

LEGISLATION (EXEMPTIONS AND OTHER MATTERS) AMENDMENT
(2021 MEASURES NO. 1) REGULATIONS 2021

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Legislation Act 2003* (Legislation Act) establishes a comprehensive regime for the publication of Commonwealth Acts and instruments. It also provides for the registration, tabling, parliamentary scrutiny, disallowance and sunseting of instruments.

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

Section 42 of the Legislation Act provides for the disallowance of legislative instruments. Subsection 44(2) of the Legislation Act provides that instruments prescribed by regulation for the purposes of paragraph 44(2)(b) are not subject to disallowance.

Part 4 of Chapter 3 of the Legislation Act provides for the sunseting of legislative instruments. Sunseting is the process by which instruments are automatically repealed approximately 10 years after they are made unless steps are taken to preserve their operation, or the instruments are exempt from sunseting.

Section 54 of the Legislation Act provides for instruments to which the sunseting regime in Part 4 of Chapter 3 does not apply. Subsection 54(2) of the Legislation Act provides that instruments prescribed by regulation for the purposes of paragraph 54(2)(b) are not subject to sunseting.

The *Legislation (Exemptions and Other Matters) Regulation 2015* (the Principal Regulation) prescribes instruments that are exempt from disallowance or sunseting. Section 10 of the Principal Regulation prescribes particular instruments that are exempt from disallowance under paragraph 44(2)(b) of the Legislation Act. Section 12 of the Principal Regulation prescribes particular instruments that are exempt from sunseting under paragraph 54(2)(b) of the Act.

The *Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021* (the Amendment Regulations) amend the Principal Regulation to update references to provisions that are, or will become by 1 July 2021, out of date.

Item 2(b) of section 10 of the Principal Regulation provides that certain instruments made under the *Air Services Regulations 1995* (ASR 1995) are not subject to disallowance. This replicates the exemption in item 1B of Schedule 2 to the former *Legislative Instruments Regulations 2004*. The reason for this exemption was that disallowance would adversely impact on the orderly management of the aviation industry and air traffic safety management.

The ASR 1995 have been replaced by the *Air Services Regulations 2019* (ASR 2019). The Amendment Regulations replace the references to the ASR 1995 with the equivalent provisions of the ASR 2019. This maintains the scope of the existing exemption from disallowance.

Australian Security Intelligence Organisation Act 1979

Section 34 AF of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) provides that the Director-General may prepare a written statement of procedures to be followed under a questioning warrant. This section replicates former section 34C of the ASIO Act which was repealed by the *Australian Security Intelligence Organisation Amendment Act 2020*.

Item 10 of section 12 of the Principal Regulation provides a sunseting exemption for a statement of procedures approved under former section 34C of the ASIO Act. The Amendment Regulations amend item 10 to provide an exemption for procedures approved under section 34AF of the ASIO Act.

Section 34JF of the ASIO Act provides that Division 3 of Part III (which includes section 34AF) will cease to have effect on 7 September 2025. This Division will also be subject to review by the Parliamentary Joint Committee on Intelligence and Security, if it resolves to do so, before 7 September 2023 (paragraph 29(1)(ce), *Intelligence Services Act 2001*).

In addition, section 16 of the *Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020* provides that the operation and suitability of the instrument will be reviewed on a recurring basis to coincide with the review of the Minister's Guidelines made under section 8A of the ASIO Act. Paragraph 1.14 of those Guidelines provides that an initial review must be completed within three years after the commencement of the Guidelines, and that a further review must be completed every three years thereafter.

The exemption is therefore appropriate as the provision is subject to a statutory review process and it provides legal certainty for the status of the instruments.

Road Vehicle Standards Act 2018

Item 40 of Section 12 of the Principal Regulation provides a sunseting exemption for national road vehicle standards made under Section 7 of the *Motor Vehicle Standards Act 1989* (MVS Act). The *Road Vehicle Standards Act 2018* (RVS Act) will replace the MVS Act on 1 July 2021. The Amendment Regulations insert item 56C in section 12 of the Principal Regulation to provide an exemption from sunseting for road vehicle standards made under the RVS Act. The exemption is appropriate as the instruments form part of an intergovernmental scheme and they provide commercial certainty due to the fact that they remain relevant for the life of the vehicle.

The Legislation Act does not specify any conditions that must be fulfilled before the power to grant exemptions from sunseting may be exercised. However, there are established criteria against which the Attorney-General considers all applications to exempt an instrument or class of instruments from sunseting. Relevant to the amendments are the criteria that:

- a) the instrument is sufficiently large and complex that the administrative burden associated with remaking the instrument would outweigh any regulatory benefit and

- i) the instrument is subject to regular review, and
- ii) the instrument is subject to regular amendment, or
- b) the instrument is part of an intergovernmental scheme

The sunseting exemptions in items 2 and 3 of Schedule 1 to the Amendment Regulations were found to be justified when analysed against the above criteria.

CONSULTATION

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

The Minister for Home Affairs, who has responsibility for the ASIO Act, wrote to the Attorney-General requesting an exemption from sunseting for a statement of procedures under section 34AF of the ASIO Act. The Department of Home Affairs did not undertake any external consultations as part of this application. However, the Department extensively consulted both the Inspector-General of Intelligence and Security and ASIO when developing the Bill to amend the ASIO Act, which included a note explaining that the statement will not be subject to the sunseting provisions in the Legislation Act.

The Assistant Minister to the Deputy Prime Minister, the Hon Kevin Hogan MP, who is one of the Ministers with portfolio responsibility for the RVS Act, wrote to the Attorney-General requesting an exemption from sunseting for road vehicle standards made under the RVS Act. In developing the application, the Department of Infrastructure, Transport, Regional Development and Communications stated that they sought the views of key stakeholders, including representatives of state and territory government, the Federal Chamber of Automotive Industries, the Truck Industry Council, the Bus Industry Confederation, the Australian Trucking Association, the Caravan Industry Association of Australia and the Australian Automobile Association. None of the stakeholders objected to the application.

REGULATION IMPACT STATEMENT

The Amendment Regulations do not create any regulatory impact. The OBPR reference is 44115.

OTHER DETAILS

Details of the Amendment Regulations are set out in the [Attachment A](#).

The Amendment Regulations are a legislative instrument for the purposes of the Legislation Act.

The Amendment Regulations commence the day after registration.

The Amendment Regulations and the Legislation Act are available on the Federal Register of Legislation <https://www.legislation.gov.au/>.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021

The *Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021* (the Amendment Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The *Legislation Act 2003* (Legislation Act) establishes a comprehensive regime for the publication of Commonwealth Acts and Instruments and provides for the sunseting of legislative instruments. Sunseting is the process by which instruments are automatically repealed approximately 10 years after they are made unless steps are taken to preserve their operation or the instruments are exempt from sunseting.

The *Legislation (Exemptions and Other Matters) Regulation 2015* (the Principal Regulation) prescribe classes of instruments (at section 9) and particular instruments (at section 10) that are exempt from disallowance under paragraph 44(2)(b) of the Legislation Act. The Principal Regulations also prescribe classes of instruments (at section 11) and particular instruments (at section 12) that are exempt from sunseting under paragraph 54(2)(b) of the Act.

The Amendment Regulations are made under section 62 of the Legislation Act and amend the Principal Regulation as follows:

1. by replacing a reference in item 2(b) of section 10 of the Principal Regulations to an outdated instrument that is no longer in force (the *Air Services Regulations 1995* (ASR 1995) with a reference to the equivalent provisions in the *Air Services Regulations 2019* (ASR 2019);
2. by amending table item 10 of section 12 of the Principal Regulations to reflect amendments to the *Australian Security and Intelligence Organisation Act 1979* (ASIO Act); and
3. by adding item 56C in section 12 of the Principal Regulations to reflect an exemption from sunseting for standards made under section 12 of the *Road Vehicle Standards Act 2018*.

The disallowance and sunseting exemptions made by the Amendment Regulations are in accordance with established policy criteria for the granting of exemptions.

Item 2(b) of section 10 of the Principal Regulation provides that certain instruments made under the ASR 1995 are not subject to disallowance. The ASR 1995 have been replaced by the ASR 2019. The Amendment Regulations replace the references to the ASR 1995 with the equivalent provisions of the ASR 2019. This maintains the scope of the existing exemption from disallowance.

ASIO Act

The Amendment Regulations provide an exemption from sunseting for a statement of procedures made under section 34 AF of the ASIO Act. Section 34 AF of the ASIO Act replicates section 34C of the Act which was exempt from sunseting under the Principal Regulation.

On its own, the exemption from sunseting for a statement of procedures under section 34 AF of the ASIO Act will not raise human rights issues. If human rights implications arise by reason of subsequent revision to the statement of procedures, or by reason of the operation of, or revision to, legislation that relies on the statement of procedures, those implications will be addressed through a review process that is equivalent to the sunseting regime (for the statement of procedures) or the applicable legislative review processes and parliamentary scrutiny processes (for any relevant legislation).

The exemption does not alter the content of the ASIO Act or the statement of procedures. It simply ensures the statement of procedures is not automatically repealed pursuant to the sunseting regime set out in the Legislation Act. As outlined above, the statement of procedures is subject to a statutory review process that is equivalent to the sunseting regime set out in the Legislation Act.

Road Vehicle Standards Act 2018 (RVS Act)

The Amendment Regulations provide an exemption from sunseting for national road vehicle standards made under the RVS Act. The Principal Regulation provided an exemption from sunseting for national road vehicle standards made under *the Motor Vehicle Standards Act 1989* (MVS Act). The RVS Act will replace the MVS Act on 1 July 2021. The exemption from sunseting maintains the existing exemption for road vehicle standards and is appropriate as the instruments form part of an intergovernmental scheme and they provide commercial certainty due to the fact that they remain relevant for the life of the vehicle.

Conclusion

As such, the exemptions from disallowance and sunseting do not alter the content of the laws to which those exemptions apply. The exemptions preserve those laws and the sunseting exemptions ensure the relevant instruments are not automatically repealed pursuant to the sunseting regime set out in the Legislation Act.

The Regulations are compatible with human rights because the exemptions from disallowance and sunseting do not engage any of the rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

NOTES ON SECTIONS

Details of the *Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021* (Amendment Regulations).

Section 2 – Commencement

This section provides for the Amendment Regulations to commence the day after registration.

Section 3 – Authority

This section provides that the Amendment 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 Amendment Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 – Section 10 (table item 2)

For the purposes of paragraph 44(2)(b) of the Legislation Act, section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Principal Regulation) provides that instruments contained in the table to that section are not subject to disallowance.

The Amendment Regulations replace a reference in item 2(b) in section 10 of the Principal Regulation to subregulation 3.03(3) or (4) of the *Air Services Regulations 1995* with a reference to subsection 7(3) or (4) of the *Air Services Regulations 2019*. The *Air Services Regulations 1995* are no longer in force and have been replaced with *Air Services Regulations 2019*.

Subsection 7(3) or (4) of the *Air Services Regulations 2019* is substantively equivalent to subregulation 3.03(3) or (4) of the *Air Services Regulations 1995*. Accordingly, it does not substantively change the scope of existing disallowance exemptions.

Item 2 – Section 12 (table item 10)

For the purposes of paragraph 54(2)(b) of the Legislation Act, section 12 of the Principal Regulation provides that instruments contained in the table to that section are not subject to sunseting.

Item 10 of section 12 of the Principal Regulation provides a sunseting exemption for a statement of procedures approved under former section 34C of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). Item 2 of Schedule 1 to the Amendment Regulations update item 10 to provide an exemption for procedures approved under section 34AF of the ASIO Act to reflect the new numbering of that provision.

Section 34C of the ASIO Act was repealed by the *Australian Security Intelligence Organisation Amendment Act 2020* (the ASIO Amendment Act 2020). New section 34AF inserted by the ASIO Amendment Act replicates in full the repealed section 34C with the addition of the defined term questioning warrant instead of the general reference to warrant.

The repealed section 34C of the ASIO Act and new section 34AF of the ASIO Act provide that the Director-General of ASIO may prepare a written statement of procedures to be followed in the exercise of authority under a questioning warrant.

The ASIO Amendment Act 2020 expanded the scope of activities to which questioning warrants may apply from only terrorism offences, to foreign interference, espionage, and politically motivated violence (which includes terrorism). The statement of procedures applies to any questioning warrant, regardless of which activity the warrant relates.

The statement of procedures is subject to a statutory review process that is equivalent to the sunseting regime set out in the Legislation Act. The application of the sunseting regime to the statement of procedures would be duplicative. In particular, section 34JF of the ASIO Act provides that Division 3 of Part III (including the power to make the statement of procedures under section 34AF) will cease to have effect on 7 September 2025. Division 3 of Part III will also be subject to review by the Parliamentary Joint Committee on Intelligence and Security, if the Committee resolves to do so, by 7 September 2023 (paragraph 29(1)(ce), *Intelligence Services Act 2001*).

In addition, section 16 of the *Australian Security Intelligence Organisation (Statement of Procedures) Instrument 2020* provides that the operation and suitability of the instrument will be reviewed on a recurring basis to coincide with the review of the Minister's Guidelines made under section 8A of the ASIO Act. Paragraph 1.14 of those Guidelines provides that an initial review must be completed within three years after the commencement of the Guidelines, and that a further review must be completed every three years thereafter.

Item 3 – Section 12 (after table item 56B)

Item 3 of Schedule 1 to the Amendment Regulations inserts a new sunseting exemption in item 56C of section 12 of the Principal Regulation for standards made under section 12 of the *Road Vehicle Standards Act 2018* (RVS Act).

The RVS Act and associated Acts relating to consequential and transitional provisions passed Parliament in late 2018. The RVS Act is being phased in and will replace the *Motor Vehicle Standards Act 1989* (MVS Act) and commence in full from 1 July 2021.

An exemption from sunseting was previously granted in respect of national standards made under section 7 or 9 of the MVS Act (item 40, section 12 of the Principal Regulation). Following the commencement of the RVS Act on 1 July 2021, the national standards will be made under section 12 of the RVS Act. Section 12 of the RVS Act is substantively equivalent to section 7 of the MVS Act.

The legislative instruments covered by the exemption are commonly known as Australian Design Rules (ADRs). ADRs set minimum standards for road vehicles and their components, which support the design, manufacture and testing of road vehicles to regulate safety, theft protection and emissions control. Standards remain relevant for the life of the vehicle and are therefore intended to have enduring operation. The ADRs also facilitate the establishment and operation of the intergovernmental vehicle standard regime that Commonwealth, State and Territory governments rely on to regulate the safety of vehicles on public roads.

Although the instruments made under section 7 and 9 of the MVS Act are saved and transitioned across to the RVS Act pursuant to the *Road Vehicle Standards Transitional and Consequential Act 2018*, the existing exemption for these instruments as made under the MVS Act will remain in the Principal Regulation (item 40, section 12), to maintain certainty around the exemption applying to the Act under which the instruments were originally made and registered.