SUBMISSION TO

THE INQUIRY INTO THE 2007 FEDERAL ELECTION

BY

THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

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This submission draws attention to three inadequacies in the Offences Part (Part XXI) of the Commonwealth Electoral Act 1918 (hereafter the CEA) that became apparent during the 2007 campaign when, in part, they were exposed by the appearance of campaign techniques resembling those used in the United States recently. If the CEA were to be amended along any of the lines suggested below, attention should also be paid to the impact on s.362(3)(a) in Part XXII, and the extent to which liability should be extended beyond "the candidate" to party officers and perhaps others who publicly support the candidate. Then if an illegal practice were of a particularly serious nature, or were repeated to an extent that warranted the Court of Disputed Returns being satisfied that the result of the election was likely to be affected, it could lead to the more serious consequence of a new election.

S.329 Misleading or deceptive publications etc.

An allegation that a candidate is not qualified to be elected or is disqualified from being elected carries the implication that a vote cast for such a candidate is wasted, and so makes it less likely that electors will vote for such a candidate. It does not come under the formula of "hinders or interferes with the free exercise or performance" of a political duty that constitutes an interference with political liberty under s.327(1), though the general purpose of that section strongly suggests rectification is needed, as is proposed now. Unfortunately the topic of qualifications and disqualifications is notoriously obscure, as many of the media comments on the problem in the electoral division of Wentworth at the recent election showed, for example by saying that it was a CEA or an Australian Electoral Commission (hereafter AEC) matter whereas the meaning of the Commonwealth Constitution's provision was the initial source of difficulty. The supposed cause of disqualification was regularly reported to be "employment by the Commonwealth", rather than "office of profit", which misled readers about the breadth of the disqualification.

Two remedies, neither of which involves amending the Commonwealth Constitution, might be considered. Both could be introduced if that were thought necessary, but I prefer the first. That is that injunctive relief should be available to the candidate against whom the allegation(s) was/were made so that the falseness of the allegation(s), if it/they be false, could be established and publicised before polling day. An argument against that course would be that it would allow the inferior court in which the relief were sought to trespass on the function of the High Court, whether sitting as the Court of Disputed Returns or otherwise, to determine eligibility to be elected. However the High Court would still be left in possession of its original jurisdiction(s) and be able to hear an appeal from the inferior court as well. The right to injunctive relief should not be available to any other person, such as the usual an elector of the division, for that would only encourage abuse of the process.

The other remedy would be to impose a duty on the offended candidate to deny the allegation(s) in a prescribed manner and within a short period after it/they came to his/her notice and thereby turn the matter into a possible illegal practice within the meaning of the CEA committed by one or the other of them. It would then be available for

consideration by the Court of Disputed Returns if a petition against the result were lodged, and could be investigated as a question of fact.

Because of the obscurity of the present law on qualifications and disqualifications, I would not think it appropriate to mix this problem with the quite dissimilar matters in s.351 which have traditionally been treated as offences with penalties. The intention here is to enable electors to make up their minds with correct information.

S.348 Control of behaviour at polling booths etc.

The meaning of "misconduct" in s.348(1)(a) should include the taking of photographs (covering all the means now available) in the area defined by the existing section unless it was authorised by an appropriate person, preferably the Divisional Returning Officer rather than the officer in charge of the polling place to ensure uniformity of practice. Approval ought to be confined in practice to the mass media. The intention is to prevent any intimidation of prospective electors by prior publicity that photographs would be taken to identify persons committing electoral offences, or by the behaviour itself that shows this apparently happening. The suggestion is associated with the one that follows.

S.351 Publication of matter regarding candidates

It may be that this section could be retitled by adding "and electoral offences" or a similar formula; alternatively a new section could be added. The problem to be dealt with is the possible intimidation of prospective voters by the threat of penalties under the Act so that they are afraid to go to the polls. The recent decision of the US Supreme Court accepting the constitutional validity of a state law requiring photo identification at the polling place made the point that the authority responsible for the administration of the election, in that case the state of Indiana, had two duties – to ensure those entitled could vote and to ensure the integrity of the vote, and that is undoubtedly the case here as well. The CEA allocates responsibilities for the second duty to the AEC and to scrutineers appointed by candidates and parties by processes it lays down. The Commonwealth Parliament has given the Joint Committee responsibilities which it is currently discharging. On the other hand, the CEA (s.348(3) and (5)) limits presence in a polling place to those who have statutory rights and duties to be there, and authorises the removal of anyone else.

Advertisements, such as one that appeared in the press during the recent campaign, which warn prospective voters about the existence of an illegal voting practice and make statements about penalties contained in the CEA, are treading on very thin ice when they say that doing something wrong when voting can get the doer into very severe trouble:

> Intentionally voting more than once in the same election
> Penalty: $6,600.00 (and/or 12 Months Imprisonment)
> Commonwealth Electoral Act 1918, Section 339(1C)

If they go further, as that one did, and say that multiple offences can lead to prosecution for every offence and the possible imposition of the maximum penalty by way of fine or

imprisonment on a cumulative basis, I believe this denies the prosecution policy applied by past Commonwealth Governments.

> The NSW woman who boasted to a defeated candidate on 24 March 2007, "I voted 30 times and not for you, you b----" would be liable for a $191,400 fine plus prison.
>
> Think no one will notice if you vote illegally on 24 November? Don't be so sure!

If it were argued that the words in the first extract are not untrue, it still has to be asked whether a relatively uninformed voter might not be misled by them. Might they think voting below the line for the Senate in New South Wales constitutes voting "30 times"? Might they think voting for the House and the Senate constitutes "voting more than once in the same election"? Might they not conclude voting is a dangerous business to be avoided?

Intimidation in the United States has the advantage that voting is not compulsory, and so discouraging prospective voters from turning out, e.g. by a party sending new electors warnings they could be challenged at the polls (House Judiciary Committee Democratic Staff, *Preserving Democracy: What Went Wrong in Ohio* (2005) pp.40-47), should be easier than getting them to risk the modest penalty for not voting. It is also easier in the United States to identify target populations more vulnerable to intimidation, such as persons with previous convictions, with English-language difficulties, who belong to communities associated with illegal immigration, &c., who are often targeted because they are known to have a propensity to vote for a particular side of politics. A tombstone advertisement in a broadsheet is unlikely to reach many such electors, and in the United States they are less likely to be enrolled to start with, but the technique can be employed via other media, such as telephone calling or communications directed at community group leaders. I saw the advertisement in question in a broadsheet newspaper, but if it appeared elsewhere that ought to have been picked up by the AEC's media service and an inquiry could be directed to the AEC if the extent of its use were thought relevant.

I think this issue can be separated from the ancient "truth in political advertising" question, even though it might be preferable if factoids like the alleged statement of an unnamed woman to an unnamed candidate were banned. However there is more recent precedent for trying to prevent statements which seek to defeat Parliament's intention as contained in the language of the CEA. If Parliament wants cumulative sentences, it should say so and try to bind the relevant prosecuting authorities. If it does not want them, then it is undesirable that someone else say they may be imposed when in practice they would not. Without wishing to raise the specter of Albert Langer, I recommend that publishing any "claim or suggestion" concerning penalties under the CEA by anyone other than the AEC be prohibited during whatever period may be defined as the election period for campaign finance regulation. That leaves open the possibility of putting such words into advertisements seeking or supporting alteration of the CEA at any other time.