

**LEGISLATION (EXEMPTIONS AND OTHER MATTERS) AMENDMENT (2023  
MEASURES NO. 1) REGULATIONS 2023**

**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.

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 Sunseting is the process by which instruments are automatically repealed 10 years after they are made unless steps are taken to preserve their operation, or the instruments are exempt from sunseting. As set out in section 49 of the Legislation Act, the purpose of sunseting is to ensure that legislative instruments continue to be fit-for-purpose and are kept up to date through regular review.

Section 54 of the Legislation Act provides for instruments to which the sunseting regime in Part 4 of Chapter 3 does not apply. Instruments which are prescribed by the regulations for the purposes of paragraph 54(2)(b) of the Legislation Act are exempt from sunseting.

The *Legislation (Exemptions and Other Matters) Regulation 2015* (the Principal Regulations) prescribes instruments that are exempt from sunseting. The Principal Regulations prescribe classes of legislative instruments (at section 11) and particular instruments (at section 12) that are exempt from sunseting under paragraph 54(2)(b) of the Act. In this way, the Principal Regulations serve as a central source of sunseting exemptions, facilitating their whole-of-government management and ensuring that accurate sunseting information can be readily provided to Australian Government agencies, the Parliament and the general public.

*The Legislation (Exemptions and Other Matters) Amendment (2023 Measures No. 1) Regulations 2023* (Amendment Regulations) prescribe two additional instruments to be exempt from sunseting under section 12 of the Principal Regulations.

*Exemption from sunseting – Defence Determination 2016/19, Conditions of service*

The *Defence Determination 2016/19, Conditions of service* (Defence Determination) is the first additional instrument to be exempt from sunseting under section 12 of the Principal Regulations, effected by the Amendment Regulations. The Defence Determination is made under section 58B of the *Defence Act 1903* (Defence Act). This section provides that the

Minister has the authority to make determinations in relation to Australian Defence Force (ADF) members' conditions of service. The Defence Determination provides benefits for members of the ADF and their families as part of the member's conditions of service. Section 58B is the sole source of power to provide benefits to ADF members, and as such the Defence Determination covers many benefits that in other workplaces would be provided by an enterprise agreement or award. In contrast to an enterprise agreement or award of that kind, the Determination cannot refer to internal policies providing the details of the benefits due to its legislative nature.

It is appropriate that the Defence Determination be exempt from sunseting pursuant to the following criteria provided in the Attorney-General's Department's *Guide to managing sunseting of legislative instruments*:

- sufficiently large and complex that the administrative burden associated with remaking the instrument would outweigh any regulatory benefit
- subject to regular review, and
- subject to regular amendment.

#### Sufficiently large and complex

The Defence Determination was 1,126 pages long as of 4 May 2023, with the number of benefits provided in the Defence Determination and their interaction and co-dependency making the rules in the instrument complex and lengthy. This is due to the varying nature of work undertaken by the ADF, including providing service in Australia, overseas, and on military deployments. The Defence Determination also provides benefits to members of the ADF based on their family composition. The benefits reduce disadvantage that may be suffered by the member's family as a consequence of the member's service in the ADF, such as the requirement to move to locations determined by the ADF. This adds increased complexity to the Defence Determination, as benefits are provided based on whether the member has no immediate dependants, is living with their family or, as a consequence of their service, lives away from their family.

Based on the instrument's size and complexity, and advice from the Office of Parliamentary Counsel, it is estimated that it would take several years to review and remake the Defence Determination. Under the standard 10 year sunseting timeframe in the Legislation Act, it would be necessary to conduct each successive, comprehensive review of the Determination only a short number of years after the conclusion of the previous review to ensure the Determination did not inadvertently sunset. This would impose a significant administrative burden on the Department of Defence, ADF personnel and the Office of Parliamentary Counsel, outweighing the regulatory benefit of the remaking process.

#### Subject to regular review and amendment

In total, since the Defence Determination commenced on 1 July 2016, it has been amended by 96 different determinations, averaging 16 amending determinations a year in response to the Department of Defence's developing environment. This is as a consequence of the Department of Defence's usual practice of the ongoing review of the instrument and its underlying policies. Moreover, the Department of Defence's recent practice is to make monthly omnibus determinations that make multiple changes across the Defence Determination. Each amending determination may address more than one policy change.

In practice, the Department of Defence is continually reviewing the policies that underpin the Defence Determination to ensure that the benefits provided by the instrument continue to be fit for purpose and, where relevant, consistent with whole of Australian Government policy. The Determination is subject to regular amendments resulting from reviews targeting various elements of the instrument. For example, reviews have resulted in the following amending determinations to the Determination:

- Defence Determination 2017/18, Overseas conditions of service (Budget measures 2017-18 – Overseas allowances) amendment. This determination gave effect to a Whole-of-Australian-Government review of overseas entitlements, allowances, financial support and conditions of service provided to Australian Government employees posted overseas which resulted in substantive changes across 3 chapters in the Determination.
- Defence Determination, Conditions of Service Amendment (Defence Regulation 2016 – consequential amendments) Determination 2018 (No. 26). This determination gave effect to Defence Regulations 2016 which came about as a result of the changes to the Defence Act by Defence Legislation Amendment (First Principles) Act 2015, which implements recommendations across the entire Determination.
- Since 2020, 11 amending determinations were made to ensure that the benefits provided in the Determination were fit for purpose during the COVID-19 pandemic. This included urgent amendments to evacuate non-essential overseas ADF members and their families from overseas posts.
- Defence Determination, Conditions of service Amendment (Employment offer modernisation) Determination 2023 (No. 1). This determination commences on 1 July 2023 and gives effect to a new categorisation and location framework which provides the basis on which many conditions of service benefits are provided to members and will result in substantive changes across the majority of the chapters of the Defence Determination that provide benefits to members working within Australia.

In addition, the Department of Defence is currently undertaking major policy reviews to further modernise the ADF employment offering. This will result in significant changes to the chapters of the Defence Determination that provide benefits to members working within Australia.

Consequently, it is not necessary to subject the Defence Determination to the requirements of sunseting given the instruments are regularly reviewed and corresponding amendments made on a regular basis to ensure the instrument remains fit-for-purpose and in line with government policy.

#### *Exemption from sunseting – Public Governance, Performance and Accountability Rule 2014*

The *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule), which is made under section 101 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), is the second additional instrument to be exempt from sunseting by the Amendment Regulations. Section 101 provides that the Finance Minister may make rules by legislative instrument to prescribe matters necessary or convenient to be prescribed for carrying out or giving effect to the PGPA Act.

The PGPA Rule fulfils a key object of the PGPA Act to establish a coherent framework for the operations of government. The PGPA Rule establishes the requirements and procedures necessary to give effect to the governance, performance and accountability matters covered by the PGPA Act.

It is appropriate that the PGPA Rule be exempt from sunseting pursuant to the following criteria provided in the Attorney-General's Department's *Guide to managing sunseting of legislative instruments*:

- sufficiently large and complex that the administrative burden associated with remaking the instrument would outweigh any regulatory benefit
- subject to regular review, and
- subject to regular amendment.

#### Sufficiently large and complex

As the key legislative instrument supporting the implementation of the PGPA Act, the PGPA Rule holds a significant number of integral requirements which support the cohesive operation of government and the Commonwealth's effective management of public resources. The PGPA Rule:

- Currently prescribes 20 listed entities in Schedule 1, including the details and purposes of each entity for the finance law. This determines each entity's status within the Commonwealth Resource Management Framework and is integral to entities receiving appropriations from the Commonwealth to implement government policy. Without a clause in Schedule 1, these entities would not have legal status to commit relevant money.
- Establishes the Commonwealth's performance reporting framework through 25 sections and 4 schedules which prescribe key requirements for annual reports,

corporate plans and annual performance statements providing transparency and accountability to the Parliament and public.

- Supports the effective delivery of Government programs and services by prescribing the minimum standard for the management of risk.
- Supports the Government's key commitment to maintaining integrity by setting a minimum standard for countering fraud and corruption and maintains integrity in the Commonwealth Fraud and Corruption Control Framework.
- Prescribes the corporate Commonwealth entities (CCEs) that are subject to the Commonwealth Procurement Rules, or any written instrument created by the Finance Minister concerning procurement that affects those CCEs, and outlines certain requirements in relation to CCE grants, providing parliamentary oversight of the procurement and grants arrangements of CCEs which operate at arm's length to government to ensure and account for the proper use and management of public resources.
- Ensures the continual operation of the ordinary business of government, for example being able to issue indemnities, bank and borrow.

Given the complex range of policy requirements, interconnected frameworks, and governance structures established in the current instrument, a policy-based review, in addition to the regular amendments, of the instrument as a whole would place an unreasonable burden on affected entities. Consultation, development and implementation of any amendments to the PGPA Rule are therefore made in increments in order to reduce the burden placed on entities to respond to and update processes to align with new requirements.

#### Subject to regular review

Since commencing, the PGPA Rule has been and continues to be subject to regular review to ensure it remains responsive to the expectations of the Parliament and supports a modern, adaptable and forward-looking public sector.

Since 2015, an annual survey has been conducted inviting all PGPA Act Commonwealth entities and companies to provide feedback on issues they may have encountered in applying the Commonwealth Resource Management Framework and to certify that the principles-based framework remains fit-for-purpose. The annual survey asks Chief Financial Officers and other officials to assess the fitness-for-purpose of the Commonwealth Resource Management Framework and the requirements and obligations imposed on them through the PGPA Rule. Results of the survey in recent years have found that perceptions of the Commonwealth Resource Management Framework and its functionality are positive. High participation rates ensure that the annual survey is a reliable tool to continually review the operation of the PGPA Rule in assuring that it reflects the changing operational environment and context for Commonwealth entities and companies. The Department of Finance also

conducts ongoing consultation through communication fora such as Communities of Practice, open to all Commonwealth entities and companies to identify areas of concern in the PGPA Rule.

Further, section 112 of the PGPA Act required the Finance Minister to, in consultation with the Joint Committee of Public Accounts and Audit, cause an independent review to be conducted into the operation of the PGPA Act and the rules as soon as practicable after three years of the Act commencing. The Independent Review into the Operation of the PGPA Act and Rule (Independent Review) was tabled in the Parliament on 19 September 2018. The Review sought submissions and conducted broad consultation with relevant Commonwealth entities and companies.

Four amending instruments implemented several recommendations from the Independent Review, relating to the:

- disclosure of material personal interests
- executive remuneration reporting
- minimum standards of performance reporting
- strengthening of audit committee independence
- transparency of audit committee reporting, and
- improvements to corporate plan reporting and disclosure requirements for expenditure on consultancy and non-consultancy contracts.

Further, progressive amendments suited to the operational context continually maintain the health of the PGPA Rule. Regular feedback on the requirements of the PGPA Rule note that while they provide a necessary rigid governance framework, complying with the existing requirements are burdensome — especially for smaller, resource poor entities and companies. Assurance that the operation and requirements prescribed by the PGPA Rule remain beyond ten years would provide certainty to entities and companies that the principles-based regime will continue without adding to the administrative burden and considerable demand on resources caused by remaking the PGPA Rule every 10 years, and maintain consistency by reviewing the PGPA Act and PGPA Rule concurrently.

Amendments to the PGPA Rule are developed in consultation with all Commonwealth entities and companies and rules prescribing annual report requirements are approved by the JCPAA, as required by subsection 46(4) of the PGPA Act, which ensures transparency, accountability and oversight of the Parliament, to maintain the principles-based nature of the Commonwealth Resource Management Framework and ensure a fit-for-purpose approach to reporting obligations.

## Subject to regular amendment

The PGPA Rule has been amended 49 times since it was made in 2014 (as at 23 May 2023), giving effect to the principles-based framework established by the PGPA Act and ensuring that it supports government policies and priorities. Key amendments have included:

- 28 instruments amending Schedule 1 of the PGPA Rule, giving effect to the prescription, abolishment or modifying of listed entities and impacting what bodies make up the Commonwealth
- 4 instruments responding to the Independent Review to reflect changing government priorities, and
- one amendment to support entities to fulfil their accountability and transparency responsibilities in the context of the COVID-19 pandemic.

The operation of the PGPA Rule and amendments to the instrument are also subject to effective and regular parliamentary oversight. The instruments are subject to disallowance by Parliament and amendments to the PGPA Rule are subject to parliamentary scrutiny upon their introduction, via the Senate Standing Committee for the Scrutiny of Delegated Legislation. As part of its legislative duties and powers, the JCPAA generally reviews all rules under the PGPA Act and are required to approve all rules prescribing annual report requirements, as required by subsection 46(4) of the PGPA Act. Furthermore, the JCPAA has an active general oversight role regarding the objectives as prescribed by section 5 of the PGPA Act.

The PGPA Rule is subject to regular review and regular amendment, which reduces the benefit of subjecting the Rule to the sunseting requirements. Frequent amendments and thematic reviews of the PGPA Act and its rules ensures the PGPA Rule remains fit-for-purpose, as well as clear for Commonwealth entities and companies subject to the PGPA Act to comply with.

## **CONSULTATION**

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 Defence, the Hon Richard Marles MP, who has portfolio responsibility for the Defence Determination, wrote to the Attorney-General requesting that the exemption be made. The Department of Defence will continue to regularly consult with internal and external partners such as Navy, Army and Air Force, Defence Housing Australia and the Department of Foreign Affairs and Trade in developing underlying policy which is drafted into the Defence Determination. Given this level of continuing consultation with relevant stakeholders on amendments to the Defence Determination, public consultation on the Certificate was not considered appropriate, and was not undertaken.

The Minister for Finance, Senator the Hon Katy Gallagher, who has portfolio responsibility for the PGPA Rule, wrote to the Attorney-General requesting that the exemption be made. The Department of Finance undertook extensive consultation with relevant Commonwealth entities and companies in the context of the 2017 statutory Independent Review. Noting the level of continuing consultation with relevant stakeholders on amendments to the PGPA Rule, public consultation on the Amendment Regulations was not considered appropriate and was not undertaken.

## **REGULATION IMPACT STATEMENT**

The Amendment Regulations do not have any regulatory impact. The Office of Impact Analysis (OIA) reference is OIA23-04959.

## **OTHER DETAILS**

A Statement of Compatibility under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at [Attachment A](#).

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

The Legislation Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

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

The Amendment Regulations commence immediately after registration.

The Amendment Regulations, the Principal 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 Regulations 2023***

The *Legislation (Exemptions and Other Matters) Amendment (2023 Measures No. 1) Regulations 2023* (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* (the Human Rights Act).

### **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 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 by adding items 21A and 53A in section 12 of the Principal Regulations to create exemptions from sunseting for the *Defence Determination 2016/19, Conditions of service*, and the *Public Governance, Performance and Accountability Rule 2014*.

The sunseting exemptions made by the Amendment Regulations are in accordance with established policy criteria for the granting of exemptions, provided for in the Attorney-General's Department's *Guide to managing sunseting of legislative instruments*. The two instruments are sufficiently large and complex that the administrative burden associated with remaking the instruments would outweigh any regulatory benefit, and they are subject to regular review and to regular amendment.

### **Human Rights Implications**

The Amendment Regulations provide exemptions from sunseting for the *Defence Determination 2016/19, Conditions of service* and the *Public Governance, Performance and Accountability Rule 2014*. The exemptions from sunseting of these instruments do not raise human rights issues as the content of the exempted instruments is not altered, nor do the exemptions affect the rights engaged under the original instruments. Further, the exempted instruments are subject to regular review and amendment. All instruments that amend the

defence Determination and PGPA Rule are assessed for compatibility with human rights and accordingly includes compatibility statements.

#### *Defence Determination 2016/19, Conditions of service*

The Defence Determination engages with and upholds the right to the enjoyment of just and favourable conditions of work, including remuneration, safe and healthy working conditions, equal opportunity and reasonable limitations. These rights all engage Article 7 of the International Covenant on Economic, Social and Cultural Rights.

In the context of supporting a member's capability to provide service, the following human rights are also engaged and upheld:

- Article 11 of the International Covenant on Economic, Social and Cultural Rights, which recognises the right of everyone to an adequate standard of living for them and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions; and
- Article 3 of the Convention of the Rights of the Child and Article 24(1) of the International Covenant on Civil and Political Rights, which recognise the rights of parents and children, including the best interests of a child, adoption of children and disability matters.

#### *Public Governance, Performance and Accountability Rule 2014*

The PGPA Rule engages the right to privacy as contained in Article 17 of the International Covenant on Civil and Political Rights. Article 17 provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. The right to privacy is not absolute, however limitations on the right must be authorised by law and must not be arbitrary. The PGPA Rule engages the right to privacy as it requires the publication, in Commonwealth entities' and companies' annual reports, of:

- individual remuneration information (including the name, position title and remuneration details) of key management personnel, and, for Commonwealth entities, aggregated remuneration information for senior executive and other highly paid staff, and
- the name of each member of the audit committee; the qualifications, knowledge, skills and experience of each audit committee member; information about each member's attendance at meetings of the audit committee and the remuneration of each member of the entity's audit committee.

The purpose of the relevant provisions in the PGPA Rule is to promote public transparency and scrutiny relating to the use of public resources through the disclosure of the remuneration of certain persons that are paid by Commonwealth entities and companies, and of audit committee members names, qualifications, skills, attendance at meetings and remuneration information of audit committee members.

Reporting this information is consistent with the objects of the PGPA Act, which include establishing a coherent system of governance and accountability across Commonwealth entities. The PGPA Rule is compatible with human rights because the extent that it may limit or restrict the right to privacy is reasonable, necessary and proportionate to the objective of ensuring transparency and accountability in the use of public resources.

### **Conclusion**

Exemptions from sunseting do not alter the content of the laws to which those exemptions apply. Sunseting exemptions merely ensure that the legislative instruments in question are not automatically repealed on the first 1 April or 1 October that falls on or after the tenth anniversary of their registration. The Amendment Regulations are compatible with human rights because the exemptions from 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*. As amending instruments are assessed for compatibility with human rights, the compatibility with human rights of any replacement instrument for the PGPA Rule or the Defence Determination will be assessed if such an instrument is made.

## NOTES ON SECTIONS

**Details of the *Legislation (Exemptions and Other Matters) Amendment (2023 Measures No. 1) Regulations 2023*****Section 1 – Name**

This section provides that the title of the Regulations is the *Legislation (Exemptions and Other Matters) Amendment (2023 Measures No. 1) Regulations 2023* (Amendment Regulations).

**Section 2 – Commencement**

This section provides for the Amendment Regulations to commence the day after their 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**

*Legislation (Exemptions and Other Matters) Regulation 2015*

**Item [1] – Section 12 (after table item 21)**

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 1 of Schedule 1 to the Amendment Regulations would insert a new sunseting exemption (item 21A) in section 12 of the Principal Regulations. New item 21A would provide an exemption from sunseting for the *Defence Determination 2016/19, Conditions of service* (Defence Determination).

Pursuant to the policy criteria provided for in the Attorney-General's Department's *Guide to managing sunseting of legislative instruments*, the exemption is appropriate as the Defence Determination is sufficiently large and complex that the administrative burden associated with remaking the instrument would outweigh any regulatory benefit, and it is subject to

regular review and to regular amendment. The sunseting exemption created by the Amendment Regulations is justified on this basis.

**Item [2] – Section 12 (after table item 53)**

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 1 of Schedule 1 to the proposed Regulations would insert a new sunseting exemption (item 53A) in section 12 of the Principal Regulations. New item 53A would provide an exemption from sunseting for the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule).

Pursuant to the policy criteria provided for in the Attorney-General’s Department’s *Guide to managing sunseting of legislative instruments*, the exemption is appropriate as the PGPA Rule is sufficiently large and complex that the administrative burden associated with remaking the instrument would outweigh any regulatory benefit, and it is subject to regular review and to regular amendment. The sunseting exemption created by the Amendment Regulations is justified on this basis.