Information Memorandum

[Local Government Constitutional Legitimacy and Rating Power]

Council occasionally receives submissions from property owners challenging the constitutional legitimacy of its existence and therefore the constitutional validity of its rates and charges levies. The purpose of this memorandum is to correct the misconceptions upon which those challenges are based.

Background

1. A 6 June, 1859 Order in Council by Queen Victoria separated Queensland from New South Wales, creating it as an autonomous British colony. Initially, its parliament was bicameral (two-house), comprising a Legislative Assembly (lower house) and a Legislative Council (upper house). Unlike the lower house members, who were elected by the people, the upper house members (other than those of the inaugural upper house) were appointed for life by the Governor.

2. The Legislative Council was abolished by legislation (on 23 March, 1922), and the Queensland parliament has been unicameral ever since.

3. Queensland passed the *Constitution Act 1867* (the *1867 Act*). As amended from time to time, that Act remained its constitution until June, 2002, when most of its provisions were repealed and re-enacted (with modifications) in the *Constitution of Queensland 2001* (the *2001 Act*). Those Acts now operate in tandem as Queensland's constitution.

4. By section 2 of the *1867 Act*, which continues in effect:

> ***2 Legislative Assembly constituted***
>
> *Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said [Legislative] Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.*

5. Section 2 is read with section 9 of the *2001 Act*, which states:

> ***9 Powers, rights and immunities of Legislative Assembly***
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> *(1) The powers, rights and immunities of the Legislative Assembly and its members and committees are—*
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> *(a) the powers, rights and immunities defined under an Act; and*
>
> *(b) until defined under an Act—the powers, rights and immunities, by custom, statute or otherwise, of the Commons House of Parliament of the United Kingdom and its members and committees at the establishment of the Commonwealth.*

6. Thus, Queensland Parliament possesses plenary (absolute) power to make laws for the peace, welfare, and good government of the State. It can amend the Constitution by simple legislative process and, with three exceptions, that amendment power is not hamstrung by formal preconditions for its exercise.

7. The exceptions (each of which requires a referendum) are:

- a proposal to abolish the office of Governor;
- a proposal to restore or establish or constitute another legislative body (e.g. an upper house); and
- a proposal to end the system of local government.

8. The Australian colonies became a federation of new States on 1 January, 1901 via an agreement between the British and colonial parliaments. Federation necessarily entailed the new States vesting certain of their constitutional powers in a federal parliament (via a federal constitution).

9. Accordingly, unlike the State constitutions, the Commonwealth Constitution specifies each of the powers given to the Commonwealth, and it imposes formal preconditions for exercising the power of alteration. Specifically, there can be no alteration unless the proposed law is passed by an absolute majority of both houses of the Commonwealth Parliament and is approved by a majority of the electors in a majority of the States via a referendum held not earlier than 2 months and not later than 6 months after its passage by Parliament.

10. By Commonwealth Constitution sections 106 and 107:

> ***106 Saving of Constitutions***
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> *The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.*
>
> ***107 Saving of Power of State Parliaments***
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> *Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.*

11. What emerges from those provisions is that few Commonwealth powers in the *Commonwealth Constitution* have been surrendered by the States. Most Commonwealth powers are concurrent with State powers, even the power to tax. That the States do not levy income tax is essentially a consensual Commonwealth-State political arrangement. Examples of the few exclusive Commonwealth powers are the power to impose customs and excise duties (section 90) and the power to coin money (section 115).

Local Government Legitimacy

12. The absolute power given it by section 2 of the *1867 Act* enables the Queensland Parliament to operate its system of local government, and to invest its local governments with as broad or as narrow a range of powers as it considers appropriate for the peace, welfare, and good government of the State. Nothing in the *Commonwealth Constitution* limits in any material sense the State's powers in that respect.[1] Successive Queensland governments have delegated to local governments the power to do whatever is necessary or convenient for the good rule and local government of their assigned areas.

13. Though *1867 Act* section 2 suffices to empower the State to maintain and dismantle a system of local government, *2001 Act* sections 70, 71, and 78 are specific:

- by section 70, there must be a system of local government in Queensland;
- by section 71, a local government is an elected body charged with the good rule and local government of an area of Queensland allocated to it; and
- by section 78, a Bill for an Act that would end the system of local government in Queensland can be passed only if a proposal that the system should end has been approved by a majority vote upon a plebiscite.

1988 Federal Referendum

14. A 1988 referendum sought the approval of a Bill to amend the *Commonwealth Constitution* by inserting a provision obliging the States to maintain their systems of local government. Having failed to command a majority of votes in any State, the proposal was defeated and the amending Bill lapsed.

15. The referendum result has fostered in some quarters the misconception that continuance of the State systems of local government became unlawful.

16. The result did not change the *Commonwealth Constitution*; it did not invalidate the later *Queensland Constitution* provisions, nor did it otherwise invalidate the State systems of local government. The electorate did not vote to dismantle the systems of local government; it merely declined to make them mandatory. Thus, maintaining its system of local government would remain a matter of choice for each State government.

17. Some have suggested that each of *Commonwealth Constitution* sections 109 and 118 operates to invalidate the *Queensland Constitution* provisions (sections 70, 71, and 78) and other local government laws by reference to the referendum result. The suggestion is erroneous.

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[1] Obviously, for example, the State cannot empower a local government to impose customs or excise duties (those being the exclusive domain of the Commonwealth), but that is by-the-bye.

18. Section 109 reads:

> ***109 Inconsistency of laws***
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> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

19. Section 118 reads:

> ***118 Recognition of laws etc. of States***
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> *Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.*

20. Each section applies to *laws*, not to constitutional powers, and not to referendum results. A referendum result is not a law; the defeat of a referendum proposal does not impliedly insert anything into the *Commonwealth Constitution*, nor does it have the effect of creating a Commonwealth law giving effect to a negative result. Accordingly, the 1988 referendum created no Commonwealth law inconsistent with the *Queensland Constitution* provisions or with Queensland's local government laws.

21. Section 109 is obviously necessary to avoid Commonwealth-State legislative deadlocks.

22. In addition to *laws*, section 118 refers to *public Acts*. The latter is a reference not to actions, in the sense of public expressions or other deeds, but to statutes (*Acts*, not *acts*).

Judicial decisions

23. Two judicial decisions are commonly raised in support of arguments against local government legitimacy.

University of Wollongong v Metwally

24. This decision has been advanced in support of the proposition that section 109 cannot validate a Queensland legislative provision that purports to overturn the result of a federal referendum; it can only oust that provision.

25. First, the *Queensland Constitution* provisions have not overturned the referendum result. Relevantly, the result is that the States cannot be *forced* to operate systems of local government, *not* that they cannot *choose* to operate them.

26. Secondly, the decision concerned merely the question of whether the Commonwealth possesses constitutional power to pass legislation retrospectively validating provisions of a State law hitherto invalid by operation of section 109. The High Court held that the Commonwealth possesses no such power of retrospective validation. The decision is unhelpful in a dialogue concerning local government legitimacy and power.

Engel v Esk Shire Council

27. The decision has been advanced in support of the proposition that constitutional illegitimacy leaves local governments without power to make local laws. However, the court held not that the local government lacked constitutional legitimacy or local law-making power but, rather, that the valid local law it had made and under which it purported to make a dangerous dog declaration did not contain the necessary provision giving the power to make such a declaration. Solution: amend the local law.

Council power to levy rates

28. There is no latitude for questioning the constitutional legitimacy of the Queensland government, nor is there latitude for questioning its power to create local governments and to delegate to them whatever powers it considers appropriate (other than any of the few powers vested exclusively in the Commonwealth). Accordingly, there is no basis for questioning the validity of the *Local Government Act* and the taxation and charging powers that the *Act* delegates to local government (the powers to levy rates and charges).

29. Some have suggested that (legal illegitimacy aside) the lawful levy of local government rates requires specific appropriation legislation by the State, and that, there being no such legitimising legislation, local government rates and charges levies are unlawful.

30. Appropriation legislation is not necessary for the valid levy of local government rates and charges. The *Queensland Constitution* requirement for appropriation legislation (section 20 of the *2001 Act*) is directed at the State, not at local government, and it addresses not the power to impose tax but how the State draws the taxation (and other) revenue that *it* collects. The local government power to rate is continuous. The *Local Government Act* enshrines the mechanics of the rating process, and local government rating resolutions require no other State authorizations or ratifications. Rates and charges levied in compliance with the *Local Government Act* are valid and effective.

Livingstone Shire Council