



PARLIAMENT of AUSTRALIA
HOUSE of REPRESENTATIVES

OFFICE OF THE CLERK OF THE HOUSE

PO Box 6021, Parliament House, Canberra ACT 2600 | Phone: [REDACTED] | Fax: [REDACTED] | Email: [REDACTED]

6 July 2017

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
Email: [REDACTED]

Dear Mr Anderson

SUBMISSION TO SUNSETTING REVIEW

The Department of the House of Representatives (the department) welcomes the opportunity to provide some targeted comments on the operation of the sunsetting provisions under the *Legislation Act 2003* (Legislation Act). The department notes the objective of the sunsetting provisions, as set out in section 49 of the Legislation Act, to provide that legislative instruments are subject to ongoing repeal and only remain in force for so long as they are needed.

The department is not generally involved in the making and review of instruments. Its role is limited to facilitating Members' and the House's scrutiny and possible disallowance or roll over of instruments. The department's comments will therefore focus on some matters of a practical nature, where the operation of the sunsetting provisions intersects with the work of the House of Representatives.

List of instruments due for sunsetting

The department acknowledges the value of the requirement under section 52 of the Legislation Act for the Attorney-General to table in Parliament lists of instruments due to sunset in 18 months. The purpose of the tabling is to advise the House, and thereby inform Members, of the affected instruments, and serves as a possible trigger for action on instruments of continuing relevance. The tabled list provides visibility of the affected instruments and may also be useful for agencies. The *Votes and Proceedings* and Disallowable Instruments List also list instruments tabled, which may include replacement instruments for those due for sunsetting.

Sitting days

For the purpose of clarification the department notes that the practice of the House has always been that a sitting may continue over two or more calendar days until the House is adjourned. Such a period constitutes one sitting day for the purpose of calculating periods for the tabling of instruments, giving notice of disallowance and other statutory requirements. There is no statutory definition of a sitting day but the established practice is set out clearly in *House of Representatives Practice*. The Office of Parliamentary Counsel *Instruments Handbook*, which provides guidance to agencies, indicates that a

sitting day 'does not necessarily correspond to a calendar day' and provides examples of when this may occur. While the department receives occasional requests for clarification it is not aware of any general confusion on the subject.

Federal Register of Legislation (FRL)

The consultation paper poses the questions (no. 37): 'How useful is the sunset information provided on the FRL? What could be done to enhance this information?' The department notes that the Legislative Instruments section of the register provides information about the instruments currently open to disallowance, and has a 'Sunsetting soon' section that provides a breakdown of the instruments due for sunsetting in the next 18 month period, by the next six-monthly regular April and October sunsetting periods. This is a useful resource, which provides Members, and other users, with information about instruments that will be affected by sunsetting provisions in a given period and providing ready access to the instruments themselves.

Prorogation of Parliament and deferral of sunsetting of an instrument

The consultation paper poses the question (no. 11): 'To what extent is the prorogation of Parliament an appropriate criterion to justify the deferral of the sunsetting of an instrument?' In response to this, the department will set out the effect of prorogation on the sunsetting process for the information of the review, but does not propose to comment on the appropriateness of the criterion.

The tabled list of legislative instruments due for sunsetting, and agencies' own instrument management processes, provide agencies with notice that action may be required in relation to instruments due to sunset but which remain relevant. An unexpected prorogation could delay (possibly substantially) a replacement instrument being tabled, or the resolution of a notice to disallow one that has not yet been dealt with by the House prior to prorogation. Section 42(3) of the Legislation Act provides that if 15 sitting days have not expired after the notice of motion to disallow a legislative instrument and the motion has not been dealt with prior to prorogation of the Parliament, then the legislative instrument is to be taken as being laid before the House on the first sitting day after that House's prorogation. In effect, this restarts the timing for which the legislative instrument will be required to be before the House, including time to consider the motion if another notice to disallow is given.

Prorogations most often immediately precede dissolutions of the House, but, if unanticipated, could impact on replacement instruments that are to be laid or have been laid before the House close to scheduled sunsettings in April or October. However, it should be noted that under section 51(1) of the Legislation Act the Attorney-General may issue a certificate of deferral in cases where '...the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed'.

Tabling requirements for certificates of deferral

The consultation paper poses the question (no. 15): 'Is the tabling requirement for certificates of deferral appropriate?' Section 51(2)(b) of the Legislation Act requires certificates of deferral to be tabled no later than six sitting days after the certificate is issued. However, as section 51(3) states that certificates made under section 51(1)(c) are legislative instruments, they are therefore subject to the general requirement of section 38(1) that all instruments be tabled within six days of registration. It therefore seems unnecessary to retain the requirement of section 51(2)(b).

Disallowance of section 51A declarations and Parliamentary roll over

The consultation paper poses the questions (no. 18): 'Is it appropriate for section 51A declarations to be subject to disallowance?' and (no. 24): 'To what extent is parliamentary roll over still a necessary and appropriate safeguard for preventing the sunseting of a legislative instrument?' While Parliament has regularly and extensively delegated power to the Executive to make legislative instruments it retains ultimate legislative authority over delegated legislation. This is reflected in the power of either House to disallow an instrument (section 42) or to roll over instruments that are due to sunset (section 53). The department considers the capture of section 51A declarations by the general disallowance provisions and the retention of the provisions of section 53 of the Legislation Act necessary and appropriate.

Yours sincerely



Acting Clerk of the House