

EXPLANATORY STATEMENT

Electoral and Referendum Amendment (Australian Consortium for Social and Political Research Incorporated) Regulations 2021

Issued by Authority of the Special Minister of State

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 (Australian Consortium for Social and Political Research Incorporated) Regulations 2021* (the Regulations) is to prescribe a permitted purpose for which the Australian Consortium for Social and Political Research Incorporated (ACSPRI) may use Electoral Roll (Roll) information it is given under subsection 90B(4) of the Electoral Act for the purposes of conducting the Australian Survey of Social Attitudes (the AuSSA).

As a non-government, non-profit research organisation, the permitted purposes for which ACSPRI can use Roll information so given are provided by subsection 91A(2A) of the Electoral Act, including sections 10 and 11 of the *Electoral and Referendum Regulation 2016* (the Principal Regulation) prescribed for the purposes of paragraph 91A(2A)(c) of the Electoral Act. Currently, subsection 91A(2A) of the Electoral Act does not clearly permit ACSPRI to the use Roll information for the purposes of conducting its annual AuSSA.

The prescribing of the additional permitted purpose ensures that, for a period of 12 months upon commencement of the Regulations, ACSPRI may lawfully use the Roll information it is given under subsection 90B(4) of the Electoral Act to invite potential participants to complete the AuSSA. This will enhance ACSPRI's ability to conduct accurate and representative research that is reflective of Australian society.

For the avoidance of doubt, the period of 12 months relates to ACSPRI's preparation and issue of such invitations and not to ACSPRI's use of information received from participants in response to such invitations (whether before or after the 12-month period), as that latter information is not Roll information for the purposes of the Electoral Act.

Operation

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

Item 3 of the table in subsection 90B(4) of the Electoral Act provides the circumstances in which the Australian Electoral Commission may provide a copy or extract of a Roll to 'any other person or organisation' (that is, a person or organisation not otherwise characterised within items 1 or 2 of the table). As an organisation not characterised within items 1 or 2 (or

items 4 to 7) of the table, ACSPRI is an ‘other person or organisation’ in item 3 of the table and is thus eligible to receive Roll copies and extracts under that item.

The Regulations insert a permitted purpose in the Principal Regulation specific to ACSPRI and the AuSSA.

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

Consultation

Consultation was undertaken between ACSPRI, the Special Minister of State (formerly the Assistant Minister for Electoral Matters), and the AEC for the addition of a permitted purpose specific to ACSPRI in the Principal Regulation. This consultation resulted in agreement that Roll information provided to ACSPRI under subsection 90B(4) of the Electoral Act may be used for a period of 12 months by ACSPRI for the permitted purpose inserted by the Regulations.

Statement of compatibility with Human Rights

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

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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 (Australian Consortium for Social and Political Research Incorporated) Regulations 2021* (the Regulations) amends the *Electoral and Referendum Regulation 2016* to include a permitted purpose for which the Australian Consortium for Social and Political Research Incorporated (ACSPRI) may use Electoral Roll (Roll) information it is given under subsection 90B(4) of the Electoral Act. This enables the Electoral Commission to give ACSPRI, being an entity that is ‘any other person or organisation’ within item 3 of the table in subsection 90B(4) of the Electoral Act, a copy or extract of a Roll for the purpose described in clause 1 of Schedule 1 to the Regulations, namely for the purposes of ACSPRI inviting persons to participate in the Australian Survey of Social Attitudes (the AuSSA).

Human rights implications

The insertion of a permitted purpose specific to ACSPRI in 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 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 inserts a permitted purpose for which ACSPRI may use Roll information it is given under subsection 90B(4) of the Electoral Act.

ACSPRI is a non-profit organisation established to support researchers understand Australian society and help inform policy makers and governments. It is comprised of a consortium of non-profit organisations including Australian universities, government departments and agencies and community sector organisations involved in social science research.

ACSPRI has conducted the AuSSA, and its precursor the National Social Science Survey (NSSS), each year since 1984. The AuSSA enables ACSPRI to collect and understand Australian attitudes towards a range of social issues, how they change over time and how they compare with other societies.

Information collected in the AuSSA has previously informed Commonwealth and State government activities and forms the Australian contribution to the International Social Survey Program (ISSP). ACSPRI's ability to conduct the AuSSA in a way which accurately represents a cross-section of Australian society would be considerably enhanced by lawfully receiving and using contact information about potential participants through Roll information.

The disclosure of Roll information to ACSPRI, and ACSPRI's 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 democratic rights and representative political participation in the country.

Further, the following safeguards apply to protect the privacy of individuals about whom Roll information may be disclosed to ACSPRI.

Limited information to be disclosed

The information which the Electoral Commission may lawfully be provided under item 3 of the table in subsection 90B(4) of the Electoral Act is limited to information that is also on the public version of the Commonwealth Electoral Roll (i.e. the names and addresses of electors). Under section 90A of the Electoral Act, the Australian Electoral Commission (the AEC) must already make this version available for public inspection (without fee) at AEC offices.

This provision is further restricted in the case of silent electors, whose information cannot be disclosed under subsection 90B(4) of the Electoral Act due to the operation of subsection 90B(6) of the Electoral Act.

Accordingly, in practice, the range of information that the Electoral Commission can disclose to ACSPRI under item 3 of the table in subsection 90B(4) of the Electoral Act is narrow and of limited sensitivity from a privacy perspective.

Discretion of the Electoral Commission

While ACSPRI may be given and use Roll information in certain circumstances and for certain purposes, the addition of another permitted purpose to the Principal Regulation does not create any mandatory right for ACSPRI to be given such information.

The disclosure of Roll information to ACSPRI and all persons or organisations listed under subsection 90B(4) of the Electoral Act remains at the discretion of the Electoral Commission. That is, unlike (for example) the provision of Roll information to registered political parties under subsection 90B(1) of the Electoral Act, there is no obligation for the Electoral Commission to disclose Roll information in any circumstance to 'any other person or organisation' under item 3 of the table in subsection 90B(4) of the Electoral Act. The information is therefore protected in the first instance by the discretion of the Electoral Commission, who can decide when and how to provide the extract or copy of a Roll.

Memorandum of Understanding (MOU)

It is the AEC's policy that an MOU for the protection of Roll information, executed by the receiving entity, must be in place before the Electoral Commission will consider providing Roll Information to a person or organisation under item 3 of the table in subsection 90B(4) of the Electoral Act. Such MOUs set out, among other things:

- the requesting entity's acknowledgment that it will comply with its obligations under the *Privacy Act 1988* in respect of the Roll information it receives;
- the requesting entity's obligations to the AEC in respect of handling the Roll information it receives (including storage, destruction or deletion, data security, confidentiality and reporting);
- the requesting entity's reporting obligations to the Office of the Australian Information Commissioner;
- the persons within the requesting organisation who will be authorised 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 Roll information is lawfully disclosed by the Electoral Commission to a person or organisation, such as ACSPRI, under item 3 of the table in subsection 90B(4) of the Electoral Act, subsections 91A(1) and 91B(2) of the Electoral Act continue to apply to the use and further disclosure of that information by the recipient and preclude 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 subsection 91A(1) and 1,000 penalty units in subsection 91B(2) of the Electoral Act.

In addition, subsection 91B(3) prohibits use for a commercial purpose. This offence is also enforceable by a criminal sanction of 1,000 penalty units.

The AEC considers that these sanctions create a significant deterrence against the misuse of Roll information by a recipient (or third party, if the case arose).

Other organisations receiving Roll information

Since its commencement in 2016, the Principal Regulation has prescribed a permitted purpose for which the Australian Red Cross Blood Service may use the Roll information it is given under item 3 of the table in subsection 90B(4) of the Electoral Act. Another permitted purpose is also prescribed for persons and organisations that conduct certain medical research or provide certain health screening programs.

Adjacently, the Principal Regulation also currently establishes a scheme in which five private entities are prescribed persons and may be given Roll information under items 5, 6, and 7 of the table in subsection 90B(4).

Accordingly, the addition of a prescribed purpose specific to ACSPRI is not novel or unusual, and the privacy safeguards are broadly equivalent to those that are in place for other organisations given Roll information.

Sunset of permitted purpose after 12 months

The amendment provided by the Regulations is repealed upon the lapse of 12 months starting on the day the Regulations commence. This is to ensure that timely review can be conducted on whether the amendment is fit for purpose or should be replaced.

Conclusion

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 ACSPRI's ability to support political participation and responsive government in Australia.

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 (Australian Consortium for Social and Political Research Incorporated) Regulations 2021*

Section 1 — Name of Regulations

This section provides that the title of the Regulations is the *Electoral and Referendum Amendment (Australian Consortium for Social and Political Research Incorporated) Regulations 2021*.

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 Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulations has effect according to its terms.

Schedule 1 — Amendments

Clause 1 of Schedule 1 inserts new section 10A into the *Electoral and Referendum Regulation 2016*. New subsection 10A(1) prescribes that the Australian Consortium for Social and Political Research Incorporated (ACSPRI) may use information it is given under subsection 90B(4) of the *Commonwealth Electoral Act 1918* by the Electoral Commission for the purpose of ACSPRI inviting persons to participate in the Australian Survey of Social Attitudes.

New subsection 10A(2) provides that section 10A is repealed 12 months after commencement.

The amendment enables ACSPRI to lawfully use Electoral Roll information to contact and invite potential participants to participate in the Australian Survey of Social Attitudes.