Glen Elmes, MP
Member for Noosa

Parliamentary Secretary
to the Shadow Minister for
Environment and
Multiculturalism

Member of the
Parliamentary
Travelsafe Committee

22 August 2007

Committee Secretary
Finance and Public Administration Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir or Madam

INQUIRY INTO THE *COMMONWEALTH ELECTORAL AMENDMENT (DEMOCRATIC PLEBISCITES) BILL 2007* ("THE BILL").

With reference to the above inquiry I am pleased to make the attached submission.

My area of Noosa is vehemently opposed to amalgamation of the Noosa Shire Council with the Maroochy Shire and Caloundra City councils under the Queensland Government's *Local Government Reform Implementation Bill 2007* and its amendments.

I welcome the Federal Government's bill and their intervention to ensure that the people of Noosa are allowed to exercise their right to formally voice their opposition to the Queensland Government's bill.

I would also welcome the opportunity to represent my constituents at the Committee hearing into the bill and will make myself available to appear at your convenience.

Should you have any queries in relation to the submission, please do not hesitate to contact me on (07) 5449 8988.

Yours faithfully

GLEN ELMES MP
Member for Noosa

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Background

1. For more than a generation Noosa Shire residents have enforced our sustainable way of life through the councils that have been elected by the people.

    a. Successive councils set up sector boards to act as community watchdogs overseeing issues such as heritage, environment, tourism and others.

    b. Examples of restrictions enforced by the council include:
        i. Building development is limited to three stories.
        ii. Population and Housing density limits are restricted.
        iii. Council has utilised roundabouts as opposed to traffic lights. Only three sets of traffic lights exist in the entire Shire and only at critical intersections – one for a major road intersection and two for children to cross roads safely near schools.
        iv. Installation of commercial signage is restricted.

2. The restrictions imposed by the Noosa Shire Council in order to protect the Noosa lifestyle and environment differ greatly from the two Shires with whom it is proposed to be amalgamated.

3. Amalgamation of the three Sunshine Coast Shires was first raised by Terry Mackenroth just prior the last federal election in 2004 in his former capacity as Deputy Premier and Treasurer. He called for the amalgamation at a property council meeting on the Sunshine Coast.

4. The Noosa community was so outraged when the amalgamation issue was first raised, that on the day of the last federal election Noosa community groups volunteered to operate a petition at each federal polling booth within the Shire. 18,747 signatures were collected that day and the petition was tabled in the Queensland Parliament on the 18th of October 2004 by the then-member for Noosa, Cate Molloy, opposing forced amalgamation.

5. Two other senior Labor Ministers have spoken to the property council of the Sunshine Coast since then and both have also called for the amalgamation of the three local authorities.

6. When the Local Government Reform Commission was announced and the initial legislation was presented to the parliament, the pre-existing legislated requirement for a referendum to decide on Council boundaries was removed.

7. During the recent submission process, 31,000 submissions, or 86% of the total number of submissions to the commission from across Queensland, came from Noosa.
8. Following the announcement that Noosa would be amalgamated, a protest rally was organised in Brisbane on Friday 3 August 2007 and approximately 7,000 -10,000 Noosa Shire residents traveled up to 2 hours to come to Brisbane and protest outside Parliament House.

9. I refer the Committee to the 'Youtube' website for examples of people protesting in Brisbane against the forced amalgamation of Noosa. The pertinent URL is http://www.youtube.com/watch?v=Kbw3iQ_iKb0 or go to http://www.glenelmes.com and follow the prompts to further media examples.

10. Recently a News Ltd website (The Courier Mail) conducted an online poll, which attracted some 5000 responses; approximately one quarter came from Noosa, opposing the legislation.

11. The Queensland Government has stated that the reason for amalgamations is to secure financial stability for local government into the future. However the Noosa Shire is not a financial basket case, in fact it rated in the top 10 financially secure local authorities in Queensland.

12. Prior to the Reform Commission's announcement being made, the Minister for Local Government and Planning, Andrew Fraser attended a meeting in Noosa, where he stated *"If I had 156 local authorities like Noosa, there would be no need for local government reform."*[1]

13. The tourism industry in the Noosa Shire is worth $800 million each year and is the Shire's major employer. The Noosa brand has been promoted nationally and internationally as a completely separate entity to the rest of the Sunshine Coast because of it's lifestyle and environmental values. This industry, including potentially massive job losses amongst other issues, is under threat by an amalgamation into a super council.

14. The government is planning to introduce *Iconic* legislation to protect Noosa and Port Douglas but have no idea how to draft it. Premier Beattie has passed the project back to these two councils in order to obtain their suggestion for the drafting of the legislation.

15. Noosa residents know that this *Iconic* legislation is only as strong as the right to vote under the old legislation which was withdrawn at the whim of the Government of the day. In effect, it will act only to placate the people of Noosa and will not ensure that the current identity and legacy of the Noosa Shire will be protected.

16. The best protectors of the Noosa Shire are the people who live there, they have proven over and over again that they are the best custodians of the area and that arbitrary government legislation is not and can never be as effective.

17. I would urge the committee to do all that in their power to see that the Noosa Shire is re-instated as a stand-alone local authority that is recognised for its values and as a shining example of a sustainable community to the rest of the country.

Section to the Bill

7 (1C) The use by the Commission of personal information (including
8 information contained in a Roll) for the purposes of conducting an
9 activity (such as a plebiscite) under an arrangement under
10 subsection (1) is taken to be authorised by law.
11 Note: The effect of this subsection includes (but is not limited to) an
12 authorisation for the purposes of paragraph (1)(c) of Information
13 Privacy Principle 10 in section 14 of the *Privacy Act 1988*.

14 (1D) To avoid doubt, the disclosure by the Commission of personal
15 information (including information contained in a Roll) for the
16 purposes of conducting an activity (such as a plebiscite) under an
17 arrangement under subsection (1) is taken:
18 (a) to be authorised by law; and
19 (b) not to contravene any provision of this Act.
20 Note: The effect of paragraph (a) includes (but is not limited to) an
21 authorisation for the purposes of paragraph (1)(d) of Information
22 Privacy Principle 11 in section 14 of the *Privacy Act 1988*.

Response

This section provides the administrative operation of the plebiscite and allows the provision of electoral roll information for the purposes of a poll without restriction under the Information Privacy Principles as set out in the *Privacy Act 1988*.

I support this section of the bill.

Section to the Bill

23 (1E) A law of a State or Territory has no effect to the extent to which
24 the law in any way prohibits a person or body from, or penalises or
25 discriminates against a person or body for:
26 (a) entering into, or proposing to enter into, an arrangement
27 under subsection (1); or
28 (b) taking part in or assisting with, or proposing to take part in or
29 assist with, the conduct of an activity (such as a plebiscite) to
30 which an arrangement under subsection (1) relates.

31 (1F) If the operation of subsection (1E) would, but for this subsection,
32 exceed the legislative powers of the Commonwealth, it is the
33 intention of the Parliament that it operate to the extent that the law
34 of the State or Territory would be inconsistent with Article 19, or
35 paragraph (a) of Article 25, of the International Covenant on Civil
36 and Political Rights.
1 Note: Articles 19 and 25 of the International Covenant on Civil and Political
2 Rights are set out in Schedule 2 to the *Human Rights and Equal*
3 *Opportunity Commission Act 1986*.
4 (1G) Subsection (1F) does not limit the operation of section 15A of the
5 *Acts Interpretation Act 1901*.

Response

This section of the bill acts to preclude the operation of section Clause 5 of the *Local Government Reform Implementation Bill 2007* (Qld) (as amended) as it inserts clause 159ZY into the *Local Government Act 1993* (Qld).

The pertinent section of the abovementioned clause states:

> **'159ZY Polls**
>
> '(1) An existing local government must not conduct a poll under chapter 6, part 2 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 area should be abolished and be included in a new local government area.
>
> '(2) If, before the commencement of this section, a local government had resolved to conduct a poll the conduct of which is prohibited under subsection (1), the local government—
> (a) must, despite chapter 6, part 2, take all necessary action to ensure that the poll is not conducted; and
> (b) must give public notice that the poll is not to proceed—
> (i) by advertisement in a newspaper circulating generally in its local government area or part of its local government area; and
> (ii) in any other way that is reasonably appropriate for making the information publicly known.
>
> '(3) A person who is a councillor of a local government must not take any action for the purpose of the conduct of a poll that the local government is prohibited from conducting under this section.
> Maximum penalty—15 penalty units.
>
> '(4) All persons who contravene subsection (3) in relation to a particular poll, whether or not they are prosecuted under subsection (3), are jointly and severally liable for the total poll amount, which may be recovered by the State, in action as for a debt for the amount, and reimbursed to the existing local government, or the successor of the existing local government, less the costs of recovering the amount.

> '(5) In this section—
> ***successsor***, of an existing local government, means a local government that, under a reform implementation regulation, is the successor of the existing local government.
> ***total poll amount*** means the amount reasonably decided by the Minister as being the total amount of the expenses incurred by the local government in the conduct of the poll after the commencement of this section.

There are two issues in relation to the latter section of the bill that I would like to discuss in this submission. First is the question of using the External Affairs power under the *Constitution* as power to overrule the state of Queensland; and second is the ability of the Federal Government to overrule the legislation passed by the state of Queensland

THE USE OF THE EXTERNAL AFFAIRS POWER

The *Constitution* gives the Commonwealth Government power to enter into treaties with other nations and external bodies for the purposes of enacting and enforcing international law. It sets out in section 51(xxix) that this is a concurrent power shared with the States. Central to this concept is that where the Commonwealth Government has entered into a treaty, it must have the authority to legislate to ensure that international treaties are upheld and obeyed domestically.

This reasoning has been upheld in numerous High Court decisions since the matter of *Roche v Kronheimer*[2] in 1921, where the Commonwealth Government passed the *Treaty of Peace Act 1919* to uphold the Treaty of Versailles.

Of more relevance than historical significance, the decision in *R v Burgess; Ex parte Henry*[3] opened the door for the Commonwealth Government to make valid law that would operate to the exclusion of the States' laws based upon international treaties. However this case and others of the same period left uncertainty in respect to how far the Commonwealth could legislate.

The *Tasmanian Dams Case*[4] set in certainty the limits to Commonwealth power under the External Affairs power. They upheld an earlier decision[5] whereby the External Affairs power could only be invoked in circumstances where 'international concern' would dictate that such legislation is required.

Turning to the matter before this inquiry committee, it is rare that a western country would see a situation where legislation is passed that actively prohibits the conducting of a poll.
Clearly the international environment demands that people have their democratic rights upheld by their Government, not trampled in the name of administrative expediency.

It is my submission that while in some instances the aim of the Queensland Government to reform some local councils may be necessary, that the end does not justify the means of actively removing the people's democratic right to express their opinion.

Article 25 of the International Covenant on Civil and Political Rights as enacted through the *Human Rights and Equal Opportunities Commission Act 1986* clearly requires that citizens be granted the right to vote. This right to vote has been trampled by the Queensland Government and the Commonwealth Government should intervene to ensure that this does not occur as this is a matter of international concern.

THE RIGHT TO OVERRULE THE STATE LEGISLATION

The majority of Commonwealth powers under the *Constitution* are shared concurrently with the States. Where legislation is passed by both Parliaments that is mutually inconsistent, the *Constitution* under section 109 upholds the Commonwealth legislation as being prime.

There is a clear inconsistency between clause 5 of the *Local Government Reform Implementation Bill 2007* (Qld) ("the state bill") and clause 1E of the *Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007* (Cth) ("the Commonwealth bill") in that the state bill purports to remove the right of local councils and councilors in their personal and public capacities to conduct polls of their constituents in relation to the amalgamation of local councils; whereas the Commonwealth act purports to invalidate any State or Territory act which prohibits, penalises or discriminates against any person or body who attempts to utilise the services of the Australian Electoral Commission.

The question of inconsistencies as between Commonwealth and State legislation is covered by section 109 of the *Constitution* and has been the subject of High Court rulings in the matters of *R v Brisbane Licensing Court; Ex Parte Daniell*[6], *Clyde Engineering v Cowburn*[7] and *Ex parte Mclean*[8].

In *Daniell* the High Court took the approach that where Commonwealth and State legislation provide directions of behaviour that are incapable of simultaneous obedience, an inconsistency arose which would cause s109 of the *Constitution* to take effect.

In the matter of *Clyde Engineering v Cowburn*, Knox CJ and Gavan Duffy J stated that where a Commonwealth act gave rights to a person that were purportedly removed by a State act, the Commonwealth act would have priority. Isaacs J in the same matter set out a test for inconsistencies which gave the Commonwealth Government the power the define legislation with the intention to 'cover the field' so as to preclude the operation of State legislation under s109 of

the *Constitution*. This test became fully authoritative once approved in the decision of *Ex parte Mclean* by Dixon J.

These two decisions set out the circumstances that give rise to a direct inconsistency between Commonwealth and State legislation. In relation to the circumstances giving rise to this inquiry, it is my submission that the abovementioned decisions give rise to a direct inconsistency between the Commonwealth bill and the State bill on three grounds:

1. That a person cannot simultaneously obey both the Commonwealth and State bills;

2. That the Commonwealth bill provides a person or body a right which the State bill purports to remove; and,

3. That the wording of clause 1E of the Commonwealth bill purports to 'cover the field' and render any State legislation inoperable, which may also deal with people's standing to seek the assistance of the Australian Electoral Commission in conducting a poll.

To deal with each of these submissions in turn, the first submission appears to engage the test of inconsistency as set out in *Daniell*. Given that a person is unable to physically obey both bills in that one allows and one prohibits the same activity, the test for inconsistency appears met and therefore s109 of the *Constitution* applies to render the State bill inoperable as against the Commonwealth bill.

The second submission concerns circumstances where an inconsistency may not be clearly evident on the comparative wording of the two bills. In the alternative to the first and third submissions herein, it appears that the Commonwealth bill appears to give rights which the State bill purports to restrict or withdraw. This relates to the right to seek electoral assistance to conduct a poll. From the reasoning of Knox CJ and Gavan Duffy J in *Clyde Engineering v Cowburn* this restriction of a right by the State of Queensland in the Queensland bill gives rise to an inconsistency that would again cause s109 of the *Constitution* to give primacy to the Commonwealth bill and render the Queensland bill inoperable.

Finally the third submission is in relation to the wording of section 1E of the Commonwealth bill, specifically "*A law of a State or Territory has no effect to the extent…"* This statement appears to be sufficient to in effect be an effort by the Commonwealth legislature to 'cover the field' as described by Isaacs J in *Clyde Engineering* and Dixon J in *Ex parte Mclean*. To use the words of Dixon J[9], it does not appear that the Commonwealth bill is intended to operate as a supplementary or to be cumulative upon the State bill. To quote Dixon J:

> "*It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.*"[10]

As is appropriate under the *Acts Interpretation Act* 1901, it is appropriate to consider the Explanatory Memorandum of the Commonwealth bill to evidence the Commonwealth Legislature's intention when drafting the bill. The Explanatory Memorandum of the Commonwealth bill states as follows:

> *"Subsection 7A(1E) is intended to provide that the benefit of the provision can be delivered to any person or body without them being subject to a State or Territory prohibition, penalty or discrimination affecting their involvement in any arrangement the AEC may make, or activity under any arrangement."*[11]

This statement evinces the Legislatures intention to specifically preclude any State or Territory Legislation from restricting any person from the benefit intended under the Commonwealth bill. Therefore on the basis of the reasoning of Dixon J in *Ex parte Mclean* the Commonwealth bill will be supreme over that of the Queensland Government under s109 of the *Constitution*.

Conclusion
Therefore on the basis of the reasoning set out in the submissions herein, I believe that this committee ought to find that this legislation is valid for the purposes of preventing the Queensland Government from creating an operative act that would prevent persons or bodies from exercising their democratic right to conduct a poll in relation to the forced amalgamation of local councils.

It boggles the mind that an Australian Government would pass legislation that actively restricts peoples' right to vote. The international precedent would make Australia to be a laughing stock on the international stage and the Commonwealth is right to act to ensure that Australia's reputation is not besmirched by a power-hungry Premier and his short-sighted Minister.

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[1] Meeting held by Minister Fraser at the Noosa Leisure Centre.
[2] (1921) 29 CLR 329.
[3] (1936) 55 CLR 608.
[4] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[5] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
[6] (1920) 28 CLR 23.
[7] (1926) 37 CLR 466.
[8] (1930) 43 CLR 472.
[9] Ibid at page 483.
[10] Ibid at page 483.
[11] *Commonwealth Electoral Amendment (Democratic Plebiscites) Bill 2007* Explanatory Memorandum. Accessed at http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2786&TABLE=EMS Accessed 22/08/2007