

Legislation (Deferral of Sunsetting—National Disability Insurance Scheme Instruments) Certificate (No. 2) 2023

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Deferral of Sunsetting—National Disability Insurance Scheme Instruments) Certificate (No. 2) 2023* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 sunseting date of the following instruments by 24 months from 1 October 2023 to 1 October 2025 (together, the ‘NDIS Rules’):

- a) *National Disability Insurance Scheme—Risk Management Rules 2013*; and
- b) *National Disability Insurance Scheme—Rules for the Scheme Actuary 2013*.

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. In this case, the NDIS Rules are expected to be remade within 24 months of the sunseting date as a result of the Government’s comprehensive review of the design, operation and sustainability of the National Disability Insurance Scheme (NDIS) and in the context of implementation of the NDIS Financial Sustainability Framework. If the Certificate were to be disallowed, there would not be enough time prior to the sunseting day for the Government to consider the Review recommendations, as well as work with the disability community and states and territories to implement the NDIS Financial Sustainability Framework, which may necessitate changes to the NDIS Rules.

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 NDIS Rules are made under the *National Disability Insurance Scheme Act 2013* (the Act).

It is likely the NDIS Rules will be replaced following the outcomes of the NDIS Review and in the context of implementation of the NDIS Financial Sustainability Framework. The NDIS Review will consider the design, operations and sustainability of the NDIS. In the terms of reference to the NDIS Review, the Government asked the panel of independent reviewers to consult widely to ensure participant, provider and community feedback. The Government will work with the disability

community and States and Territories to implement National Cabinet's commitment to a NDIS Financial Sustainability Framework.

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 an instrument 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 24-month deferral will allow sufficient time for the Government to consider the NDIS Review's recommendations and work to implement the NDIS Financial Sustainability Framework and make any necessary changes to the NDIS Rules, avoiding the need to remake the 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 NDIS Rules 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 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 NDIS Rules, the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP, provided a written application to the Attorney-General seeking a certificate of deferral of sunseting for the instruments. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the NDIS Rules 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 NDIS Rules by 24 months to 1 October 2025 to enable the Government to consider the NDIS Review recommendations and implement the NDIS Financial Sustainability Framework, and consequently review and amend the NDIS Rules as part of these processes.

National Disability Insurance Scheme—Risk Management Rules 2013

The purpose of the National Disability Insurance Scheme—Risk Management Rules 2013 is to support the Board of the National Disability Insurance Agency (the Board) to satisfy their obligations under the Act and the *Public Governance, Performance and Accountability Act 2013* and support the long-term financial sustainability of the NDIS. In particular, the rules require the Board to ensure there is a risk management framework which is documented in a risk management strategy and operationalised through the risk management function. The risk management declaration ensures that the Board remains accountable for its risk management responsibilities.

National Disability Insurance Scheme—Rules for the Scheme Actuary 2013

The National Disability Insurance Scheme—Rules for the Scheme Actuary 2013 provide guidance to the Scheme Actuary to ensure that they adopt an insurance-based approach, informed by actuarial analysis, in the performance of their duties under the Act. The rules are designed to support the long-term financial sustainability of the NDIS by embedding key elements of an insurance-based governance cycle which involves projecting outcomes and monitoring actual experience.

It is likely the NDIS Rules will be replaced following the outcomes of the NDIS Review and work with the disability community and states and territories to implement the NDIS Financial Sustainability Framework. The NDIS Review will consider the design, operations and sustainability

of the NDIS. The final report will be provided to Disability Reform Ministers by October 2023. These findings and recommendations will influence how the Rules are remade.

The Government has also undertaken to implement National Cabinet's commitment to a NDIS Financial Sustainability Framework. The Framework will provide an annual growth target for the total costs of the Scheme of no more than 8 per cent by 1 July 2026, with further moderation of growth as the Scheme matures.

Deferring the sunset of the Rules would avoid the NDIS Rules having to be remade in their current form for a short period, only to be replaced soon after to incorporate any changes arising from implementation of the NDIS Financial Sustainability Framework and outcomes of the NDIS Review. A 24-month deferral would be prudent to allow sufficient time for the Government to consider the Review recommendations and the framework, and to make any necessary changes to the NDIS Rules in light of, or as part of, broader legislative reforms in response to these processes.

Accordingly, the NDIS Rules will likely cease to be in force in their current form within 24 months of their original sunset date.

More information

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

The NDIS Rules 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 from Treasury about the instruments to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting— National Disability Insurance Scheme Instruments) Certificate (No. 2) 2023* (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 Certificate

The 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 instruments specified in the Certificate are (together, the ‘NDIS Rules’):

- a) *National Disability Insurance Scheme—Risk Management Rules 2013*; and
- b) *National Disability Insurance Scheme—Rules for the Scheme Actuary 2013*.

The NDIS Rules are expected to be repealed and replaced within 24 months of their scheduled sunseting day as part of a comprehensive review of the design, operation and sustainability of the NDIS and in the context of implementation of the NDIS Financial Sustainability Framework.

The Certificate allows the NDIS Rules 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 the instruments which would have a limited duration prior to their expected repeal and replacement, or where circumstances prevent the making of replacement instruments 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.

The NDIS Rules do not engage any human rights or freedoms recognised or declared by the international instruments in section 3 of the Human Rights Act. This is evidenced by the explanatory statements published when the instruments were made.

Before issuing the Certificate, the Attorney-General was satisfied that the NDIS Rules 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 NDIS Rules in their current form for a short period of time before they are 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 remade NDIS Rules will be assessed at the time they are made, including through the requirement to prepare a 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 section provides that the Certificate is named the *Legislation (Deferral of Sunsetting— National Disability Insurance Scheme Instruments) Certificate (No. 2) 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 2025:

- a) the *National Disability Insurance Scheme—Risk Management Rules 2013*; and
- b) the *National Disability Insurance Scheme—Rules for the Scheme Actuary 2013*.

Section 5 Repeal of the instrument

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