

Legislation (Deferral of Sunsetting—Tobacco Instruments) Certificate 2021

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Tobacco Instruments) Certificate 2021* (the Certificate) is 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 subject to the disallowance provisions of the *Legislation Act* as the deferred sunsetting day specified in the 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Subsection 50(1) of the *Legislation Act* provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration, unless it was registered on 1 January 2005.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. In this instance, the Assistant Minister to the Attorney-General is performing the functions of the Attorney-General under the *Legislation Act*. The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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.

The Certificate defers the sunsetting date of the following instruments by 24 months from 1 April 2022 to 1 April 2024:

- the *Tobacco Advertising Prohibition Regulation 1993*; and
- the *Tobacco Plain Packaging Regulations 2011*.

(together the 'Tobacco Instruments').

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 Assistant Minister to the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The then Minister for Health, the Hon Greg Hunt MP, is the relevant rule-maker for the instrument for the purposes of section 6 of the Legislation Act. The Minister approved an application to the Attorney-General setting out the reasons in support of issuing the Certificate. In this instance, the application was considered by the Assistant Minister to the Attorney-General.

Certificates of deferral are machinery in nature and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. Deferrals are most commonly used to enable an effective review of whether the deferred instrument continues to be fit for purpose taking into account anticipated policy or legislative changes.

The Tobacco Instruments are part of the Australian Government's comprehensive suite of tobacco control measures aimed at reducing the use and appeal of tobacco products in Australia. The Tobacco Instruments will cease to be in force prior to 1 April 2024 due to their repeal and replacement with new instruments as part of a legislative review of tobacco control legislation. The Department of Health delayed the legislative review due to the Government's involvement in the World Trade Organization (WTO) tobacco plain packaging dispute settlements process and its work associated with responding to COVID-19. Consultation on the legislative review was also delayed so that it would not hinder Australia's argument in the international litigation. Delaying the view has ensured that the WTO processed was not jeopardised, while maintaining the Department's commitment to consult in a timely way with affected businesses, community organisations.

A 24 month deferral will allow sufficient time for further consultation and the replacement instruments to be made. The deferral will avoid the need to remake the Tobacco Instruments in their current form for the short period of time before they are repealed and replacement instruments made. The deferral of the sunseting date of the Tobacco Instruments is consistent with the policy intent of the sunseting regime, and does not significantly alter existing arrangements.

As the deferral certificate is machinery nature, further consultation in relation to the deferral was considered unnecessary. This will minimise the administrative burden on stakeholders associated with consultation on the deferral. Any replacement instruments will be subject to parliamentary oversight, including whether adequate consultation occurred with persons likely to be affected by the replacement instruments.

Statutory preconditions relevant to the Certificate

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunsetting day can be deferred for 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, and
- (b) the Attorney-General to be satisfied that:
 - (i) the instrument would (apart from the operation of the sunsetting provisions) be likely to cease to be in force within 24 months after its sunsetting day
 - (ii) the proposed replacement instrument will not be able to be completed before the sunsetting day for reasons that the rule-maker could not have foreseen and avoided
 - (iii) the dissolution of 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 Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
- (c) the Attorney-General to issue a certificate. The explanatory statement for the certificate must include a statement of reasons for the issue of the certificate.

In this instance, the Assistant Minister to the Attorney-General is performing the functions of the Attorney-General under the Legislation Act.

The rule-maker for the Tobacco Instruments, the then Minister for Health, the Hon Greg Hunt MP, provided a written application to the Attorney-General seeking a deferral of sunsetting for the Tobacco Instruments. In this instance, the application was considered by the Assistant Minister to the Attorney-General. On the basis of the information contained in the statement of reasons below, the Assistant Minister to the Attorney-General is satisfied that the Tobacco Instruments would, apart from the operation of Part 4 of Chapter 3 of the Legislation Act, be likely to cease to be in force within 24 months after their sunsetting day. As such, the criterion in subparagraph 51(1)(b)(i) 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 the reasons for issuing the Certificate.

The Tobacco Instruments are part of the Australian Government's comprehensive suite of tobacco control measures aimed at reducing the use and appeal of tobacco products in Australia. The Tobacco Instruments will cease to be in force prior to 1 April 2024 due to their repeal and replacement with new instruments as part of a legislative review of tobacco control legislation.

Due to the Australian Government's work associated with responding to COVID-19 and its involvement in the World Trade Organization tobacco plain packaging dispute settlements process, aspects of the legislative review have been delayed. Additional time is now required to mitigate the risks associated with the complexity of drafting, delays associated with COVID-19 and potentially lengthy parliamentary passage.

A 24 month deferral will allow sufficient time for further consultation and the replacement instruments to be made. The deferral will avoid the need to remake the Tobacco Instruments in their current form for the short period of time before they are repealed and replacement instruments made. As such, deferral of the sunsetting date of the Tobacco Instruments 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 Tobacco Instruments which are subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, are available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of the Certificate, and from the Department of Health about the Tobacco Instruments.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting—Tobacco Instruments) Certificate 2021* (the Certificate) is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

Overview of the Certificate

This Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003* (the Legislation Act). Under that paragraph 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. In this instance, the Assistant Minister to the Attorney-General is performing the functions of the Attorney-General under the Legislation Act. The instrument will then be repealed on the day specified in the Certificate instead of the scheduled sunsetting day. The instruments specified in this Certificate are the:

- the *Tobacco Advertising Prohibition Regulation 1993*; and
- the *Tobacco Plain Packaging Regulations 2011*.

(together the ‘Tobacco Instruments’).

The Tobacco Instruments are part of the Australian Government’s comprehensive suite of tobacco control measures aimed at reducing the use and appeal of tobacco products in Australia. The Tobacco Instruments will cease to be in force prior to 1 April 2024 due to their repeal and replacement with new instruments as part of a legislative review of tobacco control legislation.

The Certificate allows the Tobacco 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.

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 Certificate, the Assistant Minister to the Attorney-General was satisfied that the Tobacco Instruments would, apart from the operation of the sunsetting provisions, cease to be in force within 24 months of their sunsetting date. Issuing a certificate of deferral therefore avoids the need to replace the Tobacco Instruments in their current form for a short period of time before they are expected to be repealed and possibly replaced.

Instruments that are replaced will be subject to parliamentary scrutiny and oversight through the disallowance processes unless otherwise exempt. The human rights impact of the instruments will be assessed at that time, including through the requirement to prepare a further Statements of Compatibility with Human Rights.

Conclusion

This 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 a replacement instrument that unduly limits human rights and freedoms will be subject to parliamentary oversight and scrutiny.

ATTACHMENT A

NOTES ON THE CERTIFICATE

Section 1 Name

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Tobacco Instruments) Certificate 2021*. The Certificate may be cited by this name.

Section 2 Commencement

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

Section 3 Authority

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

Section 4 Deferral of sunseting

This section provides that the following instruments, for which the sunseting day is 1 April 2022, are repealed under section 51 of the *Legislation Act 2003* on 1 April 2024:

- the *Tobacco Advertising Prohibition Regulation 1993*; and
- the *Tobacco Plain Packaging Regulations 2011*.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 April 2024.