**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) Amendment 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 certain electors who, due to testing positive for COVID-19, may be unable to vote in person at the 2022 Federal Election.

Subsection 202AB(1B) of the Electoral Act provides that regulations may 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.

The *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* (Principal Regulations) established the framework for contingency arrangements to be put in place 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. Sections 1 to 3 and Part 3 of the Principal Regulations commenced on 1 April 2022. The remaining sections of the Principal Regulations commenced on 13 May 2022.

The Principal Regulations support coronavirus affected individuals in exercising their franchise by establishing an alternative for in-person voting for certain electors who have received a notice requiring them to self-isolate or quarantine at any time in the final 72 hours before the close of the poll due to testing positive for COVID-19, through a secure telephone voting method.

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.

On 14 May 2022, the Electoral Commissioner made the *Commonwealth Electoral (Secure Telephone Voting Method for Coronavirus Affected Individuals) Determination 2022* determining a secure telephone voting method for the purposes of subsection 202AFA(1) of the Electoral Act for the individuals referred to in that subsection in relation to the general election and Senate election to be held in the year beginning 1 January 2022.

**Outline**

The *Commonwealth Electoral (COVID Enfranchisement) Amendment Regulations 2022* (the Regulations) expand the eligibility criteria for coronavirus affected individuals to register to vote using the secure telephone voting method.

The Regulations expand the period in which an individual must become a coronavirus affected individual (amongst other eligibility criteria) in order to be eligible for registration. The period is expanded from the period beginning at 6.01 pm on the Tuesday that is 4 days before the polling day in the election to 6.01pm on the Friday that is 8 days before the polling day in the election. The Regulations do not amend the ending of the eligibility period, which is the latest time when the individual may apply to be registered by the Electoral Commissioner as a secure telephone voter.

Additionally, the Regulations make a consequential amendment to omit the word ‘throughout’ in the eligibility and registration provisions, and substitute the word with ‘at any time during’ or ‘at a time during’.

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*.

The Regulations commence immediately after the instrument is registered on the Federal Register of Legislation. The Principal Regulations will automatically repeal on
31 December 2022.

**Consultation**

Consultation was undertaken with the Australian Electoral Commission, the Australian Government Solicitor, the Office of Parliamentary Counsel and the Department of the Prime Minister and Cabinet. Consistent with the *Caretaker Conventions*, consultation with the Opposition has also been undertaken.

**Regulatory Impact**

The Office of Best Practice Regulation (OBPR) has advised that the Principal 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.

ATTACHMENT A

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

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

**Part 1—Preliminary**

**Section 1 – Name**

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

**Section 2 – Commencement**

**Section 2** provides that the Regulations commence immediately after the instrument is registered on the Federal Register of Legislation.

**Section 3 – Authority**

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

**Section 4 – Schedules**

**Section 4** provides that the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* are amended as set out in the Schedule to the Regulations.

**Schedule 1 – Amendments**

***Commonwealth Electoral (COVID Enfranchisement) Regulations 2022***

**Item 1**

**Item 1** omits “Tuesday that is 4 days” in subparagraph 8(2)(c)(i) and substitutes it with “Friday that is 8 days”. This amendment has the effect of expanding the eligibility for a coronavirus affected individual to register as a secure telephone voter.

The Regulations expand the period an individual must become a coronavirus affected individual, from the period beginning at 6.01 pm on the Tuesday that is 4 days before the polling day in the election to the period beginning at 6.01pm on the Friday that is 8 days before the polling day in the election. The period ending at the latest time when the individual may apply to be registered by the Electoral Commissioner as a secure telephone voter is not amended by the Regulations.

This Item provides individuals who have contracted COVID-19 since 6.01pm on the Friday that is 8 days prior to polling day the opportunity to exercise their right to vote.

The expansion enables voters who have not had the opportunity to apply for a postal vote and are unable to vote in person on polling day due to being directed, by a public health authority of a State or Territory under a public health order of the State or Territory, to self‑isolate or quarantine due to COVID-19, to vote via the secure telephone voting method provided by the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022*.

**Item 2 and Item 3**

**Item 2** omits the word ‘throughout’ in paragraph 8(2)(e) of the Regulations and replaces it with ‘at any time during’.

**Item 3** omits the word ‘throughout’ in paragraph 9(2)(c) of the Regulations and replaces it with ‘at a time during’.

Items 2 and 3 are amendments consequential to Item 1.

**Scope and operation**

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

The *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* established the secure telephone voting method to be used by coronavirus affected individuals covered by a determination made by the Electoral Commissioner under subsection 202AFA(1) of the Electoral Act. Sections 1 to 3 and Part 3 of the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* commenced on 1 April 2022. The remaining sections of the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* commenced on 13 May 2022.

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 expand the entitlement for an individual to register to vote by a secure telephone voting method to support individuals in exercising their franchise as recommended by the Australian Electoral Commission.

For the avoidance of doubt, any registration to use the service or vote that has been cast by an eligible voter through the secure telephone voting method under the *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* continues to be valid under the expanded eligibility.

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 *Commonwealth Electoral (COVID Enfranchisement) Amendment Regulations 2022*.

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 was undertaken with the Australian Electoral Commission, the Australian Government Solicitor, the Office of Parliamentary Counsel and the Department of the Prime Minister and Cabinet.

Consistent with the *Caretaker Conventions* (www.pmc.gov.au), consultation with the Opposition has also been undertaken.

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 secure telephone voting method has already commenced for the 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 completion 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) Amendment 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) Amendment Regulations 2022* (the Regulations) expand the qualifying criteria for a coronavirus affected individual to be eligible to access the secure telephone voting system.

**Human rights implications**

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

* the right to political participation under Article 25.

**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 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 by expanding the eligibility for coronavirus affected individuals.

The Regulations support the political participation of eligible coronavirus affected individuals through enabling this cohort of voters to access the existing secure telephone voting system, by registering as a secure telephone voter during the available period.

The *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* (Principal Regulations)provided an additional method by which an individual’s voting entitlement can be exercised. The Regulations expand the eligibility set by the Principal Regulations to further promote the voting entitlement of COVID-19 positive Australian electors.

Without the option to access the secure telephone voting system, Australians voters who have been directed to quarantine under a COVID-19 public health order from 6.01pm on the Friday that is 8 days before polling may have limited to no opportunity to exercise their democratic franchise without the secure telephone voting method.

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 the Regulations promote the protection of human rights.

**The Hon Ben Morton MP**

**Special Minister of State**