Our Ref: AL gal
Your Ref:

17 September 2013

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We refer to your letter addressed to the Chief Executive Officer of the City dated 9 August 2013 (**Letter**), a copy of which has been provided to us for our consideration.

The City acknowledges that you are currently paying your debt of outstanding rates and charges to the City by way of instalments of $150.00 per fortnight. These payments are being applied to your debt in accordance with the guidelines provided by the *Local Government Act 1995* (WA) (**LG Act**) and the *Fire and Emergency Services Authority of Western Australia Act 1998* (WA) (**FESA Act**).

We have been instructed to respond to the questions put to the City in your Letter.

We summarise your contentions in the Letter as follows:

1. The LG Act was, at its inception, repugnant to the Constitution of the Australian Government.

2. The LG Act never received the Royal Seal of approval and is legally invalid.

3. The City does not have authority under the LG Act, nor any constitutional power to levy the Emergency Services Levy, land tax rates, penalty interest o r other fees and charges.

In short, you appear to claim that the LG Act is unconstitutional and that accordingly the City has no power to impose rates and charges.

Your assertions and contentions reflect many of the arguments advanced by Mr Wayne Glew in the Court of Appeal of the Supreme Court of Western Australia case of *Glew v Shire of Greenough* [2006] WASCA 260 (**the Glew Case**).

Mr Glew has also claimed the illegality of local government and rates on the following grounds:

1. Local government did not exist at the time of creation of the Commonwealth and is still not recognised in Australia as the referendum held in 1988 to introduce 'local government' did not carry.

2. The States may not overturn the specific outcome of a referendum. The enactment of the LG Act is therefore illegal and it has no basis either constitutionally or legally.

3. Only the Federal Government can enforce taxation and local government rates are to be regarded as void and illegal as they are in conflict with the Imperial laws of Australia.

Your arguments (and those of Mr Glew) appear to derive from a number of fundamental misconceptions concerning the Commonwealth and State Constitutions and a misunderstanding of the legislative process, in particular the referendum process pursuant to section 128 of the Constitution.

1. Glew v The Shire of Greenough

1.1 The Glew Case involved a challenge to the constitutional basis for the LG Act, and the validity of the powers of a local government to impose rates and charges.

1.2 The Shire of Greenough originally filed a summons in the Local Court against Mr and Mrs Glew seeking payment of arrears of rates for the financial year 2003-2004 penalty interest and costs.

1.3 Mr Glew did not dispute the amount of the rates charges and penalties sought by the Shire of Greenough, but relied upon a variety of constitutional arguments, including that the LG Act is unconstitutional, as is section 52 of the *Constitutional Act 1889* (**WA Constitution**).

1.4 The Magistrate gave judgment for the Shire of Greenough. The District Court of Western Australia dismissed Mr Glew's appeal against that decision. Mr Glew then filed a further appeal in the Court of Appeal of the Supreme Court of Western Australia (i.e. the Glew Case).

1.5 The Court of Appeal in the Glew Case ruled against Mr Glew and held that he and his wife had to pay their rates. Their submissions were said to be entirely lacking in legal merit. Mr Glew then sought special leave to appeal to the High Court, which dismissed his application peremptorily.

1.6 The leading judgement in the Glew Case was delivered by Justice Wheeler. Her Honour summarised the constitutional structure of Australia at [5] to [15], which we draw on in part below.

2. Overview of the Constitutional Structure of Australia

2.1 The settlement of the Australian colonies began as an executive act of the Imperial Crown. Letters Patent (in effect, public instructions) from the Crown were issued to Governors.

2.2 In 1823 the Act commonly called the *New South Wales Act* (4 Geo IV, c 96) was passed by the Imperial Parliament. It conferred upon the Governor power to enact laws for the "peace welfare and good government" of New South Wales, with the advice of the Legislative Council. Legislation can restrict or alter the prerogatives of the Crown and so this Act began the process of restricting the power of the Crown to govern the colonies. In time, further Acts of the United Kingdom Parliament not only set up local legislatures, but also provided that those legislatures could set up and amend their own constitutions. One of those Acts is referred to in the preamble to the *Constitution Act 1889*, which is an Act passed by the Western Australia legislature of the day pursuant to that authority. When the

Commonwealth Constitution was passed as an Act of the United Kingdom Parliament (i.e. the *British Commonwealth of Australia Constitution Act 1900*), the former colonies became States.

2.3 The Commonwealth Constitution (**Constitution**) is binding on all Courts and Parliaments throughout the country. To the extent that State or Commonwealth law is inconsistent with it, that State or Commonwealth law is invalid. It is, however, a Constitution which was superimposed on and assumes the existence of, pre-existing State Constitutions which not only continued, but which were able to be altered in accordance with their terms.

2.4 Section 51 of the Commonwealth Constitution listed most of the legislative powers of the Commonwealth. Those powers were not expressed to be exclusive. That is, the Commonwealth Constitution contemplated that both State and Commonwealth Parliaments would be able to make laws in relation to the matters set out in that list. It was only where the Commonwealth had passed a law in relation to one of those listed subject matters and a State law was inconsistent with the Commonwealth law, that the State law would become invalid or inoperative (section 109). That would not be because the State lacked constitutional power to pass the law, but simply because the Commonwealth legislation was, to the extent that the Commonwealth had passed law, paramount.

2.5 There is a short list of powers which are exclusive to the Commonwealth Parliament. They include, for example, the power to make laws with respect to the seat of government of the Commonwealth (section 52(i)).

2.6 Taxation, which is referred to in section 51(ii) of the Constitution, is a non-exclusive power so that both State and Commonwealth Parliaments can pass laws dealing with taxation. However, because of the existence of section 109 of the Constitution, it is possible for the Commonwealth Parliament to give priority to its own taxation law, and/or to impose taxation at a rate such that the practical effect would be that it would not be politically possible for a State to tax the same subject matter. This was the effect achieved in relation to income tax in the case of *South Australia v The Commonwealth* (1942) 65 CLR 373. In other areas of taxation, where the Commonwealth has not legislated, it remains both politically and practically possible for the States to impose taxation; an example of such a tax would be land tax.

2.7 The power of the State Parliaments to legislate stems in each case from the Constitution of the relevant State. In relation to Western Australia, section 2 of the WA Constitution empowers the State to make laws for the "peace, order and good government of Western Australia". That is a very extensive grant of legislative power.

2.8 That broad legislative power in the State Constitution is qualified in only three ways. First, in some very limited areas the Commonwealth Constitution provides that the Commonwealth's legislative power is exclusive. That prevents the State from validly legislating at all in that area. Secondly, in some cases the State can validly legislate, but if there is a valid Commonwealth law inconsistent with the State law, then the Commonwealth law will prevail while it is in operation. Thirdly, some State Constitutions have some restrictions relating to the way in which legislation concerning particular subject matters can be passed, such as section 73 of the WA Constitution.

2.9 So far as the State Constitutions are concerned, unless there is some particular provision in the WA Constitution prescribing the "manner and form" for amending particular parts of the Constitution, then the State Parliament is free to amend the WA Constitution in any way it sees fit. That is, the State Constitutions can generally be amended as easily as any other Act. As the Privy Council has said, they occupy "precisely the same position as a Dog Act or any other Act, however humble its subject matter": *McCawley v R* [1920] AC 691 at 704.

2.10 The Commonwealth Constitution can be altered only in the manner provided by section 128 of the Constitution. There is no express power conferred on the Commonwealth Parliament to pass laws proposing amendments to the Constitution. However, such power is implied by the first paragraph of section 128, which provides that a proposed law for the alteration of the Constitution must be passed in a particular manner by each House of the Commonwealth Parliament, as part of the process of altering the Constitution. The Commonwealth Parliament, can then propose an alteration to the Constitution to include in it a matter over which the Commonwealth, at the time of passing the law for the proposed change, has no power at all. This is what happened in relation to the referendum in 1988 concerning local government. The Commonwealth Parliament has no power over local government. However, pursuant to section 128, it passed a law submitting to the electors the question of whether the Constitution should be amended so as to make provision for local government.

2.11 Once a proposed law for the alteration of the Constitution is passed by both Houses of the Parliament of the Commonwealth in the manner prescribed, it must be submitted to the electors in each State and Territory. If it is passed by the electors in the manner prescribed by section 128, it is to be presented to the Governor-General for the Queen's assent.

2.12 The failure of a referendum does not prevent the Commonwealth from proposing amendments on the same subject matter in the future, nor does it expressly or impliedly, prohibit either the Commonwealth Parliament or the Parliament of any State from passing legislation which is otherwise within its power and which touches on the same subject matter as the proposed referendum question.

3. The 1988 referendum

3.1 Those persons arguing against the recognition of local governments often seek to rely upon the 1988 referendum concerning the recognition of local government (**1988 Referendum**). The proposition appears to be that, because the referendum was defeated, there arises some prohibition upon the State which would preclude it from passing legislation setting up local government. That proposition misunderstands the referendum process.

3.2 Justice Wheeler in the Glew Case considered the effect of the 1988 Referendum on the validity of local governments and held at [24]:

> *'...The 1988 referendum contained a proposal to amend the Commonwealth Constitution by inserting a proposed s 119A, which proposed section would have required each State to provide for the establishment and continuance of a system of local government. Because it was defeated, there is no Commonwealth constitutional requirement that a State provide a system of local government. However, the absence of a requirement to establish a system of local government does not imply any absence of power to do so.*

Each State has always had, pursuant to the power to legislate for the peace, order and good government of that State, a power to set up a system of local government as the State sees fit."

[our emphasis]

3.3 The 1988 Referendum has no effect on the power of the State to set up a system of local government as the State sees fit and the LG Act was validly enacted and is enforceable: *Glew v Shire of Greenough* [2006] WASCA 260.

3.4 Any claim that the 1988 Referendum has any effect on the validity of a local government established under the LG Act is misconceived and has no basis in fact or law. Such a claim shows a fundamental misconception of the referendum process pursuant to section 128 of the Constitution. A referendum may only have legal effect if it is passed and otherwise has no effect at all. The 1988 Referendum was not passed and has no legal effect of any sort.

4. The power of the State Parliament to establish local governments

4.1 Section 2(1) of the WA Constitution states that:

"There shall be, in place of the Legislative Council now subsisting, a Legislative Council and a Legislative Assembly: and it shall be lawful for Her Majesty, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, order, and good Government of the Colony of Western Australia and its Dependencies: and such Council and Assembly shall, subject to the provisions of this Act, have all the powers and functions of the now subsisting Legislative Council.'

(Our emphasis)

4.2 The words "peace, order and good government" are to be understood as conferring ample and plenary power on the States to legislate for any matter having a connection with the State: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. The State can make any "fact, circumstance, occurrence or thing" in or connected with the State a subject of legislation: *Broken Hill South Ltd (Public Officer) v The Commissioner of Taxation (New South Wales)* (1937) 56 CLR 337at 375 per Dixon J.

Section 52 of the WA Constitution states that:

52. Elected local governing bodies

(1) The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.

(2) Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.

[our emphasis]

4.3 Use of the word "shall" in section 52(1) of the State Constitution imposes a positive duty on the State government to maintain a system of local governing bodies. In any event, the WA Parliament has the plenary power pursuant to

section 2 of the WA Constitution to set up a system of local government, such as that contained in the LG Act: *Glew v Shire of Greenough* [2006] WASCA 260 at [25].

4.4 Section 109 of the Constitution states:

Inconsistency of Laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

4.5 Section 107 of the Constitution states:

Saving of Power of State Parliaments

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the admission of the State, as the case may be, until altered in accordance with the Constitution of the State.

4.6 Section 106 of the Constitution states:

Saving of Constitution

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

4.7 The effect of sections 106, 107, and 109 of the Constitution, when properly interpreted, is that legislative powers not vested in the Constitution may be exercised by each State under its own constitution. The Constitution specifies powers that may only be exercised by the Commonwealth (i.e. the Commonwealth 'covers the field' in respect of that power) and enumerates powers that may be exercised by both the Commonwealth and/or the State. In the event of a conflict between Commonwealth law and State law, the Commonwealth law shall prevail.

4.8 There is no provision in the Constitution to prevent the State from legislating in relation to local government. It is not a matter exclusively vested in the Commonwealth and the Constitution does not 'cover the field' in relation to local government.

4.9 The State Parliament validly enacted the LG Act pursuant to sections 2 and 52(1) of the WA Constitution. The City was established by virtue of section 2.5(2) of the LG Act as a body corporate with perpetual succession under common seal and has the powers given to it under the LG Act and other Acts.

5. The power to pass Acts without a referendum

5.1 We note the common assertion that local governments cannot legally make any laws or by-laws without a referendum. We assume that this is also a reference to the powers of the Parliament of Western Australia.

5.2 Section 2 of the WA Constitution provides that the State can make laws for the peace, order and good government of Western Australia.

5.3 Under section 2(3) of the WA Constitution, every bill, after its passage through the Legislative Council and the Legislative Assembly, shall, subject to section 73, be

presented to the Governor for assent by or in the name of the Queen and shall be of no effect unless it has been duly assented to by or in the name of the Queen

5.4 Under section 73(1) of the WA Constitution, an Act that does not alter the constitutional powers or procedures of the parliament of the State may be passed through both Houses of Parliament in the ordinary way (i.e. an absolute majority of both Houses of Parliament) without any requirement as to a referendum.

5.5 Under section 73(2) of the WA Constitution, an Act that does alter the constitutional powers or procedures of the parliament of the State must (under section 73(2) (g)) be approved in public referendum before being presented to both Houses of Parliament for a vote to be passed by an absolute majority.

5.6 There is no requirement for an Act to be passed by referendum unless it alters the constitutional powers or procedures of the parliament of the State: *Glew v The Governor of Western Australia* [2009] WASC 14 at [91].

5.7 Under section 52(2) of the WA Constitution each local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted. Section 3.4 of the LG Act provides that the general functions of a local government include legislative and executive functions. The City has a very broad legislative power to make and enforce local laws pursuant to section 3.5 of the LG Act.

6. The Power of the City to Levy Rates (Local government rates and charges)

6.1 Division 6 of the LG Act deals generally with rates and service charges. Under section 6.15 of the LG Act the City is entitled to receive revenue (including rates and service charges) as authorised by the LG Act or another written law (such as the FESA Act).

6.2 The City has the power to impose general rates on rateable land within its district pursuant to section 6.32(1)(a) of the *Local Government Act 1995.*

6.3 The City may impose a specified area rate (section 6.32(1)(b)) or a surcharge (section 6.32(1)(c)) on rateable land within its district.

6.4 The power of local governments to impose rates and charges was affirmed by Wheeler J in *Glew v Shire of Greenough* [2006] WASCA 260.

6.5 In the Glew Case, Mr Glew claimed that State Parliament cannot legislate for the imposition of taxation by way of levying rates on real property and therefore cannot authorise local governments to do so. Mr Glew variously argued that because the Commonwealth Parliament has power to legislate with respect to taxation, the States cannot, or, alternatively, the scheme of uniform taxation which was held to be valid in *South Australia v The Commonwealth* (1942) 65 CLR 373 had the effect of rendering State laws providing for rates on real property invalid pursuant to section 109 of the Commonwealth Constitution.

6.6 Wheeler J rejected Mr Glew's arguments and held that the Shire may validly exercise its power under the LG Act to impose rates and charges.

7. Waste collection and bin charges under the *Waste Avoidance and Resource Recovery Act 2007*

7.1 The City may impose on rateable land within its district, and cause to be collected, rates for waste collection services under section 66 of the *Waste Avoidance and Resource Recovery Act 2007*.

7.2 Under section 67 of the *Waste Avoidance and Resource Recovery Act 2007*, The City may impose a receptacle charge (i.e. a bin charge) in lieu of, or in addition to, a rate charge.

8. Payment of Emergency Services Levy under the FESA Act

8.1 Under section 36B of the FESA Act the Emergency Services Levy is payable each year on all land that is located in an ESL category area.

8.2 The land within the City's district is land that falls within an ESL category area: *Government Gazette* 17 June 2003 p2210. The Emergency Services Levy is therefore payable on land in the district of Greater Geraldton.

8.3 Under section 36P of the FESA Act a person who is the owner of leviable land is liable to pay the Emergency Services Levy for a levy year.

8.4 The City is authorised under the FESA Act to impose and collect an annual Emergency Services Levy from ratepayers located in its district on behalf of the Fire and Emergency Services Authority of Western Australia.

8.5 Under section 36O of the FESA Act the Emergency Services Levy together with any costs of proceedings for the recovery of the levy and any levy interest, is a charge on the leviable land.

9. Unpaid City Rates and Emergency Services Levy

9.1 Outstanding City rates and services charges constitute a 'charge' on the land rated or in relation to which the service charge is imposed under section 6.43 of the LG Act, with an interest sufficient to register a caveat (see section 6.64(3) of the LG Act).

9.2 Under section 6.55 of the LG Act rates and service charges on land are recoverable by the City from the owner at the time of rate compilation, or a person who becomes the owner whilst the rates or service charges are unpaid.

9.3 Any rates or charges which are not paid by their due date accrue penalty interest in accordance with the relevant provisions in the LG Act and FESA Act. The current rate of interest is 11% per annum.

9.4 Interest which accrues on outstanding rates, charges and levies is, for the purposes of the LG Act and FESA Act, considered a rate or levy recoverable from the ratepayer.

9.5 The LG Act and FESA Act also allow the City to recover outstanding rates, charges and interest in a Court of competent jurisdiction and recover the costs of such proceedings.

9.6 If the City obtains a judgment against a ratepayer (for non-payment of rates or Emergency Services Levy) and that person refuses to pay the judgment sum, the City may apply for a Property (Seizure and Sale) Order under the *Civil Judgements Enforcement Act 2004* to seize and sell a judgment debtor's property (real and/or personal) to satisfy the debt.

9.7 If rates are in arrears for three (3) years or longer, the City also has the power take possession of that land and take other actions pursuant to section 6.64 of the LG Act.

We trust this answers your queries in relation to this matter.

We request that any further correspondence be directed to our office.

Yours faithfully

17 September 2013

Cc – Client by email