

***Legislation (Deferral of Sunsetting—Banking (Prudential Standard)
Determination No. 10 of 2012) 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—Banking (Prudential Standard) Determination No. 10 of 2012) 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. The Certificate will be subjected 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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration. 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 The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 *Banking (prudential standard) determination No. 10 of 2012—Prudential Standard APS 117 Capital Adequacy: Interest Rate Risk in the Banking Book (Advanced ADIs)* (the Banking (Prudential Standard) Determination) by 24 months from 1 April 2023 to 1 April 2025.

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.

In December 2010, the Basel Committee on Banking Supervision (Basel Committee) released a package of reforms, known as Basel III, to raise the level and quality of regulatory capital in the global banking system. Since September 2011, the Australian Prudential Regulation Authority (APRA) has been consulting on proposals to implement the major elements of these reforms in Australia. The Banking (Prudential Standard) Determination forms part of APRA's consultations to implement the Basel III reforms.

Following approval by APRA's internal governance committee, APRA now intends to consult further on a draft revised Banking (Prudential Standard) Determination and delay commencement of the revised standard from 1 January 2024 until 1 January 2025. Until the revised Banking (Prudential Standard) Determination commences, authorised deposit-taking institutions (ADIs) will be required to comply with the current Banking (Prudential Standard) Determination. Accordingly, the current instrument is required to be in force until 1 January 2025, at which time it will be actively revoked by the legislative instrument which will also determine the revised Banking (Prudential Standard) Determination.

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. This will minimise the administrative burden on stakeholders associated with consultation on a deferral that will only have effect for a limited amount of time. Any replacement instruments will be subject to further consultation and parliamentary oversight, including oversight of whether adequate consultation occurred with persons likely to be affected by the replacement instruments. As such, deferral of the sunseting date of Banking (Prudential Standard) Determination is consistent with the policy intent of the sunseting regime, and does not significantly alter existing arrangements.

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 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.

The rule-maker for the Banking (Prudential Standard) Determination, the Executive Director of the Policy and Advice Division of APRA, Ms Renee Roberts, provided a written application to the Attorney-General seeking a certificate of deferral of sunseting for the Banking (Prudential Standard) Determination. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Banking (Prudential Standard) Determination 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 its sunseting 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 *Banking Act 1959* provides that APRA may determine prudential standards for the prudential supervision of ADIs. The Banking (Prudential Standard) Determination is a prudential standard that imposes capital requirements on ADIs. As mentioned above, since September 2011, APRA has been consulting on proposals to implement the major elements of the Basel Committee Basel III reforms in Australia. The Banking (Prudential Standard) Determination forms part of APRA's consultations to implement the Basel III reforms. APRA now intends to consult further on a draft revised Banking (Prudential Standard) Determination and delay commencement of the revised instrument from 1 January 2024 until 1 January 2025. Until the revised Banking (Prudential Standard) Determination commences on 1 January 2025, ADIs will be required to comply with the current Banking (Prudential Standard) Determination. A 24-month deferral of the sunseting date will allow sufficient time for the revised Banking (Prudential Standard) Determination to be implemented and actively revoke the current Banking (Prudential Standard) Determination prior to the deferred 1 April 2025 sunseting date. This also accounts for any possible further short delays to implementation and avoids the need to remake the current instrument for the short period of time before the revised instrument commences. Accordingly, the Banking (Prudential Standard) Determination will likely cease to be in force in its current form within 24 months of the original sunseting day.

More information

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

The Banking (Prudential Standard) 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 APRA about the Banking (Prudential Standard) Determination to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting—Banking (Prudential Standard) Determination No. 10 of 2012) Certificate 2022* (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 Declaration

This 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 sunseting 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 originally scheduled sunseting day. The instrument specified in this Certificate is the *Banking (prudential standard) determination No. 10 of 2012—Prudential Standard APS 117 Capital Adequacy: Interest Rate Risk in the Banking Book (Advanced ADIs)* (the Banking (Prudential Standard) Determination).

The Banking (Prudential Standard) Determination is expected to be repealed and replaced within 24 months of its scheduled sunseting date as part of the Basel III reforms. The Certificate allows the Banking (Prudential Standard) Determination to continue to be in force for a further, but limited, period of time when it would otherwise sunset. This removes the administrative burden of remaking the instrument which would have a limited duration prior to its repeal and potential replacement, or where circumstances prevent the making of a replacement instrument prior to the sunseting day.

Human Rights Implications

A certificate of deferral of sunseting extends the operation of the instrument but does not change or affect the rights engaged under the original instrument. As reflected in the Banking (Prudential Standard) Determination explanatory statement, it does not engage any of the human rights and freedoms declared by the international instruments set out in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Before issuing the Certificate, the Attorney-General was satisfied that the Banking (Prudential Standard) Determination would, apart from the operation of the sunseting provisions, cease to be in force within 24 months of their sunseting date. Issuing a certificate of deferral therefore avoids the need to replace the Banking (Prudential Standard) Determination in its current form for a short period of time before it is expected to be repealed and 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 Banking (Prudential Standard) Determination will be assessed at the time any replacement instrument is made, including through the requirement to prepare a further Statement 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, as it does not raise any human rights issues, and ensures that any proposal to make a replacement instrument will be subject to parliamentary oversight and scrutiny.

NOTES ON THE CERTIFICATE

Section 1 Name

This instrument is the *Legislation (Deferral of Sunsetting—Banking (Prudential Standard) Determination No. 10 of 2012) 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 *Banking (prudential standard) determination No. 10 of 2012—Prudential Standard APS 117 Capital Adequacy: Interest Rate Risk in the Banking Book (Advanced ADIs)*, for which the sunseting day is 1 April 2023, is repealed by section 51 of the *Legislation Act 2003* on 1 April 2025.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 April 2025.