

Council and Committee E-meetings State Emergency

By Peter Wittkuhn

With the advent of the COVID-19 pandemic, and the implementation of social distancing requirements, amendments to the Local Government (Administration) Regulations 1996 have been made to enable the mayor, president or council of a local government to authorise a council or committee meeting to be held by electronic means (**e-meeting**). The amendments similarly enable an individual council or committee member to participate by electronic means if so authorised by the mayor, president or council.

There is even a plausible basis for suggesting that the only form of council or committee meeting that can lawfully proceed at this time, is an e-meeting.

This update examines the pre-requisites for the convening of e-meetings, both in terms of the underlying justifying circumstances that are legally required, and also the necessary authorisation process to enable e-meetings to occur. It is observed that both of two alternative underlying justifying circumstances – a ‘public health emergency’ and a ‘state of emergency’ within the meaning of legislation – are in place at the time of issuing this update. It is plausible to suggest that a third alternative justifying circumstance – that a direction is in place that prevents a meeting from being held in person – also currently pertains, and this update discusses that possible interpretation.

Amendments to the Local Government (Administration) Regulations 1996 have been made to enable the mayor, president or council of a local government to authorise a council or committee meeting to be held by electronic means

The procedural modifications relevant to giving notice of e-meetings, associated documentation, attendance and public participation are also overviewed.

Local Government Act 1995, s. 5.25

Section 5.25(1) of the Local Government Act 1995 (**LG Act**), lists, non-exhaustively, matters as to which regulations may be made concerning council and committee meetings. One of those matters, listed in paragraph (ba), is: ‘the holding of council or committee meetings by telephone, video conference or other electronic means’. (Underlining added).

Section 5.25(2) provides that regulations providing for e-meetings may modify the application of the LG Act in relation to those meetings to the extent necessary or convenient to facilitate the holding of those meetings in that way.

Section 5.25 has been in its current form since 1998, however, the opportunity was only taken up in March 2020 to promulgate regulations to make provision for e-meetings. It has been possible since 2005 for individual members of council or a committee to attend in some circumstances by electronic means (see Regulations 14A and 14B of the Local Government (Administration) Regulations 1996), but not for entire meetings to be conducted electronically.

Local Government (Administration) Regulations 1996 (Administration Regulations), Regulations 14C and 14D

Regulations 14C and 14D were added to the Administration Regulations by gazettal on 25 March, and took effect on 26 March 2020.

Regulation 14C supplements pre-existing Regulation 14A and 14B in that it provides for additional circumstances under which individual council or committee members may participate electronically in meetings which are otherwise being held in person.

Regulation 14D provides, for the first time, for meetings to be conducted entirely electronically, that is, it authorises e-meetings.

Regulations 14C and 14D each have pre-requisites. These pre-requisites can be classed as being of two types:

- firstly, what might be called the **'justifying circumstances prerequisite'**; and
- secondly, what might be called the **'authorisation pre-requisite'**.

It is convenient to first discuss how these two types of pre-requisites operate in respect of Regulation 14D (the holding of meetings entirely by electronic means), before discussing Regulation 14C (participation by individual members by electronic means).

The 'justifying circumstances pre-requisites' for holding meetings entirely by electronic means: Regulation 14D

There are three alternative 'justifying circumstance pre-requisites':

(i) that a 'public health emergency' is in place; or

(ii) that a 'state of emergency' is in place; or

(iii) that a direction is in place under the Public Health Act 2016 or the Emergency Management Act 2005 that prevents the meeting from being held in person.

The third of these is different in its effect from the first two. If and so long as the third circumstance is in place, the only options for local governments would be to suspend council and committee meetings OR to conduct e-meetings. If on the other hand, the third circumstance does not apply, but either of the first two do apply, then local governments have the legal option (at any rate from a LG Act compliance point of view) to continue in-person council and committee meetings OR to proceed to e-meetings.

It can be said at the outset that each of the first two 'justifying circumstance pre-requisites' exists as at the time of issue of this publication: see further below.

The question of whether the third justifying circumstance pre-requisite exists is a more difficult question and will also be discussed below. It should be noted that it is far from universal practice at present among local governments, to undertake

e-meetings. Some local governments presently intend to continue undertaking in-person meetings with additional social distancing measures in place.

The ‘authorisation pre-requisite’ for holding meetings entirely by electronic means: Regulation 14D

The mere existence of one or more ‘justifying circumstance pre-requisites’ is insufficient in itself to enable meetings to lawfully occur. There must in addition be what is referred to in this publication as an ‘authorisation prerequisite’.

In the case of reliance on a public health emergency or a ‘state of emergency’ being in place, the mayor, president or council of the local government needs to ‘consider[...] it appropriate for the meeting to be held by electronic means’. Local governments may require assistance as to what form of documentation might be appropriate to record the relevant state of mind on the part of the mayor or president in this regard. Issues could also arise as to how the council might form, and document, that state of mind in circumstances where the mayor or president has not given an indication that he or she considers it appropriate to proceed by way of e-meetings.

In the case of reliance on there being a direction in place under the Public Health Act 2016 or the Emergency Management Act 2005 that prevents the meeting from being held in person, the ‘authorisation prerequisite’ is that ‘the mayor, president or council authorises the meeting to be held by electronic means’. The provision refers to more than just a state of mind, i.e. ‘considering appropriate’, but requires a positive authorisation. Local governments may require assistance as to the manner and form by which such an authorisation should occur.

Pre-requisites for individual members to attend council or committee meetings by electronic means

Assuming for present purposes that council and committee meetings in person are still lawful, then to the extent that they occur, the relevant pre-requisites for an individual member to participate electronically are as follows.

Firstly, in terms of the ‘justifying circumstances pre-requisite’, these are that a ‘public health emergency’ or a ‘state of emergency’ (or both) is in place: i.e. the same as (i) and (ii) mentioned earlier in this publication.

Secondly, in terms of the ‘authorisation pre-requisite’, the member must be authorised to attend the meeting by electronic means by the mayor, the president or the council. Local governments may require assistance as to the manner and form in which such an authorisation should occur.

Return to discussion of the first two ‘justifying circumstance pre-requisites’: public health emergency or state of emergency

At the time of issuing this publication, each of these pre-requisites is in place.

‘Public health emergency’ is defined in Regulation 3(1) as a public health state of emergency declared under the Public Health Act 2016, section 167. Such a declaration was first made at State level in relation to COVID19 on 23 March 2020, and it was extended on 28 March 2020 for a further 14 days.

‘State of emergency’ means a state of emergency declared under the Emergency Management Act 2005 section 56. A state of emergency was first declared at State level in relation to COVID-19 on 15 March, and has been twice extended since then.

Currently, it is in force until 12am on 16 April 2020.

Each of these two kinds of declarations can be extended by further declarations, but the maximum duration of any extension is a further 14 days. We anticipate that the relevant Ministers, acting on appropriate technical advice, and implementing a Cabinet position, will extend these declarations from time to time for as long as they consider necessary to combat COVID-19.

For so long as at least one of these types of declaration is in place, it follows that there exist 'justifying circumstance pre-requisites' of types (i) and (ii) mentioned earlier. It should be noted, however, that as the response to the COVID-19 pandemic progresses, it is conceivable that parts of the State might at some stage be released from the declaration: types (i) and (ii) of the 'justifying circumstance pre-requisites' only apply where at least part of the local government's district is subject to a relevant form of declaration.

Public health emergency declarations and state of emergency declarations have many legal implications, but for present purposes it suffices to say that the relevant declarations are in place at the time of issue of this publication, and therefore satisfy the 'justifying circumstance pre-requisite' for e-meetings.

A key question, however, is whether the legal position is actually more stark than this: is it the case that the only kind of council or committee meeting that can proceed in the current environment is an e-meeting?

Return to discussion of the third 'justifying circumstance pre-requisite': direction in place preventing meeting in person?

A Prohibited Gathering Direction came into effect on 1 April 2020 under the Public Health Act 2016 sections 157(1)(k) and 190(1)(p).

It provides relevantly as follows:

'5. A person who owns, controls or operates premises in the State of Western Australia must not allow a prohibited gathering to occur on the premises.

6. A person must not organise a prohibited gathering on premises in the State of Western Australia.

7. A person must not attend a prohibited gathering on premises in the State of Western Australia.

8. A **prohibited gathering** means:

(a) a gathering of more than two (2) persons in a single undivided indoor space or a single undivided outdoor space that is a **public place** at the same time; or

(b) a gathering of two (2) or more persons in a single undivided indoor space or a single undivided outdoor space at the same time, where there is not at least 4 square metres of space for each person at the gathering,

but does not include a gathering:

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- (j) at Parliament for the purposes of its normal operations; or
- (k) at a court or tribunal; or
- ...
- (m) *at an office building, factory, mining site (including mining site accommodation), construction site or other place of work that is necessary for the normal business of those premises*, except premises described in paragraph 8(n); or
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- (r) at an indoor place or an outdoor place where everyone in the gathering is a member of the same household; or
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- (s) specified as exempt from this direction by the Chief Health Officer in writing

14. **Public place** means premises that are open to the public, or are used by the public whether or not for payment of money or other consideration, *whether or not the place is ordinarily so open or used* and whether or not the public to whom it is open consists of only a limited class of persons, *but does not include premises described in paragraph 8(m) or premises being used at the relevant time for holding a wedding or funeral.* (Italics indicates our emphasis).

It is notable that necessary gatherings at State Parliament are exempted, but there is no specific express equivalent exemption in relation to local government.

Therefore a council or committee meeting held in person will be a prohibited gathering unless it can be brought within one of the exceptions in paragraphs (a) – (s).

It seems to us that the only exceptions of possible relevance are in paragraphs (m) and (s). For the purposes of paragraph (s), if the Chief Executive Officer of the WA Department of Health issues an exemption under paragraph (s), then it is placed beyond doubt that in-person meetings can proceed. But in the absence of such a specification, the questions under paragraph (m) would be:

- whether the venue for the council or committee meeting is ‘an office building... or other place of work’; and
- whether the council or committee meeting is necessary for the normal business of those premises.

With regard to the second issue, the question is, effectively, whether council and committee meetings are necessary for normal local government operations, *not* whether in-person meetings are the *only* way that council or committee meetings can proceed efficaciously. Council and committee meetings *should* be regarded as necessary for normal local government operations, so the key lies in the answer to the first question.

In that regard, it is open to legal question whether the venue for a council or committee meeting is an ‘*office building*’, and this may be a question of fact and degree. The venue may however be an ‘*other place of work*’. ‘Place of work’ is not defined

under the *Public Health Act 2016*. A council meeting will almost invariably be attended by some local government employees, and for them at least the venue will be a 'place of work'. That does not really address the core concept of a council meeting, which is a meeting of officeholders (elected members) who are nevertheless non-employees.

In our view, the *Prohibited Gatherings Direction* is somewhat ambiguous, or at the very least apt to cause some confusion, in terms of its application to local government council and committee meetings. Since questions of compliance or non-compliance with the *Direction* involve the potential application of criminal penalties, and since some local governments remain in the practice of conducting in-person council and committee meetings, it would be inappropriate to express a concluded view on this question within this publication. However, any local governments, which are concerned about their compliance, should feel free to contact a partner at McLeods.

Apart from questions of compliance with the *Prohibited Gatherings Direction* and local government legislation, there are other aspects of the law, which bear upon the advisability of conducting in-person council and committee meetings. Workplace health and safety laws require due consideration to be given to the health and safety risks associated with such meetings in the present circumstances.

In any event, the potential always exists for directions to be made under the *Public Health Act* or the *Emergency Management Act* which expressly and unambiguously have the effect of prohibiting council and committee meetings being conducted in person, whereupon the 'justifying circumstance pre-requisite' of Regulation 14D(2)(b)(i) would indisputably exist. It is important that local governments continue to monitor the regulatory environment in that regard.

Modifications to the requirements of the LG Act for e-meetings

Along with Regulations 14C and 14D, Regulation 14E was also added by the gazettal of 25 March, and came into operation on 26 March 2020.

In so far as a local government must give public notice of the place of a council or committee meeting (Administration Regulations, Reg. 12), it is sufficient compliance, in the case of a proposed e-meeting, if the local government gives notice that the meeting will be conducted by electronic means: Regulation 14E(2).

A person who attends by the electronic means determined by the mayor, president or council under Regulation 14D(3), is taken to have attended the e-meeting: Regulation 14E(3)(a). An e-meeting is taken to have been open to the public if:

- the council or committee publicly broadcasts the meeting on a website; or
- the meeting or a broadcast of the meeting is otherwise accessible to the public; or
- the unconfirmed minutes of the meeting are made available for public inspection in compliance with Regulation 13 of the *Administration Regulations*.

In relation to the second of these means, it does not appear to be necessary that the broadcast is undertaken in real time. Certainly, as regards the third of these means, it will necessarily occur after the meeting. Clearly, the State government recognises the need to trade-off the usual desirable levels of full and instantaneous public accessibility to local government affairs, with the logistical challenges occasioned by a public health emergency.

Questions from members of the public are addressed by Regulation 14E(4) as follows:

'If a council or a committee holds an electronic meeting, section 5.24 is modified so that the council or committee allocates time for raising questions by members of the public, and the asking of and responding to those questions, if —

(a) the council or committee provides a means to submit a question prior to the meeting; and

(b) the council or committee determines at the meeting —

(i) to respond to the question submitted by the member of the public at the meeting in accordance with the procedure determined by the council or committee; or

(ii) that, given the public health emergency, state of emergency or direction issued under the Public Health Act 2016 or the Emergency Management Act 2005, it is not appropriate to respond to the question at the meeting.'

The matters of notice papers, agenda, reports and other documents are provided for in Regulation 14E(5) in the following terms:

'If a council or a committee holds an electronic meeting, for the purposes of regulation 14, a notice paper, agenda, report or other document may be —

(a) tabled at the meeting, or produced by the local government or a committee for presentation at the meeting, in any manner determined by the council or committee, including by electronic means; and

(b) made available to members of the council or committee, or for inspection by members of the public, in any manner determined by the council or committee, including by electronic means.'

Attention needs to be given by local governments to many more matters of practical detail beyond those expressly addressed in the Regulation 14E, in the effective undertaking of e-meetings. As always, McLeods stands ready to assist our local government clients on these and all emerging legal issues in the current challenging environment.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information, please contact Peter Wittkuhn by email to pwittkuhn@mcleods.com.au.

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