



SNOWY MONARO
REGIONAL COUNCIL

BUSINESS PAPER

PUBLIC EXHIBITION COPY

Extraordinary Council Meeting
24 October 2024

STATEMENT OF ETHICAL OBLIGATIONS

Councillors are reminded of their oath or affirmation of office made under section 233A of the Local Government Act 1993 and their obligations under the Council's code of conduct to disclose and appropriately manage conflicts of interest.

CONFLICTS OF INTEREST

A conflict of interest arises when the Mayor or Council staff are influenced, or are seen to be influenced, in carrying out their duties by personal interests. Conflicts of interest can be pecuniary or non-pecuniary in nature.

A pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of a financial gain or loss.

A non-pecuniary interest can arise as a result of a private or personal interest, which does not relate to money. Examples include friendship, membership of an association or involvement or interest in an activity.

The Mayor or staff member who considers they may have a conflict of interest should read Council Policy.

The responsibility of determining whether or not the Mayor or Council employee has a pecuniary or non-pecuniary interest in a matter, is the responsibility of that individual. It is not the role of the Mayor or Chief Executive Officer, or another Council employee to determine whether or not a person may have a conflict of interest.

COUNCIL CODE OF CONDUCT

The Council Code of Conduct is a requirement of Section 440 of the Local Government Act 1993, which requires all councils to have a code of conduct to be observed by the Mayor and Council employees attending a Council meeting or a meeting of a committee of Council.

The code of conduct sets out the responsibilities of the Mayor and Council employees attending a Council meeting or a meeting of a committee of Council. The code also sets out how complaints against a Council employee, the Mayor or Chief Executive Officer are to be made.

COUNCIL CODE OF MEETING PRACTICE

The Council Code of Meeting Practice is a requirement of Part 2, Division 1 of the Local Government Act 1993, which requires all councils to have a code of meeting practice. The code of meeting practice is to be observed by the Mayor, members of staff, delegates of the Council and members of the public attending a Council or a meeting of a committee of Council.

Acknowledgement of Country

Council wishes to show our respect to the First Custodians of this land the Ngarigo, Walgalu, Ngunnawal and Bidhawal people and their Ancestors past and present.

Webcasting

Council meetings are recorded and live streamed to the internet for public viewing. By entering the Chambers during an open session of Council, you consent to your attendance and participation being recorded and streamed on Council's website www.snowymonaro.nsw.gov.au

**EXTRAORDINARY COUNCIL MEETING
TO BE HELD IN COUNCIL CHAMBERS, 81 COMMISSIONER STREET, COOMA NSW
2630**

**ON THURSDAY 24 OCTOBER 2024
COMMENCING AT 10:00 AM**

BUSINESS PAPER

- 1. OPENING MEETING**
- 2. ACKNOWLEDGEMENT OF COUNTRY**
- 3. COUNCILLOR REQUEST FOR ATTENDANCE VIA AUDIO-VISUAL**
- 4. APOLOGIES AND APPLICATIONS FOR LEAVE OF ABSENCE BY COUNCILLORS**
- 5. DISCLOSURE OF INTEREST**
(Declarations also to be made prior to discussions on each item)
- 6. OTHER REPORTS TO COUNCIL**
 - 6.1 EXECUTIVE OFFICE**
 - 6.1.1 Unlawful Motions 2
- 7. NOTICE OF MOTION**
 - 7.1 Unreasonable Complainant Conduct Policies of the Council 5
 - 7.2 Circumstances related to the resignation of the CEO 10
- 8. CONFIDENTIAL MATTERS**
Nil

6.1.1 UNLAWFUL MOTIONS

6.1.1 UNLAWFUL MOTIONS

Record No: I24/577

OFFICER'S RECOMMENDATION

There is no recommendation as this is a report from the CEO advising of action taken in accordance with the code of meeting practice. This report is not business before Council, simply legislative reporting.

ISSUES

Several motions that are considered unlawful by the CEO were sought to be included in the business paper for the meeting of 24 October 2024. One motion has been removed after the councillor did not accept an offer to amend the motion to make it lawful. The second motion was amended to remove the part that was considered unlawful, to allow the balance of the motion to be considered.

Under the code of meeting practice where the CEO is of the opinion that a motion is unlawful, they must not include it in the business paper and must provide a report to the next meeting of the action taken.

RISK ASSESSMENT

Risk Type	Current Risk	Expected Risk	Within Accepted
Asset Management	Low	Low	Yes
Economic Activity	Low	Low	Yes
Environmental Security	Low	Low	Yes
Financial Sustainability	Low	Low	Yes
Health and Safety	Low	Low	Yes
Legislative Governance and Compliance	Low	Low	Yes
Reputation and Image	Low	Low	Yes
Service Delivery	Low	Low	Yes

FINANCIAL IMPACTS

Nil

RESPONSIBLE OFFICER: Chief Executive Officer

OPTIONS CONSIDERED

No options have been considered as including unlawful motions breaches legislative requirements.

IMPLEMENTATION PLANS

N/A

EXISTING POLICY/DECISIONS

Code of Meeting Practice

3.19 The CEO must not include in the agenda for a meeting of the council any business of which due notice has been given if, in the opinion of the CEO, the business is, or the implementation of the business would be, unlawful. The CEO must report, without giving details of the item of business, any such exclusion to the next meeting of the council.

10.6 The chairperson must rule out of order any motion or amendment to a motion that is unlawful or the implementation of which would be unlawful.

BACKGROUND

Councillors may not be aware of the implications of motions that are put forward and even on some occasions in the past have deliberately put forward motions that are unlawful to implement. To manage this the Office of Local Government included mandatory provisions in the code of meeting practice to provide for checks and balances.

The first of these is the provisions requiring the CEO not to include notice of business that is considered unlawful to implement. The second is that the chair of the meeting is to rule as unlawful any motions put from the floor of the meeting that are considered by the chair to be unlawful.

Councillors need to be aware of the requirements of a range of legislation in addition to the Local Government Act. It can be difficult to know and understand all the requirements.

Under the Privacy and Personal Information Protection (PPIP) Act, a public sector agency (which includes a local government authority) may only use private/personal information for the purpose for which the information was collected, and as a general rule, may only disclose such information if the disclosure is directly related to the purpose for which the information was collected, and only with the person to whom the information relates. Section 18 of the PPIP Act provides as follows:

18 Limits on disclosure of personal information

1. A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless—
 - a. the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
 - b. the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or
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6.1.1 UNLAWFUL MOTIONS

- c. the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.
2. If personal information is disclosed in accordance with subsection (1) to a person or body that is a public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given to it.

ATTACHMENTS

Nil

7.1 UNREASONABLE COMPLAINANT CONDUCT POLICIES OF THE COUNCIL

Record No: I24/571

Councillor Reuben Rose has given notice that at the extraordinary meeting of Council on 24 October 2024, he will move the following motion.

MOTION

That:

- A. An urgent independent internal audit be conducted in relation to the application of Council's UCC policy. The audit to advise on the state of:
 - i. Compliance with council's policy.
 - ii. Compliance with the NSW Ombudsman's guidelines. *NOTE: This is not an arduous requirement because the Model Policy already requires that council has established and detailed systems "To guard against misuses or overuses of UCC policies, various systems should be in place.." (Page 2 of the Model Policy)*
- B. A meeting be held as soon as the internal audit is complete to advise councillors of the findings of the audit.

RESPONSIBLE COUNCILLOR: Cr Reuben Rose

BACKGROUND

Issues Arising from the "Ban" on Andrew Thaler

Some councillors were advised that the resignation of the SMRC CEO followed the receipt of legal advice to council to overturn the ban on Mr Thaler's in-person attendance at council meetings. This was a matter that the CEO had written to Mr Thaler about since his election.

If the CEO's attempt to ban Councillor Thaler from attending meetings in person is unlawful, then so might be the decision of a previous council (in 2018) to ban Mr Thaler from attending Council meetings. If so, council and former councillors may be at significant risk of litigation.

Further, although Mr Thaler has been permitted to attend the October 10 meeting, there is no assurance that the matter is fully resolved. Thus, there remains the possibility that council may be exposed to ongoing legal issues, which could result in significant potential costs (reputational and financial) to ratepayers. Indeed the 2018 ban remains a resolution adopted by a former set of councillors. This raises further issues about council's unreasonable complainant conduct policies.

Unreasonable Complainant Conduct Policies of the Council

Some councillors are aware that multiple persons, including Mr Andrew Thaler, have been deemed unreasonable complainants under the council's UCC policy.

A number of persons have claimed that the UCC policy has not been applied in a manner that is consistent with council policy or, importantly, with the more detailed NSW Ombudsman's guidelines for managing UCCs. These detailed processes for managing a UCC are in the Ombudsman's 40-page document. A few of the fundamental principles from the document are highlighted in Appendix A.

If the accusations were to be true, then it is possible that the council may not have met its statutory obligations in the way the UCC has been applied.

NB If the UCC process has not been carried out in accordance with the relevant legislation and policies, the council (and even ourselves as individual councillors), may be exposed to statutory legal action. The council's UCC policy may not be compliant with the Ombudsman's Model Code, and therefore all UCCs should be reviewed by councillors to ensure that they meet the code's requirements.

[See: Oversight of correct governance procedure and policy (**Section 8A of the NSW Local Government Act** - http://www5.austlii.edu.au/au/legis/nsw/consol_act/lga1993182/s8a.html and **Section 233 of the Local Government Act**)].

APPENDIX A (from NSW Ombudsman's Managing Unreasonable Conduct by Complainants – Model Policy)

https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0004/128092/Managing-unreasonable-complainant-conduct-a-model-policy-and-procedure.pdf

Contents of a UCC policy – Page 1

"A UCC policy should include the following basic features:

- Clear guidance on the authority vested in frontline staff and senior management to respond to and manage UCC incidents, including restricting a complainant's access to services.
- An explanation of the circumstances where it may be appropriate to change or restrict a complainant's access to services, and the procedures to follow when doing so.
- A range of possible service restrictions (not just 'write only' restrictions) that staff can use to manage UCC incidents.
- Guidance about factors (including cultural factors) that should be considered when deciding to change or restrict a complainant's access to services.
- Procedures for communicating with complainants about decisions to change or restrict their access, including the use of template letters.
- A centralised system for recording and reporting details of complainants who have service restrictions, to assist with ongoing management and review of these cases.
- A standardised process for reviewing decisions to change or restrict access – including fixed time periods and criteria for review, and a presumption that any restriction will be lifted unless there is a clear need for it to continue."....

Some additional points that are relevant:

- To guard against misuses or overuses of UCC policies, various systems should be in place (page 2). These include:
 - An easily accessible and searchable case management system
 - A system that is easily updated
 - Documents all complaints and complainants
 - Alerts to notify any changes in restrictions
 - A tracking system for monitoring incidents of UCC and their progress
- A warning letter plus or minus a further notification letter should be used to specify the date, time and location of the UCC incident, why the behaviour is problematic, and who can be contacted on staff (page 14, 7.3 and 7.4);
- The process requires that in all cases, the policy is reviewed every 3 months or 6 months, and not more than 12 months after the restriction was initially imposed or upheld (page 16, 10.1);
- The nominated senior manager must communicate the outcome of the review, including by a written letter (page 17, 10.4);
- A right of appeal to change or restrict a person's access. This needs to be undertaken by a senior staff member not involved in the original decision (page 15, 8.1).

CHIEF EXECUTIVE OFFICER'S RESPONSE

Unless it can be proven that the "ban on Mr Thaler's in-person attendance at council meetings" was a decision not made in good faith, or without exercising a reasonable degree of care and diligence, the Council and former councillors are not considered to face any significant risk of successful litigation.

731 Liability of councillors, employees and other persons

A matter or thing done by the Minister, the Departmental Chief Executive, a council, a councillor, a member of a committee of the council or an employee of the council or any person acting under the direction of the Minister, the Departmental Chief Executive, the council or a committee of the council does not, if the matter or thing was done in good faith for the purpose of executing this or any other Act, and for and on behalf of the Minister, the Departmental Chief Executive, the council or a committee of the council, subject a councillor, a member, an employee or a person so acting personally to any action, liability, claim or demand.

It would be expected if a litigant had a strong case they would have commenced litigation well before now. If there were procedural irregularities within the 2018 decision of Council, that could only be challenged within the first three months.

729 Proceedings alleging non-compliance with a procedural requirement

The validity or effectiveness of a decision of a council may not be questioned in any legal proceedings on the ground that, in making or purporting to make the decision, the council failed to comply with a procedural requirement of this Act or the regulations (including a

requirement as to the giving of notice) unless the proceedings are commenced within 3 months after the date of the decision.”

There are no records showing such a challenge was lodged. Further reducing the risk of litigation, decisions of the Council that have been implemented are valid decisions until and unless they are overturned by the Land and Environment Court. No application has been made to overturn the decision.

Council has three arrangements in place for people in accordance with the Managing Unreasonable Complainants Policy. Of those arrangements two have already been reviewed by the NSW Ombudsman’s Office at the request of the persons subject to the restrictions. This is the part of the current procedures, which follow the NSW Ombudsman’s guidelines. In the first instance under current procedures an internal review is undertaken and the second option available to those placed under restrictions is a request for the NSW Ombudsman to review the actions of Council. This provides an independent third party review of the operational decisions.

The substance of the responses to Council did not indicate a need for changes to the current practices. It would appear that, based on the reported comments to Cr Rose, the people involved are not accepting of the decision of the NSW Ombudsman in relation to the independent reviews undertaken. It is considered unlikely in that event that any review that does not agree with their views will be accepted either, so the investment of funds may provide little benefit as it is unlikely that an independent reviewer will come to a different conclusion than the NSW Ombudsman’s office.

Hi Luke

Based on Council’s detailed review and explanation to Mr [REDACTED] I have now closed this matter at our office and informed Mr [REDACTED] that I consider that he has now been provided adequate opportunities to respond to Council’s concerns about his unreasonable complainant conduct. I have noted to him Council’s plan to review the proposed communication protocol in 12 months and its policy on managing unreasonable complainant conduct in due course.

Thank you for all of your assistance with this matter.

Mr [REDACTED] has forwarded to us the attached emails which show he has contacted Council, including via ucc@snowymonaro.nsw.gov.au, since your email to him on 8 March 2023. However, I have informed Mr [REDACTED] that it does not appear he has specifically responded to your request to make a submission on changing any communication protocol that is in place. As such, I have informed him of the option to make such a submission to Council at ucc@snowymonaro.nsw.gov.au to assist Council’s review and direct response to him. As this option is open to Mr [REDACTED], we will take no further action and have closed this matter at our office.

Thank you for assistance with this matter.

Regards

Patrick Trieu (he/him)

Senior Investigation Officer | Complaints and Resolution Branch | NSW Ombudsman

There is no legislative requirement to apply the model policy and thus no liability to councillors for not applying it. Staff are required to apply the current policy adopted by Council, which is done.

A number of Council policies require review, including the Managing Unreasonable Complainants Policy and staff are developing a schedule for the reviews within the available resources. This will be determined based on an assessment of the risk seen across the policy portfolio. The current policy was based on the model policy at the time, with some of the procedural detail removed from the policy document. The model is primarily designed for NSW agencies, where this type of document is adopted by staff, not elected representatives, so the very operational aspects have been removed (sample forms and letters account for 20 of the 40 pages referred to by Councillor Rose). Inclusion of all items listed in the model policy would only be considered appropriate if the governing body determined that the policy was to be managed by the CEO directly, as the governing body should not be involved in determining the day to day operations of the organisation.

For procedures the staff utilise the [Managing Unreasonable Conduct by a Complainant Manual](#) issued by the NSW Ombudsman's office. This saves from having different processes that what is considered best practice. This provides staff with extensive information on how to recognise the behaviours and options for managing that behaviour.

If councillors are aware of legislation or policy not being complied with, this should be detailed information rather than making vague assertions and speculations of what 'may' be the case or what is 'possible'. Councillors should restrict themselves to factual information, to support their motions not making vague assertions of conduct. In addition, if there are concerns over wrongdoing of councillors or members of staff this should be managed in accordance with the code of conduct, not by raising claims in a business paper or Council meeting (See clauses 7.9(h), 9.11 and 9.12).

Undertaking an audit as proposed will have a financial cost and the notice of motion has not, in accordance with clause 3.12 of the code of meeting practice, identified the source of that funding. Council does have a budget for providing an internal audit service. Currently internal audit is provided through the CRJO under the auspice of the ARIC. The ARIC approves an internal audit plan based on their assessment of the risks and the recommendations of the internal auditor. The current funds are already allocated to the function provided through CRJO.

There are not funds allocated in the current budget towards the cost of this motion. Should the Council be seeking to adopt this motion it will need to identify where it will fund the service from, by identifying other services or activities within the delivery plan that will not be undertaken to allow for this action to be included.

ATTACHMENTS

Nil

7.2 CIRCUMSTANCES RELATED TO THE RESIGNATION OF THE CEO

Record No: I24/574

Councillor Reuben Rose has given notice that at the Ordinary Meeting of Council on 24 October 2024, he will move the following motion.

MOTION

That, in order to fulfil the statutory governance requirements of councillors: that the resignation correspondence of the CEO, Mr David Hogan, and all related correspondence (between the CEO, other councillors or persons who are now councillors), and any legal advice provided to council, relevant to or referenced in the resignation correspondence, be made available to councillors.

RESPONSIBLE COUNCILLOR: Cr Reuben Rose

BACKGROUND

At the first meeting of the council on 10th October, there were a number of issues that caused us concern from the viewpoint of our statutory obligations as councillors. Our governance function is outlined more generally in Chapter 3 of the Local Government Act and then more detail provided in Chapter 9, Part 2, Sections 222 and 223 of the Local Government Act.

Section 222 of the Local Government Act defines the governing body as follows:

222 Who comprise the governing body?

The elected representatives, called "councillors", comprise the governing body of the council

As councillors would know, our governance obligations are clearly outlined in Section 223 of the Local Government Act:

223 Role of governing body

- 1) The role of the governing body is as follows--
 - a) to direct and control the affairs of the council in accordance with this Act,
 - b) to provide effective civic leadership to the local community,
 - c) to ensure as far as possible the financial sustainability of the council,
 - d) to ensure as far as possible that the council acts in accordance with the principles set out in Chapter 3 and the plans, programs, strategies and policies of the council,
 - e) to develop and endorse the community strategic plan, delivery program and other strategic plans, programs, strategies and policies of the council,
 - f) to determine and adopt a rating and revenue policy and operational plans that support the optimal allocation of the council's resources to implement the strategic

- plans (including the community strategic plan) of the council and for the benefit of the local area,
- g) to keep under review the performance of the council, including service delivery,
 - h) to make decisions necessary for the proper exercise of the council's regulatory functions,
 - i) to determine the process for appointment of the general manager by the council and to monitor the general manager's performance,
 - j) to consult regularly with community organisations and other key stakeholders and keep them informed of the council's decisions and activities,
 - k) to be responsible for ensuring that the council acts honestly, efficiently and appropriately.
- 2) The governing body is to consult with the general manager in directing and controlling the affairs of the council."

In these 12 items, there are some fundamental statutory obligations of councillors:

1. "Direct and control affairs of council"
2. "Ensure ...the council acts in accordance with the principles set out in Chapter 3 and the plans, programs, strategies and policies of the council"
3. "Proper exercise of the council's regulatory functions"
4. "Determine the process for appointment of the general manager...and to monitor the general manager's performance"
5. "To be responsible for ensuring that the council acts honestly, efficiently and appropriately".

Access to the Resignation Correspondence of CEO David Hogan and the Subsequent Decision-Making

Prior to and at the meeting on 10th October, 2024, the requests by some councillors that all councillors be provided with the CEO's resignation correspondence was denied by David Rawlings (Chief Strategy Officer). This creates a number of issues that prevent councillors from meeting their obligations under section 223 of the Act.

- Councillors need to read the CEO's resignation correspondence to ensure that it does not outline matters that could be of concern under councillors' governance obligations.
 - The obligations in Section 223 of the Act apply to all councillors; therefore, all councillors need to read the resignation correspondence. The failure to provide it to all councillors would appear to have prevented those councillors who were not given access to that information from fulfilling their governance responsibilities. In so doing, the council has failed in its statutory obligations.
 - Some councillors have heard that the correspondence addresses legal advice that relates to the CEO's independent actions, not authorised by councillors, to attempt to ban an elected councillor from in-person attendance at council meetings and other council-related events. If true, this is material to councillors' governance obligations.
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CHIEF EXECUTIVE OFFICER'S RESPONSE

Note: Debate must remain on whether the documents should be provided to councillors, not on the content or possible content. Discussion of personnel matters (i.e. the content of any documents or references to performance) relating to an individual should occur in closed session.

As the resolution is very broad there is the potential that information that cannot be lawfully provided to councillors is included. If this is the case the CEO will not be able to enact the resolution in accordance with section 335(b) of the Local Government Act.

The resignation references the following topics, as challenges that have been worked on and the improvements achieved:

- Potential administrator appointments
- Financial reforms/sustainability
- Audit outcomes
- Aged care divestment
- Budget
- Cash reserves
- Leadership team appointments
- Change in culture
- Safety, and
- Changes in services provided.

As there is no timeframe set for the information requested in the motion this means that documents going back to the early 2010's and potentially earlier will need to be covered. Effectively all correspondence between councillors and the CEO would need to be reviewed to determine if they contained commentary on any of the topics listed above. This is a large undertaking and will require a substantial diversion of resources. It is recommended that if the governing body chooses to continue with this motion that consideration be given to the timeframes and topics and whether the scope of the request can be contained.

This motion has financial implications, as considered in clause 3.11 of the code of meeting practice. It is difficult to assess the extent of the time required. It is likely to be at least 6-8 weeks of work for a person full time to review and collate the information as it will involve review of electronic (within the records system and going through any email archives held) and physical paper files that remain.

Clause 3.12 of the code of meeting practice requires a notice of motion to identify a source of funds for implementation of the motion. The source of funds has not been identified as required under the code of meeting practice. It is estimated that approximately \$25,000 will be required to fund the motion if passed. These funds are not currently available in the existing budget. The alternative is to have the work undertaken as there is spare staff capacity. This is expected to lead to it taking a long time before the task could be completed, as there is limited capacity to divert at this time.

Section 404 of the Local Government Act requires that the Council must ensure that the delivery program remains within the available resources under the resourcing strategy. This means that in adding new services/activities into the process it must identify an equivalent value of services/activities to remove from the delivery program.

There is no reference to any legal advice in the resignation letter. The Mayor has been gaining further advice regarding the provision of the resignation letter to councillors in response to the concerns raised, with the resignation letter included in the confidential section of the business paper.

ATTACHMENTS

1. CEO Resignation - **Confidential**
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