

LEGISLATION (EXEMPTIONS AND OTHER MATTERS) AMENDMENT
(2019 MEASURES NO. 2) REGULATIONS 2019

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Legislation Act 2003* (Legislation Act) establishes a comprehensive regime for the publication of Commonwealth Acts and instruments. It also provides for the registration, tabling, parliamentary scrutiny, disallowance and sunseting of instruments.

Section 62 of the Legislation Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to that Act.

Part 4 of Chapter 3 of the Legislation Act provides for the sunseting of legislative instruments. Sunseting is the process by which instruments are automatically repealed approximately 10 years after they are made unless steps are taken to preserve their operation, or the instruments are exempt from sunseting.

Section 54 of the Legislation Act provides for instruments to which the sunseting regime in Part 4 of Chapter 3 does not apply. Subsection 54(2) of the Legislation Act provides that instruments prescribed by regulation for the purposes of paragraph 54(2)(b) are not subject to sunseting.

The *Legislation (Exemptions and Other Matters) Regulation 2015* (Principal Regulations) prescribes classes of instruments (at section 11) and particular instruments (at section 12) that are exempt from sunseting under paragraph 54(2)(b) of the Legislation Act.

The purpose of the *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 2) Regulations 2019* (Amendment Regulations) is to prescribe additional instruments to be exempt from sunseting under section 12 of the Principal Regulations. These additional instruments are made under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Aboriginal Land Grant Act) and *Gene Technology Act 2000* (Gene Technology Act).

The Legislation Act does not specify any conditions that must be fulfilled before the power to grant exemptions may be exercised. However, there are established criteria against which the Attorney-General considers all applications to exempt an instrument or class of instruments from sunseting. Relevant to the proposed amendments are the criteria that:

- a) the instrument is designed to be enduring and not subject to regular review, or
- b) the instrument is part of an intergovernmental scheme.

These criteria are consistent with the purpose of sunseting, which is to ensure that legislative instruments are kept up to date and continue to be fit-for-purpose.

Each new sunseting exemption in Schedule 1 to the Amendment Regulations was found to be justified when analysed against the above criteria.

An instrument made under section 9A of the Aboriginal Land Grant Act has the effect of declaring land within the Booderee National Park, in the Jervis Bay Territory, as Aboriginal Land. Section 10 of the Aboriginal Land Grant Act relevantly provides that where land is declared to be Aboriginal Land under section 9A it is vested in the Wreck Bay Aboriginal Community Council (WBACC) established by section 4 of that Act. Declarations made under section 9A of the Aboriginal Land Grant Act are designed to be enduring and not subject to regular review. It is appropriate to provide a specific exemption to provide certainty for the status of legislative instruments made under section 9A.

Item 31A of section 12 of the Principal Regulations provides an exemption for specific instruments under the Gene Technology Act. The Amendment Regulations will amend item 31A to provide an exemption for all instruments made under the Gene Technology Act as it was found that all instruments made under the Gene Technology Act are part of an intergovernmental scheme. The National Gene Technology Scheme involves the Commonwealth and all state and territory governments. It is appropriate to provide specific exemptions in the Amendment Regulations to provide legal certainty for the status of the instruments and to provide an accessible source of information about these exemptions for users of the legislation.

CONSULTATION

Before the Amendment Regulations were made, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Minister for Indigenous Australians, who has responsibility for declarations made under the Aboriginal Land Grant Act, wrote to the Attorney-General requesting that the exemption of declarations under section 9A of the Aboriginal Land Grant Act be made. The Minister for Aged Care and Senior Australians, Youth and Sport, who has responsibility for the specific instruments made under the Gene Technology Act, also wrote to the Attorney-General requesting that the exemptions of instruments made under the Gene Technology Act be made.

The National Indigenous Australians Agency, the WBACC and the Department of Health were consulted on, and support, the exemptions included in the Amendment Regulations.

REGULATION IMPACT STATEMENT

Amendments to the Principal Regulations are regarded as machinery changes. Where the Attorney-General has provided policy approval for the amendments, the Office of Best Practice Regulation (OBPR) does not require further assessment or approval under the Regulatory Impact Assessment process. This standing exemption has been confirmed by the OBPR under OBPR reference 17635.

OTHER DETAILS

Details of the Amendment Regulations are set out in [Attachment A](#).

A Statement of Compatibility under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at [Attachment B](#).

The Legislation Act specifies no conditions that need to be satisfied before the power to make the Amendment Regulations may be exercised.

The Amendment Regulations are a legislative instrument for the purposes of the Legislation Act and are subject to the disallowance provisions of that Act.

The Amendment Regulations commence on the day after their registration.

Details of the *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 2) Regulations 2019*

Section 1 Name

This section provides that the instrument is named the *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 2) Regulations 2019* (Amendment Regulations). The instrument may be cited by that name.

Section 2 Commencement

This section provides for the instrument to commence on the day after it is registered.

Section 3 Authority

This section provides that the instrument is made under the *Legislation Act 2003* (Legislation Act).

Section 4 Schedules

This section gives effect to the amendments in the Schedule to the instrument, according to their terms.

Schedule 1 Amendments

Item 1: Section 12 (table item 2)

For the purposes of paragraph 54(2)(b) of the Legislation Act, section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (Principal Regulations) provides that instruments contained in the table to that section are not subject to sunseting. Item 1 of Schedule 1 to the Amendment Regulations retains the existing exemption from sunseting for instruments made under section 8 or 9 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Aboriginal Land Grant Act), and provides a new exemption for declarations made under section 9A of that Act.

Similar instruments made under section 8 or 9 of the Aboriginal Land Grant Act are not subject to sunseting pursuant to section 12 of the Principal Regulations. Section 9A was not included in the initial exemption, alongside sections 8 and 9, due to an administrative oversight. As such, item 1 will provide consistency between instruments and correct the earlier omission.

Under subsection 2(1) of the Aboriginal Land Grant Act, ‘*Aboriginal Land* means land that is Aboriginal Land because of a declaration under Part III.’ The term ‘Aboriginal Land’ should continue to apply to registered Aboriginal Land for the purposes of the Aboriginal Land Grant Act and other instruments. Declarations of Aboriginal Land, when vested in the Wreck Bay Aboriginal Community Council (WBACC) and registered, become permanent fixtures unless the WBACC takes action to divest the land.

If declarations were to sunset without replacement or other action to extend the duration of their validity, land previously covered by the declarations would no longer be Aboriginal Land for the purposes of the Aboriginal Land Grant Act. This would affect the operation of a number of substantive provisions under the Aboriginal Land Grant Act.

Further, if declarations were required to be reviewed and replacement instruments made every 10 years due to their scheduled sunset, the instruments would simply be replaced in their existing form in order to maintain the classification of 'Aboriginal Land' to the declared land. This would increase the regulatory burden on the WBACC and affected agencies.

As such, item 1 exempts declarations made under section 9A of the Aboriginal Land Grant Act from the sunset regime to reflect their enduring nature and the fact that it is not necessary to subject them to regular review.

Item 2: Section 12 (table item 31A)

For the purposes of paragraph 54(2)(b) of the Legislation Act, section 12 of the Principal Regulations provides that instruments contained in the table to that section are not subject to sunset. Item 2 of Schedule 1 to the Amendment Regulations repeals table item 31A at section 12 and inserts new item 31A.

Instruments made under the *Gene Technology Act 2000* (Gene Technology Act), including the *Gene Technology Regulations 2001* and *Guidelines for the Transport, Storage and Disposal of GMOs*, are essential components of the National Gene Technology Scheme (Scheme). The Gene Technology Act's objective is to protect the health and safety of people, and to protect the environment, by identifying risks posed by or as a result of gene technology, and to manage those risks through regulating certain dealings with genetically modified organisms (GMO). The Scheme is established through the intergovernmental Gene Technology Agreement (GTA) to which all states and territories are signatories. The GTA and Scheme provides nationally consistent mechanisms for the regulation of gene technology.

The existing item 31A provides that an instrument made under subsection 21(1) of the Gene Technology Act and a determination made under subsection 78(1) of that Act are exempt from sunset. The new table item 31A broadens this exemption to all instruments made under the Gene Technology Act. This broadened exemption is appropriate as all instruments made under that Act are essential components of the intergovernmental scheme.

Additionally, the Scheme, including the gene technology legislation, is reviewed more frequently than stipulated by the sunset provisions of the Legislation Act. The most recent review, the Third Review of the National Gene Technology Scheme (Third Review), was finalised in October 2018. The Third Review's Terms of Reference sought to, among other things, investigate the gene technology legislation to ensure the current legislative arrangements were appropriate to meet the needs of the Scheme now and into the future.

Sunsetting of instruments made under the Gene Technology Act could give rise to uncertainty and inconsistencies within the Scheme. As such, item 2 exempts such instruments on the basis that they are part of an intergovernmental scheme.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 2) Regulations 2019

The *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 2) Regulations 2019* (Amendment Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The *Legislation Act 2003* (Legislation Act) establishes a comprehensive regime for the publication of Commonwealth Acts and instruments and provides for the sunseting of legislative instruments. Sunseting is the process by which instruments are automatically repealed approximately 10 years after they are made unless steps are taken to preserve their operation or the instruments are exempt from sunseting.

The Amendment Regulations are made under section 62 of the Legislation Act and amend the *Legislation (Exemptions and Other Matters) Regulation 2015* (Principal Regulations) to prescribe additional instruments made under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Aboriginal Land Grant Act) and *Gene Technology Act 2000* (Gene Technology Act) to be exempt from sunseting, pursuant to paragraph 54(2)(b) of the Legislation Act.

The instruments that are exempted from sunseting by the Amendment Regulations are:

1. a declaration made under section 9A of the Aboriginal Land Grant Act
2. an instrument made under the Gene Technology Act

Human Rights Implications

Each new sunseting exemption made by the Amendment Regulations is in accordance with established policy criteria for the granting of new exemptions. It is appropriate that the instruments should not be subject to the sunseting regime set out in Part 4 of Chapter 3 of the Legislation Act.

The Aboriginal Land Grant Act was made to grant land in the Jervis Bay Territory to the Wreck Bay Aboriginal Community Council (WBACC), among other purposes. The creation of specific exemptions from sunseting for declarations made under section 9A of the Aboriginal Land Grant Act provides certainty to the WBACC that such declarations are enduring and not subject to regular review.

The instruments made under the Gene Technology Act are essential components of the National Gene Technology Scheme (Scheme), which is an intergovernmental arrangement to which all states and territories are signatories. The Scheme is designed to protect the health and safety of people and to protect the environment. The creation of specific exemptions for

instruments made under the Gene Technology Act provides signatories with legal certainty regarding the status of the instruments and prevents inconsistency or uncertainty in the application of the Scheme.

None of the sunseting exemptions made by the Amendment Regulations alter the content of the laws to which those exemptions apply. The sunseting exemptions preserve those laws and ensure they are not automatically repealed pursuant to the sunseting regime set out in the Legislation Act. As such, the Amendment Regulations do not engage any of the applicable rights or freedoms.

Conclusion

The Amendment Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, as they do not engage any of those rights or freedoms.