

Legislation (Deferral of Sunsetting—Declaration of Aboriginal Land) Certificate 2019

EXPLANATORY STATEMENT

Issued by the Attorney-General in compliance with
section 15G of the *Legislation Act 2003*

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Declaration of Aboriginal Land) Certificate 2019* (the certificate) was made under paragraph 51(1)(c) of the *Legislation Act 2003*. It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. The certificate is not subject to the disallowance provisions of the Legislation Act as the deferred sunsetting day specified in the certificate is on or before the first anniversary of the sunsetting day (subsection 51(4) of the Legislation Act).

OUTLINE

Sunsetting is the automatic repeal of legislative instruments after a fixed period. The Australian Government's sunsetting framework is established under Part 4 of Chapter 3 of the Legislation Act. The purpose of the sunsetting framework is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on the 1 April or 1 October immediately on or following the tenth anniversary of its registration, unless it was registered on 1 January 2005. Legislative instruments registered on 1 January 2005 are subject to the staggered sunsetting timetable set out in subsection 50(2) of the Legislation Act.

Under paragraph 51(1)(c) of the Legislation Act the Attorney-General can issue a certificate to defer the sunsetting day of an instrument for a period of either six, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the certificate instead of the scheduled sunsetting day.

This allows instruments to continue to be in force for a further but limited period of time when they would otherwise sunset. This removes the administrative burden of remaking instruments which would have a limited duration prior to their repeal and potential replacement, or where circumstances prevent the making of replacement instruments prior to the sunsetting day.

The certificate defers the sunsetting date of the *Declaration of Aboriginal Land (11/10/1995)* (the Declaration) from 1 April 2019 to 1 April 2020.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A certificate of deferral of sunsetting for six or 12 months issued by the Attorney-General under paragraph 51(1)(c) of the Legislation Act is not subject to disallowance (subsection 51(4) of the Legislation Act). As such, a statement of compatibility with human rights is not required (section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*).

PROCESS BEFORE CERTIFICATE WAS MADE

Regulatory impact analysis

Certificates of deferral of sunseting are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Best Practice Regulation (OBPR). The OBPR reference for this standing exemption is ID19633.

Consultation before making

Before the certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

Senator the Hon Nigel Scullion, Minister for Indigenous Affairs (the Minister), advised the Attorney-General of the reasons in support of issuing the certificate. The Minister is responsible for administering the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the Aboriginal Land Act), the enabling legislation under which the Declaration was made. The Minister is therefore the relevant rule-maker for the purposes of section 6 of the Legislation Act.

The Wreck Bay Aboriginal Community Council, being the group most immediately affected by the operation of the Declaration, has also been consulted. The Council supports this deferral, as well as the proposed exemption from sunseting.

The certificate is consistent with the policy intent of the sunseting arrangements. Accordingly, further consultation was unnecessary.

Statutory preconditions relevant to the certificate

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunseting day can be deferred for either six, 12, 18 or 24 months by means of a certificate made under that section. In terms of process, the Legislation Act requires:

- a) the responsible rule-maker to apply to the Attorney-General in writing
- b) the Attorney-General to be satisfied that:
 - i) the instrument would (apart from the operation of the sunseting provisions) be likely to cease to be in force within 24 months after its sunseting day, or
 - ii) the proposed replacement instrument will not be able to be completed before the sunseting day for reasons that the rule maker could not have foreseen and avoided, or
 - iii) the dissolution or expiration of the House of Representatives or prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed, or
 - iv) the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (sunseting) not applying to the instrument, and
- c) the Attorney-General to issue a certificate. The explanatory statement for the certificate is required to include a statement of reasons for the issue of the certificate.

The Minister has requested that the Declaration be exempted from the operation of the sunseting framework. The Attorney-General has approved that the sunseting regime in Part 4 of Chapter 3 of the Legislation Act should not apply to the Declaration. As such, the criterion in subparagraph 51(1)(b)(iii) of the Legislation Act is met.

Statement of Reasons for issuing of the Certificate

For the purposes of subsection 51(5) of the Legislation Act, this section sets out the statement of reasons for the issue of the certificate.

The Declaration is made under section 9A of the Aboriginal Land Act. The Declaration provides that the land within the Jervis Bay National Park (Booderee National Park) and Jervis Bay Botanic Gardens (Booderee Botanic Gardens) is Aboriginal Land for the purposes of the Aboriginal Land Act. After the Declaration was made under section 9A of the Aboriginal Land Act, the land vested in and was registered to the Wreck Bay Aboriginal Community Council under sections 10 and 11 of that Act.

In March 2019 the Minister for Indigenous Affairs sought an exemption of the Declaration from the operation of the sunseting framework. The Attorney-General approved the exemption on the basis that the Declaration (and other instruments made under section 9A of the Aboriginal Land Act) should not be the subject of regular review, as they are designed to be enduring. An amendment will be made to the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Regulation) to include the proposed exemption.

A deferral of the sunseting date of the Declaration by 12 months is necessary to allow sufficient time to amend the Regulation to add a specific exemption for instruments made under section 9A of the Aboriginal Land Act. It also avoids the need to remake the Declaration in its current form for a short period of time before it is exempted from the sunseting regime.

As such, the certificate is consistent with the policy intent of the sunseting regime that legislative instruments should be kept up to date and only remain in force so long as they are needed.

More information

Further details on the provisions of the certificate are provided in [Attachment A](#).

The instrument which is the subject of the certificate, and which will now sunset at a later day as specified in the certificate, is available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of this certificate, and from the Department of the Prime Minister and Cabinet about the instrument to which the certificate applies.

ATTACHMENT A

NOTES ON THE CERTIFICATE

Section 1 Name

This section provides that the certificate is named the *Legislation (Deferral of Sunsetting—Declaration of Aboriginal Land) Certificate 2019*. The certificate may be cited by that name.

Section 2 Commencement

This section provides for the certificate to commence on the day it is registered.

Section 3 Authority

This section provides that the certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*.

Section 4 Deferral of sunseting

This section provides that the Declaration, for which the sunseting day is 1 April 2019, is taken to be repealed under section 51 of the Legislation Act on 1 April 2020.

Section 5 Repeal of this instrument

This section provides that the certificate is repealed at the start of 2 April 2020.