

Legislation (Deferral of Sunsetting—Bankruptcy Regulations) Amendment Certificate 2020

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Bankruptcy Regulations) Amendment Certificate 2020* (the Amendment Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003*. It amends the *Legislation (Deferral of Sunsetting—Bankruptcy Regulations) Certificate 2018* (the Principal Certificate). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. The Amendment Certificate is subject to the disallowance provisions of the Legislation Act as the deferred sunsetting day specified in the Amendment Certificate is after the first anniversary of the originally scheduled sunsetting day, which means that subsection 51(4) of that Act (which provides an exemption from disallowance for deferrals of 12 months or less) does not apply.

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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on the 1 April or 1 October immediately on or following the tenth anniversary of its registration, unless it was registered on 1 January 2005.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 The instrument will then be repealed on the day specified in the Certificate instead of the previously scheduled sunsetting day.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.

Through the operation of subsection 33(3) of the *Acts Interpretation Act 1901*, the Attorney-General's power under paragraph 51(1)(c) includes the power to repeal, rescind, revoke, amend or vary such a certificate.

The Amendment Certificate amends the Principal Certificate, extending the previously granted deferral of sunseting for the *Bankruptcy Regulations 1996* (the Regulations) by an additional 12 months, resulting in a deferral of 24 months. The Regulations, for which the original sunseting date was 1 April 2019 will now sunset on 1 April 2021.

PROCESS BEFORE THE AMENDMENT CERTIFICATE WAS MADE

Regulatory impact analysis

Certificates of deferral 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 Amendment Certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Attorney-General is responsible for administering the *Bankruptcy Act 1966*, the enabling legislation under which the Regulations were made. The Attorney-General is therefore the rule-maker for the purpose of section 6 of the Legislation Act.

The Amendment Certificate is consistent with the policy intent of the sunseting arrangements, that legislative instruments should be kept up to date and only remain in force so long as they are needed. Accordingly, further consultation was unnecessary.

Statutory preconditions relevant to the Amendment 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 the 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 originally scheduled 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 or avoided, or
 - (iii) the dissolution or expiration of the House of Representatives or the 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 the sunseting provisions not applying to the instrument, and
- c) the Attorney-General to issue a certificate, and
- d) the explanatory statement for the certificate to include a statement for the reasons of the issue of the certificate.

As the Attorney-General is the rule-maker for the Regulations, there is no formal correspondence associated with this Amendment Certificate.

On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Regulations would, apart from the operation of the sunset provisions, be likely to cease to be in force within 24 months of their originally scheduled sunset day. As such, the criterion in subparagraph 51(1)(b)(i) of the Legislation Act is met.

Statement of Reasons for issuing the Amendment Certificate

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

On 15 August 2018, the Attorney-General issued the Principal Certificate under section 51 of the Legislation Act, deferring the sunset of the Regulations from 1 April 2019 to 1 April 2020.

The *Bankruptcy Act 1966* regulates Australia's personal insolvency system. The Regulations underpin the framework for dealing with personal insolvencies and give effect to many procedural and administrative requirements of the Act. As such, the Regulations are required to be in force for the Act to operate as intended.

The Bankruptcy Amendment (Enterprise Incentives) Bill 2017 and the Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 were introduced into the Australian Parliament in October 2017 and February 2018, respectively. As these Bills proposed significant reform to Australia's personal insolvency framework, a review of the Regulations was dependent on the progress of both Bills. It was anticipated that the Bills would commence in early 2019, allowing the Regulations to be repealed and remade in mid-2019.

However, due to the size and complexity of amendments, the commencement time of the majority of provisions in the *Bankruptcy Amendment (Debt Agreement Reform) Act 2018* was prolonged from six to nine months. The Bankruptcy Amendment (Enterprise Incentives) Bill 2017 lapsed on 1 July 2019. Due to the length of time taken for consideration of the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 and passage of the Bankruptcy Amendment (Debt Agreement Reform) Act, the finalisation of the review of the Regulations was delayed.

Deferring the sunset date of the Regulations for a further 12 months will allow sufficient time for Regulations to be drafted and consulted on, and enable stakeholders to prepare for commencement. This will avoid the administrative burden of remaking the Regulations in their current form for a short period of time before they are likely to be repealed and replaced.

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

More information

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

The Regulations which are subject to the Amendment Certificate, and which will now sunset at a later day as specified in the Amendment Certificate, are available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the Regulations and the operation of the Amendment Certificate.

STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting—Bankruptcy Regulations) Amendment Certificate 2020* (the Amendment Certificate) is compatible with human rights and freedoms recognised or declared in international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

Overview of the Amendment Certificate

The Amendment Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*. Under that paragraph the Attorney-General can issue a certificate to defer the sunsetting day of an instrument for a period of 6, 12, 18 or 24 months. This instrument will then be repealed on the day specified in the certificate instead of the scheduled sunsetting day.

Through the operation of subsection 33(3) of the *Acts Interpretation Act 1901*, the Attorney-General's power under paragraph 51(1)(c) of the *Legislation Act* includes power to repeal, rescind, revoke, amend or vary such a certificate.

The Amendment Certificate amends the *Legislation (Deferral of Sunsetting—Bankruptcy Regulations) Certificate 2018* (the Principal Certificate), extending the previously granted deferral of sunsetting for the *Bankruptcy Regulations 1996* (the Regulations) by an additional 12 months, resulting in a deferral of 24 months in total. The Regulations, for which the originally scheduled sunsetting day was 1 April 2019, will now sunset on 1 April 2021.

The *Bankruptcy Act 1966* regulates Australia's personal insolvency system. The Regulations underpin the framework for dealing with personal insolvencies and give effect to many procedural and administrative requirements of the Act. As such, the Regulations are required to be in force for the Act to operate as intended. Significant reforms to the personal insolvency system have been proposed which also require a review of the Regulations. Implementation of these reforms has taken longer than expected resulting in a delay of the finalisation of the review of the Regulations.

Human rights implications

The Statement of Compatibility for a certificate of deferral of sunsetting focuses on the effect of the deferral instrument, rather than the substantive effect of continuing the instruments that have been deferred.

Before issuing the Amendment Certificate, the Attorney-General was satisfied that the Regulations would, apart from the sunsetting provisions, cease to be in force within 24 months of the originally scheduled sunsetting day.

The replacement bankruptcy regulations will be subject to parliamentary scrutiny and oversight through disallowance processes unless otherwise exempt. The human rights impact will be individually assessed at that time, including through the requirement to provide a further Statement of Compatibility with Human Rights.

Conclusion

The Amendment Certificate is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act by ensuring that any proposal to make replacement instruments that unduly limit human rights and freedoms will be subject to parliamentary oversight and scrutiny.

NOTES ON THE AMENDMENT CERTIFICATE

Section 1 Name

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting–Bankruptcy Regulations) Amendment Certificate 2020*. The Amendment Certificate may be cited by this name.

Section 2 Commencement

This section provides for the Amendment Certificate to commence on the day after it is registered.

Section 3 Authority

This section provides that the Amendment Certificate is made under paragraph 51(1)(c) of the Legislation Act.

Section 4 Schedules

This section provides that each instrument specified in a Schedule to the Amendment Certificate is amended or repealed as set out in that Schedule, and any other items have effect according to their terms.

Schedule 1 Amendments

This schedule sets out the amendments to the *Legislation (Deferral of Sunsetting–Bankruptcy Regulations) Certificate 2018* (the Principal Certificate) that are necessary to further defer the sunsetting of the *Bankruptcy Regulations 1996* to 1 April 2021.

Item 1 Section 6

This item repeals sections 4 to 6 of the Principal Certificate and replaces them with a new operative provision, further delaying the repeal date for the Regulations.

Item 2 Section 7

This item changes the self-repealing provision of the Principal Certificate so that it takes effect on 2 April 2021, rather than 2 April 2020.