

A Jurisdictional Dilemma:

Implications of ‘choosing’ the federal industrial relations regime

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Do WA local governments fall within the jurisdiction of the Fair Work Commission in the sphere of industrial relations?

This is an issue that many local governments have been skirting around for a number of years.

On 2 September 2016, Civic Legal presented some leading-edge research to a WALGA People and Culture Conference. That research was triggered by the following case:

A pivotal case in Yalgoo

Early last year, a local government became the subject of an unfair dismissal claim by two former employees.

In *Heather Boyd and Ross Theedom v the Shire of Yalgoo* [2016] FWC 2190, the Shire of Yalgoo objected to the jurisdiction of the Fair Work Commission.

The Shire was successful and this raised the question of whether other local governments in WA could raise the same defence, even though the vast majority of them subscribe to the industrial relations regime under the *Fair Work Act 2009* (Cth).

Implications of the case: a jurisdictional dilemma

The case revealed a jurisdictional dilemma: Should a local government subscribe to the Fair Work Act regime imposed by the Commonwealth and take the benefits it offers or should it stay out of that regime, in order to avoid the risks it presents.

It is outside the scope of this article to discuss all of the benefits of the Commonwealth industrial relations regime under the Fair Work Act. Some might argue that the benefits to employees are greater under the Commonwealth regime than under the W.A. regime, which is governed by the *Industrial Relations Act 1979*.

Key Points

- In 2016, the Shire of Yalgoo objected to the jurisdiction of the Fair Work Commission – and was successful
- Should a local government ever be considered a constitutional corporation?
- If a local government is considered a constitutional corporation, it may open itself up to governance by other Commonwealth Statutory regimes

One reason against subscribing to the Commonwealth regime is the exposure of the organisation and key officers to severe penalties if they contravene the rules. But even if a well-run local government is able to mitigate these significant risks through well-managed industrial relations practices, it begs the question of whether it should need to.

The real challenge for local governments

The real challenge to local governments in this area is thinking in more acutely strategic ways than many normally might.

The following strategic questions come to mind: What does local government as a sector actually believe its role in the political constitution of this country should be? Does the sector believe that constitutional recognition should be granted to it? If so, what exactly is the nature of a local government for the purposes of such recognition? If it is a level of government, then should it ever be capable of categorisation by a court or tribunal as being a “constitutional corporation”?

The corporate citizens who are “constitutional corporations” (typically “trading corporations”) obey laws, rather than enact laws. Their primary purpose

is to buy and sell, to trade for profit, rather than to benefit the community. Their whole ethos is different from that of government.

Local governments who are labelled or deliberately label themselves as constitutional corporations may be damaging the idea that local governments are distinguishable from corporate citizens.

The question of constitutional recognition is one that has been on some agendas for a number of years. No doubt it will be many years before this question is decided. In the meantime, local governments may well wish to decide whether or not to and how brightly to paint themselves in the colours of the convenient colours of the constitutional corporation.

Strategic risks: other Commonwealth regimes

There are other strategic risks in identifying an organisation as a constitutional corporation. For example, if a local government positions itself as being subject to the Fair Work Act jurisdiction, it begins to open itself up to being governed by other Commonwealth statutory regimes.

Australia has a very strong scheme and culture of consumer protection. This is regulated by the Australian Competition and Consumer Law. That law applies to constitutional corporations. Have any local governments considered the risk of being held accountable to this powerful regime of consumer protection?

A whole range of scenarios begins to open up:

Might a disgruntled ratepayer take a local government to the Department of Commerce for collecting annual rates that have been calculated incorrectly?

Might an aggressive waste removal operator challenge the right of a local government to be the sole provider of waste removal services in its district? Might it seek the assistance of the Australian Competition and Consumer Commission (ACCC) to force the local government to allow it to compete with, rather than work for, that local government?

Might a disgruntled party claim that communication between adjacent local governments in relation to the fees and service charges for the use of community facilities amounts to price-fixing, a practice prohibited by the Australian *Competition and Consumer Act 2010*?

“The real challenge to local governments... is thinking in more acutely strategic ways than they normally would.”

What about compliance with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)? This is the central piece of Commonwealth legislation designed to protect the environment. Civil and criminal penalties apply to constitutional corporations that breach the requirements for environmental approvals under that act.

There are some potentially far-reaching consequences in labelling oneself as a constitutional corporation. It is therefore critical that WA local governments consider this strategic question carefully.

Contact

Civic Legal provides local governments with advice on whether they are a constitutional corporation and which industrial relations regime they are accountable to.

This could prevent legal complications occurring in the future. If you require advice or guidance, feel free to contact:



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Disclaimer: This article provides a general summary of subject matter and does not constitute legal advice. The law may change and circumstances may differ. Therefore, you should seek legal advice for your specific circumstances.