Submission No 21

SUBMISSION to the LEGAL, CONSTITUTIONAL and ADMINISTRATIVE REVIEW COMMITTEE (LCARC)

INQUIRY into the PREVENTION of ELECTORAL FRAUD

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SUMMARY OF SUBMISSION

1. This inquiry is mis-timed: it must be postponed to give it more time to consider the serious issues it raises.
2. The scope of this inquiry is significantly flawed. Party pre-selection fraud is the key problem that requires addressing.

(Note on terminology. As the Issues Paper indicates 'Electoral Fraud' was an over-inclusive term, and the inquiry hoped to narrow it to focus on voting and enrolment. I use the term 'vote fraud' here instead, since voting necessarily implies prior enrolment.)

(MIS)TIMING OF THE INQUIRY

Unfortunately, the impression generated by Parliament's request for this LCARC inquiry, is that it is primarily motivated by a need for the Parliament to be seen to be *doing* something about the question of vote fraud, in light of recent allegations/events emanating from Townsville.

It is sobering enough at best of times to consider reforming electoral rules that regulate the practical exercise of something as fundamental as the franchise. I am not arguing then that this inquiry does not touch on important issues. Quite the contrary: it is *too* important to be conducted in a piecemeal, fragmentary or hurried fashion. If a serious inquiry is needed, that should be done in a comprehensive and unrushed fashion, taking into account the following:

- LCARC has been asked to consult and report, largely in a vacuum of empirical evidence about the sources, types, extent or effects of voting fraud.

  The Criminal Justice Commission (CJC) and Joint Standing Committee on Electoral Matters (JSCEM) inquiries into voting fraud are very unlikely to report within LCARC's present timeframe.[1] Both bodies will have greater power, scope and facility for investigation and input. Hopefully, they will come up with both

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[1] LCARC, 'Inquiry into the Prevention of Electoral Fraud', Issues paper, September 2000, p 4, admits this.

some hard empirical data and generate a broad array of informed opinion. Both reports logically precede any state parliamentary report or recommendation. It would be irrational to proceed in ignorance of the JSCEM report, and it would reveal minimal comity between the various arms of the Queensland government, to say the least, to proceed in ignorance of the CJC report. Indeed the integrity of LCARC's public consultation process requires that a new issues paper be circulated *after and in light of* the CJC and JSCEM reports.

- There is no clear indication how this inquiry coheres with LCARC and the State Government's recent determinations considering the implications of the 1999 amendments tightening the Commonwealth enrolment requirements. LCARC concluded that these amendments had 'the potential to effectively disenfranchise a significant number of eligible voters.'[2] These were so serious LCARC recommended re-establishing a separate Queensland roll if necessary, to avoid them.[3]

- Cabinet has already endorsed some important practical reforms recommended by LCARC's Report No 23, May 2000: including continuous roll updating through ECQ use of data from other government agencies. This was heralded by the Attorney-General in a press release of 28/8 as being principally 'to reduce the opportunity for fraud with incorrect registrations of voters.' It would be sensible (subject to any overriding urgency arising from any CJC or JSCEM findings or recommendations) to delay any state parliamentary inquiry until such time as the impact and efficacy of reforms such as this could be assessed in practice.

- Finally, in a close knit and mobile federation like Australia, it is at minimum highly desirable (subject to any fundamental overriding need for a different approach) that all States and the Commonwealth harmonise the regulation of the franchise, including the mechanisms governing its practical exercise. If, for example, the JSCEM inquiry reveals a broader problem, it would be sensible for all jurisdictions to address it simultaneously, to develop a 'best practice' approach and to harmonise regulation.

RECOMMENDATION: This inquiry report back to Parliament that the 14 November deadline is unrealistic, given the importance of the issues and the need for any recommendations to be as informed and considered as possible.

BACKGROUND: KEY ATTRIBUTES of AUSTRALIAN ELECTORAL LAW which MILITATE *AGAINST* VOTING FRAUD

We need to step back from current concerns about vote fraud, which have awoken arisen largely because of some specific allegations and events in the Townsville ALP, to consider some fundaments of Australian electoral law. In particular, there are three traditional keystones embedded in our electoral law which serve the seminal goal of openness, but which also, happily, militate *against* vote fraud.

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[2] LCARC 'Implications of the new Commonwealth enrolment requirements', Legislative Assembly of Queensland, Report 19, March 2000, conclusion 1.3.

[3] Ibid, conclusion 1.4.

- Compulsory enrolment.[4]

- Compulsory voting.[5]

  Compulsory enrolment and voting go hand in hand. Ensuring maximum possible enrolment and turnout is as good a prophylactic as any against widespread fraud in the form of fake enrolments in real names and personation. Methods to enforce ('encourage' may be the better term) and render accurate compulsory enrolment, in addition, whether they be through regular habitation reviews, 'Motor Voter' and similar mechanisms, or continuous roll updating (CRU) and data checking, are similarly valuable in protecting the integrity of the system. It should never be forgotten however, that the principal reason for compulsory enrolment and voting and procedures to support them, is to encourage maximum participation: minimising vote fraud is the side benefit, and subsidiary to the broader democratic aim.

- In person rather than postal voting.[6]

  Any system that depends overly on postal balloting invites voting fraud, as numerous investigations into industrial ballots has revealed.

SPECIFIC MEASURES CANVASSED in the ISSUES PAPER

I will not address each of the 28 'Key Issues' canvassed in the Issues Paper.[7] There are many issues on which I am not qualified to comment – in particular relating to the investigation and prosecution of suspected offences, and of an administrative character relating to roll maintenance, education, the machinery of declaration voting etc. On such issues, the Committee ought chiefly rely on people with current working expertise in those fields. It does follow from what I said above in relation to the value of in-person rather than postal voting, that the Committee is right to consider investigating reasonable measures to ensure the integrity of declaration voting, particularly in restricting non-in-person voting to those with a well grounded need say for a postal vote, and ensuring reasonable scrutiny of such ballots (eg through actual signature checking) – see Key Issue 13(a)-(b).

It is fair also to acknowledge that there is a perception that the number of prosecutions (let alone the number of convictions) for multiple voting is surprisingly low compared to the number of cases of multiple voting detected at each election. This suggests that the Committee should carefully seek expert advice on questions of prosecutorial

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[4] First introduced federally by Fisher's Labor administration in 1915, and traceable to a 1911 Bill. But the system was not partisan, had widespread support and quickly caught on.

[5] Noticeably pioneered in Qld by a Liberal government under Premier Denham. Compulsory voting, admittedly exists de jure but not de facto for local government (where turnout is not always great).

[6] It is little remembered, but postal voting was never a given feature of Australian electoral practice. Between 1911 and 1918 postal voting was in fact disallowed at federal level. In 1904, a House of Representatives Select Committee on Electoral Act administration, reporting into the first federal election of 1903 had found that postal voting was open to serious abuse, in that undue influence might be brought to bear on a postal voter.
We might assume that contemporary society is much freer of the class and gender dependencies that rendered postal voting suspect.

[7] LCARC, Issues Paper, pp 13-15.

discretion and evidentiary hurdles. This should be sensitively addressed, in part to ensure that it is remembered that deterrence does not have to be 'massive' to be effective: (i) there is absolutely no point in cranking up penalties (Key Issue No 24) simply to paint a big stick; (ii) the low number of prosecutions may be no indication of a lack of deterrence – deterrents come little higher than the high profile gaoling of Karen Ehrmann, and the purge flowing from that.

The Primary Value: Promoting the Franchise

I do wish to comment in detail on the general need to ensure a balance is struck in *favour of the franchise*. It is of great concern that a climate is being generated in which a very precious baby may be thrown out (or at least left in the cold) in a process designed to drain off some bathwater that some fear is a little dirty.

The history of electoral law and regulation in Australia has been distinctly egalitarian: every vote has been sacred.[8] Other countries, with much lower participation rates, envy us in this regard. The US, for instance, enacted a federal 'Motor Voter' law – ie one whereby an application for a motor vehicle licence was treated simultaneously as an application to register as an elector – not to increase the strictness of electoral registration procedures, but to ensure a more inclusive roll. (A worthwhile measure embraced by LCARC in its Report No 23).[9]

With every law or bureaucratic practice that increases the hurdles to the average citizen's enrolling and voting, we place hurdles in the path of the franchise. Economists call them 'transaction costs' – ie the costs in resources, time, effort, information, and opportunities foregone, inherent in the processes of enrolment and voting. It is notorious that a great proportion of the population is disengaged from politics, in particular through cynicism at trends in party politics and a decline in belief in the power of government to do good. This is not confined to Queensland or Australia: it is a creeping disease infecting many liberal democracies. Occasionally it manifests itself in 'anti-politics' activism on the right or left: such movements or moments are not our concern, since their activism by definition transcends hurdles to participation.

On the contrary, our problem is that more typically, disempowered citizens become sullen and disengaged. To a disengaged citizen, extra hurdles to participation, albeit designed to render vote fraud harder, would become de facto routes to voluntary enrolment and voting. And as earlier argued, maximising the compulsory nature of enrolment and voting is probably the best prophylactic we have to minimise widespread vote fraud.

The problem is not limited to citizens who feel disempowered or cut off from the process of electoral politics. There are many people who are too easily ignored when experts debate measures to increase enrolment and voting screening, because such

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[8] The phrase is Professor Joan Rydon's: I'm aware she employed it ironically, since she was against compulsory voting. But it neatly captures an important part of the ethos of our electoral systems over a century and a half.

[9] LCARC, 'Issues of Queensland Electoral Reform Arising from the 1998 State Election and Amendments to the *Commonwealth Electoral Act* 1918', Legislative Assembly of Queensland, Report No 23, May 2000, Recommendation No 10, p 48.

citizens don't fit the implicit picture of the electoral junkie who (because of partisan commitment, upbringing or academic fascination with elections) would wear high transaction costs.

In designing a maximally inclusive election system, we have to take into account the disparities of youth, age, education, mobility and residential 'churning', &c, &c that render some people vulnerable to practical disenfranchisement through measures such as: requiring production of a 'voting card' (Key Issue 15(b)), or cranking up identification requirements on enrolment (Key Issue 5). It is remarkable that the Committee is contemplating revisiting Key Issue 5, having, as recently as March 2000 in Report 19, rejected federal moves to require original documentary proof of identification, and narrowing the class of witnesses, for new enrolments.[10]

It is also salient to remember that we are not living in unique times. The Australian electoral system has always had to accommodate, for example, a high level of voter mobility,[11] with high numbers of NESB migrants. And it did so by evolving an open, rather than a restrictive, system of enrolment and voting.

I am *not* arguing that *modest* additional processes or checks could be built into the enrolment system in particular. For instance, require enrollees to cite or provide a copy of one official or semi-official form of identification containing current address (eg drivers' licence number and registered address; or Energex or similar account details; or university student number). Ideally, data-matching would then be employed to verify those details and immediate follow-up occur to clarify any disparities.

Voting itself, is predicated on the roll. Invasive identification checks, technology, etc, offer no solution to the odd cases of personation or multiple voting in an enrolled name, without creating more significan problems of disenfranchisement for the many innocent citizens seeking to do their duty. The common sense response to fears of multiple voting is that practised in so-called 'less developed' countries: some form of marking (eg of indelible ink) on the person (usually hand) of anyone voting in person. Such simple ideas are often the best: but parliamentarians would be better placed than me to assess whether hand marking would cause undue effront to the typical voter's sense of privacy and physical autonomy.

The ultimate problem with mechanisms stringent enough to satisfy those who are casting doubt on the integrity of our open system, is that such measures don't just affect those who are disenfranchised. They threaten the integrity of the democratic system itself: the very thing the doubters are seeking to uphold! An excessive concern with the *fairness* of elections, overlooks the larger issue of faith in the inclusiveness or *freeness* of elections. Measures such as those envisaged in Key Issues 5, 9, 15, possibly 17 and probably 18, would likely disenfranchise tens of thousands of electors at each election, and force tens of thousands more to vote under their old addresses. Each of those people will have good reason, especially in an age

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[10] LCARC, 'Implications of the new Commonwealth Enrolment Requirements', Report No 19, March 2000.

[11] John Uhr quotes electoral office data from 1911 indicating that around 20% of electors moved residences in any given year: see Uhr, 'Rules for Representation: Parliament and the Design of the Australian Electoral System', Research Paper 29/1999-2000.

where people rightly expect speedy bureaucratic service, to complain to themselves, their family and friends, that their key experience of representative democracy was one of denial rather than inclusion. Each of those people and their family/friends will have a greater reason to doubt the justice of the process, or fairness of the outcome of the election, than if they believed all the allegations that have been made about the possibilities of vote fraud. That's a lot of baby to lose, unless and until we know the water is dangerously poisoned.

I will now examine one Key Issue, as an example, to show how my analysis and promoting the value of inclusiveness leads to an *opposite* conclusion than that presumed in the Issue as stated:

Closing Rolls on the Day the Writ is Issued? (Key Issue 9)

At present, *Electoral Act* s 80(1)(b) provides that the rolls are to close on a day between 5 and 7 days from the date of the writ's issue. It is noticeable that the JSCEM 2000 majority report recommends 'that for new enrolments, the rolls for [a Federal] election close on the day the writ is issued' (extended by just 3 days to allow existing electors to update addresses).[12]

If rolls were to close on issue of the writ, this would undoubtedly lead to significant disenfranchisement. Proponents of the appear to *want* to exclude the large number of new enrolments processed after writs are issued. It is noteworthy that the JSCEM did not explicitly claim this wave of enrolments was hiding significant enrolment fraud: it merely expressed 'concern about the potential inaccuracies in the Roll caused by the large number of late enrolments ... which are not able to be fully checked.'[13] But let us assume the worst, and that some 'inaccurate' enrolments means some 'fraud'. The deluge of enrolments is at most a possibly convenient cover for such fraud, not its cause let alone its symptom.

No one doubts that the vast majority of these enrolments are genuine. Where they are legitimate new enrolments, refusing to process them until after the election is tantamount to disenfranchising citizens who have sought in good faith to register, thereby both correcting the fact of their non-enrolment and expressing a desire to have their say in the impending election. Where they are legitimate changes of address, particular where a change in electoral district is involved, to refuse to process them sacrifices the notion that each poll is an accurate reflection of the wishes of the constituents, to some fear that enrolments are shifted around to 'stack' marginal electorates.[14] Worse, in cases of say by-elections, the power to dictate the date of the writ contains within it the power for government supporters 'on the ground' to advise whether having a relatively open or closed roll favours the party in power.[15]

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[12] JSCEM 'The 1998 Federal Election', Parliament of the Commonwealth of Australia, June 2000. para 2.26.

[13] JSCEM, ibid, para 2.24.

[14] I am unaware of any evidence that such marginal seat stacking has been widespread, let alone successful, anywhere in Australia.

[15] By-elections are particularly susceptible to this, as many potential electors will be less aware of the need to (re)enrol, than in the case of an impending general election, which will be more newsworthy.

Short of more pro-active methods of enforcing enrolment, there is no democratic way to avoid the problem of enrolment waves. At best it might be diluted by requiring that a Premier/Governor give advance notice of the issue of writs, coupled with an administrative obligation on the ECQ to campaign for enrolments in that time and the roll-monitoring body to be fully resourced to enable adequate checking of applications. This would of course not be such a problem if we had a truly fixed term system, but that is not the case under the current system (and LCARC unfortunately appears to have foreclosed the idea in its four year parliamentary terms report.)[16]

Requiring advance notice of the issue of writs would enable the electoral authorities and general public to more rationally gear up/prepare for elections. It would alleviate situations akin to that created when Prime Minister Fraser called a snap dissolution in 1983. The level of disenfranchisement in 1983 was aggravated by the fact that the Commonwealth roll then closed at 6pm on the day of issue of the writs. A widespread perception prevailed that young or newly naturalised electors were disproportionately disenfranchised, and that it was more than a coincidence that these groups tended to support the then opposition. The imbroglio even ended up in the High Court.[17]

Requiring advance notice of writs would be a pre-requisite to the validity of the writs being issued, but need not legally bind either the Premier or the Governor to actually issuing the writs – ie in the interim, the Premier's advice could change and the writs not be issued, to allow for unusual, intervening circumstances.

MOTIVATIONS & SOURCES of VOTE FRAUD

The revelations that have so far arisen from the Townsville ALP suggest that internal party battles, especially branch-stacking to achieve pre-selection, are a significant driver of any fraud that might affect parliamentary elections. Just as importantly, pre-selection fraud is fraud on the whole electoral process, whether it involves vote fraud or not.

Unfortunately, the terms of this LCARC inquiry seem to ignore this underlying reality. The issues paper treats vote fraud largely as a question of the unlawful *actions of individuals*, and focuses on how the enrolment and voting procedures laid down in the *Electoral Act*, administered by the ECQ, and any subsequent quasi-criminal investigation and detection, could be improved to better deter such actions. Yet all the evidence and logic points to vote fraud being a question of corruption in the institutional culture of parties.

People who would risk the already significant sentences for vote fraud must have strong motivations. (There are unlikely, for instance, to be anarchic or motivationless people engaging in say enrolment fraud simply to 'test' the electoral system, the way hackers might threaten the integrity of computer systems.)

People engage in vote fraud for either of two reasons:

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[16] LCARC, 'Review of the Queensland Constitutional Review Commission's Recommendation for Four Year Parliamentary Terms', Legislative Assembly of Queensland, Report No 27, July 2000, which gave short shrift to fixed terms at pp 38-39.

[17] *R v Pearson; ex parte Sipka* (1983) 152 CLR 254.

(a) If they are individuals acting alone, they would be unlikely to be doing so for partisan purposes.[18]

Rather, individuals acting alone would be motivated by non-electoral factors. Call this *'collateral vote fraud'*; eg where an electoral enrolment helps to establish a false identity to aid in immigration, social security or general fraud. For once, compulsory voting might be a hindrance: it might convert 'mere' enrolment fraud to actual vote fraud, since someone maintaining a false identity, has an incentive to consummate the identity by actually voting to avoid post-election investigation.

Tightening enrolment is not necessarily the answer to this source of fraud: if enrolment becomes harder to achieve, it will become *more desirable* as a marker of the authenticity of an otherwise bogus identity. This may seem counter-intuitive. But one only has to try today to flash an electoral enrolment card as proof of ID in a commercial setting, to realise that it has little general currency. Crank up the status or formality of proof of enrolment (eg giving it the currency of a passport), and we will only make enrolment a more desirable target of collateral fraudsters. Electoral law cannot hope to affect the motivation of collateral fraudsters, and inasmuch as a few enrolments are peripherally caught up in such fraud, it is a minor aspect of the identity needed to perpetrate such fraud, which can only be attacked by specific immigration, social security, fair trading etc law and enforcement.

(b) Our central concern then is vote fraud on a collective basis.

There could be two categories of this. The first is market based (as there effectively was in days of old when direct vote-buying was rife). Compulsory enrolment and voting take most of the sting out of this: vote-buying is mostly now found in meetings of associations and co-operatives, where the disinterested can be encouraged to register, give a proxy and/or attend, with a financial incentive, when they otherwise would not bother.[19]

The second and more likely is when partisan groups are motivated to organise vote fraud collectively, out of a desire to advantage that group's interest: the paradigm is the zealous party, faction or candidate agent organising a group of trusted colleagues to engage in some level of systematic fraud.

This partisan fraud can be direct (to garner extra votes at a parliamentary election) or desirable but incidental (to gain the status of electoral enrolment for the purposes of stacking an internal party or group ballot, with any parliamentary voting fraud being a secondary consideration).

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[18] Why vote early and often as a personal hobby? There is precious little *rational* incentive to vote (outside of a fine) without adding the possibility of penalties for multiple voting or personation, *unless* the perpetrator is linked to like-minded others to maximise the impact of the fraud on an electoral outcome, or at least to ensure some psychological or financial reward.

[19] There is no suggestion, for instance, that vote fraud at general elections occurs to attract electoral funding - $1.60 odd is hardly incentive enough to lodge and take advantage of false enrolments.

It is noteworthy that collective fraud for partisan purposes, and rumours or fears of its existence, is what is driving the current debate.

GREATER REGULATION of PARTIES – TIME to CONFRONT a POLITICAL HERESY

Political parties, when they focus on their long-term self-interest (as opposed to seeking to expose failings of rivals), see legal regulation of their affairs as heresy. But we must confront the corruption in parties head on. There is no doubt pre-selection fraud occurs sometimes in all parties. It is not simply fraud on the members: pre-selections are key *electoral* events. Getting on a big-party ticket is a pre-requisite to election in most countries. The reality is that parties to a large degree (and in most instances) *effectively* select who will get to sit in Parliament.

Obviously there is a trade-off between regulation of parties to protect the public interest or democratic values, and civic freedom for an association to regulate its own affairs. But the former values are more fundamental. The US confronted this issue years ago. US primaries were corrupted in the first half of the 20th century, most famously by racially discriminatory rules and practices. The solution was to regulate primaries: to see them as not essentially private events, but activities with a significant public dimension. By and large, in the so-called 'White Primary' cases, the US Supreme Court upheld such regulation (despite the libertarian values in that country's constitution and political ethos). In other words, the anti-discrimination principle and the democratic principle of open elections, trumped the presumption that parties were private associations of like-minded citizens, entitled to organise their own affairs solely under internal rules that were neither regulable nor judiciable.

It was once assumed that the Australian common law was equally laissez-faire when it came to parties: in large part because of the *Cameron v Hogan* doctrine.[20] To a certain degree, the common law courts have rethought that doctrine in light particularly of the formal legal status that registration under the various electoral acts has given parties, but also of an underlying policy reasoning that parties are the sites of significant public power, and not merely akin to the local tennis club.[21] However merely making certain party rules or processes justiciable gives little *necessary democratic content or enforcement* to those rules and processes.

Trade Unions and Corporations, and in particular their rules, processes and elections, are subject to considerable minimum standards as well as administrative and legal scrutiny. There is a need for realism in any consideration of vote fraud, for it is largely in miscarriages of the proper practice of party voting, branch organisation and so on, that vote fraud is both learnt and enculturated. Seeing vote fraud as a problem worthy of serious consideration (which it clearly is) and legal scrutiny without

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[20] *Cameron v Hogan* (1934) 51 CLR 358.

[21] See *Clarke v ALP (SA Branch)* (1999) SASC 365; *Sullivan v Della Bosca* [1999] NSWSC 136; *Thornley v Heffernan* (Supreme Court of NSW, 25/7/1995, Brownie J); Baldwin v Everingham (1993) 1 Qd R 10; and to a lesser extent Sharples v O'Shea [1999] QSC. *Baker v The Liberal Party of Australia (SA Division)* (South Australia Supreme Court, 21/2/1997, Bollen J) is an exception to this trend, justified on the grounds that the plaintiff as an unsuccessful applicant for membership acquired no justiciable rights – this case might need rethinking in a situation where a branch-stacking was achieved not by the active signing up of new members, but by screening out any new applicants opposed to the stacker.

addressing its likely wellspring in the practice of party politics, risks carrying a fairly large mote in the political and legal eye.

A sensible system of party registration would extend to:

1. Ensuring that electoral authorities maintained and scrutinised official lists of party membership (benefiting the corrupted system of registration itself), and
2. Official conduct of party pre-selection ballots. As it is such pre-selections occur at constituency level - so each electoral district and returning office forms the natural unit to administer such a system.

Of course, electoral authorities would have to be properly resourced to do this. But if we are serious about tackling electoral fraud (including vote fraud) at its root, this is inevitable.

RECOMMENDATION: This inquiry report extend its terms of reference on the realisation that to meaningfully address concerns about vote fraud, the inquiry needs to consider the question of the regulation of political parties.

END of SUBMISSION