

Legislation (Exemptions and Other Matters) Amendment (2018 Measures No. 1) Regulations 2018

EXPLANATORY STATEMENT

Issued under the Authority of the Attorney-General

OUTLINE

The *Legislation Act 2003* establishes a comprehensive regime for the publication of Commonwealth Acts and instruments. It also provides for the registration, tabling, parliamentary scrutiny and sunseting (automatic repeal) of Commonwealth legislative instruments, and establishes an authoritative, complete and accessible register of those instruments, including compilations and explanatory statements.

Section 62 of the Legislation Act provides the Governor-General with the power to make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to that Act.

Subsections 44(2) and 54(2) of the Legislation Act provide that instruments prescribed by regulation for the purposes of paragraphs 44(2)(b) and 54(2)(b) are not subject to disallowance and sunseting respectively. Paragraph 8(6)(b) of the Legislation Act provides that instruments prescribed by regulation for the purposes of that paragraph are not legislative instruments.

The *Legislation (Exemptions and Other Matters) Regulation 2015* (the Principal Regulation), made under section 62 of the Legislation Act, sets out exemptions from legislative instrument status, disallowance by the Parliament and sunseting for instrument classes and particular instruments.

Schedule 1 to these Regulations amends the Principal Regulation to provide for an exemption from sunseting for the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Regulations).

The Legislation Act does not specify any conditions that must be fulfilled before the power to make these Regulations may be exercised.

However, it is well-established practice that an assessment of whether it is appropriate to exempt an instrument from sunseting is conducted on the basis of the following 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; or
- the instrument is subject to a more rigorous statutory review process.

The FF(SP) Regulations were analysed against the above criteria. It was determined that an exemption would be appropriate because subjecting the FF(SP) Regulations to sunseting

would undermine commercial certainty, and because the FF(SP) Regulations are part of several intergovernmental schemes.

The exemption was also assessed to be appropriate because the FF(SP) Regulations are subject to regular review and amendment, and the administrative burden associated with remaking the FF(SP) Regulations would outweigh any regulatory benefit. Assessment against this criterion is consistent with recommendation 30 of the *Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003*.

Further information is provided at [Attachment A](#).

PROCESSES FOR REVIEW OF THIS REGULATION

The Regulations are subject to tabling and disallowance under Part 2 of Chapter 3 of the Legislation Act, and will cease as if repealed on the day after the last of its provisions commence.

Regulatory impact analysis

Before the Principal 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 and granted a standing exemption from Regulatory impact analysis requirements (OBPR reference 17635).

Statement of compatibility with human rights obligations

Before these Regulations were made, their impact on human rights was assessed using tools and guidance published by the Attorney-General's Department. These Regulations will make technical amendments to the Principal Regulation 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*. These Regulations are compatible with human rights as it does not raise any human rights issues.

Consultation before making

Before these Regulations were made, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act. The Attorney-General was satisfied that consultation was appropriate and reasonably practicable to be undertaken. The exemption was requested by the Minister for Finance, who provided information to the Attorney-General to enable analysis of the request. Government departments and agencies likely to be affected by these Regulations and affected areas within the Attorney-General's Department were given an adequate opportunity to comment on its proposed content.

The following agencies were consulted: the Department of Industry, Innovation and Science; the Department of Health; the Department of the Environment and Energy; the Department of the Treasury; the Department of the Prime Minister and Cabinet; the Department of Infrastructure, Regional Development and Cities; the Department of Veterans' Affairs; the Department of Home Affairs; the Department of Human Services; the Department of Foreign Affairs and Trade; the Department of Finance; the Department of Defence; the Department of Communications and the Arts; the Department of Social Services; the Department of

Agriculture and Water Resources; the Department of Jobs and Small Business; and the Department of Education and Training.

OTHER ISSUES

Matter incorporated by reference

These Regulations do not apply, adopt or incorporate other matters by reference.

More information

An explanation of the provisions of and the Schedule to these Regulations is provided in Attachment A.

ATTACHMENT A

NOTES ON PROVISIONS AND SCHEDULES

Section 1 Name

This section provides that the title of these Regulations is the *Legislation (Exemptions and Other Matters) Amendment (2018 Measures No. 1) Regulations 2018*.

Section 2 Commencement

This section provides for the whole of the Regulations to commence on the day after it is registered on the Federal Register of Legislation.

Section 3 Authority

This section provides that the Regulations are made under the *Legislation Act 2003*.

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

Schedule 1 to the Regulations amends section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Principal Regulation) to insert a new exemption. Section 12 provides for particular instruments that are not subject to sunseting.

Item 1 inserts new item 28A into the table under section 12 of the Principal Regulation. New item 28A provides an exemption from sunseting for the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations).

The FF(SP) Regulations, made under section 65 of the *Financial Framework (Supplementary Powers) Act 1997*, provide legislative authority for Commonwealth expenditure on multiple government activities across all portfolios. As at May 2018, the Schedules to the FF(SP) Regulations provided authority for over 800 arrangements, grants and programs, and for the Commonwealth to form, or otherwise be involved in, approximately 20 companies.

If the FF(SP) Regulations were subject to sunseting, this would generate uncertainty about the continuing operation of existing contracts and funding agreements between the Commonwealth and third parties, as well as the Commonwealth's legislative authority to continue making, varying or administering arrangements, grants and programs.

The operation of the sunseting framework would require the FF(SP) Regulations to be reviewed and remade every 10 years from 1 April 2019. This could create significant commercial uncertainty for third parties affected by Commonwealth funding and investment in ongoing programs and projects authorised by the FF(SP) Regulations, particularly those extending beyond 10 years. The following are some examples of these programs and projects.

- Item 86 in Part 4 of Schedule 1AB to the FF(SP) Regulations provides legislative authority for loans to infrastructure projects. This includes a \$2 billion concessional loan for the construction of the WestConnex M5 project in Sydney, for which the Commonwealth is a major financier and the repayment of which is scheduled for late 2029. The sunseting process would introduce uncertainty about the Commonwealth's ability to contribute its share of financing and jeopardise contributions from other financiers who expect to receive repayment from future project revenue, which would result in the cessation of the project and flow-on effects to companies contracted to construct and operate the project.
- Item 191 in Part 4 of Schedule 1AB to the FF(SP) Regulations provides legislative authority for the Building Better Regions Fund through which 257 projects have been approved, totalling \$226.4 million in Commonwealth funding. Funding for approved projects is provided via a contract between the Commonwealth and successful proponents. As payments are made in arrears in the majority of instances, subjecting the FF(SP) Regulations to sunseting could cause significant uncertainty regarding payments to be made in respect of milestones reached or projects completed. If the FF(SP) Regulations were to sunset, or remade and disallowed, this could result in regional and remote proponents and suppliers being left in significant debt.
- Item 210 in Part 4 of Schedule 1AB to the FF(SP) Regulations provides legislative authority for a Commonwealth loan of up to \$19.5 billion to NBN Co Limited. The loan is provided on commercial terms and is required to be repaid with interest by 30 June 2021. The sunseting process would introduce uncertainty about the future commercial activities of NBN Co Limited and could compromise the rollout of the national broadband network within expected timeframes, which could undermine the Commonwealth's existing \$29.5 billion equity investment in the project.

Additionally, the FF(SP) Regulations authorise a number of activities that form part of intergovernmental schemes. It would not be appropriate for the Commonwealth to unilaterally sunset an instrument that provides authority for Commonwealth funding for activities that are underpinned by an intergovernmental arrangement. Examples of these activities are set out below.

- Item 402.023 in Part 4 of Schedule 1AA to the FF(SP) Regulations provides legislative authority for the Commonwealth to partially fund the National Aerial Firefighting Centre Ltd, which is a joint company for combating bushfires formed by the States and Territories in association with the Australasian Fire and Emergency Service Authorities Council Inc.
- Item 171 in Part 4 of Schedule 1AB to the FF(SP) Regulations provides legislative authority for the Sustainable Rural Water Use and Infrastructure Program, a national program that funds investment in rural water use, management and efficiency, including improved water knowledge and water purchase for the environment. Under the Program, the Commonwealth provides funding for a range of projects including State Priority Projects provided for under the *Intergovernmental Agreement on Murray-Darling Basin Reform 2008* and supply measures delivered through the *Intergovernmental Agreement on Implementing Water Reform in the Murray Darling Basin 2013*.

Furthermore, the FF(SP) Regulations are regularly reviewed and amended to ensure that they continue to reflect government priorities and remain up to date. In 2017, Schedule 1AB was

amended over 40 times. A recent substantive review of the FF(SP) Regulations identified over 160 items as redundant or no longer required. Those items were subsequently repealed by the *Financial Framework (Supplementary Powers) Amendment (2018 Measures No. 1) Regulations 2018* which were registered on 3 April 2018 and will commence on 1 January 2019.

The FF(SP) Regulations are a large and highly complex instrument and support a significant amount of government spending across multiple activities and portfolios. Because the expenditure authorised by the FF(SP) Regulations affects every Commonwealth portfolio, all of the States and Territories and a substantial number of commercial and non-profit bodies, the administrative burden associated with remaking the FF(SP) Regulations would be so significant that it would outweigh any regulatory benefit.

The process of remaking the FF(SP) Regulations would impose a considerable demand on the resources of the Department of Finance, the Office of Parliamentary Counsel, the Office of Constitutional Law, the Australian Government Solicitor and all departments and agencies which administer spending authorised by the FF(SP) Regulations.

Accordingly, it is appropriate to exempt the FF(SP) Regulations from sunseting.