***Legislation (Deferral of Sunsetting—Recovery Plans) Certificate (No. 2) 2023***

**EXPLANATORY STATEMENT**

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

**INTRODUCTION**

The *Legislation (Deferral of Sunsetting—Recovery Plans) Certificate (No. 2) 2023* (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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 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 sunsetting day.

The Certificate defers the sunsetting date of the following instruments by 24 months from 1 October 2023 to 1 October 2025 (together, the ‘Recovery Plan Instruments’):

1. *Instrument making a recovery plan (made on 11 June 2013)* (Federal Register of Legislation No. F2013L01314) made under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999*; and
2. *Instrument revoking and making a recovery plan (made on 18 July 2013)* (Federal Register of Legislation No. F2013L01506) made under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999*.

The ability to defer sunsetting dates is an integral part of the sunsetting framework. It provides the necessary flexibility to ensure the standard 10‑year sunsetting period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. In this case, new instruments to replace the Recovery Plan Instruments are expected to be made within 24 months of the current sunsetting days as part of strategic conservation planning being undertaken by the Department of Climate Change, Energy, the Environment and Water (the Department).

**PROCESS BEFORE CERTIFICATE WAS MADE**

**Regulatory impact analysis**

Certificates of deferral of sunsetting 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 Recovery Plan Instruments are made under subsection 269A(7) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and both make recovery plans for species listed as ‘Vulnerable’ under the EPBC Act. The *Instrument making a recovery plan (made on 11 June 2013)* (Federal Register of Legislation No. F2013L01314) made under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999* makes a recovery plan for the Australian Sea Lion (Neophoca cinerea) and the *Instrument revoking and making a recovery plan (made on 18 July 2013)* (Federal Register of Legislation No. F2013L01506) made under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999* makes a recovery plan for the White Shark (Carcharodon carcharias).

The Department has worked closely with the independent Commonwealth Threatened Species Scientific Committee to ensure that a statutory conservation document (Recovery Plan and/or Conservation Advice) is in place for every listed species or ecological community that requires one.

The Department’s strategic conservation planning reform is a significant and complex area of work requiring lengthy review and consultation processes. The deferral will allow for further consultation to occur in relation to appropriate conservation planning instruments. The Department will consult with relevant stakeholders to ensure that they are aware of the continued operation of the Recovery Plan Instruments.

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 instruments 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 make new legislative instruments proposed to be made in substitution for the Recovery Plan Instruments, and will avoid the need to remake the Recovery Plan Instruments in their current form for the short period of time before they are repealed and replacement instruments are made. As such, given that deferral of the sunsetting date of the Recovery Plan Instruments is consistent with the policy intent of the sunsetting 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 sunsetting 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:

1. the responsible rule-maker to apply to the Attorney-General in writing, and
2. the Attorney-General to be satisfied that:
	1. the instrument would (apart from the operation of the sunsetting provisions) be likely to cease to be in force within 24 months after its sunsetting day
	2. the proposed replacement instrument will not be able to be completed before the sunsetting day for reasons that the rule-maker could not have foreseen and avoided
	3. the dissolution of 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
	4. the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
3. 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 Recovery Plan Instruments, 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 Recovery Plan Instruments.On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Recovery Plan Instruments 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 Recovery Plan Instruments to 1 October 2025 to enable the existing Recovery Plan Instruments to remain in place for the threatened species covered by the instruments while the Department reviews and considers the instruments’ remaking as part of more strategic conservation planning reform. Due to the intended review and consultation processes, it will not be possible for the instruments proposed to be made in substitution to be completed prior to their current sunsetting date.

The reforms are a significant and complex area of work requiring lengthy review and consultation processes. A 24‑month deferral will ensure that the legislation is not unnecessarily delayed or duplicated. The deferral will avoid the need to remake the Recovery Plan Instruments in their current form for the short period of time before they are to be repealed and replacement instruments made. Accordingly, the Recovery Plan Instruments will likely cease to be in force in their current form within 24 months of their original sunsetting date.

**More information**

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

The Recovery Plan Instruments 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 about the Recovery Plan Instruments to which the Certificate applies.

**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

The *Legislation (Deferral of Sunsetting—Recovery Plans) Certificate (No. 2) 2023* (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 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 originally scheduled sunsetting day. The instruments specified in the Certificate are (together, the ‘Recovery Plan Instruments’):

1. *Instrument making a recovery plan (made on 11 June 2013)* (Federal Register of Legislation No. F2013L01314) made under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999*; and
2. *Instrument revoking and making a recovery plan (made on 18 July 2013)* (Federal Register of Legislation No. F2013L01506) made under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999*.

The Recovery Plan Instruments are expected to be repealed and replaced within 24 months of their scheduled sunsetting day as part of more strategic conservation planning reform. The Certificate allows the Recovery Plan 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 the instruments 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 sunsetting day.

**Human Rights Implications**

A certificate of deferral of sunsetting extends the operation of the instrument but does not change or affect the rights engaged under the original instrument. The Recovery Plan Instruments do not engage any applicable rights or freedoms as the content of the recovery plans pertain to the conservation status of the relevant species or ecological community. Therefore, the Recovery Plan Instruments are to that extent compatible with the human rights and freedoms recognised or declared by the international instruments listed in section 3 of the Human Rights Act.

Before issuing the Certificate, the Attorney-General was satisfied that the Recovery Plan Instruments would, apart from the operation of the sunsetting provisions, cease to be in force within 24 months of their sunsetting date. Issuing a certificate of deferral therefore avoids the need to replace the Recovery Plan Instruments in their current form for a short period of time before they are 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 Recovery Plan Instruments 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.

**ATTACHMENT A**

**NOTES ON THE CERTIFICATE**

**Section 1 Name**

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Recovery Plans) Certificate (No. 2) 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 sunsetting**

This section provides that the following instruments, for which the sunsetting day is 1 October 2023, are repealed by section 51 of the *Legislation Act 2003* on 1 October 2025:

1. *Instrument making a recovery plan (made on 11 June 2013)* (Federal Register of Legislation No. F2013L01314) made under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999*; and
2. *Instrument revoking and making a recovery plan (made on 18 July 2013)* (Federal Register of Legislation No. F2013L01506) made under section 269A of the *Environment Protection and Biodiversity Conservation Act 1999*.

**Section 5 Repeal of the instrument**

This section provides that the Certificate is repealed at the start of 2 October 2025.