

# Legislative Instruments Amendment (Sunsetting Exemptions) Regulation 2013

## EXPLANATORY STATEMENT

### Select Legislative Instrument 2013 No. 212

Issued under the Authority of the Attorney-General

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#### OUTLINE

Section 62 of the *Legislative Instruments Act 2003* (the Act) provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act establishes a comprehensive regime for the management of Commonwealth legislative instruments. Part 6 of the Act provides a regime for the sunsetting (automatic ceasing) of legislative instruments after 10 years of operation. The regime ensures that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Item 51 of subsection 54(2) of the Act provides that Part 6 of the Act does not apply to legislative instruments prescribed by the regulations for the purposes of the table. Regulation 9 of the *Legislative Instruments Regulations 2004* (the Principal Regulations) provides that an instrument listed in Schedule 3 to the Principal Regulations is declared to be exempt from the sunsetting provisions of the Act.

The purpose of the *Legislative Instruments Amendment (Sunsetting Exemptions) Regulation 2013* (the Regulation) is to amend Schedule 3 to the Principal Regulations to update, restructure and add additional items to the Schedule. The new Schedule 3 will exempt a total of 51 items from the sunsetting regime. The instruments to be exempt from sunsetting by this Regulation have each been assessed as not suitable for regular review under Part 6 of the Act. The instruments listed in this Regulation were identified through a whole of government consultation process carried out by the Attorney-General. This Regulation was then developed in consultation between the relevant ministers responsible for the Acts which provide the instrument making powers, and the Attorney-General.

The Act does not specify any conditions that must be fulfilled before the power to make this Regulation may be exercised.

However, there is a long-standing principle that exemptions should only be granted where the instrument is not suitable for regular review. This principle is underpinned by five criteria:

- the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector;
- the instrument is designed to be enduring and not subject to regular review;

- commercial certainty would be undermined by sunseting;
- the instrument is part of an intergovernmental scheme; and
- the instrument is subject to a more rigorous statutory review process.

Each exemption made by this Regulation was analysed against the above criteria and found to be not suitable for regular review under Part 6 of the Act.

This Regulation will be a legislative instrument for the purposes of the Legislative Instruments Act.

This Regulation will commence on the day after it is registered on the Federal Register of Legislative Instruments.

### **Regulatory impact analysis**

Before this Regulation was made, its expected impact was assessed using the Preliminary Assessment tool approved by the Office of Best Practice Regulation (OBPR). That assessment indicated that it will have no or low impact on business, individuals and the economy. This assessment has been confirmed by the OBPR (OBPR reference 15210).

### **Statement of compatibility with human rights obligations**

Before this regulation was made, its impact on human rights was assessed using tools and guidance published by the Attorney-General's Department. This Regulation will make a technical amendment to the Principal Regulations which will have no impact on the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. This Regulation is compatible with human rights as it does not raise any human rights issues.

### **PROCESSES FOR REVIEW OF THIS REGULATION**

This Regulation is subject to tabling and disallowance under Part 5 of the LIA, and will cease as if repealed on the day after the last of its provisions commence.

The instruments repealed by this Regulation are also subject to Part 5 of the LIA. All have been tabled, and all are either beyond their disallowance period or exempt from disallowance.

### **OTHER ISSUES**

#### **Matter incorporated by reference**

This Regulation does not apply, adopt or incorporate other matter by reference.

#### **More information**

An explanation of the provisions and the Schedules to the regulation is provided in [Attachment A](#).

**Section 1 Name of regulation**

This section provides for the Regulation to be named as the *Legislative Instruments Amendment (Sunsetting Exemptions) Regulation 2013*. The Regulation may be cited by that name.

**Section 2 Commencement**

This section provides for the Regulation to commence on the day after it is registered on the Federal Register of Legislative Instruments.

**Section 3 Authority**

This section identifies the *Legislative Instruments Act 2003* (the LIA) as the Act that authorises the making of the Regulation.

**Section 4 Schedule(s)**

This section will provide that the *Legislative Instruments Regulations 2004* (the Principal Regulations) are amended as set out in the Schedule.

**Schedule 1 Amendments**

Schedule 1 of the Regulation will repeal Schedule 3 to the Principal Regulations and substitute a new Schedule 3. Schedule 3 to the Principal Regulations lists instruments that are declared not to be subject to the sunseting regime provided under the LIA.

Item 1 will provide an exemption from sunseting for regulations made under the *Aboriginal Land Rights (Northern Territory) Act 1976*. These regulations administer the *Aboriginal Land Rights (Northern Territory) Act 2007*. The regulations provide for rights which are intended to be of enduring significance, for example, the delineation of boundaries of 80 and 99 year leases held by Aboriginal land trusts. The regulations are intended to be enduring and not subject to regular review under the LIA.

Item 2 will provide an exemption from sunseting for orders made under sections 19B or 19BA of the *Acts Interpretation Act 1901*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 3 will provide an exemption from sunseting for instruments relating to aviation safety made under the *Airspace Regulations 2007*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations.

Item 4 will provide an exemption from sunseting for rules made under section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The *Anti-Money Laundering and Counter Terrorism Financing Rules 2007* impose obligations on businesses to counter money laundering and the financing of terrorism. Industry has made a significant investment to comply with these rules, and commercial certainty would be undermined by the sunseting of these rules.

Item 5 will provide an exemption from sunseting for regulations made under the *Aviation Transport Security Act 2004*. These regulations ensure Australia meets its obligations under the Convention on International Aviation (Chicago Convention) and implement security measures for aviation transport, such as screening, the creation of restricted zones and the regulation of air cargo agents. Item 43 of the table in subsection 54(2) of the LIA already provides a sunseting exemption for ‘legislative instruments the sole purpose of which, or a primary purpose of which, is to give effect to an international obligation of Australia’. This exemption will remove any doubt that an existing exemption applies.

Item 6 will provide an exemption from sunseting for determinations made under subsection 70A(4) of the *Cheques Act 1986*. These determinations allow for the Reserve Bank of Australia to declare a system as a recognised settlement system for the purposes of the Act. Commercial certainty for financial institutions would be undermined by the sunseting of these determinations.

Item 7 will provide an exemption from sunseting for principles made under subsection 91(1B) of the *Classification (Publications, Films and Computer Games) Act 1995*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 8 will provide an exemption from sunseting for instruments made under section 104 or 105 of Schedule 2 to the *Competition and Consumer Act 2010*. These instruments set mandatory product safety standards and are intended to be enduring and not subject to regular review under the LIA.

Item 9 will provide an exemption from sunseting for instruments made under section 114 of Schedule 2 to the *Competition and Consumer Act 2010*. These instruments create mandatory and permanent bans on consumer goods or product related services. These instruments are intended to be enduring and not subject to regular review under the LIA.

Item 10 will provide an exemption from sunseting for instruments made under section 134 or 135 of Schedule 2 to the *Competition and Consumer Act 2010*. These instruments set mandatory product safety information standards about consumer goods. These instruments are intended to be enduring and not subject to regular review under the LIA.

Item 11 will provide an exemption from sunseting for proclamations made under section 3A or 3B of the *Control of Naval Waters Act 1918*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 12 will provide an exemption from sunseting for standards made under section 334 or 336 of the *Corporations Act 2001*. These standards set accounting and auditing standards in Australia which are consistent with standards set by the relevant international bodies. A more stringent statutory review process than sunseting applies to these provisions and should be preserved to ensure Australia’s regime remains consistent with international standards.

Item 13 will provide an exemption from sunseting for rules made under section 798G of the *Corporations Act 2001*. These rules provide for market integrity rules which regulate the operation of financial markets. Commercial certainty would be undermined by the sunseting of these rules.

Item 14 will provide an exemption from sunseting for instruments made under section 827D of the *Corporations Act 2001*. These instruments create financial stability standards for clearing and settlement facility licences. The instruments are subject to annual review by the Reserve Bank of Australia. This statutory review process is more stringent than that provided by sunseting and should be preserved to ensure compliance of licensees with their statutory obligations.

Item 15 will provide an exemption from sunseting for regulations made under the *Cross Border Insolvency Act 2008*. The Act gives the UNCITRAL Model Law on Cross-Border Insolvency the force of law in Australia. These regulations made under the *Cross-Border Insolvency Act 2008* provide for the exclusion of authorised deposit-taking institutions, general insurers and life companies from the operation of the Model Law. Commercial certainty and Australia's ability to comply with its international obligations would be undermined by the sunseting of these regulations.

Item 16 will provide an exemption from sunseting for regulations made solely for the purposes of section 50 or 112 of the *Customs Act 1901*. Sections 50 and 112 provide for the making of regulations in relation to prohibited exports and prohibited imports. Currently, the majority of regulations made under these sections are exempt from sunseting by item 43 of subsection 54(1) of the LIA which creates an exemption in relation to intergovernmental schemes, and subsection 54(2) of the LIA which exempts 'legislative instruments the sole purpose of which, or a primary purpose of which, is to give effect to an international obligation of Australia'. Item 16 will provide an exemption for all regulations made under sections 50 or 112, providing greater consistency to the regime.

Item 17 will provide an exemption from sunseting for tariff concession orders made under Part XVA of the *Customs Act 1901*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 18 will provide an exemption from sunseting for regulations made under the *Foreign Acquisitions and Takeovers Act 1975*. These regulations make arrangements in relation to the approval process for foreign investment proposals in Australia. Commercial certainty and Australia's ability to comply with its international obligations would be undermined by the sunseting of these regulations.

Item 19 will provide an exemption from sunseting for approvals given under subsection 16-25(1) of the *Higher Education Support Act 2003*. These approvals allow a body corporate to participate in the Higher Education Loan Program. A more stringent statutory review process applies to the approvals process and preserving this more stringent review process is important to ensure approved providers remain compliant with their statutory obligations.

Item 20 will provide an exemption from sunseting for approvals given under subclause 6(1) or (1A) of Schedule 1A to the *Higher Education Support Act 2003*. These approvals allow a body corporate providing vocational education and training to participate in the Higher Education Loan Program for vocational education and training providers. A more stringent statutory review process applies to the approvals process and preserving this more stringent review process is important to ensure approved providers remain compliant with their statutory obligations.

Item 21 will provide an exemption from sunseting for regulations made under the *Judges' Pensions Act 1968*. These regulations administer the Judges' Pensions Scheme and are intended to be enduring and not subject to regular review under the LIA.

Item 22 will provide an exemption from sunseting for regulations made under the *Maritime Transport and Offshore Facilities Security Act 2003*. These regulations implement security measures for maritime transport and offshore facilities. The primary purpose of the *Maritime Transport and Offshore Facilities Security Act 2003* and regulations is to implement the International Ship and Port Facility Security (ISPS) Code. Item 43 of subsection 54(2) of the LIA already provides a sunseting exemption for 'legislative instruments the sole purpose of which, or a primary purpose of which, is to give effect to an international obligation of Australia'. This exemption will remove any doubt that an existing exemption applies.

Item 23 will provide an exemption from sunseting for determinations made under section 6 or 8 of the *Military Rehabilitation and Compensation Act 2004*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices and updated section references in the *Military Rehabilitation and Compensation Act 2004*.

Item 24 will provide an exemption from sunseting for regulations made for the purposes of section 7 of the *National Transport Commission Act 2003*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 25 will provide an exemption from sunseting for determinations made under paragraph 26(3)(b) of the *Native Title Act 1993* as in force immediately before 30 September 1998. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 26 will provide an exemption from sunseting for regulations made solely for the purposes of Division 6 or Division 7 of Part 2 of the *Native Title Act 1993*. These regulations provide for arrangements in relation to bodies corporate which represent native title holders. These regulations are intended to be enduring and not subject to regular review under the LIA.

Item 27 will provide an exemption from sunseting for regulations made under the *Papua New Guinea (Staffing Assistance) Act 1973*. These regulations administer a superannuation scheme that has now closed. The defined benefit superannuation entitlements provided by this scheme are intended to endure for life and a number of scheme members remain. These regulations should be directly repealed after the last scheme member passes away. In this context, these regulations are intended to be enduring and not subject to regular review under the LIA.

Item 28 will provide an exemption from sunseting for regulations made under the *Parliamentary Contributory Superannuation Act 1948*. These regulations administer a superannuation scheme that has now closed. The defined benefit superannuation entitlements provided by this scheme are intended to endure for life and a number of scheme members remain. These regulations should be directly repealed after the last scheme member passes away. In this context, these regulations are intended to be enduring and not subject to regular review under the LIA.

Item 29 will provide an exemption from sunseting for regulations made under the *Payment Systems and Netting Act 1998*. These regulations create arrangements in relation to payment systems and ‘netting’. Netting is a function which allows institutions to pay only their net daily obligations to one another rather than meeting each obligation individually as they are incurred. Sunseting exemptions for parts of the payment systems and netting regime as set up by the *Payment Systems and Netting Act 1998* already exists. Item 31 of subsection 54(2) of the LIA provides an exemption for instruments made under section 9 of the *Payment Systems Netting Act 1998*. The exemption in the LIA was granted as the sunseting of instruments made under section 9 would undermine commercial certainty. Commercial certainty would be similarly undermined by the sunseting of these regulations.

Item 30 will provide an exemption from sunseting for declarations made under subsection 9(3) of the *Payment Systems (Regulation) Act 1998*. These Declarations allow the Reserve Bank to exclude specified facilities from the Act. Sunseting exemptions for parts of the *Payment Systems (Regulation) Act 1998* already exist. Item 32 of subsection 54(2) of the LIA exempts instruments made under sections 12, 14, 15, 18 and 25 of the *Payment Systems (Regulation) Act 1998*. The exemption in the LIA was granted as the sunseting of these instruments would undermine commercial certainty. Commercial certainty would be similarly undermined by the sunseting of the Declarations.

Item 31 will provide an exemption from sunseting for regulations made under the *Payment Systems (Regulation) Act 1998*. These regulations create arrangements in relation to payment systems. Sunseting exemptions for parts of the *Payment Systems (Regulation) Act 1998* already exist. Item 32 of subsection 54(2) of the LIA exempts instruments made under sections 12, 14, 15, 18 and 25 of the *Payment Systems (Regulation) Act 1998*. The exemption in the LIA was granted as the sunseting of these instruments would undermine commercial certainty. Commercial certainty would be similarly undermined by the sunseting of these regulations.

Item 32 will provide an exemption from sunseting for notices given under section 36 of the *Radiocommunications Act 1992*. These notices relate to the designation of parts of the radiocommunications spectrum for spectrum licences. Commercial certainty would be undermined by the sunseting of these notices.

Item 33 will provide an exemption from sunseting for declarations made under section 153B of the *Radiocommunications Act 1992*. These declarations are used to reallocate parts of the radiocommunications spectrum. Commercial certainty would be undermined by the sunseting of these declarations.

Item 34 will provide an exemption from sunseting for declarations made under subparagraph (c)(iii) of the definition of ‘Commonwealth authority’ in subsection 4(1) of the *Safety, Rehabilitation and Compensation Act 1988*. These declarations define bodies as Commonwealth authorities for the purposes of the *Safety, Rehabilitation and Compensation Act 1988*. These declarations are intended to be enduring and not subject to regular review under the LIA.

Item 35 will provide an exemption from sunseting for declarations made under section 4A of the *Safety, Rehabilitation and Compensation Act 1988*. These declarations allow for the definition of Commonwealth authorities for the purposes of the *Safety, Rehabilitation and Compensation Act 1988* to extend to include the

Australian Capital Territory. These declarations are intended to be enduring and not subject to regular review under the LIA.

Item 36 will provide an exemption from sunseting for instruments made under subsection 5(6) of the *Safety, Rehabilitation and Compensation Act 1988*. The instruments declare certain classes of persons to be Commonwealth employees for the purposes of the *Safety, Rehabilitation and Compensation Act 1988*. These instruments are intended to be enduring and not subject to regular review under the LIA.

Item 37 will provide an exemption from sunseting for instruments made under subparagraph 6(1)(h)(ii) or (i)(ii) of the *Safety, Rehabilitation and Compensation Act 1988*. The instruments declare certain classes of persons situated outside of Australia to be Commonwealth employees for the purposes of the *Safety, Rehabilitation and Compensation Act 1988*. These declarations are intended to be enduring and not subject to regular review under the LIA.

Item 38 will provide an exemption from sunseting for declarations made under section 100 of the *Safety, Rehabilitation and Compensation Act 1988*. These declarations allow an eligible corporation to be granted a licence to self-insure under the *Safety, Rehabilitation and Compensation Act 1988*. Commercial certainty would be undermined by the sunseting of these declarations. Additionally, a more stringent statutory review process applies and preservation of this review process is important to ensure the proper application of the scheme.

Item 39 will provide an exemption from sunseting for regulations made under the *Superannuation Act 1922*. These regulations administer a superannuation scheme that has now closed. The defined benefit superannuation entitlements provided by this scheme are intended to endure for life and a number of scheme members remain. These regulations should be directly repealed after the last scheme member passes away. In this context, these regulations are intended to be enduring and not subject to regular review under the LIA.

Item 40 will provide an exemption from sunseting for regulations made under the *Superannuation Act 1976*, except regulations made solely for the purposes of section 153AN or subsection 160(1) of that Act. These regulations administer a superannuation scheme that has now closed. The defined benefit superannuation entitlements provided by this scheme are intended to endure for life and a number of scheme members remain. These regulations should be directly repealed after the last scheme member passes away. In this context, these regulations are intended to be enduring and not subject to regular review under the LIA.

Item 41 will provide an exemption from sunseting for regulations made under the *Superannuation (Productivity Benefit) Act 1988*. These regulations administer a superannuation scheme that has now closed. The defined benefit superannuation entitlements provided by this scheme are intended to endure for life and a number of scheme members remain. These regulations should be directly repealed after the last scheme member passes away. In this context, these regulations are intended to be enduring and not subject to regular review under the LIA.

Item 42 will provide an exemption from sunseting for codes made under subclause 37(1) of Schedule 1 to the *Telecommunications Act 1997*. These codes create 'access codes' for the purposes of standard carrier licence conditions. These codes are intended to be enduring and not subject to regular review under the LIA.



Item 43 will provide an exemption from sunseting for declarations made under subclause 4(1) of Schedule 3A to the *Telecommunications Act 1997*. These declarations create protection zones around submarine cables. These declarations are intended to be enduring and not subject to regular review under the LIA.

Item 44 will provide an exemption for declarations made under subsection 6N (2) or section 34 of the *Telecommunications (Interception and Access) Act 1979*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices and updated section references.

Item 45 will provide an exemption from sunseting for declarations made under section 6 of the *Terrorism Insurance Act 2003*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 46 will provide an exemption from sunseting for regulations made under the *Terrorism Insurance Act 2003*. The main purpose of these regulations is to exclude certain types of insurance and other contracts from the application of the *Terrorism Insurance Act 2003*. A more stringent statutory review process applies to the entire Act, requiring the relevant Minister to review the continuing need for the Act at least every three years. Exempting these regulations from sunseting will preserve this more stringent statutory review process.

Item 47 will provide an exemption from sunseting for determinations made for the purposes of the definition of the terms ‘non-warlike service’ or ‘warlike service’ in subsection 5C(1) of the *Veterans’ Entitlements Act 1986*. This is an existing exemption that is provided in Schedule 3 to the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 48 will provide an exemption from sunseting for determinations made under subsection 5R(1) of the *Veterans’ Entitlements Act 1986*. These determinations set out the scope of ‘relevant service’ for the purposes of the *Veterans’ Entitlements Act 1986*. These determinations are intended to be enduring and not subject to regular review under the LIA.

Item 49 will provide an exemption from sunseting for instruments made under subsection 69B(6) of the *Veterans’ Entitlements Act 1986*. These instruments extend the right to receive veterans’ benefits to people who participated in British nuclear tests carried out in Australia. These instruments are intended to be enduring and not subject to regular review under the LIA.

Item 50 will provide an exemption from sunseting for determinations made for the purposes of the definition of the term ‘hazardous service’ in subsection 120(7) of the *Veterans’ Entitlements Act 1986*. This is an existing exemption that is provided in Schedule 3 of the Principal Regulations and has been reworded to reflect modern drafting practices.

Item 51 will provide an exemption from sunseting for regulations made under the *War Precautions Act Repeal Act 1920*. These regulations prohibit the use of the word Anzac in connection with trade and commerce and as a name for some streets, roads and parks. These regulations are intended to be enduring and not subject to regular review under the LIA.