Council	Reference to s89(2)	Reference to s89(2) paragraph	Additional information provided
Alpine				Manningham			
Ararat				Mansfield			
Ballarat				Maribyrnong			
Banyule				Maroondah			
Bass Coast				Melbourne			
Baw Baw				Melton			
Bayside				Mildura			
Benalla				Mitchell			
Boroondara				Moirra			
Brimbank				Monash			
Buloke				Moonee Valley			
Campaspe				Moorabool			
Cardinia				Moreland			
Casey				Mornington Peninsula			
Central Goldfields				Mount Alexander			
Colac Otway				Moyne			
Corangamite				Murrindindi			
Darebin				Nillumbik			
East Gippsland				Northern Grampians			
Frankston				Port Phillip			
Gannawarra				Pyrenees			
Glen Eira				Queenscliffe			
Glenelg				South Gippsland			
Golden Plains				Southern Grampians			
Greater Bendigo				Stonnington			
Greater Dandenong				Strathbogie			
Greater Geelong				Surf Coast			
Greater Shepparton				Swan Hill			
Hepburn				Towong			
Hindmarsh				Wangaratta			
Hobsons Bay				Warrnambool			
Horsham				Wellington			
Hume				West Wimmera			
Indigo				Whitehorse			
Kingston				Whittlesea			
Knox				Wodonga			
Latrobe				Wyndham			
Loddon				Yarra City			
Macedon Ranges				Yarra Ranges			
				Yarriambiack			

KEY	Yes		No		Varies		N/A		Unclear	
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273. A review and comparison⁶⁰ of a sample of public minutes relating to resolutions to close meetings under section 89(2) was undertaken. The review confirmed that the interpretation and method of compliance with the requirement to record reasons for closure varies widely.

274. The review of public minutes identified a range of issues including:

- A number of resolutions did not specifically refer to section 89(2) or a paragraph.
- Approximately 25 per cent of councils did not provide any additional information about the matters being discussed or decided in the closed meeting, other than citing a paragraph of section 89(2).
- In a number of cases there were no reasons for closure given in the resolution or anywhere else in the minutes⁶¹. For example, in one case, the resolution was simply to 'move into closed session'.
- Where councils provided additional information, the level of detail varied greatly, particularly in relation to contractual matters.
- Many councils did not identify the number of individual matters discussed or resolutions made in the meetings.
- Where a list of individual matters was provided, some councils did not attribute each matter to a particular provision of section 89(2), listing the provisions relied on and the matters without linking them.
- In one case a subsequent release of a resolution was made through an alteration of the public minutes to insert a previously confidential item. This process appears to have removed the record of the reason for closure from the minutes.

275. Appendices 1a – 1d provide examples of the range of practices used to record reasons for closing a meeting. In summary:

- The example in Appendix 1a does not specify the relevant provision of section 89(2) under which the meeting was closed, nor does it provide any other details about the matter or matters being discussed.
- In Appendix 1b six different provisions of section 89(2) are referred to as the reason for closure; however, no further detail is provided and it is unclear whether the provisions relate to a single item or multiple items. Council later clarified that these were references to a review of reports previously considered confidential and recommendations that they either remain confidential or be released to the public. Council said there were recommendations that three of nine reports remain confidential and six reports be 'released from confidential status'.
- Appendix 1c is an example of a meeting closed to discuss multiple matters where items were dealt with individually and shows some consideration of both the provision of section 89(2) relied on and the specific matter under discussion. The minutes also contain public summaries of confidential reports relating to the procurement process discussed.
- The example in Appendix 1d provides:
 - individual resolutions for closure specifying the provision of section 89(2) relied on for each item under discussion
 - public release of some of the resolutions made in relation to the items
 - public release of the report related to the contractual matter which was decided in the closed session (excluding a confidential attachment).

⁶⁰ The review was undertaken in July 2016. Minutes relating to the first closure of an ordinary meeting in 2016 were reviewed for each of the 79 Victorian councils. No closures were identified in relation to four of the councils.

⁶¹ It is possible that reasons were specified in the confidential minutes as the review undertaken was only of public minutes.

276. Documents provided by the focus councils also showed some issues in the recording of reasons for meeting closures.

For example:

- There are a number of instances in the Darebin City Council's minutes where the reason for closure of a meeting was incorrectly listed as 'contractual', when it either related personnel matters, legal advice or the personal hardship of a resident. In one case the reason for closure was listed as to discuss 'governance matters', which did not specifically align with any of the provisions of section 89(2).
- Cardinia Shire Council records all its resolutions to close meetings in the confidential minutes. The public minutes of the meetings do not contain any reference to the closure of the meeting, section 89(2), or the specific matter to be discussed. A member of the public reading the minutes would not have any indication that there were confidential items discussed or decided.

Audio recording – closed meetings

277. Councils were surveyed in relation to their record keeping practices for closed meetings. Section 93 of the Local Government Act requires minutes to be kept of all council meetings and the survey responses indicate that all councils are complying with this requirement.

Table 6: Records created for closed meetings

Council	Ordinary closed meetings - record keeping						
	Minutes	Audio created	Visual created	Council	Minutes	Audio created	Visual created
Alpine				Manningham			
Ararat				Mansfield			
Ballarat				Maribyrnong			
Banyule				Maroondah			
Bass Coast				Melbourne			
Baw Baw				Melton			
Bayside				Mildura			
Benalla				Mitchell			
Boroondara				Moira			
Brimbank				Monash			
Buloke				Moonee Valley			
Campaspe				Moorabool			
Cardinia				Moreland			
Casey				Mornington Peninsula			
Central Goldfields				Mount Alexander			
Colac Otway				Moyne			
Corangamite				Murrindindi			
Darebin				Nillumbik			
East Gippsland				Northern Grampians			
Frankston				Port Phillip			
Gannawarra				Pyrenees			
Glen Eira				Queenscliffe			
Glenelg				South Gippsland			
Golden Plains				Southern Grampians			
Greater Bendigo				Stonnington			
Greater Dandenong				Strathbogie			
Greater Geelong				Surf Coast			
Greater Shepparton				Swan Hill			
Hepburn				Towong			
Hindmarsh				Wangaratta			
Hobsons Bay				Warrnambool			
Horsham				Wellington			
Hume				West Wimmera			
Indigo				Whitehorse			
Kingston				Whittlesea			
Knox				Wodonga			
Latrobe				Wyndham			
Loddon				Yarra City			
Macedon Ranges				Yarra Ranges			
				Yarriambiack			

KEY	Yes		No		Varies		N/A		Unclear	
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Table 7: Audio – Open vs closed

Council	Ordinary meetings – record keeping				
	Open	Closed	Council	Open	Closed
	Audio created			Audio created	
Alpine			Manningham		
Ararat			Mansfield		
Ballarat			Maribyrnong		
Banyule			Maroondah		
Bass Coast			Melbourne		
Baw Baw			Melton		
Bayside			Mildura		
Benalla			Mitchell		
Boroondara			Moira		
Brimbank			Monash		
Buloke			Moonee Valley		
Campaspe			Moorabool		
Cardinia			Moreland		
Casey			Mornington Peninsula		
Central Goldfields			Mount Alexander		
Colac Otway			Moyne		
Corangamite			Murrindindi		
Darebin			Nillumbik		
East Gippsland			Northern Grampians		
Frankston			Port Phillip		
Gannawarra			Pyrenees		
Glen Eira			Queenscliffe		
Glenelg			South Gippsland		
Golden Plains			Southern Grampians		
Greater Bendigo			Stonnington		
Greater Dandenong			Strathbogie		
Greater Geelong			Surf Coast		
Greater Shepparton			Swan Hill		
Hepburn			Towong		
Hindmarsh			Wangaratta		
Hobsons Bay			Warrnambool		
Horsham			Wellington		
Hume			West Wimmera		
Indigo			Whitehorse		
Kingston			Whittlesea		
Knox			Wodonga		
Latrobe			Wyndham		
Loddon			Yarra City		
Macedon Ranges			Yarra Ranges		
			Yarriambiack		

KEY	Yes		No		Varies		N/A		Unclear	
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278. While the Act does not contain any requirements for audio recording council meetings, the survey results in Table 7 indicate that many councils that audio record their meetings turn the recording off during closed meetings.

279. There are a number of potential benefits of audio recording closed meetings, even if those recordings are not made available to the public. These include:

- assisting with the preparation of minutes
- creating records available to external oversight agencies and councillors
- encouraging the same level of professionalism to be adopted in closed, as in open, meetings.

280. One council officer described the level of professionalism amongst the councillors as diminishing in unrecorded closed sessions. They said:

The conversations in closed [meetings] are - the minute the meeting closes everything just falls away. It takes excessive time to make a decision, it just drops off. When they are in open they are more professional, the conversations are appropriate ... Each matter that goes into closed would probably factor in another half an hour onto our night and we can be there until 11 o'clock at night.

281. Another witness raised similar concerns about governance around closed sessions, citing an example where councillors asked officers to leave the chamber while discussion of an item in a closed meeting took place. They said this left the councillors to debate and make resolutions with no officers present. The officers were asked to return to minute the decisions which had been made in their absence. The witness said:

I think there's that feeling of [councillors] don't treat the confidential council meeting ... in the same way they would a Council meeting and rules tend to go out the window... I mean just because the public aren't there, does it mean that then it can become a free for all?.

Sunset clauses

282. A sunset clause with respect to confidentiality is a provision that documents/information will automatically cease to be considered as confidential after a specific date or event, unless further action is taken.

283. From 2003⁶² to 2015, the Local Government Act contained a provision deeming that confidentiality over matters designated confidential by the CEO under section 77 lapsed after 50 days, unless a resolution of council was made maintaining confidentiality. This provision did not apply to matters designated confidential by councils or made confidential by virtue of being dealt with in a closed meeting. In 2015, in order to 'provide more clarity about when information is confidential'⁶³, the sunset provision for information designated confidential by the CEO was removed from the Act⁶⁴.

284. Despite there being no legislative requirement, some councils adopt specified timeframes regarding the confidentiality of information relating to closed meetings.

62 *Local Government (Democratic Reform) Act 2003*.

63 *Local Government Amendment (Governance and Conduct) Bill 2014* Summary, April 2014, Department of Transport, Planning and Local Infrastructure.

64 *Local Government Amendment (Improved Governance) Act 2015* section 17(5).

Table 8: Use of sunset clauses

Council	Uses sunset clauses	Council comments
Alpine		
Ararat		Confidentiality of report or decision may be lifted on adoption of a motion.
Ballarat		
Banyule		
Bass Coast		Information remains confidential for 50 days unless council resolution.
Baw Baw		
Bayside		
Benalla		
Boroondara		May be released by council resolution on a case by case basis.
Brimbank		
Buloke		Resolutions of confidential sections released in ordinary meeting minutes.
Campaspe		
Cardinia		
Casey		May be made publically available by council resolution.
Central Goldfields		
Colac Otway		
Corangamite		
Darebin		
East Gippsland		Rarely confidential information is held until a date/event.
Frankston		There is no Local Law however all confidential reports include a recommendation to release/ not release information after a certain time or event. All Confidential documents released in approx. 65% of cases.
Gannawarra		May be made publically available by council resolution.
Glen Eira		
Glenelg		All in camera reports provide for the 'Date or specified event which removes the confidentiality restrictions'.
Golden Plains		
Greater Bendigo		Council would not consider releasing confidential information.
Greater Dandenong		Report is confidential unless advised by CEO.
Greater Geelong		Report is confidential unless advised by CEO.
Greater Shepparton		If temporary, CEO declares as confidential for up to 50 days.
Hepburn		
Hindmarsh		
Hobsons Bay		Council reviews confidentiality of reports in two years.
Horsham		
Hume		Confidentiality of 'Assemblies of Councillors' items ceases after 50 days.
Indigo		
Kingston		
Knox		May be publically available by council resolution.
Latrobe		May be publically available by council resolution.
Loddon		
Macedon Ranges		

Manningham		
Mansfield		May be publically available by council resolution.
Maribyrnong		
Maroondah		Confidential information ceases to be confidential after 50 days unless council resolves otherwise.
Melbourne		Sometimes used e.g. to release Business Planning information 'in five years'.
Melton		
Mildura		Council policy requires sunset clauses to be used for information in closed meetings 'where possible'.
Mitchell		
Moir		
Monash		
Moonee Valley		
Moorabool		May be publically available by council resolution.
Moreland		CEO can determine to release.
Mornington Peninsula		Review confidential items to consider release.
Mount Alexander		
Moyne		
Murrindindi		
Nillumbik		Outcomes may be publically available by council resolution.
Northern Grampians		
Port Phillip		
Pyrenees		
Queenscliff		May be publically available by council resolution.
South Gippsland		Confidential information ceases to be confidential at the expiry of 50 days.
Southern Grampians		May be publically available by council resolution.
Stonnington		May be publically available by council resolution.
Strathbogie		
Surf Coast		
Swan Hill		Public can request information through FOI or court order. If approved, it may be released.
Towong		
Wangaratta		
Warrnambool		CEO may decide to release.
Wellington		
West Wimmera		
Whitehorse		
Whittlesea		
Wodonga		
Wyndham		Not currently used but will be introduced in the next term of council.
Yarra City		
Yarra Ranges		Council routinely passes resolutions for confidential information to remain confidential indefinitely.
Yarriambiack		

KEY	Yes		No		Varies		N/A		Unclear	
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285. Some councils have policies supporting the use of sunset clauses. For example, Mildura Rural City Council's Release of Confidential Information Policy dated August 2013 requires sunset clauses to be used in relation to information considered in closed meetings 'where possible' and also establishes a system for the council to monitor confidential items with a view to facilitating their release. The policy states:

1. Where Council or its Special Committees consider a matter in confidential session it will, where possible, limit the period of confidentiality by incorporating either:

- a sunset provision after which the information will no longer be confidential; or
- where it is not possible to stipulate a date after which the information is no longer confidential, specify a particular event the occurrence of which removes the confidentiality restrictions.

2. Council will establish a Confidential Reports Register detailing the following information in respect to each confidential Report considered by Council or its Special Committees.

- Council Meeting Date
- Title of the report
- Record number
- Nominated disclosure Date
- Date released to the public.

The Register will be updated within two weeks of each Council Meeting.

3. A review group comprising of the Mayor, Deputy Mayor, Chief Executive Officer and General Manager Corporate Services will periodically review the Confidential Reports Register.

The review group will review the confidential reports that have not been made publicly available and to determine whether the information contained in the reports, that have been confidential for at least 12 months, should be released.

286. Hobsons Bay City Council's Information (Access and Use) Policy dated June 2012 contains a comparable process supporting transparency, which requires the review of the confidentiality status of reports after a specified period. It provides that:

4.2.2 An appropriate sunset clause to review the confidentiality status of relevant matters will be included on all future confidential reports.

Local Government Act Review – proposed direction

287. The Local Government Act *Review Directions Paper, Act for the future - Directions for a New Local Government Act*, released on 8 June 2016 proposes an amended list of matters which councils may consider confidentially. It proposes to:

Include in the new Act that a council may determine that information is confidential if:

- it affects the security of the council, councillors or council staff
- it would prejudice enforcement of the law
- it would be privileged from production in legal proceedings
- it would involve unreasonable disclosure of a person's personal affairs
- it relates to trade secrets or would disadvantage a commercial undertaking.

288. Most witnesses interviewed from the focus councils were supportive of the proposed direction.

What happens outside meetings

289. The Good Governance Guide states:

Good governance is transparent.

People should be able to follow and understand the decision making process. This means that they will be able to clearly see how and why a decision was made – what information, advice and consultation council considered, and which legislative requirements (when relevant) council followed.

290. The Local Government Act encourages transparency around decisions by requiring all decisions to be made by a resolution in a council meeting that is open to the public and minuted, but this process does not always tell the full story of how and why a decision is made.

291. Before councillors cast their vote, they must form an opinion on the resolution to be voted on by gathering and interpreting information relating to the matter. Some of the influences on councillors during this process may not be readily apparent to the public in the council meeting or the minutes which are the official record of the decision.

292. There are a range of unseen factors which can impact on council decision making, which can be divided into two broad categories:

- unseen influences on decisions
- agreements reached outside council meetings.

Unseen influences on council decision making

293. The legitimate factors influencing council decisions and councillor opinions which are made clear to the public and evidenced in minutes are generally as follows:

- officer reports and advice
- formal and sometimes informal community consultation
- advice and recommendations from advisory committees or experts presented to council
- debate in the council chamber.

294. While these types of influences on council decision making were referred to in many interviews, they were not the main focus of this investigation. Many of the unseen influences on council decisions are linked to councillor conduct and some, such as conflicts of interest, have been dealt with extensively in other reports produced by the Victorian Ombudsman's office. However, these influences do present risks to the transparency of local government decision making. They are therefore summarised in the table below.

Some of the influences on councillors during this process may not be readily apparent to the public in the council meeting or the minutes which are the official record of the decision.

Table 9: Unseen influences on council decisions

Transparency risks: Where undeclared/undocumented influences impact on how a councillor or group of councillors vote on a resolution, the 'real reason' for a council decision, or who is actually making it, may remain hidden from public view.

Influence	Description	Examples	Relevant legislative transparency requirements
Councillor Portfolios	Some councils allocate particular areas of council business to individual councillors as a 'portfolio'. Generally speaking, portfolio councillors act as a 'spokesperson' or 'champion' for their portfolio area, without being involved in operational activities.	Some witnesses gave evidence of: <ul style="list-style-type: none"> • portfolio councillors influencing decisions • portfolio councillors having access to information in addition to the information provided to other councillors about matters to be decided • portfolio councillors believing they have additional 'decision making powers', due to their portfolio position. 	None
Wards	Some municipalities within Victoria are divided into 'wards' for the purpose of electing councillors. Voters from a particular ward elect a councillor or councillors for that ward.	Some witnesses gave evidence of: <ul style="list-style-type: none"> • councils letting ward councillors determine the outcome of decisions affecting a particular ward, rather than voting independently • ward councillors meeting outside council meetings to discuss 'ward issues' • ward councillors working separately with council staff on 'ward-specific' issues. 	None
Undeclared personal interests	Where a councillor has a personal interest or association with a decision to be made, this interest should be declared in order to avoid bias or the perception of bias in decision making. The Local Government Act has a detailed provisions relating to conflicts of interest.	Some witnesses gave evidence of: <ul style="list-style-type: none"> • councillors voting on matters despite previously declared conflicts • the particular difficulties of conflicts of interest in small communities • councillor difficulties in understanding conflict of interest. <p>Eg. direct/indirect financial interests or affiliations with political/ethnic/religious or other groups</p>	Sections 77A to 81 define conflict of interest and procedures to be followed where a conflict is identified
Intimidating councillor behaviour	Some councillors' votes may be influenced by the opinions of other councillors whose behaviour they feel is intimidating.	Some witnesses gave evidence of: <ul style="list-style-type: none"> • 'bullying' behaviour exhibited by certain councillors when other councillors disagreed with their views 	While there are no specific transparency requirements, section 76BA(c) states that in performing the role of a councillor, a councillor must treat all persons with respect and have due regard to the opinions, beliefs, rights and responsibilities of other councillors, council staff and other persons

Undeclared external influences	Sometimes councillors may have contact with persons/groups outside council meetings, who unduly influence their opinions. These contacts are not always made obvious in council meetings.	Some witnesses gave evidence of: <ul style="list-style-type: none"> councillors, on their own initiative, talking to developers with current projects outside council processes developers using meetings with councillors to influence decision making in a 'non-transparent way' councillors 'heavily connected' with political parties or activist groups, whose arguments reflect the policies of those groups councillors feeling they must support planning applications from groups which share their religious or cultural heritage former councillors exercising strong influence over current councillors. 	None, however, conflict of interest provisions may be triggered in some situations.
Factions/ bloc voting*	A faction is a group of politically aligned councillors who meet to discuss strategy or tactics; a 'voting bloc' usually refers to a group of councillors with shared interests.	Some witnesses gave evidence of: <ul style="list-style-type: none"> strong factions existing within councils factions deciding the outcome of resolutions. 	Section 76B(b) states that a primary principle of councillor conduct is that in performing the role of councillor, a councillor must impartially exercise his or her responsibilities in the interests of the local community.
Councillors influencing officer reports**	Officer reports are reports produced by council staff to inform the councillors and the general public about the matters on the agenda.	Some witnesses gave evidence of: <ul style="list-style-type: none"> councillors trying to influence the content/advice of officer reports a group of councillors convincing officers to change a report, to the benefit of councillors in that group councillors approaching officers responsible for preparing reports (despite policies being in place to limit such approaches) and officers feeling 'pressured' councillors 'abusing' officers for advice they did not agree with council staff seeking direction/ input from councillors regarding the advice to be provided in reports. 	Section 93(6)(d) - Reports (or summaries of reports) considered in decision making process are to be included in the minutes of a meeting. Section 76E(2)(d) - A councillor must not direct, or seek to direct, a member of council staff in relation to advice provided to the council or special committee, including advice in a report.

* This issue is dealt with in further detail the section of this report titled 'Caucusing, factions and bloc voting' on page 106.

** This issue is dealt with in further detail in the section of this report titled 'Officer reports' on page 51.

Agreements reached outside meetings

295. During the investigation, some witnesses expressed concern that while resolutions were being made in the council chamber, the outcome of some of those resolutions had already been decided elsewhere.

For example, one submitter to the Local Government Act Review said:

In our community there is growing resentment towards council and the senior officers with their failure to genuinely consult prior to major decision-making ... The problem is exacerbated by closed forum meetings ... With the real decisions being made at forum meetings and officer recommendations unable to be carefully scrutinised, the subsequent open council meeting becomes something of a formality of merely ratifying decisions taken behind closed doors at the forum meetings. It is near impossible at this late stage for ratepayers to have any meaningful input into the decision-making process ...

296. Another submitter suggested:

Make it an offence for councillors to determine a matter other than in a formal session of council.

297. A concerned resident posted the following comment on the Local Government Act Review website:

The current legislation also fails to ensure that decision making occurs only in the council chamber. I don't know that any legislation can prevent decision making behind closed doors. That would depend on the ethics and governance practices of the council and individuals involved. It is clear however that at least in my council most decisions are decided in assemblies and what the public gallery then witnesses is a councillor 'performance' adhering to the predetermined decision already made.

298. A former councillor made the following comment in relation to the current council group:

[The current council] doesn't have arguments at the public council meeting ... What you're seeing is a locked in deal done behind closed doors. Council just pushes things there.

299. Another council witness said:

[Y]ou did get ... the impression that decisions had already been made and sometimes what was going on in the chamber was a bit of theatre ... To get to ... an end result ... I remember speaking to some of the other directors and saying look ... there's another game going on above us here and we don't know what it is ... So there was another set of circumstances happening where people were meeting with ... others.

...

I suppose when you see someone and you think no ... this is not a real debate or ... this is something where everyone's been told that they're going to say something and they're going to get up and say it and then the vote will happen and this is the way it will go.

300. There are a range of fora in which councils, or groups of councillors, may be reaching agreements about how they will vote prior to meetings. These are:

- councillor briefing sessions
- councillor only time
- advisory committees
- meetings and communications between councillors outside council offices, including meetings between factions/voting blocs
- consent agendas (dealt with separately in the section titled *En bloc* voting on page 44).

301. Most of the fora above are subject to little or no regulation under the Local Government Act, meaning transparency around these processes is largely at the discretion of individual councils.

Councillor briefings

302. Councillor briefing sessions are meetings where council staff brief councillors on council business. The number of briefing sessions provided to councillors by staff at Victorian councils varies, however many councils regularly provide two briefings per month.
303. During briefings, council staff provide information about a range of council business and matters of interest to councillors and there are opportunities for councillors to raise issues or clarify concerns. Many items will relate to matters to be decided at upcoming council meetings, but other council business is also discussed.
304. Forty-four of the 79 councils hold briefing sessions on the day of council meetings – these are generally referred to as ‘pre-meetings’. Witnesses advised that pre-meetings generally involve reviewing the agenda and clarifying any last minute questions from councillors. Twenty-one of the 79 councils also come together for a meal prior to the council meeting.

305. The Good Governance Guide highlights councillor briefing sessions as a key part of the council decision making process, which assists councillors in forming opinions about matters to be decided in a council meetings. The guide states:

These sessions ensure that councillors are well informed and in the best possible position to debate the issues effectively once they’re at a council meeting.

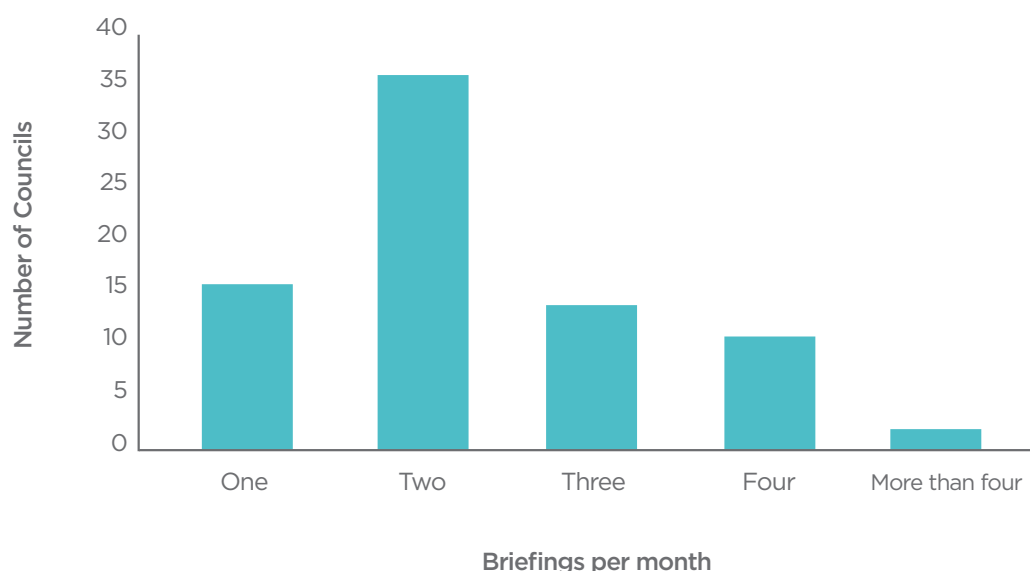
...

Briefings help councillors determine whether they have enough information and advice to help them form an opinion about the matters in question. These meetings are generally held in private so that councillors are able to openly question council officers about the information they have been given, seek further information and float ideas. For example, they may want to know more about the consultation process to ensure that it adequately represents stakeholder views.

...

Briefings should not feature debates and councillors taking a collective position on issues. The appropriate place for this to occur is in the council meeting. In briefing sessions there is generally a one-way information flow from the administration to councillors who will ask questions and identify information shortfalls.

Figure 6: Councillor briefings held each month by Victorian councils based on data provided by the 79 Victorian councils in August–September 2016



306. While the Local Government Act does not specifically mention councillor briefings, most councillor briefings fall within the definition of an 'assembly of councillors', provided for in section 3 of the Act.

307. The definition of an 'assembly of councillors' includes:

... a planned or scheduled meeting of at least half of the Councillors and one member of Council staff which considers matters that are intended or likely to be –

- (a) the subject of a decision of the Council; or
- (b) subject to the exercise of a function, duty or power of the Council that has been delegated to a person or committee – but does not include a meeting of the Council, a special committee of the Council, an audit committee established under section 139, a club, association, peak body, political party or other organisation.

308. This definition does not cover briefings on matters likely to come before council where less than half the councillor group attends.

309. The Local Government Act makes it clear that assemblies of councillors are not intended to be decision making fora. Section 3(6)(c) specifically precludes any business conducted at an assembly of councillors being considered as a resolution of council.

310. Section 80A of the Act details transparency requirements for assemblies of councillors:

(1) At an assembly of Councillors, the Chief Executive Officer must ensure that a written record is kept of–

- (a) the names of all Councillors and members of Council staff attending;
- (b) the matters considered;

- (c) any conflict of interest disclosures made by a Councillor attending under subsection (3);
- (d) whether a Councillor who has disclosed a conflict of interest as required by subsection (3) leaves the assembly.

(2) The Chief Executive Officer must ensure that the written record of an assembly of Councillors is, as soon as practicable –

- (a) reported at an ordinary meeting of the council; and
- (b) incorporated in the minutes of that council meeting.

(3) If a Councillor attending an assembly of Councillors knows, or would reasonably be expected to know, that a matter being considered by the assembly is a matter that, were the matter to be considered and decided by Council, the Councillor would have to disclose a conflict of interest under section 79, the Councillor must, at the time set out in subsection (4), disclose to the assembly that he or she has a conflict of interest and leave the assembly whilst the matter is being considered by the assembly.

Penalty: 120 penalty units.

(4) A Councillor must disclose the conflict of interest either–

- (a) immediately before the matter in relation to which the Councillor has a conflict of interest is considered; or
- (b) if the Councillor realises that he or she has a conflict of interest after consideration of the matter has begun, as soon as the Councillor becomes aware that he or she has a conflict of interest.

311. Four of the 12 focus councils have local laws in place relating to briefings and assemblies of councillors. Some of the local laws reinforce the purpose of briefings as information sharing, rather than decision making fora.

For example, Darebin City Council's Governance Local Law 2013 states:

(2) The purpose of such briefings is for the organisation to provide advice or information on upcoming reports to Council, items of a complex nature or matters of significant community impact. The briefing enables open discussion between the organisation and the Councillors and assists both officers and Councillors to develop a better understanding of the matter for consideration.

(3) The briefings are not formal decision-making forums.

Reaching a consensus

312. A council decision, as defined by the Local Government Act⁶⁵, cannot be made in a briefing session. Evidence obtained supports the view that councils sometimes reach agreements or form a consensus about resolutions in briefings. One Mayor interviewed said:

Obviously we have briefings all the time. And most of your decisions are actually made in briefings as far as council is concerned. Then you basically come to the chamber and you ratify what you have already discussed within those briefings.

313. Some witnesses said straw polls occur in briefings. A former CEO said:

[O]ne council ... were in the habit of putting their hands up at a briefing, doing a 'straw poll'. I have to say it is totally, totally wrong. Because that's when you get the decisions being made in secret and then council meetings look like rubber stamps.

314. The Governance Manager, Maroondah City Council said:

[W]e've had straw polls in the past but probably not ... for at least the last 18 months maybe two years.

...

We [undertook straw polls] ... to get a sense of where [councillors] were sitting [regarding a particular matter at that point in time in the issue resolution process].

315. Other witnesses gave evidence of more subtle forms of agreement being evident in briefings. The Mayor, Maroondah City Council said councillors did not have a show of hands, but the councillors view of issues was apparent 'from the general discussion in the room'.

316. In other cases, witnesses indicated that officers sought some form of consensus from councillors to assist in framing their advice to the councillors. One Mayor said at briefings there was:

... a 'mood of council', a few mutterings, 'Is anyone against it?'... There's nothing official done ... [The Mayor said he would ask] 'What is the mood of council? ... [B]riefings are often trying to get some sort of indication of where council's going ... [Officers] will be looking for some sort of informal direction ... so they don't ... allocate funds to a dead duck ... don't waste the time ... for efficiency.

317. Another witness from the same council said briefings were designed to inform councillors, but at the same time council staff were looking for guidance from councillors as to 'which way to go'. He said:

... It's not a decision making body but you try to make a proper report or rec. You're almost looking for a decision as an officer to frame a report.

318. Similarly, an officer from another council said:

[W]e're asking them for some ... consensus ... you're not going to get a decision at a briefing.

⁶⁵ Section 3(5) states that 'Where a Council is empowered to do any act, matter or thing, the decision to do the act, matter or thing is to be made by a resolution of the Council'. Section 3(6) states that a 'resolution of council' means a resolution made at an ordinary/special meeting of council or at a meeting of a special committee and specifically states that is 'does not include any business transacted at an assembly of Councillors'.

Case study - Seeing the way the group lies

The CEO of one council said:

[In the case of policy matters], [i]t's helpful for officers to have a feel as to council's general level of comfort or support of something before it goes into the formal council agenda because if something's going to ... flop or cause angst in the community ... we might want to recalibrate it [or consider the messaging] before it goes forward ... It's helpful for officers to have a guide.

In response to the draft report, the CEO said:

I think it is important to clarify that this approach doesn't apply when it comes to planning for example. With planning matters the officers report goes forward without amendment and any change is in the alternate motions.

The Mayor said his job was 'to see the way the council group lies' and briefings enabled him to form an idea of the councillor's views which assisted in the preparation of alternative recommendations by council officers.

Another council witness said:

The governing body at [this council] are professionals ... They're pretty cluey. They understand that at assemblies you can't make decisions. So they're very good ... at making sure they'll say 'I'm just giving you an indication of where I am'.

So it's about language ... If we're sitting in an Assembly of Councillors or a briefing and you think it's getting close to a point where you think someone is going to be silly enough to try and take a decision, then people like me will step up and say 'I'll just remind you that this is an assembly and you can't take decisions'. The fronts of the assembly paper ... [state] ... they're not decision making bodies so they're reminded every time they go into an assembly or briefing that it's not a decision making body ... [B]ut on issues that become important to them, the way that they'll do it is 'We just want to give you an indication of where we're at'. So ... there's a subtle way of pressuring. But by the same token it can sometimes also be useful for officers to get a better understanding of where the councillor group are at on any particular issue as well.

...

When you work as closely as I do with the councillors you understand the nuances, you understand the body language. It's fascinating sometimes sitting around a briefing table just watching what's going on. The body language, the eye contact, you learn to read it. Can you prove it in a court of law? Probably not. But you certainly know what's going on.

Impact on debate

319. There is no legislative prohibition on debate during briefings, as indicated by the Good Governance Guide, but it is not encouraged. Allowing debate in briefings may come at the expense of debate in the chamber which would increase public transparency around a decision. While the information in briefings is primarily intended to flow from staff to councillors, it is inevitable that some discussion takes place. A number of council witnesses acknowledged it was sometimes difficult to distinguish between discussion and debate in briefings.

As one former CEO said:

[Y]ou do everything you can to not make [a briefing] like a council decision making night. Otherwise there will be no debate and the public would go 'what ... was that?'

320. The CEO of Buloke Shire Council said:
- ... it's a difficult line because ... decisions aren't made in assemblies, but the discussion that occurs in assemblies will inevitably influence decisions.

321. The Mayor of the Campaspe Shire Council said:

Quite often I'll make the comment to the CEO, 'We need more time around that, the councillors need to ask all their questions and thrash it all out' ... because if they don't, I can see we'll get into the council meeting, and it will be a proverbial S-show, as they haven't had enough time to discuss stuff and try and tease out extra information, and ask the questions. And then ... it'll play out ... in front of the gallery ... [W]e broadcast it as well. So, we'll try and have that extra discussion ... It is really hard at times to keep the conversation from moving into debate ... It's a very fine line.

322. The CEO of the Campaspe Shire Council said:

[W]e're pretty strong on ... no debate ... [I]t is a struggle ... I'll tap the Mayor to sort of say 'We need to reign this in ... people are starting to express a view' ... [T]his is for councillors to ask questions and get information ... And it's also for officers to get some guidance - what the view of council is, without having decisions or a debate.

323. The Mayor of the Mornington Peninsula Shire Council said:

[I]t'll become almost a debate in a briefing until usually one or two councillors stand up and say 'We'll talk about it in the open chamber' and that shuts it down ... [C]ouncillors are aware that debate should not occur in the briefing, which it ... does; but if debate does start ... there is always someone canny who will say 'No, finish it. We will talk about it in the chamber'.

324. In response to the draft report, the CEO of the Mornington Peninsula Shire Council said:

It needs to be clearly stated that there are no 'debates' at briefings but open and frank discussions on issues presented sufficient for councillors to be informed for debate in chambers should that be required.

325. Some witnesses indicated that debate which took place in briefings did not substantively affect debate in the chamber, while others indicated that it did. One Governance Manager said:

[S]ometimes ... councillors are still not satisfied with what's been brought forward [by officers at briefings] and the debate would have probably been the same debate, with or without the briefing.

326. A witness from another council said:

So they might sort of do a semi-Dorothy Dixier because they know that the community [would] be interested in the answer to that question, and maybe with hindsight, in between the time when they saw the draft briefing and the report, they realised that perhaps there's not enough information in there for the general community.

327. The CEO of Maroondah City Council said questions by councillors in briefings were 'ordinarily not repeated in a formal forum' because councillors had 'got past that'. He said there was formal debate in the chamber and at times questions asked in briefings were repeated in the chamber for the benefit of the gallery.

328. One CEO said when they worked at council, there was less debate in the chamber and more at briefings because the councillors' view was that 'we've already had discussion about it'.

Records of briefings

329. The Local Government Act only requires records to be kept of briefings which meet the definition of an 'assembly of councillors' under the Act. Therefore, there are no record keeping requirements for briefings involving less than half of the councillor group.
330. As stated above, section 80A requires the following information to be recorded and tabled 'as soon as practicable' at an ordinary council meeting in relation to every assembly of councillors:
- the names of all councillors and members of council staff attending
 - the matters considered
 - any conflict of interest disclosures made by a councillor
 - whether a councillor who has disclosed a conflict of interest leaves the assembly.
331. The detail required is less than the level of detail required for council meeting minutes and there is no requirement to keep a copy or record of the documents considered at briefing.
332. Appendix 4a is an example which was typical of the level of detail recorded by most councils in their records of assembly. It appears to meet the minimum requirements of section 80A. However, the investigation reviewed some records of assembly which may fall short of the level of detail required by section 80A in terms of the 'matters considered'. An example of this is provided at Appendix 4b.
333. In response to the draft report, with respect to Appendix 4b, the CEO of Mornington Peninsula Shire Council said:
- The Assembly of Councillors [record] refers to a Council pre-meet on 15 March 2016. The items were not separately listed as they refer to the Council meeting agenda which was publically advertised.
334. The requirement to keep a 'record of assembly' was introduced in 2008 to 'address concerns about decisions being made in secret and about councillors exercising undue influence over decisions in which they had conflicts of interest'⁶⁶.
335. Some witnesses questioned the value of records of assemblies. One CEO said records of assemblies did not serve any real purpose but could increase the 'impression of transparency'. The Governance Manager of Cardinia Shire Council said requiring records of assemblies was 'overkill' designed to address issues in a minority of councils.
336. However, other witnesses indicated they consider them useful. One Governance Manager said the current record keeping requirements for assemblies of councillors represented 'the bare minimum standard'. Another Governance Officer said it was 'complete madness' not to have records of assemblies. The Executive Manager, Corporate Governance and Performance, City of Darebin said:
- I think [records of assemblies are] a good mechanism to record if there are conflicts of interest during briefing sessions ... But I think they're actually a good idea as a record of information or discussions that took place.

⁶⁶ Local Government Act Review Council Committee's Background Paper #3 November 2015, page 8.

337. Some witnesses gave evidence that they would be comfortable with even greater transparency around councillor briefings. One Mayor said briefings should be open to the public but were not because councillors were too timid.

338. The Campaspe Shire Council is the only focus council that audio records briefings. While the recordings are not released to the public, the Mayor said the councillors have found this additional record keeping measure useful:

[T]hat's something I found really helpful for us, when we moved across into recording, it really helped. Because people are conscious you're going to push the button and speak into it. It helps to control the conversation, even the briefing sessions, and extra strategy sessions. But also they're are a little bit clearer.

339. The Executive Manager, Corporate Governance and Performance, and the Mayor of the Darebin City Council said council did not audio record briefings but could see no issue with doing so.

340. Other witnesses expressed concern about the impact audio recording briefings would have on the openness of discussion. The CEO of Glen Eira City Council said assemblies were the only opportunities council staff and councillors had to discuss matters and any recording of them would potentially be 'a detriment to good decision making [in] councils and trust'. The Mayor of Banyule City Council said:

[The] only caution I would have with that is ... you don't want to bring fair and open discussion out of hidden. If people are going to say, well, we're going to be recorded this meeting, perhaps we should, perhaps we can have the next meeting outside.

341. The CEO of Warrnambool City Council said:

What we're trying to achieve with briefings ... is to encourage discussion, encourage options, encourage thinking ... they are informal discussions. The more restrictions (audio recording etc.) you apply, the more formal they become and the discussion will start to dry up ... we want conversations happening here, not to send them away to happen elsewhere.

Local Government Act Review directions

342. The Local Government Act Review proposes to remove any legislative regulation of briefings or assemblies of councillors from the Act. The Directions Paper states that:

[t]he requirements for assemblies of councillors are particularly complicated. They include rules about disclosing conflicts of interest, keeping records and tabling records at council meetings. They impose more controls on meetings with no decision-making powers than there are on delegated committees.

343. The Directions Paper proposes to:

Remove from the Act provisions regulating assemblies of councillors, leaving councils to deal with issues of public transparency about these...as part of council's internal rules.

Councillor only time

344. Many councils also hold meetings between councillors which are not attended by any staff. These meetings are generally referred to as 'councillor only time'.

345. Based on data provided by the 79 councils, 43 councils have councillor only time. Thirty-five councils said these meetings were regular and scheduled and 13 councils said the meetings were rare or infrequent.

346. There is no statutory requirement for records to be kept in relation to councillor only time – nor are there any other transparency requirements relating to this type of meeting in the Local Government Act. A review of the local laws of the 12 focus councils did not identify any laws providing guidance in relation to councillor only time.

347. Council witnesses were asked about councillor only time at interview to identify whether it had any relationship with council decision making.

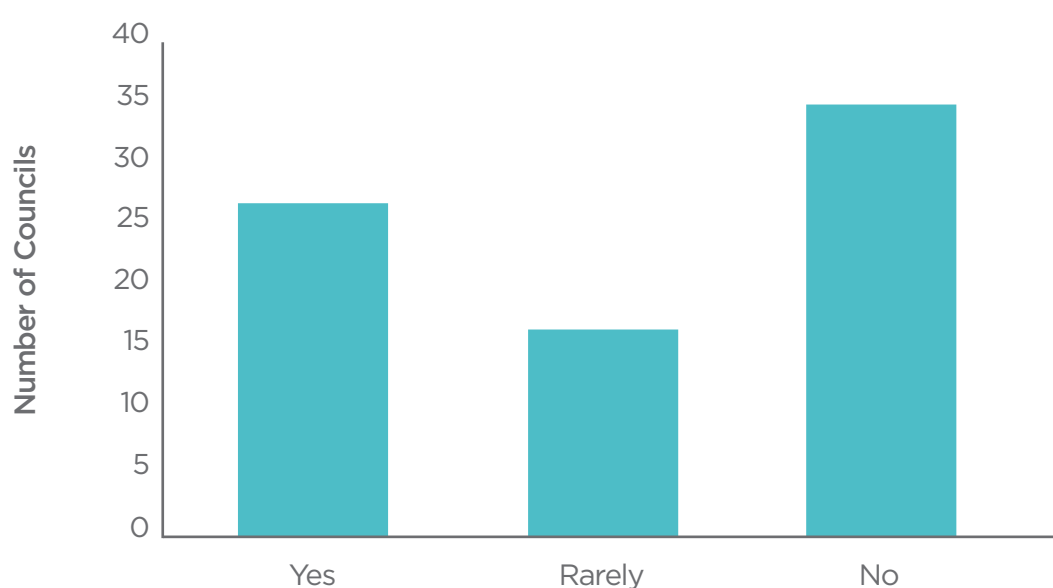
348. Examples witnesses gave of the purpose and nature of discussions during councillor only time were:

- an opportunity for councillors to ‘catch up’ or ‘have a chat’
- a forum to address councillor conduct issues
- a ‘whinge-fest’
- an opportunity to ‘grizzle’ about council staff

- a chance to deal with interpersonal issues or personality clashes
- an opportunity to discuss CEO or staff performance
- an opportunity for councillors to say they don’t understand something and they want to seek further information from staff on it
- an opportunity to have a frank discussion without falling foul of a controlling CEO
- a place where councillors could have an argument, not in front of the staff.

349. While no witnesses said that decision making on council business occurred in councillor only time, some gave evidence indicating that agenda items were discussed in councillor only time and in some instances, could have an impact on decisions made in the chamber.

Figure 7: Councillor only time in Victorian councils in 2016



350. The Mayor of Buloke Shire Council said:

Sometimes a free flowing discussion is a really good way [to reach] a robust decision ... Sometimes the rigours of meeting procedures don't allow for a proper free flowing discussion.

351. The Mayor of Mount Alexander Shire Council said:

[S]omeone will say I really think we need to do something about the footpaths in Maldon. How are we going to get that on the agenda? So there might be a bit of you know planning and talking among ourselves about that ... Someone might say, oh, look, I've been contacted by X in my ward and he thinks this is going to come up soon. We'd like people to go and have a look and then that's when the diligent councillors will say, well, you can't just give them a planning permit ... So it's a variety of things ... It's usually before a briefing.

352. A former Mayor said that when he was Mayor, council had used councillor only time to discuss budget issues. He said:

I used to run a spreadsheet ... here's the items that we have all agreed to, here's the ones that are in contention and I'd get them to vote, sort of decide once we'd narrowed it down. There might still be some items of contention so councillors were free to pursue a particular item in the council meeting, to add something in, or take something out. But I think that was a reasonable process to try and come up with a final draft budget that you could then go out to the community with. So there were in that sense decisions, they weren't final decisions ... but it was a process to try and come up with an agreed position about what the paper would look like.

Advisory committees

353. An advisory committee is defined in the Local Government Act⁶⁷ as:

any committee established by the Council, other than a special committee, that provides advice to –

- (a) the Council; or
- (b) a special committee; or
- (c) a member of Council staff who has been delegated a power, duty or function of the Council under section 98.

354. This broad provision allows councils to establish advisory committees made up of any type of member, to advise on any topic. Sixty-five of the 79 Victorian councils have more than one advisory committee and the average number of advisory committees per council is seven. Latrobe City Council and the Greater Geelong City Council have more than 30 advisory committees.

355. While the Local Government Act does not allow any decision making powers to be delegated to an advisory committee, there are concerns about the role and influence advisory committees have on the transparency of council decision making. A submission to the Local Government Act Review stated:

Advisory committees are now de facto Assemblies of Council – locked away from public scrutiny and oversight. The Local Law in Glen Eira excludes all mention pertaining to the governance, reporting, and documenting requirements of these committee meetings. Minutes tabled at council vary extraordinarily – i.e. some contain the mover and seconder of a motion, while most do not. What is of particular concern is that officer reports are tabled at these advisory committee meetings but are not made public. Ordinary council meetings then include the motion to 'note and accept' the recommendations ... this is a formality, with no discussion or elucidation in 99% of instances. Thus, the rationale for any decision is being made behind closed doors and without public scrutiny.

67 Local Government Act 1989 section 3(1).

356. There are no legislative transparency requirements which apply to non-councillor advisory committees. Meetings are not required to be open to the public, nor is there any requirement for minutes of meetings to be kept. There are however, some specific requirements which apply to particular types of advisory committees, such as audit committees⁶⁸. Further, a meeting of an advisory committee if at least one councillor is present is deemed to be an assembly of councillors⁶⁹, and the record keeping and conflict of interest requirements for assemblies will apply. From the focus councils, most advisory committees have at least one councillor as a member.

357. While councillors who are members of advisory committees must disclose conflicts of interest and avoid matters in which they have conflicts, there are no conflict of interest requirements which apply to non-councillor advisory committee members.

358. Of the 12 focus councils, 10 had advisory committees in addition to an audit committee. Of these 10, four had local laws regulating meetings of advisory committees. The local laws of Campaspe Shire Council, Darebin City Council and Warrnambool City Council provided detailed guidance, including how appointments are made to advisory committees. The local laws of the Campaspe Shire Council provided that the council may establish an advisory committee; the chair is elected by the members or the council; the chair may call meetings at the chair's discretion; and minutes must be created to record meetings.

359. A former Mayor told the investigation:

If you set up the advisory committees in the right way, with clarity around what their role is, the process is easy. If you set up advisory committees without that clarity, they can become a significant problem for council in terms of, they think they are making decisions, they think they might be directing the staff. And [I can recall one specific committee]... We started getting concerns expressed back to us by the CEO that the staff were being given tasks by this committee, massive amounts of work ... If you try and stop that with the advisory committee, you cop flack from that side for not allowing them to provide their input. So you have to be careful.

360. A Governance Manager said recommendations of advisory committees were typically accepted by the council, at times with 'serious implications on the budget or the operations of the council'. He said recommendations were usually taken 'en bloc', not read by councillors and as a result 'we spent a lot of time just unravelling what had been adopted at council meetings'. He said officers had tried to have recommendations considered by councillors at assemblies but there had been no appetite for this. They said members of advisory committees could be self-serving and even where they had conflicts, were 'well organised in terms of, if I am out of the room, are there enough numbers to get the particular items through?'. He said, 'the real issue is inconsistency between advisory committees and the council, particularly in relation to budget issues'.

⁶⁸ Section 139 of the *Local Government Act 1989* contains specific provisions relating to council audit committees which are required to be established by each council and which are deemed to be advisory committees.

⁶⁹ *Local Government Act 1989* section 3.

361. A witness from Darebin City Council said:

[E]very now and then we have a few issues with councillors trying to influence the advisory committees, see what the discussion is and what the decisions are and we deal with those independently when and if we find out about them. But it's usually any decisions that are made at the advisory committees, it's then back through the officer who's responsible for that advisory committee to report it back to council.

...

[Y]ou've got up to ... two or three councillors on advisory committees when they do turn up and ... they can influence the decisions that are being made in council on a particular matter. So in my ideal world you wouldn't have councillors as such on advisory committees. You would have actual community members then it would come through and then it would be a very sort of informed non-biased decision that they're making.

...

[I]f they've [community members] got an association or a relationship or a friendship or whatever it is with councillors. ... or ... with staff that are responsible for the committees.... I think there's issues around potential candidates that are on committees and we do have some ... and even though our pre-election period policy states that you're not to attend during the caretaker period, as such, I just think that... there can be potential for the wrong influence or the wrong decisions to be made.... [For example, the] ...bicycle riding committee ... a lot of that information goes through the advisory committee. We've got councillors who are very passionate about bike riding. We've got ... candidates for the upcoming election that are on there and whether they use that as almost a sort of a starting platform or a starting area I don't know.

362. They said that Darebin City Council's *Governance Local Law 2013* extended to advisory committees and that committee members were required to declare conflicts of interest at advisory committee meetings. They added that 'what council needs to ensure is that the declaration of conflict of interest forms part of every advisory committee agenda and that it is the first item on the agenda after the welcome'.

363. At interview, Mayors, CEOs and Governance Managers said councils generally accept recommendations made by advisory committees. This was supported by data provided by the focus councils, shown in the table below. This routine acceptance of recommendations makes transparency of advisory committees important, irrespective of the fact that they do not have decision making powers themselves.

Table 10: Focus council advisory committees

Council	Description of Advisory Committees in Addition to Statutory Audit Committee	Percentage of recommendations accepted by council in the last 12* months	Related Local Laws
Alpine Shire Council	Dinner Plain Advisory Committee; Alpine Shire Council Finance Committee; Bright Pioneer Park Recreation Reserve Committee. <i>Two advisory committees have councillor members.</i>	100%	No
Banyule City Council	Aboriginal and Torres Strait Islander Advisory Committee; Age-friendly Advisory Committee; Arts and Cultural Advisory Group; Banyule; Bicycle Advisory Committee; Banyule; Environment Advisory Committee (BEAC); Banyule Multicultural Advisory Committee(BMAC); Chief Executive Officer (CEO) Employment Matters Committee; Disability and Inclusion Advisory Committee; Early Years Advisory Committee; Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Advisory Committee. <i>All Advisory Committees have councillor members.</i>	100%	No
Buloke Shire Council	Drought Advisory Committee <i>The committee has a councillor member.</i>	No recommendations were made.	No
Campaspe Shire Council	Farming Advisory Committee; Port of Echuca Strategic Advisory Committee <i>One Advisory Committee has a councillor member.</i>	100%	Yes – detailed
City of Darebin	Active and Healthy Ageing Board; Community Board; Darebin Arts Ambassadors; Darebin Australia Day Advisory Committee; Darebin Bicycle Advisory Committee; Darebin Child Friendly City Advisory Committee; Darebin Disability Advisory Committee; Darebin Education Committee; Darebin Environmental Reference Group; Darebin Housing Advisory Committee; Darebin Interfaith Council; Darebin Women's Advisory Committee; Darebin Youth Advisory Group; Edwardes Lake Park Reference Group; Municipal Emergency Management Planning Committee; Northland Urban Renewal Precinct Committee; Preston Business Advisory Committee; Reservoir Structure Plan Community Reference Group; Sexuality, Sex and Gender Diversity Advisory Committee; Darebin Aboriginal Advisory Committee. <i>All Advisory Committees have at least one councillor member.</i>	100%	Yes – detailed
Glen Eira City Council	Arts and Culture Advisory Committee; Citizen of the Year Advisory Committee; Community Grants Advisory Committee; Community Consultation Advisory Committee; Environment Advisory Committee; Local Laws Advisory Committee; Sport and Recreation Advisory Committee <i>All advisory committees have councillor members.</i>	100%	Yes – detailed

Cardinia Shire Council	None	N/A	N/A
Latrobe City Council	<p>Australia Day Advisory Committee; Braiakaulung Advisory Committee; CEO Employment Matters Advisory Committee; Churchill & District; Community Hub Advisory Committee; Early Years Reference Committee; Gippsland Carbon Transition Committee; Housing Strategy and Latrobe Planning Scheme Review Project Reference Group; Jumbuk and Yinnar South Timber Traffic; Reference Group; Latrobe City Cultural Diversity Advisory Committee; Latrobe City Hyland Highway Municipal Landfill Consultative Committee; Latrobe City Industry Forum; Latrobe City International Relations Advisory Committee; Latrobe Regional Gallery Advisory Committee; Latrobe Tourism Advisory Committee; Morwell CBD Safety Group; Morwell Town Common Development; Plan Project Control Group; Positive Ageing Advisory Committee; Latrobe City Council Rail Freight Working Group; Sale of Goods from Council Properties Committee; Social Planning for Wellbeing Committee; Traralgon Aquatic Facility Working Party; Traralgon CBD Safety Committee; Traralgon Parking Precinct Plan Working Group; Victory Park Precinct Advisory Committee; War Memorials Advisory Committee; Warren Terrace Hazelwood North Recreation Reserve; Timber Umbrella Group.</p> <p><i>All Advisory Committees have councillor members.</i></p>	100%**	No
Maroondah City Council	<p>Disability Advisory Committee; Maroondah Business Advisory Committee; Maroondah Community Safety Committee; Maroondah Community Wellbeing Committee; Maroondah Environment Advisory Committee; s223 LGA Appointed Committees</p> <p><i>All advisory committees have councillor members.</i></p>	No recommendations were made.	No
Mornington Peninsula Shire Council	None	N/A	N/A
Mt Alexander Shire Council	<p>Heritage Advisory Committee</p> <p><i>Committee has a councillor member.</i></p>	100%	No
Warrnambool City Council	<p>Australia Day Advisory Committee; Landscape and Development Advisory Committee; City Health and Wellbeing Advisory Committee; Flagstaff Hill Advisory Committee; International Relations Advisory Committee; Safer Harbour Community Reference Group; Warrnambool Regional Airport Advisory Committee; Warrnambool Livestock Exchange Reference Group; Chief Executive Officer Employment Matters Committee.</p> <p><i>All advisory committees have councillor members.</i></p>	100%	Yes – detailed

* October 2015 – October 2016.

** Council advised that this applied for most recommendations.

Meetings and communications between councillors outside council

364. Some evidence provided also indicates that tacit agreements may be reached by councillors about resolutions outside official council arrangements. For example, the Mayor of the Mornington Peninsula Shire Council said he and other councillors had used their private emails to communicate when deciding to employ the current CEO.

365. A witness from another council said they believed text messages had been used by councillors to reach agreements about planning matters:

I was aware that councillors had been texting each other. The planning committee had been texting each other about applications and you could sometimes in those informal meetings, you knew a decision had already been made.

...

[W]e were getting some really crazy decisions being made about refusing applications predominantly that were just almost lay down misère in terms of them ticking off the planning systems but because one of the councillors had a bee in his bonnet or her bonnet about that particular development and they would talk to the others, it would get rolled.

366. There are no specific legislative provisions regulating these types of communications, other than the general requirements for decisions to be made in meetings which are open to the public and in some circumstances, conflict of interest provisions becoming applicable.

Caucusing, factions and bloc voting

367. One of the possible drivers of regular gatherings or communications between councillors outside meetings referred to by witnesses during the investigation, was the existence of factions or voting blocs within a council.

368. A former CEO said it was not realistic to expect councillors not to talk about decisions and that 'intelligent caucusing' could improve public debate. He said:

I didn't have concerns that they, [the councillors] did it. They can caucus at dinner, in the chamber, before our meeting, in the councillors lounge over a drink... where doesn't that happen? I think it's [appropriate] because the decision is not taken ... I can't think of a way you could change it that would have ... any real impact.

369. The CEO of Buloke Shire Council also considered some discussion between councillors prior to meetings could be beneficial:

I think it's almost inevitable in that ... not necessarily a voting bloc of councillors but that some councillors will work better with other councillors and will ask their advice on things and will discuss matters. And come to a conclusion that that's probably the way to go before meeting with the other councillors. And I don't think there's anything wrong with that.

370. However, he considered that caucusing could become problematic where councillors had a majority which allowed them to effectively determine the outcome of resolutions in advance:

It's when you get a majority of councillors meeting before the meeting because they have the power to make a decision and making a decision remote from the council itself, then I think it becomes a problem.

371. Similarly, the Mayor of Latrobe City Council:

It would be good if you could somehow remove the politics ... out of local government ... because ultimately we're all here to represent the views of the community and come up with the best decision. That's it ... If you concentrate on what's best for the community ... rather than for yourself, the place would be a lot better. The main problem is when decisions are made by a few councillors and not all.

372. Another witness described a situation at a council they had worked at where they believed factions were operating:

Well it just meant that [the majority faction] would really make the decision on just about any matter. They never told me officially but you could tell that they met somewhere and agreed on something and would just use the numbers. Which I guess is what the system allows.

...

If an item was discussed and people had expressed their views, you'd pretty much sort of know which way the decision was going to be made ... As the politics played out ... with a group ... making the decisions people just stopped coming to the briefings. [The group] didn't [attend] ... because they just didn't care, they didn't need to, they didn't want to clarify anything.

373. The Deputy Mayor of Alpine Shire Council said that whether councils have factions or not is a matter of luck.

374. Similarly, a former CEO said:

I used to wonder if it was just luck or me. And then my luck ... changed. So I realised it was just luck ... [T]hey would really make the decision on just about any matter. They never told me officially but you could tell that they met somewhere and agreed on something and would ... use the numbers ... The majority always wins.

375. Witnesses indicated that seven of the 12 focus councils currently or historically had some form of factions or en bloc voting.

376. A witness from Maroondah City Council said ward and political groups existed at the council but as councillors were seated alphabetically in the chamber, it was not always obvious when there was sub group voting. They said 'from time to time you can see party views being played out around the local government decision making table'. However, they said there was a greater freedom and openness for councillors to exercise their own views and opinions at the council than at other Victorian councils; and that typically councillors of Maroondah 'represent[ed] the whole of [the council] even though they've got particular views'.

377. One witness said there was a clear voting bloc at their council. They said factions were an issue for transparency in decision making because:

The biggest issue is that you end up with a decision based on the interests of the faction rather than the interests of the community. There are examples ... where that's happened where you've had factional interests represented rather than the community interest. And sometimes factional interests don't always accord with ... what's required in the Planning and Environment Act in terms of Town Planning. So factionalism ... alienates those that aren't in the faction, it denies them the opportunity to participate even though they've been elected.

378. The Mayor of the same council denied factions were operating, saying:

We don't have factions at the council ... I don't meet up regularly with any councillor ... There might be some councillors who catch up for coffee, discuss something ... they have a new idea for a committee. They may get together. As far as... voting blocs - getting together in cafes and caucusing - I'm not aware of that happening.

379. However, he said experienced councillors mentored new councillors who were 'along similar political lines' and 'some councillors identify with some subjects more than others'.

380. The Mayor of one council spoke of blocs operating at the council (including herself). They said:

[T]here's a perception of two blocs of councillors here. In reality there is one faction of three and the balance have been categorised as a group of four by default [The group of four] yes we are more united because of a common enemy, it's collegial unity only. There are differences in our politics, differences in our views, but probably on most issues we would arrive at the same view. However, the three socialise and hang together. They take a very populist position at all times. I don't think there is anything that they are really driven by, except creating disruption.

...

They sit together at briefings and are hard to control from the chair.

...

[I]n this room [at briefings] decisions are not made. The three appear to have an agenda of negativity ... They do have difficulties when they have a decision that's populist ... [When] they get lobbied by both sides, they actually don't know what to do.

...

Unfortunately with such negativity in the room, the four end up having to have our own conversations on the side, to try and work things out. Not because we want to, but because due to a known lack of confidentiality and trust, we can't talk about it at briefings.

381. The Mayor of another council said:

[I]f you actually went through the first couple of years of this council, you would see a [majority/minority] split, and those [majority] councillors would vary with each other but [the minority councillors] almost relentlessly voted the same ... if you went through historically the voting pattern, you would see a very clear voting bloc.

...

[W]e've had some pretty serious bloc voting and ... if you went through and had a look at our first couple of years ... and even probably a good part of last year, you'd see some bloc voting and you would have to wonder how they get to that. Now, we had one councillor at that time ... and she would look at another councillor to see how they voted and that's how she voted. Say those in favour, and she'd go – if he put his hand up, then she put hers up or if those against, and she'd wait, and so that's how she voted. We've got it on camera and you can see her turn her head and look and see who votes.

...

[T]he voting blocs were very clear and straightforward. But now the voting bloc has disappeared at least in the last year or more.

382. Another witness from another council spoke about a planning application and said:

[T]he planning committee deferred the application to council. They made the decision. And it was ... really about politicking. That the five people on the planning committee were ... the controlling group if you like and the other four who weren't, were the ones that were making all the noise in council. So ... that was the sort of issue that we had. We had a 5:4 split ...

[T]he group of five would have just been happy ... for everything to move on, but they used the notices of motion as a means of ... needling and ...baiting the other group if you like ... which meant that council meetings became almost farcical at times ...

[I]t would have been better if the meetings had been recorded because the minutes probably give you a very clinical and abridged version of what was going on.

383. A former senior officer of Latrobe City Council told investigators that they felt it was a toxic council at the time they had worked there and the executive had been powerless when against all advice, two or three councillors could influence almost every contract awarded. The current Mayor said there had been bloc voting in the past.

Perspectives

The Mayor of one council, who described himself as in the minority following the resignation of a councillor, said bloc voting was used for political gain.

He said:

Oh absolutely, there's caucusing for sure ... It comes through with its very elaborate arguments and you just go one, two, three and everyone's got a point to make. Oh there's definitely that ... There are officers involved and again it's ... upsetting but you can't prove it.

...

I am the Mayor ... [and] I don't know what to do ... our council Code of Conduct that they've just brought through says the Mayor specifically can't say anything.

Another councillor, who also described himself as a minority councillor said he had been asked to sign a poorly drafted Code of Conduct or be disqualified:

... so the will of six people who haven't been informed properly about the document force me in a position where I have to sign otherwise I'm disqualified.

The CEO said, 'you can sense sometimes that it does not matter how good the counter argument is ... we're going this way'. He said he 'tried to guide and advise [councillors] in terms of specific behaviours ... not in the best interests of the organisation and community'.

He also said:

... whether it's a playground or a kinder or a pavilion, a footpath or a road ... it can lead to not supporting this because we're not getting anything out of it ... I think our council does a pretty good job but to your bloc vote point, from time to time when you're in the driver's seat you set the direction of where it's going.

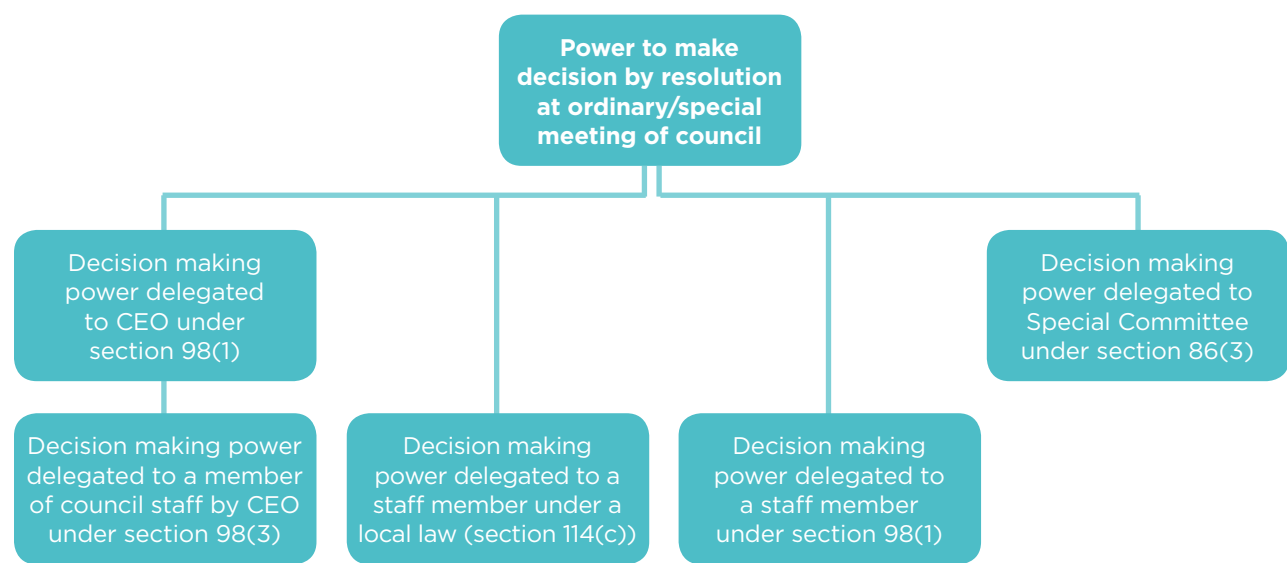
Delegated decision making

384. Efficient management of the broad and complex range of matters councils are responsible for would be impossible if every decision had to be made by the elected council during a meeting. As such, under the Local Government Act councils have the power to delegate most decisions to special committees, the CEO or other council staff. This can have implications for transparency.

Staff delegated decision making

385. Decisions made in meetings were the primary focus of this investigation, but the reality is that the vast majority of day-to-day council decisions are not made in meetings. They are made by staff under delegated authority from the council or CEO. A witness from Glen Eira City Council estimated that 90 per cent of decisions at the council were made by the CEO or staff under delegation.

Figure 8: Powers of delegation under the *Local Government Act 1989*



386. Section 98 of the Local Government Act states:

- (1) A Council may by instrument of delegation delegate to a member of its staff any power, duty or function of a Council under this Act or any other Act other than –
- (a) this power of delegation; and
 - (b) the power to declare a rate or charge; and
 - (c) the power to borrow money; and
 - (d) the power to approve any expenditure not contained in a budget approved by the Council; and
 - (e) any power, duty or function of the Council under section 223; and
 - (f) any prescribed power.
- (2) The Chief Executive Officer may by instrument of delegation delegate to a member of the Council staff any power, duty or function of his or her office other than this power of delegation unless subsection (3) applies.
- (3) The instrument of delegation to the Chief Executive Officer may empower the Chief Executive Officer to delegate a power, duty or function of the Council other than the power of delegation to a member of the Council staff.
- (4) The Council must keep a register of delegations to members of Council staff.
- (5) A delegation under this section to a member of Council staff may be made to –
- (a) a person named in the delegation; or
 - (b) the holder of an office or position specified in the delegation.
- (6) A Council must review within the period of 12 months after a general election all delegations which are in force and have been made by the Council under subsection (1).

387. Regulation 12(d) of the Local Government (General) Regulations requires registers of delegations, including the last date a review of those delegations took place to be made available for public inspection by councils. Council responses to the survey indicated 77 councils make their staff delegations register available for public inspection at their offices, but only 19 make the register available on their websites.

388. One former CEO noted that reviewing delegations was sometimes not given an appropriate amount of attention. He said:

One of the pitfalls I've seen is delegations, while they're reviewed, they're just reviewed as an exercise and not as an – 'are these genuinely decisions we want handled by these people? Is there enough scrutiny and oversight into how these decisions are made?'

389. Subject to limited exceptions, decisions of council are required to be made in public and the records of a decision are required to be made available. But there are no such requirements for delegated decisions. Whether councils take active steps to publish decisions made under delegation is at their own discretion. However, it is important to note that documents relating to these decisions are generally subject to the Freedom of Information Act.

390. In relation to staff delegated decision making, one CEO said:

A hell of a lot of the decision making is done by me as the CEO and CEOs everywhere. The transparency around that is limited for practical reasons, myself and the directors make hundreds of decisions every day. And they're not all documented, and they're not all able to be documented. So, it'd be nice to understand the quantum of influence and decision making that the council actually has over their community, relative to the CEO.

...

I often think of Federal elections, how much does the government actually shape the future? And how much of it is the bureaucrats that remain in place, time in and time out. So, so I think there's a hell of a lot of decision making that goes on that is, that is devoid of transparency. I must say that's a bad thing. But it's a reality.

391. A former CEO said:

Unless they specifically ask for it [the public will probably not see a delegated decision] and it will probably be done under Freedom of Information ... And it might even come down to the closure of a park ... And it wasn't the council that did it, it was an officer acting under delegation. And members of the public say 'what happened there?' ... [T]he first thing the public may know is when there's a lock on the door.

392. One witness noted that although individual CEO and staff decisions were not necessarily reported back to the public, they were made transparent through limitations on and publication of delegations as well as transparent annual budgeting and planning processes, which established the framework for decisions.

393. Some councils take steps to publish certain types of decisions made under staff delegation. For example, the Cardinia Shire Council tables reports listing planning decisions made under staff delegations at council meetings.

394. While a low financial delegation to a CEO means a larger number of decisions will be made in council meetings open to the public, a number of witnesses indicated that lower financial delegations were likely to be a sign of council distrust in staff and could also be inefficient. A former CEO said:

The whole idea with delegations is trying to set them up so it makes council and the organisation run really efficiently ... You'd have to pick a point where it's just the important things that come up [to council]. [With a low financial delegation to the CEO] the organisation would grind to a halt because you wouldn't be able to purchase anything.

395. At interview, a former CEO said:

[Councillors] can limit the degree of oversight if they choose and provide a lot of the decision making responsibility back on their [own] shoulders. If it suits their purposes, particularly if they want to tie the hands of the Executive...When I was at...the councillors wanted to get rid of...management... To get rid of them they needed to get rid of me. They couldn't... [do so] easily until my contract was up for renewal so...they curtailed delegations... [I]nstead of me having a half million dollar delegation, they reduced it to \$100,000 and then subsequently all the other delegations were reduced which meant the decisions had to all come up through them and they could play whatever game they liked.

396. Another witness described a situation at a council where councillors withdrew the CEO's ability to hire consultants and contractors, which effectively suspended the council's business as every minor purchase had to go through the council.

397. The following table compares the financial delegations to CEOs of the focus councils.

Table 11: CEO financial delegations – focus councils	
Council	CEO's delegation
1. Alpine	Contracts less than \$150,000
2. Banyule	Contracts less than \$500,000
3. Buloke	Contracts less than \$200,000
4. Campaspe	Contracts less than \$1,000,000 (for contracts between \$150,000 and \$1,000,000 expenditure must be previously approved in budget process)
5. Darebin	Contracts less than \$500,000
6. Glen Eira	Contracts for goods and service and for carrying out works regarding roads and drains less than \$1,000,000 All other contracts and agreements less than \$500,000
7. Cardinia	Contracts for goods and services less than \$150,000 Contracts for carrying out works less than \$200,000
8. Latrobe	Contracts less than \$500,000
9. Maroondah	Contracts less than \$500,000
10. Mornington Peninsula	Building and capital works less than \$50,000 Lease Agreements less than \$50,000 pa Contracts for goods and services less than \$300,000 Contracts for works less than \$350,000 Contracts variations approval – 10% of total initial cost for projects less than \$3 million
11. Mount Alexander	Contracts less than \$150,000
12. Warrnambool	Contracts less than \$300,000

Special committees

398. Section 86 of the Local Government Act allows councils to establish special committees, to which they can delegate almost any of their decision making powers. Section 86 states:

Special committees of the Council

(1) In addition to any advisory committees that a Council may establish, a Council may establish one or more special committees of the following –

- (a) Councillors;
- (b) Council staff;
- (c) other persons;
- (d) any combination of persons referred to in paragraphs (a), (b) and (c).

(2) A Council may appoint members to a special committee and may at any time remove a member from a special committee.

(3) Except as provided in subsection (4), a Council may by instrument of delegation delegate any of its functions, duties or powers under this or any other Act to a special committee.

(4) A Council cannot delegate to a committee the following powers—

- (a) this power of delegation;
- (b) to declare a rate or charge;
- (c) to borrow money;
- (d) to enter into contracts for an amount exceeding an amount previously determined by the Council;
- (e) to incur any expenditure exceeding an amount previously determined by the Council;
- (f) any prescribed power.

(5) A Council may require a special Committee to report to the Council at intervals determined by the Council.

(6) The Council must review any delegations to a special committee in force under this section within the period of 12 months after a general election.

399. The broad nature of these provisions means councils can create and use special committees for a wide range of purposes.

400. Regulation 12(d) of the Local Government (General) Regulations requires registers of delegations, including the last date when a review of those delegations took place to be made available for public inspection by councils. Council responses to the survey indicated that 66 make their register of delegations to special committees available for public inspection at their offices, but only 15 make it available on their websites. Twelve indicated that their register of special committee delegations was 'not publically available'.

Special committee meetings

401. Special committees are acting as the council when they make decisions under their delegated authority. Therefore, most of the transparency requirements for meetings that apply to meetings of council also apply to special committees.

402. These include the requirements to:

- open meetings to the public (unless they are closed under section 89(2))
- provide at least seven days' public notice of meetings where the committee is comprised solely of councillors (unless urgent/extraordinary circumstances exist)
- provide 'reasonable notice' to the public of meetings for any other special committee⁷⁰
- vote in accordance with procedural requirements of section 90
- keep minutes of every meeting⁷¹, in accordance with the requirements of section 93(6)
- make minutes from meetings for the last 12 months available for public inspection, if not available on council's website⁷².

⁷⁰ *Local Government Act 1989* section 89(5). The Act does not provide any further clarification of the meaning of 'reasonable notice'.

⁷¹ *Local Government Act 1989* section 93(3).

⁷² *Local Government (General) Regulations 2015* regulation 12(c).

Table 12: Records of special committee meetings

Council	Minutes			Audio			Visuals		
	Created	Available on website	Available for inspection at office	Created	Available on website	Available for inspection at office	Created	Available on website	Available for inspection at office
Alpine									
Ararat									
Ballarat									
Banyule									
Bass Coast									
Baw Baw									
Bayside									
Benalla									
Boroondara									
Brimbank									
Buloke									
Campaspe									
Cardinia									
Casey									
Central Goldfields									
Colac Otway									
Corangamite									
Darebin									
East Gippsland									
Frankston									
Gannawarra									
Glen Eira									
Glenelg									
Golden Plains									
Greater Bendigo									
Greater Dandenong									
Greater Geelong									
Greater Shepparton									
Hepburn									
Hindmarsh									
Hobsons Bay									
Horsham									
Hume									
Indigo									
Kingston									
Knox									
Latrobe									
Loddon									
Macedon Ranges									

Manningham									
Mansfield									
Maribyrnong									
Maroondah									
Melbourne									
Melton									
Mildura									
Mitchell									
Moir									
Monash									
Moonee Valley									
Moorabool									
Moreland									
Mornington Peninsula									
Mount Alexander									
Moyne									
Murrindindi									
Nillumbik									
Northern Grampians									
Port Phillip									
Pyrenees									
Queenscliffe									
South Gippsland									
Southern Grampians									
Stonnington									
Strathbogie									
Surf Coast									
Swan Hill									
Towong									
Wangaratta									
Warrnambool									
Wellington									
West Wimmera									
Whitehorse									
Whittlesea									
Wodonga									
Wyndham									
Yarra City									
Yarra Ranges									
Yarriambiack									

KEY	Yes	No	Varies	N/A	Unclear
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Notes: 'not applicable' is used in the 'created' columns of this table where the council does not have any special committees; 'not applicable' is used in the availability columns of this table where records of that type are not created; 'unclear' is used in this table where the council could not provide the requested information or provided an unclear response.

Integrity requirements

403. The following integrity requirements applying to councillors also apply to members of special committees, regardless of whether they are councillors, staff or members of the community:

- They are prohibited from misusing their position to gain advantage for themselves or others or to cause detriment to the council or others⁷³.
- They must not disclose confidential information⁷⁴.
- They must disclose any conflicts of interest and any conflicting personal interests⁷⁵.
- They must submit primary and ordinary returns, for the council's register of interests⁷⁶ (however, the council may exempt non-councillor committee members from the requirement to submit returns⁷⁷).

Committee types

404. The *Local Government (Planning and Reporting) Regulations 2014*⁷⁸, since 1 July 2015, have required that councils provide in their annual report, 'a list of any special committees established by the council that are in operation, and the purpose for which each committee was established'. Previously, no such regular reporting requirements in relation to the number or type of special committees existed. A review of focus councils' 2015/16 annual reports indicates compliance with this new reporting requirement is not consistent. Of the 12 focus councils, five did not provide the required list (Cardinia Shire Council, Latrobe City Council, Maroondah City Council, Mornington Peninsula Shire Council and Warrnambool City Council).

⁷³ *Local Government Act 1989* section 76D.

⁷⁴ *Local Government Act 1989* section 77.

⁷⁵ *Local Government Act 1989* sections 79 and 79B.

⁷⁶ *Local Government Act 1989* section 81.

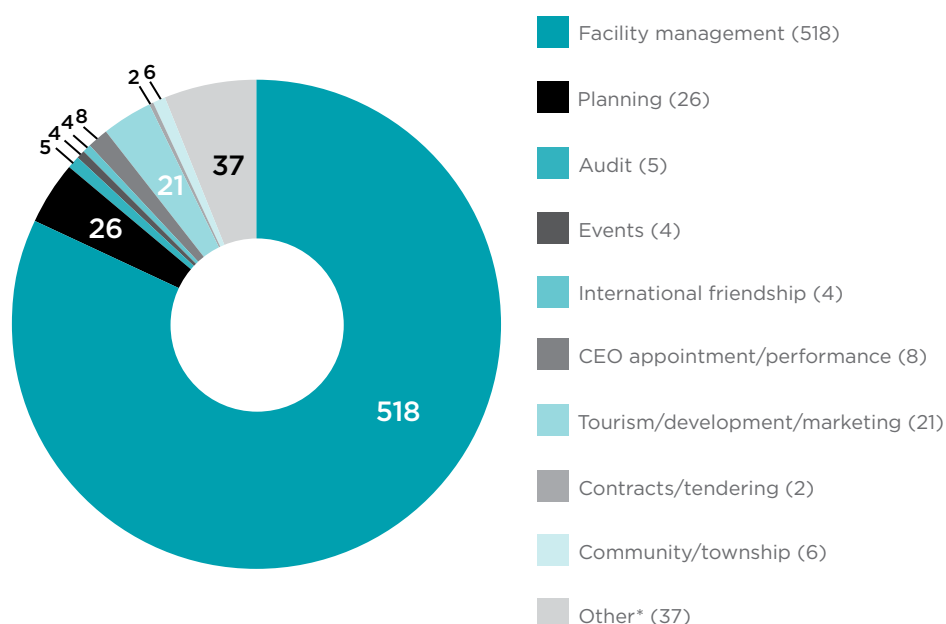
⁷⁷ *Local Government Act 1989* section 81(2A).

⁷⁸ *Local Government (Planning and Reporting) Regulations 2014* regulation 14(dc).

405. The survey found that councils across Victoria are operating a total of 631 special committees⁷⁹. While 11 councils do not operate any special committees, 21 are operating 15 or more and three are operating 30 or more. The purpose and composition of these committees ranges from those consisting entirely of councillors with significant delegated decision making powers, through to those consisting entirely of community volunteers with narrow powers to manage a single council facility, such as a public hall or reserve (usually known as committees of management).

406. Appendix 2 lists the special committees of each of the 12 focus councils.

Figure 9: Types of special committees



*Other types of committees included committees related to policy review; section 86 committee review; community impact; public art; place names; finance and operations; public places trees; fundraising; hearing of submissions; social issues; community grants; community services; strategic planning; growth strategies, closed council meeting and inter-council committees.

⁷⁹ Following the survey (conducted between March and May 2016) which the information in this section of the report is based on, councils provided updated data on the number of special committees they were operating. Information provided by councils in November 2016 indicates that the number of special committees being operated by Victorian councils had reduced by 51, to 580.

Planning committees

407. The type of special committees most commonly given significant decision making powers by councils are committees with powers delegated under the *Planning and Environment Act 1987*⁸⁰. A review of special committees identified 23 councils operating 26 committees with powers delegated under the Planning and Environment Act⁸¹. Most of these 26 committees have only councillors as members, with many consisting of the entire councillor group.

408. Table 13 shows committees identified with delegated powers under the Planning and Environment Act which do not consist entirely of councillors:

409. Of the 26 planning committees identified, all except two⁸² make the minutes of meetings available on the council's website.

410. As Glen Eira City Council was one of the 12 focus councils and the only council in Victoria operating a planning committee consisting entirely of staff, the Delegated Planning Committee (DPC)'s compliance with the transparency requirements of the Local Government Act was examined during this investigation.

80 Section 188 of the *Planning and Environment Act 1987* allows councils to delegate, by instrument, any of their powers, discretions or functions under the Act (with limited exceptions) to a committee or officer of the council.

81 Bayside City Council; Benalla Rural City Council; Boroondara City Council; Cardinia Shire Council; City of Casey; City of Darebin; Glen Eira City Council; Golden Plains Shire Council; City of Greater Geelong Council; Greater Shepparton City Council; Hindmarsh Shire Council; Hobsons Bay City Council; Kingston City Council; Maribyrnong City Council; Melbourne City Council; Mitchell Shire Council; Moreland City Council; Nilumbik Shire Council; City of Port Phillip; Strathbogie Shire Council; Surf Coast Shire Council; City of Yarra.

82 Glen Eira City Council's Delegated Planning Committee and the Greater Shepparton City Council Development Panels Hearing do not post minutes on the council website, though both councils advised they are available to the public upon request.

Table 13: Planning committees with non-councillor members			
Committee name	Council	Committee membership	Purpose
Delegated Planning Committee	Glen Eira City Council	Staff only	Has delegated power to exercise the council's powers, discretions and authorities under the Planning and Environment Act, but generally determines planning applications that have attracted objections as a result of the public notification process.
Development Hearings Panel	Greater Geelong City Council	One councillor* and various staff	To consider and determine upon planning permit applications which: <ul style="list-style-type: none"> • are referred by either a councillor or planning officers or • are recommended for refusal or • have six or more objections lodged.
Central Geelong Task Force	Greater Geelong City Council	Three councillors**, the CEO and external independent experts in one or more of the following fields: business and investment, development feasibility, planning, marketing and promotions, and place making	To: <ul style="list-style-type: none"> • oversee the implementation of the Central Geelong Action Plan consistent with the principles of the action plan • provide advice on key strategic policy and statutory processes relating to central Geelong including making decisions on major planning permit applications referred to it by Council or the Task Force manager • oversee the development of business incentives and programs that could be considered to support central Geelong development and • identify events and activities to bring more vitality to central Geelong.
Development Hearings Panel	Greater Shepparton City Council	One councillor, various staff from GSCC, one staff member from Moira Shire Council and one staff member from Strathbogie Shire Council	To consider and determine, as a delegate of council, various matters under the Planning and Environment Act, the Greater Shepparton Planning Scheme and other relevant regulations. Specifically, this includes: <ul style="list-style-type: none"> • planning permit and permit amendment applications where up to (and including) five objections are received (applications with six or more objections must go to council); • any permit application or permit amendment application, secondary consent, request for extension of time or other determination of an Officer (under a delegated authority) which is recommended for refusal by an officer; • any relevant matter referred to the DHP by an officer; and • any relevant matter referred to the DHP by the council.
Planning Committee	Surf Coast Shire Council	Five full time members of the community selected on the basis of experience and expertise in fields relevant to planning issues in the Shire and geographic representation	To make decisions on planning permit applications where officers recommend refusal and/or there are objections to a proposal.

* Note - no councillors are currently committee members as the council is under administration.

** Note - no councillors are currently committee members as the council is under administration.

Practice example – Glen Eira City Council: Delegated Planning Committee (DPC)

On 4 March 2013, the following comment about the Glen Eira City Council was posted on a resident's website, 'Glen Eira Debates'⁸³:

Only 2% of planning applications come to the full council for decision. Hence, 98% of all decisions are made by officers either through the Delegated Planning Committee or under 'managers'. These committees are held during work hours, and officers have already made recommendations as to accepting or rejecting the proposal. Objectors are given the opportunity to attend, but we suggest that their chances of altering the recommendations at this late stage are basically buckleys and none! The INDIVIDUAL decisions of the DPC are NOT MADE PUBLIC...

The most recent instrument of delegation to Glen Eira's DPC, dated 9 August 2016, stated that the DPC has delegated power to 'exercise the council's powers, discretions and authorities to perform Council's functions under the Planning and Environment Act'. However, other documents indicate that the DPC 'generally determines planning applications that have attracted objections as a result of the public notification process'. The DPC has 15 members of council staff appointed to it, including the CEO. However minutes from the DPC meetings provided by the council show between three and six of these members attending each meeting. The rationale for the DPC is described in a brochure produced by the council as follows:

Why have the DPC?

Principally, to "speed up" the decision making process and to provide an opportunity for all affected parties to express their views. Previously many matters now handled by the DPC would go to formal council meetings held every three weeks. The DPC meets more frequently in a less formal environment and importantly gives all parties an opportunity to express their points of view to the decision maker.

The DPC is non-compliant with a number of transparency requirements under the Local Government Act applying to section 86 committees. These are:

- No notice of meetings is provided to the general public in accordance with section 89(5), which requires the chairperson to provide 'reasonable notice to the public of meetings'. Only applicants and objectors to the planning application being decided at the meeting are invited.
- The meetings are not in effect 'open to members of the public'⁸⁴, as required by section 89(1) of the Act. While the council has advised that '[a]ny member of the public could attend if they wanted to', it is unclear how they would be aware of the meeting taking place given no notice is provided to the general public.
- The council advised that '[b]rief minutes of the meeting are taken by the planning officer and are added to the planning officers' report' and that a copy of these reports can be made available to the public upon request. Section 93 of the Local Government Act requires that minutes be kept of special committee meetings which contain details of the proceedings and resolutions made;

⁸³ 'Glen Eira Debates' states that it is run by 'a group of residents committed to facilitating genuine debate Glen Eira' and contains articles and posts about the Glen Eira City Council.

⁸⁴ *Local Government Act 1989* section 89(1).

are clearly expressed; are self-explanatory and 'in relation to resolutions recorded in the minutes, incorporate relevant reports or a summary of the relevant reports considered in the decision making process'⁸⁵. The DPC minutes provided by council do not contain any attached documents and contain a minimal level of detail. It does not appear that these minutes would be sufficient to meet the requirements of section 93. There is also no evidence of the minutes of the previous meeting being submitted at each meeting for confirmation as required by sections 93(4) and (5).

– Section 90(1)(ca) requires that 'voting at a meeting that is open to members of the public must not be in secret'. However, the council has advised that in the case of DPC, '[v]oting of the application takes place in a separate room. The committee then returns to the meeting room and verbally delivers the decision to all parties in the meeting room'.

Is the DPC actually a special committee?

After initially stating that the DPC was a special committee, Glen Eira City Council subsequently advised that after reviewing historical documents relating to the committee it was uncertain of its special committee status. The council provided a resolution of council from 2002 which purports to establish the DPC and delegate powers to the committee under section 98(1) of the Local Government Act. Section 98(1) however, does not relate to delegations to special committees, but rather, allows council to delegate specified powers, duties or functions 'to a member of its staff'. The wording in the instrument of delegation is not consistent regarding whether the powers are being delegated to the committee or to the individual members of staff on the committee.

Subsequent resolutions of council in 2011 and 2016 which purport to make minor amendments to this instrument of delegation refer to sections 86 and 87 (relating to special committees) of the Local Government Act as the source of the power being used by council to amend the delegations.

In response to queries raised about the status of the DPC, Glen Eira City Council sought legal advice and subsequently confirmed it now accepts that the DPC is a special committee and that it 'appears not to have met all of the procedural requirements of the *Local Government Act 1989*, including public notice provisions and transparency of voting'. It is now reviewing the role of the committee with a view to disbanding it. The response provided by the Glen Eira City Council to this draft report is attached in full at Appendix 7.

⁸⁵ *Local Government Act 1989* section 93(6).

Committees of management

411. The responses to the survey indicated that 518 of the 631 special committees being operated by councils in Victoria are committees managing council facilities such public halls; recreation reserves; golf courses, memorials; sporting facilities; art galleries; trails; theatres; swimming pools; cemeteries; caravan parks; units; community centres; visitor information centres; saleyards; racecourses; freight terminals; airports; historical sites and tourist attractions.
412. Some of these committees appear to be managing larger facilities with employees and significant budgets, but most are managing the day-to-day concerns of small facilities such as public halls or reserves. These types of committees tend to be made up entirely of community volunteers and are usually referred to as 'committees of management'.
413. In 2011, the Local Government Investigations and Compliance Inspectorate reported that its compliance audits had identified a range of issues in relation to the management of special committees within the local government sector. These included:
- Council [were] unaware of the number of special committees in place and/or the names of office bearers on each committee.
 - Council [were] unaware of the reason each special committee was established, especially those that have been in place for a long period of time.
 - No register of delegations.
 - Delegations not reviewed within required timeframes.
 - No schedule of meetings or terms of reference.
 - Meeting minutes not sent to council or not signed by the special committee Chair.
414. The above compliance issues centre on provisions in the Local Government Act aimed at maintaining transparency and accountability around special committees. The evidence obtained during this investigation indicates that these problems continue to exist at some councils in relation to committees of management.
415. Some witnesses said volunteering on committees of management was an important way for citizens to participate in their communities. However, concerns were also raised about the heavy governance requirements imposed on special committees and the potential for these requirements to act as a deterrent to volunteering.
416. One CEO said:
- I think it's probably a little naive in that, it's beyond most of those committees because we're putting in place a governance overhead that is excessive for the task they need to do. So therefore their capacity to lift to that overhead is low.
417. A Governance Officer said:
- As soon as you went to a committee to say look under the MOU this is what you need to provide or under the delegation this is what you need to provide, then they just wanted to walk away. And they said we just don't want to - it's just too much of a burden for them. Which is understandable because they don't have that knowledge, they just want to come up, come along, help, go home.

-
418. A number of council witnesses gave evidence indicating that their committees of management had not previously or were not currently consistently complying with transparency and governance requirements. A number also said they were uncertain about whether their committees of management were compliant. One CEO said, 'you know, some [committees] are better than others at doing all the right things, so we're trying to lift their level of rigour'.
419. Council witnesses also said that maintaining oversight of committees of management could be challenging for council staff. The Governance Manager of the Cardinia Shire Council, which operates more than 30 committees of management, was asked at interview how the council kept track of them. He said:
- Difficult. Extremely difficult. We're aware that there's a risk and have raised that with the council. Putting aside the transparency issue as one issue, there is a risk in having volunteers managing facilities on behalf of the council. There are occ health and safety issues and WorkCover issues that need to be addressed.
420. A Governance Manager from another council said:
- ... officers are also assigned to [special committees], and that's been an issue for this council and also⁸⁶ when I was at [another council]. There was just too many committees, you can't expect officers to be running around to all these meetings⁸⁷.
421. Each focus council was asked to provide a range of transparency-related documents for their section 86 committees, including evidence of notices provided to the public, minutes and agendas for the last two committee meetings. Mount Alexander Shire Council, which has 21 section 86 committees of management operating halls and reserves:
- could not provide evidence of notice to the public being provided in relation to any of its committees
 - provided minutes and agendas from 2014 only for three of the committees
 - provided minutes and agendas from AGMs only for three of the committees.
422. The evidence obtained indicates that many councils either have, or are still in the process of, reviewing their section 86 committees with a view to addressing issues with oversight and the compliance requirements being placed on volunteers. Six of the 12 focus councils interviewed indicated that they had either reviewed and significantly reduced the number of committees of management they were operating or that they were going through a process of phasing them out.
423. The experiences of the Buloke Shire Council provide an example of this.

⁸⁶ In addition to having a relationship with their ward councillor.

⁸⁷ Meetings generally take place at night, out of ordinary business hours.

Case study: Buloke Shire Council committees of management

In 2013, the Buloke Shire Council reviewed the status of its special committees. The review found that most committees had been appointed in 1995 (at the time of the establishment of the council) for the management of recreation and leisure facilities. The report identified:

- few of the committees had provided regular reports or financial information to the council and the council had not followed up on this
- a lack of documentation - particularly in terms of current lists of the members; past Deeds of Delegation; clarity of the objectives; and written guidance to committees in relation to management and compliance
- no recorded approval from the council for two special committees which became incorporated associations to change their legal status
- confusion about the status of committees
- special committees which had morphed into advisory committees or absorbed other committees without any formal process.

It appears that a table attached to the report may indicate that at that time, the council had approximately 22 committees which may have been created under section 86 of the Act. The report stated that:

...it is simply not possible to identify current office bearers or members of Council's s86 committees, the terms of appointment or matters delegated to them.

Upon receipt of this report, the council resolved to transition all committees established to assist with the care, maintenance and management of council owned facilities and land to advisory committees over the following 12 months.

The minutes relating to this decision state that the transition it was :

...designed to reduce the burden on members of such committee[s] by removing from them the requirement to comply with all of the provisions of the Act that apply to Councillors and to Meetings of the Council. These requirements have become more onerous over the years and are no longer seen to be appropriate to the volunteer status of Committee members. Requirements that will no longer be relevant will include the need to publically advertise all meetings, maintain financial accounts in accord with Local Government accounting requirements, compliance with conflict of interest rules and declaration of all interest.

In October 2015 the council rescinded its resolution to convert all section 86 committees to advisory committees after further investigation and consultation. In March 2016, a further report was provided to council on the status of special committees. Minutes indicate that at that time, some committees had their delegations revoked and had been replaced by advisory committees, while others had elected to retain their section 86 status.

When surveyed, the Buloke Shire Council initially advised that it had nine committees. However, when asked for documents about each of these, it said six were 'no longer sitting'. Regarding the remaining three committees, the council could not provide any of the requested agendas, minutes or evidence of notice to the public given for meetings.

The Director Corporate Services confirmed that the delegations for all section 86 committees were not reviewed within 12 months of the last election as required by the Local Government Act. However, he advised that the council had reviewed all its section 86 committees in operation over the previous 18 months. Three of those committees remained in operation and had had their delegations reviewed, while several had had their delegations revoked. He said there was one further committee whose status had not been reviewed for some time⁸⁸. He also confirmed that at the time of the investigation, Buloke Shire Council did not keep a formal register of delegations as required by section 87(1) of the Act. In response to the draft report, the council stated:

Buloke Council has not had a dedicated governance resource and as a result there has not been a systematic approach to the treatment of section 86 committees. The Council has gone through major change over the past three years and it is only now that these deficiencies have been identified and are being addressed. As can be seen from the production of several reports over the past 18 months officers have been working on this issue. It is envisaged that council will be fully compliant with the Act by February 2017.

424. One former CEO described the heavy reliance councils have on volunteers to manage facilities, particularly in rural areas, where there were limited staff and also noted that the population of these volunteers was ageing:

Without them, these committees are going to fold – and who is going to do the work? It's a ticking time bomb for councils to actually respond to.

Local Government Act Review directions

425. The Local Government Act Review proposes the following to address issues such as those raised above in the new Act:

21. Require a committee to which a council may delegate any of its powers to be known as a special committee and require it to include at least two members who are councillors.

22. Allow councils to establish administrative committees to manage halls and reserves, with limited delegated powers including limits on expenditure and procurement, and for councils to approve annually committee rules that specify the roles and obligations of administrative committee members.

23. Apply legislative provisions exclusively to special committees that have delegated council powers and to administrative committees (as described in the proposed direction above).

⁸⁸ In response to this draft report, the Buloke Shire Council provided an update on the status of its special committees. This update is provided at Appendix 6.

Councillor education and training

426. Once elected by their communities, councillors are responsible for making significant decisions. The CEO of the Warrnambool City Council stated:

I think one of the challenges for local government that we're finding is that the amalgamation and the development of councils has really made us quite complex businesses to operate ... We're not a big organisation compared to the others but we're still \$80 million ... a year, 700 staff, 35 business units.

...

A hundred services ranging from people with acquired brain injuries, abused children, to saleyards, holiday parks, tourist villages ... [L]ook at all the legal obligations, health and safety et cetera. I think the big challenge is ... getting the balance between democracy and skills-based boards.

427. Councillors are not required to obtain any particular qualification or training prior to or during their terms as councillors⁸⁹, but all of the 12 focus councils provided some education and training to their councillors. The Governance Manager at Cardinia Shire Council said there was a budget of \$3,000 for the professional development of each councillor.

428. The CEO of Banyule City Council said mandatory councillor training should be considered. The CEO of Buloke Shire Council said all councillors should have to pass a course before being able to become a councillor. He said:

[C]ouncillors will be elected who have no idea what being a councillor is about. And you'll also have councillors elected who are just not capable of performing the Councillor role.

...

I've seen quite a few Councillors who've had a hell of a shock when they've realised the commitment that's involved.

429. The Director Corporate Services of Buloke Shire Council said:

[Y]ou either say you have to have it [a qualification] to become a councillor or you could say that once elected, within the first 12 months you need to successfully complete this, or ... you're out.

430. This view was supported by the Mayor of Darebin City Council who said:

A lot of training is necessary ... for a new term councillor and a lot of mentoring and support, critical and very important ... I've got one or two councillors still can't read plans and we're making decisions on modern multimillion dollar projects and applications; still can't read a bloody plan ... I was flabbergasted. So, training is essential and mentoring.

...

[A] lot of people come in blind and still don't understand. I've got a couple of councillors now who still don't understand anything about how this place is governed or how it operates, which is sad but that's in most Councils unfortunately.

431. The Governance Manager at Cardinia Shire Council explained the various education and training opportunities available to Victorian councillors – which he said were optional but highly recommended to councillors at Cardinia Shire Council – as follows:

- training by MAV (including MAV's Mayor's program) and VLGA
- Post Graduate Diploma of Business Management
- AICD Company Director's course.

⁸⁹ The *Local Government Amendment (Governance and Conduct) Bill 2014* proposed a number of changes including mandatory induction programs for newly elected councillors (sections 63 and 65). This bill did not proceed to law.

432. He also said Cardinia Shire Council provided:

- training by a senior local government lawyer and an expert in local government law regarding the Local Government Act, councillor responsibilities, the Code of Conduct, conflicts of interest and the roles and functions of Mayor and CEO
- training by an ex-CEO.

433. The Deputy Mayor of Alpine Shire Council spoke about the inconsistency in training provided across councils. He said:

[E]ach local government pretty much does its own thing and I think that that's a problem.

...

I think they should all have ethical training [and] ... financial training ... because ... a lot of them [councillors] don't have any financial acumen at all and ... they have to sign off on the finances and they have to get the right CEO ... It can be pretty daunting and they can make the wrong mistake really easily.

434. The other focus councils were aware of at least some of the training and education options but some questioned the value of the current training.

435. The Mayor of Darebin City Council said:

Look, we've got these peak bodies; the MAV, VLGA ... they've got all these ... programs ... I believe a decent mentoring program, some decent training, decent structures put in place now so not so much having an information session for two or three hours, that's fine. That's superficial ... But there's something happening now, here's a weeks' course of what it is to be a Councillor, what you deal with, who you deal with, how to respond, what you need to understand, how to read balance sheets you know? What's a budget and what's involved in doing a budget? Okay, that needs a four week structure before you actually think about running for Council so you can understand things ... not take a whole six months before you get something ... they should be running workshops ... a week workshop ... Company Director Courses.

436. A CEO said:

[O]ur councillors are provided with ongoing training opportunities. They've attended governance training, VLGA and MAV training, weekends away, weeks away etc. They all have training budgets, which they can access. Unfortunately even with this level of training, some still demonstrate a lack of understanding of what the role actually entails.

437. Another CEO said:

We deliver them whatever training they need. But ... training doesn't turn them into decent human beings that care about their community.

Jurisdictional comparison

438. Other interstate jurisdictions have far more prescriptive and stringent council transparency requirements in some areas, particularly in relation to meeting closures.

Closed meetings

439. All other states in Australia have provisions equivalent to section 89(2) in their Local Government Acts which allow council meetings to be closed to the public⁹⁰. The types of matters which may be considered in closed meetings are broadly similar across the jurisdictions considered by this investigation. However, there is variation in how these matters are described and some states place additional limitations on how and when councils can close meetings. Some examples of these additional limitations are as follows.

440. In New South Wales, section 10B of the *Local Government Act 1993* (NSW) provides:

- (1) A meeting is not to remain closed during the discussion of anything referred to in section 10A(2)⁹¹:
- (a) except for so much of the discussion as is necessary to preserve the relevant confidentiality, privilege or security, and
 - (b) if the matter concerned is a matter other than a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret-unless the council or committee concerned is satisfied that discussion of the matter in an open meeting would, on balance, be contrary to the public interest.

...

(4) For the purpose of determining whether the discussion of a matter in an open meeting would be contrary to the public interest, it is irrelevant that:

- (a) a person may misinterpret or misunderstand the discussion, or
- (b) the discussion of the matter may:
 - (i) cause embarrassment to the council or committee concerned, or to councillors or to employees of the council, or
 - (ii) cause a loss of confidence in the council or committee.

441. In Queensland, regulation 275(1) of the *Local Government Regulations 2012* (Qld) specifies that a council may only 'resolve that a meeting be closed to the public if its councillors or members consider it necessary to close the meeting to discuss' the specified matter. This imposes an additional obligation on councillors to consider the necessity of the closure. The regulation also prohibits councils from making any resolution, other than a procedural resolution, in a closed meeting.

442. In South Australia, section 90 of the *Local Government Act 1999* (SA) imposes the following limitation on the power to close a meeting⁹²:

A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection)⁹³.

⁹⁰ The other jurisdictions reviewed were Victoria, New South Wales, Queensland, South Australia and Western Australia.

⁹¹ The provision containing the list of matters a meeting may be closed to discuss.

⁹² *Local Government Regulation 2012* (Qld) regulation 275(3).

⁹³ *Local Government Act 1999* (SA) section 90(2).

443. Further, the section also provides that, in considering whether an order should be made closing a meeting:

... it is irrelevant that discussion of a matter in public may –

- (a) cause embarrassment to the council or council committee concerned, or to members or employees of the council; or
- (b) cause a loss of confidence in the council or council committee; or
- (c) involve discussion of a matter that is controversial within the council area; or
- (d) make the council susceptible to adverse criticism⁹⁴.

444. In some states, the description of specific matters a meeting may be closed to discuss also impose additional considerations on a council decision to close a meeting. For example, in South Australia, the closure of a meeting to discuss ‘commercial information of a confidential nature (not being a trade secret)’ is not allowed unless disclosure of the information:

- (i) could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and
- (ii) would, on balance, be contrary to the public interest⁹⁵

445. In New South Wales, where a meeting is closed to discuss ‘advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal privilege’⁹⁶, the:

meeting is not to be closed during the receipt and consideration of information or advice referred to ... unless the advice concerns legal matters that:

- (a) are substantial issues relating to a matter in which the council or committee is involved, and
- (b) are clearly identified in the advice, and
- (c) are fully discussed in that advice⁹⁷.

446. While all jurisdictions impose a requirement to either record the reasons for closure or the nature of matters to be considered in the minutes of the meeting⁹⁸, New South Wales and South Australia have more detailed requirements. The South Australian Local Government Act states that where an order is made to close a meeting:

a note must be made in the minutes of the making of the order and specifying –

- (a) the grounds on which the order was made; and
- (b) the basis on which the information or matter to which the order relates falls within the ambit of each ground on which the order was made; and
- (c) if relevant, the reasons that receipt, consideration or discussion of the information or matter in a meeting open to the public would be contrary to the public interest⁹⁹.

447. The New South Wales Local Government Act states that where an order is made to close a meeting:

- (1) The grounds on which part of a meeting is closed must be stated in the decision to close that part of the meeting and must be recorded in the minutes of the meeting.
- (2) The grounds must specify the following:

- (a) the relevant provision of section 10A(2),
- (b) the matter that is to be discussed during the closed part of the meeting,
- (c) the reasons why the part of the meeting is being closed, including (if the matter concerned is a matter other than a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret) an explanation of the way in which discussion of the matter in an open meeting would be, on balance, contrary to the public interest¹⁰⁰.

94 *Local Government Act 1999* (SA) section 90(4).

95 *Local Government Act 1999* (SA) section 90(3)(d).

96 *Local Government Act 1993* (NSW) section 10A(2)(g).

97 *Local Government Act 1993* (NSW) section 10B(2).

98 *Local Government Regulation 2012* (Qld) regulation 275(2); *Local Government Act 1995* (WA) section 5.23(3); *Local Government Act 1989* (VIC) section 89(3).

99 *Local Government Act 1999* (SA) section 90.

100 *Local Government Act 1993* (NSW) section 10D.

Briefings

448. The South Australian Local Government Act is the only local government legislation in Australia to reference briefings and informal gatherings involving councillors. It states:

90 – Meetings to be held in public except in special circumstances

(1) Subject to this section, a meeting of a council or council committee must be conducted in a place open to the public.

...

(8) The duty to hold a meeting of a council or council committee at a place open to the public does not in itself make unlawful informal gatherings or discussion involving –

- (a) members of the council or council committee; or
- (b) members of the council or council committee and staff, provided that a matter which would ordinarily form part of the agenda for a formal meeting of a council or council committee is not dealt with in such a way as to obtain, or effectively obtain, a decision on the matter outside a formally constituted meeting of the council or council committee.

Examples –

The following are examples of informal gatherings or discussions that might be held under subsection (8):

- (a) planning sessions associated with the development of policies or strategies;
- (b) briefing or training sessions;
- (c) workshops;
- (d) social gatherings to encourage informal communication between members or between members and staff.

(8a) In addition, an informal gathering or discussion under subsection (8) may only be held if –

- (a) the council has adopted a policy on the holding of informal gatherings or discussions; and
- (b) the informal gathering or discussion complies with the policy.

(8b) A policy adopted under subsection (8a) must comply with any requirements prescribed by the regulations, and the regulations may (for example) include requirements that the policy provide for –

- (a) the imposition of limitations on the holding of informal gatherings or discussions; and
- (b) procedures for approval of informal gatherings or discussions; and
- (c) the capacity of the council to impose conditions on an approval.

449. In January 2016, the Local Government Association of South Australia published the Informal Gatherings: Model Policy to assist councils to comply with the requirements of section 90. The policy aims to ensure council members can convene informal gatherings without prejudicing the requirements for openness and transparency in the South Australian Act. The policy reflects the Act's intention that informal gatherings be used for briefing, planning and educational sessions, not for debating issues, building consensus positions or otherwise discharging council's deliberative and decision making functions.

450. Under the model policy:

- the CEO and council are responsible for ensuring informal gatherings are conducted in accordance with the Local Government Act
- the informal gatherings will be advertised and open to the public
- a schedule of planned briefing sessions is to be published on council's website
- the CEO must ensure the informal gatherings comply with the legislation
- the CEO or another senior council officer will chair informal gatherings
- informal gatherings are not minuted, but a list of matters to be discussed may be published on council websites and any notes taken will be tabled at the next council meeting.

451. In Queensland, while there are no legislative requirements governing briefing sessions, in 2008 the Department of Local Government, Sport and Recreation released 'Guidelines for the conduct of informal briefing sessions by local governments' which highlight the risks of both making decisions and building consensus in briefing sessions.

452. In Western Australia, the Local Government Operational Guidelines: Number 05 - Council Forums suggests the following for agenda fora¹⁰¹:

- Agenda forums should be open to the public unless the forum is being briefed on a matter for which a formal council meeting may be closed;
- Items to be addressed will be limited to matters listed on the forthcoming agenda or completed and scheduled to be listed within the next two meetings (or period deemed appropriate);
- Briefings will only be given by staff or consultants for the purpose of ensuring that elected members and the public are more fully informed; and
- All questions and discussions will be directed through the chair. There will be no debate style discussion as this needs to take place in the ordinary meeting of council when the issue is set for decision.

¹⁰¹ Assemblies of a councillor group during which councillors are given information about matters listed for decision by council and are usually able to ask questions of staff members.

Caucusing

453. The NSW Office of Local Government provides specific advice on caucusing in Model Code of Conduct for Local Councils in NSW November 2015. It states:

Binding caucus votes

- 3.9 You must not participate in binding caucus votes in relation to matters to be considered at a council or committee meeting.
- 3.10 For the purpose of clause 3.9, a binding caucus vote is a process whereby a group of councillors are compelled by a threat of disciplinary or other adverse action to comply with a predetermined position on a matter before the council or committee irrespective of the personal views of individual members of the group on the merits of the matter before the council or committee.
- 3.11 Clause 3.9 does not prohibit councillors from discussing a matter before the council or committee prior to considering the matter in question at a council or committee meeting or from voluntarily holding a shared view with other councillors on the merits of a matter.
- 3.12 Clause 3.9 does not apply to a decision to elect the Mayor or Deputy Mayor or to nominate a person to be a member of a council committee.

Public question time

454. In contrast to Victoria's Local Government Act, the Western Australia *Local Government Act 1995* (WA) provides for question time in council meetings. It states:

5.24. Question time for public

(1) Time is to be allocated for questions to be raised by members of the public and responded to at –

- (a) every ordinary meeting of a council; and
- (b) such other meetings of councils or committees as may be prescribed.

(2) Procedures and the minimum time to be allocated for the asking of and responding to questions raised by members of the public at council or committee meetings are to be in accordance with regulations.

LGPRF transparency measure

455. The Local Government Performance Reporting Framework (LGPRF) is an initiative of Local Government Victoria. It is a mandatory system of performance reporting by Victorian councils to enhance and promote transparency and accountability. It measures and reports on the performance of each council annually, relative to like councils, by applying a framework of 66 measures and a governance/management checklist of 24 items¹⁰². The framework sets out common objectives for all councils, while taking their uniqueness and differences into account.
456. The objective of the LGPRF is to provide comprehensive information about council performance which can be accessed by the public and used by councils to drive improvement. It is intended that Local Government Victoria will oversee an annual program of council performance review and continuous improvement and that the LGPRF will continue to be refined.
457. The LGPRF includes a transparency indicator. The indicator is calculated from:
- the percentage of council resolutions made at an ordinary or special meeting of council, or at a meeting of a special committee consisting only of councillors, closed to the public under section 89(2) of the Act.
458. At interview, some council witnesses raised concerns about how accurate the indicator was as a measure of a council's transparency. For example, one CEO suggested that a better measure of transparency would be how many decisions dealt with in closed meetings are subsequently released to the public.
459. There are a range of reasons why the transparency measure may not be a useful way to compare transparency of decision making between councils:
- Higher levels of delegation to staff at some councils may lead to a smaller number of confidential matters being decided in council meetings, but does not necessarily indicate a higher level of transparency.
 - The indicator does not take into account any release of information after a closed meeting. For example, a council may routinely resolve to release the resolution and report from a closed meeting after the meeting reopens.
 - The indicator does not take into account decisions made in closed meetings of special committees which do not consist entirely of councillors, despite these meetings being required to be open to the public in the same manner as council meetings or meetings of special committees consisting entirely of councillors.
 - Some councils may have adopted different practices with respect to whether, 'procedural motions' were included in the percentage.

¹⁰² The results may be accessed by the public by logging onto the Victorian Government's 'Know Your Council' website at <https://knowyourcouncil.vic.gov.au/>.

Proposed direction for the Local Government Act

I've grown up with a very prescriptive 1958 Act and then a very bare bones 1989 Act with subsequent bits being added to provide more prescription.

I think the 1989 Act had a lot of good stuff in it. In my view it had a good flavour, with the original intention of getting away from that very detailed prescription.

I think a simplified Act is good, more like the 1989 Act, not the 1958 Act would be my preference, provided that there are some very, very good guidelines or best practice processes that are available to the industry. They don't have to be legislated but there can be expectations that from time to time the industry progresses and develops best practice guidelines on a whole range of things that are then adopted by the councils. That's the system that I would think would work in a more contemporary environment.

- CEO, Maroondah City Council

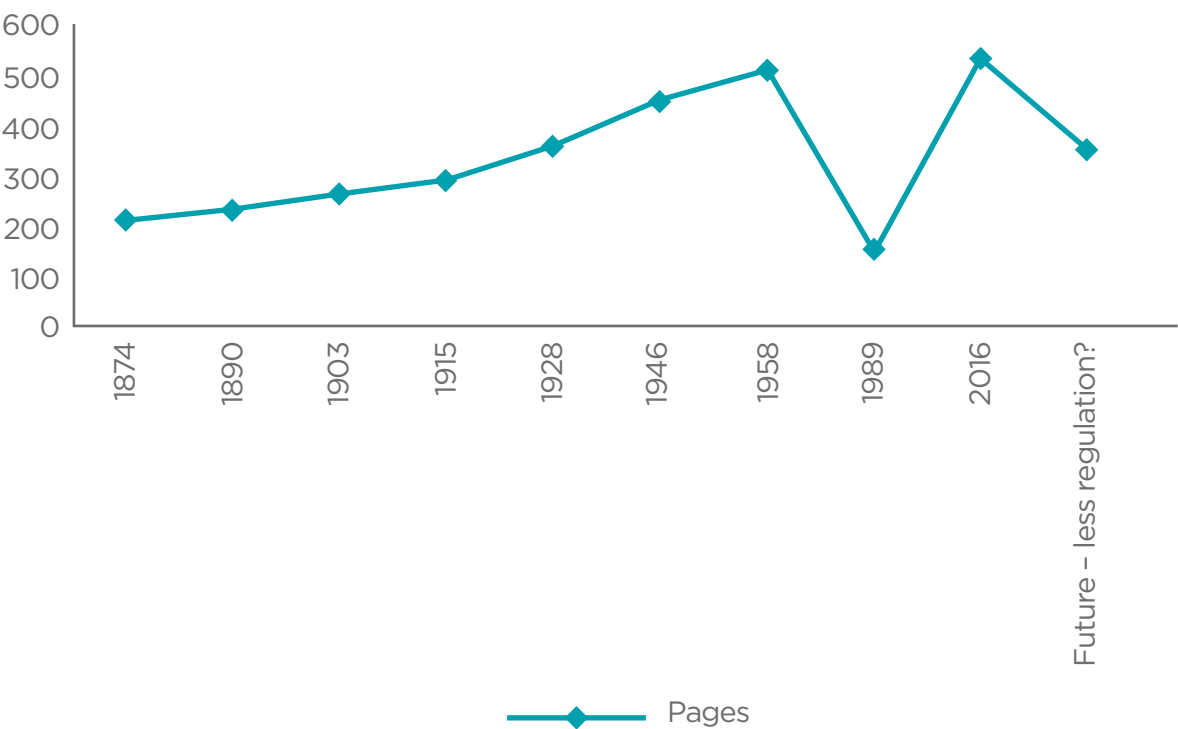
460. The current Local Government Act is generally considered to be 'prescriptive' in many areas and it has been subject to over 90 amending Acts over the past 25 years.

461. Since the Act's inception in 1874, the overall legislative trend was to increase regulation until 1989, when the Act was stripped back. Since then, it has been amended to increase regulation to its previous pre-1989 position. The review of the Local Government Act proposes to reduce regulation again.

462. In 2015, the Victorian State Government announced its intention to review the Local Government Act:

The intention of this review is not to further renovate the existing Act but rather to create an entirely new legislative structure. This will accommodate the needs of modern governance and reflect a mature relationship between councils and the state

Figure 10: Local Government Act regulation over time



463. The Local Government Act Review proposes a principles based Act, which is less prescriptive than the current Local Government Act:

The new Act will provide statutory powers and responsibilities to councils but will not say how they are to exercise or discharge their responsibilities. This is in contrast to the current Act which provides a high level of prescriptive detail.

464. The review makes clear that the Act will retain transparency as a fundamental principle, but it also indicates that the way councils create this transparency around their decisions will be left open.

465. Council witnesses interviewed were divided in terms of whether they supported a prescriptive, or a principles-based Act.

466. The CEO of Banyule City Council stated:

I believe that the review of the Local Government Act needs further input from local government administrations to ensure that the outcome does not result in substantial subjectivity that could lead to more uncertainty in decision making yet strikes a balance with a strategic vision.

467. A Governance Manager said:

I think the State without realising is putting certainly a lot of pressure on people in key positions to maintain a significant set of standards ... people in my position across councils are under significant pressure to be the corporate watchdog, to have those processes in place, to withstand even a hint of undue influence and being able to stand up for what's right and it's that indirect pressure, as in, if you choose not to tow the line then ... essentially your job's at stake every day of the week.

The current Local Government Act is generally considered to be 'prescriptive' in many areas and it has been subject to over 90 amending Acts over the past 25 years.

Conclusions

468. Behind this investigation was the premise that council decision making should be transparent to the public, appropriately balanced against the need for efficiency and specific obligations to maintain confidentiality. In practical terms, we wanted to see how local councils in Victoria were shaping up against the specific requirements of the Local Government Act, the relevant provisions of the Charter of Human Rights and Responsibilities Act, and more broadly, principles for transparent and accountable government.
469. Councils make decisions on behalf of their communities and the information related to those decisions must be open and accessible to the public. The exceptions to this fundamental principle are limited and should always be applied with great care. Demonstrating an active and ongoing commitment to transparency is critical to good governance in all aspects of council business - with the power to strengthen councils' relationships and trust with their communities.
470. What we found, first, was the inherent complexity involved in measuring the transparency of a council's decision making. It is not simply a matter of looking at the number of decisions made in closed meetings. The overall decision making structure of the council is relevant - for example, a council may have a strong record of open meetings but delegate most of its decisions in a way that is hidden from public view.
471. Nor does a council's level of compliance with the basic legislative requirements for transparency in the Local Government Act provide a complete picture. The Act allows councils to customise their decision making structures through broad powers of delegation and the basic legislative framework for transparency can be adhered to by councils in a range of different ways.
472. Fundamentally, we found that councils in Victoria are not engaging in widespread, deliberate, secretive behaviour. But, the public interest is not always upheld; there are a range of examples of councils across Victoria failing to give sufficient attention to transparency or to balance it appropriately with the need for efficiency. With so many different council decision making structures and processes, we found that the transparency of local government decisions is random in nature, dependent on municipality, councillor group and at times, ad hoc procedural decisions.
473. Some councils are proactive when it comes to transparency, taking steps to help the public access and understand their decisions which go beyond the minimum requirements of the Act. Clear cultural differences were evident between those councils embracing transparency standards and looking for innovative ways to improve their engagement with communities and those which, in the nature of their processes, appear to view transparency as an administrative burden. In such cases, councils seek only to meet a minimum standard rather than striving to make their decisions as clear and accessible as possible to the community.

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474. The way the public wants to engage with councils and receive information about decisions is also changing. As the expectation for information to be quickly and easily accessible via council websites grows, some minimum legislative requirements, such as having certain documents available for physical inspection at council offices, are falling out of step with community needs and expectations.
475. The Local Government Act Review has signalled its intention to adopt a less prescriptive approach to the regulation of local councils in its revision of the Act. Transparency will continue to be a fundamental principle of local government operations, but it remains to be seen whether this less prescriptive approach will encourage greater consideration and innovation in the area of transparency, or simply allow those councils which are already struggling to fall even further behind. The wording of the Local Government Act should reflect the importance of transparency; further consideration needs to be given to whether a less prescriptive approach is appropriate in this area. The new Act should not only set a higher minimum standard for openness than presently exists, but ensure consistent guidance on the key processes underpinning transparency raised in this report.
476. In the absence of such guidance, councils are heavily reliant on governance staff and CEOs. It is crucial that councils recruit senior governance staff with the capacity to provide frank and fearless advice. Governance should not simply be seen as an administrative, 'box ticking' exercise.

Decisions in open meetings

477. The requirement for councils to make decisions in meetings which are open to the public is the cornerstone of representative democracy and a core requirement of the transparency framework in the Local Government Act. Encouraging interest in council decision making and increasing accessibility to council meetings is fundamental to effective and transparent governance.
478. However, accessibility is no longer simply about ensuring adequate physical access to the council chamber. As the public becomes increasingly used to engaging with organisations and receiving information digitally, it is essential that councils keep pace with these expectations, while ensuring that more traditional methods, such as visiting council offices, are still available. Some councils are proving to be proactive, using social media to engage with their communities and promote meetings – encouraging both physical attendance and 'online' attendance through live streaming.
479. Councils must provide at least seven days' public notice of meetings to the community unless there are urgent or extraordinary circumstances. Councils appear to be largely adhering to these requirements, but there are some instances of non-compliance.

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480. In some cases, this is the result of poorly drafted local laws. Local laws must make the requirements of the Local Government Act clear and provide additional guidance, requirements or detail to assist councils. Councillors and council staff should be able to rely on local laws to guide their meetings' procedures. But this investigation found clear deficiencies in a number of council local laws regulating public notice requirements for meetings; some of these also being inconsistent with the requirements of the Act. The evidence raises questions about the processes used by councils to draft local laws and ensure their consistency with the requirements of the Local Government Act. There is a risk that deficiencies similar to those identified in relation to public notice requirements may be present in other areas of councils' local laws.
481. The effect of the vast majority of council processes being dealt with by local laws means that councils across Victoria have markedly different practices in relation to meetings, including such matters as provision of agendas, notices of motion, public question time, *en bloc* voting and recording of meetings.
482. For council meetings to be transparent and efficient, and to facilitate informed decision making, agendas must be provided to both councillors and the public with sufficient time to review and understand the content, particularly where lengthy reports are included. In some cases, this is not occurring.
483. Live streaming is an excellent way to facilitate public engagement with council meetings. Facilities and costs may make live streaming difficult for some councils, but as technology continues to become cheaper and easier to use, this will become a viable option for many more councils.
484. The notice of motion process can be a transparent way for councillors to raise issues at council meetings. However, the types of matters that can be effectively dealt with by notice of motion without negatively impacting other areas of governance are limited. Where notices of motion are raised without adequate time to be thoroughly researched, they can affect both the quality of decision making and transparency. There are examples of notices of motion being used inappropriately to decide matters affecting both council policy and budget. Some councils have policies to guide the use of notices of motion, but the range of practices suggests this is an area that would benefit from consistent policy guidance.
485. Despite evidence indicating public questions have limited capacity to influence council decision making, public question time is an important way for the public to engage with councils. It allows the public to seek further clarification about council's reasoning or to have concerns about council activities placed on the public record.
486. Not all councils record public questions and answers in their minutes. Yet, this should not be burdensome, as most councils require questions in advance to prepare answers. Ensuring public questions and answers are placed on the public record recognises the value of public participation in council decision making processes. Audio recording meetings and publishing recordings is one way to ensure public questions and answers are recorded without the additional administrative burden of noting them in minutes.

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487. Debate is a crucial aspect of council meetings that assists the public to understand the reasons for council decisions and demonstrates that each decision has been critically considered by councillors. Discussions which occur in briefing sessions should enhance rather than diminish the quality of debate in public meetings. However, there is evidence that in some cases, discussion in briefing sessions, where councillors feel they can be more open, comes at the expense of debate in the chamber.
488. A number of councils utilise *en bloc* voting for efficiency's sake, on either a regular or an ad hoc basis. While *en bloc* voting is not consistent with principles of transparency, there may be occasions, such as where a number of simple administrative reports are being noted as received, where efficiency may override transparency. Councils should, however, not use *en bloc* voting where third party interests are involved, such as to decide planning matters. Dealing with planning applications by way of a consent agenda may be contrary to principles of natural justice.
489. Even if a matter voted on *en bloc* has been the subject of significant councillor consideration, the process can create the opposite perception. *En bloc* voting also encourages councillors to reach agreement outside meetings; to the public, it will appear that matters are being decided outside of the council meeting and simply being 'rubber stamped' in the chamber.
490. Further, the process itself creates a greater risk of matters not being given sufficient attention by councillors, particularly if the consent agenda approach is adopted and the onus is on councillors to withdraw matters. Where a consent agenda approach is adopted, the public is not made aware of which items will be voted in *en bloc* until they arrive at the meeting.
491. Some council meeting minutes do not identify matters decided *en bloc*. This is not consistent with the requirements of the Local Government Act.
492. Council minutes are formal records of council meetings and members of the public should be able to understand from them what took place in a meeting and what decisions were made. However, minutes do not provide a full picture of what happens in meetings, and very few councils summarise the debate which takes place in the minutes. Audio recording council meetings and making the recordings publicly available on council websites – something that is increasingly cost effective – is a transparent practice.
- ## Decisions in closed meetings
493. Closed council meetings can be a source of suspicion for communities attempting to engage with council decision making, particularly where little or no information is provided to the public about the reason for the closure or the matter to be discussed.
494. There are circumstances where councils legitimately need to close meetings for confidential business, but these are limited, and it is crucial that the level of transparency around these closures is sufficient to reassure the public that the closure is appropriate.
495. Councils are, for the most part, closing meetings in accordance with the minimum requirements of the Act. However, these minimum requirements do not necessarily ensure appropriate decision making and transparency in this area.

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496. The wording of section 89(2) of the Act gives broad discretion to close meetings, based solely on the type of matter to be discussed. For example, where a contractual matter is to be discussed, a meeting can lawfully be closed, without any consideration of whether discussion of the particular matter in public would cause any harm to the council or any other party.
497. While some councils are going beyond the minimum standards set by section 89(2) and giving consideration to public interest and potential harms when deciding whether to close a meeting, many councils automatically close meetings whenever a particular content type listed in section 89(2) comes up. This indicates that the legislation needs to be more explicit in this area in order to support best practice.
498. There may be legitimate reasons for keeping certain commercially sensitive information related to contracts and tenders confidential, but there is a range of information which is in the public interest to release. Key details of contracts awarded in closed meetings, such as the name of the successful contractor, the amount of the contract and a general description of the scope of the contract should be released promptly after the contract is signed. In most cases, the names of unsuccessful tenderers, or at a minimum, the number of unsuccessful tenderers could also be released.
499. Deciding whether to discuss a matter involving commercially sensitive information in public involves balancing protection of the commercial interests of contractors and councils against the interests of the public in knowing why and how their funds are being spent. The broad wording of section 89(2)(d), which allows unfettered discretion to close a meeting to discuss any kind of 'contractual matter' does not encourage this level of consideration. There are examples of meetings closed to discuss contractual matters where no commercially sensitive information could be identified in the meeting papers or where no information about the successful contractor was released after the meeting.
500. The diverse approaches among the 12 focus councils to releasing information about tenders awarded in council meetings is indicative of the diversity of practices in the wider sector in relation to closing meetings and transparency more generally.
501. Section 89(2)(h), the catchall provision, which allows for closure of a meeting to discuss 'any other matter the council or special committee considers would prejudice the council or any person' is unnecessary and counter to best practice encouraging accountability. The evidence obtained by this investigation about how this provision is currently being used by councils also shows the potential for it to be misused.

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502. Closing a council meeting to avoid embarrassment or reputational damage to council is not an appropriate use of section 89(2)(h). Such reasoning places the interests of the council before the interests of the community. Ultimately, the public has a right to see how councils are operating and making decisions. Where the source of embarrassment is councillor behaviour, voters have a legitimate interest in seeing these behaviours and their impact on council business, to inform their decision making at the next election.
503. The manner in which councils close meetings varies greatly. The majority appear to deal with closed meeting items at the end of meetings, after vacating the public gallery, however practices have developed at some councils which isolate closed meeting items from ordinary meeting processes. For example, dealing with these items at separate meeting times and locations, or through separate committees, thereby increasing the perception of secrecy around meeting closures.
504. The key transparency requirement around meeting closures is that the reason for closing the meeting must be recorded in the minutes. In many cases, the manner in which councils demonstrated compliance with this requirement was poor. At the least transparent end of the spectrum, some councils are failing to identify which section of the Act they are closing the meeting under or are placing the reasons for closure in the confidential minutes of the meeting, rather than the public minutes. The latter is not in accordance with the requirements of the Act. More commonly, a number of councils fail to provide any reason beyond the relevant provision of section 89(2).
505. In most cases, there is no reason why individual items proposed for discussion in closed meetings cannot be identified in both the minutes and the agenda released to the public prior to the meeting, with a particular provision of section 89(2) attributed to each of these items. For example, the name of the contract being decided or the general nature of the matter which involves some hardship to a resident or ratepayer. Where the catchall provision is being used, even greater care needs to be taken to give some indication to the public about not only the type of matter to be discussed, but the nature of the prejudice that is likely to be caused by public discussion.
506. The poor record keeping identified in relation to specifying the reasons for closure of council meetings in minutes indicates that some councils take their right to closure for granted and do not expect it to be subject to scrutiny. The lack of detail provided in the public minutes regarding reasons for closure makes public and independent scrutiny impossible.
507. Audio recording closed meetings encourages professionalism and ensures councils have full records. While these records would not be made available to the public, they would increase the level of accountability.
508. Following closed meetings, there should be a routine process for assessing when and whether information discussed or decisions made can be released. Some councils are doing this, but the practice is far from routine. The best way to ensure this process takes place is by including a 'sunset' requirement with respect to confidential information in the Local Government Act.

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509. The decision to close meetings to the public is a significant one. As democratically elected representatives making decisions about public resources, councillors must always have at the forefront of their minds that the information they are dealing with belongs to the public. There are a limited range of situations where it is appropriate to deny public access to it. It is critical that councillors understand this section of the Act and actively consider each decision to close a council meeting. While councillors should consider staff and CEO advice in relation to meeting closures, the evidence suggests little or no critical consideration and understanding by councillors of section 89(2).
510. Section 89(2) only requires that councils answer the question ‘*Can we* close this meeting?’ However, a council committed to transparency would ask: ‘*Should we* close this meeting?’ Including a public interest test in the Local Government Act with respect to meeting closures would ensure this is the standard, so councillors consider not just the type of information, but the impact its release may have on the public interest.
511. While the LGPRF transparency measure is a useful means of drawing attention to meeting closures, it does not necessarily provide an accurate comparator without consideration of the wider decision making structures at each council, i.e. the level of staff delegation. While a single percentage comparator will never be able to truly reflect transparency levels, incorporation of an additional element, such as resolutions from closed meetings subsequently released, might assist in providing a more balanced view and also in encouraging councils to release information from closed meetings.

What happens outside meetings

512. Meetings themselves do not always give the public a clear picture of exactly how and why a decision has been made. A range of factors which are hidden from public view can also influence council decisions.
513. Although this investigation did not cover councillor conduct, it was evident a wide array of factors involving councillors have an impact on the transparency of council decision making. For example, some council practices create information silos in the decision making process or allow some councillors to have much greater control over the process than is evident to the public.
514. Some councillor groups effectively allow individual councillors to control decision making in relation to their wards or portfolios. Undeclared interests in matters to be voted on and intimidating councillor behaviour remain ongoing issues in local government and may also influence the outcomes of some decisions.
515. Individuals or groups within the community may exercise influence over councillors behind the scenes. Meetings between councillors and property developers are a particular area of risk which needs to be monitored by councils to avoid perceptions of bias.
516. There were many witnesses who gave evidence of councillor groups reaching agreements about agenda items outside meetings. A range of council fora such as pre-meetings and dinners provide opportunities for councillors to decide council matters away from appropriate scrutiny.

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517. Briefing sessions are particularly important to improve councillors' understanding of issues and their performance in the chamber. However, some witnesses gave evidence of councillors reaching agreements about outcomes in briefings and a number of witnesses spoke of the difficulties in maintaining an appropriate delineation between discussion, debate and decision making in briefing sessions.
518. While this may be a difficult area to navigate, it should be clear what kind of behaviour is inappropriate. For example: straw polls, individual councillors clearly stating how they will be voting, asking whether any councillors are against a motion, or officers seeking direction from councillors regarding the advice or recommendations they will be providing in a report. If councillors are not happy with officer recommendations, it is open to them to seek alternate recommendations, which will be recorded as such.
519. The recording requirements for assemblies of councillors contained in section 80A of the Local Government Act are minimal. They were primarily introduced to deal with conflict of interest concerns. The Local Government Act review proposes to remove any requirement to keep a written record of assembly and to allow councils discretion to regulate meetings involving councillors outside the chamber as they see fit. Further deregulation of this area will only increase the likelihood of substantive decisions being made in briefing sessions and merely being ratified in the chamber.
520. Recording briefing sessions is one way councils may wish to consider encouraging councillors to refrain from reaching agreements in the briefings.
521. Agreements may also be being reached outside meetings where factions or voting blocs exist. Where a group has a majority, they are effectively able to decide any council resolution prior to a meeting taking place. The existence of such control over decision making may not be evident from minutes alone as most councils do not routinely record divisions in relation to each resolution. Audio-visual records of council meetings may make voting patterns more transparent.
522. It is not unreasonable for councillors to associate with those of similar backgrounds, attitudes and interests and to seek to influence their colleagues. But, it is wrong for decisions to be made for any reason other than a councillor believing the decision to be in the best interests of the community.
523. A state-wide Councillor Code of Conduct with associated mandatory training is needed to develop and support a culture of genuine transparency and accountability in decision making by councils. At present, while a range of training options are available to councillors, there is wide variation in the types and frequency of training councillors across the state receive.

Delegated decision making

524. While the focus of this investigation was on decision making by elected councils, the reality is that the vast majority of decision making in local government is carried out by CEOs and staff under delegation. This reflects that the vast majority of decisions are uncontroversial, do not raise policy considerations and should be made as efficiently as possible.
525. There are no general requirements around reporting on staff delegated decisions. However, councils should ensure that they are giving consideration to the types of decisions being made under staff delegation and whether there are appropriate transparency or reporting measures in place around these decisions. Individual councils are in the best position to plan appropriate reporting on staff delegated decisions, based on their understanding of their own communities' and business' needs.
526. Special committees are an important element of the council decision making framework. They allow councils to delegate certain decisions to groups with appropriate expertise and capacity. Special committees are being used transparently and effectively in some councils to make decisions, such as in the area of planning.
527. Volunteer committees of management for small council facilities, however, make up the vast majority of the 500+ special committees operating across local government in Victoria. Record keeping and other statutory requirements are unduly onerous and inappropriate for small groups of volunteer community members managing halls and reserves. Despite general acknowledgement in the sector that the special committee structure is not appropriate for most volunteer committees, the process of transitioning away from this model has been slow.
528. Based on the sample of council committees of management reviewed by this investigation, there may be a large number of committees of management operating in Victoria which are not compliant with the transparency requirements of the Local Government Act, particularly in relation to public notification and minute taking. In some cases, councils have taken insufficient steps to support and oversight compliance, or transition committees to more appropriate structures.
529. While the impact of the decisions made by these committees is not usually significant in the context of a council's core activities, councils still have a responsibility to monitor legislative compliance within the decision making structure they have created for themselves.

530. The proposed direction of the Local Government Act Review, which is to transition committees of management to an administrative committee structure, appears to be consistent with reducing the legislative non-compliance. There is also a need for councils to consider how they manage transparency around advisory committees, given the high level of acceptance of advisory committee recommendations indicated by the investigation, and the minimal governance, transparency and conflict of interest requirements for such committees.

Human rights considerations

531. Council meetings are an integral part of local government democracy and the public affairs of local communities. While we did not identify any specific cases of council actions or policies which were incompatible with the right to participate in public life, this is closely linked to meeting accessibility requirements. Councils must ensure they consider section 18 of the Charter when making decisions affecting the accessibility of meetings and records of meetings. Councils which are providing both easy physical access to meetings for persons of all abilities, facilities such as hearing loops and web streaming or recordings of meetings on their council websites are setting a good example.

532. Councils also need to take care regarding restrictions on public question time. Unreasonable restrictions have the potential to be incompatible with not only the right to participate in public life, but the right to freedom of expression in section 15 of the Charter. For example, where councils require questions in writing prior to meetings, they should ensure there is appropriate assistance available to those who may have difficulty placing their question in writing. A number of councils mentioned they offered such assistance. Councils should also ensure that any restriction on the content of questions or submissions by members of the public at meetings which could be considered to limit their right to freedom of expression is appropriately balanced with any lawful restrictions reasonably necessary to respect the rights and reputation of other persons or national security, public order, public health or public morality¹⁰³.

103 *Charter of Human Rights and Responsibilities Act 2006* section 15.

Recommendations

To the Government/Local Government Victoria:

Recommendation 1

In its review of the Local Government Act, ensure that the following are reflected in primary legislation or regulations:

- requirements for the closure of meetings, including:
 - a public interest test similar to that in section 10B of the *Local Government Act 1993* (NSW)
 - the removal of any 'catchall' provision for meeting closures from section 89(2)
 - a requirement for more detailed reasons in relation to the closure of meetings to be specified in the minutes, similar to the requirements in section 90 of the *Local Government Act 1999* (SA)
 - a requirement for councils to include a 'sunset' provision in relation to all items discussed in closed meetings, which specifies a date or event after which the information will no longer be confidential without a further resolution of council
 - that embarrassment to, or potential adverse criticism of, council are irrelevant considerations in deciding whether to close a meeting to the public, similar to that in section 10B of the *Local Government Act 1993* (NSW) or section 90 of the *Local Government Act 1999* (SA).
- appropriate conflict of interest requirements to extend to members of advisory committees
- a requirement for councils to maintain an up to date list of advisory committees, special committees and members of those committees on their website.

Recommendation 2

Ensure that the following areas are covered, as a minimum, in guidance for all councils:

- agendas being made available to the public at least five days before a council meeting
- reporting on the exercise of delegations
- use of notices of motion
- recording of public questions and answers at council meetings in minutes, or through audio or audio-visual recording and publication
- councillor briefing sessions
- *en bloc* voting should only occur in clearly defined circumstances including:
 - *en bloc* voting should not be used to decide planning matters or other matters where the interests of third parties are involved
 - every resolution made at a council meeting, including a resolution to pass a number of matters *en bloc* should be clearly recorded in the minutes of the meeting.
- audio recording wherever practicable of both open and closed council meetings, and posting of audio recordings of open meetings on council websites.

Recommendation 3

Amend the *Freedom of Information Act 1982* to ensure documents relating to closed meetings are not classified as 'exempt documents', in order to encourage consideration of the contents of individual documents on a case by case basis.

Recommendation 4

Develop and implement:

- a uniform Code of Councillor Conduct for all Victorian councils setting out the minimum requirements
- a mandatory training program based on the Code of Councillor Conduct for all Victorian councillors.

Recommendation 5

Review the LGPRF transparency measure in light of the information contained in this report.

To councils:

Recommendation 6

- any council which has not done so in the last three years:
 - review their governance and meeting procedure local laws to ensure consistency with the requirements of the Local Government Act
 - review their special committees to determine their level of compliance with the requirements of the Local Government Act and whether the special committee structure is fit for the committee's purpose.
- maintain an up to date special committee page on their website listing all special committees, with links to their delegations, meeting notices, minutes of meetings and any other relevant materials.

What does a transparent council look like?

In meetings

- Provides meeting agendas to the public and councillors at least five days in advance of an ordinary meeting (longer if agenda papers particularly complex).
- Advertises meetings a variety of ways, including prominent display on the website, social media and newspapers. Links to agenda or key matters to be decided at a meeting should be included with the post, to catch the interest of the public.
- Live streams its council meetings and provides access to the recordings of meetings on its website after the meeting.
- Engages with the community to find out what type of meeting participation processes will suit its needs and implements these (balanced with efficiency).
- Engages in debate during meetings which assists the public in understanding the reasons for council decisions.
- Records public questions and answers in minutes of meetings.
- Does not vote *en bloc*.
- Promptly creates media releases for website and social media summarising key decisions made at each council meeting and providing links to relevant records.
- Has local laws in place with respect to meeting procedures which are consistent with the Local Government Act and provides additional guidance to staff, councillors and members of the public on meeting procedures.

In relation to closed meetings

- Provides a list of specific items proposed to be discussed in closed session in the publically available meeting agenda.
- Critically considers every meeting closure to discuss a particular item, with a view to minimising the number of matters dealt with in closed meetings.
- Considers public interests and any harms that may be caused by discussing a matter in public when deciding whether to close a meeting.
- Does not give consideration to matters such as embarrassment or reputational damage to council when deciding whether to close a meeting.
- Deals with closed meeting items in the same meeting as open meeting items (rather than at a different location/time).
- Audio records closed meetings.
- Provides detailed reasons for closure of a meeting in the public minutes of the meeting, including:
 - reference to the specific provision of section 89(2) relied on in relation to each item
 - reasoning as to why the closure of the meeting was appropriate which goes beyond subject matter alone.
- Releases all information possible from each closed item immediately after closed meeting. Where this is not possible, specifies a date or event which will 'sunset' confidentiality of the information.

In relation to what happens outside meetings

- Has policies in place to deter councillors from reaching agreements outside council meetings or allowing non-transparent influences to impact their decision making.
- Provides training to councillors to assist them in understanding the importance of not reaching agreements outside council meetings or allowing non-transparent influences to impact their decision making.
- Assists councillors to understand that they must act in the best interests of the whole municipality, not just their ward.
- Discourages factions and bloc voting, potentially through audio-visual recording of meetings.
- Officers provide frank and fearless advice and do not seek inappropriate direction from councillors to guide advice and recommendations in officer reports.
- Provides a list of advisory committees and members on its website.
- Has policies in place requiring all advisory committee members to declare and record conflicts.

In relation to delegations

- Makes its register of delegations available on its website.
- Regularly gives consideration and implements practices to maximise transparency around staff delegated decisions.
- Has an up to date list of special committees and membership on its website with links to meeting notices, minutes and other relevant documents.
- Provides contact, training, support and guidance materials to special committee members to assist them in understanding and keeping up with legislative governance requirements.
- Ensures all special committees are maintaining compliance with legislative transparency requirements.
- Regularly reviews its special committees to ensure special committee structure is still appropriate for each committee.

Glossary of terms

Advisory committee – a committee established by a council (other than a special committee) that provides advice to the council, a special committee and/or council staff¹⁰⁴.

Agenda – a list of topics and documents for presentation, debate and decision at a council meeting or special committee meeting.

Assembly of councillors – a planned meeting of at least half of the councillors on a council and one member of council staff that considers matters intended or likely to be:

- the subject of a decision of the council, or
- dealt with under delegation.

This does not include a council meeting or a meeting of a special committee, audit committee, club, association, peak body, political party or other organisation¹⁰⁵.

Briefing – a meeting where council staff provide information to councillors on council business.

Chief Executive Officer (CEO) – a senior council officer appointed by council to establish/maintain an organisational structure, manage relationships between councillors and council staff, implement council decisions and provide advice to council.

Closed council meeting – a council meeting that is closed to the public under section 89(2) of the *Local Government Act 1989*.

Consent agenda – a process where all items on an agenda are voted on by councillors and passed with a single resolution, without debate, unless a councillor requests that an item be ‘withdrawn’ to be voted on separately.

Councillor only time – planned informal meetings of some or all councillors in the absence of council staff, which generally take place at council premises.

En bloc voting – the practice of deciding multiple agenda items using a single resolution by council members.

Focus council – one of a sample group of 12 councils whose transparency policies and practices were examined in detail by this investigation.

Interface councils – nine municipalities forming a ring around metropolitan Melbourne.

Large shire council – a municipality with more than 16,000 inhabitants predominantly rural in character.

LGPRF – ‘Local Government Performance Reporting Framework’ that sets out performance results of all Victorian councils about a number of performance measures to enable residents to compare the performance of their councils with others.

Local Government Act 1989 (Local Government Act) – the key Victorian legislation governing the establishment and operation of Victorian councils.

Local Government Act Review – a comprehensive review of the *Local Government Act 1989* facilitated by Local Government Victoria. The review began in 2015 and the new legislation is planned for 2018.

¹⁰⁴ See *Local Government Act 1989* section 3(1).

¹⁰⁵ See *Local Government Act 1989* section 3(1).

Mayor – an individual councillor who has been elected by their fellow councillors to be the leader of the council and who has specific legislative and functional roles.

Metropolitan council – predominantly urban in character and located within Melbourne's urban core and its surrounding less populated territories.

Minutes – the official written record of a meeting including a list of attendees, issues and decisions, required to be kept by section 93 of the *Local Government Act 1989*.

Motion – a formal proposal submitted to council for discussion and resolution.

Notice of motion – a formal way for councillors to advise the rest of council that they intend to move a particular matter at an upcoming council meeting.

Officers – individual members of council staff.

Ordinary council meetings – formal council meetings held on a regular basis to deal with general council business.

Officer recommendations – proposals by council officers to councillors as to the best course of action to resolve an issue raised in a report to council. They usually contain a proposed resolution for council.

Record of assembly – at an assembly of councillors, pursuant to section 80A of the *Local Government Act 1989*. The Chief Executive Officer must ensure a written record is kept of the names of all councillors and members of staff attending, the matters considered and any conflict of interest disclosures made by a councillor.

Regional city councils – a council that is partly urban and partly rural in character.

Resolution – a decision reached through a vote at a formal meeting.

Small shire council – a municipality with less than 16,000 inhabitants and predominantly rural in character.

Special committee – any committee to which the council delegates a duty, function or power. Special committees can be created under section 86 of the *Local Government Act 1989* and are sometimes referred to as 'section 86 committees'.

Special council meetings – formal council meetings called on an ad hoc basis to deal with specific issues outside the ordinary council meeting schedule.

Sunset clause – a provision that documents/information will cease to be considered as confidential after a specific date or event.

Appendix 1 – Range of practices used to record reasons for closing a meeting

1a – Excerpt from the minutes of the ordinary meeting of the Benalla Rural City Council on 3 February 2016

15. Confidential Business

A Council or Special Committee may resolve that the meeting be closed to members of the public if the meeting is discussing any of the following:

- (a) personnel matters;
- (b) the personal hardship of any resident or ratepayer;
- (c) industrial matters;
- (d) contractual matters;
- (e) proposed developments;
- (f) legal advice;
- (g) matters affecting the security of Council property;
- (h) any other matter which the Council or special committee considers would prejudice the Council or any person;
- (i) a resolution to close the meeting to members of the public.

Councillor Davis / Councillor Alexander:

That the meeting be closed to the public for the consideration of confidential business pursuant to Section 89(2) of the *Local Government Act 1989*.

Carried

1b - Excerpt from the minutes of the ordinary meeting of Hobsons Bay City Council on 26 April 2016

13 In Camera Business

In accordance with s89(2)(a)(b)(d)(e)(f) and (h) of the *Local Government Act 1989*, Council may resolve that the meeting be closed to members of the public if the meeting is discussing personnel matters, contractual matters, proposed developments, legal advice and any matter which Council considers would prejudice Council or any person.

Motion

Moved Cr Carl Marsich, seconded Cr Jason Price:

That Council, in accordance with s89(2) (a)(b)(d)(e)(f) and (h) of the *Local Government Act 1989*, close the meeting to members of the public as the items relate to personnel matters, contractual matters, proposed developments, legal advice and matters which Council considers would prejudice Council or any person.

Carried

Council considered the report and discussed the matter In-Camera.

1C - Excerpt from the minutes of the ordinary meeting of Nillumbik Shire Council on 27 January 2016

Ordinary Meeting of Council minutes

27 January 2016

12. Officers' reports

OCM.006/16 Contract report 1516-27 Provision for Landfill Consultancy Panel

Distribution: Public

Manager: Conal Creedon, General Manager Infrastructure Services

Author: John Smyth, Waste Management Coordinator

Summary

The purpose of this report is to establish a contractor panel to assist Council with fulfilling its obligations under the Environmental Protection Act Victoria (EPA) landfill guidelines. Council is required to provide evidence to the EPA that it is managing the environmental risk associated with the Plenty and Kangaroo Ground Landfills. To achieve this, Council is required to rehabilitate the landfills and monitor and report on the risks that the landfills pose to air, land and water. The EPA requires these works to be audited and auditing must be undertaken by an EPA qualified auditor.

The new EPA landfill guidelines preclude consultants from auditing their own work, hence the necessity for a panel of consultants to enable Council to be compliant.

The tender incorporates landfill auditing, monitoring and reporting; preparation of annual reports for submission to the EPA and other services relating to landfill rehabilitation as required into a panel contract for Council to utilise expiring 31 December 2019. Conforming tenders have been received from 15 consultants which have been considered for inclusion on the panel. The Nillumbik tender evaluation panel has assessed all submissions and a separate confidential report outlines the evaluation and recommendations to award the panel contract.

Pursuant to the Instrument of Delegation to the Chief Executive Officer the anticipated value of this contract exceeds financial limits and a Council resolution is required to accept the recommendation to award and use this contract.

Motion

Cr Ken King
Cr Michael Young

That Council:

1. Notes the report
2. Makes public the decision regarding the contract but the tender evaluation remain confidential.

CARRIED

**1c – Excerpt from the minutes of the ordinary meeting of Nillumbik Shire Council on
27 January 2016 – continued**

Ordinary Meeting of Council minutes

27 January 2016

12. Officers' reports

OCM.007/16 **Contract report 1516-11 Provision of lease finance, supply and
delivery of one side loading waste collection vehicle**

Distribution: Public

Manager: Conal Creedon, General Manager Infrastructure Services

Author: John Smyth, Waste Management Coordinator

Summary

This report considers tenders for Contract No 1516-11 for the supply and delivery of one waste collection vehicle including the provision of lease finance.

This waste collection vehicle replaces an existing single axle waste collection vehicle and its replacement is consistent with the scheduled timing provided for in Council's 10 year plant replacement program and with the review of Council's waste service undertaken in 2011.

Tenders were requested through the National Procurement Networks (NPN) Register of Prequalified Supplier for the Supply of New Trucks (NPN Contract Number NPN04-13). This register gives Council access to a wide variety of vehicle manufacturers with the benefit of bulk purchasing discounts.

The Tender Evaluation Panel (TEP) has assessed the submissions in accordance with the evaluation criteria relating to price, specification conformance, OHS and operational and environmental performance.

Pursuant to the Instrument of Delegation to the Chief Executive Officer the anticipated value of this contract exceeds financial limits and a Council resolution is required to accept the recommendation to award and use this contract.

Motion

Cr Peter Perkins

Cr Ken King

That Council:

- 1. Notes the report.**
- 2. Makes public the decision regarding the contract but the tender evaluation remain confidential.**

CARRIED

1C - Excerpt from the minutes of the ordinary meeting of Nillumbik Shire Council on 27 January 2016 - continued

16. Confidential reports

The meeting may be closed to members of the public to consider confidential matters.

Motion

Cr Ken King
Cr Michael Young

That Council closes the meeting to the public pursuant to section 89(2) of the *Local Government Act 1989* to consider the following items, which are confidential for the reasons indicated:

Report No.	Title	Reason for confidentiality
OCM.010/16	Contract report 1516-27 Provision for Landfill Consultancy Panel	(d) contractual matters
OCM.011/16	Contract report 1516-11 Provision of lease finance, supply and delivery of one side loading waste collection vehicle	(d) contractual matters

CARRIED

The meeting closed to the public at 8.25pm.

1d – Excerpt from Mornington Peninsula Shire Council ordinary meeting minutes on 27 January 2016

Council Meeting Minutes

Wednesday, 27 January, 2016

8 CONFIDENTIAL ITEMS

8.1 Audit Committee – Independent Members

Prepared By	Joseph Spiteri, Manager – Governance
Authorised By	Manager – Governance
Document ID	A6336753
Attachment(s)	YES (1 Confidential)

Officers Present for Item 8.1:

Carl Cowie, Alison Leighton, Matt Hubbard, Robin Adams, Joe Spiteri, Martin Hopley and Linda Yorke.

Guest Present for Item 8.1:

David Osborne.

That in accordance with Section 89(2)(a) of the Local Government Act 1989 the Council should resolve to go into camera and close the meeting to the public for the duration of this item as the matter to be discussed relates to a matter which the Council considers a personnel matter.

MEETING CLOSED TO THE PUBLIC

Moved: Cr. Colomb

Seconded: Cr. Garnock

That in accordance with Section 89(2)(a) of the *Local Government Act 1989* the Council resolved to go into camera and close the meeting to the public for the duration of this item as the matter to be discussed relates to a matter which the Council considers a personnel matter.

Carried

COUNCIL DECISION

Moved: Cr. Fraser

Seconded: Cr. Rodgers

1. That Council appoints Ms. Lisa Woolmer as Independent Chair of the Audit Committee for a three year term commencing 2 February, 2016.
2. That the thanks and best wishes of the Council be extended to Mr. David Osborne as retiring Chair of the Audit Committee for his long and distinguished service to the Audit Committee and the Mornington Peninsula Shire.

1d – Excerpt from Mornington Peninsula Shire Council ordinary meeting minutes on 27 January 2016 – continued

Council Meeting Minutes

Wednesday, 27 January, 2016

8.1 Audit Committee – Independent Members (Cont.)

3. That Council resolves that the Council decision is not confidential pursuant to Section 77(2) (a) and (b) of the *Local Government Act 1989*.
4. That Council resolves that the report and attachment to this report passed in camera be retained as a confidential item pursuant to Section 77(2)(a) and (b) of the *Local Government Act 1989* and be placed in a separate minute book for confidential items as they contain information regarding a personnel matter.

Carried

Attendance

Cr. Bowden entered the Chamber at 11:24 p.m.

ATTACHMENT 1 - CONFIDENTIAL

This attachment relates to a matter which may prejudice Council or any other person and is therefore not available for public viewing.

1d - Excerpt from Mornington Peninsula Shire Council ordinary meeting minutes on 27 January 2016 - continued

Council Meeting Minutes

Wednesday, 27 January, 2016

8.2 Audit Committee Progress Report on Proceedings

Prepared By	David Osborne, Outgoing Chairman – Audit Committee
Authorised By	Manager – Governance
Document ID	A6303806
Attachment(s)	YES (1)

This item was heard after Item 8.3.

Officers Present for Item 8.2:

Carl Cowie, Alison Leighton, Matt Hubbard, Robin Adams, Joe Spiteri and Linda Yorke.

Guest Present for Item 8.2:

David Osborne.

That in accordance with Section 89(2)(h) of the Local Government Act 1989 the Council should resolve to go into camera and close the meeting to the public for the duration of this item as the matter to be discussed relates to a matter which Council considers may prejudice Council or any other person.

MEETING CLOSED TO THE PUBLIC

Moved: Cr. Colomb

Seconded: Cr. Garnock

That in accordance with Section 89(2)(a) of the *Local Government Act 1989* the Council resolved to go into camera and close the meeting to the public for the duration of this item as the matter to be discussed relates to a matter which the Council considers may prejudice Council or any other person.

Carried

1d – Excerpt from Mornington Peninsula Shire Council ordinary meeting minutes on 27 January 2016 – continued

Council Meeting Minutes

Wednesday, 27 January, 2016

8.3 Tender 2028 – Mornington Peninsula Library Service – Implementation of Radio Frequency Identification

Prepared By	Martin Hopley, Chief Information Officer
Authorised By	Chief Information Officer
Document ID	A6366928
Attachment(s)	YES (1 Confidential)

Officers Present for Item 8.3:

Carl Cowie, Alison Leighton, Matt Hubbard, Robin Adams, Joe Spiteri and Linda Yorke.

Guest Present for Item 8.3:

David Osborne.

That in accordance with Section 89(2)(h) of the Local Government Act 1989 the Council should resolve to go into camera and close the meeting to the public for the duration of this item as the matter to be discussed relates to a contractual matter.

MEETING CLOSED TO THE PUBLIC

Moved: Cr. Colomb

Seconded: Cr. Garnock

That in accordance with Section 89(2)(a) of the *Local Government Act 1989* the Council resolved to go into camera and close the meeting to the public for the duration of this item as the matter to be discussed relates to a contractual matter.

Carried

*Addendum – Additional Report
Circulated on Friday, 22 January, 2016*

PURPOSE

To accept a tender submission for the Implementation of Radio Frequency Identification (RFID) and enter into a contract with the preferred supplier for an initial two-year period and the option of three one-year extensions (a total of five years).

1d – Excerpt from Mornington Peninsula Shire Council ordinary meeting minutes on 27 January 2016 – continued

Council Meeting Minutes

Wednesday, 27 January, 2016

8.3 Tender 2028 – Mornington Peninsula Library Service – Implementation of Radio Frequency Identification (Cont.)

BACKGROUND

Council agreed at a meeting on 23 November, 2015 to enter into a contract with the preferred supplier, FE Technologies for a period of two years and a total amount of \$443,279 (excluding GST). Refer to Confidential Attachment 1 for a copy of the report and attachment provided to Council.

The tender evaluation presented at the 23 November, 2015 meeting was based on a five-year total cost of ownership and on that basis, FE Technologies was proposed as the preferred tenderer.

CONTRACT

To provide Council with flexibility, it is now proposed that the contract with the preferred tenderer (FE Technologies) be for five years (made up of an initial two-year period and three one-year options being for support and maintenance of the RFID solution).

This will allow Council the flexibility of:

- Arranging support and maintenance via FE Technologies; or
- Arranging a new support and maintenance arrangement from an alternate supplier; or
- Looking at a new solution in the future if the RFID market in Australia has changed.

The costs (excluding GST) of the contract over the five year period are:

Firm	Year 1	Year 2	Year 3	Year 4	Year 5	Total
Implementation	\$443,279					\$443,279
Support and Maintenance		\$2,800				\$2,800
Optional – Support and Maintenance			\$49,029	\$49,029	\$49,029	\$147,087
Total						\$593,166

OFFICER DIRECT OR INDIRECT INTEREST

No person involved in the preparation of this report has a direct or indirect interest requiring disclosure.

RECOMMENDATION

1. That Council having considered all tenders received for Tender 2028 – Mornington Peninsula Library Service Radio Frequency Identification Implementation, hereby accepts the tender submitted by FE Technology and approves a total expenditure of \$593,166 (excluding GST) over the term of a five year contract.
2. That Council enters into a two year contract, with an option for a further three one-year extensions for the amounts as follows (all excluding GST):

1d – Excerpt from Mornington Peninsula Shire Council ordinary meeting minutes on 27 January 2016 – continued

Council Meeting Minutes

Wednesday, 27 January, 2016

8.3 Tender 2028 – Mornington Peninsula Library Service – Implementation of Radio Frequency Identification (Cont.)

- Year 1 – 2015/2016 financial year – \$443,279;
 - Year 2 – 2016/2017 financial year – \$2,800;
 - Year 3 – 2017/2018 financial year – \$49,029;
 - Year 4 – 2018/2019 financial year – \$49,029; and
 - Year 5 – 2019/2020 financial year – \$49,029.
3. That the Common Seal of the Mornington Peninsula Shire Council be affixed where necessary and relevant documents be signed by Authorised Officers.
 4. That Council resolves that the report and Council decision are not confidential pursuant to Section 77(2)(a) and (b) of the *Local Government Act 1989*.
 5. That Council resolves that the attachment to this report be retained as a confidential item pursuant to Section 77(2)(a) and (b) of the *Local Government Act 1989* and be placed in a separate minute book for confidential items as it contains information of a contractual nature.

COUNCIL DECISION

Moved: Cr. Celi

Seconded: Cr. Bowden

That the recommendation be adopted.

Carried

ATTACHMENT 1 - CONFIDENTIAL

This attachment relates to a contractual matter and is therefore not available for public viewing.

Appendix 2

List of section 86 committees of focus councils*

Alpine Shire Council
<ol style="list-style-type: none"> 1. Bright Senior Citizens' Centre Committee of Management 2. Murray to the Mountain Rail Trail Committee of Management (<i>in the process of being wound up at the time of our investigation</i>)
Banyule City Council
None
Buloke Shire Council
<ol style="list-style-type: none"> 1. George Gould homes (Birchip) 2. Charlton Park Recreation Reserve 3. Wycheproof Recreation Reserve 4. Wycheproof Courthouse 5. Charlton Pool Committee 6. Berriwillock Pool Committee 7. Birchip Hall and aerodrome paddock 8. Donald Courthouse 9. Sea Lake Swimming Pool
Campaspe Shire Council
<ol style="list-style-type: none"> 1. Campaspe River Reserve Special Committee 2. Colbinabbin Memorial Centre Special Committee 3. Colbinabbin Town Recreation Reserve Special Committee 4. Corop Tennis Courts Reserve Special Committee 5. Echuca East Recreation Reserve Special Committee 6. Girgarre Memorial Hall Special Committee 7. Girgarre Recreation Reserve Special Committee 8. Koyuga Hall & Recreation Reserve Special Committee 9. Kyabram Plaza Theatre Special Committee 10. Kyvalley Community Recreation Reserve Special Committee 11. Lockington District Community Centre Special Committee 12. Lockington Recreation Reserve Special Committee 13. Nanneella Hall & Recreation Reserve Special Committee 14. Northern Oval Recreation Reserve Special Committee 15. Rochester Racecourse Recreation Reserve Special Committee 16. Rushworth Shire Hall Special Committee 17. Strathallan Hall Special Committee 18. Tongala Recreation Reserve Special Committee 19. Wyuna Memorial Hall Special Committee

* The information in this list is primarily based on information provided in response to the survey conducted between March and May 2016. A number of focus councils reported a reduced number of special committees in November 2016.

List of section 86 committees of focus councils – continued

Cardinia Shire Council

1. Town Planning committee
2. Cockatoo Township Committee
3. Emerald Village Township Committee
4. Gembrook (in recess) Township Committee
5. Koo Wee Rup Township Committee
6. Lang Lang Township Committee
7. Bunyip Hall
8. Cardinia Public Hall
9. Clematis Hall
10. Cockatoo Community Hall
11. Garfield Hall
12. Gembrook Community Centre
13. Koo Wee Rup Community Complex
14. Lang Lang Memorial Hall
15. Lilypond House
16. Modella Hall
17. Nar Nar Goon North Hall
18. Yannathan Public Hall
19. Cardinia Recreation Reserve
20. Chandler Recreation Reserve
21. Garfield Recreation Reserve
22. Gembrook Sports Ground
23. Huxtable Road Horse Riding Reserve
24. Josie Bysouth Reserve
25. Maryknoll Recreation Reserve
26. Mountain Road Recreation Reserve
27. Nar Nar Recreation Reserve
28. Officer Recreation Reserve
29. Pound Road Reserve
30. Rythdale Recreation Reserve
31. Toomuc Reserve
32. Upper Beaconsfield Tennis Reserve
33. Worrell Recreation Reserve
34. Yarrabubba Horse Riding Reserve
35. Bunyip Auditorium
36. Nobelius Heritage Park & Emerald Museum

List of section 86 committees of focus councils – continued

Darebin City Council
<ol style="list-style-type: none"> 1. Planning Committee 2. Hearing of Submissions Committee 3. Bundoora Homestead Board of Management ?? (currently inc coms) 4. Audit Committee
Glen Eira City Council
<ol style="list-style-type: none"> 1. The Delegated Planning Committee
La Trobe City Council
<ol style="list-style-type: none"> 1. Latrobe Regional Airport Board 2. Mayoral Sponsorship Committee 3. Yallourn North Community Housing Committee
Maroondah City Council
<ol style="list-style-type: none"> 1. Warranwood Special Committee of Council 2. Ringwood Athletic Centre Special Committee of Council 3. AC Robertson Field Track 4. Cheong Park Special Committee of Council 5. Warren Reserve Special Committee of Council
Mornington Peninsula Shire Council
<ol style="list-style-type: none"> 1. Balnarring Community Hall Special Committee 2. Boneo Recreation Reserve and Hall Special Committee 3. Currawong Community Centre Special Committee 4. David Macfarlan Recreation Reserve Special Committee 5. Dromana Old Shire Offices and Community Hall Special Committee 6. Dromana Recreation Reserve Special Committee 7. Main Ridge Equestrian Ground Recreation Reserve Special Committee 8. Merricks Red Hill Station Recreation Reserve Special Committee 9. Mount Martha Community House Special Committee 10. Olympic Park Reserve Special Committee 11. Percy Cerutti Recreation Reserve Special Committee 12. R W Stone Recreation Reserve and Hall Special Committee 13. Red Hill Reserve Special Committee 14. Rosebud Memorial Hall Special Committee 15. Truemans Road Reserve Special Committee 16. Western Port Athletics Track Special Committee 17. Woolleys Road Equestrian Reserve Special Committee

List of section 86 committees of focus councils – continued

Mount Alexander Shire Council	
1.	Barfold Hall
2.	Baringhup Community Association
3.	Bill Woodfull Recreation Reserve
4.	Camp Reserve
5.	Campbells Creek Community Centre
6.	Campbells Creek Recreation Reserve
7.	Castlemaine War Memorial Stadium
8.	Elphinstone Community Facilities
9.	Guildford Hall
10.	Guildford Recreation Reserve
11.	John Powell Reserve
12.	Maldon Community Centre
13.	Metcalfe Hall
14.	Muckleford Community Centre
15.	Newstead Community Centre
16.	Sutton Grange Hall
17.	Taradale Hall
18.	Taradale Mineral Springs (in the process of being revoked)
19.	Taradale Recreation Reserve
20.	Wattle Flat Reserve
21.	Wesley Hill Facility
Warrnambool City Council	
1.	Committee of the Whole Council

Appendix 3 – Information about contracts provided in public minutes

Information about contracts provided in public minutes									
	Resolution in open meeting	Name	Value	Contractor	Number of tenders	Names of tenderers	Officer report	Info about contract made public later*	Comments
Cardinia									
Mount Alexander									
Alpine									
Mornington Peninsula									
Glen Eira									
Darebin									From July 2016, after the date of the contract reviewed, Darebin City Council commenced publishing the name of contractor, contract period and contract value on its website for contracts with a value greater than \$100,000.
Maroondah									The confidential resolution allows information about the contract to be released after the contract is executed. The council advised that this information was not subsequently released, but that it would be made available to any member of the public who requested it.
Buloke									While the resolution in the confidential minutes relating to the item allows information about the contract to be released following the report - there is no evidence that this occurred. The council advised that this was an oversight.
Latrobe								Name of contractor, value and contract term listed via online tender portal linked to council website.	
Campaspe								Media release on council website approximately three weeks later identifies contractor and contract value.	
Banyule									
Warrnambool									While the resolution allowed for release of information about the resolution 'as and when appropriate' it does not appear that any information was subsequently released.

KEY	Yes	No
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* Identifiable from search for contract name on council website.

Appendix 4 – Examples of records of assembly

4a – Copy of usual record of assembly

7. Content

The following Assemblies of Councillors were held in the month of March 2016:

Meeting Information		
Meeting Name/Type	Campaspe Briefing Session	
Meeting Date	1 March 2016	
Matters Discussed	1. Disclosure of Conflict of Interest 2. Review of Open Minutes 3. Future Meeting Dates 4. Mayors Report 4.1. Kyabram Memorial Gardens Signage 4.2. Committee of Greater Shepparton - Joint Murray Darling Basin Plan Submission 4.3. Arts & Cultural Funding 4.4. Paving outside Echuca offices 5. Briefing Issues Review 6. Communication Reports 7. Confidential Business 8. Delegation – Jamestrong Packaging	
Attendees		
Councillors	Cr Leigh Wilson (Mayor), Cr Carol Howell (Deputy Mayor), Cr Emma Bradbury (9:39am - 10:29am) (10:53am – 11:47am) (1:25pm – 3:38pm), Cr Ian Maddison, Cr Neil Pankhurst, Cr Leanne Pentreath, Cr Adrian Weston, Cr John Zolbec	
Officers	Jason Russell, Diane Hood, Keith Oberin, Paul McKenzie (10:36am - 12:50pm), Sharolyn Taylor	
Apologies		
Councillors	Cr Paul Jarman	
Conflict of Interest disclosures		
Matter No.	Councillor/officer making disclosure	Left meeting: Yes/No
Nil		

4b - Copy of record of usual record of assembly



Attachment 1

ASSEMBLY OF COUNCILLORS

This form must be completed by Officers at all 'Assembly of Councillors' which are defined as:

"...meeting of an Advisory Committee of the Council, if at least one Councillor is present, OR a planned or scheduled meeting of at least half of the Councillors and one member of Council staff which considers matters that are intended or likely to be - (a) the subject of a decision of the Council; or (b) subject to the exercise of a function, duty or power of the Council that has been delegated to a person or committee." [s.3(1) of the LGA]."

An Assembly of Councillors does not include a "meeting of the Council, a special committee of the Council, an Audit Committee established under Section 139, a club, association, peak body, political party or other organisation." [s.3(1) of the LGA].

Note: A meeting is defined as an Assembly of Councillors as long as the above definition is in place for part or all of the meeting - that is, if one Councillor arrives for part of the meeting, resulting in half of the Councillors present, then the meeting must be declared an Assembly of Councillors for the duration of the meeting that half of the Councillors are present.

An Officer must designate an Assembly of Councillors as soon as he/she is aware that the meeting meets the Assembly of Councillors criteria (refer definition above).

Conflicts of Interest must be declared (specifically the nature of the conflict) as early as possible in the meeting, noting that any person who has declared an interest must leave the meeting prior to discussion on the matter.

Responsible Officer completing this form: JE VITEKI Signature: [Signature]

The responsible officer must return this Assembly of Councillors form to Governance within 7 days of the meeting, where it will be recorded in the next practicable Council Meeting agenda and made available within the minutes of that meeting.

Meeting Date: 15/3/16 Location: Rosebud

Attendees (please tick for present)

☐ Cr. Bowden ☒ Cr. Celi ☒ Cr. Colomb ☐ Cr. Dixon ☒ Cr. Fraser ☒ Cr. Garnock
☒ Cr. Gibb ☒ Cr. Pittock ☒ Cr. Rodgers ☐ Cr. Shaw ☒ Cr. Wood

All Officers Present: Paul Cowie, Alison Leighton, Matt Hubbard, Robin Adams, Frank Marcano, Susan Cowley, Derek Kotter, Mark Newman

Topic Discussed	<u>Council Meeting Pre-meet</u>		
Councillors and Officers Present (please declare any alterations to above)	<u>As Above</u>		
Was a Conflict of Interest Declared	<input type="checkbox"/> YES <input type="checkbox"/> NO	*If yes, by whom?	
Nature of Conflict	<input type="checkbox"/> Direct Interest (s.77B) OR <input type="checkbox"/> Indirect Interest (please also tick the appropriate box below) <input type="checkbox"/> close association (s.78) <input type="checkbox"/> indirect financial interest (s.78A) <input type="checkbox"/> conflicting duties (s.78B) <input type="checkbox"/> receipt of an applicable gift (s.78C) <input type="checkbox"/> becoming an interested party (s.78D) <input type="checkbox"/> impact on residential amenity (s.78E)		
Did the person who declared the conflict of interest leave the room prior to discussion on the matter and return immediately after?	<input type="checkbox"/> YES <input type="checkbox"/> NO		

Appendix 5

Public question time practices for ordinary council meetings

Council	When held	Time limits	Other limits	Public record
Alpine	Start	None	None	No – but does live stream
Banyule	Start	From website: 3 minutes Local law: Reasonable time	From website: • Must register by 2pm previous day • 1 question only Local law: No guidance	No
Buloke	Start	2 minutes	From website: Must be submitted in writing to CEO by 7:30pm night of the meeting (meeting starts at 7pm)	Yes. Questioner's name, question
Campaspe	End	2 minutes	From website: Must be submitted within the first 10 mins of meeting Local law: 10 mins before the meeting if in person; 12 noon day of meeting if electronic medium	Yes. Question and answer
Cardinia	End	None	From website: • Must be submitted by 12pm day of meeting • Must be present at the meeting Local law: • Question Time is allocated for 15 minutes only (all questions)	Yes. Records questioner's name, question and answer
Darebin	Start	Must be brief as possible	From website: • Must be submitted via online system by start of meeting • No more than 2 questions • 30 mins in duration	Yes. Questioner's name, question and response
Glen Eira	End	Must be brief as possible	From website: • Must be submitted by 12pm previous day • 150 words maximum • 2 questions maximum Local law: • 15 mins in duration	Yes. Questioner's name, question and response
Latrobe	Start	3 minutes	From website: • Must be submitted by 12 noon on day of meeting Local law: • Any more than 2 questions, the second can be deferred	Yes. Questioner's name, question and response
Maroondah	Start	None	From website: • Question time is allocated for 15 minutes only (all questions) • 2 questions maximum • Must submit form by 12pm previous day • Must be present in meeting	Yes. Questioner's name, question and response

Public question time practices for ordinary council meetings – continued

Council	When held	Time limits	Other limits	Public record
Mornington Peninsula	Start	Local law: 3 minutes per person making submissions From website: 2 minutes for response to public question	From website: <ul style="list-style-type: none"> • 50 words or less • 2 questions maximum • Must be submitted in writing 5 mins before start of meeting 	Yes. Questioner's name, question and response
Mount Alexander	Start	3 minutes	From website: <ul style="list-style-type: none"> • Duration is 30 minutes at start of meeting 	Yes. Questioner's name, question and response
Warrnambool	End	Must be as brief as possible	From website: <ul style="list-style-type: none"> • 2 questions maximum • Must be submitted in writing within 15 minutes of commencement of meeting • Must be present in meeting 	Yes. Questioner's name, question and response

Appendix 6

Update on status of special committees provided by Buloke Shire Council in response to draft report

In regard to Section 86 Committees at Buloke please be advised that a report was adopted by Council in Oct 2015 to rescind the section 86 status of the following committees with lease agreements entered into

- Sea Lake Community Centre Inc. Committee of Management,
- Birchip Leisure Centre Inc
- Donald Recreation Reserve Committee of Management.

New Instruments of Delegation were negotiated with

- Charlton Park User Group
- Wycheproof Recreation Reserve Committee of Management.

And these were adopted by Council in May 2016 and are now complying with regard to requirements of the Act.

A further report was adopted by Council in March 2016 rescinding:

- Donald Memorial Hall Committee
- Culgoa Hall Committee
- Donald Swimming Pool Committee
- Birchip Swimming Pool Committee
- Charlton Hall Committee

A further report will go to Council in Feb 2017 to rescind the following:

- Donald Court House
- Wycheproof Court House
- Birchip Hall & Aerodrome Paddock
- Charlton Pool Committee
- Berriwillock Pool Committee
- Sea Lake Swimming Pool Committee

Note: These committees have not met for several years.

The report will also contain an updated Instrument of Delegation for the Birchip Housing Group.

The Wycheproof Golf Club was identified in the 2013 report as being a S86 committee but this is not the case, it was part of the Wycheproof Recreation Reserve Committee.

Appendix 7

Glen Eira City Council response to draft report

Ms M Philpot
Deputy Ombudsman
DX 210174
Melbourne Vic 3000



GLEN EIRA
CITY COUNCIL

BENTLEIGH
BENTLEIGH EAST
BRIGHTON EAST
CARNEGIE
CAULFIELD
ELSTERNWICK
GARDENVALE
GLEN HUNTLY
MCKINNON
MURRUMBEENA
ORMOND
ST KILDA EAST

Dear Ms Philpot

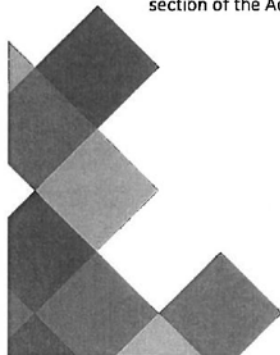
Thank you for the opportunity to provide commentary and clarification on the preliminary findings and observations outlined in your draft Own Motion Investigation Report into "Transparency of local government decision making".

Glen Eira has welcomed the general findings of the report, and the reassurance that most of our processes are consistent with contemporary expectations of transparency in local government decision making.

I would like to take this opportunity to provide clarification to the commentary on page 125 of the report concerning Glen Eira Council's Delegated Planning Committee (committee).

Council staff have now investigated this matter further and received advice from [REDACTED] lawyers on the effect of the delegations. To understand this issue I set out a chronology of the committee, the making of the relevant delegations and a summary of [REDACTED] advice below.

In the 1990's a committee was set up to hear, in an open forum, planning applications where Council had received a small number of written objections in an effort to bring applicant and objectors together to resolve issues around the table. Initially this was called the Development Approvals Co-ordinating Committee. Following changes to the Planning and Environment Act 1987 and organisational title changes, in 2002 Council resolved to change the title of the committee to the Delegated Planning Committee. The officer's report for the resolution referred to the delegations to the committee being made under section 98(1) of the Local Government Act 1989, however the actual instrument of delegation did not refer to any section of the Act.



GLEN EIRA CITY COUNCIL
CORNER GLEN EIRA AND HAWTHORN ROADS, CAULFIELD, VIC
PO BOX 42, CAULFIELD SOUTH 3162

ABN 65 952 882 314 • P 03 9524 3333 • F 03 9523 0339
NATIONAL RELAY SERVICE TTY 13 36 77 • SPEAK AND LISTEN 1300 555 727
INTERNET-RELAY.NRSCALL.GOV.AU THEN ENTER 03 9524 3333 • MAIL@GLENEIRA.VIC.GOV.AU
GLENEIRA.VIC.GOV.AU

Glen Eira City Council response to draft report – continued

In 2011, due to organisational changes, the delegations to the committee were amended. However, the officer's report to Council referred to the delegations being conferred under "sections 86 and 87 of the Local Government Act 1989". These are the special committee provisions of the Act. It is unclear why the delegations were made under section 86, and neither the Director of Planning at that time, nor the CEO at that time are still with Glen Eira to determine the intent behind this change, which may have been deliberate or inadvertent. Notwithstanding this delegation, the committee continued to meet and deliberate in the same form as it had in the past – ie. It did not comply with the special committee provisions of the Act concerning procedure for special committees.

In early 2016, again due to organisational changes, the delegations to the committee were amended to reflect revised job titles. It appears the 2011 delegation report was used as a model for the delegation to the committee, and the officer's report therefore refers to the delegations being made under sections 86 and 87 of the Local Government Act 1989.

Upon this matter being highlighted as a result of your officers' investigation, Council sought advice from [REDACTED] lawyers. The advice provides as follows:

- Delegations under section 98 are individual delegations only and cannot be used to delegate powers to a committee
- Only special committees can have delegated decision making from Council.

Accordingly, Council accepts that notwithstanding its original intention to delegate these powers to individual decision makers who comprise the committee, the committee from its inception to 2011 operated under a delegation that may have been incorrectly used. Nevertheless the members of the committee did have individual delegated authority to make the decisions they were making.

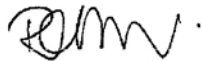
From September 2011, while the intention may not have been to establish the committee as a special committee, the Council resolution does have that effect and the committee is a special committee of Council with duly delegated authority. Notwithstanding this, we do accept that the committee appears not to have met all of the procedural requirements of the Local Government Act 1989, including public notice provisions and transparency of voting.

We are now reviewing the role of the committee with a view to disbanding it as a special committee and reverting back to section 98 delegations for decision making in planning matters where there are a small number of objections, and still using the open forum process of bringing the applicant and objector(s) together to seek a resolution. Over the years we have found that this has worked effectively for both applicants and objectors, and despite the commentary from Glen Eira Debates quoted in your report, we have received substantial positive feedback on its operation. I will seek an urgent resolution of the Council to this effect at their next Ordinary Meeting, and I therefore anticipate that this matter should be resolved before your report is published to the community.

Glen Eira City Council response to draft report – continued

Council would like to acknowledge and apologise that due to this long standing oversight, the committee does not appear to have operated in accordance with some of the legislative requirements as it should have. I would like to thank your office for alerting us to this procedural issue so that it can now be appropriately resolved.

Yours sincerely



REBECCA MCKENZIE
CHIEF EXECUTIVE OFFICER

Appendix 8

Department of Environment, Land, Water & Planning response to recommendations

Department of Environment, Land, Water and Planning: Formal Response to Draft Conclusions and Recommendations from Ombudsman's Own Motion Investigation into Transparency of Local Government Decision Making

The Department strongly supports councils being open, transparent and accountable to their communities and is pleased to note that you have concluded that fundamentally councils are not engaged in widespread, deliberate, secretive behaviour. However, your concerns in relation to some behaviour by councils are noted.

The Minister for Local Government is currently undertaking a once in a generation review of the *Local Government Act 1989* (Act) aimed at 'enhancing democracy, diversity of representation, council transparency and responsiveness to the community and state.' As the review of the Act is ongoing, the matters raised in your conclusions and recommendations can continue to be considered as the review is progressed.

This review is being undertaken acknowledging the unique status of local government as a constitutionally recognised tier of government. The constitution explicitly requires that the state have a system of democratically elected councils. Councillors being democratically elected representatives have a unique role in this system, as do council meetings which represent a council's deliberative and decision-making forum. For this reason a key objective of the review is to enhance the autonomy of councils. However, this is balanced against the state's interest in ensuring the sector is functional and appropriately governed.

As part of the Act review, it is proposed that:

- Councils develop rules governing council and council committee meeting procedures with a focus on responsiveness and consultation, and transparency and accountability.
- Councils undertake deliberative engagement with their broader communities and appropriate consultation with those directly impacted by a council decision.
- Council audit and risk committees have a greater role in overseeing councils' processes and policies.
- The Minister have the ability to intervene and direct underperforming councils on the advice of a municipal monitor to address governance issues.

The Directions Paper released in conjunction with the Act review proposes that the new Act will remove a lot of the prescription in the current Act, however this is proposed to be balanced with the ability to make regulations, where necessary, as well as to supplement legislation with good practice guidance.

In this respect, the proposed reforms are intended to achieve an effective balance between a principle-based Act supportive of self-regulation and appropriate Ministerial intervention when needed to ensure probity and good governance in the sector. They are aimed at addressing many of the issues outlined in the draft conclusions.

With regard to the draft recommendations, as provided to the Department, specific comments are as follows:

Department of Environment, Land, Water & Planning response to recommendations – continued

1. In its review of the Local Government Act, ensure that the following are reflected in primary legislation or regulations:

- *requirements for the closure of meetings, including:*
 - *a requirement for councils to include a 'sunset' provision in relation to all items discussed in closed meetings, which specifies a date or event after which the information will no longer be confidential without a further resolution by the council.*

The Department supports the intent of this recommendation which is aimed at promoting transparency. Council confidential information should be publicly available once it no longer needs to remain confidential. Certain confidential matters that a council considers may have a clear period required for that confidentiality after which the matter can be made public. The Department will issue guidelines supporting this practice.

However, there are matters which councils sometimes consider that are appropriate to keep confidential, for example, matters involving the privacy and reputation of individuals or privileged legal advice. As worded, the recommendation creates a risk that an individual's privacy could be unreasonably and arbitrarily breached by default sun-setting of all closed meeting subject matters.

The existing emphasis on transparency in the Act review, will require councils to give more careful consideration to the closing of meetings and limit the number of matters considered at these meetings. Given the proposed higher threshold for matters to be considered in closed meetings, there is likely to be a greater need to maintain the confidentiality of matters considered in those closed meetings. Automatic sun-setting of confidentiality is not conducive to maintaining such confidentiality.

For these reasons the Department does not support a fixed sun-setting provision.

2. In its review of the Local Government Act, ensure that the following are reflected in primary legislation or regulations:

- *a requirement for councils to maintain an up to date list of advisory committees, special committees and members of those committees on their website.*

The Department supports the intent of this recommendation and believes councils should endeavour to make information relating to their various committees, including the members of those committees, publicly available.

Currently, councils are required to make the register of delegations to their special committees and the minutes of their meetings, publicly available under the Local Government (General) Regulations 2015.

Whilst publishing information on a council website is currently an effective method for councils to provide information to residents this may not always be the case. When technology changes the best way of providing information to the community also changes and websites may be replaced by

Department of Environment, Land, Water & Planning response to recommendations – continued

other communication mediums in the future. Councils need to be able to readily adapt to and adopt new technologies as they emerge.

As part of the Act review, it is proposed that the councils will be required to be transparent by making information available to their community. The Department believes the manner in which this can be achieved could be better addressed in guidelines, which can be easily updated to include new communication mediums as they emerge. This will provide flexibility to enable councils to adopt new mediums where appropriate.

3. Ensure that the following areas are covered, as a minimum, in guidance for all councils:

- *audio recording wherever practicable of both open and closed council meetings, and posting the audio recordings of open meetings on council websites.*

The Department supports the intent of this recommendation in relation to record keeping. Councils should make and keep appropriate records of all council meetings, including closed meetings. This helps to ensure that council business is transparent and accountable. In this respect, audio-visual streaming of open council meetings promotes community engagement. It is noted that Minister Hutchins is supportive of audio-visual streaming of council meetings and has recently promoted this medium. Guidelines will be issued to this effect.

However, audio recording closed meetings potentially increases the risk of confidential information being inappropriately disclosed. Nor is it certain that audio recording councillors during closed meetings is the most effective means of improving councillor behaviour.

The current Act contains numerous provisions related to councillor conduct and these provisions apply to councillors at all times, including during closed meetings.

4. Amend the Freedom of Information Act 1982 to remove the classification of documents relating to closed meetings as 'exempt documents', in order to encourage consideration of the contents of individual documents on a case by case basis.

The Department does not administer this legislation and would need to liaise with the Department of Justice and Regulation to determine what the consequences of the proposed amendment would be. However, as stated above, the Department believes that restrictions on what matters can be considered in closed meetings should resolve the problems identified.

7. Develop and implement:

- *a uniform Code of Councillor Conduct for all Victorian councils setting out minimum requirements.*
- *a mandatory training program based on the Code of Councillor Conduct for all Victorian councillors.*

Department of Environment, Land, Water & Planning response to recommendations – continued

The Department strongly supports having a robust councillor conduct framework to ensure all councillors adopt high standards of conduct and behaviour. This includes encouraging councillors to act in a more transparent manner.

Currently, councillors are responsible for agreeing on and adopting a councillor code of conduct which sets appropriate standards of conduct by councillors at their council. These codes of conduct are required to include some mandatory provisions, such as to have an internal resolution process, and the Act specifies sanctions a council can apply to those councillors found in breach of their code.

As part of the Act review it is proposed to continue to require these minimum requirements to be included in the Act or regulations as is currently the case.

Training on matters such as the councillor conduct principles and councillor codes of conduct is best practice. Currently, training is offered to all councillors by local government peak bodies. There are a range of difficulties associated with seeking to compel elected representatives to participate in such training. For example what constitutes appropriate ‘participation’ and what sanctions could be imposed for nonparticipation. Therefore the Department supports guidelines in relation to training to be collaboratively developed with local government peak bodies rather than mandated in legislation.

Victorian Ombudsman
Level 2, 570 Bourke Street
Melbourne VIC 3000

Phone 03 9613 6222
Fax 03 9602 4761
Email ombudvic@ombudsman.vic.gov.au
www.ombudsman.vic.gov.au