24 August 2007

The Secretary
Senate Finance and Public Administration Standing Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Palethorpe,

Submission on the Commmonwealth Electoral Amendment (Democratic Plebisicites) Bill 2007

In response to your invitation to make a submission on the Commmonwealth Electoral Amendment (Democratic Plebisicites) Bill 2007, I wish to make several comments in relation to the constitutional validity of the proposed subsections 7A(1E) and 7A(1F). My comments are necessarily brief, given the short period of time I have had to consider the Bill.

Summary

1. To the extent that the proposed subsection 7A(1E) purports to override State law, it is invalid for two reasons: it falls outside the scope of Commonwealth legislative power; and it infringes the *Melbourne Corporation* principle.

2. The proposed 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. Section 159ZY of the *Local Government Reform Implementation Act* 2007 (Qld) appears to infringe that implied freedom.

3. Both proposed subsections appear to be valid pursuant to the territories power in s 122 in so far as they apply to Territory laws.

Proposed subsection 7A(1E)

4. Essentially, I believe this provision, in so far as it applies to State law, is likely to go beyond the scope of Commonwealth legislative power because it is not "sufficiently connected" to the source of legislative power upon which the Australian Electoral Commission (AEC) is established and functions under the *Commonwealth Electoral Act* 1918 (Cth).

5. The legislative authority for establishing the AEC derives principally from the range of powers vested in the Parliament concerned with the election of both Houses

(see eg ss 9, 24, 27, 29). Pursuant to s 51(xxxvi) of the Constitution, those powers have been effectively delegated to the AEC. A further source of power is the incidental power in s 51(xxxix) of the Commonwealth Constitution which authorises the Commonwealth Parliament to enact laws with respect to matters which are incidental to the execution of, inter alia, any power vested in the Parliament or either of its Houses.

6. Therefore, whatever the AEC is authorised to do by the *Commonwealth Electoral Act* 1918 (Cth) must be sufficiently incidental or connected to the management of the federal electoral system to come within the scope of Commonwealth legislative power under s 51(xxxvi) and s 51(xxxix).

7. Currently, s 7A(1) of the *Commonwealth Electoral Act* 1918 (Cth) empowers the AEC "to make arrangements for the supply of goods or services to any person or body" – although by subs (2) the AEC is confined to using (a) information or material in its possession or (b) its expertise, acquired in each case under that Act or another law. The commercial purpose of this section is made clear by s 7B which empowers the Commission to charge reasonable fees for goods or services supplied under s 7A.

8. The Second Reading Speech for the Bill under inquiry refers to the AEC providing plebiscite arrangements under ss 7A and 7B for trade unions, employer organisations and other organisations. Sections 7A and 7B are presently wide enough to authorise the AEC to conduct plebiscites for local government councils on request.

9. On a generous view, ss 7A and 7B are near the outer scope of the Commonwealth's power since their main connection with the federal electoral system appears to be to enhance the commercial viability of the AEC, and possibly provide opportunities for training its staff. These benefits may provide the requisite connection with Commonwealth power (compare *Attorney-General (Vic) v Commonwealth* (the *Clothing Factory* case) (1935) 52 CLR 533 at 558, 562-3, cf 566; *In re K L Tractors* (1961) 106 CLR 318).

10. However, the proposed subsection 7A(1E) clearly goes much further in so far as it purports to override any State prohibition on any person entering into an arrangement with the AEC under s 7A. This is not, in my view, sufficiently connected or incidental to the enhancement of the AEC's capacity to undertake its function of managing the Commonwealth electoral system by which the members of both Commonwealth Houses are elected. The objective of this prohibition is not to enhance the capacity of the AEC to manage the federal electoral system – it is clearly to thwart the will of a State Parliament which decides to regulate any arrangements its local government bodies may have with the AEC.

11. This scenario is not unlike that which arose in the *Second Uniform Tax* case (1957) 99 CLR 575 where a Commonwealth provision, which prohibited taxpayers from paying State income tax until their Commonwealth income tax was paid, was held invalid. Dixon CJ observed at 615: "But is it not sufficiently obvious that the incidental power cannot extend to authorising laws postponing the payment of civil debts until all or some particular indebtedness to the Commonwealth is discharged?"

12. In summary, subsection 7A(1E) cannot reasonably be considered appropriate and adapted to the enhancement of the capacity of the AEC to exercise its delegated powers of regulating and managing the federal electoral system. Accordingly, it falls outside the scope of Commonwealth legislative power and is invalid in so far as it purports to override State law.

13. In so far as subsection 7A(1E) purports to override Territory law, there seems little basis to doubt the validity of that effect given the wide scope of the Commonwealth's territories power in s 122 of the Constitution.

14. Even if, contrary to my view, the proposed subsection 7A(1E) is supported by s 51(xxxvi) and s 51(xxxix), there is a further obstacle to validity, known as the *Melbourne Corporation* principle. This principle prevents the Commonwealth from interfering with the capacity of a State government to function as such (see *Austin v Commonwealth* (2003) 215 CLR 185 at [24], [124], [284], cf [223]). It was first applied in the *Melbourne Corporation* case (1947) 74 CLR 31 which held invalid Commonwealth legislation which prohibited the private trading banks from providing services to State governments and their instrumentalities. Such a law impaired the capacity of the State governments to function as such. Further instances of State immunity have arisen more recently in: *Austin's* case which held invalid a special Commonwealth superannuation surcharge on State judges for impairing the capacity of the States to recruit judges; and in the *Industrial Relations Act* case (1996) 187 CLR 416 in relation to the terms and conditions on which State public servants are employed.

15. There is a strong case for arguing that subsection 7A(1E) infringes the *Melbourne Corporation* principle. The responsibility for local government within the States constitutes an integral function of the States. The States have delegated to their local governments those functions which are more appropriate for local management. All State Constitutions expressly recognise local government as the third tier of government - albeit within complete State control. This is particularly clear in Queensland where chapter 7 of the *Constitution of Queensland* 2001 provides for local government. Section 70 requires that there be a system of local government in Queensland, comprised of a number of local governments. Section 71 recognises that the nature and extent of their powers and functions is determined by Queensland legislation. Other provisions impose procedural requirements on the dissolution of a local government (ss 73-77), while s 78 requires referendum approval for any Bill to terminate the system of local government in the State.

16. For the Commonwealth to purport to override a State prohibition on local governments because it objects to the manner in which the State is treating its local governments, strikes at the heart of the State's delegation of power over local issues. Such an intrusion into State affairs appears to be invalid as a violation of the *Melbourne Corporation* principle.

Proposed subsection 7A(1F)

17. The proposed subsection 7A(1F) relies on the external affairs power s 51(xxix) as its source of legislative power. In this it may succeed as a partial implementation of

Australia's international obligations under arts 19 and 25(a) of the International Covenant on Civil and Political Rights (ICCPR).

18. The key issue is whether s 159ZY of the *Local Government Reform Implementation Act* 2007 (Qld), which provoked the Bill under inquiry, infringes either of those articles: the right to "freedom of expression" under art 19(2) and the right "to take part in the conduct of public affairs, directly or through freely chosen representatives" under art 25(a). A prima facie infringement appears much stronger in relation to art 19 freedom of expression than art 25(a) in so far as Queensland local governments are prohibited from conducting any type of poll in relation to a "reform matter" (s 159ZY(1)), and any local government councillor commits an offence if they "take any action for the purpose of the conduct of a poll" (s 159ZY(2A)) which is defined to include "any action to request, arrange, assist, facilitate or cause a poll to be conducted by the Australian Electoral Commission or any other entity."

19. Prohibitions of this nature, in my view, prima facie curtail/burden the freedom of expression protected by art 19. They also prima facie infringe the freedom of political communication which is guaranteed by the Commonwealth Constitution. That freedom, implied from the Constitution by the High Court in a series of decisions commencing with *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and the *ACTV* case (1992) 177 CLR 106, protects the discussion of political issues at all levels of government in Australia. Its extension as a restriction on State power remains unsettled in so far as the political issues being debated have no Commonwealth connection (see Gerard Carney, *The Constitutional Systems of the Australian States and Territories*, Cambridge University Press 2006 at pp122-131). But it appears that the conduct of local government polls on the present reforms has a sufficient connection with federal affairs, given the enactment of the Commonwealth's amendments to the *Commonwealth Electoral Act* which are the subject of this inquiry.

20. If s 159ZY does, prima facie, burden the freedom of expression under art 19 of the ICCPR and the Commonwealth implied freedom of political communication, the crucial issue then becomes whether this burden can be justified on public interest grounds. Both art 19 and the implied freedom recognise that curtailment of their respective freedoms may be justified on such grounds. This involves a process of balancing the competing rights at stake. For the implied freedom, the High Court assesses whether the impugned law is "reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government" (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-8).

21. What "legitimate end" can the Queensland Government argue to support the validity of its prohibition in s 159ZY? It may argue that the prohibition on any reform poll is intended to prevent the wastage of public money on a poll which will achieve nothing, and to protect the public from being misled by the opportunity to express a view – a view which will be ignored by the Government. While protection from these evils may be a legitimate end, they are unlikely to outweigh the freedom to express a political opinion via a poll. How can any government assert that the expression of a political view is such a waste of time that it ought to be prohibited? There is a strong case for holding s 159ZY violates both the implied freedom of political

communication and art 19 of the ICCPR. Violation of the former, however, renders the proposed subsection 7A(1F) superfluous.

22. I make no comment on whether the proposed subsection 7A(1F) infringes the *Melbourne Corporation* principle.

Please contact me if you require further elaboration or clarification of my comments.

Yours sincerely,

Gerard Carney
Professor of Law