

# *Legislation (Deferral of Sunsetting—Native Title Instruments) Certificate 2023*

## **EXPLANATORY STATEMENT**

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

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### **INTRODUCTION**

The *Legislation (Deferral of Sunsetting—Native Title Instruments) Certificate 2023* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (Legislation Act). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. 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.

### **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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 sunseting date of the following instruments by 12 months from 1 October 2023 to 1 October 2024 (together, the ‘Native Title Instruments’):

- a) *Native Title (Tribunal) Regulations 1993*;
- b) *Native Title (Indigenous Land Use Agreements) Regulations 1999*;
- c) *Native Title (Federal Court) Regulations 1998*; and
- d) *Native Title (Notices) Determination 2011 (No. 1)*.

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 Native Title Instruments 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 Native Title Instruments are expected to be remade within 12 months of the sunseting date in order to implement the findings of a holistic review of the Native Title Instruments that was undertaken by the Attorney-General’s Department following the making of the *Legislation (Native Title Instruments) Sunset-altering Declaration 2017* under section 51A of the Legislation Act. This Sunset-altering Declaration aligned the sunseting date of the Native Title Instruments to 1 October 2023 for the purposes of reviewing the instruments.

## **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 Impact Analysis (OIA). The OIA 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 Native Title Instruments are made under the *Native Title Act 1993*.

The Native Title Instruments support native title application and agreement-making mechanisms through prescribing Court and Tribunal forms and fees, as well as procedural and notice requirements for applications. In doing so, the Native Title Instruments provide an interface between native title applicants and holders, and the native title system.

As part of the review of the Native Title Instruments, in 2022 the Attorney-General's Department sought preliminary views from native title stakeholders on whether the instruments remain fit-for-purpose, and sought views on possible amendments to better support the efficient operation of the native title system. In October 2022, a native title Expert Technical Advisory Group (ETAG) was convened to provide advice for the department to consider in progressing the review. The ETAG is comprised of representatives from across the native title system, including from the Federal Court of Australia, Minerals Council of Australia, National Farmers' Federation, National Indigenous Australians Agency, National Native Title Council and its members, National Native Title Tribunal, and state and territory governments. As part of its review, the Attorney-General's Department conducted formal public consultation, which commenced on 3 March 2023 and closed on 3 April 2023. The review sought to assess whether the Native Title Instruments continue to be fit-for-purpose, and examined options to improve and streamline processes for stakeholders. The implementation of the outcomes of this review, as well as the updates required to modernise the style of the Native Title Instruments to be consistent with current drafting practices, are likely to require substantial redrafting.

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.

A 12-month deferral will allow sufficient time for the Attorney-General's Department to:

- ensure improvements to the operation of the native title system are achieved upon the Native Title Instruments being remade
- discuss OPC drafting approaches with relevant stakeholders to ensure outcomes of stakeholder consultation are comprehensively incorporated into the remade Native Title Instruments, and any unintended consequences are identified and addressed

- minimise operational disruption to the native title system and reduce confusion for stakeholders that may arise if the Native Title Instruments were to be remade in their current form and then subsequently amended in accordance with the outcomes of the review, and
- remove the administrative burden of remaking the Native Title Instruments in their current form for the short period of time before they are repealed and replacement instruments are made.

As such, given that deferral of the sunseting date of the Native Title Instruments is consistent with the policy intent of the sunseting regime and does not significantly alter existing arrangements, appropriate consultation has occurred for the purposes of section 17 of the Legislation Act.

### **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 issuing of the certificate.

As the rule-maker for the Native Title Instruments is the Attorney-General, the Hon Mark Dreyfus KC, there is no written application associated with this Amendment Certificate.

On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Native Title Instruments 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 their 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 reasons for issuing the Certificate.

The Certificate defers the sunseting date of the Native Title Instruments by 12 months to 1 October 2024 to enable the Attorney-General's Department to implement the outcomes of the holistic review of the instruments that was undertaken following the making of the *Legislation (Native Title Instruments) Sunset-altering Declaration 2017* under section 51A of the Legislation Act. This Sunset-altering Declaration aligned the sunseting date of the Native Title Instruments to 1 October 2023 for the purposes of reviewing the Instruments. The review sought to assess whether the Native Title Instruments remain fit-for-purpose, and examined options to improve and streamline processes for native title stakeholders. The deferral of the sunseting date will facilitate both the implementation of the findings of the review and the necessary redrafting to ensure they are consistent with modern drafting practices.

Accordingly, the Native Title Instruments will likely cease to be in force in their current form within 24 months of their current sunseting date.

### **More information**

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

The Native Title Instruments which are subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, are 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 about the Native Title Instruments to which the Certificate applies.

## NOTES ON THE CERTIFICATE

### **Section 1      Name**

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting— Native Title Instruments) Certificate 2023*. 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 following instruments, for which the sunseting day is 1 October 2023, are repealed by section 51 of the *Legislation Act 2003* on 1 October 2024:

- a) the *Native Title (Tribunal) Regulations 1993*;
- b) the *Native Title (Indigenous Land Use Agreements) Regulations 1999*;
- c) the *Native Title (Federal Court) Regulations 1998*; and
- d) the *Native Title (Notices) Determination 2011 (No. 1)*.

### **Section 5      Repeal of the instrument**

This section provides that the Certificate is repealed at the start of 2 October 2024.