

EXPLANATORY STATEMENT

Electoral and Referendum Amendment (Prescribed Authorities) Regulations 2020

Issued by Authority of the Minister for Finance

Commonwealth Electoral Act 1918

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 which by that Act are required or permitted to be prescribed, or when are necessary or convenient to be prescribed for giving effect to the Electoral Act.

Purpose

The first purpose of the *Electoral and Referendum Amendment (Prescribed Authorities) Regulations 2020* (the Regulations) is to amend the *Electoral and Referendum Regulation 2016* (the Principal Regulation) to include the statutory agency called the National Disability Insurance Scheme Launch Transition Agency, commonly known as the National Disability Insurance Agency (NDIA) to the list of prescribed authorities for the purposes of the Electoral Act. As a prescribed authority listed in Schedule 1, the Electoral Commission may give the NDIA Commonwealth electoral Roll information for the permitted purposes described in the table in clause 1 to Schedule 1 to the Regulation, namely for the purposes of preventing, detecting or investigating fraud and non-compliance matters in relation to the NDIA's purposes (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).

The second purpose of the Regulations is to amend the reference to the prescribed authority in item 18 of the table in Schedule 1 to the Principal Regulation from the 'Department administered by the Minister administering the *Human Services (Medicare) Act 1973*' to 'Services Australia'. This amendment reflects the Machinery of Government changes that came into effect on 1 February 2020 and established Services Australia as an executive agency. It ensures the continuation of the provision of electoral Roll data to Services Australia for the existing permitted purpose set out under item 18 of the table in Schedule 1 to the Principal Regulation.

Operation

Specific provisions in the Electoral Act provide that regulations may be made to support particular electoral or enrolment activity.

The definition of 'prescribed authority' in section 4, and circumstances specified in item 4 of the table in subsection 90B(4) of the Electoral Act establish a scheme where the Australian Electoral Commission (AEC) can provide Roll information to Commonwealth government agencies specified in the regulations. The Principal Regulation now allows the provision of Roll information to the NDIA, and specifies the purposes for which the Roll information may be used, namely preventing, detecting or investigating fraud and non-compliance matters in relation to the NDIA's purposes.

The Principal Regulation is now also amended to reflect the change of name of the prescribed authority in item 18 of the table in Schedule 1 to ‘Services Australia’.

Details of the proposed Regulation are set out in the **Attachment**.

Consultation

Consultation was undertaken between the Minister for the National Disability Insurance Scheme, the Minister for Finance and the Australian Electoral Commission for the addition of item 28 to the table in Schedule 1 to the Principal Regulation. This consultation resulted in agreement on the addition of the NDIA to the Regulation and that Commonwealth electoral Roll information may be provided to the NDIA for the prescribed purpose of preventing, detecting or investigating fraud and non-compliance matters in relation to the NDIA’s purposes (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).

Consultation was undertaken between the Department of Social Services, Services Australia, the Department of Finance and the Australian Electoral Commission for the amendment of item 18 in the table in Schedule 1 to the Principal Regulation. This consultation resulted in agreement on the amendment of the name of the prescribed authority in that item to ‘Services Australia’.

Statement of compatibility with Human Rights

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

Electoral and Referendum Amendment (Prescribed Authorities) Regulations 2020

These Regulations are 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 disallowable Legislative Instrument

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 which by that Act are required or permitted to be prescribed, or necessary or convenient to be prescribed for giving effect to the Electoral Act.

The *Electoral and Referendum Amendment (Prescribed Authorities) Regulations 2020* (the Regulations) amends the *Electoral and Referendum Regulation 2016* (the Principal Regulation) to include the statutory agency called the National Disability Insurance Scheme Launch Transition Agency, commonly known as the National Disability Insurance Agency (NDIA), to the list of prescribed authorities for the purposes of the Electoral Act. As a prescribed authority listed in Schedule 1, the Electoral Commission may give the NDIA Commonwealth electoral Roll information for the permitted purposes described in the table in clause 1 to Schedule 1 to the Regulation, namely for the purposes of preventing, detecting or investigating fraud and non-compliance matters in relation to the NDIA's purposes (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).

The Regulations also amend the reference to the prescribed authority in item 18 of the table in Schedule 1 to the Principal Regulation from the 'Department administered by the Minister administering the *Human Services (Medicare) Act 1973*' to 'Services Australia'. This amendment reflects the Machinery of Government changes that came into effect on 1 February 2020 and established Services Australia as an executive agency. It ensures the continuation of the provision of electoral Roll data to Services Australia for the existing permitted purpose set out under item 18 of the table in Schedule 1 to the Principal Regulation.

Human rights implications

The amendment to the name of the prescribed authority in item 18 of the table in Schedule 1 to the Principal Regulation is an administrative change and does not engage any human rights.

The addition of the NDIA as a prescribed authority to the Principal Regulation by these Regulations engages the following human rights:

Article 17 of the International Covenant on Civil and Political Rights (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.

Australia accepts the principles stated in Article 17, and to the right to enact and administer laws which, insofar as they authorise action which impinges on a person's privacy, family, home or correspondence, are necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the protection of public health or morals, or the protection of the rights and freedoms of others.

The amendment to the Principal Regulation adds the NDIA to the list of prescribed authorities for the purposes of the Electoral Act. As a prescribed authority listed in Schedule 1, the Electoral Commission may give the NDIA Commonwealth electoral Roll information for the purposes as described in the table in clause 1 to Schedule 1 to the Principal Regulation, namely for the purposes of preventing, detecting or investigating fraud and non-compliance matters in relation to the NDIA's purposes (within the meaning of the *Public Governance, Performance and Accountability Act 2013*).

Providing an elector's information to prescribed authorities in the prescribed circumstances assists with law enforcement and compliance with Commonwealth laws. Currently the NDIA is not a prescribed authority for receiving Commonwealth electoral Roll information for the prescribed purpose.

The disclosure of Commonwealth electoral Roll information to the NDIA is a permissible limitation, as it is necessary in the interests of the protection of public health and the economic well-being of the country.

Further, the following safeguards apply to protect the privacy of individuals about whom electoral Roll information may be disclosed to the NDIA:

Limited information to be disclosed

The information which can be lawfully be provided under item 4 of subsection 90B(4) of the Electoral Act is limited to any information on the public version of the Roll (i.e. the names and addresses of electors), and if the Electoral Commission wishes, information about the sex, date of birth and occupation of an elector. This provision is further restricted in the case of silent electors, whose information cannot be disclosed under subsection 90B(4) – see subsection 90B(6).

There is no sensitive health information, nor any other type of personal information, that the Electoral Commission can or would disclose to the NDIA under subsection 90B(4).

Accordingly, in practice, the range of information that the Electoral Commission can disclose to the NDIA under item 4 of subsection 90B(4) is narrow, and of limited sensitivity from a privacy perspective.

It is also noted that under section 90A of the Electoral Act, the AEC provides access to a version of the electoral Roll (containing names and addresses) for public inspection at AEC offices.

Discretion of the Electoral Commission

While the NDIA may receive and use electoral Roll information in certain circumstances and for certain purposes, its addition to the Principal Regulation as a prescribed authority does not create any right for it to receive such information.

The disclosure of electoral Roll information to the NDIA (and all prescribed authorities) under subsection 90B(4) of the Electoral Act remains at the discretion of the Electoral Commission. That is, unlike (for example) the provision of electoral Roll information to political parties under subsection 90B(1), there is no obligation for the Electoral Commission to disclose electoral Roll information in any circumstance to a prescribed authority under item 4 of subsection 90B(4). The information is therefore protected in the first instance by the discretion of the Electoral Commission, which can decide when and how to give the information to the prescribed authority.

Disclosure to a senior public official

Pursuant to subsection 4(1) of the Electoral Act, a ‘prescribed authority’ means:

- (a) the Agency Head of an Agency (within the meaning of the *Public Service Act 1999*) that is specified in regulations made for the purposes of this definition; or
- (b) the chief executive officer of an authority of the Commonwealth that is specified in regulations made for the purposes of this definition.

Accordingly, electoral Roll information disclosed under item 4 of subsection 90B(4) of the Electoral Act is disclosed to, and subsequently under the control of, a senior public official. In that respect, the recipient of electoral Roll information under that subsection is expected to be knowledgeable of his or her obligations in respect of handling the information received.

Memorandum of Understanding

It is the AEC’s policy that an MOU for the protection of electoral Roll Information, executed by the receiving agency, must be in place before the Electoral Commission will consider providing Roll Information to a prescribed authority under item 4 of subsection 90B(4) of the Electoral Act. Such MOUs set out, among other things:

- the requesting agency’s acknowledgment that it will comply with its obligations under the *Privacy Act 1988* in respect of the electoral Roll information it receives;
- the requesting agency’s obligations to the AEC in respect of handling the electoral Roll Information it receives (including storage, destruction or deletion, data security, confidentiality and reporting);
- the requesting agency’s reporting obligations to the Office of the Australian Information Commissioner;
- the persons within the requesting agency who will be authorised by the Agency Head to receive or otherwise have access to the Roll information; and
- the various criminal offences and sanctions that may apply under the Electoral Act and other laws for mishandling Roll information.

The NDIA has agreed in principle to enter into an MOU for the safeguarding of elector information, and has provided written assurance that elector information will not be provided to a third-party, used for commercial purposes or sent overseas. Any NDIA contract staff will also be required to sign a deed poll for the protection of elector information prior to gaining access.

Security measures

The NDIA has agreed to establish a secure file transfer protocol (SFTP) connection for the eventual transfer of electoral Roll information between the agencies. It is intended the data will be subject to a broad range of security controls designed to protect internal and external data, stored on a secure server (maintained by NDIA's own staff) which is password protected, and only accessible on a business need-to-know basis by account holders in the relevant business area of the NDIA.

Criminal offences and sanctions

Where electoral Roll information is lawfully disclosed by the Electoral Commission to a prescribed authority such as the NDIA under item 4 of subsection 90B(4) of the Electoral Act, subsection 91A(1) continues to apply to the use and further disclosure of that information by the recipient and precludes any further use or disclosure of that protected information for any purpose other than a permitted purpose. This is enforceable by a criminal sanction of 100 penalty units.

In addition, subsection 91B(2) of the Electoral Act continues to apply to prohibit any further disclosure other than for a permitted purpose, while subsection 91B(3) prohibits use for a commercial purpose. These offences are enforceable by a criminal sanction of 1,000 penalty units.

The AEC considers that these sanctions create a significant deterrence against the misuse of electoral Roll information by a prescribed authority (or third party, if the case arose) who receives such information.

Other prescribed authorities

While the NDIA is a new addition to the Principal Regulation, there are currently 27 other authorities prescribed in Schedule 1 to the Regulations. Many of these authorities have been prescribed since the Principal Regulation first came into force, while others have been added over time for purposes broadly similar to those of the NDIA. In other words, the addition of the NDIA to the Principal Regulations is not novel or unusual, and the privacy safeguards that have (or will be) put in place in respect of the NDIA are broadly equivalent to those that are in place for other prescribed authorities.

Given the above, the Regulations are a permissible limitation on Article 17 of the ICCPR as they are reasonable, necessary and sufficiently precise to ensure that they operate only to further the legitimate objective of preventing, detecting and investigating fraud and non-compliance matters in the National Disability Insurance Scheme.

Conclusion

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

ATTACHMENT

Details of the proposed *Electoral and Referendum Amendment (Prescribed Authorities) Regulations 2020*

Section 1 - Name of Regulation

This section provides that the title of the Regulations is the *Electoral and Referendum Amendment (Prescribed Authorities) Regulations 2020*.

Section 2 - Commencement

This section provides for the Regulations to commence the day after registration on the Federal Register of Legislation.

Section 3 - Authority

This section provides that the Regulations are made under the *Commonwealth Electoral Act 1918*.

Section 4 - Schedule

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Clause 1 of Schedule 1 repeals the cell at table item 18 under the column headed ‘Agency or authority’ in clause 1 of Schedule 1 to the *Electoral and Referendum Regulation 2016*, and substitutes for it ‘Services Australia’.

Clause 2 of Schedule 1 adds item 28 to the end of the table in clause 1 of Schedule 1 to the *Electoral and Referendum Regulation 2016*. This item prescribes the agency covered by section 117 of the *National Disability Insurance Scheme Act 2013* (the Statutory Agency consisting of the Chief Executive Officer and staff) as the prescribed authority. This item also prescribes the permitted purpose for which the prescribed authority can use the electoral Roll data to be ‘preventing, detecting or investigating fraud and non-compliance matters in relation to the Agency’s purposes (within the meaning of the *Public Governance, Performance and Accountability Act 2013*)’.