

2016

Australian Government
Attorney-General's
Department

Civil Justice Policy and
Programmes Division



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Attorney-General's Department

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Programmes Division**

[Guide to Managing Sunsetting of Legislative Instruments]

This Guide provides information for officers in Australian Government departments and agencies on the sunseting framework for legislative instruments as provided for under the Legislation Act 2003.

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1. Introduction

The purpose of this guide is to provide government agencies and rule-makers with information on the sunseting of legislative instruments under the [Legislation Act 2003](#) (Legislation Act). The guide is intended to assist agencies to make informed choices about managing their sunseting-related activities.

1.1 Structure of this guide

- Chapter 1—Introduction
- Chapter 2—Initial preparation for sunseting
- Chapter 3—Sunsetting basics
- Chapter 4—Thematic reviews and emergency deferral of sunseting dates
- Chapter 5—Review of sunseting instruments
- Chapter 6—Options if an instrument is no longer required
- Chapter 7—Options if an instrument is still required

For the purposes of this guide:

instrument means a legislative instrument as defined by section 8 of the Legislation Act.

rule-maker means any person who is authorised to make a certain type of instrument or, if the rule-maker is the Governor-General, the responsible minister (see section 6(1) of the Legislation Act).

agency means the government department or body responsible for advising a rule-maker on a particular area of law under the current Administrative Arrangements Order.

to sunset means to be repealed in accordance with Part 4 of Chapter 3 of the Legislation Act.

1.2 What is sunseting and why does it matter?

Sunseting provisions in legislation provide that a law is repealed after a specific date unless further legislative action is taken to extend that law. Most jurisdictions in Australia have sunseting regimes. The sunseting regime in the Australian Government context is set out in Part 4 of Chapter 3 of the Legislation Act. This provides for an instrument to sunset 10 years after its registration.

Agencies must plan for sunseting well in advance of an instrument's sunset date, as the process to review (and implement review recommendations) for each instrument can be lengthy (see [\[Chapter 5\]](#) and [\[Chapter 7\]](#)).

Sunseting is an important mechanism for the Australian Government to implement policies to reduce red tape, deliver clearer laws and align existing legislation with current government policy.

1.3 Who is responsible for sunseting?

The primary responsibility for managing the sunseting of a legislative instrument rests with the agency responsible for that instrument. Agencies are also responsible for any costs associated with the sunseting process, including drafting and registration costs related to the sunseting or bulk repeal of instruments within the agency's portfolio.

Agencies are also responsible for calculating the regulatory burden costings and offsets that may result from the repealing or remaking of legislative instruments for which they are responsible. Further guidance on how to calculate regulatory costs is outlined in the [Sunsetting legislative instruments guidance note](#) issued by the Office of Best Practice Regulation (OBPR).

The Attorney-General's Department (AGD), OBPR, the Regulatory Reform Division of the Department of the Prime Minister and Cabinet (PM&C) and the Office of Parliamentary Counsel (OPC) have worked to develop streamlined mechanisms across government to assist agencies and line areas undertaking sunseting work. This guide forms part of that assistance.

1.4 Other resources

This guide should be read in conjunction with the:

- [OPC Instruments Handbook](#)
- [Australian Government Guide to Regulation](#)
- [ANAO Better Practice Guide – Administering Regulation: Achieving the right balance](#)
- [Federal Executive Council Handbook](#)
- [Legal Services Directions](#)
- [OBPR Sunsetting Legislative Instruments Guidance Note](#), and
- [OPC's Drafting Services – A Guide for Clients](#).

For general guidance on sunseting issues, please contact:

- AGD – sunsetting@ag.gov.au
- OPC – sunsetting@opc.gov.au. Guidance can also be obtained from the relevant OPC instruments client adviser. A current list of client advisers is available on OPC's website, www.opc.gov.au.
- Regulatory Reform Division of PM&C – regulatoryreform@pmc.gov.au
- OBPR – Helpdesk-OBPR@pmc.gov.au

2. Initial preparation for sunseting

The sunseting process can involve a significant workload for agencies—particularly as each instrument needs to be reviewed well in advance of its sunseting date to allow sufficient time for drafting and potential disallowance processes (see [7.1]). It is important to plan ahead so that instruments that are still in use do not inadvertently lapse due to sunseting.

Early action to develop review plans is particularly important if:

- an instrument scheduled to sunset is likely to be controversial
- a parliamentary rollover (see [7.3]) is likely to be sought
- significant policy changes are likely to be sought, or
- an agency is responsible for a large number of instruments scheduled to sunset at the same time.

Throughout the process, an agency should keep good records of the review processes and outcomes, consistent with the *Archives Act 1983*, the *Freedom of Information Act 1982* and any other legislative obligations an agency has. Failure to comply with these requirements may attract criticism from Parliament and the public.

Agencies should also keep OPC informed of their intentions, particularly if OPC's drafting services may be required (see [7.1]).

By the time the relevant sunseting list is tabled¹ in Parliament, there will only be approximately 18 months left for action to be taken. Within six months of the list tabling date an agency should have:

- engaged the relevant rule-maker in considering the issues and options, including whether there would be benefits in negotiating minor changes to sunseting dates²
- completed a review of the instrument³
- advised the relevant minister on the outcomes of the review, and
- provided recommendations to the relevant minister on how the sunseting will be managed.

2.1 Project planning

Existing planning and accountability frameworks may be used or adapted to plan for and manage an agency's sunseting workload. If not, it may be desirable for an agency to:

- establish a suitable committee to oversee work on sunseting
- develop a rolling work program with a three to 10 year planning horizon
- treat each instrument or group of instruments as a separate project within the program, and
- adopt a well-understood project management methodology, such as Prince2.

¹ See [3.3] for more information on tabling of sunseting lists.

² See [Chapter 4](#) for more information on variations to sunseting dates.

³ See [Chapter 5](#) for more information on legislative reviews.

Generally, planning for sunseting is best done by working backwards from the date on which an instrument or group of instruments is due to sunset, in order to establish a start date and other milestones for the work program.

A key milestone is the day an instrument will be listed in a 'sunseting list' that will be tabled before Parliament approximately 18 months before the instrument's sunseting day (see [3.3]). However, consideration should be given to the management of those instruments before the sunseting list is tabled to allow time for conducting reviews and implementing review recommendations.

Where there are numerous instruments that are scheduled to sunset together, linked by a common theme or enabling Act, or that are complex or controversial in nature, it is recommended that work commence at least two years ahead of the sunseting date. This timeframe will assist in managing workloads and minimising the risk of instruments lapsing without appropriate measures in place.

Regardless of the timeframe or plan adopted, progress should be monitored regularly to ensure that milestones are generally being met. It is also helpful to conduct a brief evaluation, as each sunseting review is completed, of the lessons learned during the process.

2.2 The risks of inaction

If an agency fails to take early action to prepare for sunseting, there is a real risk that the instrument due to sunset will be repealed before necessary action can be taken to preserve its effect.

It is strongly recommended that prior to an instrument's scheduled sunseting date agencies allow enough time to conduct a review, brief the relevant rule-maker and implement review recommendations (including remaking instruments) where necessary.

If an agency finds that an instrument it still requires is included in a sunseting list but no measures have been taken to manage this, it should:

- decide if the instrument is still required and if so use the tabled sunseting lists (see [3.3]) as an opportunity to engage the relevant rule-maker
- review the instrument to establish whether it is fit-for-purpose in its current form (see [5.2]), and
- plan to remake (see [7.1]) the instrument or take other steps to preserve its effect as a matter of urgency.

There are significant legal and other consequences if a decision is made to remake the instrument, and the remade instrument is not registered and does not commence before the existing instrument sunsets. This would create an unintended gap in the law that may have significant consequences for individuals, businesses and the continued operation of government programmes, and may in turn lead to public criticism.

3. Sunsetting basics

3.1 All instruments subject to sunsetting unless exempted

Under section 50 of the Legislation Act, all instruments in force are subject to sunsetting unless they are explicitly exempted from sunsetting. Exemptions are set out in:

- section 54 of the Legislation Act
- Part 5 of the [Legislation \(Exemptions and Other Matters\) Regulation 2015](#), and
- where applicable, the Act of Parliament that authorises an instrument.

Most exemptions provide that instruments made under specific enabling provisions are exempt from sunsetting under the Legislation Act, and the exempted instruments are therefore relatively easy to identify. Other types of exemptions may be more difficult to apply—for example, where instruments are exempted from sunsetting based on their sole or primary purpose.⁴

If there is any doubt about whether an instrument is exempt, the administering agency should seek legal advice. There are significant legal and other consequences if, contrary to an agency's assessment, a court finds that an instrument was not subject to an exemption and had sunset.

Additional exemptions from sunsetting are granted only in exceptional circumstances and require the approval of the Attorney-General. A template for applying for an exemption from sunsetting, which includes information on the criteria used to assess such applications, can be found at [Attachment E](#). Please contact AGD (sunsetting@ag.gov.au) for further information.

Even if an instrument is exempt from sunsetting, it should be reviewed periodically to comply with specific statutory obligations and the [Australian Government Guide to Regulation](#).

3.2 Federal Register of Legislation (FRL)

The [FRL](#) website is administered by OPC and is the official database of all Commonwealth legislation.

The Legislation Act (Chapter 2, Part 1, Division 3) requires all legislative instruments to be registered on the FRL. This requirement commenced on 1 January 2005.

Agencies register and manage the registration of their instruments on the FRL through the [FRL lodgement portal](#). While there is no cost for registration,⁵ the administering agency will be responsible for paying the annual fee required to maintain an instrument on the FRL. For more information or to obtain access to the service, please contact OPC.

⁴ For example, item 1 of the table in section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015* exempts “[a]n instrument the sole purpose of which, or a primary purpose of which, is to give effect to an international obligation of Australia”.

⁵ Fees may apply for registration that is required on an urgent or expedited basis.

3.2.1 Sunset dates for instruments registered on or after 1 January 2005

Unless otherwise provided by the enabling Act, an instrument registered on the FRL on or after 1 January 2005 will sunset on the first 1 April or 1 October falling on or after the 10th anniversary of that instrument's registration.⁶ For example:

Date of registration	Default sunset date
1 April 2007	1 April 2017
2 April 2008	1 October 2018
1 January 2013	1 April 2023

3.2.2 Sunset dates for instruments made before 1 January 2005

Special rules apply for the many older instruments registered in bulk on 1 January 2005. Those instruments now sunset based on their year of making, with the older instruments sunsetting first.

The key dates are as follows, and are set out in subsection 50(2) of the Legislation Act:

Year of making	Sunset date
Before 1930	1 April 2015
1930-39	1 October 2015
1940-49	1 April 2016
1950-59	1 October 2016
1960-69	1 April 2017
1970-79	1 October 2017
1980-89	1 April 2018
1990-94	1 October 2018
1995-99	1 April 2019
2000-02	1 October 2019
2003-04	1 April 2020

⁶ *Legislation Act 2003*, section 50(1).

For older instruments made before 1 January 2005 that were not registered in bulk, section 29 of the *Legislative Instruments Act 2003* (LIA) provided a grace period during which those instruments could be registered:

- instruments made during the years 2000-2004 were required to be registered by 1 January 2006, and
- instruments made during 1999 or earlier years were required to be registered before 1 January 2008.

The sunseting date for those instruments was, or will be, on the first 1 April or 1 October falling on or after the 10th anniversary of that instrument's registration.

3.3 Tabling in Parliament of lists of instruments due to sunset soon

Under section 52 of the Legislation Act, the Attorney-General must table in the Parliament a list of instruments which are due to sunset. This 'sunseting list' is required to be tabled on the first sitting day within eighteen months before the relevant sunseting date.

Once a sunseting list is tabled, a record of its tabling is published online in accordance with current tabling guidelines and the list itself is published on the FRL.

To facilitate an efficient and transparent process, in addition to publishing the sunseting list document [as tabled](#), the [FRL](#) provides:

- information on each instrument's current sunset date, including the authority for any changes to that date
- [real-time lists](#) of all of the instruments due to sunset within the next eighteen months—these will be updated automatically if, for example, an instrument is repealed, rolled over or has its sunseting date altered, and
- the ability to sort these lists by portfolio or sunseting date.

AGD and OPC have joint responsibility for the tabling process. OPC is responsible for consulting with the relevant agencies and compiling lists of legislative instruments due to sunset, and AGD manages the tabling process.

3.3.1 OPC to provide sunseting lists to rule-makers

Once a sunseting list is tabled, OPC provides the list to each departmental secretary to distribute to each rule-maker of a listed instrument within the portfolio. This process is in accordance with section 52(3) of the Legislation Act.

3.4 Inaccurate FRL data on sunseting should be reported

If you have any questions or concerns about the accuracy of information published on the [FRL](#), please contact OPC to discuss. You can also report a problem by using the [feedback form](#) on the FRL website. Where inaccurate data or other problems are found this should be reported as soon as practicable.

4. Thematic reviews and emergency deferral of sunseting dates

The Legislation Act recognises that changes to default sunset dates may be appropriate and important in certain circumstances. It empowers the Attorney-General to:

- align the sunset dates for related instruments to facilitate thematic review, and
- defer sunseting by up to 12 months in limited circumstances.

A House of Parliament may also pass a resolution to defer the sunseting date of an instrument for 10 years. This is known as a parliamentary rollover (see [7.3]).

4.1 Alignment of sunseting dates for thematic review

A thematic review is a review of two or more instruments which share a common theme, such as a particular treaty or the regulation of a particular industry. Thematic reviews are not limited to instruments made under a single Act or administered by a single agency.

Rule-makers are encouraged to apply for a declaration to facilitate thematic review because it streamlines the review process by aligning the sunseting dates of instruments which are closely related, but have different sunseting dates. This may involve bringing forward some dates and pushing others back by up to five years.

This allows agencies to review two or more instruments concurrently and to structure reviews around subject areas and policies, not instruments. This can facilitate investigation of the cumulative burden of regulation in a given area, and identify opportunities to streamline, simplify or reduce such burdens in line with the Government's deregulation agenda.

Agencies may also wish to use the thematic review process as an opportunity to review the compatibility of each instrument with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified, as required by the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁷

4.1.1 Legislative requirements for a thematic review

Under section 51A of the Legislation Act, rule-makers must apply in writing to the Attorney-General to align the sunseting dates of two or more instruments for a thematic review.⁸

The Attorney-General must be satisfied that the instruments are or will be subject to a single review. If the Attorney-General approves an application for thematic review, he or she will then declare the instruments will sunset on a single specific day. This declaration must be

⁷ Further guidance is at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/default.aspx>.

⁸ If the Governor-General is the rule-maker, then it is the responsible minister who would apply.

made in accordance with section 51A of the Legislation Act and is an instrument which is disallowable by the Parliament.

It is recommended that in considering their timelines, agencies should account for the possibility of Parliament disallowing a declaration of thematic review. For further information about setting timelines, please see [\[7.1.1\]](#).

4.1.2 Practical steps for applying for a thematic review

Rule-makers should apply to the Attorney-General for a declaration at least 18 months before the earliest sunset date that applies to a group of instruments. For example, if the oldest instrument in a group is due to sunset on 1 October 2018, then an application for that group should be lodged by 1 April 2017. The lengthy lead time is required because the process of making a declaration takes time. It will also allow more time for remedial action if the declaration, once made, is disallowed.

An application should deal with only one group of instruments to avoid complications if part of the application is declined or delayed. In general we recommend that agencies avoid the inclusion of classified material in an application, because the application will be used in the development of the Explanatory Statement that will be registered on the FRL. If there is sensitive information in the application, it may be appropriate to change the form in which the information is conveyed in the Explanatory Statement and AGD will discuss this with the requesting agency. An application is more likely to be successful, and to be resolved quickly, if it demonstrates a strong commitment to best practice and is supported by relevant stakeholders.

Agencies may be required to consult:

- any agency that jointly administers an instrument
- PM&C, particularly the Regulatory Reform Division and OBPR, about the extent to which those areas should be involved in a review. While the Regulatory Reform Division in PM&C does not need to be formally consulted prior to making an application for thematic review, AGD will provide it with a copy of applications received, to enable comments on an exceptions basis
- OPC about the scope and timing of the proposal – this is essential if OPC's drafting services are required, and
- other stakeholders, to the extent practical and appropriate, in accordance with section 17 of the Legislation Act.

A template for a thematic review application is included in this guide at **Attachment A**.

Agencies should provide their draft request to the AGD contact mailbox (sunsetting@ag.gov.au) prior to seeking the Attorney-General's formal approval.

4.2 Certificate for deferral of sunseting

Under section 51 of the Legislation Act, the Attorney-General can, upon written application by the rule-maker,⁹ issue a certificate to defer an instrument's sunset date by either six or 12 months where the Attorney-General is satisfied:

- the instrument is likely to cease to be in force within 12 months after the sunseting day, or
- the instrument was unable to be remade before the sunseting date due to:
 - unforeseen and unavoidable circumstances or
 - the dissolution or expiration of the House of Representatives, or the prorogation of the Parliament rendering it inappropriate to make a replacement instrument before a new government is formed.

The certificate must include a statement of reasons for deferring the sunseting date. The certificate is a legislative instrument but is not disallowable by the Parliament.

The rule-maker's letter of application for deferral should provide the relevant background (details of the relevant instruments including their unique FRL identifier, current sunseting dates, and the period of deferral sought) and the reasons supporting the application. Please contact AGD (sunseting@ag.gov.au) for assistance in preparing the letter, to ensure that the legislative criteria are satisfied and all necessary supporting information is provided.

Workload is not a good reason for requesting a certificate. Where unforeseen circumstances arise, do not assume that a certificate can be arranged in time. Even if a certificate is justifiable, the certificate must be prepared, signed **and** registered on the FRL before the relevant sunset date. A certificate cannot revive an instrument that has already sunset.

⁹ In cases where the Governor-General is the rule-maker, the responsible minister would apply.

5. Review of sunseting instruments

An initial review of instruments that have been identified as sunseting is an essential part of the process. The review should inform the rule-maker's decision about whether the instrument should be left to sunset, remade with amendment, remade without amendment or rolled over by the Parliament.

Instruments that are clearly spent or redundant (see [\[Chapter 6\]](#)) will not require a thorough review.

If it is not appropriate for an instrument to sunset, a more comprehensive review should be undertaken. In these cases, the review must also:

1. determine if an instrument is fit-for-purpose (see [\[5.2\]](#) for more information on the fit-for-purpose test), and
2. justify the rule-maker's decision to the Parliament, stakeholders and the public.

In these cases, it is important that the review documentation is prepared to a standard that would enable the review document to be publicly released. Although there is no explicit legislative requirement to table the review document in Parliament, it is good practice to do so for any major review.

Any final report of a review that determines that the instruments should be remade (whether in substantially the same or revised form) should at a minimum be made available online, as the Explanatory Statement and RIS are likely to refer to it.

Instruments which have been grouped to be thematically reviewed should still be individually assessed.

5.1 Designing a review

The appropriate model of legislative review for each instrument varies. Examples of common models of legislative review are included at **Attachment B**. There is no 'one size fits all' model for reviews, but a more comprehensive and inclusive process is likely to be required if:

- the last review was more than 5 years ago
- significant issues have emerged since the last review
- previous review processes did not address all aspects of the fit-for-purpose test (see [\[5.2\]](#))
- there are significant regulatory burdens associated with the instrument/s, or
- there is a high level of stakeholder interest in the instrument.

Other considerations in designing a review include:

- Scope – the terms of reference should take into account the fit-for-purpose test.
- Independence from government – should any outside expertise should be used?
- Consultation – what consultation is appropriate and practicable?¹⁰
- Deliverables – what needs to be produced, other than a final report?
- Deadline – when must the review be completed?

Agencies should also consider opportunities to engage stakeholders in consultations online through the agency’s website, business.gov.au, or GovDex. Otherwise, face-to-face engagement may be appropriate if stakeholders are from diverse cultural and linguistic backgrounds or have a low level of computer literacy or access, or if very quick feedback is needed.

If there are any uncertainties in the process to be adopted, the agency should seek early guidance from the relevant rule-maker. The agency should also seek early guidance from the Regulatory Reform Division of PM&C if the instrument has a high regulatory impact.

5.2 The fit-for-purpose test

The fit-for-purpose test includes, at minimum, a consideration of the five issues listed below. The most common aspects of each issue are provided as a starting point for agencies. It may be appropriate to address other aspects of those issues, or other issues altogether, in reviewing a particular instrument.

1. OBJECTIVE OF THE INSTRUMENT

What is the objective of the instrument and is it still required?

If no, when and how should it be repealed?

If yes:

- why is an instrument the best way of achieving that objective in future?
- what would be the consequences if the instrument was allowed to sunset?
- how could it be improved (e.g. to make it no more complex than necessary to achieve that objective)?

2. REGULATORY IMPACT

Does the instrument impose significant compliance costs on business, community organisations and individuals? If so, how could compliance costs be reduced?

Consideration should be given to the application of Regulatory Impact Assessment requirements – see the [Australian Government Guide to Regulation](#).

¹⁰ See also the requirements under section 17 of the Legislation Act.

3. BROADER LEGAL AND POLICY CONTEXT

Does the instrument touch on any of the following **legal or policy** issues?

- **Australia's obligations under international law**, including security, trade, investment, fisheries, maritime, aviation and space law, as well as the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified.
- **Constitutional law**, particularly where constitutional issues have been raised in litigation or by state and territory governments.
- **Criminal law**, particularly to ensure compliance with the Guide to Framing Commonwealth Offences
- **Administrative law**, particularly merits or judicial review, administrative decision making processes and alternative dispute resolution and compliance with Government policy on regulatory powers and the use of civil and administrative penalties
- **Privacy law**, particularly compliance with the National Privacy Principles.
- **Deregulation**, particularly the Government's commitment to reducing regulatory burden.

For further information on each of these issues, please contact the AGD or the Regulatory Reform Division of PM&C.

If yes:

- how closely does it reflect Australian Government policy on that issue?
- what would be the consequences of changing the instrument to better reflect that policy?
- if there are competing policy considerations, how could those be resolved?

4. CLEARER LAWS

Does the instrument comply with clearer laws principles (see the [Clearer Laws Quick Reference Guide](#))? Is the instrument necessary? What can be done to make it simpler, clearer or easier to read? For example, would it assist users and be appropriate to:

- move common provisions into a single instrument of general application?
- consolidate instruments that have significant overlap?
- split an instrument? For example, some of an instrument's subject matter may be exempt from disallowance/sunsetting if made in a separate instrument.

Does the instrument meet OPC drafting and publishing standards (see the [Instruments Handbook](#))? If not:

- what are the main areas of non-compliance?
- what are OPC's views on the areas of non-compliance?

Note: a comprehensive assessment against the OPC drafting and publishing standards is only required at the review stage if the instrument is a candidate for a parliamentary rollover. Otherwise, it is enough to acknowledge that there are OPC drafting and publishing standards issues and recommend action to address these as part of the remaking process.

5. CONSULTATION

Have you consulted with internal and external stakeholders? If not, why not?

What were the consultation findings? Have these been addressed by the review?

6. Options if an instrument is no longer required

If, after either an initial or more detailed review, it is assessed that an instrument is no longer required, it may be repealed by:

- automatic or bulk repeal provisions of Part 3 of Chapter 3 of the Legislation Act
- the rule-maker, or
- being left to sunset under Part 4 of Chapter 3 of the Legislation Act.

If an instrument is no longer required, it is preferable to actively repeal it instead of allowing it to remain in force until it sunsets. This is in line with best practice regulation principles.

A repealed instrument remains available on the [FRL](#) but does not display as current law.

6.1 Automatic and bulk repeal under Part 3 of Chapter 3 of the Legislation Act

The automatic repeal provisions of the Legislation Act automatically repeal an instrument if:

- the instrument solely amends or repeals another legislative instrument or notifiable instrument; or
- the instrument is a commencement instrument.

Additionally, an individual provision of a legislative instrument will automatically be repealed if the sole effect of the provision is to amend or repeal the instrument, or another legislative instrument or notifiable instrument.

Division 2 of that Part deals with other instruments or provisions of instruments that are no longer required. These may be repealed in bulk by a regulation made by under section 48E(1) of the Legislation Act. It is a prerequisite to making such a regulation that the Attorney-General is satisfied that the instruments or provisions of instruments being repealed are spent or no longer required.

AGD and OPC coordinate a rolling program of bulk repeals of spent and redundant instruments and work closely with relevant agencies to progress this.

Please contact OPC on operational issues and AGD on policy issues associated with automatic or bulk repeal.

6.2 Direct repeal by rule-maker

Any rule-maker who is authorised to make a certain type of instrument can repeal any such instrument (whether or not the rule-maker was the original rule-maker). This can be done with:

- a self-repealing provision, or
- an instrument of repeal.

Any date specified for repeal must not be later than the instrument's sunset date.

If you are required to or wish to use OPC drafting services for a direct repeal, please contact OPC with the details. Please see **Attachment C** for more information on drafting such instruments.

6.3 Self-repealing provisions

An instrument should include or be amended to include a self-repealing provision where the instrument is only likely to be needed for a well-defined period, such as a financial year.

The recommended approach for a self-repealing provision is as follows:

Repeal of this instrument

This instrument is repealed at the start of [insert date].

Such a provision will ensure that the instrument is repealed rather than merely ceasing to have effect.

For further guidance on such matters, please refer to the [Instruments Handbook](#).

6.4 Instruments of repeal

An instrument of repeal can be used to repeal a spent or redundant instrument.

If a transitional, savings or application provision is included in the instrument of repeal, a self-ceasing provision should be included. This is because the instrument is no longer ‘solely repealing’ and is not repealed automatically under Part 3 of Chapter 3 of the Legislation Act. The instrument of repeal should list the full name, series number (if applicable) and unique FRL identifier of each instrument to be repealed.¹¹

For further guidance on such matters, please refer to the [Instruments Handbook](#).

6.5 Sunsetting under Part 4 of Chapter 3 of the Legislation Act

As outlined in [3.2], section 50 of the Legislation Act provides for the sunsetting of all instruments around the tenth anniversary of each instrument’s registration on the FRL.¹²

However, doing nothing does not guarantee that an instrument will sunset. Once a list of instruments for sunsetting is tabled,¹³ any Member of Parliament in their capacity as a private member can, for any reason, move a motion for a resolution of the House of Parliament to defer the sunsetting date of an instrument for a further ten years (i.e. a parliamentary rollover).¹⁴ Where the motion is not moved by the relevant rule-maker, that rule-maker should be consulted prior to the motion being moved (see [7.3]).

OPC monitors parliamentary proceedings. If an instrument is subject to a private motion for a rollover, OPC will notify agencies as soon as practicable so that the agency may brief the relevant minister.

¹¹ For a best practice example, see the *Attorney-General’s (Spent and Redundant Instruments) Repeal Regulation 2013*, SLI 2013 No. 49 ([F2013L00604](#)).

¹² Unless the instrument was registered on 1 January 2005—see section 50 of the Legislation Act for details.

¹³ See [3.3] for more information on the tabling process.

¹⁴ See [7.3] for more information on parliamentary rollovers.

7. Options if an instrument is still required

If, after either an initial or more detailed review, it is assessed that an instrument is still required, there are two options that will reset the sunseting 'clock' for another 10 years:

- seeking a parliamentary rollover for the instrument, or
- remaking the instrument (with or without amendments).

Amending an instrument is insufficient and does not reset its sunseting 'clock'.

Of these two options, it is generally preferred and recommended to remake the instrument. This is because remaking provides a greater opportunity to update instruments in line with Government requirements for reducing regulation and because of the uncertainties involved in relying on parliamentary rollover (see [\[7.3\]](#)). Remaking well prior to the sunset date also minimises risks of unmanaged sunseting leaving a gap in the law, and assists in distributing sunseting management workloads.

7.1 Remaking an instrument

A remade instrument is a 'new' instrument and a new 10-year sunseting period will apply. A rule-maker who is authorised to make a certain type of instrument is also authorised to repeal it and make a replacement for it (whether or not the rule-maker was the original rule-maker).

The remade instrument must:

- have a new title, and
- repeal (see [Chapter 6](#)) any existing instruments which it is intended to replace,
- be accompanied by an explanatory statement in accordance with section 15G of the Legislation Act and
- comply with drafting and publishing standards for instruments under sections 15M and 16 of the Legislation Act.

The remade instrument may include policy changes to the existing text of the instrument that are desirable or important. This is particularly appropriate where the fit-for-purpose review has recommended changes to the existing scheme.

The replacement instrument must be made and registered before the sunseting date of any existing instruments to be replaced. There are significant legal and practical limits to the retrospective commencement of instruments.¹⁵

¹⁵ See [\[7.2\]](#) for options if an instrument cannot be remade before it sunsets.

As with any other new instrument, a remade instrument is subject to disallowance under section 42 of the Legislation Act (unless it is exempt). Section 42 of the Legislation Act provides that an instrument or a provision of an instrument may be disallowed if:

- a motion of disallowance is given in a House of the Parliament within 15 sitting days after a copy of the instrument was laid before that House, and
- within 15 sitting days after the giving of that notice, the House passes a disallowance resolution.

Please see **Attachment C** for more information on choosing drafting services, drafting and publishing standards and the issuing of drafting instructions.

7.1.1 Timing and scrutiny considerations when remaking an instrument

In setting timeframes for the remaking of an instrument, agencies should take into account:

- the possibility of parliamentary disallowance of the remade instrument
- the need to bid for OPC drafting resources, and
- where necessary, the need to seek policy approval.

Potential disallowance

It is strongly recommended that agencies plan to table a replacement instrument at least 30 sitting days prior to the sunset date of the original instrument. This period allows for the maximum duration of the disallowance process, which can amount to two blocks of 15 sitting days:

- a motion for disallowance of the remade instrument may be lodged within the first 15 sitting days of the date on which the instrument is tabled, and
- if such a notice is given and has not been resolved or withdrawn within 15 sitting days of the notice being given, the instrument is deemed to have been disallowed and ceases to have effect from that time.

It should be noted that a disallowed instrument (or provision of an instrument) cannot be made again if it is the 'same in substance', rather than 'similar'.

Failure to remake an instrument well before its sunset date could leave an unintended gap in the law when that instrument sunsets and is no longer enforceable. However, it is worth noting that if a replacement instrument is disallowed, it will, assuming it commences on the day after registration or another day that occurs before disallowance, operate from that day until it is disallowed.

It should also be noted that planning to have a remade instrument made, registered and tabled only 30 sitting days prior to the sunset date of the original instrument may limit the contingency measures available if the replacement instrument is disallowed.

For example, an instrument (or provision of an instrument) that is similar to the disallowed instrument (or provision of an instrument) cannot be made again:

- within seven days after tabling or, if the instrument has not been tabled, within seven days after the last day on which it could have been tabled (unless both Houses approve)¹⁶
- while it is subject to an unresolved notice of disallowance,¹⁷ or
- within 6 months of being disallowed (without the approval of the House that disallowed the regulation).¹⁸

Bidding for OPC drafting resources

Under the *Legal Services Directions*, the drafting of legislative instruments made or approved by the Governor-General (Executive Council legislative instruments) is tied to OPC. These instruments must therefore be drafted by OPC.

To better target OPC's drafting services, OPC has developed a prioritisation system for Executive Council legislative instruments. Before each parliamentary sittings period, the First Parliamentary Counsel will seek bids from departments for Executive Council instruments to be drafted in the sittings period. If the priority of an instrument or measure changes or an additional instrument or measure needs to be added to a department's bid, a variation bid must be provided to OPC.

For further information on the prioritisation system, please contact the OPC instrument client adviser for your agency. A current list of client advisers is available on OPC's website, www.opc.gov.au.

Seeking policy approval

If there are no substantive policy changes required for the remade instrument and the agency has lodged a bid for the project, OPC can begin drafting as soon as drafting instructions are received without requiring advance policy authority from the responsible minister.

However, agencies must seek advance ministerial approval if substantive policy changes are required to an existing instrument in the redrafting process.

Generally, there are fewer timing pressures with remaking an instrument which has been found to be fit-for-purpose.

All new instruments are automatically provided to the Senate Standing Committee on Regulations and Ordinances for scrutiny.

¹⁶ Section 46 of the *Legislation Act 2003*.

¹⁷ Section 47 of the *Legislation Act 2003*.

¹⁸ Section 48 of the *Legislation Act 2003*.

7.1.2 Regulatory Impact Assessment in relation to remade instrument

A Regulatory Impact Assessment (RIS) may already have been undertaken as part of reviewing whether the existing instrument or group of instruments is fit-for-purpose (see [5.2]). Please refer to the [Australian Government Guide to Regulation](#) for further guidance on this issue.

You should also review OBPR's [Sunsetting Legislative Instruments Guidance Note](#) on the RIS requirements for sunsetting instruments that are found to be fit-for-purpose and are remade in substantially the same form. In some circumstances where a RIS would usually be required, this can be satisfied by senior-level departmental correspondence to OBPR.

If a RIS is prepared for any new or remade instrument, it is a parliamentary requirement that the RIS be lodged together with the Explanatory Statement for FRL registration and parliamentary tabling. Where, in accordance with the OBPR Guidance Note, the RIS requirement is satisfied by correspondence, that correspondence should also be lodged together with the Explanatory Statement for FRL registration and parliamentary tabling.

7.1.3 Explanatory material is required

As a remade instrument is a new instrument, generally an Explanatory Statement is required under section 15G(4) of the Legislation Act. It is not appropriate to simply refer to the Explanatory Statement of a previous version of the instrument.

An Explanatory Statement can apply to more than one instrument—this can be a useful and succinct way of dealing with groups of instruments, especially those remade following a thematic review.

Rule-makers should not assume that simply replicating or referring back to the Explanatory Statement associated with the sunsetting instrument will satisfy current legislative requirements for Explanatory Statements. All Explanatory Statements must now contain, at a minimum:

- if the instrument is disallowable—a statement of compatibility with human rights in accordance with section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*
- information about any non-legislative material incorporated by reference, and
- information about any consultation undertaken or, if this was not appropriate or practical, a compelling case for the lack of consultation.

As a matter of best practice, rule-makers should also consider explaining:

- any relevant statutory pre-conditions or parliamentary undertakings
- provisions which depart from current government policy or practice (e.g. the framing of criminal offences or the standardised regulatory powers framework, or where external merits review is not provided for), and
- the operation of each remade provision.

If a RIS has been prepared, this must be lodged with the Explanatory Statement for registration and tabling. Where, in accordance with the OBPR's [Sunsetting legislative instruments guidance note](#), the RIS requirement is satisfied by correspondence, that correspondence should also be lodged together with the Explanatory Statement for FRL

registration and parliamentary tabling. For other documents such as review reports, it is normally enough to name the report and specify how it can be accessed.

7.2 If an instrument cannot be remade before it sunsets

If an instrument cannot be remade before it sunsets, there are several options for ensuring or restoring continuity of the law.

7.2.1 Attorney-General's certificate

If an instrument cannot be remade before it sunsets, it may be possible to request a deferral of its sunset date by means of an Attorney-General's certificate under section 51 of the Legislation Act (see [\[4.2\]](#)).

7.2.2 Retrospective instrument

Once an instrument has sunset, it may be possible to make a replacement instrument and to backdate its commencement to the relevant sunset date. However, this approach has significant legal and practical limitations. Under section 12(2) of the Legislation Act, provisions with retrospective application do not apply *to the extent* that they disadvantage a person or impose liabilities on a person before the day the instrument is registered.

As such, instruments containing provisions with retrospective application are only likely to be valid if those provisions:

- do not disadvantage any person other than the Commonwealth, or
- are explicitly authorised to be made retrospectively by their enabling Act.

If the replacement instrument is invalid (in whole or in part), it may create confusion about what law is in force and may attract adverse comment from bodies including the Senate Standing Committee on Regulations and Ordinances (see Principle B of the [Committee's scrutiny principles](#)).

Legal advice should be obtained on these issues before attempting any form of retrospective 'fix'. It should be noted that AGS advice is required for instruments with retrospective application that are to be considered by the Executive Council.¹⁹

The legal basis for retrospectivity must also be noted in the Explanatory Statement.

7.2.3 Prospective instrument with gap

A prospective instrument can be made immediately to reduce the gap in coverage. Other arrangements would need to be made to deal with the gap.

¹⁹ See paragraph 4.4.7 of the [Federal Executive Council Handbook](#).

7.2.4 Act of Parliament

An Act of Parliament can be enacted to revive or backdate an instrument and to restore continuity of the law. However, this is a major undertaking and should only be considered if all other options have been exhausted.

For more information on the legislative process for Acts, please refer to [PM&C's Legislation Handbook](#).

7.3 Parliamentary rollovers

Under section 53 of the Legislation Act, either House of Parliament can pass a resolution to defer the sunset date of an instrument for a further 10 years (a parliamentary rollover). Such a resolution must be passed within 6 months of the instrument being mentioned in either:

- a certificate of deferral of sunset laid before that House, or
- a sunset list laid before that House (under section 52 of the Legislation Act, this must occur approximately 18 months before the instruments on that list will sunset).

7.3.1 Assessing the suitability of a rollover

Parliamentary rollover should only be used in exceptional circumstances where it would not be appropriate or feasible for a minister to remake the instrument. It may, for example, be appropriate where an instrument is found to be fit-for-purpose following a rigorous, clearly documented review and it is crucial that the instrument should retain its current name²⁰ (for example, where the costs associated with updating systems that make reference to the instrument would be disproportionate to the benefits of remaking the instrument).

Careful consideration should be given to the risks associated with pursuing a rollover compared to other options such as remaking. The most significant risk in relation to a rollover is that Parliament may not pass a resolution to defer sunset (i.e. where the motion is defeated or if no vote is taken within six months of the tabling of the sunset list or deferral certificate). If this occurs, urgent action will be required to remake the instrument (see [\[7.1\]](#)), or apply for a certificate of deferral (see [\[4.2\]](#)), before the existing instrument sunsets. Other issues to consider include that the workload involved in pursuing a parliamentary rollover may not necessarily be less than in remaking an instrument, and that the process could take longer if the instrument is controversial and the motion is referred to a committee. In comparison, an instrument that has been reviewed and found to be fit-for-purpose can be remade in substantially the same form and would be eligible for a streamlined regulatory impact assessment process (see [\[7.1.2\]](#)).

Agencies should also consider the justification for using parliamentary resources (rather than engaging one minister in the remaking process).

²⁰ OPC's [Instruments Handbook](#) requires a replacement instrument to have a different name from the instrument it is replacing.

As at the time of publication, parliamentary rollover has not been sought since the introduction of the sunseting regime. As such, it would be a novel process for agencies to navigate. Agencies wishing engage this process should allow sufficient time for new arrangements to manage parliamentary rollover motions to be developed, as well as to address any unexpected complications that may arise.

7.3.2 Process for rollover

Any Senator or Member of Parliament can move the motion for parliamentary rollover.²¹ Where the motion is not moved by the relevant rule-maker, the portfolio minister should be consulted prior to the motion.

AGD should also be consulted before commencing arrangements for a parliamentary rollover. However, the agency responsible for the instrument in question will have sole responsibility for managing the rollover process, including the preparation and tabling of all supporting documents in Parliament.

A motion for parliamentary rollover of an instrument must occur prior to the sunseting day of that instrument, as a parliamentary rollover cannot revive an instrument that has already sunset. Any proposal for a rollover should therefore allow sufficient time to accommodate parliamentary scheduling considerations and the process of debating a motion. It should not be assumed that a minister can move for a rollover at the last possible minute, even if there are good reasons for a rollover.

CALCULATING KEY DATES

Section 53 of the Legislation Act allows for a motion of parliamentary rollover to be made within 6 months of either a sunseting list or certificate of deferral from the Attorney-General being tabled in Parliament. Time limits for making a motion are therefore dependent on the date of these key events.

For example, sunseting lists must be tabled on the first sitting date within the period 18 months prior to the sunseting date of the instruments listed. The sunseting list for instruments due to sunset on 1 April 2018 was tabled on 10 October 2016 which was the first sitting day after 1 October 2016. Therefore, parliamentary rollovers for instruments on the list which was tabled will need to be passed by 10 April 2017.

²¹ See also [6.5] regarding private motions for rollovers.

7.3.3 Tabling of documents for rollover purposes

Together with the usual documents required for tabling under parliamentary tabling guidelines,²² the Member of Parliament moving the motion should also table a statement explaining why each instrument named in the resolution is fit-for-purpose. This should include a copy of the legislative review (or details on where it can be accessed). Additional courtesy copies should be provided to key scrutiny bodies such as the Senate Standing Committee on Regulations and Ordinances.

This material must be lodged by the agency, as OPC only lodges such material for new instruments, and AGD does not facilitate the preparation of documents or their tabling for parliamentary rollover.

Agencies are not required to prepare a new Explanatory Statement, or register or table a new instrument. The instrument is also not subject to a new disallowance period.

²² Agencies should consult their internal Tabling Officers and/or clerks of the relevant House of Parliament on tabling requirements.

Attachment A—Thematic review template

Application for thematic review

This template assists agencies in preparing an application to the Attorney-General to exercise his/her powers under section 51A of the [Legislation Act 2003](#) to align the sunseting dates of instruments that will be reviewed together.

The Attorney-General may exercise this power if satisfied that:

- the instruments would otherwise be repealed under sections 50 or 51 of the Legislation Act
- the instruments are or will be the subject of a single review, and
- aligning the sunseting dates will facilitate the undertaking of the review and the implementation of its findings.

It is strongly recommended that you use this template as it will help you to consider and communicate key issues. Your application is also more likely to be successful, and to be resolved quickly, if it demonstrates a strong commitment to best practice and is supported by relevant stakeholders.

How to use this template

To enable timely consideration of your application, please ensure it:

- only deals with one group of instruments (this will avoid complications if part of the application is declined or delayed)
- does not carry or mention documents that carry a security classification, and
- is concise (no more than 3 pages plus attachments if necessary).

Please note that if successful, all or part of this application and its covering letter may be published as part of the Explanatory Statement to the alignment instrument.

1. SHORT TITLE

Nominate a short, thematic title.

(For example: 'Review of national licensing regime for X and Y').

2. PROPOSED SCOPE OF REVIEW

Summarise the review's scope and list the relevant instruments in an attachment.

(For example: 'This review will cover 123 legislative instruments made under the *Cat and Dog Act 1901*, as listed at Attachment 1.')

- Identify any Acts or instruments that are no longer needed, and can therefore be allowed to sunset or be repealed.
- If appropriate, include Acts and instruments exempt from sunseting – this will not make them subject to sunseting.

Provide a rationale for the selection of instruments proposed to be reviewed together (i.e. the particular theme that makes it more efficient or effective to review them together).

3. RECENT REVIEWS AND RELATED PROCESSES

Detail any reviews of this legislation that may have been undertaken in the last five years or so. Reviews may include internal or external audits, parliamentary inquiries, other public inquiries or studies (such as by the Productivity Commission), or court or tribunal decisions.

- Who did the review, when was it conducted, and what were the outcomes?
- What consultation occurred and how? If consultation was not undertaken, why not?
- Why is a further review necessary before repealing or remaking the instrument/s?

Identify any ongoing public processes which could affect the legislation to be reviewed, such as current work on Bills or treaties. Do not refer to any processes which have not been publicly announced or formally committed to.

4. DETAILS OF THIS REVIEW

Specify what this review will now achieve. In particular:

- What is the **objective** of the review? How will it build on or differ from recent reviews? Ensure your assessment captures a consideration of whole-of-government objectives to simplify and reduce regulatory burden and pursue clearer laws, as well as the specific policy outcomes you report against.
- What is the **process and timing** for the review? Consider questions about **resourcing**. In general terms, how many people will be on your review panel and support secretariat? Note that it is acceptable and appropriate to say that you plan to engage an external consultant, private counsel and so on but not disclose the funds available.
- How do you plan to include consultation with stakeholders?
- Do the instruments have a **regulatory impact**, or do you propose to seek a RIS exemption? You should foreshadow that you will consult with OBPR on RIA requirements (guidance material, including information on how to calculate offsetting, can be found in the OBPR's [Sunsetting legislative instruments guidance note](#)). Note that it is not necessary to consult with OBPR for the purposes of completing this application.

Please refer to [Attachment B](#) for general guidance on when different types of review may be appropriate, and what each type of review usually involves. Please note that Attachment B is provided for information only and should be deleted from your final application.

5. CONSULTATION (AS PART OF COMPLETING THIS APPLICATION)

Detail what consultation has been undertaken prior to submitting your application for thematic review. You must consult with other relevant or affected Commonwealth agencies (for example, if the legislative instruments are jointly administered across two or more portfolios).

If provided with the opportunity to make comments on your draft application, AGD will also provide a copy of your application to the Regulatory Reform Division of PM&C and will confirm with you that this has occurred so that it can be noted here. If you have not undertaken any consultation, explain why it was not appropriate or practical (for example, because there are no other relevant or affected Commonwealth agencies).

6. DRAFTING OF INSTRUMENTS AND TIMING OF NEW SUNSET DATE

Identify whether OPC drafting resources will be required (either because drafting of the instruments is tied to OPC or the rule-maker wishes for OPC to draft the instruments).

Nominate a new sunset date for all of the sunsetting instruments listed at Attachment 1 to this application. This date must be 1 April or 1 October, and cannot be more than 5 years after the earliest sunset date that currently applies. Explain why this is the best date with reference to the review process to date and proposed next steps.

7. ALTERNATIVES TO THEMATIC REVIEW

Describe what you will do and what else may happen (or not happen) if your application is not accepted by the Attorney-General, or is accepted but then disallowed by the Parliament.

8. MORE INFORMATION

Explain how interested parties can get more information about the progress and outcome of the review if approved. If it will be through a dedicated webpage, provide the URL and commit to having it in place by a certain date. When designing your webpage, remember that short, user-friendly URLs are best (for example, <http://www.ag.gov.au/LA-review>).

Alternatively, provide the name and contact details of a senior executive service (SES) officer from the relevant policy area. The contact officer must be an SES officer as successful applications may be published and could attract media and parliamentary attention.

Anticipate other questions that are likely to be asked about your review. Will it be mentioned in key corporate documents, such as your agency's strategic plan or annual report? If it will result in a written report, will that be tabled in the Parliament or available to the public? If not, why not?

List of legislation to be reviewed

LEGISLATION TITLE	FRL ID ¹	SUNSET DATE (IF ANY) ²
Enabling Act: <insert Act name and insert more headings as needed if multiple Acts are involved>		

¹ To review this document, go to the FRL (www.legislation.gov.au) and enter this ID into the search box at the top of any page.

² Acts and instruments which are exempt from sunseting can be listed if relevant. Doing so will not make them subject to sunseting.

Attachment B—Common models of legislative review

Not required for inclusion; please delete before finalising your application

This attachment provides general guidance on when different types of review may be appropriate, and what each type of review usually involves. Please consider the issues carefully and, if you have any questions or concerns about the best way to proceed, seek early guidance from your executive or minister.

When it comes to engagement, remember also that the [Legislation Act 2003](#) requires you to consult to the extent practical and appropriate before making or remaking an instrument, and to address this issue in your explanatory material when you (re)make instruments.

MODEL	SCOPE	INDEPENDENCE	COMMUNITY ENGAGEMENT
If the last review was more than 5 years ago, or if significant issues have emerged since the last review			
A	Public review	Broad scope	<p>A formal review panel should be established that:</p> <ul style="list-style-type: none"> is chaired by somebody independent of the responsible agency, and includes, or is advised by a separate group of, stakeholder representatives. <p>The merits of a COAG reform project or interagency working group should be tested with relevant agencies.</p>
			<p>Public notice should be given of the scope of the review, of associated deadlines for submissions, and of any hearings open to the public. To facilitate useful comment, an initial issues paper should be published, as well as the draft report.</p> <p>The final report should be published and tabled in Parliament promptly. A formal Government response to it should be tabled as soon as practical after it is tabled, and before any laws are (re)made or amended in response to it.</p>
B	Semi-public review	Narrow but complex scope	<p>A formal review panel should be established and chaired by somebody independent of the responsible agency.</p> <p>The merits of a COAG reform project or interagency working group should be considered.</p>
			<p>Public notice should be given of the scope of the review and the deadline for submissions. However, the main focus of consultation should be on targeted consultation with peak bodies and subject-matter experts.</p> <p>The final report should be published online promptly. It is not essential to table or formally respond to the report unless it proposes significant changes.</p> <p>Information on how to access the report and any formal response to it should be included in the explanatory material for any new or changed laws resulting from it.</p>
C	Targeted review	Narrow and simple scope	<p>A formal review panel should be established but it is not essential to include non-government members.</p> <p>The review may be undertaken by an external consultant if desired, e.g. for workload or expertise reasons.</p> <p>The merits of an interagency working group should be considered.</p>
			<p>Targeted consultation with peak bodies and subject-matter experts is required to the extent practical and appropriate. If in doubt, consult the relevant rule-maker.</p> <p>The final report should be published online promptly, and information on how to access it included in the explanatory material for any new or changed laws resulting from it.</p>
In all other cases			
D	In-house review		<p>A review panel is not essential and the review may be undertaken by an external consultant if desired, e.g. for workload or expertise reasons.</p>
			<p>Targeted consultation may be appropriate to confirm that there are no major issues requiring attention. If in doubt, consult the relevant rule-maker.</p> <p>The final report does not have to be published online, but it must be suitable for public release if required, e.g. for the purposes of parliamentary scrutiny.</p>

Attachment C—OPC drafting services

Under the [Legal Services Directions](#), certain drafting work is tied to OPC. Agencies must use OPC drafting services if making, amending or repealing a regulation, an Ordinance or regulation of a non-self-governing Territory, or any other legislative instrument made or approved by the Governor-General.

OPC is also available to draft other instruments on a billable basis.

OPC provides a range of drafting-related services to agencies on a billable basis. These include drafting advice (such as commenting on, or clearing, instruments), instrument design and editorial services. For more information about these services, see OPC's website (www.opc.gov.au).

While developing legislative proposals, agencies can obtain quick off-the-cuff advice from OPC client advisers about drafting matters that arise. A current list of client advisers is available on OPC's website.

If an instrument is not to be drafted by OPC, the person drafting the instrument needs to be aware of the drafting and publishing standards set out in the [Instruments Handbook](#). Compliance with these standards is important and will help ensure that new instruments are:

- legally effective—there are a number of laws of general application to consider
- clear, and
- intelligible to anticipated users, including people who may rely on assistive technology.

If an agency needs or wishes to use OPC's drafting services to draft a replacement for a particular instrument, OPC would appreciate early instructions that, as a general guide, incorporate the following considerations:

- the findings of any review of the instrument in question
- the preferred timing, including whether an exposure draft is required to assist consultation
- whether any policy or other changes are needed (such as deletion of unwanted provisions or changes required as a result of new or amended laws), or whether the instrument is to remain the same in substance
- technical or structural changes to the existing instrument that may be necessary or desirable
- commencement, transitional and application provisions
- consequential amendments to other instruments and Acts that may be necessary, noting that apart from a new name for the instrument, OPC would also normally renumber the existing provisions and may also suggest that they be restructured for consistency with current drafting style and conventions, and
- whether the existing instrument is within the scope of the regulation-making power of the Act under which it is made, and whether there are any provisions that would benefit from rewriting for greater clarity or to remove interpretative doubt.

Attachment D—Summary of main issues and options open to agencies

OPTION	BENEFITS	THINGS TO CONSIDER
If an instrument is no longer required		
Nominate instrument for bulk repeal [see 6.1]	This is a more efficient process than direct repeal and creates less work for agencies.	This option may not be suitable if the effect of repeal is to substantially alter existing arrangements.
Repeal instrument directly [see 6.2]	Direct repeal allows the agency to present the case for repeal at a time of its own choosing.	This option requires a new instrument and Explanatory Statement to be prepared and registered. The instrument of repeal may be disallowable.
Allow instrument to sunset automatically [see Chapter 3]	Sunsetting happens automatically if no action is taken.	Any member of parliament can ask questions about an instrument and seek a resolution that it continue to be in force.
If minor changes to dates are required		
Apply to Attorney-General to align sunset dates for related instruments to facilitate a thematic review [see 4.1]	There are economies of scale and many other benefits to reviewing instruments thematically. Sunset dates can be deferred by up to 5 years.	Sunset dates may be brought forward (but this may be a reasonable trade-off if other dates are deferred). The rule-maker's written application to the Attorney-General is a public document. The Attorney-General's declaration is disallowable.
Apply to Attorney-General for 6 or 12 month deferral of sunset [see 4.2]	If the Attorney-General approves the application and makes the certificate, the instrument remains in force for a further 6 or 12 months. The Attorney-General's certificate is not disallowable.	The Attorney-General cannot defer sunset for more than 12 months.
If the instrument is still required		
Remake instrument, with or without policy changes [see 7.1]	The new instrument can incorporate amendments and be modernised if needed. The new instrument will sunset 10 years from the date of registration.	A new instrument and Explanatory Statement must be registered before the old instrument sunsets. The new instrument may be disallowable.
Seek a parliamentary rollover [see 7.3]	If a resolution is passed, the instrument remains in force for a further 10 years. The instrument does not need to be re-registered or re-tabled and will not go through a disallowance period, and no Explanatory Statement is needed.	There is potential for the motion and debate process to be more complex and time-consuming than remaking. Unless the instrument has been reviewed and found to be fit-for-purpose, it may be difficult to justify keeping it as is for another 10 years. There is a limited window of approximately 6 months for getting a resolution passed. If a resolution is unsuccessful or unresolved, there will be very limited time for the instruments to be remade or for certificates of deferral to be sought. Please consult with AGD before pursuing this option.

Attachment E—Template application for exemption from sunseting

Request to exempt a class of legislative instruments from sunseting under Part 4 of Chapter 3 of the Legislation Act 2003

Please complete a separate template for each class of instruments and read section 7 (notes) first. Please keep your application concise (no more than 4 pages). Additional information can be attached.

1 Proposed scope of exemption

Please identify the class of instruments for which you are seeking an exemption: what legislation is it made under? Is it limited to certain types of instrument eg declarations made under an Act, or to instruments made under a particular provision? Please be as specific as possible.

Please see section 54(1) of the Legislation Act and sections 11 and 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* for examples of existing exemptions.

An exemption is generally framed in terms of:

- the provision under which an instrument is made (e.g. instruments made under section X of Act Y), or
- the class of instruments to which an instrument belongs (e.g. declarations made under Act Y).

2 Description of the instrument/s covered by this proposal

Please list all instruments currently on the FRL that would be covered by this proposal if approved. Do not include solely commencing, amending or repealing instruments (these are covered by automatic and bulk repeal provisions in the Legislation Act). If there is a long list of instruments, please attach a list. Otherwise, list the instruments here. For each instrument, please provide:

- its title
- its unique FRL number, which is available on the FRL (eg F2012L00025), and
- its sunset date.

Describe what the instrument/s proposed to be covered by this exemption do, and what would happen if they were allowed to sunset. Please keep it factual; use relevant statistics and quotes from key stakeholders if you have them to hand.

3 Basis for proposed exemption

Additional exemptions will be made only if exceptional policy circumstances exist. There are five long-standing criteria which can justify granting an exemption, and more than one criterion may apply. Please address each criterion that applies.

- 3.1 *Reason: The rule-maker has been given a statutory role independent of government, or is operating in competition with the private sector.*
- 3.2 *Reason: The instrument is designed to be enduring and not subject to regular review.*
- 3.3 *Reason: Commercial certainty would be undermined by sunseting.*
- 3.4 *Reason: The instrument is part of an intergovernmental scheme.*
- 3.5 *Reason: The instrument is subject to a more stringent statutory review process than is set out in the Legislation Act, and preserving that process is important.*
- 3.6 *Other reason.*

4 Alternative review arrangements

What has been or will be put in place to ensure that the instruments covered by your proposal are subject to periodic review, and only remain in force for so long as they are needed?

5 Other issues

5.1 Human rights compatibility

If approved, your proposal will need to have a human rights statement of compatibility prepared. Is an exemption likely to raise human rights issues under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*? If yes, what specific rights are involved?

5.2 Consultation

Part 1 of Chapter 3 of the *Legislation Act 2003* imposes an obligation on the Attorney-General to be satisfied that consultation has been undertaken to the extent appropriate and reasonably practical. Have you consulted with relevant departments, agencies or other stakeholders in developing this request?

6 Contact details in requesting agency

Please provide contact details at action officer and SES level.

Please provide email and phone details.

7 Notes

7.1 Purpose of sunseting

Section 49 of the *Legislation Act 2003* establishes that the purpose of sunseting is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.

Legislative instruments are an important structural element of Australian law and regulation. There is a high potential for rule-makers to influence legislative schemes for better and for worse. Sunseting is an opportunity for agencies to review their legislative instruments and ensure that legislative instruments are clear, fit for purpose and least burdensome to achieve their purpose.

7.2 Policy criteria for exemptions

REASON	EXAMPLE
The rule-maker has been given a statutory role independent of government, or is operating in competition with the private sector.	Statutes made under the Australian National University Act 1991 or rules or orders made under those statutes by the Australian National University Council for the management, good government and discipline of the University.
The instrument is designed to be enduring and not subject to regular review.	Proclamation of a Commonwealth reserve under sections 344 and 350 of the Environment Protection and Biodiversity Conservation Act 1999.
Commercial certainty would be undermined by sunseting.	Fisheries Plans of Management made under section 17 of the Fisheries Management Act 1991 where people invest based on an understanding that the plan will remain in force for 30 years. Instruments made by the Reserve Bank under the Payment Systems and Netting Act 1998 or the Payment Systems (Regulation) Act 1998 regulating the financial system.
The instrument is part of an intergovernmental scheme.	Declarations made by ministers under section 32 of the Mutual Recognition Act 1992.
The instrument is subject to a more stringent statutory review process than is set out in the Legislation Act, and preserving that process is important.	An instrument is subject to a special 2-yearly sunseting regime.

7.3 Thematic review

Applying for a thematic review is an alternative to making an exemption request. A thematic review is a review of a class of legislative instruments which share a theme, such as regulating a certain industry, or affecting a certain interest. In many instances, thematic review may be the best way for rule-makers to conduct a coherent review of a class of legislative instruments. A separate application template is available for thematic reviews.

Section 51A of the Legislation Act permits the Attorney-General to align the sunseting dates of instruments subject to a thematic review. The sunseting date of an instrument subject to a thematic review can be delayed by up to 5 years. Where possible, a request for alignment of sunseting dates to enable thematic review should be made two years prior to the original scheduled sunseting date. This leaves sufficient time for the instrument to still be included in the 18-month sunseting list tabled in Parliament, should the alignment of sunseting dates be disallowed.

7.4 Regulatory impact assessment

If the exemption is approved by the Attorney-General, your proposal does not need to undergo any further regulatory impact assessment.

If the application is not approved, you will need to confirm the Office of Best Practice Regulation (OBPR) requirements that apply to the instruments that you will be remaking. In some cases a self-assessment process may be available where a Regulatory Impact Statement would otherwise have been required. For further information see OBPR's [Sunsetting legislative instruments guidance note](#).

Non-compliance with the Government's best practice regulation requirements is publicly reported by OBPR and the agency responsible must also complete a post-implementation review of the relevant policy.

7.5 After making an exemption request

AGD will consult with you about your request.

7.6 Contacts

To submit this request, enquire about completing this request or enquire about policy aspects of exemptions to sunseting, please contact:

Attorney-General's Department—Administrative Law Section

Mary Wignall

02 6141 2736

sunsetting@ag.gov.au

For other enquiries:

Office of Parliamentary Counsel—FRL and sunset date questions

Liz O' Donnell

02 6120 1384

Liz.ODonnell@opc.gov.au

Nikki Conduit

02 6272 1323

Nikki.Conduit@opc.gov.au

Department of the Prime Minister and Cabinet, Office of Best Practice Regulation—RIS and agency self-assessment questions

02 6271 6270

helpdesk-obpr@pmc.gov.au

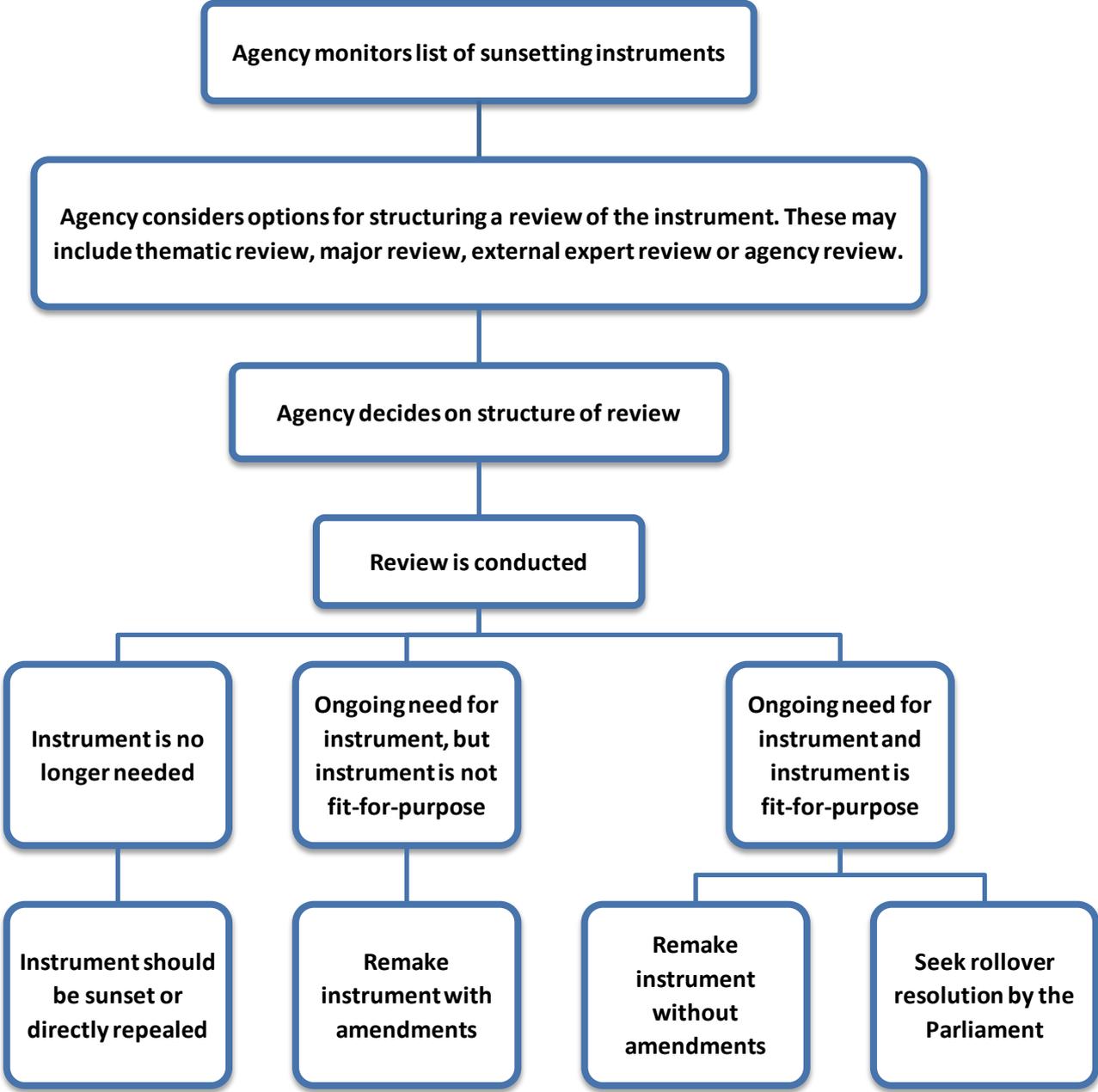
Attorney-General's Department—Human Rights questions

Emma Swinbourne

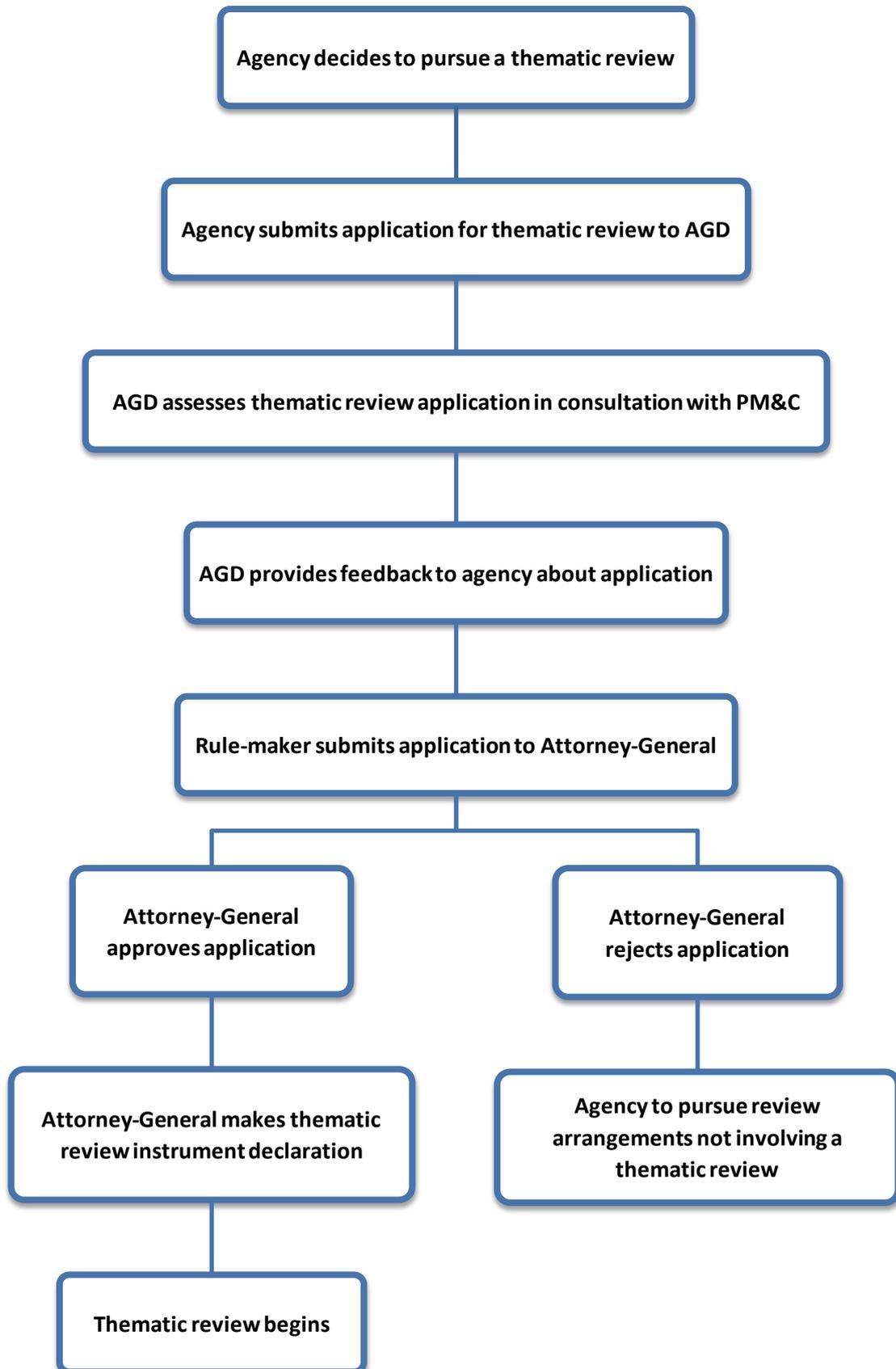
02 6141 2676

humanrights@ag.gov.au

Flowchart 1: The sunseting process



Flowchart 2: Process for applying for a thematic review



Flowchart 3: Process for making a bulk repeal regulation

