

EXPLANATORY STATEMENT

Electoral and Referendum Amendment (AUSTRAC) 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 purpose of the *Electoral and Referendum Amendment (AUSTRAC) Regulations 2020* (the Regulations) is to amend the permitted purpose for which the Australian Transaction Reports and Analysis Centre (AUSTRAC), being the authority prescribed in item 11 on the list at clause 1 to Schedule 1 of the *Electoral and Referendum Regulation 2016* (the Principal Regulation), may use electoral Roll information it receives under subsection 90B(4) of the Electoral Act.

The existing permitted purpose reflects AUSTRAC's limited role and function prior to the passage of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act). This Act has largely superseded the *Financial Transactions Reports Act 1988* (the FTR Act) as the main legislation underpinning AUSTRAC's regulatory and intelligence functions. The amendment to AUSTRAC's permitted purpose will enable AUSTRAC to use electoral Roll information to more fully support its CEO's regulatory and intelligence functions, including under the AML/CTF Act, the FTR Act and other laws.

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.

AUSTRAC is a Commonwealth government agency that has been a prescribed authority since the Principal Regulation was first made in 2016. The Regulations amend AUSTRAC's permitted purpose in the Principal Regulation.

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

Consultation

Consultation was undertaken between AUSTRAC, the Minister for Home Affairs (being the Minister with portfolio responsibility for AUSTRAC), the Minister for Finance and the AEC

for the amendment to item 11 in the table in Schedule 1 to the Principal Regulation. This consultation resulted in agreement that Commonwealth electoral Roll information provided to AUSTRAC under subsection 90B(4) of the Electoral Act may be used by AUSTRAC for the permitted purpose as amended by the Regulations.

Statement of compatibility with Human Rights

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

Electoral and Referendum Amendment (AUSTRAC) 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) amend the permitted purpose for which the Australian Transaction Reports and Analysis Centre (AUSTRAC), being the authority prescribed in item 11 on the list at clause 1 to Schedule 1 of the *Electoral and Referendum Regulation 2016* (the Principal Regulation), may use electoral Roll information it receives under subsection 90B(4) of the *Commonwealth Electoral Act 1918* (the Electoral Act).

Human rights implications

The amendment to the permitted purpose for the prescribed authority in item 11 of the table in Schedule 1 to the Principal Regulation 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 amends the permitted purpose for which AUSTRAC may use electoral Roll information it receives under subsection 90B(4) of the Electoral Act.

AUSTRAC is a Commonwealth government agency that has been a prescribed authority since the Principal Regulation was first made in 2016. Providing electoral Roll information to prescribed authorities in the prescribed circumstances assists with law enforcement and compliance with Commonwealth laws.

The existing permitted purpose reflects AUSTRAC's limited role and function prior to the passage of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act). This Act has largely superseded the *Financial Transactions Reports Act*

1988 (the FTR Act) as the main legislation underpinning AUSTRAC's regulatory and intelligence functions. The amendment to AUSTRAC's permitted purpose will enable AUSTRAC to use electoral Roll information to more fully support its CEO's regulatory and intelligence functions, including under the AML/CTF Act, the FTR Act and other laws.

Many prescribed authorities at Schedule 1 to the Principal Regulation engage in law enforcement and compliance work. AUSTRAC's regulatory and intelligence functions are considerably enhanced by receiving Commonwealth electoral Roll information.

The disclosure of Commonwealth electoral Roll information to AUSTRAC, and its subsequent use for the permitted purpose, is therefore a permissible limitation on electors' right to privacy, as it is necessary in the interests of the protection of national security, public safety 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 AUSTRAC.

Limited information to be disclosed

The information which can lawfully be provided under item 4 of subsection 90B(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).

Accordingly, in practice, the range of information that the Electoral Commission can disclose to AUSTRAC 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 AUSTRAC 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 AUSTRAC (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.

Criminal offences and sanctions

Where electoral Roll information is lawfully disclosed by the Electoral Commission to a prescribed authority such as AUSTRAC 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

AUSTRAC is one of (currently) 28 authorities prescribed in Schedule 1 to the Principal Regulation. Many of these prescribed authorities have, from time to time, had their permitted purposes amended by legislative instrument in order to maintain or improve the usefulness of the electoral Roll information they receive. The amendment to AUSTRAC's permitted purpose is not novel or unusual, and the privacy safeguards that have (or will be) put in place in respect of AUSTRAC 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 enhancing AUSTRAC's ability to perform its regulatory and intelligence functions in respect of serious crimes.

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 (AUSTRAC) Regulations 2020*

Section 1 - Name of Regulation

This section provides that the title of the Regulations is the *Electoral and Referendum Amendment (AUSTRAC) 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 - Schedules

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 item 11 of the table in clause 1 of Schedule 1 to the *Electoral and Referendum Regulation 2016*, and substitutes for it a new item 11. This item prescribes the Australian Transaction Reports and Analysis Centre (AUSTRAC) as the prescribed authority, and the following permitted purposes for which AUSTRAC may use electoral Roll information it receives under subsection 90B(4) of the *Commonwealth Electoral Act 1918*:

- (a) detecting, deterring or disrupting money laundering, the financing of terrorism or other serious crimes; or
- (b) retaining, compiling, analysing or disseminating AUSTRAC information (within the meaning of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*); or
- (c) advising or assisting reporting entities in relation to their obligations under any of the following:
 - (i) the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or a legislative instrument made under that Act;
 - (ii) the *Financial Transaction Reports Act 1988* or a legislative instrument made under that Act; or
- (d) promoting, investigating or enforcing compliance by reporting entities with their obligations under an Act or instrument mentioned in paragraph (c).

The amendment enables AUSTRAC to use electoral Roll information to more fully support its CEO's regulatory and intelligence functions, including under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Financial Transactions Reports Act 1988*, and other laws.