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BILLS DIGEST

28 August 2007, no. 34, 2007–08, ISSN 1328-8091

Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007

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Law and Bills Digest Section

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Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007

Date introduced: 16 August 2007

House: House of Representatives

Portfolio: Finance and Administration

Commencement: On Royal Assent

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

To amend the *Commonwealth Electoral Act 1918* (the CEA) to enable the Australian Electoral Commission (the AEC) to use and disclose information for the purpose of conducting an activity (such as a plebiscite). The Bill also seeks to override any state or territory law that prohibits or discourages a person or body from entering into such an arrangement with the AEC or taking part in such an activity.

Background

Queensland local government amalgamations

On 17 April 2007 the Premier of Queensland, the Honourable Peter Beattie, and the Queensland Minister for Local Government, the Honourable Andrew Fraser, announced the establishment of a seven-member Queensland Local Government Reform Commission (the QLGRC).[1] The brief of the Commission was to consider new boundaries for the long-term sustainability of local government across the state.[2] The Queensland Government's rationale for the changes was that 40 per cent of Queensland councils were struggling

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1. Hon. Peter Beattie, 'Ministerial statement: local government reform', Queensland, *Debates*, 17 April 2007, pp. 1167–8.
   Hon. Peter Beattie and Hon. Andrew Fraser, *Local Government to Undergo Historic Reform*, media release, Brisbane, 17 April 2007.

2. For a preliminary timeline of the reform process, see Australian Services Union, Queensland Services Branch, 'ASU working for members during the reform process of Queensland Local Government,' 26 April 2007, http://asuqld.asn.au/pdfs07/Reforms.pdf, accessed on 24 August 2007.

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financially and that, as Australia's fastest growing state, Queensland's system of local government was outdated and needed 'to be modernised to reflect the way Queenslanders live, work and interact in today's Queensland.'[3] They claimed these major reforms

> will provide a stronger, more efficient local government system that has a greater ability to deliver services and infrastructure for all Queenslanders.[4]

As a consequence of the July 2007 recommendations of the QLGRC,[5] the amalgamation of Queensland's 157 councils is going ahead, under legislation passed by the Queensland Parliament. The details of the mergers are beyond the scope of this digest. However, some aspects of the laws will be canvassed, since the Commonwealth Government is presenting this Bill as a consequence of the process adopted in Queensland.

Under the *Local Government Act 1993* (Queensland), certain proposed determinations made by a Local Government Electoral and Boundaries Review Commission require a referendum.

Section 92(1) requires a **compulsory referendum** on certain 'reviewable local government matters', defined in section 64 as follows:

> (1) The following are reviewable local government matters—
> (a) creating a new local government area, including, for example, creating a new local government area from—
> (i) 2 or more local government areas that are abolished; or
> (ii) a local government area that is abolished and a part of another local government area; or
> (iii) a part of a local government area that is excluded from the local government area; or
> …
> (f) abolishing a local government area and merging the local government area with another local government area.

Section 92(2) provides that the Commission may decide to have a **non-compulsory referendum** in relation to a reviewable local government matter if it pertains to:

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3. Queensland Department of Local Government, Planning, Sport and Recreation, 'Stronger councils providing better services to Queenslanders! 40% of Queensland councils are struggling financially', http://www.strongercouncils.qld.gov.au/Whyreform.aspx, accessed on 24 August 2007.

4. Queensland Department of Local Government, Planning, Sport and Recreation, 'Local Government Reform. A new chapter for local government in Queensland,' http://www.lgp.qld.gov.au/?id=4461, accessed on 24 August 2007.

5. *Report of the Local Government Reform Commission*, Brisbane, July 2007, released on 27 July 2007.

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> (c) changing the external boundaries of a local government area by excluding part of the local government area and including the part in another local government area, or
>
> (e) including in a local government area a part of the State that is not part of a local government area.

In going ahead with its reforms, the Beattie Government initially decided not to allow a referendum on the amalgamation issue, and made amendments to this effect via the Local Government and Other Legislation Amendment Bill. This led to controversy and discontent on a variety of fronts.[6]

The Commonwealth Government was not initially involved. It did not seem to consider that it could directly prevent the amalgamations, nor did it appear to want to. The Federal Minister for Local Government, the Honourable Jim Lloyd, was reported as saying:

> Obviously, local governments are creatures of state legislation and it's an area where the Commonwealth really doesn't have a role to play, other than certainly supporting them and appealing to the Queensland Government to ensure there is a longer public consultation period.[7]

He also ruled out any retaliatory action such as withholding of funding, and indeed guaranteed to maintain funding:

> So there is in fact, no financial impediment to amalgamations. We certainly don't support involuntary amalgamations.[8]

The Prime Minister, the Honourable John Howard, has explained that the allegations regarding the lack of consultation and the possibly 'involuntary' nature of the Queensland measures had led him to offer funding to allow the AEC to undertake any plebiscite on the amalgamation of any local government body in any part of Australia. He has accused Mr Beattie of behaving in an 'arbitrary jackbooted fashion'[9] and in a joint press conference with the Treasurer on 8 August 2007, Mr Howard said:

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6. See for example, Dennis Atkins, 'Merger Madness', *Courier Mail*, 12 May 2007, p. 48.
7. Roberta Mancuso, 'Council mergers a state matter', *Courier Mail*, 16 May 2007, p. 19.
8. ibid.
9. The Hon. John Howard, *Queensland local government amalgamations*, media release, 19 August 2007.

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> I think it is a total travesty of democracy to not only refuse to consult people about what you are going to do that is going to affect them[, but] having refused to consult them, threaten to punish them if they dare to express their opinion in a vote…[10]

Shortly thereafter the Beattie Government inserted a provision into the *Local Government Reform Implementation Act 2007*, section 159ZY, prohibiting an existing local government from conducting a poll on the amalgamations:

> An existing local government must not conduct a poll in its area, or a part of its area, if the question the subject of the poll relates to anything that is, or is in the nature of, a reform matter, or the implementation of a reform matter.
>
> *Example—*
>
> > An existing local government must not conduct a poll under chapter 6, part 2 about whether its local government should be abolished and be included in a new local government area.
>
> (3) Maximum penalty – 15 penalty points.

This Act was passed on 10 August 2007.

Mr Howard, in turn, on 16 August 2007, announced that he would change the electoral laws to override the 'Queensland Government's attempt to block local councils from holding referendums on mergers'.[11] This led to the current Bill having a provision to the effect that any law prohibiting the holding of a plebiscite would be invalid (**proposed subsection 7A(1E)**, discussed further below).

Mr Beattie has since changed his position on the question of the holding of plebiscites and on 22 August 2007 a Bill repealing section 159ZY was introduced into the Queensland Parliament.[12] Mr Beattie is reported as commenting that he wanted to move on and that:

> Perhaps we were a bit heavy-handed in relation to that, and we got that wrong… That part of it we stuffed up. But if people want the right to protest we should allow that. I

10. The Hon. John Howard, *Joint Press Conference with the Treasurer, The Hon Peter Costello MP, Parliament House, Canberra*, interview transcript, 8 August 2007.

11. 'Howard to override Beattie on merger votes', *ABC News*, 16 August 2007.
The Hon. John Howard, *Joint Press Conference with the Special Minister of State, the Hon Gary Nairn MP, Parliament House, Canberra*, interview transcript, 16 August 2007.
See also 'Council laws rushed into Parliament,' *Sydney Morning Herald*, 16 August 2007.

12. Local Government Amendment Bill 2007.

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> obviously got that wrong. When it comes to giving people a vote, John Howard and Kevin Rudd got it right and I didn't.[13]

The resulting amendments mean that the proposed provision in the Bill to override such restrictive measures is otiose, at least as far as it applies to the Queensland situation.

Referenda and plebiscites

The Minister made the point in his second reading speech that the Bill is not designed to provide an avenue for citizen-initiated referenda (CIR). Without this reference in the second reading speech, this conclusion would be very difficult to glean from the text of the Bill. The *Acts Interpretation Act 1901* section 15AB allows the Minister's second reading speech to be an aid to the interpretation of a Bill in certain circumstances, but the second reading speech is not conclusive of issues raised by legislation and does not override the text of that legislation.

Mr Howard has been very emphatic in stating that the issues of consultation and the participation of local people in political processes are at the centre of his intervention:

> It should be remembered that the Government is not expressing a view as to whether or not an individual merger should occur. Rather, the Commonwealth believes that people should have the right to express a view on the actions of a government without threat of penalty.
>
> However, if there is a strong expression of opinion in local government areas that choose to go ahead with the ballots, the Queensland Government may be forced to reconsider those amalgamations.[14]

In Australia there are legally binding mechanisms for constitutional referenda under s. 128 of the Constitution. There is also the possibility for advisory referenda or plebiscites:

> An issue put before the electorate which does not effect [sic] the Constitution is called an advisory referendum or a plebiscite. Governments can hold advisory referendums to test whether people either support or oppose a proposed action on an issue. The Government is not bound by the 'result' of an advisory referendum as it is by the result of a Constitutional referendum. Australian Governments, Federal, State and Territory, have held advisory referendums on various issues…[15]

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13. Andrew Fraser, 'I was wrong, says Beattie, as he allows plebiscites,' *The Australian*, 20 August 2007, p. 4.

14. The Hon. John Howard, *Queensland local government amalgamations*, op. cit.

15. Australian Electoral Commission, 'Advisory Referendums (also called Plebiscites)', http://www.aec.gov.au/Elections/referendums/Advisory_Referendums.htm, accessed on 24 August 2007.

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There have been three plebiscites held at the federal level. Military-service plebiscites were held in 1916 and 1917. Both sought a mandate for conscription and were defeated.

There was also a federal plebiscite in 1977 on the question of a national song, at which four alternatives were put and *Advance Australia Fair* 'won' (with 43.29 per cent of the vote).[16]

More recently, Western Australians were asked to vote on extended shopping hours (this was rejected), and ACT voters were asked to endorse the Hare-Clark proportional representation electoral system (this was accepted).[17]

Norman Abjorensen, an ANU political scientist, provides this further background on CIR:

> Australia was once a leading proponent of direct democracy because of the provision for referenda in the Australian Constitution, where s128, adapted from the Swiss Constitution, provides for amendment of the Constitution by a referendum initiated by the federal parliament. The experiment, however, has progressed little further.
>
> Bills for Citizens' Initiated Referenda (CIR) have been introduced across the Australian parliaments, yet not one has been passed despite support for the concept at different times by all sides of politics.
>
> The concept of CIR has been advocated in Australia since before Federation, and the Australian Labor Party was an early proponent of the principles of popular initiative and referendum, adopting as part of its platform in 1908 where it remained until it was removed in 1963.
>
> Although the Liberal Party has not supported CIR at a national level and recently rejected it in Queensland, it has supported it in the ACT, Tasmania and Western Australia.
>
> CIR has been introduced successfully only at the local government level, but only in rare and isolated instances, most notably at North Sydney Council in NSW and Burnie City Council in Tasmania. CIR has long been in use in Switzerland, and in the United States it is widespread at the State level even though there is no provision for CIR at a federal level.
>
> It has been argued that CIR is inconsistent with the Westminster system of government and, in particular, the principles of responsible government and representative democracy.
>
> While its proponents argue that it increases the participation of electors in a democracy and serves to make governments more responsive and accountable to

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16. For more information on referenda and plebiscites, see the *Parliamentary Handbook*.
17. Norman Abjorensen, 'Suddenly, plebiscites are all the rage', *Crikey*, 24 August 2007.

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> voters, opponents claim that it clearly has the potential to undermine the accountability of elected representatives if they were to abdicate leadership to the CIR process.
>
> The measure in recent years has become the preserve of the extreme right and its distrust of politicians and the political system in general.[18]

Recently the question of having a plebiscite has also been raised in relation to the Northern Territory emergency measures—as well as in relation to nuclear power stations, by the Deputy Prime Minister, the Honourable Mark Vaile, agreed to by Mr Howard on 23 August 2007.[19]

The Constitution and Local Government

> The Commonwealth Constitution, while recognising government at the national and state levels, makes no mention of local government. The issue of constitutional recognition of local government has been put to the Australian people twice by way of referenda pursuant to section 128 of the Constitution.[20]

The *Constitution Alteration (Local Government Bodies) 1974* sought to give the Commonwealth Parliament powers to borrow money for, and to make financial assistance grants directly to, any local government body.

This was a proposed law to allow the Commonwealth to directly fund local councils. It was rejected by referendum. Such assistance still has to be paid 'through' the States.

The *Constitution Alteration (Local Government) 1988* sought to give such constitutional recognition to local government.

The Constitutional Commission in its *Final Report* (1988)[21] had recommended that a new section 119A be added to the Constitution in the following terms:

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18. ibid.

19. Sen. Andrew Bartlett, 'Cynical hypocrisy on council elections provides a chance to promote genuine democracy', 19 August 2007, http://andrewbartlett.com/blog/?cat=54.
'Vaile flags vote on possible nuclear sites', *ABCNews*, 23 August 2007.
The Hon. John Howard, *Nuclear Power Station Plebiscites*, media release, 23 August 2007.

20. Section 128 of the Constitution provides the method of altering the Constitution. This includes that a proposed amendment must be put to a referendum which requires the approval of a majority of electors in a majority of the states. Following an amendment in 1977, the Constitution now allows electors in the territories, as well as electors in the states, to vote in constitutional referenda. Territory votes are included in the national total only.

21. *Final Report of the Constitutional Commission*, Volume One, 1988.

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> Section 119A. Each State shall provide for the establishment and continuance of local government bodies elected in accordance with its laws and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State[22].

This was the provision that would have been inserted by the *Constitution Alteration (Local Government) 1988* but was rejected by the people in the 1988 referendum.

The actual amendment was not for the Commonwealth to have a direct relationship with the local-government tier of government, but rather sought to entrench the existing situation of local governments being creatures of the states. That is, it was not seeking to cut the states' middleman role.

The result was an even more resounding defeat than that in 1974.

This means that the constitutional relationship between the Commonwealth and the third tier of government has to be through the states.

Senate inquiry

The Bill was referred to the Senate Finance and Public Administration Committee upon its introduction to the Parliament. The Committee will visit regional Queensland to 'hear first-hand about the impact of the Beattie government's plans to forcibly amalgamate councils.'[23] Submissions were due by 24 August 2007, and the Committee is due to report on 4 September 2007. To date, submissions come from a variety of perspectives, ranging from support for the Bill but with a request that its measures go further (from the North Queensland Self-Government League),[24] to the claim the Bill is a political stunt[25] and support for the principle of ensuring public consultation.[26]

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22. ibid., p. 435.
23. AAP, 'Senate inquiry to examine federal plebiscite laws', 21 August 2007.
24. Submission No. 1, http://www.aph.gov.au/senate/committee/fapa_ctte/democratic_plebiscites_07/submissions/sub01.pdf.
25. See for instance, Submission No. 20, http://www.aph.gov.au/senate/committee/fapa_ctte/democratic_plebiscites_07/submissions/sub20.pdf.
26. See for instance, Sumission No. 25, http://www.aph.gov.au/senate/committee/fapa_ctte/democratic_plebiscites_07/submissions/sub25.pdf.

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Financial implications

According to the Explanatory Memorandum there will be a financial impact but it is not possible to quantify it at this stage.

One matter that is relevant to the cost of holding a vote such as a referendum or a plebiscite is the timing of the process. Section 394 of the CEA provides that on the polling day for an election for the Senate or the House of Representatives:

> No election or referendum or **vote** of the electors of a State, or part of a State shall, without the authority of the Governor-General, be held or taken under a law of the State (emphasis added).

There may be questions as to whether a plebiscite is a 'referendum', however, no *vote* can be held on the same day as a federal election, unless the Governor-General (acting on the advice of the Federal Executive) so approves.

This provision of the CEA is not being amended. It should be noted that once an election is called, the 'caretaker conventions' come into play, and such advice to the Governor-General is required to be bipartisan.[27]

Main provisions

Section 7 of the CEA sets out the functions of the AEC. Most matters specified under section 7 revolve around functions relating to 'electoral matters'. This term is defined in section 5:

> ***electoral matters*** means matters relating to Parliamentary elections, elections and ballots under the *Workplace Relations Act 1996* and referendums.

Although 'electoral matters' does not specifically encompass 'plebiscites', paragraph 7(1)(g) provides that the AEC has any other functions that are conferred on it by a law of the Commonwealth. As discussed above, the AEC provides information on advisory referenda/plebiscites, which have been held before, and are generally understood as part of the electoral process.

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27. The 'caretaker conventions' are required by the principles of good public administration but there are no penalties attached to their breach, although the Governor-General can counsel against such a breach. See more on this in Richard E. McGarvie, *Democracy: choosing Australia's Republic*, Carlton, Vic., Melbourne University Press, 1999, p. 49, http://www.mup.unimelb.edu.au/democracy/049.html, accessed on 23 August 2007.

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This suggests that the CEA, and section 7 in particular, would currently provide a sufficient basis for the AEC to hold plebiscites, and that the AEC and the states and territories could enter into arrangements under existing mechanisms.

Section 7A currently allows the AEC to make arrangements for the supply of goods and services to any person or body. These arrangements can cover arrangements under section 84 of the CEA, relating to a joint electoral roll with the states and territories.

Section 7A was inserted into the CEA in 1992 and amended in 1998. At the time of its introduction the Explanatory Statement explained that the new section was:

> To empower the Australian Electoral Commission, in a manner not inconsistent with the performance of its primary functions, to provide goods and services to other organisations or individuals (for example, providing a "scanning" service to State electoral authorities, or assisting in the conduct of an election other than a federal election).[28]

Item 1 adds **new subsections 7A(1C)–(1G)** to the CEA. **New subsections 7A(1C)–(1D)** will enable the AEC to use any personal information that it holds, including information contained on the electoral roll, for the purpose of conducting an activity arranged under subsection 7A(1), that is, the provision of 'goods and services'. **Subsections 7A(1C)** and **(1D)** specifically mention the conduct of a plebiscite by way of example. Both provisions seek to ensure that the use and disclosure of personal information, including information contained on the electoral roll, is taken to be authorised by law, and **subsection 7A(1D)** also states, to avoid doubt, that the disclosure will not contravene any provision of the CEA.

New subsection 7A(1E) provides that any law of a state or territory that prohibits, penalises or discriminates against a person or body from entering into an arrangement under existing subsection 7A(1) (the supply of goods and services) 'will have no effect'.

To address any possible constitutional uncertainty with this particular provision, **new subsection 7A(1F)** seeks to assert the external affairs power[29] of the Constitution by relying on Article 19 and Paragraph 25(a) of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 19 relates to the right to freedom of expression and the right to hold opinions without interference. Paragraph 25(a) refers to the right to political participation, stipulating that every citizen has the right:

> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.

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28. Explanatory Memorandum, Electoral and Referendum Amendment Bill 1992.

29. Section 51(xxxvi) of the Constitution.

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In a submission to an inquiry of the Joint Standing Committee on Electoral Matters, the Human Rights and Equal Opportunity Commission (HREOC) provided the United Nations interpretation of Article 25 as follows:

> The United Nations Human Rights Committee has issued a General Comment (General Comment 25) to help interpret the meaning of article 25 of the ICCPR.
>
> General Comment 25 explains that article 25 of the ICCPR requires parties to the Convention to make it practically feasible for all people to exercise their right to vote:
>
> > States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. … **Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community**. (emphasis added by HREOC).[30]

According to the Explanatory Memorandum:

> Subsection 7A(1F) reinforces subsection 7A(1E) by rendering such State or Territory laws inoperative to the extent of any inconsistency with Articles 19 and 25(a) of the *International Covenant on Civil and Political Rights,* should subsection 7A(1E) exceed the Commonwealth's legislative powers.[31]

In a submission to the Senate inquiry, Prof. Gerard Carney has observed that subsection 7A(1F)

> may be supported by the external affairs power (s 51(xxix)) in its application to State law. But it is superfluous if the State law is invalid for infringing the implied freedom of political communication.[32]

New subsection 7A(1G) refers to section 15A of the *Acts Interpretation Act 1901* to the effect that by relying on the external affairs power of the Constitution in this Bill, section

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30. Human Rights and Equal Opportunity Commission, Submission no. 34 to the Joint Standing Committee on Electoral Matters Inquiry into Civics and Electoral Education, 2 June 2006, p. 3.

31. Explanatory Memorandum, p. 9.

32. Prof. Gerard Carney, Submission no. 77 to the Senate Finance and Public Administration Committee Inquiry into Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007, 24 August 2007, p. 1. He also finds subsection 7A(1E) invalid for two reasons: 'it falls outside the scope of Commonwealth legislative power; and it infringes the *Melbourne Corporation* principle.'

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15A is not being limited in its operation. This means that when interpreting the provision, section 15A will still allow a court to preserve parts of an enactment as valid, even if some parts are invalid by being beyond the legislative power of the Commonwealth.

Item 3 inserts a new power to make regulations as to how the Commission is to supply goods and services under an arrangement entered into under existing section 7A of the CEA.

Concluding Comments

Mr Beattie is proposing to remove provisions that prevent plebiscites being held in Queensland on the amalgamation of local governments. Although this Commonwealth Bill is not directed specifically towards Queensland, the policy rationale for the Bill was in the context of Queensland, and therefore the provision which tries to override state laws is now unnecessary in the short term. Furthermore, the existing section 7 has been wide enough to encompass the holding of plebiscites and has been used in the past, so one can question if the main provisions of this Bill are necessary. If ‘referenda’ can include plebiscites, it is the case that no referenda, plebiscites or any other votes can be held on the same day as a federal election without the Governor-General’s approval.

The provisions in the Bill which explicitly refer to the external affairs power and which call on the principles of preservation contained in the Acts Interpretation Act all make it clear that the Commonwealth Government is taking steps to improve the likelihood of the legislation being found to be constitutional. It also may indicate an element of uncertainty regarding its constitutional standing as it ventures into traditional areas of state responsibility.

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