Submission to Senate Finance and Public Administration Committee

Commonwealth Electoral (Democratic Plebiscite) Bill 2007

General

This submission will focus on the legal/constitutional aspects of this Bill, and the Commonwealth intervention.

My focus of research interest and expertise for over a decade now has been the law and regulation of elections and parties.

On the political or policy wisdom of the issue, I feel that:

1. The Beattie government has been heavy-handed: The pre-existing Local Government Act included a process for local polls. Whilst these may have had no binding purpose, they would have allowed Shires/ratepayers to vent steam.
2. The Howard government has been heavy-handed. There is no rationale for ad hoc Commonwealth intervention into a sub-State level issue like the organisation of local government. It is ironic that, as Opposition Leader, the Prime Minister helped scuttle the referendum proposal that would have at least entrenched local government in the national Constitution.

Constitutional Issues

This Bill would not pass constitutional muster.

The Commonwealth cannot override State law on local government in this way. There are two reasons for this.

1. State Immunity

The existential autonomy of the States. The *Melbourne Corporation* principle provides that States are immune from Commonwealth laws that are too directly restrictive of the States' core functions/freedoms as independent polities. As Justice Dixon put it, there is a reservation on Commonwealth power to make a 'law which places a particular disability or burden upon the operation or activity of a State, and more especially the execution of its constitutional powers'.[1] This arises from 'their position as separate governments in the system exercising independent functions'. Starke J emphasised the federal aspect of this: Commonwealth law which directly and in a 'substantial manner' interferes with the 'exercise of constitutional power' by the States is suspect. Latham CJ focused on whether the law is properly seen as a law 'with respect to State government functions as such' – if so it is suspect.

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[1] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (striking down law compelling States and their authorities, including local governments, to bank with the Commonwealth Bank).

The principle was more recently applied in the *Industrial Relations Act Case* to strike down Labor's unfair dismissal laws from applying to senior public servants.[2] Local government councillors are no less inherently officers of the State apparatus - local government having no independent existence, especially in Queensland, but owing its existence and powers to State legislation. Local government is a core part of State government.[3]

Queensland has the power to forbid its councillors from taking public action, particularly on an issue so central to the shape of local government as whether to ballot local citizens on local boundary questions.

2. Absence of any Underlying Commonwealth Power

The Commonwealth has power to run plebiscites on a range of issues. It can do so:

(a) on issues of Commonwealth legislative competence, as incidental to that power – (eg the conscription 'referenda' under the defence power); and

(b) on issues of nationhood, under the nationhood power (eg the national song poll).

It can also use its general appropriations power to legislate for non-binding plebiscites on general matters, including say local government affairs: but *not* to legislate in a compulsory fashion nor override valid State law. An analogy would be if the Commonwealth sought to hold a 'State election' run under its own rules by the Australian Electoral Commission. It could do so, given its broad appropriations power, but not only would the poll have no effect, the Commonwealth would have no power to, for example, force State citizens to vote in such a poll.

The attempt in clause 1F of the Bill to invoke the external affairs power suggests constitutional desperation.

Article 25(a) of the ICCPR merely provides that:

> Every citizen shall have the right and opportunity [without racial, sexual etc discrimination] and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through chosen representatives.

Article 25(a) obviously does not require a system of direct democracy (eg citizens referenda or plebiscites). It merely guarantees some vague, minimal level of ability to 'take part in the conduct of public affairs'. This can be limited to 'chosen representatives' – in this case, the Queensland Parliament. Article 25(a) cannot found a Commonwealth law overriding a State law when, as here, the State legislative actions are not both the formal product of a democratically elected Queensland Parliament, and will be answerable to that system at the next Queensland election.

Article 19, the other ICCPR provision relied on in this Bill, merely provides a general freedom of expression. A draconian law banning public expression on the topic of council amalgamations, or possibly banning public protests, might be overridden by

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[2] *Victoria v Commonwealth* (1996) 187 416.

[3] Comments in the *Municipalities Case* (1919) 508 notwithstanding (it was said there that municipal ie local authorities were not 'agents' of the State government, but this case concerned their service and trading activities, and whether these were subject to the federal award system. This is a long way removed from (a) direct federal legislation regulating the (b) role/status/freedom of councils and councillors as governmental entities.

Commonwealth law invoking Article 19. But for all its heavy-handedness, the State law merely prohibits the use of council money or councillor participation, in plebiscites on amalgamations. The councillors are free to protest and otherwise express themselves in any other way – as are ratepayers, including by themselves arranging a plebiscite if they wish.

To put the argument another way – nothing in the ICCPR guarantees the existence of local government, let alone its freedom of action. Hence nothing in the ICCPR prevents a State Parliament legislating to remove local government altogether (an action that would more greatly diminish or silence local councillors and processes than the present amalgamations). It follows that preventing Councils from holding polls about their own restructuring is not in breach of the ICCPR.

Validity of the Queensland Restriction

(Please note this was written just prior to the Beattie government announcing a backdown and intention to repeal the restriction.)

There has been talk about the Queensland law breaching the implied freedom of political expression, read into the Constitution in several activist decisions of the High Court under Chief Justice Mason. It is notable that subsequent High Courts have been more literalist, and reined in this freedom. Thus, for example, the implied freedom is yet to be used to strike down any electoral legislation. As a result, the freedom remains somewhat nebulous and underdeveloped, so it is not easy to be certain about how it might affect the *Local Government Reform Implementation Act 2007* (Qld).

Even on the original, activist reading of the implied freedom, it was merely a protection against laws that unreasonably restricted freedom of expression on governmental matters.[4] Put simply, the implied freedom works in two stages: (1) does the law effectively limit expression about governmental mattes? (2) is the law nevertheless reasonably and appropriately to competing/justificatory public ends?

The Queensland Act states that an existing 'local government must not conduct a poll' on amalgamations, whether under the local government poll regime or in conjunction with the AEC or other polling body. It does so by threatening strong penalties: financial ones and potential dissolution of the council (and hence loss of office).

Certainly, the implied freedom would strike down a law restricting councillors from *communicating* with ratepayers about amalgamations, and vice versa. But it is far from clear that a law that restricts councillors from organising polls is unconstitutional in breach of the implied freedom.

The argument against the Queensland law would be that the *Commonwealth Electoral Act* provides a voluntary mechanism whereby 'private' or at least non-Commonwealth bodies can seek to contract for electoral services. The Queensland law closes off the

[4] See eg *McClure v Commonwealth* (1999) 163 ALR 734 (no right to means of expression, such as access to media); *Mulholland v AEC* (2004) 209 ALR 582 (no guarantee to statutory form of expression such as party label on ballot paper).

ability of councils to do this (as well as to use the pre-existing local government poll regime).

It should first be noted that the implied freedom does *not* require one level of government to erect – or in this case for Queensland to keep open - structures to permit particular forms of expression such as council authorised or sponsored plebiscites. This is particularly so when such activities necessarily involve public resources and decisions about the degree to which government, including policy-making, should be representative as opposed to being conducted via direct methods of participation.[5] It is thus constitutional for the Queensland Parliament to impose restrictions on the use of polls under the Local Government Act – what Parliament gives, it can take away. It is also constitutional for the Queensland Parliament to impose fines/restrictions on Councils using council monies to fund such polls, even if run by outsiders. Remember also that Council resources – even if only in the form of updating/vetting and delivering lists of ratepayers entitled to vote – are probably needed even under the Commonwealth's proposal to fund the plebiscites.

The issue then is whether banning councils contracting or running 'private' amalgamation polls, funded by the Commonwealth, is unconstitutional. It must be stressed that the Queensland amendments limit 'poll' to 'any process similar to a poll, referendum or plebiscite' ('poll' here having the meaning given to it in the Local Government Act). That is, it restricts only a formal, public vote. There does not appear to be any restriction on, say, surveying public views through market research methods, public meetings or other consultation, or for that matter agitating through the usual processes of public petitions etc. (Similarly, in *Levy's* case, the High Court considered an offence restricting non-shooters being on duck-flats, a provision designed to limit conflict between protestors and shooters. It upheld the restriction because the anti-shooting protestors were free to use a host of other means of expression besides on-site protests).

There is some force in an argument that the Queensland law goes too far. This argument gains traction if one thinks of councils as quite separate from, rather than creatures of, State Parliament. (Technically of course they owe their existence to State legislation).

Consider by analogy an NGO or even QANGO, receiving funding from public grants. The executive is surely free to attach conditions preventing such funding being used to run plebiscites on politicised questions. But would it be able to legislate to withdraw funding or even deregister an NGO or QANGO merely because it took money from another level of government to run such plebiscites? If this is a fair analogy, then the Queensland Parliament arguably went too far when it attached penalties to prevent a council from organising a plebiscite in a kind of 'private' capacity, albeit with another level of government.

My view, however, is that the Queensland law, though harsh, is not unconstitutional because it still leaves a host of methods for councils and councillors to communicate with their publics, including by various survey methods and protests.

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[5] Compare *McClure's* case, in footnote above.

Consider, by analogy, dissident public servants or commissioned public officials (eg the DPP) who proposed to conduct formal, public plebiscites (say by contracting with the AEC) on issues like the re-organisation or funding of their departments or agencies Is it seriously arguable that the executive or Parliament could not restrict such action with threat of dismissal?

Other Electoral Act options

The power over Commonwealth elections naturally permits the Commonwealth to establish the Australian Electoral Commission. I will assume that, incidental to that, the Commonwealth can legitimately allow the AEC to trade by providing electoral assistance to private and non-Commonwealth entities.[6]

The Commonwealth as an entity – or a person representing it, or indeed a group of ratepayers – can *without this Bill* seek to enter arrangements with the AEC to contract its services to say plebiscites. Under the *Commonwealth Electoral Act 1918* ss 7-7B, the AEC has the power to run such polls: it appears to be a matter for the AEC whether it accepts such contracts.

The Commonwealth could even seek to arrange for such plebiscites to be held on Federal election day, by having the Governor-General permit that under **s** 394. I believe it would be very unwise to do so, since the very purpose of that provision is to prevent the muddying of State level issues with the paramount task of choosing Federal MPs.

It is unclear, to me, why the Commonwealth does not pursue this course, except that for political reasons it would prefer the plebiscites to be formally initiated by local councils. Perhaps it also needs their co-operation to gain access to local voting rolls and to run the plebiscites individually by council region. Otherwise the AEC may have to run Commonwealth initiated plebiscites as:

(i) generic ballot questions of the form 'do you approve of the amalgamation (if any) affecting your shire' or 'do you approve of the Queensland government's scheme of amalgamations', and

(ii) report the results by federal electoral booths and divisions. Since the plebiscites are not legally binding, and the old councils may disappear before the plebiscites could be held, the manner of reporting results seems of limited importance.

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[6] I am aware there is an argument that such trading is not incidental: it probably depends on the timing and amount of such trading. But this is a much larger issue, affecting other government agencies, and one that can't be advised upon in a hurried inquiry such as this.