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### The role of councillors and their capabilities

#### **What do you consider to be the role of councillors in local government? Has the role of councillors changed over the last decade or should the role change?**

The primary or fundamental role of a local government councillor is to govern. And what that means is to firstly adopt a view about what 'success' looks like, a vision, if you like, of a desired future. Secondly it means to establish, implement and monitor plans aimed at achieving that desired future and thirdly, to ensure that the Council's policies and programs are aligned with that vision. The 'big picture' should instruct organisational life!

Clearly, the quality of the work that Councillors and management do around this fundamental role has a profound effect on what is achieved by a Council. Councillors, of course, play many subsidiary and supportive roles to the 'mission' role. Councillors, at various times are:

- Councillors in their **decision making role**
- Councillors as **representatives** of their citizens
- Councillors as **stewards** ensuring that compliance and ethical standards are being **strictly** applied
- Councillors involving themselves in **strategy and policy development**
- Councillors in their **leadership role**.

There has been a gradual change to the role over the last decade or so. The role now demands a stronger performance in the strategic space. However, I believe the changes are incremental and perhaps inconsistent across the sector. Most Councils have spent the last decade coping with constrained revenues and, in many cases, strong population growth.

I have, however, seen firsthand how transformational a strong, clear vision, supported by creative, effective strategies can be.

It is important to also understand what many Councillors who come to their role might perceive to be their duty. Many Councillors see citizens as constituents and accept their primary role to be responsive to constituent demands. Many Councillors try to solve problems raised with them by constituents. These problems can range from unfair or erroneous decisions by Council's management to parking fines.

The pertinent issues in these cases is that people who live in a municipality are citizens and, at the same time, often customers of the Council. When you pay car parking fees you are a customer of the Council's car parking business. Many Councillors feel obliged to support citizen concerns. To some extent there is mimicry at work here – Federal and State Government parliamentarians' offices are constantly dealing with a myriad of citizen issues.

It is not easy to convince all Councillors that their role is to work 'on the business' not 'in the business'. In other words, when confronted by a citizen's seemingly unfair parking fine, the Councillor's role should be to ensure that the Council organisation has a high quality, impartial and robust parking fine appeal process in place. Their role is not to prosecute the case for the individual's parking fine.

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This 'representative' role, this problem solver role, was not one envisaged by the legislators who have given us successive Local Government Acts. Legislation has never given Councillors any problem solving powers such as powers to investigate, demand information, or to interview employees to direct actions. Quite the contrary. Councillors have been given only one power by legislators – the power to vote!

### **In general terms, what has been your experience of the capabilities of councillors in terms of their ability to perform their duties?**

Over the last fifty years there has been an important change in who we, the voters, have been electing to be our Councillors. Once upon a time we elected people with proven track records of community leadership, people who had shown themselves to be capable community leaders in other fields. Most of the Councillors I worked with in the 1970s and 1980s had considerable leadership credentials. Many Councillors chaired several community organisations. Many understood from experience the importance of relationships, teamwork, governance and so on. I didn't see great technical skills but I did see people who were regarded as community leaders.

The problem, however, was that the people we elected looked nothing like our communities. They were nearly all men, mostly aged sixty and over, often retired or, in rural areas, farmers. Our Councils did not reflect the diversity so obvious in our communities. And that was because we kept picking mostly proven community leaders.

Today's Councillors tend not to have the community leadership track records of the past but, thankfully, our Councillors are more diverse. At the same time, however, the complexity of the Councillor role has significantly changed and we are asking much more of our Councillors in the 'strategic' space.

I think the sector would be improved if Councillors brought stronger community leadership and technical skills to their roles. I think there are some straightforward changes that might have a positive impact on that shortcoming. I support:

- Fewer Councillors – modern society doesn't need so many Councillors for 'personal' citizen coverage
- Better paid Councillors – It is not a silver bullet but would make some difference
- Councillors who are expected to commit less time to their roles – Many current Councillors devote fifteen, twenty or even thirty hours to their role. That kind of commitment simply isn't possible for many highly capable people
- Councillors who behave better- too many capable people are not prepared to run for office because they are not prepared to cop bad behaviour. We need swifter, stronger punitive processes for bad behaviour.

I would also say I'm not convinced that compulsory voting in local government makes a positive contribution to electing capable candidates. Citizens often have difficulty recalling who they voted for! A highly competent Councillor once told me that, if he had a reasonable campaign budget he could 'get Donald Duck elected to a Council'. Too many voters have little or no interest in local government elections.

So, I am of the view that we need decision making structures which use appropriate combinations of criteria like:

- Efficiency – where scale, size and specialist skills for things like 'back of house' or mandatory services are need and where Council policy considerations are mostly inconsequential.

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- Skills and Knowledge - where complex businesses are unlikely to be sufficiently understood by lay people.
- Strategic Outcomes – where Council’s goals are more likely to be achieved through multi-Council or public/private arrangements. (The recent recycling crisis was, in hindsight, partly created by the separateness of local government activity in recycling. A different structure appears to be an emerging long term solution.)

I would add that none of this should diminish the capacity for a Council to achieve economic, social or environment goals through the delivery of routine business operations. Experience shows us that using any of these ‘arm’s length’ arrangements can come at a cost if we cannot satisfactorily achieve our policy goals through the new structures.

At the same time, I think it unlikely that Councils will voluntarily take up these options in great numbers. I’m inclined to the view that best practice information should be delivered by Local Government Victoria, probably in partnership with the local government peak bodies, to develop a stronger understanding and a quicker uptake of these alternatives across Victorian local government.

### **What can be done to improve the skills and capability of councillors? Do you believe there is adequate training and guidance for councillors to enable them to deliver effective governance of complex service delivery businesses?**

There are two dimensions to this question:

- Encouraging more capable people to seek office and citizens to make more informed choices about who they elect, and
- Elected Councillors undertaking training to improve their capabilities.

In the first instance I have already touched on the changes worth considering to get highly capable, busy citizens interested in seeking office.

In the second instance there are many opportunities for Councillors to undertake training. The Local Government Act requires mandatory induction training of all elected Councillors. I offer two views about typical Councillor training and induction activities. Firstly, induction in particular is often a huge information overload. Too much, too soon. There are, of course, pressures to get it done – October elections mean a four year Council Strategic Plan and a budget to be done by the following June. It is a very cramped timetable.

Secondly, the sector tends to ‘train up’ across the board – finance, risk, governance, town planning and so on. There is a good argument to suggest that better training dividends might be realised if more upskilling focussed on the key role played by Councillors. That is, setting direction, describing a preferred future and creating a plan to get there. Playing that role well is not easy. Most people would be thoroughly challenged by the prospect of negotiating with fellow Councillors (probably elected from many sides of the political divide) a four year Strategic Plan which might embrace the agenda of a diverse, just elected group.

### Conflicts of interest

#### **What issues have you observed with the way councillors declare and manage conflicts of interest?**

The most common shortcomings I have observed in the way Councillors declare and manage conflicts of interest are:

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- A failure to 'spell out' the exact nature of their conflict of interest, as specified in current legislation, and
- A failure to understand exactly what a conflict of interest is and to understand the very complex legislation which seeks to regulate this matter.

The provisions of the *Local Government Act 1989* were quite clear in circumstances where a Councillor has declared a conflict of interest at either a Council Meeting or an Assembly of Councillors. The Councillor is required not only to identify the type or class of the conflict but to 'describe the nature of the interest'.

The 2020 Local Government Act requires a Councillor who has a conflict of interest in a matter to 'disclose the conflict of Interest in a manner required by the Council's governance Rules'.

I would hope that through Local Government Act Regulations, a Council's Governance Rules will require that the manner by which a Councillor discloses a conflict of interest includes a requirement to disclose the exact nature of the conflict. It is my experience that Councillor colleagues of a Councillor who has declared a conflict of interest in a matter would be far more likely to avoid any kind of discussions with such a Councillor on that matter, if they had a complete understanding of the exact nature of the conflict of interest. I would prefer that more, not less be disclosed.

I would also prefer that Council Governance Rules be required, by regulation, to prohibit any conversations between a Councillor declaring a conflict of interest and other Councillors on the matter subject to the conflict. There are obvious difficulties in enforcing such a prohibition but such discussions should be unlawful.

### **Who is (or should be) responsible for ensuring conflicts are properly declared and managed?**

The only person who can properly determine whether a Councillor has a conflict of interest in a matter is the Councillor themselves. When I was a Council CEO, I was often asked by Councillors immediately prior to a Council Meeting, whether they did or did not have a conflict of interest in a particular matter before the Council. I could not assist them. I couldn't possibly know the totality of their private circumstances which might have given rise to the conflict. Nor could I be certain that their understanding of the conflict would ensure that they would reveal that totality to me. Legal advice is generally available to Councillors to assist with the identification and declaration of conflicts of Interest. But that advice is limited to a response based on the personal circumstances revealed by the Councillor.

It is my firm view that the obligation to declare a conflict of interest must rest with the Councillor concerned. Councillors need facilitation to carefully consider conflict of interest matters. This includes access to legal advice, training, clear and regular information, details of Court or Conduct Panel cases dealing with conflict of interest and strong punitive measures for those not meeting their obligations.

### **The *Local Government Act 1989* sets out detailed criteria for declaring conflicts of interest. What is your view of these provisions governing how councillors declare and manage conflicts of interest?**

The *Local Government Act 1989* contained specific but quite complex and somewhat convoluted provisions around conflict of interest. In my experience many Councillors do not have a sound understanding of the legislation. And, to be fair, the provisions seeking to describe the circumstances that give rise to a conflict of interest were well short of plain English and for precision's sake, legalistic.

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### Do you consider the principles-based approach to declaration of conflict of interest in the *Local Government Act 2020* will improve the way councillors declare and manage conflicts of interest?

The *Local Government Act 2020* has opted for a principles based approach to conflict of interest. It uses phrases like:

*a relevant person has a **general conflict of interest** in a matter if an impartial, fair-minded person would consider that the person's private interests could result in that person acting in a manner that is contrary to their public duty.*

In due course the Act will probably be accompanied by Regulations to put some 'meat on the bones' of the principles. However, I'm unsure whether we can expect better outcomes. New legislation, in isolation, probably won't make the impact hoped for.

Legislation is like computer hardware – a framework that isn't much use without software. And, it is the software that needs attention - that is a renewed sector focus on Integrity. IBAC Operation Sandon will heighten community unease around local government. It follows governance failures at several Victorian Councils which have resulted in Councils being dismissed.

It seems to me that community confidence in local government will not be enhanced by a continued focus on mechanisms like rate capping (efficiency) or a narrowing of functions (to core business – whatever that means!). There is very strong, even empirical evidence, that it is good governance that forges sound reputations in local government and I think that integrity represents Governance 101.

### Block voting and en bloc voting

#### What do you consider to be the advantages and disadvantages of en bloc voting practices in councils?

I am familiar with two kinds of voting blocs. They are quite dissimilar.

#### Groups of councillors voting together

The first kind is very common in all kinds of representative governments. It is when the same group of Councillors vote the same way on pretty much every issue. Often the group of Councillors share membership of the same political party. Sometimes the group is simply a coalition of like-minded Councillors. Sometimes it is a more formal coalition, formed for the purpose of being dominant in decision making.

This kind of voting bloc doesn't hold many concerns for me. The risk to good governance practice is that group members caucus and all commit their vote to support the dominant view within the group. It can mean that a Council with nine Councillors, containing a dominant group of five Councillors can potentially resolve matters on three votes – the majority view within the dominant group. However, the practice is as old a group decision making. It is politics. I'm unaware of any regulatory remedy.

The other more disturbing possibility involving dominant groups within a Council is when, because the dominant group 'holds the numbers' it may not bother creating the transparency around the Council's decisions that **debate** achieves. . This may be a particular risk if council meeting procedures provide that debate is only permitted if there is no clear majority. This can stifle debate and lead to particularly poor outcomes. Transparency is only achieved through proper debate.

#### En bloc voting by the whole council to adopt multiple resolutions without debate

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The second kind of bloc voting I'm familiar with is when more than one proposal, in fact often several unrelated proposals, are grouped together and adopted with one Council resolution, often without debate. These practices usually have unanimous support and are even 'regulated' by Meeting Procedure Rules.

In my view, this represents particularly poor governance practice. The assumption implicit in this practice is that the proposals adopted in a single resolution are unimportant or of self-evident merit and, in either case, not worthy of debate. If that is the case these matters should not appear on a Council Agenda. Council Meetings are held to determine important significant matters. Debate is necessary around important matters because it creates the transparency communities deserve.

Council Meetings are intended to be a pinnacle of local democratic governance. Issues not important enough to warrant debate should be found another pathway for resolution - probably delegation! I see no redeeming features of this practice.

### Relationship between CEOs and councillors

**In Victoria, Council is responsible for employing the CEO, managing their performance and their tenure (under both the *Local Government Act 1989* and the *Local Government Act 2020*). What, if any, risks does this arrangement pose for the integrity and effective operation of councils?**

The nature of the CEO and Councillor relationship is exactly the relationship one would expect – the Council hires and manages their CEO under a performance-based contract and the Council determines when the services of the CEO are no longer required.

So, I don't think the employment arrangement, of itself, poses unusual risks for the integrity or effective operation of the Council. Furthermore, I have reservations about some of the commonly touted alternatives like CEO appointments being made by the State Government. Such an arrangement would give rise to numerous complexities and would risk worse outcomes than the current employment relationship arrangements.

However, the usual risks around CEO recruitment and performance management are probably exacerbated in local government. Internal politics and/or inadequate levels of Councillor experience or skills in dealing with such matters are not uncommon.

Nevertheless, significant and skilled consultant resources are well established in Victorian local government. Most Councils manage these risks using experienced and competent human resource consultants.

It is undeniable that dysfunctional Councils regularly founder on 'the rocks' of a CEO sacking. Recently sacked Councils were conspicuous for unsatisfactory relationships with what many people regarded as relatively high performing CEOs.

Councils that demonstrate an inability to govern effectively often create an issue of divisiveness around the CEO. There is always a constant danger that the CEO will be viewed by a non-dominant group of Councillors as providing partial support to the dominant group.

The other important integrity risk arises when the CEO only retains the confidence of the dominant group by appeasing that group's wishes. A toxic 'perfect storm' emerges when a dominant group regularly ignores good governance practices for its own purposes and is not held to account by a CEO who cares more about his or her own tenure than good governance and will not risk the displeasure of the dominant group.

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### **What are the political risks for an effective CEO?**

Any CEO should have his or her performance evaluated objectively and against key performance indicators set by Council and set out in the contract of employment. However, divisive internal politics can mean the CEO will be evaluated against subjective, politically inspired notions. And, in a divisive, politically torn Council it is not uncommon for the CEO to be seen as the villain by both sides of the political rift.

### **How does the role of the councillor fit in modern council organisations that are becoming more complex service delivery businesses?**

Councils deliver a relatively similar set of services that probably consume 80-90% of a Council operating budget. These services or businesses represent the 'common' batch of the local government offering. Waste management, road management, aged care, libraries, leisure and recreation services are all relatively common to most Councils. I am not sure that I would describe those businesses as 'complex service delivery businesses' but, of course there are complexities which are best understood by the professional people who are charged with running the businesses.

In my view, the important governance role to be played by Councillors in these service delivery areas involves, ensuring that Council businesses operate in such a way as to achieve Council's social, economic or environmental goals.

Admittedly, some aspects of the work Councils undertake are less suited to 'Councillor' governance. In particular, those areas where skills, experience and knowledge are fundamental to produce good outcomes. Over time the need for expert knowledge has been reflected in the introduction of skilled members on things like audit committees. The same principle could arguably be applied to CEO recruitment and performance – that is, councillors could be retained as decision makers with experts added to the delegated decision making committee.

### **How do you consider the relationship between the Council and the CEO should be framed in legislation? In particular can it be framed in a way that assists in the prevention of misconduct and corruption? Can it be framed to protect the community interests from politically motivated decisions?**

The fundamental relationship between the CEO and the Council is, I think, inadequately framed in legislation (old and new Acts).

There are three changes I would like to see. Firstly I would prefer that legislation should require Councils to establish a 'CEO Employment Matters Committee' using the structure of the mandatory Audit and Risk Committees as the model. That is:

- A majority of external, skilled members, including the Chair; and
- Responsibility for all matters dealing with CEO employment.

I would consider providing decision making powers to this Committee (Audit and Risk Committees are Advisory). I am not adamant on this point. Advice from an Advisory Committee with a majority of independent, skilled members isn't easily ignored.

Secondly, there should be some increased attention given to legislative changes that more clearly mandate CEO powers and responsibilities. For example, the clarity around the CEO's powers in

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relation to employees (hire, fire, industrial relations and so on) has served the sector very well. Prior to that clarifying legislation, Councils were a mess in relation to employer/employee relationships.

I think there are opportunities to get best practice by clarifying responsibilities between Council and the CEO. For example, Councils are required to undertake 'Best Value' – basically a continuous improvement process. Why wouldn't legislation require a CEO to deliver continuous improvement (with appropriate opportunities for Council interventions)? A mandatory, legislated requirement for continuous improvement to be a CEO responsibility is, in my view, more likely to get it done.

Thirdly, I am of the view that the sector should explore a role for a legislated Integrity Officer. Under current legislation, most integrity legislation involves the CEO playing an administrative, investigative or enforcement role. I'm not sure that is in the best interests of the employer/employee relationship.

These three initiatives would all make a contribution to assisting the prevention of misconduct and corruption. CEOs need to be more confident that objectivity, and not politics, are the determinants of their ongoing employment. More clarity around legislated responsibilities between Council and CEO would provide a stronger framework for guiding conduct and behaviour. And a clear role for an Integrity officer would provide a stronger focus on these issues going forward and might lift the CEO out of a perceived, and sometimes real, role of police officer.

These three changes I have proposed would also make it more difficult for Councils to make purely political decisions seemingly against the community interest. CEOs with more confidence in their employment arrangements and their powers and responsibilities are more likely to provide stronger, clearer advice in such circumstances. The CEO role is very much about 'frank and fearless' advice but current arrangements do little to support CEOs playing that role more often.

### Planning

#### **What do you consider to be the key strengths and weaknesses in the governance around planning decisions insofar as it relates to local government?**

At the outset I'd want to separate the two fundamental land use and development planning roles Councils play.

Firstly as a part of a **highly regulated process** Councils undertake strategic planning which, amongst other things, produces a Planning Scheme – a set of 'rules and requirements' which is aimed at producing the land use plan that supports the Council's vision for the municipality. This responsibility is very much a shared one with the State Government.

Secondly, the Council makes decisions about development in the municipality. Mostly, planning permit decisions about land uses and development that require a planning permit under the provisions of the Planning Scheme.

In relation to the task of producing (and, of course, amending) a Planning Scheme for a municipality, I'd continue to see a fundamental role for Councillors. The Planning Scheme is an important piece of policy for the Council. It is an essential tool to realise the Council's preferred future. I think it is at the very core of what Councillors should do.

Finally, I'm reluctant to believe that the required processes currently legislated to prepare a Planning Scheme (or an amendment to a Planning Scheme) are inadequate. Without defining the current process, suffice to say that it involves several rigorous steps, the Victorian Planning Minister (and bureaucracy) independent expert panels and public submissions which would seem to create a robust set of checks and balances. Operation Sandon would appear to have found flaws in the current arrangements. However, I'm thinking that those flaws had more to do with a range of alleged

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inappropriate, relationships and extraordinary money making incentives for development interests. I don't feel qualified to propose mechanisms to address those two obvious weaknesses. I would say, however, that the broad issue of windfall financial gains and its close relation, developer contributions, needs serious attention.

In other respects, the Planning Scheme process seems to be a considered, evidence based and transparent process.

Planning decisions, or planning permits, are another story. Councils make many planning decisions. A medium sized metropolitan Council might make about a thousand or more per year.

The vast majority of those planning decisions will be made by Planning Officers (experts) on relatively routine matters, under delegation. The essential task for the Planning Officer is to determine whether a proposal meets the requirements of the Planning Scheme. Often, the Planning Officer will determine that the development proposal can meet the requirements of the Planning Scheme by imposing some conditions on the development.

Large or controversial developments are less likely to be delegated to Planning Officers for a decision. These proposals will often attract resident objections. These more significant development applications will often be decided by the Councillors – that is, the Council.

The task is identical to the one undertaken by the Planning Officers. The question to be answered is 'does the development proposal meet the requirements of the Planning Scheme'?

It is normal practice for Councillors to hear both proponents and objectors and to consider the best professional advice of their planning experts and planning consultants. There is often plenty of information to digest.

Clearly, Councillors are often weighing the extent to which a development proposal complies with the Planning Scheme against the 'community interest' sometimes as expressed by objectors who often live near the proposed development. Medium and high density residential developments are typical of this scenario.

Sometimes, perhaps too often, Councillors ignore the advice of the Planning Officers and make a decision which supports the objector's position. In these circumstances I'm not convinced that the fundamental proposition, i.e. 'does the proposal comply with the provisions of the Planning Scheme?' is the **deciding factor** in their deliberations. Sometimes, perhaps too often, the deciding factor is a politician's 'need' to please a lot of objecting constituents

Of course, Council planning decisions are able to be appealed to the Victorian Civil and Administrative Tribunal (VCAT). So, what sometimes plays out is:

- an unpopular, but compliant development proposal is recommended for approval by the Council's Planning Officer
- Council, seemingly under pressure from many objectors, does not follow the advice and rejects the development application
- the development proponent appeals the Council decision to VCAT, which reaches the same conclusion as the Council's Planning Officer and directs that the development be approved
- meanwhile, the Council has spent considerable resources supporting the Council decision to reject the proposal.

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So, several months and considerable costs later the proposal can proceed. Delays and costs on both sides can be very significant. Resolving a planning permit application is a quasi-judicial process. The Planning Scheme is a legal instrument. It is published and plays a vitally important role in property acquisition. Understanding opportunities and constraints on developing an acquired property is a fundamental part of the conveyancing process.

I think local political pressure can make it difficult for Councillors to make evidence based decisions about controversial and unpopular development proposals.

**What role (if any) should councillors play in the planning process? If not councillors, who should be the decision maker (eg independent panel, delegation to council staff)? If there is no role for councillors in planning decision making, how are communities' interests represented and protected?**

I am mostly inclined to the view that Councillors should focus on making the rules (the Planning Scheme and associated work) and someone else should consider the planning applications.

I'm uncertain exactly who should make those planning permit decisions. I think the Chief Planning Officer would be best placed to deal with the more significant Planning Permit applications that are currently, mostly determined by Councillors, using a 'checks and balances' process which probably includes:

- A citizen's jury
- Experts, and
- Special Integrity arrangements.

It should be noted that the Chief Planning Officers in Victorian local governments currently determine the **vast majority** of Planning Permit Applications and regularly need to involve consultative processes and expert opinions to reach a determination.

If Chief Planning Officers are empowered by legislation to determine all applications, integrity arrangements must be in place to provide transparency and accountability for those decisions.

I would support arrangements where the Chief Planning Officer, under certain unusual conditions, be required to refer the matter to Council.

I am of the view that a renewed, stronger focus by Councillors on preparing and maintaining their Municipal Planning Schemes can be a much more satisfactory way of representing and protecting community interest.

Planning Schemes that seek to contain localised provisions to protect or enhance local circumstances need high quality research and persuasive strategic thinking. This is a very legitimate role for Councillors as Council.