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# Recording and Publishing Council Meetings

## Risk Management and Insurance Implications

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The MAV encourage councils to maintain a publicly accessible audio archive of council meetings, in order to provide a fuller public record of proceedings than can be made available in addition to formal written minutes. As with any new business activity, however, there are risk considerations that should be assessed prior to councils confirming what (if any) approach to recording and publishing council meetings is the most appropriate for that council.

The purpose of this guidance document is to:

- Clarify the MAV Insurance Liability Mutual Insurance (“LMI”) scheme’s position regarding public liability insurance coverage for webcasting and audio recordings
- Identify some of the risks associated with webcasting and/or audio recordings
- Provide risk management recommendations to assist councils in making an informed decision when considering whether / how to record and publish their council meetings online

## Benefits of Recording & Publishing Council Meetings

Webcasting and audio recording is recognized as promoting and improving the democratic process at the local Council level. Other benefits to Councils are:

- Improved accessibility of Council meetings to residents
- Improved participation and interaction in Council meetings
- Improved communication to residents of Councils’ forthcoming plans and projects
- Improved transparency in the decision making process of Council
- Providing a complement to formal minutes
- Maintaining a more detailed historical record of meetings than formal minutes alone will offer

## Identified Risks

Public Council meetings are an open forum of statements, questions and answers. Occasionally, some things that are said may be regarded as offensive, defamatory or contrary to law.

When such statements occur during a meeting that is not recorded, the potential for damage is generally confined to the audience in attendance. In contrast, when a recording of a meeting is published the audience is potentially far greater, increasing the likelihood and/or severity of potential liability. Additionally, whilst the council may not be

liable for any defamatory comments made by an individual at a meeting, it may be liable if it publishes that material. Outlined below are some of the risks associated with webcasting and audio recording, including defamation. Councils will note that the risks identified generally relate to the content of the meeting and the legal effect of publishing the content over the internet or making that material available in any other way.

## Defamation

- Council may be liable for defamatory statements made by Councillors during a Council meeting. Council's liability risk is increased if the meeting is recorded and published online or made available to the public. In that case it may be liable for defamatory statements made by Councillors or members of the public, as it has published those comments.
- Defamation occurs when statements are made and published about a person, which causes injury to that person's reputation by:
  - Disparaging them
  - Causing others to shun or avoid them, or
  - Subjecting them to hatred, ridicule or contempt
- A defamatory statement can be in written form, or in verbal form.
- Scheme members should be aware of the provisions of the *Defamation Act 2005 (Vic)* and the *Defamation Act 2005 (Tas)*, which will apply in addition to the common law position stated above.

## Infringement of Copyright

- A copyright owner has certain exclusive rights over their work. . The copyright owner has the exclusive right to reproduce the work in a material form, publish it, perform it in public, communicate it to the public, or make any adaptation of it.
- Infringement of copyright occurs when a person uses copyright material without the consent of the owner and the use contravenes one or more of the 'exclusive rights' of the owner
- If someone at a Council meeting reads material subject to copyright, without the consent of the copyright owner, the person may have violated the copyright owner's exclusive right to reproduce the material. The council may breach the person's exclusive right to the material, if the material is published as a webcast or audio recording.

## Breach of Privacy / Disclosure of Personal Information

- Councils are required to comply with their state's privacy principles:
  - In Victoria the Information Privacy Principles are contained within Schedule 1 of the *Privacy Data and Protection Act 2014 (Vic)*
  - In Tasmania the Personal Information Protection Principles are contained within Schedule 1 of the *Personal Information and Protection Act 2004 (Tas)*.

Councils may be liable for breach of the privacy principles if Councillors or Council Officers are found to have used or disclosed personal, health or sensitive information about individuals during a Council meeting, and that information is made public.

### **Publishing of Offensive Material**

- Council may be liable for an offence under:
  - The *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)*
  - The *Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tas)*, or
  - Commonwealth legislation

If it publishes content through a webcast or audio recording relating to sex, drugs, violence or revolting or abhorrent phenomena, which is likely to cause offence to a reasonable person.

- Council should seek independent legal advice if in doubt of the appropriateness of the content of a council meeting prior to making it digitally available.
- Deliberately publishing offensive material with the intention to cause harm may be uninsured under LMI.

### **Offensive behaviour on basis of race, colour or national or ethnic origin**

- Under section 18C of the *Racial Discrimination Act 1975 (Cth)*, it is unlawful for a person to do an act, otherwise than in private that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people and the act is done because of race, colour or national or ethnic origin of the other person or group of people.
- An act is taken not to be done in private if it causes the words, sounds, images or writing to be communicated to the public. Therefore, this may include councils publishing material that falls within this area.
- There are exemptions to this provision under 18D of the Act, which include making or publishing a fair and accurate record of any event or matter of public interest. However, it is arguable whether this will apply, as the council may not be considered to be reporting on the event but rather publishing it to the public. Accordingly, it is recommended councils seek legal advice before publishing such material.
- Deliberately publishing offensive behaviour with the intention to cause harm may be uninsured under LMI.

### **Vilification or inciting hatred**

#### **Victoria only**

- In Victoria, councils may be liable if they publish material that vilifies groups on religious or racial grounds under the *Racial and Religious Tolerance Act 2001 (Vic)*.
- Behaviour that could be seen as vilification includes:
  - Speaking about a person's race or religion in a way that could make other people hate or ridicule them

- Publishing claims that a racial or religious group is involved in serious crimes without any proof
- Repeated and serious spoken or physical abuse about the race or religion of another person
- Encouraging violence against people who belong to a particular race or religion, or damaging their property
- Encouraging people to hate a racial or religious group using flyers, stickers, posters, a speech or publication, or using websites or email

### **Tasmania only**

- In Tasmania the *Anti-Discrimination Act 1998 (Tas)* prohibits a person by public act from inciting hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the grounds of:
  - Race
  - Being a member of any group
  - Disability
  - Sexual orientation
  - Lawful sexual activity, or
  - Religious belief / affiliation

### **General**

- At the federal level, under section 85ZE of the *Crimes Act 1914 (Cth)* it is an offence to use the Internet intentionally to disseminate material that results in a person being menaced or harassed. Federal criminal law, therefore, is available to address racial vilification where the element of threat or harassment is also present, although it does not apply to material that merely causes offence.
- Deliberately publishing material that:
  - Vilifies groups on religious or racial grounds
  - Results in a people being menaced or harassed, or
  - Incites hatred

May be uninsured under the LMI policy.

### Confidential or privileged council information

- Some material, including current litigation will be discussed at closed council meetings, rather than in an open forum. The council should record minutes that it has discussed this issue, without disclosing the material which is confidential or privileged.
- In Tasmania there is specific provision under Regulation 34 of the *Local Government (meeting procedures) Regulations 2005 (Tas)*, as to the recording of minutes of closed meetings.
- To ensure that this confidential and/or privileged material is not disclosed, it is recommended that those confidential parts of meetings which are not held in public not be audio or visually recorded.

### Conflict of Interest

- Comments made by Councillors and Officers during meetings may be perceived as a conflict of interest, and the recording of such comments has the potential to increase their influence / impact. Among other consequences, such conflicts of interest may result in loss of income to third parties if the comments create an unfair advantage to a particular organisation.
- It is recommended that councils consider the removal of any statements which may be perceived as a conflict of interest from any recording, before it is made available publically.

## Insurance Options

### Insurance – MAV Insurance Liability Mutual Insurance

The LMI policy provides coverage in relation to ‘libel and slander’ and ‘advertising’. Councils will be covered for any defamatory ‘publication’ that occurs as a result of webcasting / audio recordings, subject to the full terms and conditions of the LMI policy. The policy would, for example, cover the Council’s liability for inadvertently webcasting a deliberate, malicious defamatory comment; however the councillor or officer knowingly making a deliberate, malicious statement would not be covered.

Please see the following "Libel and Slander" Extension No. 5 in the current LMI liability policy wording:

#### **5 LIBEL AND SLANDER**

Notwithstanding exclusion 10, this policy shall indemnify The Insured against any claim or claims first made against The Insured, and notified to the Association, during the insurance year arising out of the publication or utterance of a libel or slander or infringement of copyright, title, slogan, patent and design by The Insured, except any such publication or utterance of a libel or slander which is made by, or at the direction of, The Insured with The Insured’s knowledge of the falsity thereof.

- Coverage is also subject to existing policy conditions, in particular council demonstrating it acted with ‘reasonable care’. As mentioned previously, LMI is of the view that deliberately publishing:
  - Offensive material with the intention to cause harm
  - Material that vilifies groups on religious or racial grounds
  - Material that results in people being menaced or harassed, or

- Material that incites hatred

Falls outside the LMI policy wording, and therefore is not covered.

### **Insurance – Other**

In view of the LMI policy not covering Councillors for defamatory statements knowingly made during a Council meeting, Councils should ensure Councillors are adequately covered for defamation under another policy, such as a Councillors and Officers policy.

## **Risk Management Control Strategies**

### **Risk Assessment**

Prior to making a decision about publishing recordings or webcasting council meetings, councils should conduct a risk assessment to identify risks and determine appropriate controls. The risk assessment should be performed in consultation with experienced staff and/or experts in such areas as IT. LMI recommends where necessary, suitably qualified lawyers, may also be of assistance.

### **Resources / Community Response**

Councils should determine whether it has adequate resources for both the initial and ongoing costs associated with recording and publishing council meetings. Initial costs include the purchase of recording equipment (e.g. cameras, microphones, encoder etc.). Ongoing costs are associated with employing staff to operate the equipment and monitoring the content of the recording.

Councils should also consult with stakeholders to gauge the response to online access to Council meetings. If a decision is made in the affirmative, delegate responsibilities, allocate resources etc.

### **Policy & Procedure**

Prior to commencing online publishing of council meetings, Councils should have a detailed *policy and procedure* in place. The policy should outline how Council will manage the use of webcasting / audio recordings. Procedures should provide technical guidance for recording or conducting a webcast and include processes for reducing the associated risks.

These documents should be developed in consultation with experienced staff and/or relevant experts. Training should be provided to all relevant Council staff to ensure awareness and understanding of the policy provisions. The policy & procedure should consider:

- **Live or delayed publishing**

Most of the risks of webcasting can be eliminated or certainly reduced by monitoring the content of the webcast and editing the content where required. LMI recommends that councils pre-record the meetings and ensure the recording is thoroughly reviewed and signed off by an authorised member of Council before the webcast / audio record is made publicly available.

For those councils which prefer to broadcast meetings live or only with a short delay, it is important that a procedure is followed for the identification and treatment of problematic content (e.g. termination of webcast). Council's decision to pre-record or broadcast live should take into consideration the level of risk exposure Council is willing to retain.

Council will need to consider whether the webcast / audio recording will be made available for download at a later date, or will only be accessible via the website as a live broadcast. Both scenarios present risks:

- A downloadable file can be viewed several times and may reach a greater audience than a live broadcast, thus increasing the potential of a claim arising. In comparison,
- Defamatory content or other content that is problematic is more likely to be found in a live broadcast which has undergone little or no editing than a pre-recorded (downloadable) webcast / audio recording.

- **Attendees consent**

Councils should ensure members of the public attending the council meeting are notified of the fact that the meeting is being recorded and will be published online. They should advise that those who do not wish for their words or image to be recorded and/or published should contact a relevant contact council officer, and advise of their wishes. There should be a nominated person and procedure put in place for this occurrence.

- **Conflict of Interests**

While councils should have existing policies in place in relation to Conflicts of Interest, it may be worthwhile for councils to include guidance in relation to conflicts of interest within the policy / procedure for recording and publishing council meetings.

## **Disclaimer**

Councils may consider accompanying the online content with a disclaimer. A disclaimer provides councils with some limited protection from liability. Generally, a disclaimer will include words to the effect that the opinions or statements made during the course of the Council meeting are those of the particular individual, and not the opinions or statements of council.

The disclaimer can be included as part of the broadcast, or separately as a link on the webpage prior to opening the link to the meeting recording. Councils should seek independent legal advice on the appropriate wording of a disclaimer, to ensure that it meets the council's specific requirements.

## **Formal Minutes**

### **Victoria only**

Victorian councils are required under Section 93 of the *Local Government Act 1989 (Vic)* to keep minutes of each meeting of council. Therefore, the council must ensure that it keeps formal minutes in addition to any recording of meetings.

## **Tasmania only**

In Tasmania, Regulation 32 of the *Local Government (Meeting Procedures) Regulations 2005 (Tas)* requires that the council meet certain criteria in relation to the taking of minutes of meetings. These are subject to Regulation 34(1), which applies to closed council meetings. Accordingly, councils must ensure that they comply with this requirement to keep minutes in addition to any recording of meetings.

Tasmania has specific provisions in relation to audio recordings of council meetings under Regulation 33. These include that the council may determine that an audio recording be made of any meeting or part of a meeting.

If the council determines to make an audio recording, the recording of the meeting or part of meeting that is not closed to the public is to be:

- Retained for at least six months; and
- Made available for listening on written request by a person.

Under Regulation 33(3) the minutes of a meeting once confirmed will prevail over any audio recording

Under Regulation 33(4) a council may determine any other procedures relating to audio recording of meetings it considers appropriate.

For more information, please contact MAV Insurance Liability Mutual Insurance:

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