

EXPLANATORY STATEMENT

Issued by the Authority of the Special Minister of State

Commonwealth Electoral Act 1918

Electoral Legislation Amendment (COVID Enfranchisement) Act 2022

Commonwealth Electoral (COVID Enfranchisement) Regulations 2022

Legislative Authority

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

The *Electoral Legislation Amendment (COVID Enfranchisement) Act 2022*, which received the Royal Assent on 17 February 2022, amended the Electoral Act to allow regulations to be made to provide a measure of last resort for voters who, due to a coronavirus related public health order requiring them to self-isolate or quarantine in the final 72 hours before polling day, may be unable to vote in person at the 2022 Federal Election.

Subsection 202AB(1B) of the Electoral Act provides that regulations may provide a telephone voting method, to be used by coronavirus affected individuals covered by a determination under subsection 202AFA(1) of the Electoral Act, to vote at general elections, Senate elections and by-elections.

Outline

The Regulations enable contingency arrangements to be put in place, should they be required, to assist the Australian Electoral Commission to conduct safe, efficient and timely elections within a COVID-19 operating environment, and support the ongoing resilience of Australia's democracy.

The *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* (the Regulations) support coronavirus affected individuals in exercising their franchise by providing an alternative for in-person voting for certain electors who have received a notice to self-isolate or quarantine in the final 72 hours before polling day due to testing positive for COVID-19.

The Regulations will establish a secure telephone voting method for eligible persons in Australia who are subject to a direction from a public health authority that prevents those individuals from attending a polling place.

Part XVB of the Electoral Act and the *Electoral and Referendum Regulation 2016* currently enables sight-impaired electors and Australians working in Antarctica to vote using a version of secure telephone voting. The Regulations expand this existing secure telephone voting method (with some modification) to eligible voters who have COVID-19 and have been

directed to self-isolate or quarantine under a State or Territory public health order and are therefore unable to attend a polling place.

The application of the secure telephone voting method established under the Regulations will be contingent upon the Electoral Commissioner making a determination under section 202AFA of the Electoral Act that certain persons can be made eligible to vote by secure telephone voting. In order to make this determination, the Electoral Commissioner must be satisfied that it is necessary or conducive to ensure the due conduct of a general election, Senate election or by-election that access to the secure telephone voting system may be used by individuals who:

- have not previously voted in the election; and
- are coronavirus affected individuals during all or part of the period:
 - starting at 6:01pm on the Wednesday that is 3 days before the polling day in the election; and
 - ending on the close of the poll for the election.

The financial impact of the Regulations is unable to be quantified for 2022 as it will be contingent on the level of required usage of the service, if any.

Details of the Regulations are set out at [Attachment A](#). A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Sections 1 to 3 and Part 3 of the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation. The remaining sections commence on a single day to be fixed by the Minister by notifiable instrument. The Regulations will automatically repeal on 31 December 2022.

Consultation

Consultation was undertaken with the Australian Electoral Commission, the Department of the Prime Minister and Cabinet, the Department of Health, the Department of Infrastructure, Transport, Regional Development Communications, and the Attorney-General's Department.

Regulatory Impact

The Office of Best Practice Regulation (OBPR) has advised that the Regulations are unlikely to have a more than a minor regulatory impact. Accordingly, a regulatory impact assessment is not required.

OBPR ID Number: OBPR22-01653.

Details of the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022*

This attachment sets out the details of the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* (the Regulations).

The Regulations provide for the secure telephone voting method to apply to certain coronavirus affected individuals who are unable to vote in person or apply for a postal vote due to the application deadline for postal voting passing. The Regulations will provide for the following procedures in relation to secure telephone voting:

- registration as a secure telephone voter;
- voting;
- scrutiny;
- authorised call centres; and
- offences.

Part 1—Preliminary

Section 1 – Name

Section 1 provides that the title of the Regulations is the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022*.

Section 2 – Commencement

Section 2 provides that sections 1 to 3 and Part 3 of the instrument commence on the day after the instrument is registered on the Federal Register of Legislation. The remaining sections of the instrument commence on a single day to be fixed by the Minister by notifiable instrument.

Section 3 – Authority

Section 3 provides that the instrument is made under the *Commonwealth Electoral Act 1918* (the Electoral Act).

Section 4 – Definitions

Section 4 provides definitions that are used in the Regulations. This section also notes that a number of expressions used in the Regulations are defined in the Electoral Act, such as:

- approved list;
- certified list of voters;
- Electoral Commissioner; and
- Roll.

Section 5 – Time

Section 5 provides that where the Regulations refer to time as it relates to an individual it is a reference to the legal time in the State or part of the Commonwealth in which the individual

is located. This is consistent with the expression of time in section 37 of the *Acts Interpretation Act 1901*.

The section clarifies that if the individual is located in Norfolk Island or Lord Howe Island, then it is a reference to the legal time in Sydney. Similarly, if the individual is located in the Territory of Cocos (Keeling) Islands or the Territory of Christmas Island, then it is a reference to the legal time in Perth.

This allows voting through the secure telephone voting method to occur as closely as possible to the ordinary conduct of voting in elections. This supports the operation of the Regulations to provide each eligible secure telephone voter with the opportunity to cast their vote, noting the different time zones across Australia.

Part 2—Secure telephone voting for coronavirus affected individuals

Division 1—Preliminary

Section 6 – Telephone voting method for coronavirus affected individuals

Section 6 provides that Part 2 of the Regulations provides a telephone voting method for use by certain coronavirus affected individuals covered by a determination under subsection 202AFA(1) of the Electoral Act.

Subsection 202AFA(1) of the Electoral Act provides the Electoral Commissioner with the power to determine, by a legislative instrument, that a secure telephone voting method may be used by coronavirus affected individuals in Australia if the Electoral Commissioner is satisfied on reasonable grounds that it is necessary or conducive to ensure the due conduct of a general election, Senate election or by-election.

Section 7 – Telephone voting method to be provided to the extent feasible

Section 7 provides that, if the Electoral Commissioner is satisfied that it has become unfeasible to provide, or continue to provide, a telephone voting method in accordance with Part 2 of the Regulations to any extent for any period for a general election, Senate election or by-election, then to that extent and throughout that period the Regulations do not require:

- or entitle an individual to be registered as a secure telephone voter;
- a registered secure telephone voter to be enabled to vote by a secure telephone vote, or entitle a registered secure telephone voter to vote by a secure telephone vote; and
- any other function or duty to be performed, or any other power to be exercised, under the Regulations.

This provides flexibility for the secure telephone voting method to respond to any change of circumstances to the feasibility of the secure telephone voting system. For the avoidance of doubt, subsection 7(1) can apply to one, some, or all authorised call centres and can apply whether or not secure telephone voting has commenced.

Subsection 7(2) provides that, as soon as practicable after the Electoral Commissioner's satisfaction in subsection 7(1), the Electoral Commissioner must:

- make a written record of the fact that the Electoral Commissioner is so satisfied, and of the extent and period of the non-feasibility to which the Electoral Commissioner is satisfied; and
- publish the written record on the Australian Electoral Commission's website.

The record must remain available on the website until 40 days after the polling day for the election, this being the period for filing a petition disputing an election or return in the Registry of the High Court under section 355 of the Electoral Act, to provide transparency of this measure.

This section further provides that any failure to provide a telephone voting method in accordance with Part 2 of the Regulations does not invalidate the result of a general election, Senate election or by-election. This is intended to have an effect similar to that of subsection 227(7) of the Electoral Act in relation to mobile polling. Given that secure telephone voting (like mobile polling) is a service that is provided to a small number of voters across a large number of Divisions and States, it is appropriate that a failure of such a service does not affect the delivery of an entire general election.

Division 2—Registration

The Regulations provide that an eligible coronavirus affected individual must first register before the individual is entitled to access the secure telephone voting method in a general election, Senate election or by election. **Sections 8, 9 and 10** provide for the procedures relating to the registration of a secure telephone voter including establishing the conditions that must be satisfied by an individual to register as a secure telephone voter.

Section 8 – Entitlement to register to vote by a secure telephone vote

Section 8 relates to the entitlement to register as a secure telephone voter.

Subsection 8(1) provides that an individual must register as a secure telephone voter in order for the individual to vote by a secure telephone vote in a general election, Senate election, or by-election. A Note draws the reader's attention that the individual, once they are a registered secure telephone voter, must also meet the requirements of section 11 in order to vote by a secure telephone vote.

Subsection 8(2) provides that, in order for an individual to be entitled to be registered as a secure telephone voter, subject to subsection 7(1), the Electoral Commissioner must be satisfied of all of the following in relation to the individual:

- a) the individual's name is on an approved list of voters, a certified list of voters, or a reference Roll;
- b) the individual has not already voted in the election;
- c) the individual became a coronavirus affected individual in the period beginning at 6.01pm on the Tuesday that is 4 days before the polling day in the election and ending at the latest time when the individual may apply to be registered as a secure telephone voter by the Electoral Commissioner;
- d) the individual has been directed, by a public health authority of a State or Territory and under a public health order of that State or Territory, to self-isolate or quarantine

- (i) because the individual has tested positive for COVID-19 on a test approved by the Therapeutic Goods Administration for the purpose of testing COVID-19; or
 - (ii) because of a matter specified by the Minister under subsection 8(3); and
- e) the direction to self-isolate or quarantine means that the public health order prevents the individual from attending a polling place in the State or Territory throughout the period beginning at 6.01pm on the Wednesday that is 3 days before the polling day in the election and ending at 4pm on the polling day in the election.

Subsection 8(3) provides that the Minister may, in writing, specify matters for the purposes of subparagraph 8(2)(d)(ii). A specified matter must be a matter because of which an individual becomes, or continues to be, a coronavirus affected individual. This provides flexibility to enable the requirements for the use of the secure telephone voting method to adapt to the changing and evolving nature of the COVID-19 pandemic. For the avoidance of doubt, the Minister cannot specify matters for the purposes of subparagraph 8(2)(d)(ii) under subsection 8(3) beyond those provided at section 202AFA(2) of the Electoral Act. Further, consistent with subsection 33(3A) of the *Acts Interpretation Act 1901*, the Minister may exercise this power to specify only some matters (such as a matter that is relevant to only one State or Territory).

This section includes a Note to alert the reader that a declaration vote or provisional vote cannot be cast using the secure telephone voting method.

This section ensures that only eligible individuals are registered for secure telephone voting.

Section 9 – Registering as a secure telephone voter

Section 9 provides the necessary processes that an eligible coronavirus affected individual must follow in order to register as a secure telephone voter. These requirements include applying during the allocated time period, using the approved method for registration, and providing requisite personal information and evidence to support their entitlement to register.

Paragraph 9(1)(c) outlines the evidentiary requirement for voters seeking to be registered as a secure telephone voter.

It is a requirement for an individual applying to register as a secure telephone voter, who has tested positive to COVID-19 to register their RAT or PCR result with their relevant State or Territory health authority where the health authority provides a reference number. Where a State or Territory does not provide a reference number, the individual must instead provide any reference number attached to their positive RAT or PCR result directly to the Australian Electoral Commission.

If an applicant for a secure telephone vote is unable to provide either of these items of evidence due to neither their health authority providing a reference number for positive results, nor their test having a unique reference number, the applicant must make a declaration to this effect.

This subsection includes a Note which clarifies that the Electoral Commissioner reserves the right to deny the registration of an applicant if they are not satisfied they meet the criteria as

an eligible coronavirus affected individual, which includes the presentation of evidence of COVID-19 status.

In addition, the individual will be required to make a declaration to the effect that:

- they have not already voted before in the election;
- either they have been directed by a public health authority of a State or Territory
 - i. to self-isolate or quarantine as a result of testing positive to COVID-19; or
 - ii. if the Minister has specified a matter under subsection 8(3), to self-isolate or quarantine from a time and date because of a specified matter; and
- because of the direction, they believe they are prevented from attending a polling place in the State or Territory throughout the period beginning 6.01pm on the Wednesday that is 3 days before polling day in the election and ending at 4pm on the polling day for the election.

For the avoidance of doubt, voters are to be advised that pre-poll voting, postal voting, and election day voting are all examples of voting for the purposes of determining whether they have already voted before in the election.

The Electoral Commissioner may also request further evidence from the individual to assist with determining whether the individual is entitled to be registered for secure telephone voting.

The collection of the individual's personal information is necessary to assist with determining whether the individual is eligible to access the secure telephone voting system, determining if they are enrolled to vote, and sending the individual their registration details to enable them to vote using the secure telephone voting system.

The Australian Electoral Commission collects and stores personal information for the purpose of carrying out its functions and duties. As provided for in section 29 of the Regulations, the information collected under the Regulations will be subject to the existing provisions under section 393A of the Electoral Act that relate to the storage and handling of electoral documents. This information is also subject to the Australian Privacy Principles and the requirements of the *Privacy Act 1988*.

This section also requires the registered secure telephone voter to keep the following (as the case may be) until the day that is 40 days after the polling day for the election:

- if the voter provided a direction reference number as evidence to support their entitlement to register, a copy of the direction to the individual to self-isolate or quarantine; or
- if the voter provided a test reference number or serial number as evidence to support their entitlement to register, a record of their positive COVID-19 test or test result.

Section 10 – Procedures for registering a secure telephone voter

Section 10 establishes the procedures for registering an individual who has met the conditions to be registered as a secure telephone voter. If an individual has satisfied the conditions in subsection 8(2) and section 9 of the Regulations, the Electoral Commissioner must:

- register the individual as a secure telephone voter;
- provide the individual with a registration number; and

- register a personal identification number chosen by the individual.

As part of establishing the secure telephone voting method, the Electoral Commissioner must:

- determine in writing the time period in which an individual may apply for registration as a secure telephone voter;
- approve in writing a form and manner for applying for registration;
- determine in writing procedures for:
 - assessing an individual’s eligibility to be registered as a secure telephone voter;
 - how an individual satisfies the requirements to be registered as a secure telephone voter;
 - advising an individual when making the declaration required by paragraph 9(2)(a) that voting in the election includes voting by attending a polling place, by a pre-poll vote or by a postal vote; and
 - the submission of evidence for assessing eligibility; and
- make and keep a register for the purposes of registering secure telephone voters.

The time period determined by the Electoral Commissioner must occur within the window beginning 6.01pm on the Wednesday 3 days before polling day in an election (that is, a Division election or a Senate election) and ending on the close of the poll in that election. For the avoidance of doubt, the Electoral Commissioner can determine a time period that covers some or all of this window.

The procedures may also provide for the audio recording of applications to be registered as a secure telephone voter if those applications are made by calling an authorised call centre. This does not include the audio recording of the casting of a secure telephone vote, which is explicitly prohibited by subsection 16(8).

If procedures are made that do provide for this audio recording, the applicants must be informed that their call may be recorded. These audio recordings are intended to provide both a quality assurance mechanism to ensure call centre operators are following procedures and as a review method should later verification be needed regarding an individual’s entitlement to register as a secure telephone voter.

Division 3—Voting

Section 11 – Entitlement to vote by a secure telephone vote

Section 11 establishes the requirements that a registered secure telephone voter must meet in order to be entitled to vote by a secure telephone vote.

This section also provides the circumstances for when a registered secure telephone voter is not entitled to vote by a secure telephone vote. The section also has a Note that clarifies that, voting in the election in paragraph 11(2)(f) includes in-person voting at a polling place, a pre-poll vote or a postal vote.

Section 12 – Procedures for requesting to vote by a secure telephone vote

Section 12 relates to the procedures for how a registered secure telephone voter can request to vote by a secure telephone vote.

The section provides that the Electoral Commissioner:

- must determine, in writing, the days and times at which voting by secure telephone vote is to be available;
- must determine, in writing, procedures for assessing whether an individual is a registered secure telephone voter; and
- may give directions to Australian Electoral Commission officers in relation to requests to vote by secure telephone vote.

This section also provides that the Electoral Commissioner must ensure that any registered secure telephone voter who is in one of the following situations at 6pm on the polling day for the election is not prevented from using the secure telephone voting method (unless otherwise not entitled):

- is in an authorised call centre's telephone queue waiting to request a vote by secure telephone vote, and wishes to vote; or
- is in the process of voting by secure telephone vote, and wishes to continue voting.

For example, if a registered secure telephone voter calls the call centre at 5.58pm on the polling day for the election requesting to vote, and at 6pm the voter is still waiting in the call centre's telephone queue, then the voter will be able to exercise their vote, even if it is past 6pm. This entitlement remains so long as the voter does not leave the queue. This is intended to have the equivalent effect to that which is provided for in-person voters on polling day under paragraphs 220(b)–(c) of the Electoral Act.

For the avoidance of doubt, this provision exclusively applies to individuals who have already registered as secure telephone voters. An individual who has not registered as a secure telephone voter prior to commencing their call to an authorised call centre will not be permitted to register and subsequently cast a vote after 6pm.

Section 13 – Questions to be put to registered secure telephone voter

Section 13 establishes the requirements for a call centre operator to verify that an individual requesting to vote by secure telephone vote is a registered secure telephone voter and so entitled.

In particular, this section provides that the procedures must require a call centre operator to advise the individual that a declaration relating to voting in the election includes voting by attending a polling place, by pre-poll vote or by a postal vote. For the avoidance of doubt, this provision ensures the registered secure telephone voter understands that they are not entitled to vote via secure telephone voting if they have already voted in the election, and this includes all methods of voting.

Section 14 – Voting

Section 14 provides that a call centre operator who is satisfied that a registered secure telephone voter is entitled to vote by secure telephone vote must assist the voter in accordance with the procedures determined under subsection 16(1) of the Regulations.

This section provides that, when the voter tells the call centre operator how the voter wants the ballot paper to be marked (as the voter is required to do in order to vote by secure telephone vote), the call centre operator must:

- initial the voter's ballot paper on the top front of each ballot paper;
- mark the ballot paper according to the voter's instructions;
- read the ballot paper with the voter's preferences marked back to the voter;
- ask the voter to affirm that the marked voting preferences are the voter's voting preferences; and
- if the voter so affirms, put the ballot paper in an envelope that is in the approved form and marked with:
 - the voter's Division;
 - the voter's registration number; and
 - the date and time when the voter affirmed the preferences marked on the ballot paper are correct.

The call centre operator is then required to place the envelope in a ballot-box used in the authorised call centre for secure telephone voting.

This section also allows the voter to request another call centre operator to read back to the voter the voter's voting preferences marked on the ballot papers.

Additionally, this section provides for what is to occur where the voter indicates to the call centre operator that the preferences recorded are incorrect. The ballot paper is deemed to be a spoilt ballot paper that has been cancelled under subsections 238(1) or (2) of the Electoral Act. The voter may restate to the call centre operator their preferences to be marked on a fresh ballot paper. The call centre operator must read back the voter's preferences prior to confirming the ballot paper is marked correctly and before the ballot papers are placed in an envelope. For the avoidance of doubt, the voter is not required to state the same preferences as the voter stated when the original ballot paper was being marked.

This section also clarifies that a call centre operator must follow the voter's instructions for marking a ballot paper, even if the voter does not want any preferences marked or where the marking of the ballot paper would result in an informal ballot paper.

This section provides that a call centre operator must make a record of any objection by any scrutineers regarding the right of the voter to vote by secure telephone vote or to the marking of a ballot paper.

This section also provides an offence if a call centre operator intentionally contravenes this section, carrying a penalty of 10 penalty units. An example of this would be if a call centre operator deliberately marked a ballot paper in a way that does not represent the voter's instructions. The express intentional element of the offence recognises call centre operators are already required to recite a voter's preferences back to the voter, and receive affirmation from the voter that the preferences are marked correctly before the ballot paper is placed in an envelope, mitigating the risk of inadvertent errors or mistakes.

Section 15 – Voters requiring assistance to vote

Section 15 provides processes for eligible registered secure telephone voters who may require assistance to vote via secure telephone voting. This section enables voters who may

require additional assistance when using call centre services to exercise their vote. The section provides for processes to allow a voter to inform the call centre operator that assistance from a third person is required. The voter must inform the call centre operator that they require a third person's assistance to vote via the secure telephone voting system. This ensures that those with disabilities or from culturally and linguistically diverse backgrounds can fully access the service.

This provision mirrors section 234 of the Electoral Act where a voter advises the presiding officer that they are unable to vote without assistance.

Additionally, the section makes provision for an offence if an individual assists a voter to inform the call centre operator of the voter's preferences for the ballot paper without the voter advising the call centre operator that they require another individual's assistance. The penalty for this offence is 5 penalty units. This is designed to replicate the principle of in person voting that all voters are present while receiving assistance in casting their vote. An affirmation by the voter ensures that the call centre operator can confirm a voter receiving assistance is present for the full process of casting their vote.

The section also provides that, whilst the Regulations do not prevent assistance from the National Relay Service or a dedicated interpreter service in secure telephone voting, section 15 of the Regulations does not apply to such assistance.

Section 16 – Procedures for enabling a registered secure telephone voter to vote

Section 16 requires the Electoral Commissioner to determine, in writing, procedures for how a registered secure telephone voter will vote under these Regulations. The procedures must ensure that the voter receives the same information and options as would appear on the ballot paper if the voter were voting via ordinary polling in-person, and that the voter can indicate their preferences in the same way as if the voter was marking the House of Representatives and Senate ballot papers in person.

The procedures must also provide that a representation of the ballot paper be available on the Australian Electoral Commission's website for the same period that the secure telephone voting method (both registration and voting) is available. The Electoral Commissioner must ensure that the ballot paper representation is an accurate (but visually distinguishable) representation of the ballot paper information that would be available for in-person voting.

This section also specifies that the procedures must not require a call centre operator to read to the registered secure voter the ballot paper information unless the voter affirms that they are unable to access or use the ballot paper representation on the Australian Electoral Commission's website.

Additionally, this section makes provision for scrutineers to monitor the performance of the duties of call centre operators. The procedures must allow a scrutineer, upon request, to listen to a call between a registered secure telephone voter and a call centre operator when the operator is performing duties under section 14 of the Regulations (such as receiving the voter's instructions of their preferences for the ballot paper). The procedures must require voters to be informed that scrutineers are permitted to listen to the call. This provision is similar to subsection 234(2) of the Electoral Act that enables a scrutineer to observe an officer at a polling place providing assistance to a voter (where requested).

For the avoidance of doubt, subsection 16(8) provides that the audio of a voter voting by secure telephone vote is not to be recorded.

Section 17 – How the Act applies in relation to secure telephone votes

Section 17 provides that the Electoral Act, except for Part XVA and Schedule 2, applies in relation to a vote cast using a secure telephone vote as if the vote were a pre-poll ordinary vote, unless otherwise provided in Part 2 of the Regulations. This exception means that Part XVA (which provides a method of pre-poll voting) and Schedule 2 (which relates to grounds of application for a postal or pre-poll vote) do not apply, as the Regulations already provide the method for secure telephone voting.

If an individual votes by a secure telephone vote, the requirements of the Electoral Act relating to the individual's right to receive a ballot paper are taken to have been satisfied.

Section 18 – Temporary suspension of polling

Section 18 provides that the Electoral Commissioner may temporarily suspend polling by secure telephone vote for a period if the Electoral Commissioner is satisfied that the temporary suspension during that period is justified because of:

- (a) riot or open violence;
- (b) the threat of riot or open violence;
- (c) storm, tempest, flood or an occurrence of a similar kind;
- (d) a health hazard;
- (e) a fire or the activation of fire safety equipment (such as sprinklers or alarms); or
- (f) anything else related to the safety of voters or difficulties in the physical conduct of the voting.

This provision is intended to have an effect similar to that of section 240A of the Electoral Act. Accordingly, this section also provides that the Electoral Act applies to a suspension under this section of the Regulations in the same way as the Electoral Act applies to a suspension under section 240A of the Electoral Act.

A suspension under this section may apply to some or all authorised call centres arranged in accordance with section 25.

For the avoidance of doubt, unlike for adjournments under section 241 of the Electoral Act, a temporary suspension under this section of the Regulations:

- must commence and cease on the same day; and
- can occur regardless of whether secure telephone voting has already opened or not for the day.

Division 4—Scrutiny

Section 19 – Requirements relating to ballot-boxes

Section 19 provides for Subdivision C of Division 3 of Part XVA of the Electoral Act to apply to ballot-boxes that are used for voting by secure telephone voting as if it were pre-poll ordinary voting. This ensures safe custody of the ballot boxes for the period of secure

telephone voting, consistent with the Australian Electoral Commission's existing process for pre-poll voting. The forwarding of ballot-boxes under section 200DR of the Electoral Act will not apply to ballot-boxes for secure telephone voting.

Section 20 – Scrutineers at authorised call centres

Section 20 makes provision for the appointment, duties and number of scrutineers at an authorised call centre. This section reflects the scrutineer provisions in sections 200DA, 200DB and subsection 202A(3) of the Electoral Act.

Candidates in an election may appoint scrutineers to attend at each authorised call centre for the purpose of monitoring performance of the duties of call centre operators. The number of scrutineers representing each candidate is not to exceed the number of call centre operators performing duties at that time. This number limitation mirrors subsection 264(2) of the Electoral Act.

This section also makes provision for offences in relation to scrutineers during their attendance at an authorised call centre. A scrutineer commits an offence if they attempt to interfere with the duties of a call centre operator or an Assistant Returning Officer, or if they attempt to communicate with an individual in the authorised call centre when the communication is not reasonably necessary for the discharge of the scrutineer's function. Both of these offences have a penalty of 5 penalty units.

For the avoidance of doubt, all scrutineers, including scrutineers observing secure telephone voting at an authorised call centre, cannot begin the performance of their duties until they have provided an undertaking in the form required by section 202A of the Electoral Act.

Section 20 of the Regulations does not prevent scrutineers from objecting to the performance of a duty or exercise of a function under the Regulations, for example, the marking of a ballot paper under section 14 of the Regulations. For clarification, the section provides a Note with an example explaining a scrutineer may object to how a call centre operator has marked a ballot paper or placed it in an envelope under section 14 of the Regulations.

Section 21 – Record of secure telephone votes

Section 21 provides that the Electoral Commissioner must place a mark on a copy of a certified list of voters or record electronically on an approved list of voters against the voter's name when the secure telephone vote ballot paper is placed in an envelope.

This provision mirrors section 223 of the Electoral Act, which provides a mechanism to record that ballot papers have been given to an enrolled voter. For secure telephone voting the voter is not considered to have 'voted' until the ballot papers are placed into the envelope, to ensure that voters do not lose their entitlement to vote should, for example, their telephone line cut out mid-way through the voting process (before the envelope stage is reached).

Section 22 – What must be done with the ballot papers

Section 22 provides for the handling of ballot papers after the close of the poll has occurred for all Divisions. This section provides that as soon as possible after the close of the poll, an Assistant Returning Officer (ARO) must open each secure telephone voting ballot-box and

sort the envelopes, unopened into bundles that correspond to Divisions. The ARO must forward each bundle to the Divisional Returning Officer (DRO) for further scrutiny.

This section also provides that an individual commits an offence of strict liability if they open a secure telephone voting ballot-box or sort envelopes and the individual is not an ARO or performing tasks under the direction of an ARO. The penalty for this offence is 5 penalty units.

Section 23 – Scrutiny before opening of envelopes containing ballot papers

Section 23 relates to the handling of the envelopes containing ballot papers on the day that is 4 days after the polling day in the election. It requires that the scrutiny of the secure telephone voting ballot papers must not be conducted before the day that is 4 days after the polling day in the election.

This section provides that the DRO, after checking that the voter has no other marks against their name on a copy of a certified list of voters and no record for the voter has been made against an approved list of voters, is to open the envelope and place the ballot paper in a ballot-box for further scrutiny. If after the reconciliation process a mark is against a voter's name on a copy of a certified list of voters or an approved list of voters (under section 200DJ or 232 of the Electoral Act), the DRO must, without opening the envelope, exclude the ballot papers contained in the envelope from further scrutiny. It is a requirement that, during this stage of scrutiny, all secure telephone votes must be reconciled against all votes marked on an electronic certified list (ECL) and all declaration and postal votes received by the Australian Electoral Commission at the time of scrutiny.

The effect of the delay in the opening of envelopes is to ensure that in the rare event of a multiple vote, it is the secure telephone vote that is excluded. This process will mitigate against the effect of instances of multiple voting and protect the 'one person, one vote' principle.

This section also requires the DRO to seal up ballot papers excluded from further scrutiny in a parcel and write on the parcel a description of the contents, the name of the Division and the date.

This section also provides that an individual commits an offence of strict liability if they open an envelope placed in a ballot-box and the individual is neither the DRO for the Division nor an individual performing tasks under the direction of the DRO. The penalty for this offence is 5 penalty units.

Section 24 – Scrutiny of ballot papers

Section 24 provides that the DRO must conduct the scrutiny of the ballot papers placed in a ballot box under paragraph 23(2)(b) of the Regulations, and provides the processes that the DRO must follow in so doing.

The procedures contained in Part XVIII of the Electoral Act apply to the scrutiny of secure telephone voting ballot papers. Modifications may be made when they are necessary to ensure that:

- no preliminary scrutiny mentioned in section 266 of the Electoral Act is to be conducted;
- the secure telephone vote is taken to be a pre-poll ordinary vote;
- it is irrelevant that the voter did not complete the ballot paper personally; and
- it is irrelevant that the vote can be identified as being cast by a coronavirus affected individual.

The preliminary scrutiny process outlined in section 266 of the Electoral Act is superseded by the scrutiny process outlined in the Regulations.

The exemptions to personal completions of ballot papers, and identification as an eligible coronavirus affected individual reflect that the nature of the process of registering as a secure telephone voter, and casting a ballot using the secure telephone voting method.

This section also provides that an individual commits an offence of strict liability if they conduct the scrutiny and are neither the Divisional Returning Officer nor an individual performing tasks under the direction of the Divisional Returning Officer. The penalty for this offence is 5 penalty units.

This section also provides that, for the purposes of publishing results of the scrutiny on the Commission's website, a separate vote collection point must be identified for each Division in which votes are cast by using a secure telephone vote. As such, the Electoral Commissioner may reflect the secure telephone voting method in the vote type breakdown when publishing the 2022 Federal Election Tally Room on the Australian Electoral Commission's website (www.aec.gov.au).

Division 5—Miscellaneous

Section 25 – Authorised call centres

Section 25 provides that the Electoral Commissioner must make arrangements for the establishment of one or more call centres to receive telephone calls from eligible coronavirus affected individuals who wish to register as a secure telephone voter and/or vote by a secure telephone vote.

This section also allows the Electoral Commissioner to determine the forms and documents that call centre operators are to use to register and assist secure telephone voters to vote by secure telephone vote. These approved forms and documents may include statements and responses that call centre operators are able to read to the voter to explain the process and provide consistent advice across all call centres and call centre operators.

Section 26 – Offence for false or misleading declaration

Section 26 establishes the offence and the corresponding penalty of 10 penalty units for individuals who make a false and misleading declaration in relation to registering for or voting by secure telephone voting method. Section 330 of the Electoral Act provides a similar provision for persons who make a false or misleading statement on polling day to an elector about the elector's enrolment.

This provision is in addition to sections 137.1 and 137.2 of the *Criminal Code*, to mirror the provisions in section 330 in the Electoral Act relating to false statements in relation to Rolls. This highlights the seriousness of this offence and provides an additional assurance mechanism in secure telephone voting. This also protects the integrity of the election and ensures that the secure telephone voting method is being utilised appropriately. Given that secure telephone voting is a time-limited service for electors who otherwise have no opportunity to exercise their democratic franchise near the end of the polling period, it is particularly important that the system is preserved for the exclusive use of those individuals who have the greatest need to access the service.

Section 27 – Offences related to secure telephone voting

Section 27 establishes two offences related to secure telephone voting. The first offence, established by subsection 27(1), relates to if an individual interferes with a voter whilst the voter is voting by secure telephone vote, communicates with a voter who votes by secure telephone vote about the voter's vote, or does anything to find out the outcome of the secure telephone voter's vote. The penalty for this offence is 5 penalty units.

This offence does not apply if the individual is a call centre operator who is assisting the voter to vote, an appointed scrutineer acting in accordance with subsection 20(7), or the individual is permitted under subsections 15(1) or 15(3) of the Regulations to assist the voter to vote. A Note alerts the reader that the defendant bears an evidential burden in relation to the matters in subsection (2) of this section, as per subsection 13.3(3) of the *Criminal Code*.

This offence is to ensure that there is consistency in the treatment of the secrecy of the ballot despite the method of voting by the voter and to deter those seeking to interfere with the free exercise of a secure telephone voter's vote. This section aligns with section 25 of the *Electoral and Referendum Regulation 2016*, for the electronically assisted voting method for Antarctic electors and sight-impaired persons.

A second Note alerts the reader that other offences related to voting by a secure telephone vote include offences for impersonating any individual with the intention of voting in that other individual's name, as per section 339 of the Electoral Act.

Subsection 27(3) establishes an offence of strict liability for if an individual votes by a secure telephone vote and the individual votes (whether by secure telephone vote or otherwise) more than once in the same election. The penalty for this offence is 20 penalty units.

Two Notes are also included in subsection 27(4) to clarify that subsection 27(4) means that each act of voting by a secure telephone vote gives rise to a separate offence but it is not necessary to know which act of voting was the first one and therefore legitimate, and that is also an offence to intentionally vote more than once in the same election, as per section 339(1D) of the Electoral Act.

Section 28 – Offence for destroying or interfering with the voting hardware or software

Section 28 establishes the offence and corresponding penalty of 50 penalty units for an individual who destroys or interferes with the voting hardware or the software that is used or intended to be used for or in connection with the secure telephone voting method, unless the individual is an officer acting in the course of their duties. This provision mirrors the existing

provision in section 26 of the *Electoral and Referendum Regulation 2016*, for the electronically assisted voting method for Antarctic electors and sight-impaired persons.

This section reflects that destroying or interfering with voting hardware or software is a serious offence, and it aims to deter those seeking to interfere with secure telephone voting methods in federal elections.

Section 29 – Records

Section 29 provides that any records made under the Regulations (including audio records) are to be treated as electoral documents for the purposes of section 393A of the Electoral Act.

Part 3—Repeal

Section 30 – Repeal

Section 30 provides that the instrument is to be repealed at the end of 31 December 2022.

This is consistent with the automatic repeal on 31 December 2022 of the temporary measures provided by the *Electoral Legislation Amendment (COVID Enfranchisement) Act 2022*. The repeal date of 31 December 2022 will ensure that 2022 Federal Election events are able to be held with COVID-19 related safeguards in place.

Scope and operation

The *Electoral Legislation Amendment (COVID Enfranchisement) Act 2022*, which came into effect on 18 February 2022, amended the Electoral Act to provide a measure of last resort for voters who, in the upcoming 2022 Federal Election, may be unable to vote in person due to having COVID-19 in the final 72 hours before polling day.

These Regulations would provide for contingency arrangements to enable electors in mandatory self-isolation or quarantine due to COVID-19 (and therefore unable to attend a polling place) during the final 72 hours before polling to participate in the upcoming 2022 Federal Election.

Subsection 202AB(1B) of the Electoral Act provides that regulations may be made to provide for a telephone voting method, to be used by coronavirus affected individuals covered by a determination under subsection 202AFA(1) of the Electoral Act, to vote at general elections, Senate elections and by-elections.

Subsection 202AFA(1) of the Electoral Act provides the Electoral Commissioner with the power to determine, by a legislative instrument, that a secure telephone voting method may be used by coronavirus affected individuals in Australia if the Electoral Commissioner is satisfied on reasonable grounds that it is necessary or conducive to ensure the due conduct of a general election, Senate election or by-election.

The Regulations provide an alternative for in-person voting for voters who have tested positive to COVID-19 and received a notice to self-isolate or quarantine in the final 72 hours before polling day, to support individuals in exercising their franchise. The Regulations will

enable electors who may otherwise be are unable to vote at a polling place on polling day or unable to apply for a postal vote (because the cut-off time has passed) to vote using the secure telephone voting system.

Part XVB of the Electoral Act currently enables sight-impaired electors and Australians working in Antarctica to vote through secure telephone voting (also called electronically assisted voting). This is determined through the *Electoral and Referendum Regulation 2016*.

Section 245 of the Electoral Act provides that it is the duty of every elector to vote at each election, and that electors who have failed to vote are to be issued a penalty notice unless they had a valid and sufficient reason for failing to vote. Whilst the DRO assesses the merits of a 'valid and sufficient reason' on an individual case-by-case basis, decisions of the courts on the interpretation of the term 'valid and sufficient' provide practical examples of what would be regarded as valid and sufficient reasons. This includes physical obstruction due to sickness, natural disasters or accidents. As such, the availability of secure telephone voting should not affect the possibility that having COVID-19 is a valid and sufficient reason for failing to vote. Whilst ultimately a matter for the relevant DRO, such reasoning would find support from the High Court case of *Judd v McKeon* [1926] HCA 33, in which Isaacs J found that sickness can be a valid and sufficient reason.

The Regulations will not have any effect on silent electors, being voters who do not have their address shown on the Roll as per section 104 of the Electoral Act, noting that silent electors are entitled to be general postal voters as per paragraph 184A(g) of the Electoral Act.

Providing COVID-19 positive individuals the ability to vote through a secure telephone voting method provides public confidence in the safety of voting, as it alleviates the need for those persons to attend a polling place or booth to vote in person which may affect the safety of other voters.

Independent merits review is not considered suitable for decisions made in connection with the Regulations as such decisions are automatic or mandatory in nature. Section 121 of the Electoral Act prescribes when independent review by the Administrative Appeals Tribunal may apply. The activities provided by the Regulations are not included as a reviewable decision under section 121 of the Electoral Act.

Additionally, decisions made in connection with determining registration eligibility of individuals are not considered suitable for independent review, as these decisions may also be described as automatic or mandatory as the nature of such decisions arises as a direct consequence of a person testing positive to COVID-19 and meeting the statutory requirements as set out in the Electoral Act and the Regulations.

The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 3.8 to 3.11 of the guide, *What decisions should be subject to merit review?*).

Consultation has been undertaken with the Department of the Prime Minister and Cabinet, the Department of Health, the Australian Electoral Commission, the Australian Government Solicitor, and the Attorney-General's Department.

Broader consultation on the Regulations is not considered necessary as the Electoral Act is technical in nature and prescribes the administration and conduct of general elections, Senate elections, and by-elections. There is also a need to implement the Regulations in a timely manner, noting the upcoming 2022 Federal Election. Furthermore, since the Regulations impose no regulatory burden on individuals and businesses, broader consultation was not required in this instance.

The financial impact of the Regulations is unable to be quantified in advance of the 2022 Federal Election as it will be contingent on the level of required usage of the service, if any.

The Regulations do not restrict the implied freedom of political communication, as the Regulations support the rights of Australian voters to participate in federal elections amidst the COVID-19 pandemic.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Commonwealth Electoral (COVID Enfranchisement) Regulations 2022

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* (the Regulations) establish the qualifying criteria for a coronavirus affected individual to be eligible to access the secure telephone voting system and prescribe the necessary procedures for the operation and conduct of secure telephone voting.

The Regulations provide a mechanism to ensure voters who have COVID-19 and receive a notice to self-isolate in the final 72 hours before polling day have the opportunity to vote, where the cut-off time for a postal vote application has passed and the voter is unable to attend in-person voting.

Human rights implications

The Regulations engage the following rights under the *International Covenant on Civil and Political Rights* (ICCPR):

- the right to privacy under Article 17; and
- the right to political participation under Article 25.

Article 17 – Right to Privacy

The Regulations engage the right to privacy under Article 17 of the ICCPR as the Electoral Commissioner may record and collect a coronavirus affected individual's personal details during the registration process to determine if the individual is eligible to be registered to vote through the secure telephone voting system.

The Regulations will allow the collection of personal data relating to the individual, including their name, address, contact number, email address, date of birth, and health information relating to their COVID-19 status.

The collection of this personal information is necessary to assist with determining whether an individual is eligible to access the secure telephone voting system, determining if they are enrolled to vote, and sending the individual their registration details to enable them to vote using the secure telephone voting system.

Article 17 of the ICCPR provides for the right of every person to be protected against arbitrary or unlawful interference with their privacy. The right to privacy is subject to permissible limitations where these limitations are authorised by law, not arbitrary, for a reason consistent with the ICCPR, and reasonable in the particular circumstances.

The United Nations Human Rights Committee has interpreted the requirement of reasonableness to imply that any interference with privacy must be proportionate to the end sought and necessary in the circumstances of any given case.

The requirement to collect and record personal information about an individual seeking to use secure telephone voting is authorised by law and is intended to support the integrity of Australia's electoral system. The Regulations will provide an option for eligible voters who would otherwise be unable to participate in the upcoming 2022 Federal Election (because of a public health order requiring the voter to self-isolate in the final 72 hours before polling day) to so participate. The requirement to collect personal information ensures that an individual seeking to use secure telephone voting is enrolled to vote, qualifies for access to the secure telephone voting system, and can vote using the secure telephone voting system. Furthermore, the use of the secure telephone voting method is voluntary.

The Regulations' provisions to collect personal information are therefore appropriate and proportionate to the end sought and necessary to ensure all eligible individuals are able to participate in the upcoming 2022 Federal Election whilst protecting the principle of 'one person one vote'.

The limitation is therefore consistent with Article 17 of the ICCPR.

Article 25 – Right to political participation

The Regulations will engage the right of citizens to take part in public affairs and elections under Article 25 of the ICCPR, as it supports the rights of Australian voters to participate in the upcoming 2022 Federal Election where public health measures may restrict voters from participation by requiring them to self-isolate to reduce the spread of COVID-19.

In addition, the Regulations have made provision to include accessibility options for voters who require a third person to assist with telephone calls. The voter is able to advise the call centre operator that another person is required to assist them to vote using the secure telephone voting system. This includes voters who may already subscribe to the National Relay Service.

The Regulations support the political participation of eligible coronavirus affected individuals, including those who require additional assistance with telephone calls due to deafness or a need for language interpreter services. The Regulations enable this cohort of voters to access the existing secure telephone voting system, by registering as a secure telephone voter during the available period. The Regulations provide an additional method by which an individual's voting entitlement can be exercised. Without the option to access the secure telephone voting system, Australian voters directed to quarantine under a COVID-19 public health order during this period may have limited opportunity to exercise their democratic franchise.

Therefore, the Regulations support and protect the right of citizens to take part in public affairs and elections under Article 25 of the ICCPR.

Conclusion

The Regulations are compatible with human rights because, to the extent that the Regulations may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon Ben Morton MP
Special Minister of State