



Special Council Meeting

Minutes

Wednesday 29 November 2023 – 9:30am

CONFIRMED

MINUTES

Minutes of a meeting of the Busselton City Council held in the Council Chambers, Administration Building, Southern Drive, Busselton, on Wednesday 29 November 2023 at 9:30am.

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1. OFFICIAL OPENING

The meeting opened at 9:30am.

The Presiding Member welcomed Councillors, staff, guests and members of the public to the Special Council Meeting of 29 November 2023.

The Presiding Member acknowledged the Wadandi and Bibbulmun people as the traditional custodians of this region and paid respects to Elders past and present.

The meeting was audio recorded for minute taking purposes.

2. PURPOSE OF MEETING

The purpose of the meeting was to recognise Cr Ryan's statutory right (as per external legal advice) to have already been appointed to the Audit and Risk Committee ('at any given time': *Local Government Act 1995* s5.10) and thus protect the Council by ensuring her full rights of participation in that committee have not been prejudiced by previous Council decisions.

3. ATTENDANCE

PRESIDING MEMBER	MEMBERS
Mayor Phill Cronin	Cr Anne Ryan
	Cr Val Kaigg
	Cr Jodie Richards
	Cr Kate Cox
	Cr Jarrod Kennedy
	Cr Sue Riccelli
	Cr Mikayla Love
	Cr Andrew Macnish

OFFICERS	
Mr Tony Nottle	Chief Executive Officer
Ms Sarah Pierson	Director Corporate Strategy and Performance
Ms Maxine Palmer	Director Economic and Business Development <i>from 9:58am</i>
Mr Ben Whitehill	Manager Legal and Governance
Ms Tegan Robertson	Governance and Risk Coordinator
Ms Jo Barrett-Lennard	Governance Officer

APOLOGIES	
Nil	

LEAVE OF ABSENCE	
Nil	

4. DISCLOSURES OF INTEREST

DISCLOSURES OF FINANCIAL INTEREST

Nil

DISCLOSURES OF IMPARTIALITY INTEREST

Nil

5. PUBLIC QUESTION TIME

QUESTION TIME FOR PUBLIC

Nil

6. PRESENTATIONS BY PARTIES WITH AN INTEREST

Nil

7. CORPORATE STRATEGY AND PERFORMANCE REPORTS

7.1. Committee Appointment - Councillor Anne Ryan

Strategic Theme:	Key Theme 4: Leadership 4.2 Deliver governance systems that facilitate open, ethical and transparent decision making.
Directorate:	Corporate Strategy and Performance
Reporting Officer:	Manager Legal and Governance - Ben Whitehill
Authorised By:	Director of Corporate Strategy and Performance - Sarah Pierson
Nature of Decision:	Executive: Substantial direction setting, including adopting budgets, strategies, plans and policies (excluding local planning policies); funding, donations and sponsorships; reviewing committee recommendations.
Voting Requirements:	Absolute Majority
Disclosures of Interest:	No officers preparing this item have an interest to declare.
Attachments:	1. CONFIDENTIAL - Legal Advice: Appointment of Council members to committees [7.1.1 - 11 pages]

Prior to the meeting, nominations were received for the appointment of elected members to the Audit and Risk Committee. These nominations were confirmed by the Presiding Member before the officer recommendation was considered.

The motion was moved, there was opposition and debate ensued. During debate, Cr Mikayla Love foreshadowed an alternative motion.

The officer recommendation was lost.

SUBSTANTIVE MOTION

C2311/184 Moved Cr Andrew Macnish, seconded Cr Val Kaigg

That the Council, in addition to the elected members appointed at the special meeting on 25 October 2023, appoint Cr Ryan to the Audit and Risk Committee and the following nominating elected members:

Cr Jarrod Kennedy

Cr Val Kaigg

Cr Kate Cox

Cr Mikayla Love

Cr Jodie Richards

LOST 4 / 5

FOR: Cr Anne Ryan, Cr Val Kaigg, Cr Andrew Macnish and Cr Jarrod Kennedy

**AGAINST: Mayor Phill Cronin, Cr Jodie Richards, Cr Mikayla Love,
Cr Kate Cox and Cr Sue Riccelli**

With the officer recommendation being lost, Cr Love moved her alternative motion. There was opposition and debate ensued.

The alternative motion was carried.

COUNCIL DECISION

C2311/185 Moved Cr Mikayla Love, seconded Cr Kate Cox

That the Council:

- 1. In addition to the elected members appointed at the special meeting on 25 October 2023, appoint Cr Ryan to the Audit and Risk Committee and the following nominating elected members:**

Cr Jarrod Kennedy

Cr Val Kaigg

Cr Kate Cox

Cr Mikayla Love

Cr Jodie Richards

- 2. Appoint an independent member position to the Audit and Risk Committee Terms of Reference; and**
- 3. Request the CEO to undertake an expression of interest process for a suitably qualified and experienced independent member and recommend appointment to Council.**

CARRIED 5 / 4

FOR: Mayor Phill Cronin, Cr Jodie Richards, Cr Mikayla Love, Cr Kate Cox and Cr Sue Riccelli

AGAINST: Cr Anne Ryan, Cr Val Kaigg, Cr Andrew Macnish and Cr Jarrod Kennedy

BY ABSOLUTE MAJORITY

Reasons: Council determined that appointing an independent member position to the Audit and Risk Committee Terms of Reference would add to the efficacy of the Committee.

OFFICER RECOMMENDATION

That the Council, in addition to the elected members appointed at the special meeting on 25 October 2023, appoint Cr Ryan to the Audit and Risk Committee and the following nominating elected members:

Enter names

EXECUTIVE SUMMARY

The purpose of this report is to consider matters associated with the appointment of Councillor (Cr) Anne Ryan to a committee of Council specified in section 5.9(2)(a) or (b) of the *Local Government Act 1995*, and specifically the Audit and Risk Committee.

The report recommends the Council appoint Cr Ryan to the Audit and Risk Committee plus (through the re-opening of nominations) any additional nominating elected members it considers appropriate.

STRATEGIC CONTEXT

The finalisation of appointment of members to committees supports the good governance of the district.

BACKGROUND

At 3:07pm on Tuesday 28 November 2023 the CEO, in accordance with s 5.4 of the *Local Government Act 1995* (the Act) received a notice from Crs Macnish, Kennedy and Ryan calling for a special meeting at 9:30am on Wednesday 29 November 2023 (or at a time immediately prior to the resumption of the Audit and Risk Committee meeting).

The proposed purpose of the meeting was specified as follows:

“To recognise Cr Ryan’s statutory right (as per external legal advice) to have already been appointed to the ARC (‘at any given time’: LGAct) and thus protect the Council by ensuring her full rights of participation in that committee has not been prejudiced by previous Council decisions.”

A special meeting to deal with committee appointments (including the Audit and Risk Committee appointments) had originally been called and advertised for 22 November 2023 at 5:30pm and was rescheduled following a request from Cr Ryan to hold the meeting at 4:30pm Wednesday 29 November 2023.

The current call for a special meeting proposes to deal with substantially the same subject matter as the already convened special meeting and the agenda for that meeting includes the relevant background. For ease of reference this has also been provided below. For clarity this current special meeting is additional to the already convened special council meeting for 4.30pm Wednesday 29th November 2023.

At a special meeting on 25 October 2023 the Council appointed elected members to its established committees, after having considered nominations from elected members and undertaking a process of allocating members to committees, including conducting a secret ballot where there were more nominations than committee positions.

The Audit and Risk Committee Terms of Reference (endorsed by the council in July 2023) states that the Council will appoint four elected members to the committee.

The Behaviour Complaints Committee Terms of Reference (endorsed by the council in October 2023) states that the Council will appoint all elected members to the committee.

Councillor Ryan only nominated to be on the Audit and Risk Committee (out of all the s 5.9(2)(a) and (b) committees – discussed further below) but following a secret ballot was not appointed. Mayor Cronin and Crs Macnish, Woodhams and Riccelli were appointed as members to the committee following the secret ballot. Councillor Ryan was not appointed as a member but was appointed as second deputy, with Cr Love as first deputy member.

No councillors were required to formally nominate for the Behaviour Complaints Committee (given the Council's Terms of Reference for that Committee) and Cr Macnish and Ryan expressed concerns about being appointed to a committee they had not nominated for, and in Cr Ryan's case, concerns about not being appointed to the Audit and Risk Committee.

The Council resolved 7-2 (with Councillors Macnish and Ryan voting against) to make the committee appointments, which included the Audit and Risk Committee appointments outlined above as well as appointing all elected members to the Behaviour Complaints Committee, as per its terms of reference.

Since the 25 October 2023 special meeting, Cr Ryan has sought to resign from the Behaviour Complaints Committee, giving notice to the CEO on Friday 3 November 2023.

Assuming Cr Ryan's resignation from the Behaviour Complaints Committee is valid (or if her appointment to the Behavioural Complaints Committee was invalid – see legal opinion attached and discussed in officer comment below) she is no longer a member of a committee comprised of council members only or council members and employees.

Cr Ryan is seeking that she be appointed to the Audit and Risk Committee in accordance with an entitlement under s 5.10(2) of the Act. Section 5.10(2) of the Act states:

At any given time each council member is entitled to be a member of at least one committee referred to in section 5.9(2)(a) or (b) and if a council member nominates himself or herself to be a member of such a committee or committees, the local government is to include that council member in the persons appointed under subsection (1)(a) to at least one of those committees as the local government decides.

The types of committees in s 5.9(2)(a) or (b) of the Act are those that comprise council members only or those that comprise council members and employees. Both the Audit and Risk Committee and Behaviour Complaints Committee are currently committees that comprise council members only.

Officers presented a report to Council at its November Ordinary meeting recommending the following:

That the Council:

- 1. In addition to the elected members appointed at the special meeting on 25 October 2023 appoint the following additional elected members to the Audit and Risk Committee:
enter names*

2. *Appoint one independent position to the Audit and Risk Committee and request the CEO to undertake an expression of interest for a suitably qualified and experienced independent member and recommend an appointment to the Council.*
3. *Request the CEO to provide a further report on the relevance of the Behaviour Complaints Committee.*

The Council considered two alternative motions, the first of which lost 3 / 4 (for / against) and the second of which was put and voted on 4 / 3 (for / against). That motion was in three parts as outlined below:

That the council:

1. *Note the sought legal opinion and in particular its 'Narrow' view of the application of LGA s5.10(2).*
2. *Accordingly, and noting Cr Ryan's previous and still current nomination to the Audit and Risk Committee (ARC), appoint Cr Ryan to the ARC.*
3. *Request the CEO to provide a further report on recommendations to the Council with the following elements;*
 - i) *the relevance of retaining/replacing the BCC;*
 - ii) *the implications of and brief for the attracting and appointment of an independent person to be an additional member of the ARC;*
 - iii) *the relevance and implications for the ARC's Terms of Reference to be recast based on the Local Government Department's Audit Guidelines* and its appended model terms of reference; https://www.dlqsc.wa.gov.au/docs/default-source/local-government/operational-guidelines/operational-guideline-9-the-appointment-function-and-responsibilities-of-audit-committess.pdf?sfvrsn=77bf5a06_1;*
 - iv) *what model options are available to the ARC to assess Risk in the local government governance context;*
 - v) *the Terms of Reference number of positions of the ARC pursuant to the above.*

Parts one and three of the motion required a simple majority – which was achieved. Part two of the motion required an absolute majority – which was not achieved. Part two was therefore put to the Council separately and was again voted 4/3, thereby not achieving the absolute majority requirement.

OFFICER COMMENT

The City has sought external legal advice on the proper interpretation of section 5.10 of the Act as it relates to committee appointments. In particular the City has sought advice on, if an elected member nominates to be on such a committee or committees, and the elected member specifies only one particular committee, is the local government required to appoint the elected member to the particular committee. That advice is attached confidentially at Attachment 1.

At issue is what is meant by the Council's obligation to 'appoint a council member to at least one of those committees as the [Council] decides'.

In particular, is the reference to ‘one of those committees’ intended to mean:

1. a ‘committee referred to in section 5.9(2)(a) or (b)’ as referred to in the first limb of section 5.10(2) (**Wider Interpretation**); or
2. ‘a committee or committees’ to which the Council member nominates himself or herself to be a member (as referred to in the second limb of section 5.10(2)) (**Narrower Interpretation**)?

The external legal advice acknowledges that the terms of s 5.10(2) of the Act are ambiguous and open to both interpretations. However, the advice concludes that the more prudent approach may be to adopt the Narrow Interpretation.

It is somewhat unclear from the Council’s decision on 15 November which interpretation of the advice Council has accepted. The decision, and specifically not appointing Cr Ryan to the Audit and Risk Committee (through non-achievement of the absolute majority requirement), aligns with the Wider Interpretation, although Council has noted the legal advice and its ‘Narrow’ view at part one of the decision. At part three of the decision Council has also resolved to request the CEO to provide a further report to the Council including on the relevance of retaining / replacing the Behaviour Complaints Committee. It is not clear however whether Council is of the view that the previous appointments to the Behaviour Complaints Committee are valid, and if so, Cr Ryan’s resignation must be considered.

The officer report to the 15 November Council meeting leaned, for pragmatic reasons, to adoption of the Narrow Interpretation, and therefore recommended the appointment of Cr Ryan to the Audit and Risk Committee. In leaning to the Narrow Interpretation, officers also took the view that the previous appointments to the Behaviour Complaints Committee were potentially invalid, and therefore did not specifically deal with the matter of Cr Ryan’s resignation. If Council were to take the Wider Interpretation, that is, that the Council can appoint a member to any one of the committees specified at 5.9(2) (a) or (b), it would also need to consider (as per the legal advice) Cr Ryan’s request to be removed from the Behaviour Complaints Committee.

As noted above, while acknowledging both interpretations remain open, officers believe there remains uncertainty around the validity of Cr Ryan’s appointment to the Behaviour Complaints Committee, and whether Cr Ryan is currently appointed to a committee. To resolve the uncertainty, and in the interests of good governance, officers recommend that the Council appoint Cr Ryan to the Audit and Risk Committee.

As it is the Council’s role to determine the composition of its committees, officers also recommend that nominations are reopened for the Audit and Risk Committee, and that the Council determine which Council members (if any), beyond Cr Ryan and those Council members already appointed, are to be appointed to the Audit and Risk Committee. Officers believe it is appropriate to offer all councillors the opportunity to renominate for ARC, noting it was a committee subject to a ballot. With knowledge of the Narrow Interpretation of the legal advice, other councillors who were unsuccessful in the ballot process may also have sought to nominate for only the ARC.

Statutory Environment

Part 5 Division 2 Sub-division 2 of the *Local Government Act 1995* (WA) deals with committees and their meetings.

Section 5.8 deals with establishment of committees:

A local government may establish committees of 3 or more persons to assist the council and to exercise the powers and discharge the duties of the local government that can be delegated to committees.*

** by absolute majority*

Section 5.9 deals with the types of committees:

- (1) *In this section — other person means a person who is not a council member or an employee.*
- (2) *A committee is to comprise —*
 - (a) council members only; or*
 - (b) council members and employees; or*
 - (c) council members, employees and other persons; or*
 - (d) council members and other persons; or*
 - (e) employees and other persons; or*
 - (f) other persons only.*

Section 5.10 of the Act deals with the appointment of committee members.

- (1) *A committee is to have as its members —*
 - (a) persons appointed* by the local government to be members of the committee (other than those referred to in paragraph (b)); and*
 - (b) persons who are appointed to be members of the committee under subsection (4) or (5).*

** by absolute majority*

- (2) *At any given time each council member is entitled to be a member of at least one committee referred to in section 5.9(2)(a) or (b) and if a council member nominates himself or herself to be a member of such a committee or committees, the local government is to include that council member in the persons appointed under subsection (1)(a) to at least one of those committees as the local government decides.*

Relevant Plans and Policies

The officer recommendation aligns to the following adopted plan or policy:

Plan:

Not applicable.

Policy:

Not applicable.

Financial Implications

Not Applicable

External Stakeholder Consultation

Not Applicable

Risk Assessment

An assessment of the potential implications of implementing the officer recommendation has been undertaken using the City’s risk management framework, with risks assessed taking into account any controls already in place.

No risks of a medium or greater level have been identified.

Options

As an alternative to the proposed recommendation the Council could:

1. formally resolve to take the Wider Interpretation and, as opposed to appointing Cr Ryan to the Audit and Risk Committee, appoint Cr Ryan to one of the committees referenced as 5.9(2)(a) and (b) or consider her to be appointed to the Behaviour Complaints Committee.
2. appoint an independent member position to the Audit and Risk Committee Terms of Reference, with that committee then becoming a committee referenced at 5.9(2)(d), not 5.9(2)(a) or (b). As a consequence, the Audit and Risk Committee would become a committee to which s 5.10(2) of the Act would no longer apply (s 5.10(2) only applies to committees that comprise council members only or those that comprise council members and employees). This means that the entitlement provided to Cr Ryan under the Narrow Interpretation would cease to exist for the Audit and Risk Committee.

CONCLUSION

The officer recommendation is consistent with the external legal advice received and will ensure the good governance of the district.

TIMELINE FOR IMPLEMENTATION OF OFFICER RECOMMENDATION

The officer recommendation will be implemented in full, or in stages as per the following table:

Milestone	Completion Date
Appointment of new Council members to Audit and Risk Committee	29 November 2023

8. CONFIDENTIAL MATTERS

Nil

9. CLOSURE

The meeting was closed at 10.11am.

The minutes of the Special Council Meeting held on 29 November 2023 at 9:30am were confirmed as a true and correct record on 13 December 2023.

Date: 13.12.23

Presiding Member:

A handwritten signature in blue ink, consisting of a large, stylized initial 'C' followed by a horizontal line extending to the right.

Special Council Meeting
Minutes

Wednesday 29 November 2023 9:30am