

**IN AN INTERNAL ARBITRATION PROCESS
FOR MORNINGTON PENINSULA SHIRE COUNCIL
UNDER SECTION 143 OF THE *LOCAL GOVERNMENT ACT 2020***

LGA IAP REF: IAP 2025-19
APPLICANTS: Crs David Gill (representative), Kate Roper, Max Patton, Michael Stephens, Patrick Binyon
RESPONDENT: Cr Anthony Marsh
TYPE OF HEARING: On the papers
BEFORE: Arbitrator J Silver
DATE: 1 December 2025

FINDINGS:

1. The application is dismissed.

STATEMENT OF REASONS

1. This application (allocated reference number IAP 2025-19) was made on about 27 August 2025, and on 30 September 2025, the Principal Councillor Conduct Registrar appointed me to hear the application.
2. With the parties' agreement, I determined this application "on the papers", through considering the parties' positions and evidence in writing, without an in-person hearing. The facts were all matters of public record not requiring further evidence, being past Council decisions, what was proposed in motions, and what was said in video recordings, in which regard I received some assistance from the Councillor Conduct Officer in locating the relevant Council documents and materials.
3. I have considered the parties' material in drawing these reasons. However, they ended up being of limited assistance, in what proved to be a rather complex exercise in statutory construction.
4. In the Mornington Peninsula Shire Governance Rules (adopted on 24 August 2021), sub-clause 22(1), titled 'Revocation and Amendment' provides as follows–

Motions to revoke or amend a resolution can be made in the following ways:

- (a) *By Notice of Motion signed by at least two Councillors, including one Councillor who previously supported the resolution and lodged with the Chief Executive Officer; or*
- (b) *By recommendation contained in an Officer's report included on the agenda.*

The operation of the clause can be suspended by a suspension of standing orders under clause 33, meaning a subsequent majority of Councillors can still overturn a resolution in the absence of original supporters.

5. Under sub-clause 22(4), a revocation or amendment "*must be included on the agenda of the Meeting at which it is to be considered*", such that even if there is a failure to comply with sub-clause 22(1), for example, because only one Councillor has signed it, the motion must be included on the agenda despite the apparent non-compliance. In

other words, the question of compliance with sub-clause 22(1) is to be dealt with at the Council Meeting, not in the settling or finalisation of the agenda.

6. In addition, while the Chief Executive Officer must reject notices of motion on certain grounds under clause 21, because sub-clause 22(4) states that a notice involving revocation or amendment "must be included" on the agenda, the Chief Executive Officer cannot reject it. This means the validity of the motions is for the Chairperson to decide (unlike other motions, where the Chairperson and the Chief Executive Officer have overlapping powers under clauses 16 and 21).
7. The practical utility of such arrangements for notices of revocation or amendment are that once a Council decision is made, its opponents cannot keep agitating the matter without having a real prospect of the Council making a different decision. The alternative is that motions doomed to fail could nevertheless be brought repeatedly, and either fail, or would have to be "gagged" repeatedly by the majority: either alternative exercise is an arguably poor use of the Council's time and resources.
8. While I have not conducted a survey, I suspect these clauses are not unique to Mornington, and may also appear in the Governance Rules of other Councils.
9. Clause 22 doubtless allows for differing opinions about the effect of a notice (ie. different readers might disagree if its effect is to "revoke" or "amend"), noting again that if a majority of Councillors disagree with the interpretation of a motion, a suspension of standing orders can remedy the issue and allow it to proceed.
10. In my view, this means that notices of motion worded to avoid the operation of clause 22 on a technical reading, by not seeking to directly revoke or amend a decision (instead involving what might be called "precursor steps"), might nevertheless be interpreted (validly) as having that effect.
11. On the agenda for the Council Meeting of 3 June 2025, Item 5.2 listed that Cr David Gill had given a notice of his intention to move a motion (numbered **485**) as follows:

Climate Change

That Council:

- (1) *Urgently develops in-house a new plan to ensure the continuation of locally focused, practical and measurable climate resilience and mitigation projects on the Mornington Peninsula.*
- (2) *Invites our community to contribute to the plan.*

12. Further, on the agenda for the Council Meeting of 17 June 2025, Items 5.1 and 5.2 listed that Cr Max Paton had given notice of intention to move two motions (numbered **490** and **491** respectively) as follows:

Arts and Culture

That Council:

1. *Recognises the value of arts and culture in fostering community wellbeing, local identity, and economic investment on the Mornington Peninsula.*
2. *Requests that a report be brought back to Council outlining:*
 - A. *Consultation undertaken with community and arts and culture stakeholder groups prior to changes to Community Investment Funding (CIF), endorsed by Council in May 2025.*
 - B. *The impact that the removal of the Performing Arts Grant and Creative Grants will have on the delivery of the Arts and Culture Strategy and the Music Plan.*
 - C. *The funding gap between budgeted resourcing and the successful delivery of the Arts and Culture Strategy, Music Plan and Council Plan.*
 - D. *A high-level analysis of operational and capital investment in the arts compared to similar councils.*
3. *Requests that a report be brought back to Council outlining:*
 - A. *Consultation undertaken with First Nations stakeholder groups prior to changes to CIF, endorsed by Council in May 2025.*
 - B. *The impact of the removal of Aboriginal and Torres Strait Islander (ATSI) inclusion organisation subsidy on the delivery of ATSI inclusion programs on the Peninsula.*

- C. *The impact of the removal of ATSI inclusion organisation subsidy on First Nations relations and delivery of the Council's Reconciliation Action Plan (RAP) and related, adopted Council Plans and Strategies.*
- 4. *Requests that a report be brought back to Council outlining:*
 - A. *The level of consultation with the Dolphin Research Institute, and Repower prior to changes to the CIF, endorsed by Council in May 2025*
 - B. *The impact of the removal of subsidies related to these organisations will have on Council Plan objectives and adopted Council Plans and Strategies.*
- 5. *That these reports be brought to Council in September.*

Climate Change

That Council:

- 1. *Acknowledges the significant level of community engagement and concern expressed in relation to recent decisions regarding the Climate Emergency Declaration and Climate Emergency Plan.*
- 2. *Acknowledges the immense, unique challenges that changes in the climate will bring to the Mornington Peninsula and the need to ensure the community is adequately informed and prepared.*
- 3. *Commits to meaningful, comprehensive community engagement with the Mornington Peninsula community about Council's future role in supporting climate resilience, hazard adaption and emissions reduction, consistent with its obligations under the Local Government Act 2020, Climate Change Act 2017, and Public Health and Wellbeing Act 2008.*
- 4. *Requests that officers deliver a community engagement process, commencing as soon as possible, that seeks to:*
 - A. *Inform the community of Council's mandated role in Climate Action*
 - B. *Capture community sentiment, expectations and priorities regarding climate action*
 - C. *Identify the programs, partnerships and approaches residents believe Council should prioritise*
 - D. *Provide opportunities for feedback across diverse cohorts, including youth, business, agriculture, coastal groups and community organisations.*
- 5. *Requests that a report be brought back to Council in October 2025, outlining:*

- A. Outcomes from community engagement.*
- B. High-level analysis of climate response measures in similar councils (coastal, agricultural).*
- C. Forecasted impacts on the community highlighted in existing Government reports or data and Council strategies and plans - i.e. Our Coast, Our Future, Port Phillip Bay Coastal Hazard Assessment, Council Health and Wellbeing Data.*
- D. Recommended pathways to respond to the challenges and opportunities identified in 5A, 5B, and 5C.*

13. While couched in terms of being a request for a report, on my reading, Motions 485 and 491 sought to re-agitate Council's 22 April 2025 decision to discontinue its Climate Emergency Declaration and associated Climate Emergency Plan.

14. Motion 490 sought to re-agitate Council's decision, earlier in the same meeting on 17 June 2025, as part of the adoption of the annual budget (being Amendment E), to refer to the mid-year budget for consideration of the allocation of surplus funds to Arts and Culture creative grants, the Willum Warrain reconciliation program, and the Dolphin Research Institute education program. The proposed reports that Motion 490 called for, on my reading, sought information that effectively challenged the decision that had just been made.

15. The respondent, who is the Mayor of the Council and was acting as the Chairperson of the Council Meeting within the meaning of the Governance Rules, ruled each of the motions out of order, with reference to clause 16 of the Governance Rules.

16. Clause 16, titled 'The Chairperson's Duties and Discretions', provides—

In addition to the other duties and discretions as provided in these Governance Rules, the Chairperson:

- (a) must not accept any motion which is:*
 - i. vague or ambiguous; or*
 - ii. outside the powers of Council.*
- (b) must not accept any motion, question or statement which is:*

- i. *defamatory, malicious, abusive or objectionable in language or in substance; or*
- ii. *outside the powers of Council.*

...

- (f) must decide on all points of order.*

To avoid doubt, while it is helpful for a Chairperson to identify the source of the power on which they rely, such statements do not empower. The Governance Rules either give a power to act, or they don't. If the Chairperson acts, then they are acting pursuant to that power, whatever they might say.

17. Following each motion being ruled out of order, Cr Gill (on 3 June) and Cr Paton (on 17 June) sought to move a dissent motion, and the Chairperson also ruled those motions out of order.

18. The Governance Rules define "motion of dissent" in clause 31:

- (1) Where these Governance Rules do not provide guidance on a matter before a Meeting, the Chairperson shall decide the procedure to be followed unless a Motion of Dissent is carried in which case the procedure to be followed will be decided by the Meeting.*
- (2) When deciding the procedure to be followed the Chairperson must observe the requirements to be open, fair and transparent as stated in rule 1 of these Governance Rules.*

19. Because the Chairperson did not purport to decide a matter of procedure in ruling the notions of motion out of order, a motion of dissent was not the correct motion to move (as opposed to a suspension of standing orders under clause 33).

20. In considering the application, it seemed unusual to me that, despite their clear intention, neither of clause 16 or clause 22 appeared to empower the Chairperson to rule out non-compliant revocation motions. Without such a power, the Chairperson would instead have to rule out motions under clause 31 on a general question of procedure. Compliance with clause 22 is not a matter of general procedure.

21. In a strict legal sense, the Governance Rules are not the source of a Council's power, as such, a motion not permitted by the Governance Rules is not "outside the powers of Council": even the most careless drafter cannot mean anything by that other than the motion must be within a Council's powers conferred by Parliament, rather than a Council's powers as limited or regulated by the Council itself.
22. However, Governance Rules are not a Council policy, rather (at least when dealing with the matters that Parliament has specified), they are a form of subordinate legislation which Councils are permitted and required by Parliament to make under section 60 of the *Local Government Act 2020*.
23. This means the rules for interpreting a Council's Governance Rules are the ordinary rules of statutory construction.
24. In interpreting a statutory instrument, words can be read into the instrument where certain criteria are met, namely, that the instrument was intended to deal with a matter, that the intention has not been fulfilled in the drafting of the instrument, that the missing words that would have been used can be stated with some certainty in the event that the legislature (or in this case, the Council) were made aware of the omission, and the modified construction must be open and conformant with the rest of the instrument.¹
25. Reading the Governance Rules in full, and considering their purpose, I am satisfied that clause 16 includes the power to rule out motions that do not comply with clause 22. It is clear from the absence of an express power in clause 22 to rule out non-compliant motions that clause 16 was intended to be the means of doing so, but due to inadvertence in drafting, or perhaps a misunderstanding of what "the powers of a Council" means, no specific power was included.

¹ See *Director of Public Prosecutions (DPP) v Leys* (2012) 44 VR 1, 38-9 (The Court); *Joybay Pty Ltd & Anor: in the matter of an Application under Section 68 of the Domestic Building Contracts Act 1995 (Vic)* [2019] VSC 620, [57] (Daly AsJ)

26. I accordingly read sub-clause 16(1)(a)(ii) of the Governance Rules as providing, *inter alia*, that ‘the Chairperson must not accept any motion which is outside the powers of Council or has not met a requirement of the Governance Rules.’ These words would likely also be found in sub-clauses 16(1)(b)(ii) and 21(5)(b), however, that issue does not arise in this application, so I do not consider it.

27. That brings me to the application itself.

28. The thrust of the application is that the respondent breached clause 3 of the Model Councillor Code of Conduct (‘**Model Code**’), which provides—

3. Good governance

A Councillor must comply with the following Council policies and procedures required for delivering good governance for the benefit and wellbeing of the municipal community—

- (b) the Council's Governance Rules developed, adopted and kept in force by the Council under section 60 of the Act, including in relation to—
 - (i) conduct in Council meetings or meetings of delegated committees; and

Before the Model Code was adopted, the former standards of conduct in schedule 1 of the *Local Government Regulations (Governance and Integrity)* Regulations 2020, at sub-standard 3(c), provided as follows:

3. Compliance with good governance measures

A Councillor, in performing the role of a Councillor, to ensure the good governance of the Council, must diligently and properly comply with the following—

- (c) the Governance Rules developed, adopted and kept in force by the Council under section 60 of the Act...

29. Clause 3 of the Model Code is arguably stricter than its predecessor, in that the standard of compliance is no longer that a Councillor must ‘*diligently and properly comply*’, rather, they seem ‘*must comply*’.

30. The applicants allege that, by ruling their motions out of order, and declining to hear their dissent motions, the respondent breached clause 3, as well as sub-clauses 2(1), 4(1)(a) and (b), the later of which I posit the applicants argue apply to a Chairperson in conducting meetings, such that the Chairperson must interpret the Governance Rules having regard to those other clauses in the Model Code.
31. Because the Governance Rules and the Model Code are two different instruments, the latter has no bearing on the meaning of the former, in particular, to how a Chairperson exercises their discretion while chairing a Council Meeting, such that the allegations under sub-clauses 2(1), 4(1)(a) and (b) fail.
32. Nor am I satisfied that the respondent failed to comply with the Governance Rules in breach of clause 3 of the Model Code: to the contrary, given my interpretation of the Governance Rules, I am satisfied that he acted within power, and that none of the three motions qualified for consideration.
33. I accordingly dismiss the application.

J A SILVER

ARBITER