

Legislation (Deferral of Sunsetting—Environment Protection and Biodiversity Conservation Regulations) 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—Environment Protection and Biodiversity Conservation Regulations) Certificate 2024* (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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 after the day on which 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 *Environment Protection and Biodiversity Conservation Regulations 2000* ('EPBC Regulations') by 24 months from 1 April 2024 to 1 April 2026.

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 EPBC Regulations are expected to be remade within 24 months of the sunseting date as a result of a recent thematic review, which occurred alongside a statutory review of the Instrument's enabling legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). If the Certificate were to be disallowed, there would not be enough time for comprehensive changes to Commonwealth environmental laws and the EPBC Regulations through the proposed Nature Positive reforms to occur in response to the review outcomes prior to the sunseting day.

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 EPBC Regulations is a legislative instrument which, amongst other regulatory measures, gives effect to provisions of the EPBC Act dealing with environmental assessment and approvals, conservation of biodiversity and management of protected areas, such as world, Commonwealth and national heritage places and Commonwealth reserves.

The Department of Climate Change, Energy, the Environment and Water (the Department) is reviewing and considering the remaking of the Instrument as part of broader reforms to environmental

legislation. This is a significant and complex area of work requiring a lengthy review and consultation.

The Department has undertaken a series of rolling consultations since October 2023 on the detailed policy settings and draft legislation underpinning the proposed new Nature Positive laws. Consultation on new subordinate legislation, including new National Environmental Standards, will start with planned introduction of the primary legislation in 2024. Stakeholder consultation on subordinate legislation will be of particular importance to the success of these reforms.

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 instrument 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 Department to remake the EPBC Regulations aligned with new environmental legislation reforms, avoiding the need to remake the EPBC Regulations in their current form for the short period of time before being repealed and a replacement instrument made. As such, given that deferral of the sunseting date of the EPBC Regulations 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 issue of the certificate.

The rule-maker for the EPBC Regulations, the Minister for the Environment and Water, the Hon Tanya Plibersek MP, provided a written application to the Attorney-General seeking a certificate of deferral of sunsetting for the Instrument. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the EPBC Regulations 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 sunsetting 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 sunsetting date of the EPBC Regulations by 24 months to 1 April 2026 to enable the Department to progress changes to the EPBC Act and the EPBC Regulations in response to a thematic review and broader strategic reform.

The EPBC Regulations is a legislative instrument which, amongst other regulatory measures, gives effect to provisions of the EPBC Act dealing with environmental assessment and approvals, conservation of biodiversity and management of protected areas, such as world, Commonwealth and national heritage places and Commonwealth reserves. The Instrument's original sunsetting date of 1 October 2018 was previously aligned to 1 April 2024 by the *Legislation (Environment Protection Instruments) Sunset-altering Declaration 2018* for the purposes of undertaking a thematic review. The thematic review was undertaken in 2019. The then Attorney-General, the Hon Christian Porter MP approved an alignment of the Instrument on the basis that the outcomes of the EPBC Act statutory review may have implications for the direction and necessity of the EPBC Regulations.

The Department is progressing comprehensive changes to Commonwealth environment legislation as a result of the review. In October 2020, Professor Graeme Samuel AC submitted his independent review into the EPBC Act. In December 2022, the Department released the Nature Positive Plan, the response to the independent review, and government's commitment to reforming Australia's environmental laws. A deferral of sunsetting of the EPBC Regulations is required to ensure that the reforms are accurately reflected within the replacement instrument and to avoid remaking the EPBC

Regulations in their current form before being repealed and replaced within a short period of time. A deferral ensures that the existing EPBC Regulations remain in place while the Department reviews and considers the Instrument's remaking as part of broader environment law reform.

Accordingly, the EPBC Regulations 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 EPBC Regulations 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 Climate Change, Energy, the Environment and Water about the Instrument to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation Deferral of Sunsetting—Environment Protection and Biodiversity Conservation Regulations) Certificate 2024* (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 sunset date 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 sunset date. The Instrument specified in the Certificate is the *Environment Protection and Biodiversity Conservation Regulations 2000* (the EPBC Regulations).

The EPBC Regulations are expected to be repealed and replaced within 24 months of their scheduled sunset date once the replacement instrument is made, reflecting reforms progressed through the proposed Nature Positive laws.

The Certificate allows the EPBC Regulations to continue to be in force for a further, but limited, period of time after the day on which they would otherwise sunset. This removes the administrative burden of remaking the Instrument which would have a limited duration prior to their expected repeal and replacement, or where circumstances prevent the making of a replacement instrument prior to the sunset day.

Human Rights Implications

A certificate of deferral of sunset extends the operation of the instrument but does not change or affect the rights engaged under the original instrument.

The EPBC Regulations do not engage any human rights and freedoms recognised or declared by the international instruments in section 3 of the Human Rights Act. The EPBC Regulations focus on regulatory and machinery aspects of biodiversity conservation and management of protected areas. Accordingly, it does not directly engage with human rights, environmental or otherwise.

Before issuing the Certificate, the Attorney-General was satisfied that the EPBC Regulations would, apart from the operation of the sunset provisions, cease to be in force within 24 months of their sunset date. Issuing a certificate of deferral therefore avoids the need to replace the Instrument 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 any new instrument replacing the EPBC Regulations 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—Environment Protection and Biodiversity Conservation Regulations) 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 *Environment Protection and Biodiversity Conservation Regulations 2000*, for which the sunseting day is 1 April 2024, are repealed by section 51 of the *Legislation Act 2003* on 1 April 2026.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 April 2026.