

Bills Digest
No. 144 2003–04

Electoral and Referendum Amendment (Access to Electoral Roll and other Measures) Bill 2004

ISSN 1328-8091

© Copyright Commonwealth of Australia 2004

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2743.

Information and Research Services publications are available on the ParlInfo database.
On the Internet the Parliamentary Library can be found at: <http://www.aph.gov.au/library/>

Published by the Information and Research Services, Parliamentary Library,
Department of Parliamentary Services, 2004.

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 144 2003–04

Electoral and Referendum Amendment (Access to
Electoral Roll and other Measures) Bill 2004

Jerome Davidson
Law and Bills Digest Group
25 May 2004

Contents

Purpose.....	1
Background.....	1
Scrutineers at pre-poll voting offices	1
Permitting the use of roll information by prescribed authorities	2
Roll access restructuring	2
Extending prohibition on inappropriate use of roll information	2
Providing and publishing reasons for decision on party names	3
Broadcasting of political material at polling booths	3
Removal of appeal to the High Court by way of right.....	4
Main Provisions	5
Amendments to the <i>Commonwealth Electoral Act 1918</i>	5
Amendments to the <i>Referendum (Machinery Provisions) Act 1984</i>	6
Concluding Comments.....	6
Endnotes.....	7

Electoral and Referendum Amendment (Access to Electoral Roll and other Measures) Bill 2004

Date Introduced: 1 April 2004

House: House of Representatives

Portfolio: Special Minister of State

Commencement: The Act commences on the day that it receives Royal Assent. The provisions in schedule 1—that is, the amendment provisions of the Act, commence on the 28th day after the Act receives Royal Assent

Purpose

The Bill amends the *Commonwealth Electoral Act 1918* (the Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act). Many of the amendments are technical and many are directed at eliminating discrepancies between the Electoral Act and the Referendum Act. The purposes and origins of the more substantive provisions are discussed under the Background section below.

Background

Scrutineers at pre-poll voting offices

The Bill provides for new sections in the Electoral Act and Referendum Act to expressly enable scrutineers to be present at pre-poll voting offices. The amendment comes in response to the recommendation 16 of the Joint Standing Committee on Electoral Matters' (JSCEM) report on the 2001 election. The Committee noted, in making that recommendation:

The Electoral Act is silent on the attendance of scrutineers at pre-poll voting centres. The AEC noted that the *Referendum (Machinery Provisions) Act 1984* allows for scrutineers to be present at pre-poll voting centres, as scrutineers are allowed at 'each place in Australia where voting is being conducted'. The AEC recommended that a similar provision be included in the Electoral Act.

The Committee considers that openness and transparency are key factors in ensuring high levels of electoral integrity, fairness and public confidence. Measures such as

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

opening the pre-poll voting centres to correctly appointed scrutineers would increase openness and transparency.¹

It is made an offence punishable by up to six months imprisonment for a scrutineer to communicate with another person at a pre-poll voting office where that communication is not reasonably necessary for the discharge of the scrutineer's duty. These provisions are similar in effect to the existing provisions in s. 217 and 218 of the Electoral Act that make it an offence to influence or attempt to influence any elector within a polling booth.

Permitting the use of roll information by prescribed authorities

There is currently a regime in place for the use of electoral roll information by 'prescribed authorities'. The relevant provisions appear in the *Electoral and Referendum Regulations 1940*. The regulations have effect only until 24 June 2005. The current Bill preserves those regulations, but also provides express power in the Act itself for the provision of such information.

Roll access restructuring

The Bill clears the way for the Australian Electoral Commission (AEC) to establish an electronic database available via the internet as provided for in a recommendation of the JSCEM that was consistent with submissions by the AEC.² This is achieved by allowing the AEC to determine the form in which roll information is to be provided.

The amendments also restructure the provisions that relate to supply of roll information. Members and Senators will be entitled, under the provisions, to three printed copies of the roll rather than the five required to be provided under the current provision.

The Bill introduces a provision to prohibit the sale of the electoral roll in any format. This comes about as a result of a recommendation of the JSCEM, concurring with the view of the AEC.³ The JSCEM was concerned that information on purchased copies of the roll could easily be used for commercial purposes.

Extending prohibition on inappropriate use of roll information

The Electoral Act currently provides for a penalty of 100 penalty units (a penalty unit is currently \$110) for the wrongful use of roll information.⁴ The current provision is limited to the provision of information by tape or disk. The Bill repeals the current provision and substitutes for it a provision that refers simply to information, and hence covers information supplied by any means.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Providing and publishing reasons for decision on party names

The Bill proposes to introduce an express provision requiring the AEC to provide reasons in relation to its decisions relating to registration of party names. The provision originates with a JSCEM recommendation based on this reasoning:

While the AEC is obliged under subsection 141(7) of the Electoral Act to give relevant persons associated with the reviewable decision ‘written notice’ of that decision, the Committee considers that the AEC has a wide discretion in the level of detail it is required to provide in the notice. The Committee believes that the provision of detailed reasons, with reference to the Electoral Act, should be mandatory. Those reasons should be published to assist the understanding of the application of the relevant provisions.⁵

Broadcasting of political material at polling booths

The Electoral Act currently prohibits a number of activities at an entrance or within a polling booth or within six metres of a polling booth or polling booth entrance. Those activities are:

- (a) canvassing for votes
- (b) soliciting the vote of any elector
- (c) inducing any elector not to vote for any particular candidate
- (d) inducing any elector not to vote at the election, or
- (e) exhibiting any notice or sign (other than an official notice) relating to the election.⁶

The Bill proposes to add to that prohibition, the circumstance where a person engages in any of those activities more than six metres from polling booths but by means of various specified public address systems, ‘radio equipment’, or a ‘device for broadcasting’ and the activity is audible within the polling booth or within six meters from the polling booth. The provision emanates from recommendation 22 of the JSCEM’s report on the 2001 election. That recommendation was not in the terms of that contained in the Bill, rather it was:

that subject to advice from the AEC, section 340 of the Commonwealth Electoral Act 1918 be amended so as to prohibit the broadcast of political material which is clearly audible within the six metres surrounding a polling place on election day.⁷

There are potential problems with the proposed provision. One problem arises because of the inclusion of radio equipment or broadcasting devices in the provision. If a radio station broadcasts a political advertisement on the day of the election, and a person has a radio turned on inside or within earshot of a polling booth, does the radio station breach the

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

section? A presently drafted, it seems so. The person authorising the advertisement and perhaps the radio station itself would be technically liable to the penalty provided for under the provision (5 penalty units). Whether that goes beyond the intention of the provision is a matter for consideration.

Another potential problem, as raised by the JSCEM when making the relevant recommendation, is that care needs to be taken to ensure that any proposed provision is consistent with the constitutional principles of freedom of political communication. The freedom of political communication extends to any non-verbal actions which are intended and are capable of expressing ideas about government and the policies/politics of the Commonwealth or the States. At first sight, the proposed restriction on the broadcast of the political material specified would infringe the constitutionally guaranteed freedom of communication. But the restriction might be allowable if:

- it is enacted to fulfil a *legitimate purpose* (of Australia's constitutional system); and
- the restriction is *appropriate* and *adapted* to fulfilment of that purpose.

The JSCEM referred to legal advice obtained by the AEC, to the effect that, in order to comply with those principles, the provision would need to:

- be limited to a defined time period (say 8am to 6pm on polling day);
- be confined to prescribed places (polling places);
- define the limit to which the 'electioneering' activity may extend beyond the six metre boundary around the polling place; and
- consider the scope of the power of authorised officers to regulate this sort of activity beyond pre-existing definitions of polling booths and polling places.⁸

The Bill does not address all of those matters. The resolution of the question of the constitutional validity of this provision is beyond the scope of this Digest, but the Parliament may require reassurance that the issues going to the question have been adequately addressed.

Removal of appeal to the High Court by way of right

The Electoral Act and Referendum Act provide for applications by candidates or the AEC to the Federal Court for injunctions restraining conduct in breach of the Act, or compelling conduct required under the Act. Currently, the Acts provide that an appeal lies from decisions of the Federal Court in such matters, to the High Court. The Bill proposes to remove the existing right of appeal to the High Court, by way of right (meaning, without the need to first apply to the High Court for special leave to appeal) in relation to judgments of the Federal Court granting or refusing to grant injunctions.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Explanatory Memorandum asserts that the existing provisions ‘conflict’ with section 33 of the *Federal Court Act 1976* which, the memorandum says, ‘states that appeal should be by way of special leave’. To say that the provisions ‘conflict’, with respect, overstates the position. Section 33 of the Federal Court Act provides simply that an appeal requires special leave *except as otherwise provided by another Act*. Hence section 33 allows for, and contemplates that other Acts might provide for an appeal without leave. Whether that leave should be required is a question of policy. To add a requirement for special leave effectively places another obstacle in the way of access to the High Court. Such leave is granted only where there is some special reason that warrants intervention by the High Court. The Parliament may wish to consider whether appeals by candidates or the AEC against decisions relating to injunctions under the Electoral or Referendum Act warrant speedy and unimpeded access to the High Court.

Main Provisions

Amendments to the *Commonwealth Electoral Act 1918*

Schedule 1, items 1 and 20

These items amend the Electoral Act to allow for the presence of scrutineers at pre-poll voting offices and to provide for a penalty (similar to that provided under s. 218(1) of the Electoral Act) for making unofficial communications (for instance, attempting to influence an elector).

Schedule 1, items 2, 5, and 6

These items amend the Electoral Act to permit the use of roll information by prescribed authorities for prescribed purposes.

Schedule 1, items 3, 7, 9, 13, 112 and 114

These items amend the Electoral Act so as to restructure the provisions that relate to supply of roll information.

Schedule 1, items 4, 8, 113 and 115

These items amend the Electoral Act to extend the prohibition on inappropriate use of roll information to cover information supplied by any means.

Schedule 1, items 14, 15 and 16

These items amend the Electoral Act to require the AEC to publish reasons for decisions to refuse to register party names.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Schedule 1, items 27, 28 and 29

These items amend the Electoral Act to prohibit the broadcasting of electoral material audible within six metres of a polling booth.

Schedule 1, item 30

This item amends the Electoral Act by removing the appeal from the Federal Court's decisions on injunctions to the High Court as of right.

Amendments to the *Referendum (Machinery Provisions) Act 1984*

Schedule 1, items 33 and 37

These items amend the Referendum Act to allow for the presence of scrutineers at pre-poll voting offices and to provide for a penalty (similar to that provided under s. 218(1) of the Electoral Act) for making unofficial communications (for instance, attempting to influence an elector).

Schedule 1, items 40 and 41

These items amend the Referendum Act to prohibit the broadcasting of electoral material audible within six metres of a polling booth.

Schedule 1, item 42

This item amends the Referendum Act by removing the appeal from the Federal Court's decisions on injunctions to the High Court as of right.

Concluding Comments

The Bill contains a large number of technical amendments that are unlikely to be controversial. Parliament may wish to consider the issues raised herein regarding the proposal to prohibit the broadcasting of electoral material audible within six metres of a polling booth and the proposed provision removing the appeal to the High Court as of right, in respect of decisions of the Federal Court on injunctions.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Endnotes

- 1 Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 2001 Federal Election and matters relating thereto*, Canberra, June 2003, pp. 158–9.
- 2 *ibid.*, recommendations 27 and 28, pp. 26–27.
- 3 *ibid.*, recommendation 29 and commentary, pp. 227–8.
- 4 *Commonwealth Electoral Act 1918*, section 91A.
- 5 *The 2001 Federal Election*, *op. cit.*, p. 117.
- 6 *Commonwealth Electoral Act 1918*, section 340(1).
- 7 *The 2001 Federal Election*, *op. cit.*, p. 193.
- 8 *ibid.*, p. 192.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.