

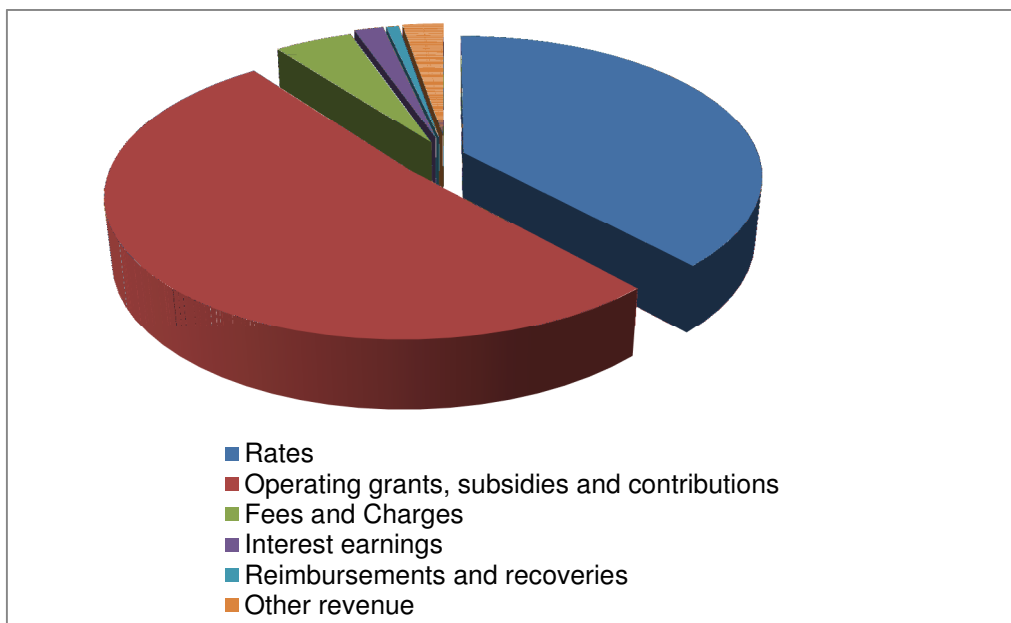


**Submission in Relation to Ministerial Review of  
the State Industrial Relations System**

1. The Shire of Wiluna is a small remote local government in the Murchison Goldfields region of Western Australia.
2. It employs 24 people.
3. The budget revenue for 2017-2018 is \$11,176,661, comprised as follows:

	<b>2017/18 Budget \$</b>	
Rates	4,260,474	38.12%
Operating grants, subsidies and contributions	5,761,921	51.55%
Fees and Charges	556,060	4.98%
Interest earnings	209,926	1.88%
Reimbursements and recoveries	91,700	0.82%
Other revenue	296,580	2.65%
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TOTAL REVENUE =	\$11,176,661	

4. This is represented in the chart below:



5. At some stage in the past, the Shire was persuaded (incorrectly, in our view) to transfer from the WA State Industrial Relations System to the federal system. We believe as a matter of fact and of law that this was incorrect because we cannot see that the Shire of Wiluna would be found to qualify as a constitutional corporation by any criteria ever known to be applied to determining that issue.
6. Even setting aside the reasoning behind the decisions in *Australian Workers Union v. Etheridge Shire Council*, *Bysterveld v. Shire of Cue* and *Boyd and Theedom v. Shire of Yalgoo*, an examination of our revenue as presented on the preceding page indicates that the Shire of Wiluna would find it impossible to make any credible argument that it was either a trading corporation or a financial corporation. Even the meagre revenue attributed to Fees and Charges substantially comprises fees/charges in respect of local government services and/or services provided by the local government due to market failure.
7. This is not to say that the Shire of Wiluna does not engage in any trading activities whatsoever. But the case law relating to outback local governments indicates that a corporation can engage in a few trading activities without being considered a “trading corporation”.
8. In addition, there is an argument that, irrespective of how much trading it engages in or how much revenue is derived from “trading activities”, that local governments are:
  - Intrinsically part of the “machinery of government”
  - Creations of the State (not of the Commonwealth government)and therefore cannot be constitutional corporations because it is not their predominant characteristic.
9. Industrial Relations System where we more properly belong. Of our current 24 employees:
  - 13 (mainly longer-serving employees) are currently employed pursuant to contracts or letters of engagement that cite federal awards and legislation.
  - 11 (mainly more recently-appointed employees) are employed pursuant to contracts or letters of engagement that cite state awards and legislation.It is intended to transfer those whose contracts/letters of appointment cite federal awards and legislation to the state system over the next few weeks.

### **Background**

10. Prior to 2005, it was not uncommon for local governments in Western Australia (and in other Australian jurisdictions) to operate under both the federal and state industrial relations regimes, with their administrative staff working under an award or agreement registered in the federal system and their “outdoor staff” working under an award or agreement registered in the state system (or vice versa).
11. This was possible because, until the coming into force of the *Workplace Relations Amendment (Work Choices) Act 2005*, Commonwealth industrial relations legislation was an exercise of the Commonwealth powers under subsection 51 (xxxv) of the *Commonwealth of Australia Constitution Act* (“the Constitution”) to make laws for the peace, order, and good government of the Commonwealth with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state”.
12. The exercise of that commonwealth power did not preclude an employer operating in both the federal and the state system; it depended upon the unions that the employees belonged to and whether their awards were registered in the state or federal systems.

13. That changed abruptly with the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cwth) (and the subsequent enactment by the next federal government of the *Fair Work Act 2009* (Cwth)). In both cases, the federal government of the day sought to impose its industrial relations system by using its constitutional power pursuant to subsection 51 (xx) of the Constitution to make laws for the peace, order, and good government of the Commonwealth with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”.
14. This was a change in the law of very significant proportions because employers were no longer able to operate under both the national and state systems. They were either a national employer (for the purposes of the federal legislation) or they were covered by the applicable state or territory legislation and system.
15. As the *Fair Work Act 2009* superseded the Commonwealth *Workplace Relations Act*, all further references in this submission will be to the *Fair Work Act* (as that is the current legislation). But by way of background, it is important to mention the *Workplace Relations Amendment (Work Choices) Act 2005* because it was the coming into effect of that Act that ushered in the era of federal industrial relations legislation being reliant upon subsection 51 (xx) of the Constitution.
16. In addition to covering “constitutional corporations” (ie. Corporations as defined in subsection 51 (xx) of the Constitution), the *Fair Work Act* makes provision for the definition of “national system employers” to be extended to cover other types of entities (including local governments) if the Parliaments of the individual states and territories “refer” their industrial relations powers to the Commonwealth. Generally speaking, the parliaments of the various states and territories have been reluctant to do so. That is certainly not something that the Parliament of Western Australia has ever done, so in Western Australia the only “national system employers” are “constitutional corporations”.
17. It is stated in the second paragraph of the Terms of Reference for the current Ministerial Review of the State Industrial Relations System that:

**The Western Australian Government does not intend to refer any industrial relations powers to the Commonwealth. As such, the Ministerial Review will be predicated on there being no referral of powers.**

#### **Constitutional Corporations**

18. Subsection 51 (xx) of the Constitution refers to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”.
19. It is fairly clear that probably all corporations registered under the *Corporations Act 2001* (Cwth) will be constitutional corporations; however, since 2005 there has been considerable confusion as to which other types of bodies corporate might also be “constitutional corporations”.
20. That confusion has been widespread within the local government sector, and in Western Australia (where the matter has remained unresolved until now) in particular.
21. WA local governments are certainly bodies corporate, as specified in section 2.5 of the Local Government Act 1995. They have perpetual succession, a common seal, and the legal capacity of a natural person.

22. It is universally accepted that a local government is not a “foreign corporation”, so whether a local government is a “constitutional corporation” turns on whether it is either a “trading corporation” or a “financial corporation”.
23. The advice offered in relation to this has varied over time and many mistakes have been made, and there is now a body of case law which indicates matters to be considered in determining this question.
- In 2005, the Local Government Association of Queensland (LGAQ) advised a number of its members (including Etheridge Shire Council, whose defence it funded) that they would be constitutional corporations. That case is worthy of some study, because of the circumstances of the case and the principles upon which the case was determined.
  - Following the loss of the Etheridge Shire Council case, LGAQ’s advice had to change. In fact, the Queensland government legislated to remove any doubt that a local government might be a constitutional corporation. That has provided certainty for the local government sector in that state, and saved local governments from a lot of wasted effort and money trying to determine which jurisdiction they belong in, and defending cases in the federal jurisdiction.
  - Despite the decision in *Australian Workers Union v. Etheridge Shire Council*, and a lack of referral of industrial relations powers from the Parliament of Western Australia to the Commonwealth, WALGA advocated for a long time for WA local governments to opt into the federal system.
  - WALGA’s policy position changed in December 2016 (following the decision of the Fair Work Commission in *Boyd and Theedom v. Shire of Yalgoo*) to its current policy position of providing information and advice for local governments to make their own assessments of the appropriate industrial relations jurisdiction in which to operate.
24. The recent WALGA infopage stated that over 85% of WA local governments are “identifying as a constitutional corporation under the Federal system”. The problem is that being a constitutional corporation is not a matter of choice; it is a matter of law based on facts and it is ultimately to be determined by a court or a semi-judicial commission such as the Fair Work Commission or the WA Industrial Relations Commission (as the case may be).
25. It may well be as a consequence of the advice previously being given (erroneously, in our view) to WA local governments that so few are currently operating in the state industrial relations system. We are aware that among “outback” local governments, the Shire of Wiluna is not the only WA local government currently transitioning back to the state system where we properly belong. We are not sure whether WALGA has counted us (and the other local governments currently transitioning back to the WA State Industrial Relations System) among the 85% it claims to be identifying as a constitutional corporation under the federal system, or among the “less than 15%” that are operating in the WA State Industrial Relations System. The fact is that we are transitioning (and would have done so more quickly if advice on how to do it was more forthcoming).

### **Matters to be considered**

26. It does not matter how individual local governments “identify”.
27. The Etheridge Shire Council case illustrates this point. Etheridge Shire Council had for some years been a party to two enterprise bargaining agreements, each of which had been renegotiated at two-yearly intervals and new agreements were registered after each renegotiation. Historically, the enterprise bargaining agreement covering local government officers was registered in the federal system, and the enterprise bargaining agreement covering “municipal employees” was registered in the Queensland state system.
28. Both agreements were due for renegotiation in late 2005. The Officers’ Agreement was fairly quickly settled and was registered (in the federal system) prior to the coming in to force of the *Workplace Relations Amendment (Work Choices) Act 2005*. However, delays in settling and documenting the Municipal Employees agreement resulted in the document not being ready for registration until after the *Workplace Relations Amendment (Work Choices) Act 2005* had come into force.
29. At this time:
  - The Etheridge Shire Council had advice from LGAQ that it was a constitutional corporation.
  - 37% of the Shire’s revenue was attributed to trading activities.
  - The Council “identified” as a constitutional corporation.
  - The Shire’s Officers certainly had a preference for being in the federal system, which had proven advantageous to them over the years.
  - The municipal employees voted in favour of their enterprise bargaining agreement being registered in the federal jurisdiction.
30. There was nothing wrong with the conditions in the enterprise bargaining agreements. There was some uncertainty during the renegotiation of the agreements relating to the future of the underlying awards under the new “Work Choices” legislation, and the Council had generously agreed to try to preserve all the award conditions by writing them into the EBAs.
31. Nevertheless, the Australian Workers Union lodged a jurisdictional challenge in the Federal Court, with the support of the government of the State of Queensland. Not a word was said against any of the conditions of the EBA (which were recognised as very good); the sole issue was the jurisdictional challenge, which turned on whether the Etheridge Shire Council could be characterised as a trading corporation.
32. The judgement (handed down by Justice Spender on 20 August 2008) was that it could not be so characterised.
33. The judgement need not be recited here; it can be appended as an attachment. But the central reasoning (at paragraph 21) is (with reference to the High Court *Work Choices Case* handed down in 2006) that as the federal industrial relations system is now essentially an exercise of the “corporations power” conferred on the Commonwealth by s 51 (xx) of the Constitution, it can only be exercised in relation to corporations over which the Commonwealth has the power to regulate the activities, functions, relationships and business of.

34. Furthermore, if a local government is a constitutional corporation then the Commonwealth will be able to create rights and privileges belonging to it, impose obligations upon it, and regulate the conduct not only of its employees but also of its Councillors (in the same way that it regulates the conduct of company directors). We will return to this point when discussing some of the risks of being in the federal industrial relations system.
35. One of the matters to be considered in relation to constitutional corporations is whether they are “trading”; historically arguments have been made based on the proportion of their revenue that can be attributed to trading activities.
36. If this is the main criteria, then we do not argue that there might be some WA local governments that could successfully make out that case (probably these would all be “minimum grant” local governments for Financial Assistance Grant purposes).
37. But the Shire of Wiluna (and similar outback local governments) will not be among them.
38. In the confusion as to the appropriate industrial relations jurisdiction for local governments that has persisted within Western Australia for these 12 years past the Shire of Wiluna would be content to make its own decision as to which is the best fit for the facts of our circumstances and the state of the law as we understand it to apply to us.
39. But if it is now desired to have the entire Western Australian local government sector covered in one jurisdiction or the other, then we would argue that the single industrial jurisdiction must be the WA State Industrial Relations System, because to try to join the federal industrial relations system would exclude too many local governments such as the Shire of Wiluna that clearly are not constitutional corporations.

#### **The risks of being in the Federal Industrial Relations System**

40. There are significant risks to local governments in being in the federal industrial relations system. These can be classified into two types – direct (industrial relations) and broader risks.

##### Direct Risks

41. The most obvious and direct risks of being in the federal industrial relations is the particularly harsh penalties that a local government and its senior officers could be exposed to (even inadvertently). These penalties have recently been increased (for the most serious offences) to \$126,000 for individuals and \$630,000 for corporations.
42. WA employers who operate in the federal system are exposed to a kind of limited “double jeopardy” in that employees can initiate an action in either the Fair Work Commission or the WA Industrial Relation Commission. That is, although an employer who is not a constitutional corporation can argue a lack of federal jurisdiction (as in *Boyd and Theedom v. Shire of Yalgoo*), being a constitutional corporation (even if a local government can make that case) is no bar to a case being heard and determined in the WA Industrial Relations Commission.
43. This is because section 23 of the *Industrial Relations Act 1979* gives the WA Industrial Relations Commission a general jurisdiction to enquire into and deal with any industrial matter.

44. This “double jeopardy” is limited by section 29AA which states that the WA Industrial Relations Commission must not determine a claim of harsh, oppressive or unfair dismissal from employment if the dismissed employee has lodged an application with Fair Work Australia. However, if such a claim with Fair Work Australia is withdrawn or fails for want of jurisdiction, then the Commission may determine the claim.
45. This gives employees in the federal industrial relations system two avenues of claim compared to only one avenue available to employees in the WA State Industrial Relations System.

#### Broader Risks

46. We revert to paragraphs 33 and 34 hereof, and the reasoning of the majority decision of the Full Bench of the High Court in the *Work Choices Case* as cited by Justice Spender in *Australian Workers Union v. Etheridge Shire Council*.
47. If local governments are constitutional corporations, it follows that the Commonwealth has the power to impose obligations on local governments, to regulate what local governments can do, and to regulate the conduct of local government employees and councillors as if they were the Directors and employees of Corporations.
48. Furthermore, it means that in addition to the considerable efforts and costs involved in complying with all the State legislation by which (being creatures of the State) we are bound, we may also find that we are subject to a whole raft of other Commonwealth legislation with which corporations are required to comply. Such as:
- The *Privacy Act 1988* (in addition to our own *WA Freedom of Information Act*)
  - *Competition and Consumer Act 2010*
  - Etcetera.


#### The costs of confusion

49. We would suggest that, collectively, the local government sector in Western Australia has paid a considerable (though not easily measurable) price for the confusion that has prevailed over several years as to the appropriate industrial relations system in which local governments should operate. These costs would include:
- The costs to local governments of negotiating, documenting, and registering workplace agreements that are without effect because they have been registered in the wrong jurisdiction.
  - The costs to local governments of arguing in the courts, the Fair Work Commission, or the Western Australian Industrial Relations Commission over jurisdictional issues (often unsuccessfully).
  - The additional costs of defending actions brought against local governments in the Fair Work Commission (even if the local governments were ultimately successful on jurisdictional or other grounds).
  - The considerable attention and resources that has been expended over several years in relation to pursuing the federally registered Local Government Industry Award 2010, when the same resources (if applied within the WA State Industrial Relations System) could have achieved much better outcomes applicable to all local governments throughout the State.

50. With specific reference to the 8<sup>th</sup> Term of Reference for the current Ministerial Review of the State Industrial Relations System (the question of whether local government employers and employees in Western Australia should be regulated by the State industrial relations system, and if so, how that outcome could be achieved) we observe that the local government sector in Queensland has been spared the costs of confusion set out above because (following the Etheridge Shire Council case) the Queensland government legislated to provide certainty to the local government sector.
- 51. We submit that it is time to end the confusion that continues to prevail (at considerable cost) in the Western Australian local government sector, and we would encourage the Western Australian government to end the confusion by enacting legislation to bring all Western Australian local governments under the WA State Industrial Relation System.**
52. That would be a legitimate and appropriate exercise of the State's powers because local governments are creatures of the State, and the State has the power to create rights and privileges belonging to local governments, impose obligations upon local governments, and to regulate the conduct of local government Councillors and employees.
53. We are not constitutional corporations, so the Commonwealth government does not have the power to do those things.



Cr Jim Quadrio  
Shire President



Colin Bastow  
Chief Executive Officer

Date: 25 October 2017