



Instructor Guidance Note— Sunsetting of legislative instruments

Introduction

1 Many legislative instruments are automatically repealed on set dates (1 April or 1 October) 10 years after the instrument is registered—this process is known as “sunsetting” and is governed by Part 4 of Chapter 3 of the *Legislation Act 2003*. Sunsetting ensures that legislative instruments are kept up-to-date and only remain in force for as long as they are needed.

2 To ensure continuity of the law, a new (replacement) instrument must be made and registered before an existing legislative instrument sunsets. Failure to get a replacement instrument made and registered by the sunsetting date can have significant legal and other consequences.

3 This requires agencies to plan ahead and review whether a legislative instrument remains required. If the review establishes that the instrument is still required, the agency should:

- have the instrument remade and registered *before* the instrument sunsets to ensure continuity of the law; or
- contact the Attorney-General’s Department to seek a deferral of the instrument’s sunsetting date (see below).

4 If a request for deferral is unsuccessful, urgent action will need to be taken to have the instrument remade and registered before it sunsets.

5 If the agency’s review concludes that the instrument is no longer required, it should be repealed without delay.

When an instrument sunsets

6 Unless a legislative instrument is exempt from sunsetting, the instrument sunsets on the first 1 April or 1 October falling on or after the 10th anniversary of the instrument’s registration (*Legislation Act 2003*, s 50(1)). This position can change if:

- the instrument’s default sunsetting date is deferred; or
- the instrument’s default sunsetting date is adjusted as part of a “thematic review”; or

Instructor Guidance Note—Sunsetting of legislative instruments

- the sunsetting of the instrument is “rolled over”.

7 For example:

An instrument registered on this date ...	... has this default sunsetting date:
31 March 2015	1 April 2025
1 April 2015	1 April 2025
2 April 2015	1 October 2025

Tabling the sunsetting list

8 The Attorney-General is required to table a list of all the legislative instruments due to sunset on a given sunsetting date. The list must be tabled in each House of the Parliament on the first sitting day within 18 months before that date (*Legislation Act 2003*, s 52). The exact date of tabling will vary, but for example:

An instrument with this sunsetting date ...	... must be included in a list tabled on this date:
1 October 2027	first sitting day on or after 1 April 2026
1 April 2028	first sitting day on or after 1 October 2026
1 October 2028	first sitting day on or after 1 April 2027

9 Tabled lists are made available on the Federal Register of Legislation as soon as possible after tabling. OPC also provides the tabled list to each Departmental Secretary for distribution to each rule-maker within the portfolio as soon as practicable after the list is tabled.

10 Separately, OPC also provides a list of instruments due to sunset in 6 and 12 months to all agency Legislation Liaison Officers. This list is not tabled in each House of the Parliament but is provided for information only. This is so agencies can take into account any changes that have occurred to the tabled list, and to assist agencies in managing their sunsetting instruments by ensuring the timely remaking or repeal of sunsetting instruments.

Exemptions from sunsetting

11 All legislative instruments are subject to sunsetting unless:

- the instrument relates to an intergovernmental body or scheme of a kind mentioned in subsection 54(1) of the *Legislation Act 2003*; or
- the instrument is exempt under section 11 or 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*; or
- an Act exempts the instrument from sunsetting.

12 The formal policy approval of both the responsible Minister and the Attorney-General is required to create a new exemption from sunsetting. The reason for the exemption should be included in the explanatory materials for the exemption.

Instructor Guidance Note—Sunsetting of legislative instruments

13 When an instrument is lodged for registration, the lodging agency is asked to certify whether an exemption from sunsetting applies and, if so, what legislation authorises the exemption.

Key steps in a sunsetting rewrite project

14 Instructing agencies frequently underestimate the work involved, and time required, to effectively conduct a sunsetting rewrite project. OPC has published the following Instrument Drafting Guidance Notes on its website to assist instructing agencies to plan sunsetting rewrite projects:

- *No. 1.2—Sunsetting checklist;*
- *No. 1.3—Judging size and complexity for instrument projects;*
- *No. 1.4—Timeframes for the development of instruments.*

15 The key steps in conducting a sunsetting rewrite project include the following:

- reviewing the existing legislative instrument and considering its fitness for purpose;
- considering issues that have been raised in legal advices on the instrument, and working out how to address those issues;
- conducting appropriate consultation on the policy to be incorporated in the new instrument;
- obtaining policy authority for the new instrument;
- for an Executive Council instrument (e.g. regulations)—submitting a bid to OPC to get the instrument on the instruments drafting program so that drafting resources can be allocated to the instrument;
- conducting consultation on an exposure draft of the instrument;
- amending the draft instrument in response to consultation;
- making and registering the new instrument in sufficient time to manage disallowance risk.

16 Agencies should also expect that OPC will often suggest updates to the existing instrument during the drafting process to bring the new instrument into line with modern drafting standards.

Particular issues in sunsetting rewrites

17 Particular attention should be paid if the sunsetting instrument:

- enables the making of another instrument that is still in force; or

Instructor Guidance Note—Sunsetting of legislative instruments

- incorporates by reference documents other than Commonwealth Acts or disallowable legislative instruments; or
- is cited in other legislation that is in force; or
- deals with a criminal offence, civil penalty or related enforcement issue; or
- contains gender-specific language.

Attorney-General's deferral of sunsetting

18 If the Attorney-General is satisfied that the statutory conditions in section 51 of the *Legislation Act 2003* are met, an instrument's sunsetting date can be deferred for up to 2 years by means of a certificate made under that section.

19 The process for obtaining such a deferral is as follows:

- the responsible rule-maker applies to the Attorney-General in writing;
- the Attorney-General must be satisfied that the instrument meets the statutory conditions in section 51;
- the Attorney-General makes a certificate that is itself a legislative instrument that must be registered (however, note that a certificate of deferral for 6 or 12 months is exempt from disallowance).

20 The explanatory statement for the certificate must include a statement of reasons for the issue of the certificate. A certificate cannot operate retrospectively by reviving an instrument that has already sunsetted, so it must be prepared, signed, and registered before the relevant sunsetting date to be effective.

Alignment of sunsetting dates due to “thematic review”

21 The sunsetting dates for a group of legislative instruments can be aligned to facilitate a thematic review of the instruments (*Legislation Act 2003*, s 51A). This process may involve bringing forward some dates, and pushing others back by up to 5 years. It is not limited to instruments made under a single Act or administered by a single portfolio—instruments can be grouped on some other basis, such as a particular treaty or industry.

22 The process for aligning sunsetting dates for a thematic review is as follows:

- the responsible rule-maker applies to the Attorney-General in writing;
- the Attorney-General must be satisfied that all the legislative instruments are or will be subject to a single review, and that making the sunset-altering instrument sought will facilitate the review or implementing its findings;

Instructor Guidance Note—Sunsetting of legislative instruments

- the Attorney-General makes a sunset-altering declaration that is itself that legislative instrument which must be registered and is subject to disallowance.

23 A sunset-altering instrument for a thematic review cannot revive a legislative instrument that has already sunsetted. Also, if the sunset-altering instrument is disallowed, any legislative instrument named in it that has passed the instrument's previous sunsetting date is repealed. Consequently, any application for a sunset-altering instrument on the basis of a thematic review should be made well in advance of the earliest sunsetting date.

Further extensions

24 A legislative instrument for which the sunset date has already been deferred by the Attorney-General under section 51 may be one of the instruments whose sunset date is altered for the purposes of a thematic review. Additionally, a legislative instrument that has had its sunset date altered for the purposes of a thematic review may subsequently be the subject of a deferral certificate under section 51.

25 Please contact the Attorney-General's Department if seeking a further extension of a sunsetting date that has already been deferred or altered.

Parliamentary "rollovers"

26 Under section 53 of the *Legislation Act 2003*, either House of the Parliament can resolve to continue in force (i.e. "rollover") a legislative instrument that would otherwise sunset on the day mentioned in a section 51 deferral certificate or a sunsetting list laid before the House under section 52. The rollover defers the instrument's sunsetting date for 10 years.

27 There is no requirement to remake, register or table an instrument that has been rolled over and, having already been the subject of parliamentary scrutiny, the instrument is not subject to further scrutiny in the form of disallowance.

28 Only Senators and Members of Parliament can move for a rollover under section 53. Consequently, unless the rule-maker is a Minister, it will be necessary for the rule-maker (for example, the Secretary of a Department or statutory body) to make the case for a rollover to the responsible Minister. This should be done well in advance of the deadline for rollover motions.

29 Agencies considering a rollover motion should consult AGD before proceeding, to ensure that current policy and process requirements have been met. Agencies should also recognise that a rollover may not reduce overall workload compared with replacing an instrument. There could be significant workload and other consequences if, for example:

- a motion is controversial and referred to committee; or

Instructor Guidance Note—Sunsetting of legislative instruments

- public uncertainty about the instrument generates campaign correspondence; or
- a motion is unsuccessful and the instrument has to be replaced within short timeframes.

30 If a document needs to be tabled in anticipation or support of a rollover motion, it cannot be lodged for tabling through OPC. The relevant agency will need to prepare and lodge it in accordance with the current Tabling Guidelines. It may also be appropriate to provide additional courtesy copies to relevant scrutiny bodies.

31 OPC monitors parliamentary proceedings and will notify agencies as soon as practicable if an instrument is subject to a motion for a rollover by a non-government member of a House of the Parliament.

Amending instruments and sunsetting

32 Amending a legislative instrument does not change when it sunsets, so the date of amendment provided by the rule-maker cannot be later than any sunsetting date that already applies to the instrument. If the sunsetting date is soon, there may be workload and other benefits in making a single replacement instrument that incorporates the proposed amendments.

Sunsetting and disallowance

33 In redrafting a legislative instrument that is due to sunset, best practice risk management is to register the replacement instrument in sufficient time to allow the whole of the disallowance period to expire before the replacement instrument commences. This requires good project planning by agencies.

34 Disallowance of a replacement instrument or provision may temporarily revive a previous instrument, but it cannot prevent the original instrument from sunsetting or revive the instrument if it has already sunsetted (*Legislation Act 2003*, s 45).

Express repeals

35 In drafting a replacement instrument for a sunsetting legislative instrument, it is OPC's practice to expressly repeal the sunsetting instrument (rather than rely the operation of the sunsetting provisions in the *Legislation Act 2003*). The reason for this is to provide clarity and certainty as to when sunsetting instrument ceases to be in force.

More information

- *AGD Guide to Managing the Sunsetting of Legislative Instruments*
- *Instruments Handbook*
- *Instrument Drafting Guidance Notes 1.2, 1.3 and 1.4*

Instructor Guidance Note—Sunsetting of legislative instruments

The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.