



Australian Government  
Department of Education and Training

Mr Iain Anderson  
Chair of the Sunsetting Review Committee,  
Chief Operating Officer and Deputy Secretary  
Attorney-General's Department  
4 National Circuit  
BARTON ACT 2600

Dear Mr Anderson

**Review of the Operation of the Sunsetting Provisions in the *Legislation Act 2003***

I refer to your letter dated 30 May 2017 to the Secretary, Dr Michele Bruniges AM, inviting submissions to the review of the operation of the sunsetting provisions in the *Legislation Act 2003*.

The department supports the operation of the sunsetting framework and endorses the practical benefits associated with the current regime. The department recognises that sunsetting provides an important prompt for regular evaluation and appraisal of existing legislative instruments, a strong incentive to revisit the merits of existing policy design, and an opportunity to reduce regulatory burdens.

A summary of the department's views on a number of questions and issues posed by the Review Committee in its consultation paper are set out in **Attachment A** to this letter.

Should you wish to discuss any aspect of the department's contribution to the review, please contact [REDACTED], Senior Government Lawyer [REDACTED] [REDACTED] [REDACTED]

Yours sincerely

[REDACTED]  
[REDACTED]

Chief Lawyer  
5 July 2017

*Opportunity through learning*

## Attachment A

**The Department recommends that the 10 year sunset period for legislative instruments be retained and that sunset provisions not be included in primary legislation**

The department considers that the default sunset period of 10 years is appropriate and should not be reduced. A 10-year expiration period provides adequate lead time to determine how the instrument is operating in practice, and balances agency concerns about the resource and other implications associated with a shorter sunset cycle. Further the 10-year expiration period is consistent with comparable sunset regimes for delegated legislation in Victoria, Queensland, South Australia and Tasmania.<sup>1</sup>

New South Wales (NSW) is the only jurisdiction that adopts a 5-year sunset period.<sup>2</sup>

In its 2008 review the operation of the (predecessor) *Legislative Instruments Act 2003*, the Review Committee of the Attorney-General's Department (AGD) disagreed with a recommendation of the 2006 Review (*Rethinking Regulation*)<sup>3</sup> to amend the Legislative Instruments Act to provide for the sunset of legislative instruments after 5 years rather than 10 years.<sup>4</sup> As the 2008 review noted, historically NSW has invoked statutory provisions to postpone the sunset dates of instruments which would have otherwise lapsed at the 5 year mark, technically subverting the statutory default sunset period.<sup>5</sup>

In the department's view, there are no compelling arguments for reducing the sunset period. On the contrary, reducing the sunset period may have the unintended effect of creating an unreasonable burden on agencies and stakeholders if review processes are conducted at shorter intervals. Given that agencies invest considerable time into conducting consultation with stakeholders, and undertaking regulatory impact assessment when re-making instruments, this could represent a significant impact on resourcing.

A mandated shorter duration sunset period is also unnecessary. If a legislative instrument becomes superfluous within the 10-year period from its commencement agencies are not precluded from initiating a review at any stage and, where necessary, repealing the instrument at that time. Further, decision makers will usually have discretion to make legislative instruments with a lifespan of less than 10 years. Given this existing flexibility, a blanket 5 year sunset period would be unnecessarily restrictive in terms of managing and coordinating review processes of legislative instruments.

<sup>1</sup> See respectively the *Subordinate Legislation Act 1994* (Vic), *Statutory Instruments Act 1992* (Qld), *Subordinate Legislation Act 1978* (SA), *Subordinate Legislation Act 1992* (Tas).

<sup>2</sup> *Subordinate Legislation Act 1989* (NSW).

<sup>3</sup> Regulation Taskforce on Reducing Regulatory Burdens Report on Business *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, Report to the Prime Minister and the Treasurer* (January 2006).

<sup>4</sup> See p 49-50 of the 2008 AGD Review, discussing recommendations 7.11 and 7.26 of the 2006 Regulation Taskforce Report.

<sup>5</sup> 2008 AGD Review at p 49 citing the Regulation Review Committee, *Regulatory Impact Assessment in New South Wales*, Report prepared by the Public Management Service of the OECD, Report No 18/51, Regulation Review Committee, Sydney, 1999, p. 39.

If shorter sunset periods were to be contemplated, the department considers that they should be applied sparingly, and restricted to very confined cases, where the public interest weighs in favour of such a measure. For example, where the effect of a legislative instrument on rights means its life span should be attenuated or the instrument is intended to be a short-term response to an incident, such as a disaster response which is temporally and geographically confined.

The department also considers that including automatic sunset provisions in primary legislation (as has been instituted in the UK) should not be adopted in the Australian setting. Making primary legislation susceptible to sunset, even if only those Acts nominated as having significant impact would be problematic as it would lead to uncertainty in the law, impose a considerable administrative burden, including placing undue pressures on parliamentary processes and increasing legislative drafting workloads. The department also notes that, according to Office of Best Practice Regulation analysis, statutory review provisions are routinely included in primary legislation and serve a similar objective to sunset by requiring agencies to evaluate the effectiveness of the legislative frameworks and ensuring they commit to periodic appraisal of their operation. This inbuilt review process avoids imposing additional burdens on parliamentary workload which would directly result from the automatic sunset of primary legislation.

**Centralised process for Commonwealth officer level alerts 6-9 month prior to the sunset of instruments**

The 18-month formal reminder by Office of Parliamentary Counsel (OPC) is the sunset 'action benchmark' and does, in effect, start the clock for agencies in initiating instrument review processes (if they haven't already been initiated). However, it would be beneficial if a further formal notification of instruments due to sunset within the next 6 or 9 months could also be provided. This could be either auto-generated by OPC or by AGD to the Legislation Liaison Officers of each agency. This would improve visibility of the sunset regime, provide a buffer to potential agency error or failure to act and generally be a useful back up mechanism to internal audit processes departments have instituted.

This process would not, of course, supplant the responsibility of individual agencies to monitor the elapse dates of their own instruments in any way.

**Investigate enhanced capabilities of the Federal Register of Legislation (FRL) to generate an agency specific alert system**

As an adjunct to, or in substitution for, the 6-9 month alert proposal, the FRL publishing arm of OPC could investigate the cost and viability of enhanced features for the FRL website to allow for more personalised alert systems for agencies in relation to their sunset instruments. For example, links to instruments of interest by a particular agency and time-based prompts. This could be particularly useful for thematic reviews (below) where multiple instruments may be aligned so that agencies and key stakeholders are able to track the progress of thematic reviews for consultation and implementation purposes.

### **Further explanation for agencies to assist understanding as to what is meant by a thematic review in the sunseting context**

Under section 51A of the *Legislation Act 2003* (Legislation Act), the Attorney-General may declare common sunseting dates for related instruments and thereby enable stakeholders to participate in the regulation of their sector and contribute to consistency in regulation making by aligning the review of multiple instruments. Paragraph 4.1 of the AGD 2016 *Guide to Managing Sunseting of Legislative Instruments* states, '[a] thematic review is a review of two or more instruments which share a common theme, such as a particular treaty or a regulation of a particular industry. Thematic reviews are not limited to instruments under a single Act or administered by a single agency'.

The department recognises that thematic reviews are of considerable utility to agencies where sectoral review of closely related instruments is being undertaken, as it would streamline the sunseting workload and reduce stakeholder fatigue. To that end, it would be useful to have some more detailed guidance or training on how to go about identifying instruments that would be suitable for thematic review.

### **Agency guidance on legislative review processes more generally**

Further to the department's comments on thematic reviews, the department also considers that further explanation around legislative review processes in the context of sunseting would also be beneficial. The information currently provided by AGD (Attachment B to the AGD 2016 *Guide to Managing Sunseting of Legislative Instruments*) describes the common models of legislative review, and when they may be appropriate, however there is no detailed guidance on what each may entail. This guidance could take the form of explanatory materials, or an OPC initiated training course or a guidance note.

### **Clarifying the nature of single review for the purposes of section 51A of the Legislation Act**

As AGD has observed, as currently drafted, section 51A prevents the Attorney-General from aligning the sunseting dates of instruments to a later date to allow sufficient time for the Government to implement the findings of a review directly affecting those instruments. This is because, in order to align sunseting dates to facilitate the undertaking of a review under the terms of section 51A, the Attorney-General must be satisfied that aligning the instruments will facilitate both a review being undertaken *and* the implementation of the review.

This means instruments that could otherwise be amended or repealed as a consequence of the implementation of a particular review, cannot have their sunseting dates aligned to accommodate that process because of the limited scope of section 51A.

The department therefore supports adjustments being made to section 51A to enable the Attorney-General to align the sunseting dates of instruments that have been the subject of a completed review in order to facilitate implementation of the findings of that review.