



**14.5** SOUTH MELBOURNE MARKET - LOCAL GOVERNMENT ACT 2020

**EXECUTIVE MEMBER:** KYLIE BENNETTS, GENERAL MANAGER, CITY GROWTH AND ORGANISATIONAL CAPABILITY

**PREPARED BY:** KIRSTY PEARCE, HEAD OF GOVERNANCE

**1. PURPOSE**

- 1.1 To ensure the South Melbourne Market Committee is compliant with the requirements of the new *Local Government Act 2020* (the Act).

**2. EXECUTIVE SUMMARY**

- 2.1 The South Melbourne Market Committee was established as a Special Delegated Committee under the Local Government 1989 on 26 February 2001. The Committee comprises Councillors and members who are independent of Council. The independent members are remunerated.
- 2.2 The Committee and its members are currently governed by a Charter approved by Council which sets out the purpose, objectives, duties, functions and powers of the Committee. Primarily, the powers included in the Instrument of Delegation are non-legislative powers. They are essentially powers of strategic oversight and the preparation of documents for the consideration of Council itself.
- 2.3 On 1 May 2020, section 86 of the *Local Government Act 1989* was repealed removing provision for Special Committees of the Council, and the *Local Government Act 2020* came into effect providing councils the ability to establish four types of committees – Delegated Committee, Community Asset Committee, Joint Delegated Committee and Audit and Risk Committee. Councils are also able to establish any type of advisory committee to meet their needs, though this is not prescribed in the Act.
- 2.4 The provisions of the new Act as they relate to delegated committees is inconsistent with the current structure of the South Melbourne Market Committee.
- 2.5 For some time, officers have been exploring options available to Council to resolve this matter including the various committees outlined in item 2.3 as well as Ministerial exemption. Officers sought independent legal advice and had informal discussions with the South Melbourne Market Committee and Audit and Risk Committee. The outcome of this work is outlined in this paper for Council's consideration.
- 2.6 Key considerations for Council in its decision making is to ensure compliance with the Local Government Act, providing continuity and stability of current governance arrangements given the historic period of business disruption for the Market as a result of COVID-19 as well as ensuring appropriate risk management controls are in place. Options explored in this paper achieve these requirements to a lesser or greater extent, however it is acknowledged no option is ideal for the longer term. In light of this, it will be important for officers to work with the new Council, once the new strategic plan for the South Melbourne Market has been developed to explore a longer-term approach to governance of the South Melbourne Market.



### 3. RECOMMENDATION

That Council:

3.1 Notes the requirements of the Local Government Act 2020 as it relates to the South Melbourne Market Committee.

3.2 Resolves to: -

- Re-establish the South Melbourne Market Committee as an Advisory Committee of Council.
- Delegate to the Chief Executive Officer the powers, duties and functions set out in the Instrument of Delegation (Attachment 1).
- Affix the Common Seal of the Port Phillip City Council to the Instrument of Delegation, which:
  - comes into force once the seal is affixed; and
  - remains in force until Council determines to vary or revoke it.

**OR**

3.2 Resolves to: -

- Re-establish the South Melbourne Market Committee as a Delegated Committee under section 63 of the Local Government Act 2020.
- Appoints Councillor X as Chair of the South Melbourne Market Committee for the period until the end of the Council term.
- Amend the current membership of the Committee to include three independent members, one of which is an independent deputy chair and delegates to the CEO the ability to work with the current Chair to establish appropriate transitional arrangements.
- Affix the Common Seal of the Port Phillip City Council (Attachment 2) to the Instrument of Delegation, which:
  - comes into force once the seal is affixed; and
  - remains in force until Council determines to vary or revoke it.

3.3 Authorises the CEO to make the necessary amendments to the South Melbourne Market Committee Charter (Attachment 3) to reflect the decisions made by Council through resolution of this report, to take effect from 3 September 2020.

3.4 That officers work with the Committee, the new Council and the Audit and Risk Committee to undertake a review of the governance structure of the South Melbourne Market in 2021.



#### 4. KEY POINTS/ISSUES

##### 4.1 The Committee

- 4.1.1 The South Melbourne Market Committee (The Committee) has been formed under section 86 of the Local Government Act. The Committee's purpose is to oversee South Melbourne Market's (the Market) performance and direction, ensuring its financial viability, its pre-eminent position as a community resource and its position as a dynamic retail competitor.
- 4.1.2 Over the years there have been various reports commissioned by the Council into the governance of the Market. These found the arrangements did not give the Committee sufficient authorities to operate a commercial entity effectively and highlighted the Committee was only advisory to Council except for having the delegation to approve leases and licences.
- 4.1.3 The current Charter:
- Sets out the purpose, objectives, duties, functions and powers of the Committee;
  - Provides that the Committee Chair is to be one of the independent members unless Council determines otherwise or an Independent Chair is precluded by relevant legislation.
- 4.1.4 An extensive review of the committee structure was undertaken in 2018. Officers undertook the review against a range of criteria identified as being important to Council and the ongoing success of the Market. These criteria included:
- Create an environment where the Market is as independent as possible;
  - Enable the Market staff to have as simple a reporting line as possible;
  - Enable the Market Board and staff to focus on the strategic and operational management of the Market rather than corporate support functions;
  - Ensure the Council (i.e. the elected body, not the administration) retains sufficient control over the outcomes and financial sustainability of the Market;
  - Continue to build on the strong performance and community attachment with the Market so this is maintained and grown;
  - Sufficiently manage financial and asset management risk for the Council.
- 4.1.5 This review was undertaken at a time when the compliance requirements and financial implications of the South Melbourne Market asset were not yet fully quantified, and the operating model of the Market was of lesser maturity. As a result, it was recommended to maintain the section 86 committee with extensive changes to the Committee charter and the Committee itself (including the appointment of an independent Chair) as the first step towards greater independence.
- 4.1.6 The key changes included in the restructure of the charter included:



- A far more extensive and strategic focus for the Committee with clearer roles and responsibilities;
- A revised and smaller membership of the Committee and an independent Chair;
- Changes to the way the Market Manager interacts with the Committee and the City of Port Phillip;
- Clearer roles, responsibilities and expectations of the administration.

4.1.6 The powers of the Committee include powers delegated under an Instrument of Delegation made by Council:

- Power to approve licences to stallholders in accordance with ss 17 and 17B of the Crown Land (Reserves) Act 1978; and
- A power to incur expenditure subject to prior Council appropriation or approval.

4.1.7 The remaining elements of the Instrument of Delegation are non-legislative powers and are essentially powers of strategic oversight and the preparation of documents for the consideration of Council itself.

4.1.8 The intent was always to review this arrangement at some point to determine whether further changes would be in the best interest of the Market and the City of Port Phillip. The changes to legislation have brought the need to reconsider this matter forward.

## 4.2 Legislative Requirements

4.2.1 The Local Government Act 2020 includes several requirements of Committees that are inconsistent with the current committee structure:

Requirements of 2020 Act	Current arrangements under 1989 Act
A Delegated Committee must be chaired by a Councillor.	The Committee Chair is an independent member appointed by Council following a recruitment process
The Mayor's power to appoint a Councillor to be the chair of a delegated committee overrides a Council appointment	The Mayor has no ability to appoint positions. The Committee Chair is an independent member appointed by Council following a recruitment process

4.2.2 Officers have explored extensively with the State Government the opportunity to seek exemption from the requirement for the Committee to be chaired by a Councillor, so that the current structure may be retained without change at this point in time as this is seen to provide the greatest level of



stability in the current environment. Officers are of the view that this approach was in alignment with the first principles of the Local Government Act, where the intent of the State Government was to provide greater flexibility for Councils to put in place arrangements that are appropriate for local communities and operations.

- 4.2.3 Given officers received varying responses when approaching State Government, they have ultimately concluded that an exemption is unlikely and provides no value in pursuing further

**4.3 Possible Structures under the Act**

There are three possible structures which include: -

- Section 64 Delegated Committee
- Special Advisory Committee
- Section 65 Community Asset Committee

Details on these three structures are outlined in the sections that follow.

	Section 64 Delegated Committee	Special Advisory Committee	Section 65 Community Asset Committee
<b>Purpose</b>	Exercises a power delegated by council	Provides advice to Council / officers	Manages a community asset in the municipal district
<b>Instrument of Delegation</b>	Delegated by council, requires a resolution of council	Delegated by Council to the CEO who would sub-delegate to market manager, subject to the terms and conditions set by Council, which would include the requirement for the market manager to take on the views of the Committee	Delegated by CEO, subject to the terms and conditions specified by the CEO, for the purpose of managing a community asset in the municipal district
<b>Reporting Requirements</b>	As specified in the instrument of delegation	As specified in the charter	Specified by CEO, the CEO must submit an annual report to council
<b>Membership</b>	Determined by Act, appointed by council <ul style="list-style-type: none"> <li>- Mayor, Deputy Mayor or Councillor appointed as chair</li> <li>- at least two councillors</li> <li>- any other person appointed by council, who is entitled to vote</li> </ul>	Determined and appointed by council <ul style="list-style-type: none"> <li>- independent chair</li> <li>- two councillors</li> <li>- two independent members</li> </ul>	Determined and appointed by council (can be delegated to CEO)

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	Section 64 Delegated Committee	Special Advisory Committee	Section 65 Community Asset Committee
<b>Other Requirements</b>	<ul style="list-style-type: none"> <li>- Indemnity</li> <li>- Description of roles and responsibilities</li> <li>- Reimbursement of expenses of members of a delegated committee</li> <li>- committees are subject to the same governance rules as council</li> <li>- members are subject to many of the same requirements as councillors, such as confidentiality, conflicts of interest, personal interest returns and standards of conduct</li> </ul>	<ul style="list-style-type: none"> <li>- indemnity</li> <li>- description of roles and responsibilities</li> <li>- governance requirements specified by Council and written into a revised charter</li> </ul>	<ul style="list-style-type: none"> <li>- indemnity</li> <li>- description of roles and responsibilities</li> <li>- governance requirements specified by the CEO and must include the limits and purpose of any financial delegation that can be exercised by the committee; governance arrangements; and monitoring and reporting requirements.</li> </ul>

## 4.4 Assessment of Options

- 4.4.1 In the report prepared for Councillors in 2018, on possible models for Market governance an assessment was undertaken of three models (proprietary company, restructured delegated committee and Council department) against the following criteria: -
- Create an environment where the Market is as independent as possible;
  - Enable the Market staff to have as simple a reporting line as possible;
  - Enable the Market Board and staff to focus on the strategic and operational management of the Market rather than corporate support functions;
  - Ensure the Council (i.e. the elected body, not the administration) retains sufficient control over the outcomes and financial sustainability of the Market;
  - Continue to build on the strong performance and community attachment with the Market so this is maintained and grown;
  - Sufficiently manage financial and asset management risk for the Council.
- 4.4.2 The assessment used the following ratings which were informed by the experiences and outcomes being experienced by markets in Victoria and interstate: -



- High – 80% or more likelihood that the proposed model will contribute highly to the desired criteria;
- Moderate – 60% or more likelihood that the proposed model will contribute to the desired criteria;
- Low – less than 60% likelihood that the proposed model will contribute to the desired criteria.

The 2018 assessment is outlined below: -

Criteria	Proprietary Company	Restructured Section 86 Committee	Council Department
Create an environment where the SMM is as independent as possible	High	Moderate	Low
Enable the SMM staff to have as simple a reporting line as possible	High	Moderate	High
Enable the SMM Board and staff to focus on the strategic and operational management of the SMM rather than corporate support functions	Moderate	High	N/A
Ensure the Council (i.e. the elected body, not the administration) retains sufficient control over the outcomes and financial sustainability of the SMM	Moderate	High	Moderate
Continue to build on the strong performance and community attachment with the SMM so this is maintained and grown	May create opportunities but also creates risk	High	May create opportunities but also creates risk
Sufficiently manage financial and asset management risk for the Council. <sup>1</sup>	Low to moderate	High	High

4.4.3 This assessment and the operating context at the time, resulted in the Council continuing with a Section 86 with a range of changes implemented.

<sup>1</sup> The primary reason for this assessment was the unquantified risk associated with the asset management requirements for the SMM. In any move to a proprietary company, asset management is a key consideration and is often a sticking point between the Council and the proprietary company in terms of roles and responsibilities. Officers are currently undertaking a project to establish a building compliance assessment for the SMM, however the findings of this work are not yet known.

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4.4.4 This work has been revisited in the context of the options currently available to Council to ensure immediate compliance with the Local Government Act with the least impact on current Market operations. This assessment is outlined below: -

Criteria	Special Advisory Committee	Delegated Committee	Community Asset Committee
Create an environment where the SMM is as independent as possible	<p><b>High</b></p> <p>Role of independent Chair maintained. It is considered that there are significant advantages of an independent chair including for example the ability to develop external partnership opportunities. In this option decision making capacity of the Committee is removed, however minimal decisions made by the Committee currently, and the instrument of delegation would be structured in a way to ensure that advice of Advisory Committee is required prior to exercising delegation.</p>	<p><b>Moderate</b></p> <p>This model could be considered a retrograde step in terms of independence of the market as the chair role reverts back to the Council.</p>	<p><b>Inadequate</b></p> <p>Role of independent Chair maintained, decision making capacity of Committee retained, however South Melbourne Market could be deemed a business activity rather than a community asset which may preclude this as a viable option. Otherwise this criterion would rate as high.</p>
Enable the SMM staff to have as simple a reporting line as possible	<p><b>High</b></p> <p>Operating arrangements for the market manager would be maintained where they take day to day direction from the chair as they do now, while employment arrangements are managed by a senior officer of Council.</p> <p>Market manager was recruited on the basis of day to day operational management with independent Chair and Board / Committee.</p>	<p><b>Moderate</b></p> <p>Operating arrangements for the market manager would need to be significantly altered as it would not be appropriate for them to take day to day direction from the chair as they do now if this was a Councillor, given legislative requirements around employment arrangements for Council staff. They would need to report on all matters through a senior officer of Council and this may create inefficiencies in decision making and some risks.</p>	<p><b>High</b></p> <p>Operating arrangements for the market manager would be maintained where they take day to day direction from the chair as they do now, while employment arrangements are managed by a senior officer of Council.</p> <p>Market manager was recruited on the basis of day to day operational management with independent Chair and Board / Committee.</p>



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Criteria	Special Advisory Committee	Delegated Committee	Community Asset Committee
Enable the SMM Board and staff to focus on the strategic and operational management of the SMM rather than corporate support functions	<b>High</b> Corporate support functions provided by the CoPP.	<b>High</b> Corporate support functions provided by the CoPP.	<b>High</b> Corporate support functions provided by the CoPP.
Ensure the Council (i.e. the elected body, not the administration) retains sufficient control over the outcomes and financial sustainability of the SMM	<b>Moderate</b> Much of the activity undertaken by the SMM Committee is currently advisory in nature, under this model decisions that need to be made would be delegated to the Market Manager through the CEO, any risks could be mitigated by Council putting controls in the delegation of authority.	<b>Moderate</b> The Committee retains decision making power as the Chair is a Councillor.	<b>High</b> The Committee retains decision making power.
Continue to build on the strong performance and community attachment with the SMM so this is maintained and grown	May create opportunities but also creates risk	May create opportunities but also creates risk	May create opportunities but also creates risk
Sufficiently manage financial and asset management risk for the Council.	<b>Moderate</b> There may be transitional risks associated with this model.	<b>Moderate</b> There may be transitional risks associated with this model.	<b>Inadequate</b> There are significant transitional risks with this model, particularly management of confidentiality and conflict of interest requirements as independent members would not be held to the same standards as Councillor representatives on the Committee. While this is also true of a Special Advisory Committee, the risk is higher in this model, given the decision making capacity of the Community Asset Committee.



4.4.5 A delegated committee and special advisory committee are both possible options. Both have advantages and inherent challenges and no option is the ideal option for the longer term. In light of this, it will be important for officers to work with the new Council, once the new strategic plan for the South Melbourne Market has been developed to explore a longer-term approach to governance of the South Melbourne Market.

#### 4.5 Instrument of Delegation and Charter documents

There will be a requirement to alter both the instrument of delegation and charter documents to reflect the governance arrangements determined by Council.

The instrument of delegation in both cases is included as an attachment to this document for consideration and authorisation to affix the common seal.

In the case that Council resolves to re-establish the Committee as an Advisory Committee of Council, minor amendments to the Charter are required to reflect legislative requirements of independent members.

In the case that Council resolves to maintain the Committee as a Delegated Committee, amendments to the Charter are required to reflect the change in committee membership and the reporting relationship between the Market staff, the Committee and the Council.

The current charter is attached to this report. Amendment to the Charter requires a formal Council resolution. Accordingly, the recommendation contains an authority for the CEO to make the necessary amendments to the Charter document to reflect the decisions made by Council through resolution of this report.

### 5. CONSULTATION AND STAKEHOLDERS

5.1 The attached instrument of delegation has been prepared in accordance with recommendations received from Council's legal advisors.

5.2 Officers sought informal feedback and advice from the independent members of the Audit Committee as well as the South Melbourne Market Committee.

### 6. LEGAL AND RISK IMPLICATIONS

6.1 Council must determine the structure of the South Melbourne Market to ensure its ongoing compliance with the requirements of the Act.

6.2 The Instrument of Delegation is structured in accordance with the requirements of the Act.

### 7. FINANCIAL IMPACT

7.1 Funding for governance compliance work required under the Local Government Act 2020 has been provided for in existing budgets.

### 8. ENVIRONMENTAL IMPACT

8.1 There is no direct environmental impact resulting from this report.



## 9. COMMUNITY IMPACT

9.1 A council decision on the structure of the Market Committee aligns with key objectives of the Governance Rules relating to the community, which are to:

- 9.1.1 Ensure proceedings and decision making by Council is transparent and understandable to all people who wish to participate in and observe meetings of Council.
- 9.1.2 Ensure participation in proceedings is accessible and balanced with Council's primary decision-making role.
- 9.1.3 Ensure proceedings and decision making is conducted in accordance to the principles of procedural fairness and good governance.
- 9.1.4 Ensure proceedings and decision making is made in a safe and respectful environment and provides an equal opportunity for all to participate, with respect being accorded to the expression of differing views.

## 10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

10.1 This report supports Direction 6 of the Council Plan (Our Commitment to You), by providing a transparent and good governance approach to decision making and aids in achieving a financially sustainable, high performing, well governed organisation that puts the community first.

## 11. IMPLEMENTATION STRATEGY

### 11.1 TIMELINE

11.1.1 The delegations proposed in this report will come into force immediately when the common seal is affixed.

### 11.2 COMMUNICATION

11.2.1 Council must keep a register of its delegations and this must be publicly available for inspection. The register will be updated according to the resolutions carried by Council and will be made available on Council's website.

## 12. OFFICER DIRECT OR INDIRECT INTEREST

12.1 No officers involved in the preparation of this report have any direct or indirect interest in the matter.

**TRIM FILE NO:  
ATTACHMENTS**

**F20/1**

- 1. Instrument of Delegation to the Chief Executive Officer**
- 2. Instrument of Delegation – South Melbourne Market Committee**
- 3. Charter of the South Melbourne Market Committee**