



July, 2017

Mr Iain Anderson
Chair of the Review of the Operation of the Sunsetting Provisions
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

Enclosed is the Treasury submission to the review of the operation of the sunsetting provisions in the *Legislation Act 2003*.

Yours sincerely


Division Head
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The Treasury

ATTACHMENT

TREASURY SUBMISSION - REVIEW OF THE OPERATION OF THE SUNSETTING PROVISIONS IN THE *LEGISLATION ACT 2003*

TREASURY SUBMISSION

General comments

Treasury supports the continuous review, evaluation and improvement of regulation. The goal of regulation is to address a problem in an efficient and effective way; regulation that does not do so requires amendment or repeal. Sunsetting provides a valuable mechanism for assessing regulation.

In practice, we have observed a number of challenges with the sunsetting framework. We therefore welcome this review and the opportunity it presents to strengthen the framework.

Observations

The scale of sunsetting is vast. In the Treasury portfolio alone, there are around 1,800 legislative instruments, of which 141 are due to sunset in the next twelve months. Across the Commonwealth, the number is even higher. The very large volume of instruments that need to be evaluated each year increases the difficulty of conducting reviews in appropriate detail. This raises the prospect that regulation may be amended or remade without adequate scrutiny.

The current sunsetting framework requires that each instrument be reviewed on the same cycle, regardless of its size, importance or the magnitude of the regulatory burden it imposes. The exemption regime has regard to matters such as the need for commercial certainty and the existence of inter-governmental arrangements. In practice, this makes it likely that many of the instruments that are exempt from sunsetting may be larger and more complex than average. This creates a risk that evaluation resources could be expended on smaller instruments, rather than on larger ones, which may have a greater potential to benefit from review.

Options for reform

The current sunsetting regime could be enhanced to support the fitness for purpose of Commonwealth regulation, while at the same time targeting evaluation resources on the most important regulatory frameworks. This could be done by broadening the scope of sunsetting reviews, allowing for more targeted evaluation and amending the sunsetting period.

Broaden the scope

Sunsetting is currently limited to legislative instruments. However, the drivers of inefficiency or ineffectiveness in a regulatory regime, of which an instrument forms one part, may not be found in that instrument; they may lie in the primary legislation or related instruments.

Therefore, we suggest structuring sunsetting requirements around regulatory frameworks as a whole, rather than around individual legislative instruments. Examining frameworks holistically, or in a thematic way, is likely to yield greater benefits than assessing individual instruments in isolation.

... and narrow the focus

The sunsetting framework applies to all legislative instruments that do not fall into one of the categories for exemption, and so each of these instruments will need to be reviewed. As an alternative, Departments and

agencies could nominate a program of regulatory frameworks to review over a period. This would allow Departments and agencies to focus their evaluation resources on the regulatory frameworks that would most benefit from assessment – where a review may have the greatest impact and where there may be the most potential for reform.

To ensure that Departments and agencies put forward a sufficiently ambitious program of work, the nominations could be approved by portfolio Ministers and then submitted to the Attorney-General.

RESPONSE TO SELECTED CONSULTATION QUESTIONS

1. To what extent has the purpose of the sunseting framework been realised, and is that purpose still appropriate?

The sunseting framework has resulted in the identification of a number of redundant legislative instruments that have been repealed or allowed to sunset. The sunseting framework has also been beneficial in facilitating the updating and modernisation of a number of legislative instruments, particular older instruments or those in areas that have been subject to significant change to the law.

3. Is the current sunseting period of 10 years appropriate?

Consideration could be given to a longer sunseting period such as 15 or 20 years to balance the resource impact of sunseting regime on agencies with the need to also deliver other government legislative priorities.

4. What effect has the sunseting framework had on departmental and agency processes for conducting fit for purpose reviews of legislative instruments?

It has been effective at ensuring that reviews of legislative instruments are undertaken in the lead-up to the sunset date, and that processes are put in place to make sure that instruments due to sunset remain fit for purpose.

The process by which instruments made by one government department or agency relating to the laws administered by another can generate risks where there is limited consultation. Therefore all agencies should consult with others affected by a change they are proposing to make. The involvement of affected entities or industry groups also assists in ensuring the relevancy and efficacy of the instruments under review. This could be encouraged by ensuring these entities and groups are made aware that changes in circumstances rendering the legislative instrument no longer fit for purpose can be brought to the relevant agency's attention. Possibly this could be achieved through statements in the explanatory statements accompanying the legislative instrument (the *Instruments Handbook* could be updated to provide guidance on drafting such instructions in the explanatory statements).

5. Is there a need to develop whole-of-government policy guidance on processes for managing sunseting legislation? If so, what matters should be covered by such a policy?

The existing material is considered to be sufficient.

7. Is there a need to develop policy or legislative guidance on undertaking reviews of sunseting legislative instruments?

The relevant agencies which manage and administer the legislative instruments are best placed to determine the policy and processes for complying with the sunseting legislation.

10. Should the Attorney-General have the power to defer the sunseting of an instrument for more than 12 months?

A deferral power of up to 18 months should be considered. This will address reform areas in which there are wider reforms being implemented that need to be considered before remaking a sunseting instrument.

11. To what extent is the prorogation of Parliament an appropriate criterion to justify the deferral of the sunseting of an instrument?

It is important that the prorogation of Parliament trigger an automatic deferral of sunseting for any instrument that would sunset from the time of prorogation of Parliament until 6 months after this time. This will ensure that prorogation does not result in the lapse of any instruments and it also ensures that there is sufficient time after a new Parliament is formed to remake instruments.

16. Would it be appropriate for more than one deferral of sunseting to be granted for the same instrument?

There may be unavoidable reasons that require several deferrals to be made and accordingly there would be benefits in allowing the *Legislation Act 2003* to provide flexibility for this to occur.

26. Should Parliament be able to roll over legislative instruments that have had their original sunseting dates changed by a declaration of alignment under section 51A?

Yes Parliament should still be able to roll over these instruments. The declaration of alignment provides an avenue to review and remake related instruments at the same time. Doing so should not prevent Parliament from deciding to roll over the instruments so that they continue to operate.

29. To what extent is section 54 still appropriate, having regard to the broader objectives of the sunseting framework?

Section 54 is an important element of the sunseting framework which excludes the types of instruments that should not be subject to sunseting. In considering the sunseting of the *Competition and Consumer Regulations 2010*, Treasury came to the view that subsection 54(1) did not provide sufficient certainty that the regulations would not sunset. While it was likely that sunseting would not apply there was some risk that later litigation might result in a different view being reached. Accordingly, to ensure that stakeholders had certainty about this matter, Treasury therefore decided to seek an explicit exemption by means of a regulation made under paragraph 54(2)(b).

30. Should subsection 54(1) be amended to include intergovernmental bodies or schemes involving the Territories, not just the States?

Yes subsection 54(1) should apply in relation to Territories also.

31. Should subsection 54(1) be moved from the Legislation Act and inserted into LEOMR?

Yes this would ensure that all of the sunseting exemptions are in one place. There should also be a list of the instruments that are exempt under subsection 54(1) in the LEOMR to provide clarity to stakeholders.

32. Are the five policy criteria still appropriate and aligned to the overall objectives of the sunseting framework?

The criteria could be expanded to also exempt instruments that are regularly updated. In these cases, there is already ongoing maintenance of the provisions and having to remake the instrument every 10 years even where the provisions may have been made only two or three years previously would not be necessary.

33. Should the criteria for granting specific exemptions from sunseting be set out in legislation, rather than policy?

No, there are benefits for the criteria remaining a policy matter so that there is sufficient flexibility to adapt the criteria as required as new sunseting issues arise over time.

35. Should notifiable instruments be subject to the sunseting framework, or alternatively a modified automatic repeal or bulk repeal process?

A modified automatic repeal process would be appropriate for amending or repealing notifiable instruments.

37. How useful is the sunseting information provided on the FRL? What could be done to enhance this information?

This information is valuable as it assists users of the legislative instruments to readily identify sunseting dates for instruments, including instruments in each portfolio that will sunset over the next 18 months. There would be a benefit in extending the list beyond instruments that will sunset over the next 18 months to the next 24 months to ensure early identification of sunseting instruments.

38. To what extent are the automatic repeal provisions appropriate?

The process is effective in reducing the number of redundant instruments on the Federal Register of Legislation.