

## EXPLANATORY STATEMENT

### ***Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018***

Issued by Authority of the Electoral Commissioner

*Commonwealth Electoral Act 1918*

#### **Authority**

Subsection 321D(7) of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides that the Electoral Commissioner may make a legislative instrument to further determine exceptions to communications or circumstances for electoral and referendum matter; and to also determine further requirements in relation to the particulars which are to be notified as part of the authorisation, across a number of pieces of legislation.

#### **Purpose of this Determination**

The purpose of the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018* (the Determination) is to give effect to the Electoral Commissioner's power under subsection 321D(7) of the Electoral Act to make a legislative instrument.

The Determination provides that the Electoral Commissioner may, by legislative instrument, determine:

- (a) communications or circumstances for the purposes of either or both of the following:
  - (i) paragraph 321D(3)(b) of the Electoral Act;
  - (ii) paragraph 110C(3)(c) of the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act); and
- (b) requirements or particulars for the purposes of any one or more of the following:
  - (i) subsection 321D(5) of the Electoral Act;
  - (ii) subsection 110C(5) of the Referendum Act;
  - (iii) subsection 79A(2) and paragraph 79A(6)(b) of the *Australian Broadcasting Corporation Act 1983*;
  - (iv) paragraph 1(2)(b) and subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;
  - (v) subsection 70A(2) and paragraph 70A(6)(b) of the *Special Broadcasting Service Act 1991*.

#### **Consultation**

In making an instrument under subsection 321D(7) of the Electoral Act, the Electoral Commissioner is expected to consult with persons likely to be affected by the proposed instrument, as required by section 17 of the *Legislation Act 2003*.

Consultation on the making of the Determination was undertaken by the Australian Electoral Commission and:

- the Department of Finance;
- the Department of Communications and the Arts;
- the Australian Communications and Media Authority (ACMA);
- Australian Broadcasting Corporation (ABC);
- Special Broadcasting Service (SBS);
- Free TV Australia;
- Press Council of Australia;
- the Special Minister of State;
- the Shadow Special Minister of State;
- Federal Director, Liberal Party of Australia;
- Federal Director, the National Party of Australia;
- National Secretary, Australian Labor Party; and
- National Secretary, Australian Greens.

### **Regulation Impact Statement**

Office of Best Practice Regulation was consulted in the preparation of this Determination and assessed that no Regulation Impact Statement was required as the Determination would be likely to have only minor regulatory impacts (**OBPR reference: 23384**).

## Statement of Compatibility with Human Rights

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

### ***Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018***

This Determination 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**

Subsection 321D(7) of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides that the Electoral Commissioner may make a legislative instrument to further determine exceptions to communications or circumstances for electoral and referendum matter; and to also determine further requirements in relation to the particulars which are to be notified as part of the authorisation, across a number of pieces of legislation, being:

- the Electoral Act;
- the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act);
- the *Australian Broadcasting Corporation Act 1983*;
- the *Broadcasting Services Act 1992*; and
- the *Special Broadcasting Services Act 1991*.

In making an instrument under subsection 321D(7) of the Electoral Act, the Electoral Commissioner is required to ensure that the requirements or particulars are consistent with the objects of the Part as set out in section 321C of the Electoral Act.

#### **Human rights implications**

The Determination engages the following rights as provided for in the International Covenant on Civil and Political Rights (ICCPR):

- the prohibition on interference with privacy and attacks on reputation, as contained in article 17; and
- the right to freedom of opinion and expression, as contained in article 19.

#### Article 17

Article 17 of the ICCPR provides, that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. It further sets out that everyone has the right to the protection of the law against such interference or attacks.

The Determination may be seen to engage article 17 of the ICCPR insofar as it relates to the prohibition on interference with privacy. For example, where a paid advertisement by social media communication is authorised by a natural person who is not a disclosure entity, the following particulars must be notified at the end of the communication or if the particulars are too long to be included in the communication – in a website that can be accessed by a URL included in the communication, or a photo included in the communication:

- (a) the name of the person that authorised the communication;
- (b) the town or city in which the person lives that authorised the communication.

The Determination facilitates free and informed voting at elections, an object which is essential to Australia's system of representative democracy. The strong public interest in achieving these objectives outweighs the rights to privacy of those covered by the authorisation regime who might wish to communicate anonymously.

The Determination's authorisation particulars and requirements which create restrictions on anonymous electoral communications, support the right of participants in public debate on electoral matters to protection against unlawful attacks on reputation. This is achieved by providing key information to the end-users of the electoral communication. Should the interested party then wish to make contact and ask questions about the content of the communication they are able to do so. It also provides the opportunity and ability to make a complaint to the relevant communicator or to the Australian Electoral Commission who will be able to enforce the legislative provisions.

### Article 19

Article 19(1) provides that everyone shall have the right to hold opinions without interference. The right to freedom of expression includes the right to seek, receive and impart information and ideas of all kinds using any media. Article 19(3) explicitly states that the exercise of this right carries with it special duties and responsibilities. Accordingly, it may be subject to certain restrictions provided that the restrictions are provided by law and necessary for respect of the rights and reputation of others.

The Determination establishes further exceptions in communications or circumstances than those provided for in paragraph 321D(3)(b) of the Electoral Act and paragraph 110C(3)(c) of the Referendum Act. These exceptions do not seek to restrict the right to freedom of expression, rather in cases where electoral matter forms part of a communication that is graffiti or skywriting, the authorisation framework established by section 321D of the Electoral Act, or section 110C of the Referendum Act does not apply.

The authorisation of voter communication particulars and requirements established by the Determination are in addition or to complement those set out in subsection 321D(5) of the Electoral Act and subsection 110C(5) of the Referendum Act. These particulars and requirements amount to restrictions on anonymous political speech. Accordingly, the Determination engages the rights established by article 19 of the ICCPR.

An example of such restrictions may be where a video-sharing communication is authorised by a natural person who is not a disclosure entity. The following particulars must be notified by being announced and shown at the end of the video in the same language used for the rest of the communication:

- (a) the name of the person that authorised the communication;
- (b) the town or city in which the person lives that authorised the communication.

The restrictions are objective, legitimate and proportionate because they:

- are provided for by law;
- serve a genuine public interest by protecting free, fair and informed voting, which is essential to Australia's system of representative government;

- support the right to protection against unlawful attacks on reputation; and
- apply to an objectively defined group of entities who freely choose to play a prominent role in political debate.

Accordingly, to the extent that the Determination engages with the requirements of article 19 of the ICCPR, it is proportionate, necessary and reasonable.

**Conclusion**

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

## **Explanation of the provisions - Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018**

### **Section 1 - Name of Determination**

This section provides that the name of the instrument is the *Commonwealth Electoral (Authorisation of Voter Communication) Determination 2018* (the Determination).

### **Section 2 - Commencement**

This section provides for the Determination to commence on 15 March 2018. This is the same date as the commencement of the *Electoral and Other Legislation Amendment Act 2017*.

### **Section 3 - Authority**

This section provides that the Determination is made under subsection 321D(7) of the *Commonwealth Electoral Act 1918* (the Electoral Act).

### **Section 4 – Definitions**

This section specifies the meaning of terms that have been used through the Determination.

***digital banner advertisement*** includes the following:

- (a) static or dynamic banners on websites accessed through internet browsers;
- (b) videos that stream when banner advertisements are hovered over.

***Electoral Act*** means the *Commonwealth Electoral Act 1918*.

***journal*** means a newspaper, magazine or other periodical, whether published for sale or for distribution without charge.

***Referendum (Machinery Provisions) Act*** means the *Referendum (Machinery Provisions) Act 1984*.

***social media*** includes social media that uses pictures or other images.

***streamed music*** includes music streamed by Spotify, Google Play Music or Apple Music.

***telephony*** includes the following:

- (a) communication by VoIP or Skype;
- (b) a communication generated by computerised auto-diallers.

***text message*** means an electronic message (within the meaning of section 5 of the *Spam Act 2003*) that is sent to an electronic address in connection with a telephone account.

*video-sharing* includes video sharing through websites such as YouTube, but does not include streamed radio or television.

## **Part 2 – Communications and circumstances**

### **Section 5 – This Part**

This section provides that Part 2 of the Determination is made for the purposes of paragraph 321D(7)(a) of the Electoral Act.

### **Section 6 – Electoral matter exceptions**

This section provides for additional exceptions to the authorisation of particulars beyond those listed at paragraph 321D(3)(b) of the Electoral Act.

Additional exceptions included in the Determination for the Electoral Act are for graffiti or skywriting.

The *Electoral and Other Legislation Amendment Act 2017* sought to promote free and informed voting at elections by enhancing the transparency, accountability and traceability of communications with voters, irrespective of the communication channel. The intention was not to make the authorisation requirements too onerous or difficult on the notifying entity. The purpose is for all particulars to be clear and for the voter to know who is communicating the electoral matter regardless of the medium in which the communication is transmitted. It would not be clear, if, for example, it was difficult to read or hear, or its placement was easily overlooked. Communication channels also need to be capable of containing authorisation details that can be regulated by the Australian Electoral Commission and need to contain the particulars of the person who authorised the communication.

Due to the nature of skywriting, compliance with the authorisation framework would be impractical and accordingly has been included as an exception in the Determination.

Graffiti is typically considered to be the illegal defacement of public and private premises, infrastructure and assets. Further, graffiti, however described, is a criminal offence in each State and Territory of Australia. Accordingly, the Electoral Act does not seek to regulate the authorisation of a communication that is already subject to a criminal offence.

Compliance with the authorisation framework would also be impractical with communication by graffiti and accordingly has been included as an exception in the Determination.

As such, section 321D of the Electoral Act does not apply in relation to electoral matter if the matter forms part of a communication that is graffiti or skywriting.

### **Section 7 – Referendum matter exceptions**

This section provides for additional exceptions to the authorisation of particulars beyond those listed at paragraph 110C(3)(c) of the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act).

Additional exceptions included in the Determination for the Referendum Act are for graffiti or skywriting.

The authorisation regime for the Referendum Act is similar to that of the Electoral Act with some modifications to reflect the different nature of the electoral events. Accordingly, the additional exceptions included in the Determination for the Referendum Act are similar in nature to the Electoral Act for graffiti or skywriting.

The reasons for excluding graffiti and skywriting from the Referendum Act's authorisation regime mirror that of the Electoral Act, and have been discussed above in relation to section 6 of the Determination.

Accordingly, section 110C of the Referendum Act does not apply in relation to referendum matter if the matter forms part of a communication that is graffiti or skywriting.

### **Part 3 – Requirements and particulars**

#### **Section 8 – This Part**

This section provides that Part 3 of the Determination is made for the purposes of paragraph 321D(7)(b) of the Electoral Act.

#### **Section 9 – Electoral Act and Referendum (Machinery Provisions) Act**

Subsection 321D(1) of the Electoral Act and subsection 110C(1) of the Referendum Act specify the requirements for electoral or referendum matter, as defined in subsection 4(1) of the Electoral Act and section 110A of the Referendum Act, to be authorised. The explanatory memorandum to the Electoral and Other Legislation Amendment Bill 2017 sets this out in further detail.

This section of the Determination provides for the requirements for notifying particulars if the communication needs to be authorised for the purposes of subsection 321D(5) of the Electoral Act and subsection 110C(5) of the Referendum Act. The particulars that are required under these subsections of the Electoral Act and the Referendum Act can include details such as the name of the entity or person, the address of the entity or person, or the town or city of the entity or person. Depending on the communication medium, it may also include printer details.

These requirements are set out in a table at subsection 9(1) of the Determination and differ according to the nature of the communication type.

- **Item 1** of the table establishes the particulars that must be notified if the communication is printed media. Printed media may include, for example, a pamphlet or poster. If the communication is printed media, the particulars must be notified:
  - (a) at the end (or bottom) of the printed material; and
  - (b) in a font size that can be read by a person with 20/20 vision without the use of any visual aid.
- **Item 2** of the table establishes the particulars that must be notified if the communication is telephony. *Telephony* is defined under section 4 of the Determination to include communication by VoIP or Skype and any communications



generated by computerised auto-diallers. If the communication is telephony, the particulars must be notified at the beginning of the communication. The authorisation regime as set out by section 321D of the Electoral Act and this Determination applies to all communication by telephony except for those that fall within any of the prescribed exceptions.

- **Item 3** of the table establishes the particulars that must be notified if the communication is a text message. A *text message* is defined under section 4 of the Determination to mean an electronic message (within the meaning of section 5 of the *Spam Act 2003*) that is sent to an electronic address in connection with a telephone account. If the communication is a text message, the particulars must be notified:
  - (a) at the end of the message; or
  - (b) if the particulars are too long to be included in the message – in a website that can be accessed by a URL included in the message.
- **Item 4** of the table establishes the particulars that must be notified if the communication is communicated by social media. If the communication is communicated by social media, the particulars must be notified:
  - (a) at the end of the communication; or
  - (b) if the particulars are too long to be included in the word limit of the communication – in:
    - (i) a website that can be accessed by a URL included in the communication; or
    - (ii) a photo included in the communication.

Social media includes social media that uses pictures or other images such as Facebook, Twitter or Instagram.

- **Item 5** of the table establishes the particulars that must be notified if the communication is search advertising. If the communication is search advertising, the particulars must be notified:
  - (a) in the footer of the landing page from the URL; or
  - (b) if the particulars are too long to be included in the word limit of the search advertising – in a website that can be accessed by a URL included in the search advertising.
- **Item 6** of the table establishes the particulars that must be notified if the communication is streamed music. *Streamed music* is defined under section 4 of the Determination to include music streamed by Spotify, Google Play Music or Apple Music. If the communication is streamed music, the particulars must be notified by being announced at the end of the communication in the language used for the rest of the communication.
- **Item 7** of the table establishes the particulars that must be notified if the communication is a digital banner advertisement. *Digital banner advertisement* is defined under section 4 of the Determination to include static or dynamic banners on websites accessed through internet browsers, or videos that stream when banner advertisements are hovered over.

If the communication is digital banner advertisements, the particulars must be notified:

- (a) at the end of the banner; or
- (b) if the particulars are too long to be included or embedded in the banner – in a website that can be accessed by a URL included in the banner.

The placement and manner of notifying the particulars for digital banner advertisements, can be notified in either the static or dynamic banner, or the video.

- **Item 8** of the table establishes the particulars that must be notified if the communication is a mobile phone application or a computer application. If the communication is a mobile phone application or a computer application, the particulars must be notified:
  - (a) at the bottom of the screen on which the application is open; or
  - (b) if the particulars are too long to be included in the application – in a website that can be accessed by a URL included on the screen on which the application is open.
- **Item 9** of the table establishes the particulars that must be notified if the communication is video-sharing. *Video-sharing* is defined under section 4 of the Determination to include video-sharing through websites such as YouTube, but does not include streamed radio or television. If the communication is video-sharing, the particulars must be notified by being announced and shown at the end of the communication in the language used for the rest of communication. Therefore, if the communication is on a video-sharing medium, the required particulars should be communicated in the form of a spoken announcement in the same language used for the rest of the communication, and cause all the required particulars to be communicated in the form of images or words, in the same language used for the rest of the communication.
- **Item 10** of the table established the particulars that must be notified if the communication is cinema. If the communication is cinema, the particulars must be notified by being announced and shown at the end of the communication in the language used for the rest of the communication. Therefore, if the communication is in a cinema medium, the required particulars should be communicated in the form of a spoken announcement in the same language used for the rest of the communication, and cause all the required particulars to be communicated in the form of images or words, in the same language used for the rest of the communication.

#### *Placement of printer details*

Subsection 321D(5) of the Electoral Act requires printer details, such as the name of the printer who printed the communication and the address of the printer, to be notified, where the communication is a sticker, fridge magnet, leaflet, flyer, pamphlet, notice, poster or how-to-vote card.

Item 1 of the table at subsection 9(1) of the Determination sets out that if the communication is printed material, the particulars must be notified at the end (or bottom) of the printed material; and in a font size that can be read by a person with 20/20 vision without the use of any visual aid.

Subsection 9(2) of the Determination provides an exception to the requirement for the placement of printer details to be at the end of printed material as required by item 1 of the table in subsection 9(1) of the Determination.

That is, item 1 of the table in subsection 9(1) does not require the following particulars to be notified at the end of printed material in a journal if those particulars are notified elsewhere in the journal:

- (a) the name of the printer who printed the printed material;
- (b) the address of the printer.

For example, the printer details for a notice published in a journal do not need to be notified at the end (or bottom) of the printed material, being the notice, if the printer details are notified elsewhere in the journal.

### **Section 10 – Broadcasting Acts**

This section provides for the requirements for notifying particulars for the purposes of the subsection 79A(2) of the *Australian Broadcasting Corporation Act 1983*, subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*, and subsection 70A(2) of the *Special Broadcasting Service Act 1991*.

These requirements are set out in a table at section 10 of the Determination and differ according to the nature of the communication type.

- **Item 1** of the table establishes the particulars that must be notified if the communication is broadcast on a radio service. If the communication is broadcast on a radio service, the particulars must be announced at the end of the communication in the language used for the rest of the communication.
- **Item 2** of the table establishes the particulars that must be notified if the communication is broadcast on a television service. If the communication is broadcast on a television service, the particulars must be announced and shown at the end of the communication in the same language as the communication.

Accordingly, if the political matter is broadcast on a television service, the broadcaster should cause the required particulars to be broadcast in the form of a spoken announcement in the same language as the rest of the communication, and cause all the required particulars to be broadcast in the form of images or words in the same language as the rest of the communication.

The requirement for particulars to be both announced and shown where communication is a broadcast enables access for vision and hearing-impaired voters.

The requirement for particulars to be in the same language of the communications ensures that members of the target audience for the communication can understand the authorisation information.

**ISSUED BY THE AUTHORITY OF THE ELECTORAL COMMISSIONER**