



NOTICE OF MEETING

Dear Councillors

I respectfully advise that the ORDINARY COUNCIL MEETING will be held in Greenhills Hall, Greenhills Road, Greenhills on Tuesday, 26 September 2023, commencing at 5.00pm.

MEETING LATE AGENDA ATTACHED

Chris Linnell

CHRIS LINNELL
CHIEF EXECUTIVE OFFICER
Date: 21 September 2023

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MISSION STATEMENT
"Building on our history to create our future"

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12 BUSINESS OF AN URGENT NATURE INTRODUCED BY DECISION OF THE MEETING

SY128-09/23 DEED OF COMPANY ARRANGEMENT - PROVISION OF COMMUNITY RESOURCE CENTRE SERVICES BY THE SHIRE OF YORK

File Number:	4.0468; 4.0783
Author:	Alina Behan, Executive Manager Corporate & Community Services
Authoriser:	Chris Linnell, Chief Executive Officer
Previously before Council:	22 August 2023 (010823)
Disclosure of Interest:	Nil
Appendices:	1. Draft Deed of Company Arrangement York CRC ↓

NATURE OF COUNCIL'S ROLE IN THE MATTER

Legislative

PURPOSE OF REPORT

To seek Council's approval to enter into a Deed of Company Arrangement (DOCA) to enable the provision of a Community Resource Centre service for York.

BACKGROUND

At its 22 August 2023 Ordinary Meeting Council resolved (010823):

"That, with regard to the Provision of Community Resource Centre Services by the Shire of York, Council:

- 1. Authorises the Chief Executive Officer to finalise negotiations with stakeholders as listed below to ensure current levels of Community Resource Centre funding and services remain available to the community as soon as possible:***
 - a. Regional Development Australia – Wheatbelt WA – Lumen Regional University Centre***
 - b. Department of Primary Industries and Regional Development Services***
 - c. Services Australia***
 - d. KPMG***
- 2. Authorises the Shire President and Chief Executive Officer to engross any legal documents with the above stakeholders and apply the Common Seal to the document(s) (if required).***
- 3. Approves the allocation of \$10,000 (Lumen) and \$25,000 (Shire community program formerly York Community Resource Centre Multiyear Funding Agreement) to support the Shire run Community Resource Centre as part of the 2023/24 budget adoption.***
- 4. Directs the Chief Executive Officer to commence the preparation of a Deed of Company Arrangement with KPMG to be presented to Council at its September 2023 Ordinary Meeting.***
- 5. Authorises the Chief Executive Officer to make any minor typographical and formatting changes to documents prior to signing."***

COMMENTS AND DETAILS

Officers have continued to work closely with the Administrators, KPMG, in the preparation of the DOCA which is presented in Appendix 1.

Key terms of the DOCA include:

1. The Shire will be responsible for immediately satisfying the proven debts of the organisation formerly known as the York Community Resource Centre Inc (YCRC also referred to as the Association) including KPMG’s fees.
2. A payment plan will be sought for the debt to the Australian Taxation Office (ATO).
3. All non-circulating assets and intellectual property will be transferred to the ownership of the Shire of York.
4. Existing contracts for service provision will be novated to or be renegotiated with the Shire of York.
5. The existing YCRC will be wound up.

These are more fully explored in the DOCA document.

Should Council give its approval for the Shire to enter into this DOCA, the document will be considered at the Reconvened Second Meeting of Creditors. At the time of writing this report it is anticipated this will occur on 2 October 2023. At this meeting the creditors will vote on the option to either:

1. Accept the terms of the DOCA.
2. Cease the Administration and return the Association to its current board of Directors.
3. Wind up the Association which would necessitate the sale of 89 Avon Terrace, York.

Should Council choose not to approve the DOCA, then only options two (2) and three (3) listed immediately above are available to the creditors.

Subject to the creditors’ approval of the DOCA, the Shire will be able to restore the following service contracts via a Shire run CRC service:

1. Department of Primary Industries and Regional Development
2. Lumen University
3. Services Australia
4. Shire led community programs

Officers now seek Council’s direction with regard to the DOCA.

To service the new arrangements adjustments will need to be made to the adopted 2023/24 budget to allow for the new operating income streams and corresponding expenses. The adjustments are summarised below:

TABLE 1.

GL	DESCRIPTION	CURRENT BUDGET	AMMENDMENT (\$)	REVISED BUDGET (\$)	COMMENTS
138201	York CRC Charges Other Tax Supply Mun	\$0	-\$171,155	-\$171,155	Operational income from service contracts, fees and charges
138101	York CRC Expenses	\$1,058	\$182,196	\$183,254	Operational expenditure

					building and programs
138106	York CRC Garden/ Carpark Maintenance *New*	\$0	\$2,950	\$2,950	Operating expenditure garden/carpark
138151	Wheatbelt Regional University	\$10,000	-\$10,000		Budgeted allowance for Lumen University support
132144	Multiyear Funding Agreements	\$25,000	-\$25,000		Budgeted allowance for YCRC Multiyear Funding Agreement
TOTAL			-\$21,009		

GL: 138201 York CRC Charges Other Tax Supply Mun

Currently no budget is allocated to this existing GL. This GL would capture the operating income derived for the CRC from service contracts such as the Department of Primary Industries and Regional Development, Regional Development Western Australia – Wheatbelt (Lumen University) and Services Australia as well as fees and charges associated with this service. Income is currently estimated at \$171,155.

GL: 138101 York CRC Expenses

A small budget allowance of \$1,058 exists. This would be increased by \$182,196 to cover operating expenditure such as employee costs, materials and contracts, utilities, and insurances. Estimates have been derived from KPMG’s advice on known expenditure and consulting Shire expenditure on other outstations.

GL: 138106 York CRC Garden/Carpark Maintenance *New*

This new GL will be created to cover maintenance costs of the carpark and surrounds. Expenditure is expected to be minor and include the regular maintenance of the carpark and alleyway. An amount of \$2,950 has been estimated from other similar Shire facilities.

GL: 132144 Multiyear Funding Agreements

An amount of \$25,000 was budgeted to cover a possible new multiyear funding agreement with York CRC Inc to allow the continued delivery of Shire programs. It is proposed these will now be delivered via the Shire run CRC and the funds reallocated to support this service.

GL: 138301 Wheatbelt Regional University

An amount of \$10,000 was included this financial year to support the provision of accommodation for Lumen University. It is proposed this will be reallocated to the Shire run CRC service to assist in funding a short-term lease at 89 Avon Terrace, York until the DOCA process concludes.

Further amendments will need to be included in the Shire’s Mid-Year Budget Review process to consider the reallocation of overheads, plant and labour costs across the new CRC service and all other Shire functions. This will not represent an increase in costs for the Shire, but an adjustment to where the costs are spread. An adjustment will need to be made to recognise the new assets received as part of the DOCA process, and to consider depreciation for the remainder of the year.

OPTIONS

Council has the following options:

- Option 1:** Council could choose to direct the Chief Executive Officer to progress the DOCA subject to the acceptance of the Association's creditors and approve the proposed budget adjustments.
- Option 2:** Council could choose to direct the Chief Executive Officer to progress the DOCA with altered terms subject to the acceptance of the Association's creditors. Noting this would necessitate a new report to the creditors and a new date for the Reconvened Second Meeting of Creditors would need to be set. Council could choose to make amendments to the proposed budget adjustments.
- Option 3:** Council could choose not to approve the progress of the DOCA and reject the associated budget adjustments.

Option 1 is the recommended option.

IMPLICATIONS TO CONSIDER**Consultative**

KPMG

DPIRD

Lumen

Services Australia

Australian Taxation Office

Council Concept Forum 8 August 2023

Council Agenda Briefing 15 August 2023

Council Ordinary Meeting 22 August 2023

Council Concept Forum 12 September 2023

Executive Leadership Team

StrategicStrategic Community Plan 2020-2030

Goal 1: The Place to be

To be a close-knit community, full of life, in a welcoming and accessible place for all.

Goal 4: Our Built Environment

To have a built environment which support community, economy and the environment, respects the past and creates a resilient future.

Goal 5: Strong Leadership and Governance

To have effective and responsive leadership and governance, where a sense of collective purpose and shared direction combine to work together.

Policy Related

G19 Risk Assessment and Management

Financial

Budget adjustments to support the new CRC service are listed above. An amount of \$200,000 has been budgeted in GL: 138102 – Contribution to York CRC to support the payment of creditors.

Upon the acceptance of the DOCA, Shire Officers will seek Council's permission to write off outstanding rates previously billed to York CRC Inc.

Legal and Statutory

Part 9 of the *Associations Incorporation Act 2015* is applicable to the Administration and Winding Up of an Incorporated Association (i.e. the YCRC) and states:

“Part 9 – Administration and winding up

Division 1 — Voluntary administration and winding up

120. Administration under Corporations Act

- (1) *This section makes provision for the voluntary administration under the Corporations Act of an incorporated association.*
- (2) *Subsection (3) is made for the purposes of the Corporations (Ancillary Provisions) Act 2001 Part 3.*
- (3) *The administration of an incorporated association is declared to be an applied Corporations legislation matter in relation to the Corporations Act Part 5.3A subject to the following modifications —*
 - (a) *the modifications to the text of that Act set out in Schedule 3;*
 - (b) *such other modifications (within the meaning of the Corporations (Ancillary Provisions) Act 2001 Part 3) as may be prescribed by the regulations.*

121. Voluntary winding up under Corporations Act

- (1) *This section applies to an incorporated association that has surplus property to be distributed on winding up.*
- (2) *An incorporated association may be wound up voluntarily if the association so resolves by special resolution.*
- (3) *The voluntary winding up of an incorporated association is declared to be an applied Corporations legislation matter in relation to the Corporations Act Parts 5.5 and 5.6 subject to the following modifications —*
 - (a) *the modifications to the text of that Act set out in Schedule 3;*
 - (b) *such other modifications (within the meaning of the Corporations (Ancillary Provisions) Act 2001 Part 3) as may be prescribed by the regulations.*

122. Further application of Corporations Act

Any matter declared under section 120 or 121 to be an applied Corporations legislation matter is, in addition, an applied Corporations legislation matter in relation to the Corporations Act Part 5.9 Division 3, subject to the following modifications —

- (a) *the modifications to the text of that Act set out in Schedule 3; and*
- (b) *such other modifications (within the meaning of the Corporations (Ancillary Provisions) Act 2001 Part 3) as may be prescribed by the regulations.*

Division 2 — Winding up by Supreme Court

123. Grounds on which winding up may be ordered

An incorporated association may be wound up by the Supreme Court on application made on any ground specified in Schedule 4.

124. By whom application may be made

An application to the Supreme Court for the winding up of an incorporated association may be made by —

- (a) *the incorporated association; or*

- (b) *a member of the incorporated association; or*
- (c) *the Commissioner; or*
- (d) *the Minister; or*
- (e) *a creditor, in the case of an application based on the ground specified in Schedule 4 item 5.*

125. Application of Corporations Act

- (1) *The winding up of an incorporated association (other than by a voluntary winding up) by the Supreme Court is declared to be an applied Corporations legislation matter in relation to the Corporations Act Part 5.7, subject to the following modifications —*
 - (a) *the modifications to the text of that Act set out in Schedule 3; and*
 - (b) *the provisions of Part 5.7 of that Act are to be read as if they extended to the winding up of the affairs of an incorporated association in the State; and*
 - (c) *such other modifications (within the meaning of the Corporations (Ancillary Provisions) Act 2001 Part 3) as may be prescribed by the regulations.*
- (2) *Any matter declared under this section to be an applied Corporations legislation matter is, in addition, an applied Corporations legislation matter in relation to the Corporations Act Part 5.9 Division 3, subject to the following modifications —*
 - (a) *the modifications to the text of that Act set out in Schedule 3;*
 - (b) *such other modifications (within the meaning of the Corporations (Ancillary Provisions) Act 2001 Part 3) as may be prescribed by the regulations.*

126. Cancellation of incorporation upon winding up by Supreme Court

- (1) *When the Commissioner is satisfied that the winding up of an incorporated association under this Division has been completed the Commissioner must, in writing, cancel the incorporation of the association with effect on and from a day that the Commissioner considers appropriate and specifies.*
- (2) *The Commissioner may cause notice of a cancellation under subsection (1) to be published in the Gazette if the Commissioner considers that public notification of the cancellation is desirable.*

Division 3 — Offence related to incurring of debt

127. Duties of management committee members with respect to incurring of debt

- (1) *If an incorporated association incurs a debt and —*
 - (a) *the association is insolvent at the time the debt is incurred or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and*
 - (b) *immediately before the debt is incurred —*
 - (i) *there are reasonable grounds to expect that the association is insolvent; or*
 - (ii) *there are reasonable grounds to expect that, if the association incurs the debt, the association will become insolvent,*

any person who was a member of the management committee of the association at the time the debt was incurred commits an offence.

Penalty: a fine of \$5 000.

- (2) *In any proceedings against a person under subsection (1) it is a defence if the accused proves that, at the time the debt was incurred, the accused had reasonable grounds to expect, and did expect, that the incorporated association was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.*

- (3) *Without limiting subsection (2), in any proceedings against a person under subsection (1) it is a defence if the accused proves that, at the time the debt was incurred, the accused —*
- (a) *had reasonable grounds to believe and did believe —*
 - (i) *that a competent and reliable person (the **other person**) was responsible for providing to the accused adequate information about whether the association was solvent; and*
 - (ii) *that the other person was fulfilling that responsibility;*
 - and*
 - (b) *expected, on the basis of information provided to the accused by the other person, that the incorporated association was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.*
- (4) *In any proceedings against a person under subsection (1) it is a defence if the accused proves that, at the time the debt was incurred, because of illness or for some other good reason, the accused did not take part at that time in the management of the incorporated association.*
- (5) *In any proceedings against a person under subsection (1) it is a defence if the accused proves that the accused took all reasonable steps to prevent the incorporated association incurring the debt.*
- (6) *In determining whether a defence under subsection (5) has been proved, the matters to which regard must be had include, but are not limited to the following —*
- (a) *any action the accused took with a view to appointing an administrator of the incorporated association;*
 - (b) *when that action was taken;*
 - (c) *the results of that action.”*

Sections 436A and 438A of the *Corporations Act 2001* (Cwlth) is applicable and available via the following link <https://www.legislation.gov.au/Details/C2023C00194>.

Risk Related

There is a financial risk should the cost of the provision of a Shire run CRC be underestimated, or service contracts not be able to be concluded. A further risk exists in relation to outstanding debts of the Association. Proven debts excluding the ATO are currently in the order of \$195,000 and provision was made for this in the adopted budget. As part of the DOCA process there will be a further call for creditors and the amount owing may increase. The DOCA clause has been adjusted to permit thirty (30) days after notification for debts to be satisfied. This will allow sufficient time for the Council to process and necessary budget amendments.

A reputational risk exists should a CRC service be lost to the York community.

Workforce

This workflow cannot be met with current staffing requirements. It is proposed to fund 1.6 new FTE via contract arrangements to provide a CRC service. A further 0.4 FTE has been allowed for in the budget to complete complementary community activities, taking the staffing of this new program to 2 FTE. It is intended to relocate Officers of the Community and Place team to 89 Avon Terrace, York to increase their availability.

VOTING REQUIREMENTS

Absolute Majority: Yes

RECOMMENDATION

That, with regard to the Deed of Company Arrangement - Provision of Community Resource Centre Services by the Shire of York, Council:

- 1. Directs the Chief Executive Officer to complete negotiations for the Deed of Company Arrangement.**
- 2. Authorises the Shire President and Chief Executive Officer to engross any legal documents and apply the Common Seal to the document(s) (if required).**
- 3. Authorises the Chief Executive Officer to make any minor typographical and formatting changes to the documents prior to signing.**
- 4. Notes the requirement for the Deed of Company Arrangement to be accepted at the Reconvened Second Meeting of Creditors.**
- 5. Resolves to approve the budget adjustments as listed below:**

GL	DESCRIPTION	CURRENT BUDGET	AMMENDMENT (\$)	REVISED BUDGET (\$)	COMMENTS
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TOTAL			-\$21,009		

York Community Resource Centre Inc ABN 38 440 811 494

PROPOSAL FOR DEED OF COMPANY ARRANGEMENT

The Shire of York (**Proponent**) proposes that the Association enter into a deed of company arrangement pursuant to Part 5.3A of the *Corporations Act 2001*.

The essential terms of the proposed deed of company arrangement are to be as follows:

Key Elements	Proposal
1. DOCA Proponent	The Shire of York (the Shire)
2. Deed Administrators	The Deed Administrators are to be Martin Jones and Matthew Woods of KPMG, who will have extensive powers to administer the DOCA.
3. Association bound by DOCA	York Community Resource Centre Inc ABN 38 440 811 494 (Association)
4. Purpose of the DOCA	<p>The purpose of the DOCA is to:</p> <p>4.1. establish a DOCA contribution where the Participating Creditors are to be paid as provided for in the DOCA;</p> <p>4.2. pay out all outstanding debts of the Association in full in a timely manner (excluding the ATO debt);</p> <p>4.3. repay the ATO debt of the Association by way of a payment plan;</p> <p>4.4. allow the community centre to resume operations under control of the Shire; and</p> <p>4.5. transfer the Property described in section 6 below to the Shire .</p>
5. DOCA Contribution	<p>The Proponent will make a contribution equal to the adjudication of creditor claims (excluding the ATO debt) by the Deed Administrator plus outstanding professional fee of the Voluntary Administrators and the Deed Administrators plus their costs. The DOCA contribution will be payable within 30 days on notification of the amount by the Deed Administrator.</p> <p>The Proponent has proposed to enter into a payment arrangement with the ATO in relation to the amount owed by the Association and will liaise with the ATO directly on this matter.</p> <p>If the Proponent fails to pay within 30 days on notification by the Deed Administrators or such time as agreed between the Deed Administrators and Proponent, the Deed Administrators will have the option to sell the Association's property located at 89 Avon Terrace York and apply the net proceeds in the order of payments provided in section 7.1, including the debt owed to the ATO, in full.</p>

Key Elements	Proposal
<p>6. Transfer of Property</p>	<p>6.1. The property situated at 89 Avon Terrace York, shall be transferred by the Deed Administrator clear of encumbrances to the Shire subject to the following:</p> <p>6.1.1. payment of the DOCA Contribution;</p> <p>6.1.2. documentary evidence that an arrangement has been agreed with the ATO to repay the tax debt</p> <p>6.2. Any grant arrangements with DPIRD;</p> <p>6.3. All plant and equipment owned by the Association; and</p> <p>6.4. Any intellectual property of the Association including but not limited to telephone numbers, websites, email address (ETC).</p> <p>(Collectively defined as “the Property”)</p>
<p>7. Distribution of DOCA Contribution</p>	<p>7.1. The order in which the funds are to be distributed among creditors with admissible debts and Claims will be as follows:</p> <p>7.1.1. firstly, in payment of the Voluntary Administrators fees and costs;</p> <p>7.1.2. secondly, the fees and costs of the Deed Administrator;</p> <p>7.1.3. thirdly, Priority creditors in respect of their debts or claims in the order of priority under s.556(1), s.559, s.560 and s.561 of the Corporations Act 2001 as if the Association had been wound up on the date on which the Association’s administration commenced; and</p> <p>7.1.4. fourthly, Participating Creditors (excluding the ATO) in accordance with the Participating Creditors’ debts or claims as adjudicated by the Deed Administrators.</p>
<p>8. Interim Arrangement</p>	<p>8.1. In the time between execution of the DOCA and effectuation the Shire will be able to utilise the property at 89 Avon Terrace York for the purpose as defined in in the Associations constitution in exchange for the Shire to pay all outgoing (such as internet, electricity, water, rates, and insurance) and maintenance costs.</p>
<p>9. Participating Creditors</p>	<p>Creditors of the Association who had claims as at the date of the appointment of the Administrators will be participating in the DOCA.</p>
<p>10. Deed Administrators</p>	<p>10.1. The Deed Administrators are to have all the powers specified in clause 2 of Schedule 8A of the Corporations Regulations 2001;</p> <p>10.2. Any debts payable by or claims against the Association the circumstances giving rise to which occur after the execution of the deed will not be liabilities of the Deed Administrators;</p> <p>10.3. The Deed Administrators’ remuneration for the Deed Administrators’ services as administrator of the deed is to be the amount calculated as follows:</p>

Key Elements	Proposal
	<p style="text-align: center;">Remuneration = (Time x Firm Rates) + GST</p> <p>10.4. The Administrators and Deed Administrators are entitled to be indemnified out of and have a lien over the assets of the Association for their remuneration, costs, fees and expenses for work done in the performance of their duties as Administrators and Deed Administrators.</p>
11. Completion of the DOCA	<p>The DOCA will complete or be fully effectuated when:</p> <p>11.1. The DOCA Contribution is transferred to the Deed Administrator in accordance with section 5;</p> <p>11.2. the financial arrangement to repay the ATO has been agreed and documented; and</p> <p>11.3. the Property has been transferred.</p>
12. Termination of DOCA	<p>The DOCA will automatically terminate upon the earlier of the following events occurring:</p> <p>12.1. the parties fulfil all obligations under the DOCA and the Deed Administrators lodge a notice with DMIRS to that effect; or</p> <p>12.2. the Court makes an order terminating the DOCA; or</p> <p>12.3. the Association's Creditors pass a resolution terminating the DOCA.</p>
13. Other Common Terms	<p>13.1. There will be a moratorium such that, until the deed terminates:</p> <p>13.1.1. a Creditor may not:</p> <ul style="list-style-type: none"> (i) make or proceed with any application to wind up the Association; (ii) without the leave of the Court, begin or proceed with a proceeding against the Association in a court, tribunal or arbitration; (iii) without the leave of the Court, begin or proceed with any enforcement process in relation to the Association's property or property used or occupied by or in the possession of the Association; and (iv) exercise any right of set off to which the Creditor would not have been entitled had the Association been wound up on the date on which the Association's administration began. However, rights of set off which a Creditor would have been entitled to exercise had the Association been wound up on the date on which the Association's administration commenced may still be exercised; <p>13.2. Nothing in the DOCA shall limit the operation of section 445D and section 445E of the Act;</p> <p>13.3. The DOCA may be varied by resolution passed at a meeting of creditors convened under section 445A of the Act;</p>

Key Elements	Proposal
	<p>13.4. The DOCA Proponent takes no proprietary interest in the DOCA. Accordingly, a future variation of the DOCA may provide for replacement of all/any of these terms including the parties to the DOCA;</p> <p>13.5. Debts or Claims must have arisen on or before Relevant Date (being the day when the Association's administration commenced) if they are to be admissible under the deed;</p> <p>13.6. Each Priority and Participating Creditor is to accept the Priority and Participating Creditor's entitlements in the DOCA in full and final satisfaction of the Priority and Participating Creditor's debt or Claim against the Association;</p> <p>13.7. The Association will be released from all admissible debts and Claims of Priority and Participating Creditors on termination of the deed; and</p> <p>13.8. the DOCA is to include all those machinery clauses considered reasonably necessary or convenient by the Deed Administrators of the Association or their solicitors who prepare the deed.</p>
<p>14. Other conditions</p>	<p>14.1. Following completion of the DOCA, the Shire will take control of all non-circulating assets of the Association, including the land and building at 89 Avon Terrace, York and office fittings and equipment. The Deed Administrator will do all things necessary to effect the transfer of the Property to the Proponent (or its nominated association). All costs associated with the transfer (including stamp duty, if any) shall be borne by the Proponent; and</p> <p>14.2. Where necessary, the Deed Administrator will work with the Proponent to facilitate the novation of the Association's existing contracts.</p>
<p>15. Likely return to creditors / shareholders</p>	<p>Priority creditors: 100 cents in the dollar</p> <p>Unsecured creditors: 100 cents in the dollar.</p>

We agree that we will, execute any deed of company arrangement substantially in these terms so as to give effect to a resolution of the Association's Creditors that the Association execute a deed of company arrangement.

DATED: September 2023

Director