SUBMISSION to
SENATE STANDING COMMITTEE on FINANCE and PUBLIC ADMINISTRATION
Legislation Committee

I thank the committee secretary for the invitation to make a submission on these two bills.

By way of credentials, I have just authored the first dedicated legal work on the field: The Law of Politics: Elections, Parties and Money in Australia (Federation Press, 2010, forthcoming). I have also taught and written about electoral regulation for about 13 years and wrote a PhD on electoral bribery law.

Given the short-time frames for submissions, I cannot give detailed attention to the many machinery provisions, so I have focused on the more substantive proposals.

My recommendations are in bold type.

ELECTORAL and REFERENDUM AMENDMENT
(HOW to VOTE CARDS and other MEASURES) BILL 2010

Reform to restrain misleading 'second-preference' how-to-vote cards is welcome, if overdue. The proposed s 328B(2)-(3) offer neat and bright line rules for the form of the authorisation. This ought go a fair way to achieving more transparent authorisation and hence informed voting and fewer complaints of sharp practice.

My preference would be a simple ban on how-to-vote cards (HTVs) altogether on polling day – something effectively achieved in Tasmania and the ACT despite their more complex voting systems. But I accept that option is not on the table and that HTV cards at least provide a form of polling day participation for party faithful.

The model proposed does not require HTVs to be registered. HTV registration is mandatory in Victoria and Queensland. This has the benefit of educating campaigners, by bringing them into the administrative net ahead of polling day. More importantly, it gives the Commissions and parties advanced notice of material, allowing time for a considered challenge to any dubious material. It also offers a cleaner path to polling day enforcement for Commission staff: unregistered material can be readily identified and its withdrawal requested, on the spot, by polling officials, without drawing them into subjective or difficult arguments about whether the material is misleading or the true source of its authoriser.

Instead, proposed s 328B focuses on after-the-event enforcement. The penalty – 10 penalty units or around $1100 maximum – is adequate if the offence is presumed to be a technical one (eg the font unintentionally being too small). However as a penalty for 'false authorisation' under proposed s 328B(5), this is clearly inadequate. Of course in theory, a false authorisation might also be misleading under existing s 329 (maximum penalty of $1000 or 6 months). But comparing the two penalties shows that s 328B(5) will sit uneasily beside s 329. For harmony, I recommend the penalty in s 328B(5) be

increased to match s 329(4).

In any case, relying on an offence provision is inadequate: it closes-the-gate-after-the-horse, is hampered by the limited time for prosecuting 'simple' offences (ie offences with low maximum penalties) and the common experience is that DPPs, faced with a criminal burden of proof but low penalties, rarely prosecute. Similarly, the threat of an electoral petition provides little deterrence: petitions are rare, very costly, time frames are radically short and there is an inbuilt difficulty of proving the result was affected even in cases of sharp practice (see the Mansfield petition, which involved 'second preference' HTVs).

Proposed s 328B seems implicitly to rely on the parties being able (financially and time-wise) to enforce the law through polling day injunctions. This is hardly a stitch-in-time method. It is notable that the Queensland Parliament added pre-poll registration to the system of mere transparent authorisation proposed by the post-Mansfield petition committee report on HTVs. Hence I recommend a pre-polling day registration requirement, similar to Victoria and Queensland.

Whether it must be registered or not, there is the question of whether a HTV card is 'authorised by or on behalf' of a party or candidate. We may hope that registered parties and official candidates will not engage in sharp practices, but the history of electoral legislation and case law in this area is not cause for optimism; HTV cards in particular have been a cat and mouse game. The term 'authorised ... on behalf of' would benefit from some tightening. I am particularly thinking of circumstances where a party supporter may claim to have authorised the material themselves.

I recommend adding the following, inclusive definition to clarify what is meant by 'authorised by or on behalf of':
Whenever a party or candidate provides, directly or indirectly, any or all of the cost or materials involved in producing a HTV, that party or candidate should be deemed to have authorised the HTV, unless the cards are authorised by another party or candidate which has nominated in that seat.
The rider at the end is to allow for situations where two simpatico parties, in a coalition or non-briberous preference arrangement, assist each other with producing materials.

Finally, one judge (in the Mansfield petition) seemed to doubt that he could take into account the context of how HTVs were actually distributed when deciding if they were misleading. Examples of context are things said or worn by party activists as they hand out the cards. I think the judge was wrong to have those doubts. But it would be advisable to remove any doubt about such sharp practices: I recommend adding a rider to s 329, dealing with misleading or deceptive publications, to clarify that in deciding if 'any matter or thing is likely to mislead or deceive an elector in relation to the casting of a vote', a court should consider the immediate context and manner of the publication or distribution, including the appearance and actions of those doing the publication or distribution.

ELECTORAL and REFERENDUM AMENDMENT (MODERNISATION and OTHER MEASURES) BILL 2010

This bill is largely about machinery matters. However there are four significant measures.

Schedule 2: Evidence of Identity

The 2006 'Electoral Integrity' Bill probably went too far in imposing extra identity requirements on new and mobile electors. If the integrity of the roll were a substantial issue in practice, it would be only right to recreate the roll from scratch and require proper identification from everyone. The application of the 2006 requirements to those re-enrolling at a new address was really a half-way house, a form of incrementally requiring identity from many, but hardly all, electors.

So I support the proposed simpler and flatter requirements and their application to new enrolments only.

Schedule 3: Age 16 Provisional Enrolment.

I support the policy behind extending provisional youth enrolment to 16 (indeed I have publicly advocated it). It is a small measure to increase the time period in which the Commission and others can encourage young people to prepare for enfranchisement.

Schedule 6: Postal Voting

I am equivocal about proposals that weaken safeguards on postal voting, given the history and potential for fraud in that form of voting. Item 1, removing witnessing and signatures, could fall into that category. However I would defer to AEC advice on whether removing the witnessing requirement will in fact add any weakness to the anti-fraud measures. The deeper issue is the reliability of the underlying enrolment. Anyone seeking to use postal voting to personate another elector would have to:
(a) intercept the ballot (not entirely difficult since postal votes, given their origin in assisting electors on the move, do not have to be sent to registered addresses),
(b) forge a signature on the ballot envelope, and
(c) risk being detected after the scrutiny, assuming the real elector turned out to vote.

A problem with Australian postal voting is the heavy involvement of political parties in the process. Encouraging online applications may somewhat reduce that involvement. I do not have any in principle opposition to party activists distributing official postal voting application forms; indeed that is one way of disseminating them. Item 23, in requiring

that postal application forms be physically distinct from party literature seems to envisage this, and is a useful if small improvement on current practice.

Item 2 inserts a requirement that an application shall be made 'directly' to the Divisional Returning Officer. The Explanatory Memorandum states that this 'is intended to ensure that the completed application is not returned via a third party, including a political party'. It is not clear that the mere insertion of 'directly' will achieve this end. One can apply 'directly' to a government agency simply by filling in the official form addressed to that agency. It would hardly matter that one gives the form to a carrier or agent – whether it be the post office or a friend. Indeed, many infirm and old postal voters by necessity would rely on a 'third party'. Indeed the Act still envisages 'indirect' applications: s 197 makes it an offence for a third party to not forward a postal vote application or ballot in a timely fashion.
I recommend that Schedule 6, item 2 be rethought: it should not be interpretable as forbidding a postal voter to rely on a friend to deliver or post their application. Instead a specific provision should be included prohibiting registered parties, candidates or those acting on their behalf from handling completed postal voting applications.

Schedule 8: Eligibility for Early Voting

Given what I said above about postal voting's potential for fraud, I am equivocal about extending the grounds for eligibility for postal voting. This does not mean, however, that the grounds cannot be streamlined. Also, those concerns do not necessarily apply to in-person early voting.

Item 1 inserts a new, fairly broad reason 3A, as a basis for early voting. It is that 'on polling day, the elector will be absent from the Division for which the elector is enrolled'. This will make existing reason 1 (being outside one's State or Territory) redundant. For simplicity, if new 3A is adopted, it may as well replace reason 1 rather than being included as reason 3A.

I doubt if many people have any idea of the exact boundaries of their electoral division. Being outside one's division seems an arbitrary place to draw the line, and an exceedingly generous one in inner-city electorates. If a new and broad eligibility rule is desired, why not a rule that the elector will be more than (say) 20 kms from their home/enrolled address throughout polling day?

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