

Legislation (Deferral of Sunsetting—Woomera Prohibited Area Rule)
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—Woomera Prohibited Area Rule) 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 subject 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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 sunsetting day.

The Certificate defers the sunseting date of the *Woomera Prohibited Area Rule 2014* (the Rule) by 24 months from 1 October 2024 to 1 October 2026, at which time the Rule is repealed.

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 Rule is expected to be remade within 24 months of the sunseting date as a result of a targeted review of the Rule to be undertaken by the Department of Defence (Defence). The Review will be informed by targeted consultation, and the Government's response to the Defence Strategic Review 2023 (released on 24 April 2023). If the Certificate were to be disallowed, there would not be enough time to undertake this targeted review and remake the instrument 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 Rule is made under Part VIB of the *Defence Act 1903* (Defence Act) and regulates third party access to the Woomera Prohibited Area (WPA). The Rule provides for Defence's power to grant access permits, declare exclusion periods for Defence testing and evaluation of military systems, and issue penalties. The Rule applies to a range of users seeking access permits for: resource production (mining) and resource exploration; opal mining and precious stone prospecting; tourism; and research, environmental and other activities.

Defence has undertaken specific consultation on the Certificate, including with the WPA Advisory Board in 2023. The WPA Advisory Board is the primary governance body for the WPA coexistence framework. It is led by an independent Chair and Deputy Chair who are supported by stakeholder Commonwealth and South Australian government agencies.

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 Defence to conduct the review and will avoid the need to remake the Rule in its current form for the short period of time before it is repealed and a replacement instrument is made. As such, given that deferral of the sunseting date of the Rule 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 the 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 responsible rule-makers for the Rule, the Hon Richard Marles MP, Deputy Prime Minister and Minister for Defence, and the Hon Madeleine King MP, Minister for Resources and Minister for Northern Australia, provided a written application to the Attorney-General seeking a certificate of deferral of sunseting for the Rule. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Rule 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 its sunset 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 sunset date of the Rule by 24 months to 1 October 2026 to enable Defence to conduct a targeted review ahead of re-making the Rule.

The Rule is made pursuant to Part VIB of the Defence Act and regulates third party access to the Woomera Prohibited Area (WPA). The Rule provides for Defence's power to grant access permits, declare exclusion periods for Defence testing and evaluation of military systems, and issue penalties. The Rule applies to a range of users seeking access permits for: resource production (mining) and resource exploration; opal mining and precious stone prospecting; tourism; and research, environmental and other activities.

The Rule is a legislative instrument that requires review at least every ten years to determine whether it remains fit for purpose. If the Rule sunsets, without being remade, Defence would no longer be able to maintain primacy of use of the WPA. Defence could not exclude third party users and the area would cease to function as a 'prohibited area' for capability testing.

Defence is preparing for a targeted review of the Rule to develop a replacement instrument that is fit for purpose. The effectiveness of the instrument is dependent on Defence maintaining its primacy of use under a coexisting arrangement with third party users. The Rule governing the WPA is required to be contemporary to match Defence's capability intent and respond to the dynamic strategic environment. Key inputs to inform the Rule review include: targeted consultation; and the Government's response to the Defence Strategic Review 2023 (released on 24 April 2023).

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

More information

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

The Rule, which is subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, is 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 Defence about the Instrument to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting—Woomera Prohibited Area Rule) 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 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 Certificate defers the sunseting date of the *Woomera Prohibited Area Rule 2014* (the Rule) by 24 months from 1 October 2024 to 1 October 2026.

The Rule is expected to be repealed and replaced within 24 months of its scheduled sunseting day following a targeted review of the Rule.

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

Human Rights Implications

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

The Rule engages the following rights and freedoms declared by the international instruments set out in section 3 of the *Human Rights Act*:

- Freedom of movement in Article 12 of the International Covenant on Civil and Political Rights (ICCPR)

- Right to work in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- Right to enjoy one's own culture in Article 27 of ICCPR and Article 15 of the ICESCR.

Freedom of Movement in Article 12 of the ICCPR

The Rule engages the right to freedom of movement in Article 12 of the ICCPR by providing for exclusion zones along with the various required permits that may be subject to conditions, cancelled or suspended. The establishment of the Woomera Prohibited Area (WPA), its exclusion zones and exclusion periods place restrictions on who may enter the WPA and in some circumstances may require evacuation of a specific zone for a set period of time. During exclusion windows, those with permission to be within the WPA may not be allowed within a zone.

The WPA is used by Defence for activities relating to the defence of Australia, the conduct of which could endanger human life should people be in the area while a defence-related activity is taking place. Therefore, it is reasonable, necessary and proportionate to limit this right as set out in the Rule in order to achieve the legitimate objective of enabling the Government to carry out activities necessary for maintaining a modern defence force and protecting national security, while also allowing non-Defence users to safely access the WPA to take full advantage of the economic benefits it contains.

While the right to freedom of movement may also be limited where there is a threat to safety or security, people affected by a decision relating to the issue, renewal, conditions suspension or cancellation of a permit may make an application to the Minister for internal review or apply to the Administrative Appeals Tribunal. The right of review ensures that the limitation on the right of freedom of movement is only limited to the extent necessary to allow the conduct of defence activities in a safe and secure manner.

Right to work in Article 6 of the ICESCR

Parts 3 and 4 of the Rule engage the right to work in Article 6 of the ICESCR by allowing the Minister to refuse to grant permission for a person access the WPA, thereby preventing a person from obtaining employment that requires access to this area.

In addition, the exclusion periods provided for in section 8, and determined by the Minister by legislative instrument will limit access to parts of the WPA during specified periods. These exclusion periods will limit the times in which a person may attend work or the periods in which a body corporate may conduct business activities.

The limitations on the right to work set out in the Rule are reasonable and necessary to allow a prohibited area to be used for non-defence purposes while maintaining the security of defence activities and the safety of all users, in that the restrictions on access to the WPA are only for periods set out in a legislative instrument and are carried out in a manner which will maximise access to the area when it is not being used for the testing of war materiel. Any limitation caused by a person not meeting the requirements for a permission or permit or subject to cancellation or suspension, is subject to internal review or application to the Administrative Appeals Tribunal for review of this decision.

The right to enjoy one's own culture in Article 27 of ICCPR and Article 15 of ICESCR

The rule promotes the right to enjoy one's own culture in Article 27 of the ICCPR and Article 15 of the ICESCR by not infringing on the ability of Indigenous people to access their traditional lands in the WPA. Section 72TB of the Defence Act clarifies the pre-existing rights under the *Defence Force Regulations 1952* for specified Indigenous people; or someone employed, engaged by, or acting for, or on behalf of those people; or someone accompanied by those people, to continue to access their traditional lands in the WPA. Additionally, all new non-Defence users of the WPA must comply with all relevant laws, including those related to Indigenous land and sites, as a condition of access.

Before issuing the Certificate, the Attorney-General was satisfied that the Rule would, apart from the operation of the sunset provisions, cease to be in force within 24 months of its 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 the remade Rule will be assessed at the time it is 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 any limitations on human rights are reasonable, necessary and proportionate. 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—Woomera Prohibited Area Rule) 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 sunseting

This section provides that the *Woomera Prohibited Area Rule 2014*, for which the sunseting day is 1 October 2024, is repealed by section 51 of the *Legislation Act 2003* on 1 October 2026.

Section 5 Repeal of the instrument

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