

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2007 No. 270**

*Commonwealth Electoral Act 1918*  
*Referendum (Machinery Provisions) Act 1984*

*Electoral and Referendum Amendment Regulations 2007 (No. 3)*

Section 395 of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides, in part, that the Governor-General may make regulations, not inconsistent with that Act, prescribing matters which by that Act are required or permitted to be prescribed, or necessary or convenient to be prescribed for giving effect to that Act.

In addition, section 144 of the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) provides, in part, that the Governor-General may make regulations, not inconsistent with that Act, prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

The Electoral Act and the Referendum Act also contain specific provisions in relation to what the regulations may, or must, provide in relation to electronic voting trials. In the Electoral Act, these provisions are sections 202AB, 202AC and 202AD. In the Referendum Act, these provisions are sections 202AH, 202AI, 202AJ and 202AK.

The Regulations implement two electronic voting trials to be conducted by the Australian Electoral Commission (AEC) at the next election. The trials also apply to voting at a referendum if any referendum is held on the same day as the next federal election. The first trial provides the opportunity for some sight-impaired people to cast an electronically assisted vote. The second trial provides the opportunity for some defence members and defence civilians serving overseas to cast a remote electronic vote.

The Regulations follow amendments to the Electoral Act made by the *Electoral and Referendum Legislation Amendment Act 2007*, which established the broad legal framework for the electronic voting trials. The Regulations provide the necessary operational detail.

The Regulations have a commencement date of 1 August 2007. A commencement date of 1 August 2007 provides certainty in relation to the validity of any activity undertaken before the Regulations were registered on the Federal Register of Legislative Instruments (FRLI).

This date was chosen to benefit defence personnel by maximising the number of defence personnel that may access Remote Electronic Voter Registration forms and General Postal Voter Registration forms before they are deployed overseas. These forms are available on the Defence intranet.

Advice was sought from an external legal adviser in relation to the possible application of subsection 12(2) of the *Legislative Instruments Act 2003* (LI Act). This subsection generally provides that a provision has no effect if:

- (a) it commences before registration on the Federal Register of Legislative Instruments; and
- (b) it affects the rights of a person to disadvantage a person, or it imposes liabilities on a person before the date of registration.

The AEC was advised that there was no real risk of subsection 12(2) of the LI Act operating in these circumstances.

Details of the proposed Regulations are set out in the Attachment.

The Department of Defence, the Attorney-General's Department and a large number of small and large organisations representing the interests of people who are blind or visually impaired were consulted in the preparation of these regulations.

**Details of the proposed *Electoral and Referendum Amendment Regulations 2007 (No. 3)***

**Regulation 1 – Name of Regulations**

This regulation provides that the title of the Regulations is the *Electoral and Referendum Amendment Regulations 2007 (No. 3)*.

**Regulation 2 – Commencement**

This regulation provides that the Regulations are taken to have commenced on 1 August 2007. This date was chosen to benefit defence personnel by maximising the number of defence personnel that may be provided with Remote Electronic Voter Registration forms and General Postal Voter Registration forms before they are deployed overseas.

**Regulation 3 – Amendment of *Electoral and Referendum Regulations 1940***

This regulation provides that the *Electoral and Referendum Regulations 1940* are amended as set out in Schedule 1.

**Schedule 1 – Amendments**

**Item [1] – After regulation 40**

Item 1 of the Schedule inserts a new Division 2, Division 3 and Division 4 into the *Electoral and Referendum Regulations 1940*. Division 2 provides for a trial of electronically assisted voting for sight-impaired people. Division 3 provides for a trial of remote electronic voting for defence personnel serving outside Australia. Division 4 provides for an additional function for the Electoral Commissioner.

**Division 2 – Trial of electronically assisted voting – sight-impaired people**

**Regulation 41**

Regulation 41 defines terms for the purposes of Division 2.

**Regulation 42**

Regulation 42 provides that the trial of electronically assisted voting is restricted to the first general election and the first Senate election held after the commencement of section 202AB of the Electoral Act. This section commenced on 15 March 2007. If a referendum is held on the same day as the election following the commencement of section 73M of the Referendum Act, electronically assisted voting will also be available for voting in that referendum. Section 73M commenced on 15 March 2007.

### **Regulation 43**

Regulation 43 provides that the Electoral Commissioner, by notice in the Gazette, determine the polling places or pre-poll voting offices at which electronically assisted voting is available. The determination will also specify the days and hours of operation for electronically assisted voting.

It is envisaged that electronically assisted voting will be available at 29 locations around Australia utilising the pre-poll voting centres established to accept votes before polling day. This will allow a sight-impaired person to cast an electronically assisted vote on, or before, polling day.

### **Regulation 44**

Subregulation 44(1) provides that where available, an elector may ask an Australian Electoral Commission (AEC) employee to assist him or her to cast an electronically assisted vote. Subregulation 44(2) limits the electronically assisted voting trial to sight-impaired people. Subregulation 44(3) provides that the Electoral Commissioner may give directions to the AEC employee in charge of the polling place in relation to requests to use the electronically assisted voting method.

### **Regulation 45**

Regulation 45 provides that an AEC officer must assist an elector in a number of ways. These include explaining the declaration that must be completed by the elector before using the electronic voting machine, preparing the electronic voting machine and conducting a practice session if required.

### **Regulation 46**

Regulation 46 provides that unless the elector has asked for assistance, the elector must cast his or her vote in private. Regulation 46 is based on section 233 of the Electoral Act which requires an elector to vote in private.

### **Regulation 47**

Regulation 47 provides for the electronically assisted voting method or process. The first step in the method is the requirement for an elector seeking to use electronically assisted voting to complete the form on the front of a declaration envelope. Declaration envelopes are used for a number of types of voting, including for all electors who vote before polling day or cast a postal vote. The form seeks such information as the elector's name and enrolled address.

Once the declaration envelope has been completed the elector uses the electronic voting machine to cast his or her vote. The vote is cast using a keyboard or keypad and by following prompts through headphones or on a screen. The machine will print out a record of the votes cast in the form of a separate barcode for the Senate, House of Representatives, and if held, any referendum.

The elector may ask any person, including an AEC employee, to assist in casting an electronically assisted vote.

At any time before the vote records are sealed in a declaration envelope, an elector may decide to vote by completing a printed ballot paper. Any vote records printed by the electronic voting machine will be destroyed.

### **Regulation 48**

Regulation 48 provides that the AEC employee that issued the declaration envelope must seal the barcoded output from the electronic voting machine inside the completed declaration envelope and then place the envelope in a ballot box.

### **Regulation 49**

Regulation 49 provides that the AEC must make a record of each person who has voted using the electronically assisted voting method. The record will contain the names of electors, the Division for which they are enrolled and the date on which the votes were cast.

### **Regulation 50**

Regulation 50 provides that for each vote cast by a person, the electronic voting machine must print a record of the vote cast in the form of a barcode. Once the vote records have been printed, the barcode will be inserted into a declaration envelope and be treated the same as a pre-poll vote ballot paper for scrutiny purposes. During the scrutiny process, the envelope will be opened and the barcode decoded so that the preferences cast by the elector will be displayed. The decoded printout will be attached to the barcode for further scrutiny purposes. The decoding procedures will ensure that it is not possible to identify the preferences cast by an elector.

### **Regulation 51**

Regulation 51 extends the role of scrutineers to the electronically assisted voting method. If scrutineers are appointed by candidates for the purposes of pre-poll voting or voting on polling day, they may perform any function authorised by the Electoral Act or the Referendum Act for electronically assisted voting as if the person using the electronically assisted voting method were casting a pre-poll or ordinary vote. The provisions of the Electoral Act and the Referendum Act providing for scrutineers to perform a role outside of the polling place have been excluded from these provisions as this situation will not arise with electronically assisted voting.

### **Regulations 52 to 57**

These regulations provide for offences and penalties and are discussed below.

## **Division 3 – Trial of remote electronic voting for defence personnel serving outside Australia**

### **Regulation 58**

Regulation 58 defines terms for the purposes of Division 3.

### **Regulation 59**

Regulation 59 provides that the trial of remote electronic voting is restricted to the first general election and the first Senate election held after the commencement of section 202AH of the Electoral Act. This section commenced on 15 March 2007. If a referendum is held on the same day as the election following the commencement of section 73S of the Referendum Act, electronically assisted voting will also be available for voting in that referendum. Section 73S commenced on 15 March 2007.

### **Regulations 60 to 62**

Regulations 60, 61 and 62 relate to the register of remote electronic voters. Regulation 60 requires the Electoral Commissioner to maintain a register of remote electronic voters. Defence personnel must be registered as a remote electronic voter to cast an electronic vote under regulation 61. Defence personnel may apply to register if they are electors and are serving, or may be serving, outside of Australia at the next federal election. Defence personnel can access the registration form on the Defence intranet.

Regulation 62 provides that a Divisional Returning Officer (DRO) must remove an elector from the register of remote electronic voters in two circumstances. These are if the DRO becomes aware that the elector is in Australia when the writs for an election are issued or if the elector has returned to Australia on a permanent basis.

To protect the security of deployment information, the register will not be publicly available or otherwise disclosed by the AEC.

### **Regulation 63**

Regulation 63 provides that the Electoral Commissioner may, by notice in the Gazette, determine the countries where remote electronic voting is to be available. As remote electronic voting will be using Defence's secure network, the AEC does not have any control over the days and hours when the voting method will be available. The intention is that voting will be available continuously from the Monday after the declaration of nominations until 6.00pm local time in Western Australia on polling day.

### **Regulation 64**

Regulation 64 requires that electors must cast their votes in private unless they have asked someone to provide assistance. Once asked, any person may provide any assistance that an elector requires.

## **Regulations 65**

Regulation 65 provides that an elector votes by using a login and password. These will be provided by the AEC once the elector has registered as a remote electronic voter. An elector may choose not to cast a vote using the remote electronic voting method at any time before the process of casting his or her vote is completed. If an elector does choose not to proceed with a remote electronic vote, any preferences cast by the elector will be destroyed.

As all electors who register as remote electronic voters will be encouraged to register as general postal voters, those that do so will be sent postal ballot material. This means that if for some reason electors cannot successfully cast a remote electronic vote, or they choose not to cast a remote electronic vote, then electors would have the option of casting a postal vote.

## **Regulation 66**

Regulation 66 requires the AEC to keep records of each person who has voted using the remote electronic voting method. The record will contain the elector's full name, date of birth and the name of the Division for which the elector is enrolled. The record will also include the login generated by the AEC and allocated to all registered remote electronic voters. This login is not disclosed to the public.

## **Regulation 67**

Regulation 67 provides for the storage, transmission and printing of votes. The vote will not be stored on the electronic voting machine, rather, once an elector completes the voting process the vote will be transmitted through Defence's secure network to the AEC. The votes will be stored at the AEC until the day after polling day when printed records of all the votes will be produced. These records will be bundled according to the Division in which remote electors are enrolled and then sealed in an envelope for each Division.

After all the vote records have been printed and sealed in an envelope, a list of names of the people who cast a remote electronic vote will be printed for each Division. Each list will then be inserted into an envelope, along with the sealed envelope containing the corresponding printed vote records, and sealed in an envelope for each Division. Existing administrative procedures used by the AEC ensure that, even in the situation where only one remote electronic vote is received for one Division, the secrecy of the vote is preserved.

## **Regulation 68**

Regulation 68 provides that scrutineers appointed by candidates for the purposes of scrutiny may observe the printing of remote electronic vote records and the bundling of these records for distribution to the relevant DRO.

## **Regulations 69 to 72**

These regulations provide for offences and penalties and are discussed below.

## **Division 4 – Functions of Electoral Commissioner for Divisions 2 and 3**

### **Regulation 73**

To assist in overcoming any unforeseen issues with electronic voting trials, regulation 73 prescribes an additional function for the Electoral Commissioner under the Electoral Act. Under this regulation, the Electoral Commissioner may give advice or instructions to a person for the purpose of assisting the person to comply with the Regulations.

### **Offences and penalties**

Subsections 202AB(5) and 202AH(4) of the Electoral Act, and subsections 73N(5) and 73S(5) of the Referendum Act, provide that the regulations may provide for offences in relation to the electronic voting trials, and may prescribe penalties for those offences. The maximum penalty is restricted to 50 penalty units. As one penalty unit currently equates to \$110, the maximum allowable penalty is \$5,500. The offence provisions in the proposed Regulations are based on the offence provisions in Part XVA of the Electoral Act.

### **Regulation 52**

Regulation 52 makes it an offence for a person who is not the appropriate Divisional Returning Officer (DRO), or an officer acting at the direction of the DRO, to open a declaration envelope that contains a printed vote record. This offence carries a penalty of 5 penalty units and is an offence of strict liability. A strict liability offence negates the requirement to prove fault, however, strict liability does give rise to the defence of honest and reasonable mistake of fact.

Regulation 52 is modelled on section 200J of the Electoral Act. Section 200J makes it an offence for a person who is not the appropriate DRO, or officer acting at the direction of the DRO, to open an envelope containing a pre-poll ballot paper. The penalty for a breach of section 200J is \$500 and it is an offence of strict liability.

As part of the *Criminal Code* harmonisation process, section 200J was amended in 2001 to specifically state the offence of opening an envelope containing a ballot paper was an offence of strict liability. This is because after the application of the *Criminal Code*, all offences in Commonwealth statutes that do not explicitly state they are strict liability offences will be presumed not to be strict liability. The amendment was intended to ensure that the application of the Criminal Code did not alter the operation of the offence. As regulation 52 provides for a similar offence as section 200J, it is appropriate that it is also an offence of strict liability.

### **Regulation 53**

Regulation 53 makes it an offence for a person not to obey all directions of an officer if that person is present when an elector is casting an electronically assisted vote. The penalty is 10 penalty units. This offence is modelled on paragraph 200K(a) of the Electoral Act which generally makes it an offence for a person not to obey all



directions of an officer if that person is present when an elector casts a pre-poll vote. The penalty for a breach of paragraph 200K(a) is \$1,000.

### **Regulations 54 and 69**

Regulation 54 and regulation 69 provide that a person must not make any communication to an elector in relation to an elector's vote. The offence does not apply to an officer providing the elector with assistance in the case of electronically assisted voting, or to another person assisting the elector at the request of the elector for both trials. The penalty is 10 penalty units. This offence is modelled on subparagraph 200K(b)(i) of the Electoral Act which makes it an offence for a person to communicate with the elector in relation to the elector's vote unless requested by the elector. The penalty for a breach of subparagraph 200K(b)(i) is \$1,000.

### **Regulations 55 and 70**

Regulation 55 and regulation 70 provide that a person must not interfere with an elector in relation to the elector's vote. The offence does not apply to an officer providing the elector with assistance in the case of electronically assisted voting, or to another person assisting the elector at the request of the elector for both trials. The penalty is 10 penalty units. This offence is modelled on subparagraph 200K(b)(ii) of the Electoral Act which makes it an offence for a person to assist the elector or in any way interfere with the elector in relation to the elector's vote unless requested by the elector. The penalty for a breach of subparagraph 200K(b)(ii) is \$1,000.

### **Regulations 56 and 71**

Regulation 56 and regulation 71 provide that a person must not do anything to find out how an elector voted. The offence does not apply to an officer providing the elector with assistance in the case of electronically assisted voting, or to another person assisting the elector at the request of the elector. The penalty is 10 penalty units. This offence is modelled on subparagraph 200K(b)(iii) of the Electoral Act which prohibits a person from doing anything that would enable the person to find out how the elector marked the ballot-paper unless requested by the elector. The penalty for a breach of subparagraph 200K(b)(iii) is \$1,000.

### **Regulations 57 and 72**

Regulation 57 and regulation 72 provide that it is an offence if a person destroys or interferes with a computer program, data file or an electronic device that is used, or intended to be used, for or in connection with the electronic voting trials. The offence does not apply to an officer acting in the course of his or her duties. The penalty is 50 penalty units.

As the Electoral Act does not specifically provide for offences in relation to electronic voting equipment, the model for these computer offences were provisions in Victorian and Australian Capital Territory electoral legislation. It is also likely that Division 477 (Serious Computer Offences) and Division 478 (Other Computer Offences) of the *Criminal Code Act 1995* (Cth) would apply. The penalties for these offences are terms of imprisonment between two and ten years.

## **Offences in relation to scrutineers**

There are no specific provisions relating to possible offences committed by scrutineers in the Regulations, however as electronically assisted voting will be available at pre-poll centres, offences under section 200DB of the Electoral Act will apply. Subsection 200DB(1) makes it an offence for a scrutineer to interfere with, or attempt to influence any elector within the pre-poll voting office. The penalty is imprisonment for six months. Subsection 200DB(2) makes it an offence if a scrutineer communicates with someone else in the pre-poll voting office and the communication is not reasonably necessary for the discharge of the person's functions as a scrutineer. The penalty is imprisonment for six months.

For electronically assisted voting that will take place on polling day, section 218 of the Electoral Act makes it an offence for a scrutineer to interfere with or attempt to influence any elector within the polling booth, or communicate with any person in the polling booth except so far as is necessary in the discharge of the scrutineer's functions. The penalty is \$1,000 or imprisonment for six months, or both.