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No. 49 2000–01

Commonwealth Electoral Legislation (Provision of
Information) Bill 2000

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No. 49 2000–01

Commonwealth Electoral Legislation (Provision of
Information) Bill 2000

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Contents

Purpose	1
Background	1
Legal Issues	2
Implications for Government Authorities	3
Main Provisions	4
Concluding Comments	5
Endnotes.	5

Commonwealth Electoral Legislation (Provision of Information) Bill 2000

Date Introduced: 4 October 2000

House: House of Representatives

Portfolio: Finance and Administration

Commencement: Royal Assent

Purpose

To provide authority for various government agencies previous use of electronic elector information and to authorise the incorporation of previously supplied elector information in databases where certain conditions are satisfied.

Background

This Bill, like the Commonwealth Electoral Amendment Bill (No. 1) 2000 introduced on 6 September 2000, has its origin in legal opinion received as a result of the proposal for the Australian Taxation Office (ATO) to mail out a personalised letter by the Prime Minister¹ as part of the GST information campaign. To conduct the mail out the ATO purchased an electronic copy of the Electoral Roll from the Australian Electoral Commission (AEC) which contained names, addresses and details of age and gender. The information had been 'grouped' by the AEC to minimise the number of letters to be sent to each household. It was estimated that approximately 8 million packages would be sent, comprising general GST information and a personalised letter from the Prime Minister. This was to be the first time that Electoral Roll information was to be used for an Australia wide mail out.²

Legal opinion received by the Government as a result of doubts expressed regarding the validity of the supply of electronic information by the AEC and its proposed use by the ATO cast doubts on the authority the AEC was relying on to distribute this and other electoral information. The opinion also has other implications, relating principally to the authority of the AEC to provide certain information to members of the House of Representatives, senators and registered political parties and the information which may be supplied in relation to medical research and health screening. These issues are

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addressed in this Bill and will be discussed after dealing with the legal points raised in relation to the proposed mail out.

Legal Issues

The supply of electoral Rolls by the AEC by electronic means and the uses to which such information may be put is governed by sections 91 and 91A of the *Commonwealth Electoral Act 1918* (the Act).

Paragraph 91(4A)(e) of the Act provides that the AEC may, on request, provide a copy of the roll on tape or disk if it considers it appropriate and subject to any conditions determined by the AEC. However, this power is subject to section 91A of the Act which restricts the uses to which the information provided may be used. The restrictions are contained in regulation 10 of the Electoral and Referendum Regulations and are that the information can only be used for:

- the conduct of medical research in accordance with the Guidelines for the Protection of Privacy in the Conduct of Medical Research, and
- the provision of certain public health screening programs.

In relation to the proposed mail out by the ATO, the proposed use of the information did not fall within the prescribed purposes and so was not authorised under this paragraph of the Act.

It was also contended by the AEC³ that the information could be supplied to the ATO without any legislative restriction on use under subsection 91(10). Subsection 91(9) provides that except as otherwise provided by the Act, the AEC is not to provide information which discloses the occupation, age or sex of electors. Subsection 91(10) provides that the AEC

may provide a prescribed authority with a microfiche copy of a Roll or with information referred to in subsection (9)

if this is authorised by the regulations (the ATO is a prescribed authority and so authorised to receive information).

Following questioning in the Senate Finance and Public Administration Committee on 24 May 2000 as to the legality of its providing an electronic version of Rolls to the ATO disclosing the age and sex of electors, the AEC stated in a Media Release dated 6 June 2000 that it had received legal opinion in 1991 and 1993:

Advising that it was lawful to provide prescribed authorities with information disclosing the personal particulars of electors by electronic means

and that:

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The AEC sought additional legal advice after the Senate Estimates hearings on 24 May involving the AEC's provision of elector information to the ATO. Senior General Counsel from the Australian Government Solicitor provided written confirmation that under the Commonwealth Electoral Act it was open to the AEC to provide a prescribed authority with information on a tape or disk.

However, on 8 June 2000 the Attorney-General issued a News Release containing advice from the Solicitor-General that subsections 91(9) and (10) did not authorise the provision of an electronic version of Rolls containing details of elector's occupation, age or sex to the ATO or other prescribed authority. This opinion was based on the premise that the disclosure of personal information authorised by subsection 91(10) acted only as an exception to the general prohibition on such action contained in subsection 91(9) and was not in itself sufficient to authorise the provision of an electronic version of Rolls.⁴

The end result is that:

- while the AEC may provide a person or body with an electronic version of the Rolls under paragraph 91(4A)(e), the information provided (which is not to include age or gender details as there is no exemption from subsection 91(9) for this purpose) may only be used for a permitted purpose determined by the Electoral and Referendum Regulations, and
- subsection 91(10) does not authorise the provision of an electronic version of Rolls to a prescribed authority such as the ATO. The Solicitor-General's opinion was that subsection 91(10) could not be relied upon for this purpose and as a result it is necessary for an authority not only to be prescribed to receive electronic copies of the Rolls but also for the purposes for which such information may be used to be approved by the regulations.

In accordance with the advice from the Solicitor-General, the Government announced that the proposed mail out would be cancelled and a mail out addressed to 'The Householder' substituted. The new mail out comprised a letter from the Commissioner of Taxation and the general information on the GST.

Implications for Government Authorities

The AEC has provided electronic copies of the Rolls to prescribed authorities for a number of years based on the presumption that this would be authorised under subsection 91(10) and that the information so provided could be used for any purpose which would not breach privacy requirements applicable to government authorities and Departments.⁵ In his Media Release of 8 June 2000 the Attorney-General noted that authorities other than the ATO had also been provided with electronic copies of Rolls since 1993 without the use for which the information may be put being authorised by a regulation made under paragraph 91(4A)(e) of the Act, contrary to the Solicitor-General's opinion. The AEC provides 7 authorities, including the ATO, with electronic versions of the Rolls under the

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Electoral and Referendum Regulations apparently in reliance on subsection 91(10). In relation to current and past unauthorised provisions of Rolls, the Attorney-General stated in his Media Release:

In order to validate uses of the Electoral Roll already made in the past by Federal Government agencies, retrospective legislation dating from 1993 may be required.

The Government will rectify this as soon as possible either through legislation, regulation or other appropriate action.⁶

The first response was to amend the Electoral and Referendum Regulations to legitimise future uses of electronic electoral rolls by various authorities. The Electoral and Referendum Amendment Regulations 2000 (Statutory Rules 2000 No. 196) amended regulation 10 to provide that prescribed authorities, which are already listed in the Regulations, could use information provided under paragraph 91(4A)(e) of the Act for the purposes listed in Schedule 3. Schedule 3, which was also contained in the amending regulations, lists 14 authorities and Departments and the permitted use of information by that agency. For example, the ATO is permitted to use the information for identifying and locating taxpayers and preventing detecting or investigating taxation fraud.⁷ The amending regulations have effect from the date they were gazetted, 25 July 2000, and will cease to have effect 18 months after commencement (subregulation 10(3)). (The 18 month period will presumably allow time for a more considered response to the issue.)

While the changes to the regulations provides authority for the use of information supplied by the AEC for permitted purposes on and after 25 July 2000, they do not provide authority for previous uses of the material or for cases where the information has been incorporated into databases of agencies. These matters are dealt with by this Bill.

Main Provisions

Clause 3 will provide authority for uses of certain information and will apply to information provided:

- by the AEC to a prescribed authority as defined under subsection 91(10)
- under an agreement entered into on or before 9 May 2000, and

which was provided on or before 8 June 2000 (the date of the Attorney-General's News Release acknowledging the problem) (**subclause 3(1)**).

If such information has been provided, it will be taken to have been provided under paragraph 91A(4A)(e) of the Act and any use before 30 June 2000 will be taken to have been an authorised. If it is used after 30 June 2000, the regulations made after 30 June

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2000 (ie those made on 25 July) will apply to govern the authorised use of the information (**subclause 3(2)**).

The situation where information provided by the AEC has been incorporated in a database is dealt with in **subclause 3(3)**, which provides that if the information has been used in such a manner as:

- it can no longer be identified as AEC information, or
- it cannot be removed without rendering the other information on the database unusable

then the use of the information will be deemed to be for a permitted purpose regardless of when the information was used.

Concluding Comments

The extent of distribution and use of electronic version of electoral rolls by the AEC to Commonwealth departments and authorities and political parties has only been revealed since the Solicitor-General's opinion and the need for new regulations and this Bill.

While there may have been established practices between the AEC and government departments and authorities for the unauthorised (illegal) use of electronic electoral information, and many of these purposes no doubt have a general public interest justification, it should be considered that electoral enrolment, and the provision of information necessary for enrolment, is compulsory under the Act.

While the various enrolment forms, which differ on the extent of personal information to be provided depending on the State/Territory of the voter, indicate that the information provided may be used for additional purposes, the use of such information for any other purposes may act as a disincentive for people to either enrol or provide information of a change of electoral information.

Endnotes

- 1 The letters were to be personalised by being addressed to individuals and signed by the Prime Minister.
- 2 Evidence by AEC officials to the Finance and Public Administration Legislation Committee, 24 May 2000.

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3 *ibid.*

4 A statement of the basis of the Solicitor-General's advice is attached to the Attorney-General's *Media Release* of 8 June 2000.

5 For a general discussion of the privacy issues involved see Evidence by AEC officials to the Finance and Public Administration Legislation Committee, 24 May 2000, and *Media Releases* by the AEC, dated 5 July 2000 and the Privacy Commissioner, also dated 5 July 2000.

6 Attorney-General, *Media Release*, 8 June 2000.

7 A list of the Departments and Authorities which receive copies of the Rolls and the purposes for which they may be used is available on the AEC website at <http://www.aec.gov.au/enrol/authorities.htm>

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