Lessons from the Australia Card
-- deux ex machina?

Graham Greenleaf


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Readers of the Report will be familiar with the Australian Labor Government's proposals for a national identification scheme, the pseudo-patriotically named `Australia Card', and many of the arguments against it, from Roger Brown's recent article[1]. In my view, it would have gone beyond being a mere identification scheme, and would have established the most powerful location system in Australia, and a prototype data surveillance system totally out of keeping with the traditions of a common law country[2].

It is no exaggeration to say that the ID card proposal gave many Australians nightmares, and not only those of East European and Asian extraction. However, like all good nightmares, we woke one September morning to find that the nightmare was over. A retired and retiring public servant, Ewart Smith, himself having a restless night being kept awake by magpies, had dawn upon him a loophole in the legislation. It ensured that the Opposition parties could prevent the Card from ever being implemented, even though the Government could still pass the Australia Card Bill 1986.

For those not familiar with Australia's constitutional structure, this requires explanation.

A thrice denied Bill

The background to the Bill's demise is that had been twice passed by the House of Representatives (the lower house of Australia's Federal Parliament) and twice rejected by the Senate (the upper house), in which the Opposition parties held a majority. Australia's Constitution (s 57) provides that deadlocks between the houses may be resolved by the Government calling an election in which both houses are dissolved. After only the sixth `double dissolution' election in Australia's history, called on the pretext of the Australia Card Bill's rejection, the Labor Government was returned to office in June 1987 and vowed to press ahead with the Bill. The Constitution provides that, if the Bill is rejected for a third time by the newly-constituted Senate, a Joint Sitting of both Houses may be called, at which a majority may pass the Bill into law. It is an uncharted constitutional minefield.

The `loophole'

Ewart Smith's `loophole' depended upon the fact that the Bill did not explicitly make it legally compulsory for any person to obtain a Card, because this would be of dubious constitutional validity. It merely made it impossible to operate in Australian society without one. However, the
crucial clauses of the Bill, those which imposed $20,000 penalties on businesses which failed to 
require a person to produce their ID Card, or authorised the freezing of bank account and social 
security payments for those who did not produce one[3], were all defined to commence operation 
`on or after the first relevant day'. This `first relevant day' was defined (cl 32) such that it could only 
be declared by regulations, and the Government did not have the necessary majority in the Senate to 
prevent the Opposition parties disallowing any regulations which were made. The Opposition 
vowed that no `first relevant day' would ever occur and that the Bill was `stone dead'. In effect, if 
the Bill was passed, obtaining a Card would really be voluntary because no adverse consequences 
would attach to failure to hold one. The Government was hoist on its own petard.

The untried `escape routes' 

The Government could still have pressed ahead with the legislation, to attempt to get it onto the 
Statute books and force the Opposition actually to go ahead with what Labor claimed was 
`constitutional vandalism'. It is also possible that this loophole was not fatal to the Bill, despite the 
Opposition's claims. Among the Government's possible `escape routes', it has been argued[4] that 
the disallowance of regulations would not serve to alter a `first relevant day' once it was declared; 
that a `first relevant day' could be proclaimed, the provision for regulations being only directory, 
not mandatory; that the Bill could have been amended to allow a proclamation, not regulations, at 
the joint sitting of Federal Parliament necessary to pass the Bill; and that the blockage of the Bill by 
disallowance of regulations is unconstitutional, being contrary to the intent of the provisions of s57 
of the Constitution . All of these potential escape routes were of dubious validity and would 
inevitably have resulted in lengthy and bitter High Court and Parliamentary challenges.

The Government considered its options for a week and then abandoned the Bill, blaming the 
Opposition's `constitutional vandalism', and attempting to draw parallels with the sacking of the 

Political realities and public opinion 

What lessons should those who are interested in data protection and the politics of surveillance 
draw from this? Was it merely a lucky escape for the lucky country, a deus ex machina for which 
we should all toast Ewart Smith and an unknown Parliamentary draftsman who preferred 
regulations to proclamations? If we only consider the mechanics of the Card's demise, this is how it 
may appear, but this would be to completely misread the real reasons for the abandonment of the 
Card and to miss the important lessons which should be drawn from the Australian experience.

Since the idea of an ID card to combat tax and welfare fraud was first floated in mid-1985[5], 
public opinion polls indicated consistent majority support for the Card of about 68%, up to the time 
of the June 1987 election[6]. The Labor Government was returned to office at an election ostensibly 
called because of the Senate's rejection of the Bill. In the election campaign the Card was rarely 
mentioned by either side, the principal issues being economic ones. There was certainly no public 
outcry against the Card, and no apparent electoral damage to Labor. Yet a mere three months later 
the Bill was dropped, ostensibly because of a legal loophole, but one which was possibly not fatal 
as has been mentioned. There was no suggestion that the Government would introduce a fresh 
`regulation-free' Bill and go through the whole process again. It is obvious that something more 
than a mere legal loophole had intervened.

What had occurred was one of the most massive shifts in public opinion seen in recent Australian 
politics. By August 1987 the opinion polls showed support for the Card had declined to about 55%, 
and by September support was down to 39% [7], and there was little reason to suspect that it would
not continue to fall. Quite apart from statistics, the intensity of the mounting opposition to the Card astonished supporters and opponents alike.

The Australian media had not considered the Card proposals to be a consistently newsworthy item, even during the election campaign. By September the media were preoccupied with the Card to the exclusion of virtually everything else. Sydney talk-back radio journalist John Tingle claimed that for some weeks it was simply impossible to get callers who wished to talk about anything else. The Australian newspaper editorialised [8]:

There has never been a debate like it in the letters page; there has never been such a cry of opposition form the nation over one topic...It has dominated the mailbag to the point where today, for the first time, we block present two pages on the topic. We do this to keep faith with the hundreds of contributors who have flooded us with letters on the card. The figures speak for themselves. Since September 3 we have received 526 letters on the ID card, with an overwhelming 475 against, 25 for and 26 unspecified.

Talk-back radio and newspaper letters columns are the two aspects of the media most susceptible to public opinion and the least under editorial control. These more democratic aspects of the media appeared to force all journalists and, more importantly, editors, to take the Card seriously. Once journalists could justify the allocation of significant amounts of time and space to stories exploring details of the Card proposal, their stories were overwhelmingly critical and served to fuel public anger even further. The more people knew, the less they liked the idea, and this is what the polls eventually reflected.

`Strange bedfellows'

A number of significant events occurred in the period following the June election which contributed to this massive change in public perception.

An important factor in many people's minds was a deep-seated distrust of the Health Insurance Commission[9], the Government's chosen operator for the Card's computer system. An important incident during the campaign which heightened this distrust was the `McGoldrick Case', a widely publicised court case where the Health Insurance Commission had provided Police with details from Medicare files about a doctor's patients so as to assist them to prosecute him for alleged illegal abortions. Police confronted the young girls who were his patients in ways which disclosed their abortions to their parents and employers. The Health Insurance Commission argued that its disclosures were within the provisions of its Act[10] -- a tactic which only increased people's fears about trusting official policies. To make matters worse, evidence was then given that the disclosures predated any possible official authorisations. The McGoldrick Case was referred to constantly by the Card's opponents.

During the election the Opposition parties did not make the Card a major campaign issue, probably because they believed that the Card did command majority support, and feared being dubbed 'the tax-avoiders parties'. Labor supporters who opposed the Card could not campaign against it without supporting a worse alternative, a conservative coalition government, so their hands were tied. Many also believed that the Card was merely a pretext for the election, and that Labor had no real
intention to pursue the Card. On election night, however, re-elected Prime Minister Hawke announced that the Card was the government's highest legislative priority.

With all restraints on opposition removed, and the reality of the Card imminent, potential opponents of the Card joined forces in a number of extra-Parliamentary opposition groups. The most prominent was the Australian Privacy Foundation, a coalition of public figures spanning the whole political spectrum, including rock singer Peter Garrett, yacht designer Ben Lexcen and Australian Democrats Parliamentary leader Janine Haines plus many other names well known in Australia including left wing academics and right wing doctors. The very fact that such people who were normally at loggerheads could make common cause about anything attracted immediate media attention and prompted Hawke to dub them `strange bedfellows'. The Foundation ran a very effective scare campaign of releasing leaked Government documents about details of the Card's proposed administration each Sunday night for a few weeks, forcing the Minister responsible for the Card to either confirm or deny what were in fact fairly trivial administrative matters, but serving to focus people's attention on how the scheme would really work.

Apart from the media-oriented Foundation, numerous grass-roots opposition groups were established by small business organisations, community and welfare groups, and State and local organising committees. By September, there were significant anti-Card rallies and meetings being held at a rate of more than one per day, with consequent continuous media attention. Most notable was a rally of 20,000 in Perth, and even small cities like Orange with a population of 35,000 could muster 3,000 people. Giant ID Cards were starting to be burnt for the cameras on University campuses, and stunts such as a giant `No ID' sign atop a smokestack were sufficient for page one of the afternoon papers.

In short, Australia had not seen any political campaign like this since the anti-Vietnam War campaigns of the 1960s, which campaigns contributed toward a whole generation rejecting the conservative parties. Labor had good reason to be worried. Although it was safely re-elected at the Federal level, Labor was facing a State election in early 1988 in its New South Wales heartland. The political fall-out of the Card worried the NSW Premier sufficiently for him to announce that all the members of his Cabinet opposed the Card -- not that it had anything to do with them! Furthermore, the NSW Labor Government was relying very heavily on public goodwill stemming from Australia's bicentenary celebrations in January 1988 to sweep it back into office. The Federal Minister for the Australia Card was also the Minister for the Bicentenary. The prospect of these celebrations taking place in the midst of a High Court challenge to the Card, after four more months of mounting opposition, inevitably culminating with nationwide protest rallies on Australia Day (January 26) is not a prospect that either government could have relished.

While we can only speculate about what would have happened if Ewart Smith had not discovered his loophole, it is reasonable to argue that the Labor Government would have been forced to abandon the Card, or find some way to postpone it indefinitely, because of the success of the political campaign mounted against it. Failure to do so may have guaranteed the destruction of the NSW Government, years of damaging instability in Federal politics, and a large section of the population permanently embittered toward Labor. The Opposition parties had vowed to repeal it if returned to office, and may have even been forced to keep that promise, though most were rightly sceptical about any ex post facto deliverance. If it had been implemented, an organised campaign of civil disobedience was likely, although it is difficult to say how effective this was likely to have been. In short, the Card was probably beaten even without Ewart Smith's help, though it would be churlish not to be grateful for it. Australia is better off without the divisiveness that a long drawn out campaign against the Card would have produced, provided that we do not fail to learn from the lessons of the experience.
The lessons for data protection

After reviewing the development of data protection laws in the United States and elsewhere up to the 1980s, James Rule and colleagues concluded that the 'privacy protection movement' of the late 1960s had failed to make any fundamental attacks on the rise of information surveillance as a means of social control. They concluded[12] that

... no frontal collision has occurred between an aroused public opinion and organisations engaged in what we term surveillance. The emergent official interpretation of 'privacy protection' has forestalled any such confrontation. In this view, the drawbacks of surveillance systems are not inherently in their nature, but lie in their failure to work 'correctly'.

The Australia Card's demise is a welcome exception to Rule's rule. It involved a 'frontal collision' between a (belatedly) informed and unprecedentedly 'aroused' public opinion. What is more, the public rejection of the Card had nothing to do with its failure to work 'correctly', but was a rejection of the very idea of the surveillance system proposed. The Government promised constantly to provide the most secure computer system possible, at no matter what cost, plus a Data Protection Agency with sweeping powers, but the Australian public was not interested. The public had instead accepted one of the Privacy Foundation's slogans -- 'The Only Safeguard Is No Card'.

Perhaps the Australian experience can show those interested in data protection that it is possible to interest, inform and 'arouse' the general public concerning data protection issues. Data protection needs to be as well understood in the public imagination as environmental protection has become, and as important. For a brief time in Australia, this was the case, but whether it can be sustained remains to be seen.

Surveillance marches on

Meanwhile, Australia remains alone among OECD countries in having no national data protection legislation. The Federal Privacy Bill 1986 had been held hostage to the fate of the Australia Card Bill, by the linking of the enforcement provisions of the two Bills. It is, at any rate, a fatally flawed piece of legislation which barely deserves the title of 'data protection' and which does not satisfy Australia's international obligations[13].

The Federal Government is considering alternatives to the ID Card, including extended use of the Tax File Number. A report of a high level inter-departmental committee has advocated the extension of data matching practices between all Federal agencies wherever this would be effective against fraud, the repeal of existing secrecy legislation to permit this, and cross-system enforcement by agencies of obligations owed to other agencies[14].

All of these matters are to come under the scrutiny of the Senate's Constitutional and Legal Affairs Committee, which will commence public hearings in February. Perhaps these hearings will see data protection start to become the issue of public importance that it ought to be.

Graham Greenleaf, Lecturer in Law, University of New South Wales
Member, NSW Privacy Committee; Committee Member, Australian Privacy Foundation
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[3] cll 40--54; see Brown op cit p 9 for details


[6] The Australian newspaper Newspoll showed 68% in favour in June 1986, 67% in November 1986; a Morgan Gallup Poll at the time of the election showed 68% support for the Card.

[7] The Australian newspaper Newspoll showed 55% in favour in August 1987, 39% in favour in September 1987; Morgan Gallup Poll -- 39%; Saulwick Herald poll -- 40%.

[8] 15/9/1987

[9] See Greenleaf and Nolan op cit for reasons for such distrust.

[10] Health Insurance Act, s130


[14] Review of Systems for Dealing With Fraud on the Commonwealth, Special Minister of State, AGPS, Canberra