

***Legislation (Deferral of Sunsetting—Broadcasting Instruments) Certificate
2024***

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Broadcasting Instruments) Certificate 2024* (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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 sunseting day.

The Certificate defers the sunseting date of the following instruments by 12 months from 1 April 2024 to 1 April 2025 (together, the ‘Broadcasting Instruments’):

- a) *Australian Broadcasting Corporation (Definition of senior political staff member) Instrument 2014* (the Senior Political Staff Member Definition Instrument)
- b) *Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013* (the ABC Selection Criteria Determination)
- c) *Special Broadcasting Service Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013* (the SBS Selection Criteria Determination).

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 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 Broadcasting Instruments are expected to be remade within 12 months of the sunseting date as a result of two government reviews into government board appointments processes.

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 Senior Political Staff Member Definition Instrument and the ABC Selection Criteria Determination are made under the *Australian Broadcasting Corporation Act 1983* (ABC Act). The SBS Selection Criteria Determination is made under the *Special Broadcasting Service Act 1991* (SBS Act).

The ABC Act and SBS Act establish the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) boards, respectively. The Acts also provide for the membership and process for making appointments to those boards.

On 5 February 2023, the Australian Government announced that Ms Lynelle Briggs AO would undertake a Review of Public Sector Board Appointments Processes (Briggs Review). Additionally, on 20 July 2023, the Minister for Communications, the Hon Michelle Rowland MP, announced the opening of consultation by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department) to review options to support the independence of the national broadcasters (the Independence Review). This review involves a public and targeted consultation process with key stakeholders within government. Both reviews consider government board appointments including those on the ABC and SBS board. The recommendations in the final report of the Briggs Review and the recommendations of the Independence Review are expected to be considered by Government in 2024. It is anticipated that any new arrangements for ABC and SBS board appointments will be considered through the Briggs Review and the Independence Review.

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 instruments 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 department to undertake a thematic fitness-for-purpose review of the instruments and implement those findings, as well as the findings arising from the Briggs Review and Independence Review, and will avoid the need to remake the Broadcasting 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 Broadcasting 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.

The rule-maker for the Broadcasting Instruments, the Minister for Communications, the Hon Michelle Rowland MP, provided a written application to the Attorney-General seeking a certificate of deferral of sunseting for the Broadcasting Instruments. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Broadcasting 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 Broadcasting Instruments by 12 months to 1 April 2025 to enable the Department of Infrastructure, Transport, Regional Development, Communications and the Arts to undertake a thematic fitness-for-purpose review of the Broadcasting Instruments and implement those findings.

The ABC Act and SBS Act establish the ABC and SBS boards, as well as the membership and process for making appointments to those boards. Both the ABC and SBS Acts include Chair and other non-executive Directors as members of the ABC and SBS boards, respectively.

Paragraph 12(5A)(c) of the ABC Act and paragraph 17(2A)(c) of the SBS Act provide that a person who is or was a senior political staff member is not eligible for appointment as a Chair or other non-executive Director. Subsection 3(3) of the ABC Act states the Minister may, by legislative instrument, specify a class of persons for the purposes of the definition of ‘senior political staff member’ in subsection 3(1). The Senior Political Staff Member Definition Instrument defines a ‘senior political staff member’ by specifying classes of persons for the purpose of the definition of ‘senior political staff member’ in subsection 3(1) of the ABC Act.

The ABC Act and SBS Act also provide that the Governor-General makes Chair and other non-executive appointments to the boards, following recommendations by the Minister, or Prime Minister for the ABC Chair. The Minister, or Prime Minister, makes recommendations following a merit-based selection process undertaken by the Nomination Panel (the Panel). As part of the process, the Panel must assess applicants against selection criteria established by the Minister. Subsection 24W(1) of the ABC Act and subsection 43A(1) of the SBS Act require the Minister to determine the selection criteria by legislative instrument. The ABC Selection Criteria Determination and the SBS Selection Criteria Determination outline the required skills and experience for government appointments to the respective boards.

On 5 February 2023, the Australian Government announced that Ms Lynelle Briggs AO would conduct a Review of Public Sector Board Appointments Processes, known as the Briggs Review. Additionally, on 20 July 2023, it was announced that the department would review options to support the independence of the national broadcasters, known as the Independence Review. Both reviews consider government board appointments processes, including ABC and SBS board appointments, and it is anticipated any new arrangements for ABC and SBS board appointments will be examined through these reviews. A 12-month deferral of the sunseting day for the Broadcasting Instruments will avoid the need to remake the instruments in their current form for the short period of time before they are repealed and replaced with instruments reflecting any government decisions arising from the reviews. Further, it will allow sufficient time for the department to undertake a thematic fitness-for-purpose review of the instruments, and implement those findings.

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

More information

Further details on the provisions of the Certificate are provided in Attachment A.

The Broadcasting 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 from the Department of Infrastructure, Transport, Regional Development, Communications and the Arts about the 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—Broadcasting Instruments) Certificate 2024*. 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 sunsetting

This section provides that the following instruments, for which the sunseting day is 1 April 2024, are repealed by section 51 of the *Legislation Act 2003* on 1 April 2025:

- a) the *Australian Broadcasting Corporation (Definition of senior political staff member) Instrument 2014*
- b) the *Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013*
- c) the *Special Broadcasting Service Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013*.

Section 5 Repeal of the instrument

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