

Legislation (Private Health Insurance Instruments) Sunset-altering Declaration 2021

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Private Health Insurance Instruments) Sunset-altering Declaration 2021* (the Declaration) is made under subsection 51A(1) 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 Declaration is subject to the disallowance provisions 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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on the 1 April or 1 October immediately on or following the tenth anniversary of its registration, unless it was registered on 1 January 2005.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 subsection 51A(1) of the Legislation Act, the Attorney-General can issue a declaration aligning the sunsetting days of two or more instruments, if satisfied on application by the rule-maker of the relevant instruments that:

- (a) all the instruments to be reviewed:
 - i) would (in the absence of a declaration made under section 51A of the Legislation Act) be repealed by section 50 or 51 of the Legislation Act; and
 - ii) are or will be the subject of a single review; and
- (b) the making of the declaration will facilitate the undertaking of the review or the implementation of its findings.

The day specified in the sunset-altering instrument must be 1 April or 1 October of a year that is up to five years later than the earliest sunsetting day. The instruments will then be repealed on the day specified in the declaration instead of the previously scheduled sunsetting day of each instrument. This allows instruments to continue to be in force for a further but limited period of time when they would otherwise sunset, or to sunset earlier than the originally scheduled sunsetting day.

The objective of issuing a sunset-altering declaration is to facilitate either: the undertaking of a single review into the fitness-for-purpose of two or more thematically related legislative instruments; or the implementation of such a review's findings. This reduces administrative burden as well as the possibility of legislative inconsistencies arising from reviewing and replacing related legislation at different times.

The Declaration aligns the sunseting dates of the following instruments (together, ‘the Private Health Insurance Instruments’) to be 1 April 2027:

- (a) the *Private Health Insurance (Accreditation) Rules 2011*;
- (b) the *Private Health Insurance (Benefit Requirements) Rules 2011*;
- (c) the *Private Health Insurance (Incentives) Rules 2012 (No. 2)*;
- (d) the *Private Health Insurance (Complying Product) Rules 2015*;
- (e) the *Private Health Insurance (Lifetime Health Cover) Rules 2017*; and
- (f) the *Private Health Insurance (Health Insurance Business) Rules 2018*

PROCESS BEFORE DECLARATION WAS MADE

Regulatory impact analysis

The Office of Best Practice Regulation (OBPR) advised the Department of Health that changing the sunset dates of the current instruments is unlikely to have more than a minor regulatory impact. Accordingly, neither a Regulation Impact Statement (RIS) nor a sunset letter is required for that element.

In addition, OBPR has advised that sunset-altering declarations are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the OBPR. The OBPR reference for this standing exemption is ID 19486.

Consultation before making

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

The Minister for Health and Aged Care, the Hon Greg Hunt MP, has administrative responsibility for administering the *Private Health Insurance Act 2007*, under which the Private Health Insurance Instruments are made. Minister Hunt is therefore the relevant rule-maker for the purposes of section 6 of the Legislation Act for the Private Health Insurance Instruments.

The Minister for Health and Aged Care applied to the Attorney-General setting out the reasons in support of issuing the Declaration.

The Minister advised that the application to align the sunset dates was informed by ongoing consultations with stakeholders including private health insurers, private hospitals and medical specialist groups. In addition, the Department of Health consulted with OBPR and the Attorney-General's Department, and has ongoing consultations across government, including with the Australian Prudential Regulatory Authority, Services Australia, and the Private Health Insurance Ombudsman.

Accordingly, further consultation in relation to the Declaration was considered unnecessary. Any replacement instruments will be subject to parliamentary scrutiny including whether adequate consultation occurred with persons likely to be affected by the replacement instruments.

Statutory preconditions relevant to the certificate

In order to align the sunset day of two or more instruments, the Attorney-General must be satisfied on written application from the relevant rule-maker that the statutory conditions in paragraphs 51A(1)(a) and (b) of the Legislation Act are met. The statutory conditions are that:

- (a) all the instruments to be reviewed:
 - i) would (in the absence of a declaration made under section 51A of the Legislation Act) be repealed by section 50 or 51 of the Legislation Act, and
 - ii) all the instruments to be reviewed are or will be the subject of a single review, and
- (b) the making of the declaration will facilitate the undertaking of the review or the implementation of its findings.

In terms of process, the Legislation Act requires:

- (a) the responsible rule-maker to apply to the Attorney-General,
- (b) the Attorney-General to be satisfied of the statutory conditions, and

- (c) the Attorney-General to make a declaration, which is a legislative instrument and subject to disallowance.

As noted above, the relevant rule-maker for the Private Health Insurance Instruments (the Minister for Health and Aged Care) approved an application to the Attorney-General seeking an alignment of the relevant sunseting days. On consideration of this application, the Attorney-General was satisfied that the criteria in paragraphs 51A(1)(a) and (b) of the Legislation Act were met.

Statement of Reasons for issuing of the Certificate

For the purposes of subsection 51A(4) of the Legislation Act, this section sets out the statement of reasons for the issue of the certificate.

As outlined above, the Declaration aligns the sunseting dates for the Private Health Insurance Instruments to enable the Department of Health to conduct a thematic review of the instruments. The instruments interact to a significant extent, both in terms of how private health insurers and healthcare providers fund and supply services, and how the incentives for consumers to participate in the private health insurance market operate.

The Government has already delivered a number of substantive reforms in the private health insurance sector. In the context of the 2020-21 and 2021-22 Budgets, the Government has announced further phases of reform to the private health insurance sector and private health system. The reform program is expected to affect all six instruments, and is also expected to assist the identification of deregulatory and streamlining opportunities. Given the links between the instruments and the likelihood that the reform program will result in a number of changes to the instruments, aligning the sunseting dates to 1 April 2027 would be appropriate as it will enable time for appropriate stakeholder engagement, detailed analysis of reform options and coordination of implementation activities that are underway.

This proposed review will provide a mechanism to ensure that the current reform agenda and associated activities have resulted in a comprehensive examination of the regulatory arrangements set out in the Private Health Insurance Instruments, and that the opportunities for aligning and streamlining the regulatory requirements on stakeholders have been identified, assessed and (where appropriate) reflected in a consistent manner across the instruments. The proposed review will also ensure, by taking into account the stakeholder engagement processes associated with the current reform program, that the sector is not burdened with duplicative and uncoordinated requests.

As such, the sunset-altering instrument 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 Declaration are provided in Attachment A.

The Private Health Insurance Instruments which will now all sunset on 1 April 2027 as specified in the Declaration, are available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of the Declaration, and from the Department of Health about the Private Health Insurance Instruments to which the Declaration applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Private Health Insurance Instruments) Sunset-altering Declaration 2021* (the Declaration) 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 Declaration

The Declaration is made under subsection 51A(1) of the Legislation Act. Under that subsection, the Attorney-General can align the sunset days of two or more legislative instruments to 1 April or 1 October of a year that is up to five years later than the earliest sunset day. The instruments specified in the declaration will then be repealed on the day specified in the declaration instead of the previously scheduled sunset day. The instruments specified in the Declaration are:

- (a) the *Private Health Insurance (Accreditation) Rules 2011*;
- (b) the *Private Health Insurance (Benefit Requirements) Rules 2011*;
- (c) the *Private Health Insurance (Incentives) Rules 2012 (No. 2)*;
- (d) the *Private Health Insurance (Complying Product) Rules 2015*;
- (e) the *Private Health Insurance (Lifetime Health Cover) Rules 2017*; and
- (f) the *Private Health Insurance (Health Insurance Business) Rules 2018*.

The Declaration aligns the sunset dates of the Private Health Insurance Instruments to 1 April 2027. Three of the instruments are due to sunset in 2022, and the remaining three instruments will sunset in 2025, 2027 and 2028 respectively. The objective of issuing the Declaration is to facilitate the undertaking of a single thematic review of the Private Health Insurance Instruments.

This proposed review will provide a mechanism to ensure that the current reform agenda and associated activities have resulted in a comprehensive examination of the regulatory arrangements set out in the Private Health Insurance Instruments, and that the opportunities for aligning and streamlining the regulatory requirements on stakeholders have been identified, assessed and where appropriate reflected in a consistent manner across the instruments. The proposed review will also ensure, by taking into account the stakeholder engagement processes associated with the current reform program, that the sector is not burdened with duplicative and uncoordinated requests.

Human Rights Implications

The Statement of Compatibility with Human Rights for a sunset-altering declaration focuses on the effect of the aligning instrument, rather than the substantive effect of continuing the instruments that have been aligned. The Declaration itself is machinery in nature. It does not alter the arrangements in place under the Private Health Insurance Instruments, but extends the operation of the Private Health Insurance Instruments to 1 April 2027.

Before issuing the Declaration, the Attorney-General was satisfied that all instruments specified in the declaration would be subject to a single thematic review. A thematic review is an effective mechanism for determining whether the instruments are fit for purpose, identifying opportunities to update, streamline and clarify the operation of the instruments and, where appropriate, reducing unnecessary regulation. The human rights impact of the Private Health Insurance Instruments will be considered during the proposed review, and addressed in the Statement of Compatibility of each replacement instrument.

Conclusion

The Declaration is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act, as it does not raise any human rights issues.

ATTACHMENT A

NOTES ON THE DECLARATION

Section 1 Name

This section provides for the Declaration to be named the *Legislation (Private Health Insurance Instruments) Sunset-altering Declaration 2021*. The Declaration may be cited by that name.

Section 2 Commencement

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

Section 3 Authority

This section provides that the Declaration is made under subsection 51A(1) of the *Legislation Act 2003*.

Section 4 Aligning of sunseting

This section provides that the following instruments are repealed by section 51A of the *Legislation Act 2003* on 1 April 2027:

- (a) the *Private Health Insurance (Accreditation) Rules 2011*;
- (b) the *Private Health Insurance (Benefit Requirements) Rules 2011*;
- (c) the *Private Health Insurance (Incentives) Rules 2012 (No. 2)*;
- (d) the *Private Health Insurance (Complying Product) Rules 2015*;
- (e) the *Private Health Insurance (Lifetime Health Cover) Rules 2017*; and
- (f) the *Private Health Insurance (Health Insurance Business) Rules 2018*

1 April 2027 is the aligned sunseting day for these instruments, which would otherwise have sunset on 1 April 2022, 1 April 2022, 1 October 2022, 1 October 2025, 1 April 2027 and 1 October 2028 respectively.

Section 5 Repeal of this instrument

This section provides that the Declaration is repealed at the start of 2 April 2027.