

Legislation (Deferral of Sunsetting—Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011) Certificate 2022

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011) Certificate 2022* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (Cth) (the Legislation Act). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation.

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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration. 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 6, 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 The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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.

The Certificate defers the sunsetting date of the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (the Determination) by 12 months from 1 April 2022 to 1 April 2023.

Pursuant to subsection 51(4) of the Legislation Act the Certificate will not be subject to the disallowance provisions of that Act as the deferred sunsetting day specified in the Certificate is on or before the first anniversary of the originally scheduled sunsetting day. Subsection 51(4) of the Legislation Act provides that a certificate of deferral is exempt from disallowance if it defers the sunsetting day of an instrument by up to 12 months.

The ability to defer sunseting dates is an integral part of the sunseting framework. It provides the necessary flexibility to ensure the standard 10 year sunseting period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. Where the deferral is for a short period (6 or 12 months), the certificate is exempt from disallowance because the instrument will shortly be reviewed and, if remade, subject to disallowance and parliamentary scrutiny. Subjecting short term certificates of deferral to disallowance would undermine the flexibility afforded by their further but strictly limited postponement of sunseting. In this case, 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. The Determination must be remade. Without a valid instrument in place, there is no legal basis to assess and grant Disability Support Pension (DSP) to new applicants who meet the relevant qualification criteria under the *Social Security Act 1991*. In this case, a sunseting deferral of 12 months avoids creating a gap in the law.

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.

The Minister for Families and Social Services, Senator the Hon Anne Ruston, is the relevant rule-maker for the instrument for the purposes of section 6 of the Legislation Act. Minister Ruston applied to the Attorney-General for this certificate of deferral, providing the necessary information and context, including details of the unanticipated and unavoidable delays in making the required replacement instrument.

The *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* provides the legal basis to assess and grant Disability Support Pension (DSP) to new applicants who meet the relevant qualification criteria under the *Social Security Act 1991*. The Department of Social Services has been undertaking a review of the Impairment Tables, including public consultations, prior to making a new instrument. Completion of stakeholder consultation has been delayed by circumstances relating to the COVID-19 pandemic, and is expected to occur in 2022.

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.

A 12 month deferral will allow sufficient time for the necessary stakeholder consultation to be undertaken and if necessary, for proposed amendments to be included in the new instrument. The deferral will avoid a gap in the law between the sunseting day, and the time a new instrument is able

to be finalised and introduced. Without a valid instrument in place, there is no legal basis to assess and grant DSP for people who are unable to work for at least 15 hours per week at or above the relevant minimum wage, for at least the next two years, due to a permanent physical, intellectual or psychiatric impairment. As such, deferral of the sunseting date of the Regulation is consistent with the policy intent of the sunseting regime, and does not significantly alter existing arrangements.

In light of these considerations, further consultation under section 17 of the Legislation Act was not necessary.

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 6, 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 sunseting provisions) be likely to cease to be in force within 24 months after its sunseting day
 - (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
 - (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 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.

The rule-maker for the Determination is the Minister for Families and Social Services, Senator the Hon Anne Ruston. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that 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. As such, the criterion in subparagraph 51(1)(b)(ii) 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 issuing the Certificate.

The *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* provides the legal basis to assess and grant Disability Support Pension (DSP) to new applicants who meet the relevant qualification criteria under the *Social Security Act 1991* (SSA). DSP is an income support payment for people who are unable to work for at least 15 hours per week at or above the relevant minimum wage, for at least the next two years, due to a permanent physical, intellectual or psychiatric impairment. Eligibility for DSP is based on functional impairment and ability to work, not on diagnosis or specific medical conditions alone.

To qualify for DSP, paragraph 94(1)(b) of the SSA provides a person's impairment must attract at least 20 points under the Impairment Tables. The Impairment tables are a legislative instrument made by me under subsection 26(1) of the SSA. The current instrument is the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*. The Impairment Tables contain 15 individual tables designed to assess a person's loss of functional capacity as it relates to their ability to work.

The Department of Social Services has been undertaking a review of the Impairment Tables, including public consultations, prior to making a new instrument. The COVID-19 pandemic significantly delayed the start of the review, originally scheduled for 2020, as the Government priority was responding to the pandemic.

Subsequent lockdowns across Australia have also delayed the finalisation of stakeholder consultations, particularly with individuals with disability. Consultation with individuals who have lived experience of disability and the DSP is key in understanding the direct policy impacts on the affected cohort.

A 12-month deferral will also provide the opportunity for the report of the Senate Standing Committee on Community Affairs inquiry into the purpose, intent and adequacy of the Disability Support Pension (the Senate Inquiry) to be considered in the context of the Impairment Tables review. The Senate Inquiry was originally due to report by 30 November 2021. On 21 October 2021, the Senate agreed to extend the reporting date to the first sitting week of February 2022.

The deferral will avoid a gap in the law between the sunset day, and the time a new instrument is able to be finalised and introduced.

More information

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

The Determination which is subject to 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 the Certificate and from the Department of Social Services about the Determination.

ATTACHMENT A

NOTES ON THE CERTIFICATE

Section 1 Name

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011) Certificate 2022*. 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 2003*.

Section 4 Deferral of sunseting

This section provides that the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*, for which the sunseting day is 1 April 2022, is repealed by section 51 of the *Legislation Act 2003* on 1 April 2023.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 April 2023.