

***Legislation (Deferral of Sunsetting—Australian Broadcasting Corporation
Regulation) Certificate 2023***

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Australian Broadcasting Corporation Regulation) Certificate 2023* (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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 *Australian Broadcasting Corporation (Election of Staff-elected Director) Regulation 2012* (the Regulation) by 12 months from 1 April 2023 to 1 April 2024.

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 instrument 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 Regulation is expected to be remade within 12 months of the current sunseting date as a result of a review by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts into whether the Regulation remains fit-for-purpose. If this Certificate were to be disallowed, there would not be enough time to thoroughly review and remake the Regulation, should the review confirm this to be the preferred option, 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 Regulation is made under subsection 83(1) of the *Australian Broadcasting Corporation Act 1983* (ABC Act) which provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Section 12 of the ABC Act provides that the ABC Board

includes a staff-elected Director, and subsection 13A(1) of the ABC Act provides that the staff-elected Director of the ABC Board must be elected in accordance with the Regulation. The Regulation prescribes how the staff-elected Director is to be elected to the Australian Broadcasting Corporation (ABC) Board. The Regulation covers matters such as the notification and method of election, including that the Australian Electoral Commission (AEC) conducts the election unless it otherwise advises; the role of the returning officer; the roll of voters; candidate nominations; candidate statements; issuing and receiving ballots; scrutineering; and the determination of results and disputes.

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts consulted with the ABC and AEC as affected agencies in its current review of whether the Regulation remains fit-for-purpose, with initial findings indicating that the instrument may need to be remade with some changes.

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 Regulation 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 Regulation.

A 12 month deferral will allow sufficient time for a comprehensive review to be conducted, and resulting implementation of its findings, and will avoid the need to remake the Regulation in its current form for the short period of time before it is repealed and a possible replacement Regulation is made. As such, given that deferral of the sunseting date of the Regulation 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 Regulation, 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 Regulation. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Regulation 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 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 Regulation to 1 April 2024 to enable the Department of Infrastructure, Transport, Regional Development, Communications and the Arts to undertake a comprehensive review into whether the Regulation remains fit-for-purpose. The deferral of the sunseting date will facilitate both the efficient undertaking of the review and the implementation of its findings. Accordingly, the Regulation will likely cease to be in force in its current form within 24 months of its original sunseting date.

A 12 month deferral will also allow the election of the next ABC staff-elected Director to be finalised. The next ABC staff-elected Director vacancy arises on 1 May 2023, and the related election process will likely be underway when the Regulation is due to sunset. The deferral will allow for the election to be finalised without disruption and avoid the need to remake the Regulation in its current form for a short period of time, before it is repealed and a replacement instrument made. Additionally, it will minimise the possibility of an ABC staff-elected Director election (five-year cycle) and related regulation sunseting date (10-year cycle) aligning again, thereby avoiding this issue in the future.

More information

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

The Regulation 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 Infrastructure, Transport, Regional Development, Communications and the Arts about the Regulation 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—Australian Broadcasting Corporation Regulation) Certificate 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 *Australian Broadcasting Corporation (Election of Staff-elected Director) Regulation 2012*, for which the sunseting day is 1 April 2023, is repealed by section 51 of the *Legislation Act 2003* on 1 April 2024.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 April 2024.