

2010 - 2011 - 2012

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**LEGISLATIVE INSTRUMENTS AMENDMENT  
(SUNSETTING MEASURES) BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Nicola Roxon MP)

## **LEGISLATIVE INSTRUMENTS AMENDMENT (SUNSETTING MEASURES) BILL 2012**

### **GENERAL OUTLINE**

Under the *Legislative Instruments Act 2003* (LIA), all regulations and other legislative instruments sunset, or cease automatically, after ten years unless action is taken to exempt or preserve them. As set out in section 49 of the LIA, the purpose of sunseting is to ensure that legislative instruments are kept up to date, and only remain in force as long as they are required.

Sunseting is an important mechanism for the Australian Government to pursue clearer laws and reduce red tape. However, the need to review legislative instruments to ensure they are still fit for purpose—and in many cases to remake them after appropriate consultation—may place acute demands on government and on stakeholders, especially businesses subject to regulation under legislative instruments. This issue has been highlighted in a number of recent reports:

- Review of the *Legislative Instruments Act 2003* (2008) by the Legislative Instruments Act Review Committee (Mr Anthony Blunn AO, Mr Ian Govey and Professor John McMillan AO), and
- *Identifying and Evaluating Regulation Reforms* (2011) by the Productivity Commission.

These reports affirm that sunseting is a useful and important process, but recommend action to ensure sunseting delivers the best outcome for government, business and the broader community. To this end, the Bill contains measures to:

- efficiently repeal spent and redundant instruments and provisions up to 10 years earlier than is provided for under the existing sunseting regime
- provide greater certainty about what instruments sunset and when they sunset, and provide staged sunseting dates for older instruments
- enable the Attorney-General to align sunseting dates of related legislative instruments to enable thematic reviews to be conducted, and
- clarify the requirements for explanatory material for instruments, including instruments that are remade following a review.

The Bill leaves unchanged other key elements of the existing sunseting regime, maintaining current arrangements for:

- instruments to sunset when they are approximately 10 years old on either 1 April or 1 October each year, starting on 1 April 2015 (subject to limited exceptions, including the new ‘thematic reviews’ mechanism)
- tabling a list of the instruments due to sunset on any given date 18 months beforehand, from 1 October 2013, and
- the capacity of either House of Parliament to resolve that a legislative instrument is to continue in force, in effect restarting the 10 years until sunseting.

## **FINANCIAL IMPACT STATEMENT**

The amendments in this Bill have no impact on Government revenue.

## **HUMAN RIGHTS STATEMENT OF COMPATIBILITY**

This Bill is compatible with human rights as defined in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**LEGISLATIVE INSTRUMENTS AMENDMENT (SUNSETTING MEASURES)  
BILL 2012**

**NOTES ON CLAUSES**

**Clause 1 – Short title**

Clause 1 provides that when the Bill is enacted, it will be cited as the *Legislative Instruments Amendment (Sunsetting Measures) Act 2012*.

**Clause 2 – Commencement**

This clause provides that the Bill will commence on the day after it receives Royal Assent.

**Clause 3 – Schedule(s)**

This is a formal clause which makes it clear that the Bill will amend and repeal other Acts as set out in the Schedules to the Bill.

## **SCHEDULE 1 – LEGISLATIVE INSTRUMENTS ACT 2003**

### **Part 1 – Repeal of spent instruments and provisions**

The purpose of Part 1 of Schedule 1 is to enable the efficient repeal of spent and redundant instruments and provisions. The Part will:

- automatically repeal new instruments and provisions that are wholly commencing, amending or repealing, and
- allow existing instruments and provisions that are no longer required to be repealed by regulation.

Since the Federal Register of Legislative Instruments (FRLI) commenced on 1 January 2005, thousands of instruments have been registered. More than 40,000 instruments are now in force, but as many as 40% serve no ongoing purpose. Most have become ‘spent’—having achieved their purpose as commencing, amending or repealing instruments.

This Bill will address the situation by automatically repealing new spent instruments and provisions as soon as they are registered and have commenced in full. Repeal will not undo their effects, unless Parliament chooses to disallow an instrument or provision.

This Bill will also make it possible to repeal instruments in bulk if they are or will become redundant. Such instruments will be formally repealed by a regulation made under the LIA, and are subject to disallowance.

#### **Item 1 – Title**

This clause amends the long title of the LIA, reflecting the fact that the Act will now provide additional mechanisms for repeal of redundant legislative instruments other than periodic repeal.

#### **Item 2 – Subsection 3(1)**

This clause removes an unnecessary subsection number in section 3. Section 3 is not divided into subsections.

#### **Item 3 – After paragraph 3(1)(e)**

Existing section 3 sets out the overall object of the LIA, and each paragraph under it corresponds to a particular Part of the LIA. This item inserts a new paragraph into section 3 to correspond with the insertion of the new Part 5A.

#### **Items 4, 5 and 6 – Paragraphs 33(1)(a), After subsection 33(1), Paragraph 33(2)(a)**

Existing section 33 governs when a compilation of an instrument is required to be registered. If retained in its current form, it would require a compilation to be registered whenever a spent provision or commencement provision is automatically repealed by new section 48C or 48D. This requirement would continue to result in spent and redundant instruments being registered in large numbers. This would also contradict a central purpose of this Bill, which is to ‘de-clutter’ FRLI by removing spent legislative instruments from the lists of those currently in force.

Item 4 amends paragraph 33(1)(a) so that a compilation is not mandatory where a legislative instrument is automatically repealed by the new Part 5A.

Item 5 inserts new subsection 33(1A) to allow a compilation repealed by new sections 48C or 48D to be registered at the First Parliamentary Counsel's discretion. The provision refers to First Parliamentary Counsel, rather than the Secretary of the Attorney-General's Department, to reflect that the Parliamentary Counsel and Other Legislation Amendment Bill 2012 transfers responsibility for FRLI to the Office of Parliamentary Counsel.

Item 6 amends paragraph 33(2)(a) to make it clear that the obligations contained in subsection 33(2) — concerning what happens to a compilation affected by a disallowance motion — apply to all decisions made by the First Parliamentary Counsel to require registration of a compilation, regardless of whether this decision was made mandatorily under subsection 33(1) or by discretion under new subsection 33(1A).

#### **Items 7 and 8 – Subsection 34(5) and After subsection 34(5)**

Existing section 34 of the LIA allows the First Parliamentary Counsel to issue notices requiring rule-makers to provide compilations for registration purposes. If a legislative instrument is amended by an Act or another instrument and a notice is issued by the First Parliamentary Counsel, a compilation must be lodged as soon as practicable after the relevant provision of the principal Act or instrument has come into force.

Item 8 inserts a new subsection 35(5A). Items 7 and 8 make it clear that because new sections 48C and 48D enable the automatic repeal of instruments or provisions, compilations made under these sections must be lodged as soon as practicable after the giving of a notice requiring lodgement of a compilation.

#### **Item 9 – Subsection 45(2)**

Existing section 45 states that if the Parliament disallows an instrument or provision that has repealed another instrument or provision, the repealed instrument or provision is revived unless it would have sunsetted.

Item 9 repeals and replaces subsection 45(2) to ensure that failure to table an instrument or disallowance continues to have this 'reviving' effect on repealing instruments, even if a repealing instrument or provision is repealed automatically by proposed section 48A, or 48C (described below).

#### **Item 10 – After Part 5**

Item 10 inserts new Part 5A to facilitate the efficient repeal of legislative instruments and provisions that are no longer required.

### *Division 1 of Part 5A*

New Division 1 of Part 5A automatically repeals spent commencing, amending or repealing instruments and provisions made after the provisions in this Bill commence. Such instruments and provisions have no continuing operation or effect once the relevant repeal, amendment or commencement has taken effect. Automatic repeal will avoid unnecessary waste of resources in individually removing them from the category of legislative instruments currently in force. It also adds to the clarity and accessibility of the law by ensuring the ‘current legislative instruments’ element of FRLI only contains legislative instruments that have ongoing legal effect and relevance.

Other instruments and provisions may, if appropriate, be repealed by a regulation made under new Division 2. In all cases under new Part 5A, repeal will not:

- undo an instrument’s effect (section 7 of the *Acts Interpretation Act 1901* applies)
- remove the requirements to lodge the instrument for registration on FRLI and to table the instrument in each House of Parliament, or
- prevent a House of the Parliament from disallowing the instrument.

Sections 48A and 48B provide for the automatic repeal of entire legislative instruments (if wholly spent). Sections 48C and 48D, on the other hand, provide for the automatic repeal of individual provisions (if wholly spent).

New section 48A repeals amending and repealing legislative instruments as soon as they have been registered and have commenced in full. This section only applies to legislative instruments the legal effect of which is only to amend or repeal other legislative instruments. It does not apply to legislative instruments that contain application, saving or transitional provisions.

New section 48B repeals new commencement instruments, such as commencement Proclamations for Acts or provisions of Acts. Such instruments will be repealed only when they have been registered and have taken effect in full.

New section 48C repeals provisions of an instrument that amend or repeal instruments. This section only applies to provisions that solely amend or repeal other provisions. Such provisions can only be repealed once the provision has commenced, and the instrument containing the provision is registered.

New section 48D repeals provisions of an instrument that commence the instrument, another instrument or an Act (or a provision of an instrument or Act). Repeal of the provision will occur on the day after the provision has both commenced in full and been registered.

### *Division 2 of Part 5A*

New section 48E enables the Governor-General to make regulations that repeal spent or redundant instruments or provisions of instruments. Before the Governor-General makes a regulation under new section 48E, the Attorney-General must be satisfied that the instrument or provision is spent or no longer required.

The purpose of this particular section is to enable the Governor-General to undertake bulk repeals to ensure FRLI is accurate and complete. As identified by the Review of the *Legislative Instruments Act 2003* in 2008, the accuracy of FRLI is dependent on rule makers formally revoking registered instruments. This does not always occur, and has resulted in a large number of instruments continuing to be shown as in force even though they are spent or otherwise redundant. The inclusion of new section 48E will ensure that a ‘housekeeping’ function can be performed for FRLI, similar to that done by the various Statute Law Revision Acts for Acts. This approach was also recommended by the Productivity Commission (recommendation 6.1).

**Item 11 – Subsection 54(2) (table item 48)**

Existing section 54 details a number of instruments that are exempt from sunseting. In subsection 54(2), table item 48 refers to Proclamations that provide solely for the commencement of Acts or provisions of Acts. These Proclamations will be repealed automatically by new section 48B, so the exemption provided by table item 48 is no longer required.



## **Part 2 – Date of sunset**

Part 2 of Schedule 1 to the Bill will provide greater certainty about what instruments sunset and when they sunset, as well as incentives for rule-makers to review instruments thematically. The Part will:

- reset the rules for calculating when instruments sunset to focus on date of registration
- allow a common sunseting date to be established for related instruments, subject to disallowance by the Parliament, and
- make a variety of technical changes to improve the clarity and consistency of language in the provisions of the LIA that relate to sunseting.

Current rules for calculating when instruments and provisions sunset are difficult to apply, particularly for older instruments amended before or just after the LIA came into force.

Current rules will also result in two ‘peaks’ in the volume of instruments sunseting in 2016 and 2018, and then every ten years or so afterwards. The 2011 report *Identifying and Evaluating Regulation Reforms* by the Productivity Commission notes that these peaks increase the risk that instruments will be remade without adequate scrutiny and consultation with business. The Productivity Commission recommended that the LIA be amended to eliminate these peaks (recommendation 4.1).

The Bill remedies this by establishing a new default rule for all instruments—they will now sunset based on their date of registration. Special provision is made for the many older instruments registered in bulk on 1 January 2005—these will sunset over a range of dates based on their year of making, with the oldest instruments sunseting first.

The Bill introduces and encourages thematic reviews of legislative instruments by creating a mechanism to align sunseting dates. This may involve bringing forward some sunseting dates, and pushing others back by up to five years. The ability to conduct thematic reviews will facilitate more efficient and effective review processes, and enable departments and agencies to comprehensively engage with stakeholders prior to the remaking of any instrument. This is consistent with the Productivity Commission recommendation that more flexibility be introduced to the LIA to enable thematic reviews of related instruments (recommendation 4.1).

Section 60 of the LIA provides for independent individuals to conduct a review of the sunseting provisions within 12 years of their commencement, or by 1 October 2017. This review is required to be tabled in both Houses of Parliament. Amendments in Part 2 of this Bill will be encompassed within that review.

### **Item 12 – Subsection 45(3)**

Subsection 45(3) has been amended to simplify the language in the section. There has been no substantive change to the operation of the section. This section continues to operate so that repealed instruments or provisions will not be revived under subsection 45(2) of the LIA (see above at Item 9) if they expire according to the sunseting provisions of Part 6 of the LIA.

### **Item 13 – Section 50**

Section 50 determines when instruments and provisions sunset. Item 13 repeals and replaces this section.

New subsection 50(1) sets out a clear and simple rule for calculating sunset dates. It no longer relies on the date of making, date of commencement or other dates which may not be self-evident. Instead, for instruments registered after 1 January 2005, sunset is determined by date of registration, which is published on FRLI for every instrument.

New subsection 50(2) makes special provision for the many pre-LIA instruments registered in bulk on 1 January 2005. Some 600 of those instruments are still in force, and they include all current Commonwealth regulations made before 2005. Instruments registered on 1 January 2005 will now sunset based on their year of making, with the oldest instruments sunset first.

Extending the sunset date for these older instruments is consistent with the Productivity Commission's recommendation that 'peaks' in volume of sunset be 'softened'. This amendment will reduce the total number of legislative instruments that will expire between 2015 and 2017 by moving their sunset dates the period between April 2015 and April 2020.

New subsection 50(3) explains the relationship between new section 50 and other relevant provisions of the LIA, particularly that an instrument:

- may be repealed before its sunset date in accordance with new Part 5A
- may have its sunset date changed under section 51, new section 51A or section 53, and
- may be permanently exempted from sunset by or under section 54.

### **Items 14, 15, 16 and 17 – Paragraph 51(1)(a), (c) and (d) and Subparagraphs 51(1)(b)(i) and (ii)**

Existing section 51 of the LIA enables the Attorney-General to issue a certificate to defer the sunset date for an instrument or provision for a period of six or 12 months. Items 14, 15 and 16 amend section 51 so that such certificates can only be issued for legislative instruments (and not provisions). These amendments are necessary to ensure consistency with new Part 5A, which now provides for the automatic repeal of amending provisions and instruments.

Item 14 also enables the Attorney-General to grant certificates under section 51 to extend the sunset dates of instruments that have received an extension under the thematic review provisions of new section 51A. Such an extension will be for a maximum of 12 months and will be subject to the strict requirements of section 51, particularly that the application for extension must be available for public scrutiny.

Item 17 simplifies paragraph 51(1)(d) to make it clear that if a certificate is issued by the Attorney-General under section 51, the relevant instrument will expire on the date specified in the certificate, instead of the original sunset date. This clarification does not affect the current operation of paragraph 51(1)(d).

## **Item 18 – After section 51**

Item 18 inserts a new section 51A to enable thematic reviews of instruments.

At present, on application by the rule-maker, the Attorney-General can defer an instrument's sunset date by six or 12 months if exceptional circumstances apply. This involves issuing a certificate under section 51. The certificate must be registered on FRLI but is exempt from disallowance under section 44.

Under the provisions of the Bill, on application by the rule-maker, the Attorney-General can also declare a common sunset date for instruments, by means of a legislative instrument made under new section 51A. This new power—which will be subject to disallowance by the Parliament in every case—is subject to the following conditions:

- the Attorney-General must be satisfied that the instruments are, or will be, subject to a single review, and
- the new sunset date may be earlier than would otherwise apply, but can be no more than five years from the earliest sunset date that currently applies.

The objective of new section 51A is to encourage robust reviews of current legislative instruments to reduce the regulatory burden faced by business and other stakeholders. Thematic reviews will ensure that reviews consider all legislative instruments that govern an industry, allowing for the clear illustration of total regulatory burden. The possible extension of sunset dates by five years to conduct such reviews is consistent with the Productivity Commission's 2011 report *Identifying and Evaluating Regulation Reforms*. The Commission recommended that the LIA be amended to:

provide flexibility and incentives to package related regulations for review, by enabling regulations to extend beyond their sunset date if they are scheduled to be reviewed as part of a package of related regulation within a reasonable period (Recommendation 4.1).

The Commission noted the need for business and other stakeholders to participate in consultation processes, which would be hampered by the large volume of instruments scheduled to sunset in 2015. The introduction of extended sunset dates for legislative instruments by up to five years will ensure that business and other stakeholders are appropriately consulted and engaged prior to the remaking of current legislative instruments.

## **Items 19, 20, 21 and 22 – Subsections 52(1), (2) and (3)**

Items 19, 21 and 22 remove references from sections 52(1) and 52(3) to the sunset of amending instruments and provisions, as these are now dealt with by new Part 5A of the LIA and should no longer be referred to in Part 6.

Item 20 amends subsection 52(1) to change the definition of sunset day by omitting “cease to be in force because of the operation of” and substitute “be repealed by”. The purpose of this amendment is to simplify the language in the subsection. It will have no practical effect on the current operation of the subsection.

### **Item 23 – Section 53**

This item remakes section 53 to clarify what happens if either House of Parliament passes a resolution for an instrument to continue in force.

New subsection 53(1) continues to allow either House of Parliament to resolve that an instrument should continue in force even if it is scheduled to sunset under section 50, 51 or 51A of the LIA. In order for such a resolution to be made, the instrument must be mentioned in a section 51 certificate that is tabled in Parliament, or be contained in a list of sunseting legislation tabled in Parliament under section 52 of the LIA within the six months prior to the resolution.

Existing subsection 53(2) states that if a resolution is passed for an instrument, the instrument continues in force as if it had been remade on the day it would otherwise sunset.

The new subsection 53(2) also states that if either House of Parliament passes a resolution, the instrument continues in force as though it were registered on the day on which it would have been repealed. As such, the instrument will not need to be re-registered on FRLI or re-tabled in both Houses of Parliament. This amendment does not reduce substantive accountability since the legislative instrument will inevitably face close scrutiny by the Parliament prior to a resolution being made under section 53.

### **Part 3 - Explanatory statements**

Part 3 of Schedule 1 to the Bill will clarify the requirements concerning explanatory statements to accompany the making of legislative instruments, particularly for instruments that are remade.

As legislative instruments sunset, it will be particularly important to maintain the quality and currency of explanatory material. To this end, the Bill will:

- make the requirements for explanatory statements more prominent, moving them out of the definitions section (subsection 4(1)) and into the substantive provisions of the LIA, and
- clarify that explanatory material can cover more than one instrument both in thematic groupings and when instruments or provisions are remade.

#### **Item 24 – Subsection 4(1) (definition of *explanatory statement*)**

Item 24 replaces the current definition of explanatory statement in existing subsection 4(1) with a cross-referencing definition that refers to the new subsection 26(1A). The new subsection 26(1A) will now contain all of the substantive requirements for explanatory statements.

The definition is cited in a note to section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, so a consequential amendment to that Act is required. This amendment is set out in Schedule 2 to the Bill.

#### **Item 25 – Note to subsection 17(3)**

Item 25 clarifies that an explanatory statement can apply to more than one instrument. It will replace the note to subsection 17(3) to reflect that the definition of explanatory statements is now located in new subsection 26(1A).

#### **Item 26 – After subsection 26(1)**

Section 26 currently provides that, if a rule-maker lodges an instrument for registration on FRLI, the rule-maker must also lodge an explanatory statement for registration that relates to that instrument.

New subsection 26(1A) provides a list of the general requirements for explanatory statements. These requirements were formerly located in the definitions section of the LIA in section 4(1), and in section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. When drafting legislative instruments, regulators should continue to consult enabling legislation for requirements that may be unique to particular types of instruments.

New subsection 26(1B) states that a new explanatory statement is not required when an instrument or provision is substantially the same as an existing instrument or provision. In such a situation, the information in the existing explanatory statement can be relied upon. New subsection 26(1C) states that a rule-maker can, at their discretion, provide an explanatory statement for new instruments and provisions.

New subsection 26(1D) states that a single explanatory statement can cover multiple instruments. This is designed to promote more efficient and reader-friendly explanatory statements, for example to more clearly explain the effect of a group of related instruments.

The adequacy of explanatory statements of legislative instruments tabled in Parliament will still be subject to review by the Senate Standing Committee on Regulations and Ordinances.

## **Part 4—Repeal of section 15**

### **Item 27 – Section 15**

Existing section 15 outlines what happens when a legislative instrument is repealed. Section 7 of the *Acts Interpretation Act 1901* outlines what happens when Acts of Parliament and other instruments are repealed.

Item 27 repeals section 15 to ensure that the repeal of legislative instruments is covered by section 7 of the *Acts Interpretation Act 1901*. Thus, these interpretive rules will now automatically apply to Acts, legislative instruments and non-legislative instruments.

**SCHEDULE 2 – HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT  
2011**

**Item 1 – Note to subsection 9(1)**

Item 1 amends the note to refer to the new subsection 26(1A), inserted by this Bill. The definition of ‘explanatory statement’ will now be in subsection 26(1A) not section 4, so this amendment updates the cross-reference to that definition in the note to subsection 9(1) of the Human Rights (Parliamentary Scrutiny) Act 2011, to reflect this.