Australian Government
Attorney-General's Department

Guide to managing the sunsetting of legislative instruments

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1. Introduction

1.1 What is sunsetting?

Sunsetting is the automatic repeal of legislative instruments after a fixed 10 year period. The Australian Government's sunsetting framework is set out in Part 4 of Chapter 3 of the *Legislation Act 2003* (Legislation Act).

1.2 Purpose of this guide

The purpose of this guide is to assist agencies to manage sunsetting through appropriate planning and informed decision-making. A glossary of terms is at Appendix A. A simplified overview of sunsetting processes is available at Appendix B. Further information and links to additional resources are contained in other Appendices.

1.3 What determines an instrument's sunsetting date?

All legislative instruments are subject to sunsetting unless they are exempt. Section 50 of the Legislation Act provides that legislative instruments registered after 1 January 2005 are automatically repealed on 1 April or 1 October on or immediately following the tenth anniversary of their *registration*. Special rules apply to legislative instruments that were already in effect at the time the Legislation Act commenced on 1 January 2005 (see Appendix C).

1.4 Why sunsetting matters

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

Sunsetting provides an opportunity for agencies to review and streamline legislative instruments. It is an important mechanism for reducing red tape, delivering clearer laws and aligning existing legislation with current government policy. The sunsetting framework ensures that legislative instruments are reviewed by the responsible agency at least every 10 years to determine whether they:

- remain fit for purpose and should be replaced by an instrument substantially the same in form
- should be replaced with substantial changes and improvements, or
- are spent or redundant and can be actively repealed or allowed to sunset without replacement.

1.5 Who is responsible for managing sunsetting?

The agency responsible for a legislative instrument has primary responsibility for the management of its sunsetting. Sunsetting requires the attention of all levels of Government from administering line areas through to Ministers and other rule-makers.

The Attorney-General's Department (AGD), the Office of Best Practice Regulation (OBPR) in the Department of the Prime Minister and Cabinet (PM&C) and the Office of Parliamentary Counsel (OPC) work together to streamline sunsetting mechanisms across government and assist agencies undertaking sunsetting work. The Attorney-General, AGD and OPC have particular responsibilities for different aspects of the framework.

2. Sunsetting regime

2.1 Sunsetting process

2.1.1 Tabling of 'sunsetting lists'

The Attorney-General tables in Parliament a list of instruments that are due to sunset within 18 months (the 'sunsetting list'). Once a sunsetting list is tabled, the list is published on the Federal Register of Legislation (FRL), as required by section 52 of the Legislation Act. Sunsetting lists are tabled twice a year.

Once a sunsetting list is tabled, OPC provides the list to each agency head to distribute to each rule-maker of a listed instrument within that portfolio. This process is in accordance with subsection 52(3) of the Legislation Act.

Agencies are strongly encouraged to actively monitor the sunsetting status of their portfolio instruments (see 2.1.3 Active engagement via the FRL). If you have any questions or concerns about the accuracy of information published on the FRL, please contact OPC to discuss. Contact details for OPC are at Appendix A. You can also report a problem by using the feedback form on the FRL website.

2.1.2 Preparing for sunsetting

Once a sunsetting list is tabled and circulated, there will be less than 18 months available for agencies to prepare for the sunsetting of these instruments. This can involve conduct of a review, consultation with government, business and community stakeholders, implementation of review recommendations, drafting of replacement instruments, and preparation for scrutiny processes, including the possibility of disallowance (see 3.1.5 Potential disallowance). In some circumstances depending on the content, age and size of an instrument, an agency may require more than 18 months to prepare effectively for sunsetting.

2.1.3 Active engagement via the FRL

Agencies should use the FRL to identify and monitor upcoming sunsetting dates affecting their portfolio's legislation.[1] Early identification of sunsetting dates is vital to the proper planning and resourcing for sunsetting processes.

In addition to publishing copies of sunsetting lists, the FRL provides:

- information on each instrument's current sunsetting date, including the authority for any changes to that date[2]
- real-time reports 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 sunsetting date altered, and
- the ability to sort these reports by portfolio or sunsetting date.

It is critical that agencies actively monitor upcoming sunsetting dates, and do not rely solely on the tabling and circulation of the sunsetting list for commencing planning and review processes.

Agencies can use the FRL lodgement portal to develop downloadable portfolio-specific sunsetting reports (see Appendix D for further information).

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[1] Agencies can browse the Sunsetting Soon page on the FRL, or use the FRL lodgement portal to generate portfolio-specific sunsetting lists. These lists can then be exported to Excel, creating a searchable document that can be used to forward plan for upcoming sunset dates. Agencies are encouraged to create portfolio specific sunset lists regularly. Further information on how to create a list can be found at Appendix D.

[2] Sunsetting information (including any changes to sunsetting status due to deferral, alignment or exemption) is located on the Series page for each 'in-force' legislative instrument on the FRL.

2.1.4 Costs and other responsibilities

Administering agencies are responsible for the costs associated with the sunsetting of their instruments, including OPC fees for drafting and registration of replacement instruments, instruments progressed by AGD at an administering agency's request, and for preparation of compilations where required. OPC also charges annual fees for the ongoing maintenance of instruments on the FRL. Further information is available from OPC's website.

Agencies are also responsible for calculating the regulatory burden costings and offsets that may result from the repeal or replacement 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 OBPR.

2.2 Options for managing sunsetting

OPTION	BENEFITS	THINGS TO CONSIDER
If a law is no longer required		
Repeal instrument directly (see Direct repeal)	Direct repeal allows the agency to present the case for repeal at a time of its own choosing.	This requires a new instrument and explanatory statement to be prepared and registered. The new instrument may be disallowable.
Allow instrument to sunset automatically (see Allow to sunset)	Sunsetting happens automatically if no action is taken.	Any member of Parliament can seek a resolution that an instrument that is due to sunset continues to be in force.
If changes to dates are required		
Apply to Attorney-General for an alignment of sunsetting dates to facilitate a thematic review (see Alignment of sunsetting dates)	There are economies of scale and many other benefits to reviewing instruments thematically. Sunsetting dates can be deferred by up to five years through an alignment.	Sunset dates may be brought forward (but this may be a reasonable trade-off if other dates are postponed). The Attorney-General's declaration of alignment is disallowable. Legislative criteria apply. The declaration of alignment must be made before the first scheduled sunsetting date – it cannot revive an instrument that has sunset.
Apply to Attorney-General for a deferral of sunsetting (see Certificate of deferral)	A deferral may be for six, 12, 18 or 24 months. A certificate of deferral is not disallowable if it is a deferral for six or 12 months.	A deferral cannot be for more than 24 months. A certificate of deferral is disallowable if it is a deferral for 18 or 24 months. Legislative criteria apply. The certificate of deferral must be made before the scheduled sunsetting date – it cannot revive an instrument that has sunset.
If the law is still required		
Replace instrument, with or without changes (see Replacing an instrument)	The instrument can be revised and updated. The replacement instrument will sunset 10 years from the date of registration.	A replacement instrument and explanatory statement should be registered before the old instrument sunsets. Failure to do so risks creating a gap in the law that may not be able to be addressed retrospectively. The replacement instrument may be disallowable.
Seek a Parliamentary roll over (see Parliamentary roll over)	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, will not go through a disallowance period, and no	There is potential for the motion and debate process to be more complex and time-consuming than replacing the instrument. The resolution must be passed before the scheduled sunsetting date – it cannot revive an instrument that has sunset.

	explanatory statement is needed.	If a resolution is unsuccessful, there could be very limited time for replacement instruments to be made or for certificates of deferral to be sought. Please consult AGD early if you intend to pursue this option.

2.3 Exemptions from sunsetting

All legislative instruments in force are subject to the sunsetting processes in the Legislation Act unless they are explicitly exempt. A legislative instrument may be exempt from sunsetting if one or more of the following apply:

- the instrument falls under subsection 54(1) of the Legislation Act
- the instrument falls under section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEOMR) (classes of legislative instruments that are not subject to sunsetting)
- the instrument or its enabling provision is specified in section 12 of the LEOMR (particular legislative instruments that are not subject to sunsetting), and/or
- in limited circumstances, the Act of Parliament that authorises the making of the instrument provides that the instrument is exempt from sunsetting.

As a matter of best practice, instruments that are exempt from sunsetting should still be reviewed periodically to comply with specific statutory obligations and the *Australian Government Guide to Regulatory Impact Analysis*.

2.3.1 Class exemptions

There are a number of 'category' or 'class' exemptions from sunsetting.

Subsection 54(1) of the Legislation Act provides that an instrument is not subject to sunsetting if its enabling legislation:

- is not the *Corporations Act 2001*
- facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories, and
- authorises the instrument to be made by the body or for the purposes of the body or scheme.

Section 11 of the LEOMR also prescribes various classes of instruments that are not subject to sunsetting.

2.3.2 Applicability of class exemptions

The agency and the rule-maker must determine whether an instrument falls within one or more of the provisions set out above. It is strongly recommended that agencies seek legal advice on the applicability of these provisions to an instrument. There is a potential for significant legal and other consequences if, contrary to an agency's assessment, a court later finds that an instrument was not subject to an exemption and has already sunset. Agencies should also note that the applicability of a 'class exemption' may change over time if the instrument is amended.

If you consider that an instrument is exempt from sunsetting by virtue of subsection 54(1) of the Legislation Act or section 11 of the LEOMR, please contact OPC via your agency's instrument adviser or the FRL feedback form so that the FRL can be updated to reflect that the instrument is exempt from sunsetting.

2.3.3 Specific exemptions

Section 12 of the LEOMR sets out specific legislative instruments that are exempt from sunsetting. New exemptions may be prescribed by amendment to the LEOMR. A rule-maker may seek a new

exemption by applying to the Attorney-General. However, exemptions are only granted if exceptional policy circumstances exist (see below). If an agency is proposing to seek an exemption in relation to an existing instrument, it is strongly recommended this process is begun well in advance of the sunsetting date (see 2.3.5 Practical steps for applying for a specific exemption).

Amendments to the LEOMR are made by amending regulation and are therefore subject to the standard parliamentary scrutiny processes applying to all legislative instruments. The Senate Standing Committee for the Scrutiny of Delegated Legislation (SSCSDL) has expressed the view that an exemption from the sunsetting requirements of the Legislation Act is a significant matter. The SSCSDL expects future proposed exemptions to be accompanied by a robust and thorough justification that addresses how the Parliament will retain oversight of the review process of such instruments.[3] This is particularly important when a specific exemption is expressed in a way that would apply to both instruments in force at the time and instruments that may be made in future.

AGD's position is that all specific exemptions from sunsetting should be prescribed in the LEOMR, rather than in the Act of Parliament that authorises the making of the instrument.

2.3.4 Policy criteria for specific exemptions

Specific exemptions from sunsetting are granted only in exceptional circumstances. The Attorney-General will conduct an assessment of whether it is appropriate to exempt an instrument from sunsetting on the basis of the seven policy criteria set out below.

POLICY CRITERIA	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 Australian National University is a self-governing academic institution. • A determination relating to remuneration, allowances or leave for parliamentarians and public office holders made by the Remuneration Tribunal, which has a statutory role independent of Government.
The instrument is designed to be enduring and not subject to regular review. To establish that this criterion has been met, the application must identify the particular aspects of the instrument's operation or effect that make it unsuitable for regular review.	• A determination made solely for the purposes of sections 13 and/or 13A of the *Currency Act 1965*, which governs the standard composition, weight, design and dimension of coins. • A regulation made under the *Protection of Word 'Anzac' Act 1920*, which prohibits the use of the word 'Anzac' in connection with trade and commerce, and as a name for some streets, roads and parks. • A Proclamation made under certain provisions of the *Seas and Submerged Lands Act 1973*, which specifies the limits of Australia's territorial sea, contiguous zone, exclusive economic zone and continental shelf, and declares certain bays in South Australia to be historic bays.

[3] Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated legislation monitor 9 of 2017*.

POLICY CRITERIA	EXAMPLE
Commercial certainty would be undermined by sunsetting. To establish that this criterion has been met, the application must identify why 10-yearly review and replacement of the instrument would have an impact on the commercial certainty of a specified industry, by specific reference to the instrument's operation. It is not enough to make an argument based on the consequences that would arise if the instrument were to sunset, as presumably this would not be allowed to occur if the instrument were still up to date and needed.	• Fisheries Plans of Management made under section 17 of the *Fisheries Management Act 1991*. Investment decisions are made in reliance on these Plans and are intended to be in force for substantially longer periods than 10 years. • Regulations made under the *Patents Act 1990*. Investment decisions are made in relation to new inventions with a view to rights that are currently presumed to outlast the sunsetting period of 10 years; most Australian patents may be maintained for up to 20 years, and certain pharmaceutical patents may be maintained for up to 25 years.
The instrument is part of an intergovernmental scheme. To establish that this criterion has been met, the application must demonstrate that, because it is part of an intergovernmental scheme, it would be inappropriate for the Commonwealth to unilaterally sunset the instrument. Please note that the term 'intergovernmental' encompasses both domestic and international schemes. This criterion is different from subsection 54(1) of the Legislation Act, which is a dual-pronged test relating to the instrument's enabling legislation, rather than the instrument itself. It is also different from the class exemption in item 1 of section 11 of the LEOMR, which is a sole or primary purpose test relating specifically to an international obligation of Australia.	• The *Corporations Regulations 2001*, which are integral to the *Corporations Agreement 2002*, an intergovernmental scheme which is supported by a referral of powers to the Commonwealth. • Regulations made under the *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Protection (Fees) Act 2009*, which are integral to the *Council of Australian Governments National Credit Law Agreement 2008*, an intergovernmental scheme supported by a referral of powers to the Commonwealth. • Declarations made under section 31 of the *Trans-Tasman Mutual Recognition Act 1997*, which support an intergovernmental agreement between Australia and New Zealand.
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. To establish that this criterion has been met, the review process must be set out in legislation (rather than merely policy), and must involve a periodic review cycle that is shorter (or otherwise more rigorous) than the 10-year requirement under the sunsetting framework.	• An Australian Airspace Policy Statement made under subsection 8(1) of the *Airspace Act 2007*. Section 10 of that Act requires the Statement to be reviewed every three years. • Disability standards made under section 31 of the *Disability Discrimination Act 1992*, all of which include a statutory requirement for the effectiveness of the Standard to be reviewed every five years.

POLICY CRITERIA	EXAMPLE
The instrument is: • **sufficiently large and complex that the administrative burden associated with remaking the instrument would outweigh any regulatory benefit** • **subject to regular review, and** • **subject to regular amendment.** Consistent with recommendation 30 of the final report of the Sunsetting Review, instruments exempted from sunsetting on this basis must meet all three of these criteria. For more information, see the discussion at paragraph 9.2.1 of the report.	• The *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) provide legislative authority for Commonwealth expenditure on multiple government activities across all portfolios. The FF(SP) Regulations are regularly reviewed and amended to ensure that they continue to reflect government priorities and remain up to date. In 2017, Schedule 1AB was amended over 40 times. The FF(SP) Regulations are a large and highly complex instrument. Because the expenditure authorised by the FF(SP) Regulations affects every Commonwealth portfolio, all of the States and Territories and a substantial number of commercial and non-profit bodies, the administrative burden associated with remaking the FF(SP) Regulations would be so significant that it would outweigh any regulatory benefit.
The instrument governs a scheme that is applicable to a permanently closed class of persons. Consistent with recommendation 31 of the Sunsetting Review, this criterion recognises that instruments governing a closed class scheme are unlikely to need to be reviewed and a replacement instrument made every 10 years. Instruments falling under this criterion will often also fall under the 'enduring and not subject to regular review' criterion. For more information, see the discussion at paragraph 9.2.2 of the report.	• Certain instruments made under the *Veterans' Entitlements Act 1986*, which provide assistance or outline criteria or guidelines that support the benefits and entitlements payable under the Act. They apply to classes of World War I and World War II veterans and, in some cases, their spouses and dependants. As such, the instruments apply only to a 'closed class' of beneficiaries and will need to remain in force while the affected veterans, spouses or dependants continue to obtain assistance under these schemes. • Regulations relating to the administration of the superannuation scheme established under the *Papua New Guinea (Staffing Assistance) Act 1973*, which provide for defined benefit superannuation entitlements that are intended to be enduring for the life of those schemes and not subject to regular review.

2.3.5 Practical steps for applying for a specific exemption

Agencies wishing to seek a specific exemption should contact AGD (sunsetting@ag.gov.au) as soon as possible for guidance. As exemptions from sunsetting will draw the attention of the SSCSDL, it is essential that AGD is consulted at an early stage to ensure that there is a sufficiently robust justification for the proposed exemption. Agencies should allow sufficient time in their planning for contingency measures to be undertaken if a proposed exemption is disallowed.

Agencies should be discerning when choosing the ground(s) on which the exemption is proposed to be justified. An exemption from sunsetting is justifiable as long as the instrument clearly meets one of the criteria set out above. It is strongly recommended that applications do not seek to satisfy too many of the criteria, as this will almost certainly lead to contradictory justifications. For example, an instrument that is intended to be enduring and not subject to regular review is unlikely to also be subject to a more rigorous statutory review process than is set out in the Legislation Act. We

encourage agencies to choose one or two relevant criteria and focus on developing robust justifications based on those particular criteria.

Previous regulations that have amended the LEOMR to insert additional exemptions can be found here. You may wish to consult the explanatory statements to each of those regulations for further examples of justifications that have been used as a basis for exemption from sunsetting.

2.3.6 Process steps – Applying for an exemption

1. The agency prepares a draft application for exemption using the template at Appendix H and provides the draft application to AGD (sunsetting@ag.gov.au) for review.
2. AGD reviews the draft application to ensure that it provides appropriate justification for an exemption.
3. Once the draft application is finalised at the officer level, the agency briefs the rule-maker(s) for the instrument to write to the Attorney-General, attaching the application and requesting the exemption by way of amendment to the LEOMR.
4. Once the letter of application has been received, AGD provides the application to the Attorney-General for policy approval.
5. If policy approval is granted, AGD prepares drafting instructions for a regulation to amend the LEOMR and issues them to OPC. The timing of this will depend on whether there are other proposed exemptions that can be included in the same amending regulation.
6. AGD prepares a draft explanatory statement setting out the justifications for the proposed exemption. The agency will have the opportunity to review both the draft explanatory statement and the draft amending regulation before they are finalised for the Attorney-General's approval.
7. AGD provides the application, draft amending regulation and explanatory statement to the Attorney-General for text approval. (In some cases text and policy approval may be sought in the one submission.)
8. If text approval is granted, AGD arranges for the amending regulation to be provided to the Executive Council.
9. If the amending regulation is made, AGD registers the amending regulation on the FRL and OPC will arrange for its tabling in both Houses of the Parliament.
10. Once tabled, the amending regulation is subject to the usual parliamentary scrutiny processes, including the disallowance mechanism set out in section 42 of the Legislation Act.
11. AGD will liaise with the agency if the SSCSDL requests further information on any aspect of the amending regulation.

3. Planning for sunsetting

3.1 Risk management

3.1.1 Timeframes

Agencies should plan carefully for the time and workload involved in the sunsetting process. Each instrument needs to be reviewed well in advance of its sunsetting date to allow sufficient time for drafting, consultation, ministerial approval processes and (where applicable) Executive Council deadlines, as well as to account for the risk of disallowance (see 3.1.5 Potential disallowance). This applies even if an instrument is expected to be replaced by an instrument that is substantially the same.

Additionally, where the instrument imposes charges on the non-government sector (for example for the provision of goods, services or regulation), additional cost and price management may be required. The relevant agency may also be required to obtain a government decision about whether charging should continue and at what level (see RMG 302 *Australian Government Charging Framework*).

The following provides a guide to the time OPC requires for the drafting of replacement instruments, without significant changes:

- a 10 page instrument - six weeks
- a 50 page instrument - six months
- a 100 page instrument - 12 months, and
- a 200 page instrument - two years.

Failure to plan for sunsetting creates a risk that a law which is still required will be repealed before action to preserve its effect can be taken. The resulting unintended gap in the law may have significant consequences.

An unintended gap in the law will also occur if a replacement instrument is disallowed by the Parliament after the sunsetting instrument has been repealed and the responsible agency has not taken steps to mitigate this risk (including planning for potential disallowance and contingency arrangements when setting timeframes) (see 6.4 If a replacement instrument cannot be made before a sunset date).

3.1.2 Drafting

Agencies must consider what drafting resources will be required for their replacement instrument(s). Under the *Legal Services Directions*, the following is 'tied work' and must be drafted by OPC:

- regulations
- ordinances and regulations of external Territories and Jervis Bay Territory, and
- other legislative instruments made or approved by the Governor-General.

Other legislative instruments may be drafted in-house or by OPC on a fee-for-service basis.[4] Your agency's Legislation Liaison Officer or equivalent will be able provide agency-specific information about drafting requirements.

3.1.3 Bidding for OPC drafting resources

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 that sittings period. If the priority of an instrument or measure changes, or an additional instrument or measure needs to be added, a variation bid must be provided to OPC.

[4] Please see Appendix J for more information on choosing drafting services, drafting and publishing standards and the issuing of drafting instructions.

For further information on the prioritisation system, please contact your agency's OPC instrument adviser.

3.1.4 Charging

Where the instrument enables charging or may involve charging in the future, an agency may need to seek refreshed or new authority for charging as per the RMG 302 *Australian Government Charging Framework*. For regulatory charges, this will involve a decision by either the Prime Minister or the Government. This can be obtained in parallel to developing the new instrument; however the agency should allow sufficient time to obtain the authority. This will need to include time for the agency to interact with the Agency Advice Unit in the Department of Finance and for the making of appropriate process decisions in consultation with PM&C.

3.1.5 Potential disallowance

In conjunction with Parliamentary tabling requirements, the disallowance mechanism set out in section 42 of the Legislation Act provides for the Parliamentary scrutiny of legislative instruments.

The disallowance process ensures the accountability of the executive to Parliament by allowing either House of the Parliament to veto a legislative instrument. A notice of motion to disallow a legislative instrument may be given by any member of Parliament. The Chair of the SSCSDL may also place a notice of motion on behalf of the Committee, if its scrutiny concerns have not been effectively addressed by the responsible agency or rule-maker.

Replacement instruments (unless exempt), declarations of alignment, certificates of deferral for 18 or 24 months and regulations prescribing new exemptions from the sunsetting regime are all subject to disallowance.

Any agency proposing to make an instrument that is subject to disallowance is strongly encouraged to factor in sufficient time for the instrument to be made and tabled in both Houses of the Parliament at least 30 sitting days prior to the sunsetting 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 notice of motion to disallow the instrument (or a provision of that instrument) may be given in either House of the Parliament within 15 sitting days after the date the instrument is tabled in that House, and
- if such a notice has not been resolved or withdrawn within a second period of 15 sitting days after the date the notice was given, the instrument (or provision) is deemed to have been disallowed and ceases to have effect from that time.

If an instrument (or a provision of that instrument) has been disallowed (whether by carriage of the disallowance motion, or automatically through expiry of the second block of 15 sitting days), an instrument or provision that is the same in substance cannot be remade within six months of the date of disallowance.

Agencies should ensure that there are contingency measures in place if there is a risk that an instrument may be subject to a motion to disallow. In the absence of such measures, a disallowance motion could lead to a gap in the continuity of the law.

For instruments drafted by OPC, it is essential that you provide OPC with sufficient drafting time in addition to the 30 sitting days. You should not assume that the drafting timeframes can be shortened to minimise the potential ramifications of disallowance. If you do not allow for sufficient drafting time, it may not be possible to have your instrument made in time to allow the full 30 sitting day period to elapse prior to the original instrument's scheduled sunsetting date.

3.1.6 Seeking policy approval

As a general principle, policy approval from the rule-maker of a legislative instrument must be in place prior to issuing drafting instructions to OPC to replace the instrument. OPC may be able to begin drafting without policy approval where no substantive policy changes are required. However, as arrangements differ between portfolios, advice should be sought from your agency's legislation area and OPC's instrument adviser for your agency as early as possible.

3.2 Sunsetting Checklist

This checklist aims to provide a snapshot of the sunsetting process to assist agencies with planning ahead for the sunsetting of instruments within their portfolios.

General responsibilities – action necessary every six months

- ✓ Create a list of administered legislative instruments (see Appendix D).[5]
- ✓ Using that list:
  - identify the sunsetting date for each instrument
  - identify any instruments that currently involve charging or could involve charging in the future (see 3.1.4 Charging)
  - identify any applicable exemptions (see 2.3 Exemptions from sunsetting):
    - ensure that any exemptions are reflected on the FRL (see 2.1.3 Active engagement via the FRL)
    - consult with AGD on any proposed new exemptions from sunsetting (see 2.3 Exemptions from sunsetting).

Prepare for sunsetting date – start this process at least 18 months prior

- ✓ Map out the timeframes for managing the sunsetting of your instruments (see 3.1 Risk management).
  - Large, complex or controversial instruments may require more than 18 months of preparation. (see 3.1.1 Timeframes)
  - Ensure timeframes allow for disallowance process prior to the sunsetting date (see 3.1.5 Potential disallowance).
- ✓ Conduct an initial review to assess if the instrument can be left to sunset or needs replacement.
- ✓ Consider whether it may be appropriate to align sunsetting dates to facilitate a thematic review (see 4.1 Alignment of sunsetting dates to facilitate thematic review).
- ✓ Consider options for structuring a review of the instrument (see Appendix I).
- ✓ Seek approvals at the appropriate level for conducting the review.
- ✓ Review the instrument's fitness for purpose (see 5.2 Designing a fitness-for-purpose review).
- ✓ Take into account the issues set out in OPC's sunsetting checklisthttps://www.opc.gov.au/about/documents.htm, including:
  - Is each provision supported by an appropriate head of power?
  - Are all references in the instrument still appropriate and correct?
  - Does each provision meet OPC's drafting and publishing standards?
- ✓ Identify impacts of legislative reform projects or other timing issues that may affect the instrument and consider whether it may be appropriate to seek a deferral (see 4.2 Certificate of deferral).

If making a replacement instrument, reassess timeframes to ensure sufficient time for drafting and any applicable Executive Council, charging authority and parliamentary disallowance processes (see 3.1 Risk management).

[5] Consider using the FRL to generate portfolio-specific sunsetting lists – see Appendix D for more information.

4. Variation of sunsetting dates

The Legislation Act recognises that changes to sunsetting dates may be appropriate and important in certain circumstances. The Attorney-General can:

- align the sunsetting dates for two or more instruments to facilitate a single review of those instruments, or
- defer the sunsetting of an instrument by up to 24 months in limited circumstances.

4.1 Alignment of sunsetting dates to facilitate thematic review

Section 51A of the Legislation Act provides for the Attorney-General to align the sunsetting dates of two or more instruments if satisfied, on written application by the rule-maker, that:

- all of the instruments are or will be the subject of a single review (often referred to as a 'thematic review'), and
- aligning the sunsetting dates will facilitate either the undertaking of the review or the implementation of that review's findings.

This means that the Attorney-General can align the sunsetting dates of a group of instruments if:

- the rule-maker(s) intends to conduct a thematic review of those instruments, or
- a review of the instruments has already been undertaken and the alignment would allow the findings of the review to be implemented, regardless of whether the review was instigated for reasons other than the sunsetting process.

An alignment is only possible when the relevant instruments have at least two different sunsetting dates. An alignment may bring forward the sunsetting of some of the instruments, and cannot push back the sunsetting date of any of the instruments by more than five years. When multiple instruments already share a single sunset date, an alignment cannot be undertaken.

4.1.1 What is a thematic review?

A thematic review is a review of two or more instruments which share a common theme that makes it more efficient or effective to review them together, rather than separately. This could include, for example, instruments that implement a particular treaty or that regulate a particular industry. Thematic reviews are not limited to instruments made under a single Act or administered by a single agency.

Thematic reviews allow 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.

The purpose of section 51A is to encourage thematic reviews of related legislative instruments, thereby facilitating more efficient and effective review processes and enabling agencies to comprehensively engage with stakeholders prior to the remaking of any instrument.[6] Agencies are encouraged to consider section 51A as a mechanism for managing the workload associated with evaluating multiple sunsetting instruments.

4.1.2 Legislative requirements for an alignment

Section 51A of the Legislation Act provides for the rule-maker of the instruments to be reviewed to apply in writing to the Attorney-General to align the sunsetting dates of those instruments.

If the Attorney-General is satisfied that the rule-maker's application for alignment meets the legislative criteria set out above, he or she will issue a declaration (a 'sunset-altering instrument') providing that all of the instruments in question will sunset on a single specified day. The explanatory

[6] Explanatory Memorandum to the *Legislative Instruments Amendment (Sunsetting Measures) Act 2012*, which inserted section 51A into the then *Legislative Instruments Act 2003*, consistent with recommendation 4.1 of the Productivity Commission's *Research Report – Identifying and Evaluating Regulation Reforms* (December 2011).

statement for the sunset-altering instrument must include a statement of reasons for the alignment.[7] Sunset-altering instruments are legislative instruments and are disallowable by the Parliament.

As at December 2018, no sunset-altering instrument made under section 51A has been disallowed by the Parliament. Nonetheless, it is recommended that agencies account for the possibility of disallowance when setting timelines for briefing their rule-maker to apply for an alignment. For further information about setting timelines (see 3.1.5 Potential disallowance).

4.1.3 Practical steps for applying for an alignment

Rule-makers should apply to the Attorney-General for an alignment at least 18 months before the earliest sunset date that applies to the instruments. For example, if the oldest instrument is due to sunset on 1 October 2021, then an application should be lodged by 1 April 2020. This is to allow sufficient time for the instrument to be drafted and registered. It will also allow time for remedial action if the sunset-altering instrument, once made, is subject to a motion to disallow.

4.1.4 Process steps – Applying for an alignment

1. The agency prepares a draft application for alignment using the template at Appendix F and provides the draft application to AGD (sunsetting@ag.gov.au) for review.
2. AGD reviews the draft application to ensure it contains appropriate justification for an alignment.
3. Once the draft application is finalised at the officer level, the agency briefs the rule-maker(s) for the instruments to write to the Attorney-General, attaching the application and requesting the alignment.
4. Once the letter of application has been received, AGD prepares drafting instructions for a sunset-altering instrument and issues them to OPC. OPC drafts the sunset-altering instrument on a fee for service basis, which is billed to the agency.
5. AGD prepares a draft explanatory statement setting out the justifications for the proposed alignment. The agency will have the opportunity to review both the draft explanatory statement and the draft sunset-altering instrument before they are finalised for the Attorney-General's approval.
6. AGD provides the application, draft sunset-altering instrument and explanatory statement to the Attorney-General for policy and text approval.
7. If text and policy approval are granted, AGD registers the sunset-altering instrument on the FRL and OPC arranges for its tabling in both Houses of the Parliament.
8. Once tabled, the sunset-altering instrument is subject to the usual parliamentary scrutiny processes, including the disallowance mechanism set out in section 42 of the Legislation Act.
9. AGD will liaise with the agency if the SSCSDL requests further on any aspect of the sunset-altering instrument.

Agencies should note that the information provided in the application will be used in the development of the explanatory statement that will be registered on the FRL. Any information that is sensitive or classified should be clearly indicated in the application.

In preparing the application, the applicant agency may need to consult:

- any agency that jointly administers an instrument affected by the application

[7] Subsection 51A(4) of the Legislation Act.

- OBPR
- OPC about the scope and timing of the proposal, and
- other stakeholders, to the extent practical and appropriate, in accordance with section 17 of the Legislation Act.

4.2 Certificate of deferral of sunsetting

In circumstances where the replacement or repeal of a sunsetting instrument needs to be delayed, agencies may wish to consider seeking a deferral. Section 51 of the Legislation Act allows the Attorney-General to defer a sunset date by up to 24 months in certain circumstances.

4.2.1 Legislative requirements for a deferral

Section 51 of the Legislation Act provides for the Attorney-General to issue a certificate deferring the sunsetting date of an instrument by six, 12, 18 or 24 months (a 'certificate of deferral') if satisfied, on written application by the rule-maker, that one or more of the following criteria is met:

- the instrument is likely to cease to be in force within 24 months after its sunsetting date[8]
- a replacement instrument will not be able to be completed before the sunsetting date for reasons that the rule-maker could not have foreseen and avoided
- a replacement instrument will not be able to be completed before the sunsetting date because the dissolution or expiration of the House of Representatives or the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed, or
- the Attorney-General has given policy approval to exempt the instrument from the operation of the sunsetting framework.[9]

If the Attorney-General is satisfied that the rule-maker's application meets one or more of the criteria set out above, he or she will then issue a certificate of deferral providing that the instrument is taken to sunset on a new date that is six, 12, 18 or 24 months after its original sunsetting date. The explanatory statement for the certificate of deferral must include a statement of reasons for the deferral.[10]

Certificates of deferral are legislative instruments. A certificate is not disallowable by the Parliament if it defers the sunsetting date of an instrument by six or 12 months, but is disallowable if it defers the sunsetting date of an instrument by 18 or 24 months.[11]

4.2.2 Practical steps for applying for a deferral

Agencies intending to seek a deferral should contact AGD as early as possible with a draft letter of application prepared (see template application letter at Appendix G).

The rule-maker must provide the Attorney-General with the necessary supporting information to satisfy the legislative criteria. Information provided in the letter of application will be used to prepare the statement of reasons that forms part of the explanatory statement, which will be publicly available after registration of the certificate on the FRL. Any information that is sensitive or classified should be clearly indicated in the application.

It is important for agencies intending to seek deferrals of 18 or 24 months to engage with AGD as early as possible. As these certificates may be the subject of a disallowance motion, timeframes

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[8] For example, where the replacement of the instrument is contingent upon proposed legislation that is being considered by the Parliament, or is intended to be introduced into Parliament.

[9] The purpose of this criterion is to allow the Attorney-General to prevent the unintended sunsetting of an instrument that she or he considers should be exempt from sunsetting, but where extenuating circumstances may prevent the exemption from coming into force before that instrument would have sunset.

[10] Subsection 51(5) of the Legislation Act.

[11] Subsection 51(4) of the Legislation Act.

should provide for the possibility that the instrument may be disallowed, and that the original sunsetting date will continue to apply.

Workload is not an adequate justification for requesting a deferral 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 of deferral cannot revive an instrument that has already sunset.

4.2.3 Process steps – applying for a deferral

1. The agency prepares a draft letter of application for deferral using the template at Appendix G and provides the draft letter to AGD (sunsetting@ag.gov.au) for review.
2. AGD reviews the draft letter to ensure it contains appropriate justification for a deferral.
3. Once the draft letter is finalised at the officer level, the agency briefs the rule-maker(s) for the instrument to write to the Attorney-General, requesting the deferral.
4. Once the letter of application has been received, AGD prepares drafting instructions for a certificate of deferral and issues them to OPC. OPC drafts the certificate on a fee for service basis, which is billed to the agency.
5. AGD prepares a draft explanatory statement setting out the justifications for the proposed deferral. The agency will have the opportunity to review both the draft explanatory statement and the certificate before they are finalised for the Attorney-General's approval.
6. AGD provides the application, draft certificate of deferral and explanatory statement to the Attorney-General for policy and text approval.
7. If text and policy approval are granted, AGD registers the certificate of deferral on the FRL and OPC arranges for its tabling in both Houses of the Parliament.
8. Once tabled, the certificate is subject to the usual parliamentary scrutiny processes, including the disallowance mechanism set out in section 42 of the Legislation Act (18 and 24 month certificates of deferral only).
9. AGD will liaise with the relevant line areas if the SSCSDL requests further information on any aspect of the certificate of deferral.

4.3 Parliamentary roll over

Under section 53 of the Legislation Act, either House of the Parliament can pass a resolution to defer the sunsetting date of an instrument for a further 10 years (often referred to as a 'parliamentary roll over'). Such a resolution may be passed at any time before the instrument's sunsetting date and after the instrument is mentioned in either:

- a certificate of deferral of sunsetting laid before that House, or
- a sunsetting 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).

4.3.1 Assessing suitability for roll over

Parliamentary roll over should only be used in exceptional circumstances where it would not be appropriate or feasible for a rule-maker to replace 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 name[12] (for example, where the costs associated with updating systems that make reference to the instrument would be disproportionate to the benefits of replacing the instrument).

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

Careful consideration should be given to the risks associated with pursuing a roll over compared to other options for managing the sunsetting of an instrument. The most significant risk in relation to a roll over is that the Parliament may not pass a resolution that the instrument should continue (i.e. if the motion is defeated, or if no vote is taken). If this occurs, urgent action will be required to replace the instrument (see 6.1 Replacing an instrument), or apply for a certificate of deferral (see 4.2 Certificate of deferral), before the instrument sunsets.

Other issues to consider include that the workload involved in pursuing a parliamentary roll over 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 have a replacement instrument made in substantially the same form and would be eligible for a streamlined regulatory impact assessment process (see 6.2 Regulatory impact assessments of replacement instruments).

Agencies should also consider whether there is sufficient justification for using parliamentary resources, rather than just engaging the rule-maker(s) in the remaking process.

4.3.2 Process for roll over

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

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

Together with the usual documents required for tabling under parliamentary tabling guidelines,[13] the Senator or Member 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 SSCSDL. 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 roll over.

Agencies are not required to prepare a new explanatory statement, or register or table a new instrument. The instrument is not subject to a new disallowance period.

4.3.3 Timing considerations

A motion for parliamentary roll over of an instrument must occur prior to the sunsetting day of that instrument, as roll over cannot revive an instrument that has already sunset. Further, as parliamentary roll over has never been sought since the introduction of the sunsetting regime, it would be a novel process for agencies to navigate. As such, agencies wishing to engage this process should allow sufficient time to develop appropriate arrangements for the process, accommodate parliamentary scheduling considerations, the process of debating a motion, and address any unexpected complications that may arise. It should not be assumed that a Senator or Member can move for a roll over at the last possible minute, even if there are good reasons for a roll over.

[13] Agencies should consult their internal Tabling Officers and/or the Clerks and Tabling Offices of the relevant House of the Parliament on tabling requirements.

5. Review of sunsetting instruments

The regular review of instruments to assess their fitness for purpose is central to the sunsetting regime.

5.1 Initial assessment of sunsetting instruments

Agencies should undertake an initial assessment of the sunsetting instrument to establish whether the law contained in the instrument is still required.

Instruments that are clearly spent or redundant will not require a thorough review. The decision for the rule-maker in these cases is whether the instrument should be left to sunset, or actively repealed prior to its scheduled sunsetting day. Where possible, it is preferred that instruments are actively repealed.

Where there are financial implications to the continuation or repeal of an instrument the agency may need to address revenue considerations (see 3.1.4 Charging).

If the law is still required, the agency should also form a *preliminary* view on the effectiveness of the sunsetting instrument. This, together with characteristics of the instrument itself (size, age, stakeholder interest, legal concerns and charging/revenue implications) provides the starting point for determining the scope of a review of the instrument's fitness for purpose.

A comprehensive review is likely to be required if:

- the sunsetting instrument has been assessed as not operating effectively or efficiently, but is still likely to be replaced, and
- there are likely to be significant regulatory impacts associated the replacement instrument.

The decision to replace an instrument may require the preparation of a Regulatory Impact Statement (RIS) and the agency should consult OBPR (see 6.2 Regulatory impact assessments of replacement instruments). The question of whether the changes are significant is determined based on the impact of replacing the sunsetting instrument (with any changes or updates that may be appropriate), relative to no instrument being in place. See Appendix E for more information on the RIS requirements.

5.2 Designing a fitness-for-purpose review

There is no 'one size fits all' model for reviews and the Legislation Act does not prescribe how a fitness-for-purpose review should be conducted. Agencies are best placed to determine the form and structure of review that is most appropriate for an instrument; AGD cannot provide specific advice on the design of the review.

As a general principle, the review should result in a clear finding as to whether the law contained in the sunsetting instrument continues to have a purpose. If so, the review must identify any changes that are required to ensure that the replacement instrument is current, legally effective, drafted to a high standard and reflects the outcomes of appropriate consultation.[14]

The method used by an agency to review its sunsetting instruments is a matter for the agency. If the review is to be conducted from a central legal or strategic area of the agency, it is strongly advised that the responsible line area is consulted closely at all stages of the process.

A fitness-for-purpose review may be anything from a desktop review conducted by an agency officer to a formal, independent and public review conducted by appointed experts. Examples of common

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[14] Particular attention should be given to the requirements of sections 15J and 17 of the Legislation Act:

- Section 17 requires that, before a legislative instrument is made, the rule-makers must be satisfied that any appropriate and reasonably practicable consultation has been undertaken.
- Section 15J requires an explanatory statement for a legislative instrument to (among other things) describe the nature of the consultation that was undertaken under section 17 before the instrument was made.

It should also be noted that SSCSDL will criticise explanatory statements that do not include this information (see 6.3 Requirements for explanatory statements).

models of review are at Appendix I. Whatever model is adopted, its findings must be sufficiently robust that the administering line area can be confident in making a recommendation to the rule-maker on what course of action should be taken.

A more comprehensive review process is likely to be required if:

- the last review was more than five years ago
- significant issues have emerged since the last review
- previous review processes did not address all aspects of the fitness-for-purpose test (see 5.3 The fitness-for-purpose test)
- there are significant regulatory impacts associated with the likely changes to the instrument(s)
- the instrument(s) imposes or affects a charge (see 3.1.4 Charging), and/or
- there is a high level of stakeholder interest in the instrument.

Other considerations in designing a review include the following:

- Scope: In addition to the fitness-for-purpose test, are there other issues associated with the operation of the sunsetting instrument, its underlying policy, or the broader legislative framework (including the enabling legislation) that require attention?
- Related work: Are there significant legislative or policy changes currently under consideration which may require further changes to the replacement instruments shortly after they are made?[15]
- Independence from government: Should external expertise be used?
- Consultation: What consultation is appropriate and practicable?[16]
- Deliverables: How will the findings of the review be captured and communicated?[17]
- Deadline: When must the review be completed to allow sufficient time for its findings to be considered and implemented before the instrument's sunsetting day?

If the sunsetting instrument has a high regulatory impact, the agency should seek early guidance from OBPR, particularly if it is likely that the instrument will be replaced by an instrument with similar regulatory impact.

5.3 The fitness-for-purpose test

The phrase 'fitness-for-purpose' carries its ordinary English meaning in relation to sunsetting. The assessment of an instrument's fitness for purpose includes, at a minimum, consideration of the six 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. The agency is best placed to determine which other issues may be relevant.

General issues that you should consider in assessing the fitness-for-purpose of an instrument are set out in the following two pages.

[15] In these circumstances it may be appropriate to seek a deferral of sunsetting day by six, 12, 18 or 24 months (see 4.2 Certificate of deferral of sunsetting).

[16] Consider also the requirements under sections 15J and 17 of the Legislation Act.

[17] For example, the findings of the review could take the form of a formal report published online, which is then provided through a submission directly to the rule-maker for the instrument and implemented through the preparation of a replacement instrument.

THE FITNESS FOR PURPOSE TEST

1. OBJECTIVE OF THE INSTRUMENT

What is the objective of the instrument and is it still required (to achieve this objective)?

If no, when and how should it be repealed?

If yes:

- Are there alternative ways to achieve this objective?
- What would be the consequences if the instrument was allowed to sunset without replacement?
- How could it be improved (e.g. to make it no more complex than necessary to achieve that objective)?

2. CURRENT OPERATION OF THE INSTRUMENT

What is the current context and operating environment for the instrument?

- There may have been significant shifts in the operating environment or policy settings underlying the instrument and its operation since it was first made.
    - If so, it may be worth considering reviewing a number of thematically linked instruments in a single review (see 4.1 Alignment of sunsetting dates to facilitate thematic review).
- Are there broader legislative or policy reforms being planned that will affect the sunsetting instrument? Would these reforms require the replacement or amendment of the instrument within 24 months? If so, it may be appropriate to seek a deferral of the sunsetting day for up to 24 months to avoid the need to replace the instrument in its current form for a short period of time prior to its impending amendment or repeal (see 4.2 Certificate of deferral).
- Where an instrument deals with relatively static or stable subject matter, or has been regularly amended to ensure its currency, it *may* be possible to replace it with a new instrument in substantially the same form. It is important that the complexity of the task and the timeframes for consultation and drafting are not underestimated; in particular, agencies should note that there may be little difference in OPC drafting timeframes for drafting a new instrument versus replacing an instrument in substantially the same form.

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, Infringement Notices and Enforcement Powers*.
- **Civil penalties**, including consideration of whether *Regulatory Powers (Standard Provisions) Act 2014* has been triggered in primary legislation and the associated impacts on instruments.
- **Administrative law,** particularly merits or judicial review, administrative decision-making processes including use of computers, 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 Australian Privacy Principles.
- The Government's deregulation agenda and commitment to reducing regulatory impacts.

For further information on each of these issues, please contact the relevant area of AGD, or the Department of the Prime Minister and Cabinet in relation to deregulation (deregulation@pmc.gov.au; david.poulter@pmc.gov.au).

If the instrument does engage any of the issues listed above:

- How closely does it reflect Australian Government policy on that issue?
- What would be the consequences of seeking to better reflect that policy in the replacement instrument?
- If there are competing policy considerations, how could those be resolved in the replacement instrument?

4. REGULATORY IMPACT

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

If the instrument is to be replaced and the regulatory impacts associated with the replacement instrument are significant, consideration should be given to the application of RIS requirements as set out in Appendix E.

Regulatory cost estimates are to be calculated where an instrument ceases or changes, regardless of whether a RIS is required. Regulatory costs and offsets must be quantified in a manner consistent with the *Regulatory Burden Measurement Framework*.

5. CLEARER LAWS

Does the instrument comply with clearer laws principles? What can be done to make the replacement instrument simpler, clearer or easier to read (see OPC's *Guide to Reducing Complexity in Legislation*)?

For example, would it be both useful and appropriate to:

- move duplicated or common provisions from many instruments into a single instrument of general application?
- consolidate instruments that have significant overlap?
- split an instrument? For example, part of an instrument may contain material that could be exempt from disallowance and/or sunsetting if it were made in a standalone instrument.

Does the instrument meet OPC drafting and publishing standards (see OPC's *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 roll over. Otherwise, it is enough to acknowledge that there are drafting and publishing issues and recommend action to address these issues as part of the remaking process.

6. 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? If not, why not?

6. Options if an instrument is still required

If, after either an initial review or a more detailed review, it is decided that the law expressed in a sunsetting instrument is still required, then the instrument will need to be replaced (with or without changes). Amendments do not constitute replacement and therefore will not reset the instrument's sunsetting 'clock'.

6.1 Replacing an instrument

A sunsetting instrument cannot be 'remade' by amendment to the text, title or year of the instrument. It must be replaced by a new instrument, which will then be subject to the 10-year sunsetting period anew. The original instrument can either be allowed to sunset as scheduled or actively repealed at the time the new instrument comes into force. 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).[18]

The replacement instrument must:

- have a new and unique title
- repeal any existing instruments which it is intended to replace, or be drafted to commence at the same time as the sunsetting of those instruments, such that there is no gap in the law
- be accompanied by an explanatory statement in accordance with section 15G of the Legislation Act
- comply with the drafting and publishing standards for instruments as prescribed by the Legislation Act, and
- comply with any statutory conditions in enabling legislation, or other obligations such as consultation requirements.

Agencies should refer to OPC's *Instruments Handbook* for more information on the drafting of replacement instruments.

The replacement instrument should reflect any changes in policy that have occurred since the sunsetting instrument was first made, as well as any findings of the fitness-for-purpose review. It may consolidate numerous instruments into one, or be part of an entirely new legislative framework for a particular subject matter.

The replacement instrument must be made and registered before the sunsetting date of any existing instruments it is intended to replace. Failure to make and register a replacement instrument before the sunsetting date can have significant legal and other consequences, and there are legal and practical limits to the retrospective commencement of instruments (see 6.4 If a replacement instrument cannot be made before a sunset date).

[18] Subsection 33(3) of the *Acts Interpretation Act 1901* provides that, where an Act confers a power to make a legislative instrument, that power includes the power to repeal, rescind, revoke, amend, or vary any such instrument.

6.2 Regulatory impact assessments of replacement instruments

A RIS may be completed as part of the fitness-for-purpose review or following a decision to make a replacement instrument. OBPR's *Sunsetting Legislative Instruments Guidance Note* sets out the regulatory impact analysis requirements for sunsetting instruments.

If a RIS is prepared for any new or replacement instrument, it must be lodged with the explanatory statement when registered on FRL and tabled in Parliament, see Appendix E. Where, in accordance with OBPR's Guidance Note, the RIS requirement is satisfied by correspondence, that correspondence should also be lodged together with the explanatory statement for registration and tabling.

Please refer to the *Australian Government Guide to Regulatory Impact Analysis* for further guidance.

6.3 Requirements for explanatory statements

Subsection 15J(2) of the Legislation Act provides that an explanatory statement for a legislative instrument must contain, at a minimum, the following information:

- the purpose and operation of the instrument
- a description of any documents that are incorporated in the instrument by reference and information on how they may be obtained
- if consultation was undertaken – a description of the nature of that consultation
- if consultation was not undertaken – an explanation of why no such consultation was undertaken, and
- if the instrument is disallowable – a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

In addition:

- subsection 51(5) requires the explanatory statement for a certificate of deferral to include a statement of reasons for the making of the certificate, and
- subsection 51A(4) requires the explanatory statement for a sunset-altering instrument to include a statement of reasons for the making of the instrument.

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

- any relevant statutory pre-conditions or parliamentary undertakings
- any provisions that depart from current government policy or practice, such as:
    - departures from the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*
    - broad delegation or sub-delegation powers
    - the lack of, or limits on, merits review of administrative decision-making powers
    - significant matters that may be more appropriate for primary legislation, and
- the operation of each provision of the replacement instrument, rather than just the instrument as a whole.

The explanatory statement for a replacement instrument should provide users with a full understanding of its background and intended operation, even if it has been drafted in substantially the same form as the sunsetting instrument. It should be treated as a standalone document; so it is not sufficient to simply replicate or refer back to the explanatory statement of a previous version of the sunsetting instrument. Further information and guidance on explanatory statements can be found in Chapter 8 of OPC's *Instruments Handbook*.

Agencies should also note that SSCSDL places considerable reliance on explanatory statements to assess legislative instruments and should ensure they meet SSCSDL's general requirements for preparing explanatory statements. In particular, agencies should consider the types of issues that the SSCSDL may consider under its technical scrutiny principles and ensure that the explanatory

statement addresses any aspects of the replacement instrument that is likely to draw the SSCSDL's attention.

6.4 If a replacement instrument cannot be made before a sunset date

If a replacement instrument cannot be made before a sunset date, there are some options for ensuring or restoring continuity of the law.

6.4.1 Certificate of deferral

If a replacement instrument cannot be made before a sunset date, it may be possible to request a deferral by means of an Attorney-General's certificate under section 51 of the Legislation Act (see 4.2 Certificate of deferral).

6.4.2 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 and agencies are strongly encouraged to seek legal advice before attempting to make an instrument with retrospective commencement or application.

Subsection 12(2) of the Legislation Act provides that any provision of a legislative instrument with retrospective commencement *will not apply to the extent* that the retrospectivity disadvantages a person or imposes liabilities on a person (other than the Commonwealth).

Instruments containing provisions with retrospective commencement are only likely to be effective if those provisions:

- do not disadvantage any person other than the Commonwealth, or
- are explicitly authorised to apply retrospectively regardless of their effect (by way of express provision in the enabling Act overriding subsection 12(2) of the Legislation Act).

Any instrument purporting to commence retrospectively is also likely to attract adverse comment from bodies including the SSCSDL, as this may be considered an undue trespass on personal rights and liberties (see Principle (h) of the SSCSDL's technical scrutiny principles).

It should be noted that, for instruments with retrospective commencement that are to be considered by the Executive Council, written certification from the Australian Government Solicitor is required about whether the operation of the proposed instrument would be affected by subsection 12(2) of the Legislation Act.[19]

6.4.3 Prospective instrument with gap

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

6.4.4 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 legislation process for Acts, please refer to PM&C's *Legislation Handbook*.

6.4.5 Parliamentary roll over

If there are no other options available, then seeking a parliamentary roll over under section 53 of the Legislation Act to defer the sunsetting of the instrument for a further 10 years may be considered as a last resort (see 4.3 Parliamentary roll over).

[19] See the Checklist for Draft Executive Council Documents in the *Federal Executive Council Handbook*.

7. 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 the rule-maker or 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. The length of time until the instrument's scheduled sunset date, along with the availability of appropriate legislative vehicles for the repeal, may be factored into the assessment of whether active repeal is the best use of resources in the circumstances.

Agencies will need to instruct OPC on the repeal of the instrument, consequential amendments of other instruments and any transitional arrangements.

A repealed instrument remains available on the FRL but does not display as current law.

7.1 Direct repeal

Any person who is authorised to make a certain type of instrument can repeal any such instrument (whether or not that person originally made the instrument).[20] 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's drafting services for a direct repeal instrument, please contact your agency's OPC instrument adviser as early as possible. All tied drafting work (e.g. regulations) will require OPC's services.

For further information on OPC's drafting services, please refer to Appendix J and to OPC's *Instruments Handbook*.

7.2 Allow to sunset

If no action is taken, the instrument will sunset on its sunsetting date. Please advise OPC if your intention is that the instrument will be left to sunset. Please refer to Appendix C for further information on calculating sunsetting dates.

7.3 Automatic repeal

Division 1 of Part 3 of Chapter 3 of the Legislation Act provides that the following are automatically repealed at the end of the disallowance period for that instrument or when the instrument has fully taken effect, whichever occurs later:

- an instrument the only legal effect of which is to amend or repeal another legislative or notifiable instrument (section 48A)
- a commencement instrument (section 48B)
- a provision of an instrument the only legal effect of which is to amend or repeal the instrument, or another instrument (section 48C), and
- a provision of an instrument the only legal effect of which is to provide for the commencement of an instrument or an Act (section 48D).

[20] Subsection 33(3) of the *Acts Interpretation Act 1901* provides that, where an Act confers a power to make a legislative instrument, that power includes the power to repeal, rescind, revoke, amend, or vary any such instrument.

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Appendix A – Further information

Glossary

For the purposes of this Guide:

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*

FRL means the Federal Register of Legislation, which is administered by OPC and is the authoritative source of Commonwealth legislation

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

Legislation Act means the *Legislation Act 2003*

LEOMR means the *Legislation (Exemptions and Other Matters) Regulation 2015*

registered or ***registration*** means the registration of legislation on the FRL in accordance with Chapter 2 of the Legislation Act

replacement instrument means an instrument made in connection with or as a result of the repeal of other instruments by operation of the sunsetting framework. In this Guide it is used as an inclusive term and may refer to:

- an instrument that is substantially the same in form as the sunsetting instrument, apart from updates to correct minor errors or reflect current drafting practices (often referred to as a 'remade' instrument)
- an instrument that consolidates and replaces multiple earlier instruments
- an instrument that effects significant reforms and changes to the legislative framework in a particular area of regulation

rule-maker for an instrument means the person prescribed by subsection 6(1) of the Legislation Act.[21] For instruments made by the Governor-General under enabling legislation (including all Regulations), the rule-maker is the Minister administering the relevant provision of the enabling legislation, as set out by the current *Administrative Arrangements Order*. In other situations, the rule-maker may be the Prime Minister, a Minister prescribed by regulation or a person authorised to make the instrument

SSCSDL means the Senate Standing Committee for the Scrutiny of Delegated Legislation

sunsetting list means the list required to be tabled by the Attorney-General twice yearly in accordance with section 52 of the Legislation Act

Sunsetting Review means the 2017 review of the operation of Part 4 of Chapter 3 of the Legislation Act, which resulted in the *Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003*

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

[21] In relation to instruments (but *not* Acts or provisions of Acts) the terms *rule-maker* and *responsible person* are interchangeable for the purposes of the Legislation Act.

Resources

This guide should be used in conjunction with the following documents:

- OPC's *Instruments Handbook*: Provides information to help Commonwealth rule-makers and agencies make and manage legislative and notifiable instruments
- OPC's *Sunsetting checklist*https://www.opc.gov.au/about/documents.htm: Identifies key issues to consider when conducting a review of a legislative instrument that is to sunset
- *OPC's drafting services: a guide for clients*: Provides information to assist instructors to understand their role and the role of OPC's drafters, how OPC's drafters do their job in the context of the overall legislative process, and how this can affect a particular legislative project
- PM&C's *Australian Government Guide to Regulatory Impact Analysis*: Provides the context for regulation and sets out principles for considering regulatory impacts as part of the policy process
- OBPR's *Sunsetting legislative instruments guidance note*: Provides information about the Australian Government Guide to Regulation requirements as they apply to sunsetting instruments that have a regulatory impact
- The Federal Executive Council Secretariat's *Federal Executive Council Handbook*: Provides guidance for departmental officers and ministerial staff in preparing papers for consideration by the Governor-General in Council
- AGD's *Legal Services Directions and guidance notes*: The Legal Services Directions are issued by the Attorney-General and set out binding rules about the performance of Commonwealth legal work. The Office of Legal Services Coordination has prepared guidance notes to help agencies to comply with their obligations under the directions
- Department of Finance's RMG 302 *Australian Government Charging Framework*.

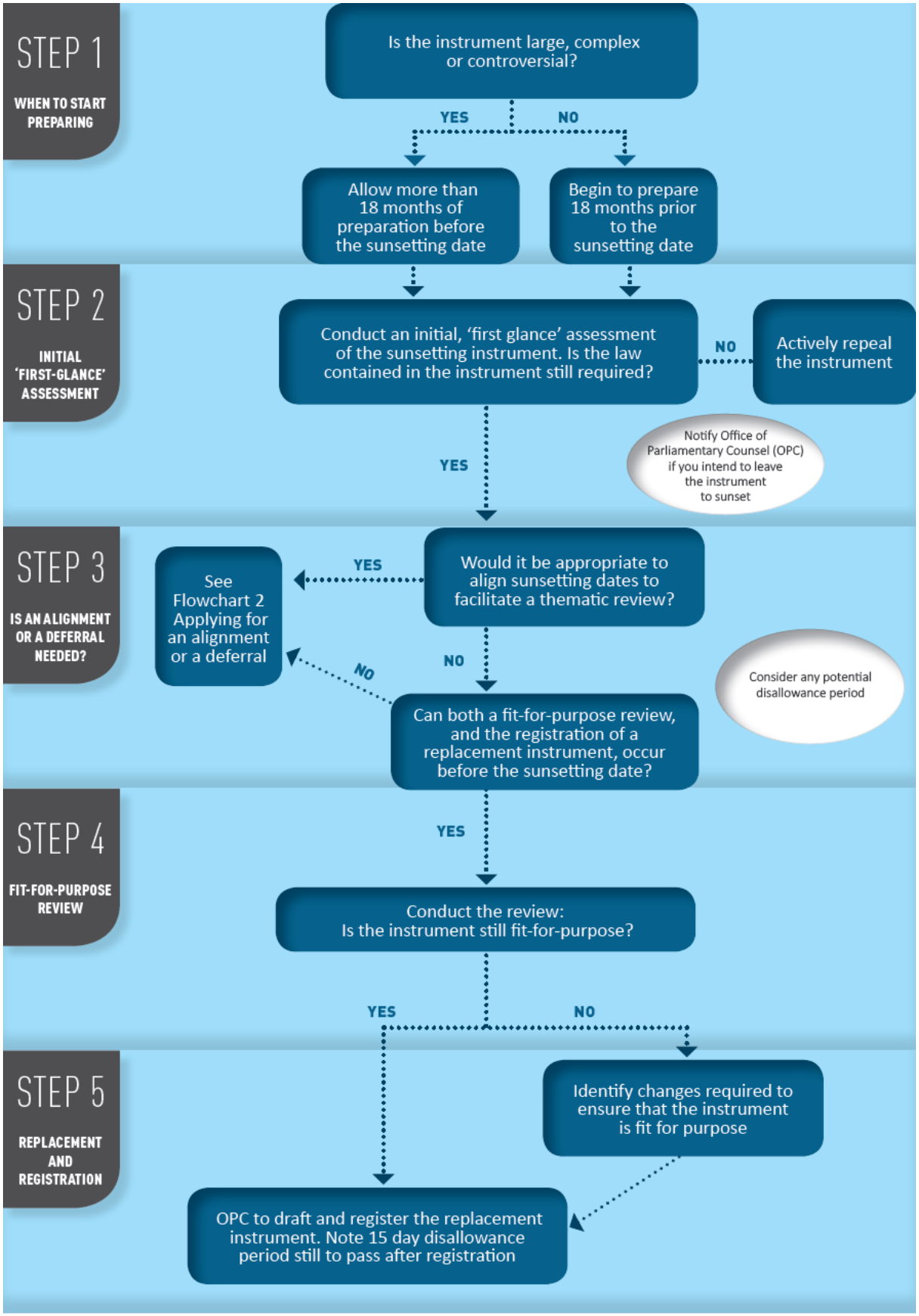
Contacts

- For more information on the matters set out in this Guide contact AGD at sunsetting@ag.gov.au.
- For drafting enquiries relating directly to sunsetting, contact OPC at sunsetting@opc.gov.au, or OPC's client adviser for your agency.
- To apply for FRL login credentials, contact lodge@legislation.gov.au.
- For questions or comments about the currency and accuracy of FRL data, use the feedback form on the FRL website.
- For questions on charging requirements, contact the Finance Charging Policy Team at ChargingPolicy@finance.gov.au
- For information on Regulatory Impact Assessment requirements, contact OBPR Helpdesk at Helpdesk-OBPR@pmc.gov.au.
- For issues relating to the Government's deregulation agenda and commitment to reducing regulatory impacts, contact Department of Prime Minister and Cabinet at deregulation@pmc.gov.au; david.poulter@pmc.gov.au.

Appendix B – Flow charts

Preparing for sunsetting

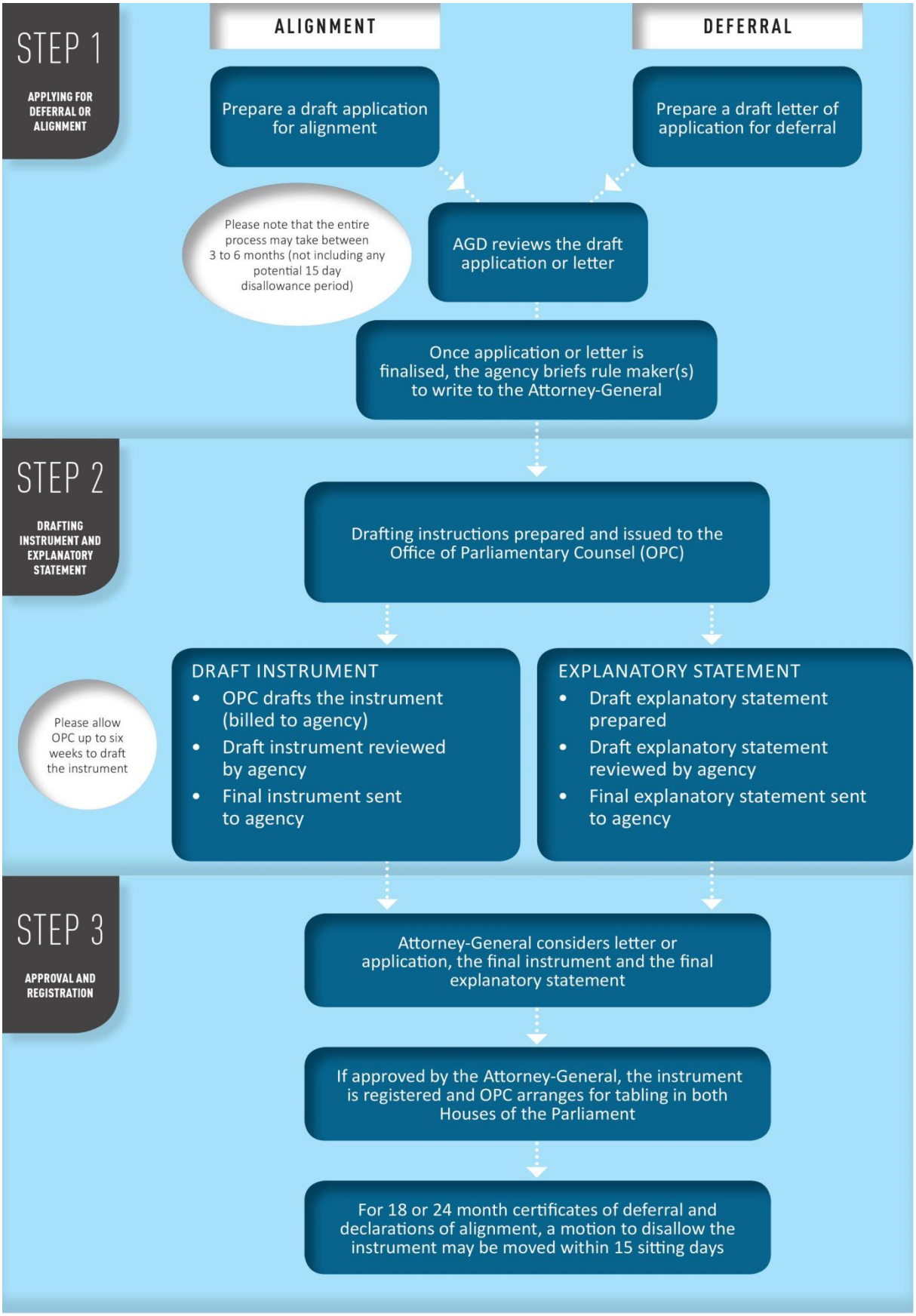
- Please refer to Part 3 Planning for sunsetting and Part 4 Variation of sunsetting dates.



Appendix B continued

Applying for an alignment or deferral

- Please refer to Part 4 Variation of sunsetting dates.



Appendix C – Determining an instrument's sunsetting date

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.[22] 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

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

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

- instruments made during 2000 to 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.

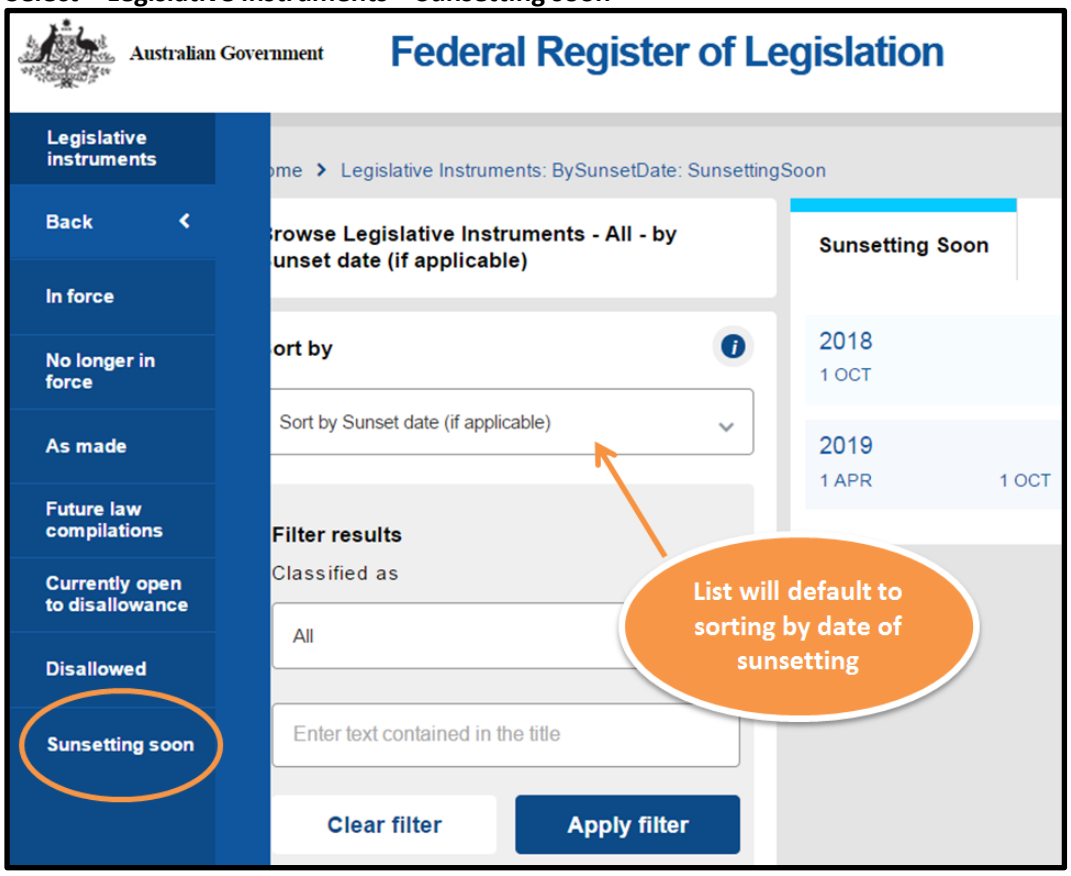
The sunsetting date for those instruments was, or will be, on the first 1 April or 1 October falling on or after the 10th anniversary of that instrument's registration.

[22] *Legislation Act 2003*, subsection 50(1).

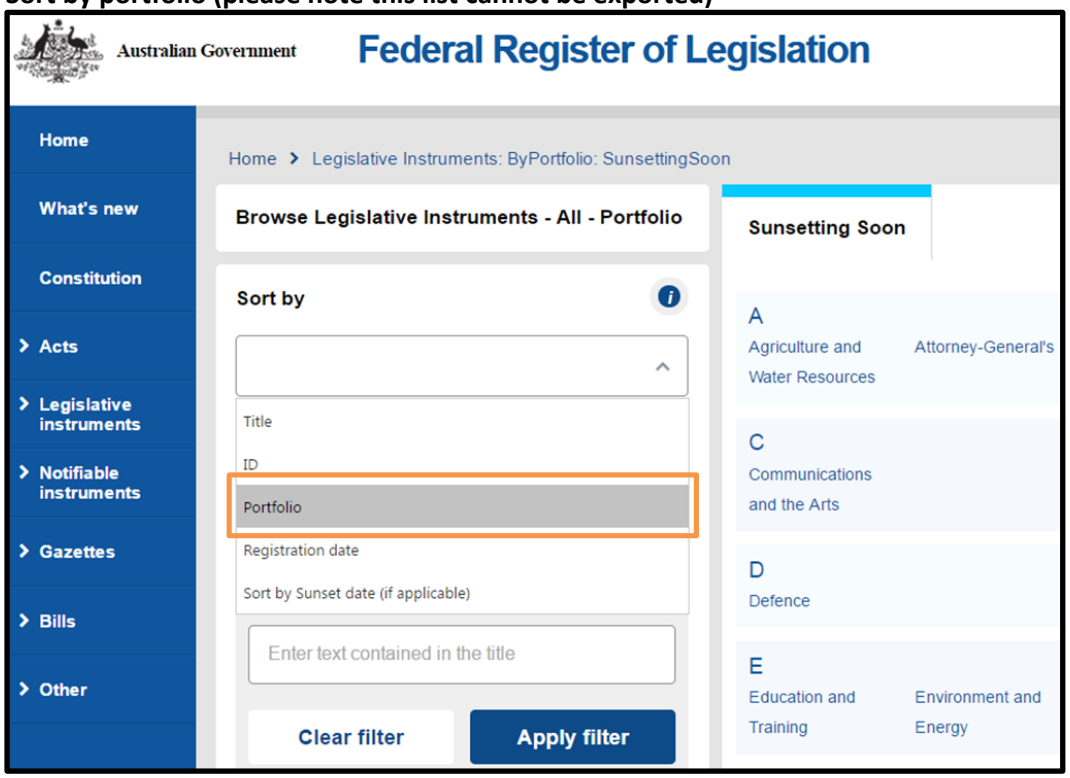
Appendix D – Use of FRL sunsetting data

Creating a portfolio-specific sunsetting list

1. **Go to www.legislation.gov.au**
2. **Select > Legislative instruments > Sunsetting soon**



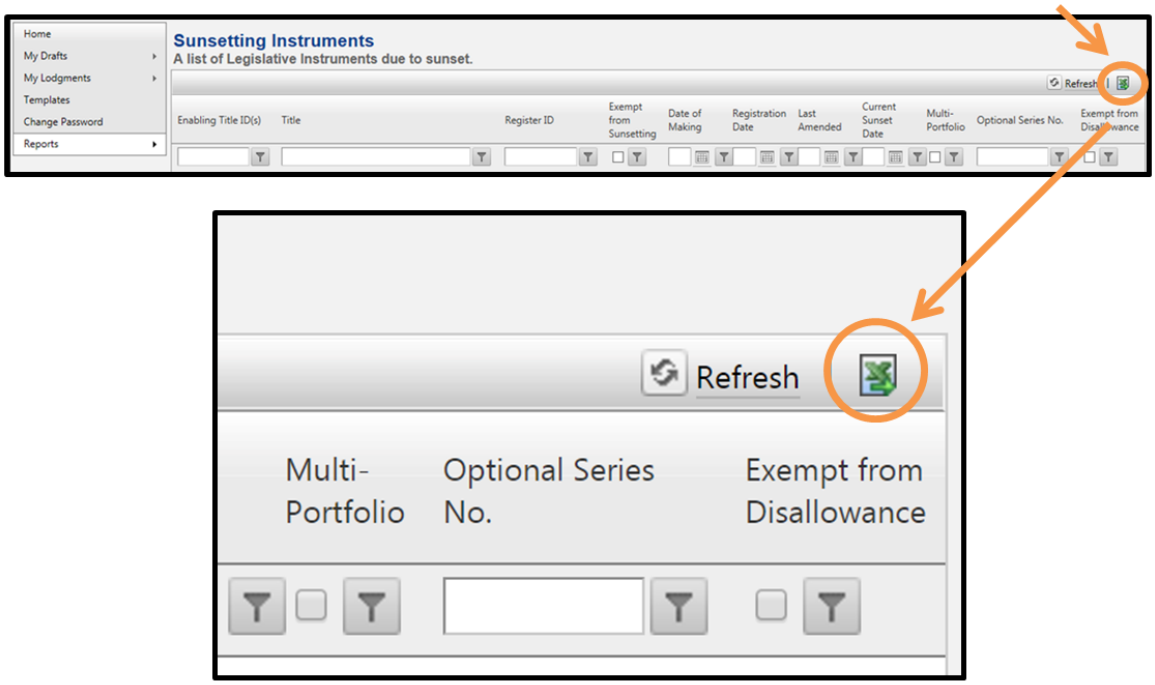
3. **Sort by portfolio (please note this list cannot be exported)**



Creating a searchable Excel sunsetting list

4. **Log in to https://lodge.legislation.gov.au using your FRL login credentials.**[23]
5. **Select > Reports > Sunsetting Instruments**

6. **Select the green Excel icon at the top right of the table to export to Excel.**



[23] To apply for FRL login credentials, contact OPC via lodge@legislation.gov.au.

Appendix E – Regulatory Impact Statement process

- Please refer to 6.2 Regulatory impact assessments of replacement instruments.

The *Australian Government Guide to Regulatory Impact Analysis* seeks to ensure that proposed regulation is carefully assessed in a transparent and accountable way. This means regulatory proposals with a significant regulatory impact must be accompanied by a RIS. The RIS is a tool designed to encourage rigour, innovation and better policy outcomes from the beginning.

Some legislative instruments have significant impacts on businesses, community organisations or individuals. Under the Australian Government's RIS requirements, the decision to continue some forms of regulation by making an instrument to replace one that is to sunset would normally require the completion of a RIS.

For each sunsetting instrument that you are seeking to replace, you need to consult OBPR to determine whether the instrument has a significant regulatory impact. To determine this, OBPR considers whether the impacts from the regulation are more than minor or machinery in nature.[24] The impact of replacing a sunsetting instrument is calculated relative to no instrument being in place.

Do you need to complete a RIS?

No RIS will be required:

- if the instrument is allowed to sunset
- if the replacement instrument has no regulatory impact
- if the replacement instrument has a minor or machinery regulatory impact relative to no instrument being in place
- if the instrument or its replacement has been granted an exemption from sunsetting under the Legislation Act[25], or
- at the time that the Attorney-General issues a section 51 certificate of deferral or a section 51A sunset-altering instrument under the LIA (a RIS or certification letter may still be required when a replacement instrument or instruments are made following that deferral or alignment).[26]

A RIS is required if:

- your assessment finds that the sunsetting regulatory instrument has not been effective or efficient at achieving the Government's objectives (but you are nevertheless proposing to replace it in the same or substantially the same form), or
- the replacement instrument will involve changes to the regulatory effect that are more than minor or machinery in nature (relative to the instrument being replaced without changes).

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[24] A full definition of 'minor or machinery in nature' is in the *User Guide to the Australian Government Guide to Regulatory Impact Analysis.*

[25] Exemptions from sunsetting are granted by the Attorney-General. Instruments that have a significant regulatory impact on business, community organisations or individuals are unlikely to be granted an exemption, given the criteria used by the Attorney-General to assess exemption requests.

[26] Under the Legislation Act, the sunsetting date of an instrument may be altered if the Attorney-General issues a certificate of deferral or a sunset-altering instrument. These instruments do not require a RIS because they are machinery in nature. A certificate of deferral can postpone the sunsetting date of an instrument by up to 24 months. A sunset-altering instrument aligns the sunsetting dates for two or more instruments so that their fitness for purpose may be examined as part of a thematic review process. These instruments can delay the sunsetting date of an included instrument by up to five years.

If the sunsetting instrument is being replaced by an instrument that does involve changes or is not substantially the same in substance, the RIS is only required to reflect the proposed changes. In some cases, it may be that the only feasible option is to make a replacement instrument without changes, despite problems with its performance. A RIS is still required in such cases.

A RIS is also required where a replacement instrument is being made in substantially the same form, and the regulatory impacts are more than minor or machinery in nature.

A streamlined process in lieu of preparing a RIS applies when you:

- have considered the need for the regulation to continue and found that there is a genuine need for ongoing regulation in some form
- have reviewed the regulatory performance of the sunsetting instrument and found that it is fit-for-purpose (that is, the sunsetting instrument is efficient and effective in achieving the Government's objectives; see 5.3 The fitness-for-purpose test), and
- intend to make a replacement instrument that is substantially the same in effect as the sunsetting instrument.

In this situation, an alternative to preparing a RIS is that your secretary, deputy secretary or equivalent agency head may write a letter to OBPR. The letter must certify that you have reviewed and assessed the performance of the sunsetting instrument and found that it is achieving its objectives efficiently and effectively[27]. The certification needs to state that your assessment was informed by appropriate consultation with relevant stakeholders. A template that can be used for such a letter is available in the Australian Government's RIS requirements *Sunsetting legislative instruments guidance note*.

This process satisfies the Australian Government's RIS requirements for making a replacement instrument. Alternatively, you may choose to complete a RIS.

It is your responsibility to contact OBPR early in the process of making replacements for sunsetting instruments. You should allow enough time to incorporate the RIS into the fitness-for-purpose review.

Do you need to do a regulatory costing?

Regardless of whether a RIS is required, you need to complete a regulatory costing consistent with the *Regulatory Burden Measurement Framework* if:

- the instrument is being allowed to sunset (including where that sunsetting date has been altered by a certificate of deferral or sunset-altering instrument)
- the instrument is being actively repealed, or
- the instrument is being replaced by an instrument with substantive changes (regardless of whether the changes are deregulatory).

If the instrument ceases operation (whether by sunsetting or active repeal), the costing should reflect a regulatory saving equal to the total regulatory impacts of the instrument. If the costing reflects changes to the regulation, it should reflect the net impact of those changes, whether regulatory (net cost) or deregulatory (net saving). If the sunsetting instrument is being replaced by a new instrument without changes, then the regulatory costs would be zero.

Office of Best Practice Regulation Contacts

If you have any questions or require any further assistance on RIS or regulatory costing processes related to sunsetting, contact OBPR by email at Helpdesk-OBPR@pmc.gov.au or call (02) 6271 6270.

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[27] *Effectiveness* relates to the degree to which objectives are achieved and the extent to which targeted problems are solved. Is the instrument achieving its purpose? In the context of regulation, an assessment of *efficiency* needs to balance the costs of administering and complying with the regulation against the regulatory objectives. In particular, to be considered efficient, regulation should be achieving its objectives in a least-cost way.

Appendix F – Template application for alignment of sunsetting dates

This template guides agencies in preparing an application to ask that the Attorney-General exercise his or her powers under section 51A of the *Legislation Act 2003* by making a declaration aligning the sunsetting dates of instruments that will be reviewed together – see 4.1 Alignment of sunsetting dates to facilitate thematic review.

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 sunsetting dates will facilitate the undertaking of the review and/or the implementation of its findings.

This means that the Attorney-General can align the sunsetting dates of a group of instruments if:

- the rule-maker(s) intends to conduct a thematic review of those instruments, or
- a review of the instruments has already been undertaken and the alignment would allow the findings of the review to be implemented.

Please note that there are two different templates, depending on whether the review will be conducted or has already concluded. Please ensure that you use the correct template.

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.

We encourage you to consult with us (sunsetting@ag.gov.au) throughout the application process. In particular, we suggest that you share a draft of your application with us (at officer level) prior to arranging for it to be provided to the Attorney-General under cover of formal ministerial correspondence. Please ensure that this correspondence is signed by the current rule-maker for the instrument(s). We will provide comments on your draft application and identify any areas that may require more development or information. This increases the likelihood that we will be able to recommend to the Attorney-General that he or she should approve the alignment and make the declaration.

How to use these templates

Please use **Template 1** if you are seeking an alignment to facilitate the undertaking of a review.

Please use **Template 2** if you are seeking an alignment to facilitate the implementation of the findings of a review that has already concluded.

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

- only deals with one group of instruments (this will avoid complications if part of the application is declined or delayed)
- clearly identifies any documents carrying a security classification or including reference to security classified information, and
- is concise (no more than three pages plus attachments if necessary).

Please note that if successful, all or part of this application and its covering letter may be used in preparation of the explanatory statement to the declaration. As such, please clearly indicate whether any information included in your application is classified or has other restrictions on public release. AGD will work closely with the responsible line areas to determine an appropriate form of words for use in any public statements or materials relating to the proposed declaration.

Template 1: Alignment to facilitate the undertaking of a review

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 covered by the review. (For example: '*This review will cover six legislative instruments made under the* Cat and Dog Act 1901*, as listed below:*', or '*This review will cover 123 legislative instruments made under the* Cat and Dog Act 1901*, as listed at Attachment A*'.) Please provide full details of the instruments, including their Federal Register of Legislation Series IDs, set out in the format suggested at Attachment A to this template.) • 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 sunsetting – this will not make them subject to sunsetting. 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. 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 instruments? Identify any ongoing public processes which could affect the legislation to be reviewed, such as current work on Bills or treaties. If this explanation includes information about any processes that have not been publicly announced or formally committed to, please identify this in your application.
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 that 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 Regulatory Impact Assessment (RIA) requirements (guidance material, including information on how to calculate offsetting, can be found in 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 Appendix I of this Guide for general information on when different types of review may be appropriate, and what each type of review usually involves. The Attorney-General's Department will not stipulate what form or scale of review is most appropriate for the review. Nor is it necessary for administering line areas or their Minister to seek formal feedback or approval of the finalised review document. The administering agency is best placed to decide how thorough and detailed the review needs to be, how it is conducted and how its findings should be presented.

In general terms, we suggest that the review should be sufficiently rigorous that it provides the rule-maker in question (usually the responsible Minister) with sufficient information and analysis to determine how the reviewed legislation should be managed, and to respond appropriately to any stakeholder whose interests may be affected.

5. ENGAGEMENT WITH HUMAN RIGHTS

If approved, the explanatory statement associated with the declaration of alignment will need to have a human rights statement of compatibility prepared, pursuant to section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (HRPS Act).

Do the instruments and their proposed alignment engage any of the human rights and freedoms recognised or declared by the international instruments in section 3 of the HRPS Act? If yes, what specific rights are involved? This should be set out in the initial application as it will be included in the Explanatory Statement for the declaration of alignment.

6. 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 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).

At this stage of preparing your application, it is not usually necessary to broadly consult with your business or community stakeholders, as the mechanism of alignment affects only the sunsetting dates of the instruments in question – it does not alter their current operation. Consultation relating to the subject matter of the instruments being reviewed and the substance of the review's findings should be detailed in the review report and/or the explanatory materials for any resulting legislation.

7. DRAFTING OF INSTRUMENTS AND TIMING OF NEW SUNSET DATE

Identify whether Office of Parliamentary Counsel (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 them).

Nominate a proposed new sunset date for all of the sunsetting instruments listed at Attachment A to this application. This date must be on 1 April or 1 October of a particular year, and cannot be more than five years after the earliest sunset date that currently applies.

Explain why this is the best date with reference to the review process and proposed next steps. In proposing this sunsetting date, keep in mind that once an instrument has been subject to one alignment, it is not eligible for inclusion in any further alignments.
8. ALTERNATIVES TO THEMATIC REVIEW
Describe what you will do and what else may happen (or not happen) if your application is not approved by the Attorney-General, or is approved but then disallowed by the Parliament.
9. 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. 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 as part of the explanatory materials to the declaration 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 report be tabled in the Parliament or available to the public? If not, why not?

Attachment A

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 sunsetting can be listed if relevant, to demonstrate the scope and nature of the proposed review. Doing so will not make them subject to sunsetting.

Template 2: Alignment to implement the findings of a review that has concluded

1. SHORT TITLE
Nominate a short, thematic title, reflecting the name used to identify the review that has concluded. (For example: *Review of national licensing regime for X and Y*).
2. SCOPE OF REVIEW
Summarise the review's scope and list the relevant instruments covered by the review. (For example: '*The review covered six legislative instruments made under the* Cat and Dog Act 1901*, as listed below:*', or '*The review covered 123 legislative instruments made under the* Cat and Dog Act 1901*, as listed at Attachment A*'.) Please provide full details of the instruments, including their Federal Register of Legislation Series IDs, set out in the format suggested at Attachment A to this template. • 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 sunsetting – this will not make them subject to sunsetting. Explain why the instruments were reviewed together.
3. DETAILS OF REVIEW
Provide some information on the review. In particular: • What was the **objective** of the review? • What was the **process and timing** for the review? • Was there any **consultation with stakeholders**? • What were the **findings** of the review? • What was the **Government response** to the findings of the review? • What are the **proposed timeframes** for implementation of the findings?
4. ENGAGEMENT WITH HUMAN RIGHTS
If approved, the explanatory statement associated with the declaration of alignment will need to have a human rights statement of compatibility prepared, pursuant to section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (HRPS Act). Do the instruments and their proposed alignment engage any of the human rights and freedoms recognised or declared by the international instruments in section 3 of the HRPS Act? If yes, what specific rights are involved? This should be set out in the initial application as it will be included in the Explanatory Statement for the declaration of alignment.
5. RECENT REVIEWS AND RELATED PROCESSES
Detail any **other** reviews of this legislation that may have been undertaken in the last five years. 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 was a further review necessary before repealing or remaking the instruments?

Identify any ongoing public processes which could affect the legislation to be reviewed, such as current work on Bills or treaties.

If this explanation includes information about any processes that have not been publicly announced or formally committed to, please identify this in your application.

6. DRAFTING OF INSTRUMENTS AND TIMING OF NEW SUNSET DATE

Identify whether Office of Parliamentary Counsel (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 them).

Nominate a proposed new sunset date for all of the sunsetting instruments listed at Attachment A to this application. This date must be on 1 April or 1 October of a particular year, and cannot be more than five years after the earliest sunset date that currently applies.

Explain why this is the best date with reference to the outcomes of the review and proposed next steps for implementation. In proposing this sunsetting date, keep in mind that once an instrument has been subject to one alignment, it is not eligible for inclusion in any further alignments.

7. ALTERNATIVES TO ALIGNMENT

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

8. MORE INFORMATION

Explain how interested parties can get more information about the progress on implementing the findings 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.

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 as part of the explanatory materials to the declaration and could attract media and parliamentary attention.

Anticipate other questions that are likely to be asked about the review and the Government response. Will it be mentioned in key corporate documents, such as your agency's strategic plan or annual report?

Will a formal Government response to the review be tabled in the Parliament or available to the public? If not, why not?

Attachment A

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 sunsetting can be listed if relevant, to demonstrate the scope and nature of the proposed review. Doing so will not make them subject to sunsetting.

Appendix G – Template letter of application for deferral

- Please refer to 4.2 Certificate of deferral of sunsetting and read the notes and guidance in this template before completing your application.

The Hon Christian Porter MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

I am writing to request that you issue a certificate to defer the sunsetting of the [name of instrument(s)] to [proposed new sunsetting date]. The [instrument] is currently due to sunset on [sunset date].

Pursuant to subparagraph [51(1)(b)(i) / 51(1)(b)(ii) / 51(1)(b)(iii)] of the *Legislation Act 2003*, I seek this deferral on the basis that [the instrument is likely to cease to be in force within 24 months after the sunsetting day / an instrument proposed to be made in substitution for the instrument will not be able to be completed before the sunsetting day for reasons that I could not have foreseen and avoided / the dissolution or expiration of the House of Representatives or the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed / you have given approval to exempt the instrument from the sunsetting framework (include ministerial correspondence reference number if possible)].

[Provide a brief (1–2 paragraphs) summary of the operation and effect of the instrument(s).]

> *For example: The Apples Act imposes a fruit levy on all apples sold in Australia, subject to certain exemptions. The Regulations prescribe the categories of apples that are exempt from the fruit levy.*

[Provide a summary of the background and circumstances leading to the need for a deferral.]

> *For example: An independent review conducted by Mr John Smith (Smith Review) has found that the fruit levy framework requires significant revision. The Government has accepted the findings of this review, and my Department is in the process of preparing a Bill to amend the Apples Act to revise the criteria for prescribing categories of apples to which the fruit levy does not apply. If this amendment is passed by Parliament, the exempt categories prescribed by the Regulations will be redundant and a replacement instrument will need to be made.*

[Explain why a deferral will meet the requirements of the relevant criterion under section 51 of the *Legislation Act 2003*.]

> *For example, if arguing subparagraph 51(1)(b)(i): The Apples Amendment Bill is expected to be introduced in the Spring 2017 sittings. Should Parliament pass the Bill, it is expected that the Bill will commence by July 2018 and new Regulations made by December 2018. A 12-month deferral of the sunsetting day will allow sufficient time for the amendments to the Apples Act to be made and avoid the need to remake the Regulations in their current form for the short period of time before they are repealed and a replacement instrument is made.*
>
> *Note: If deferral is sought on the basis of subparagraph 51(1)(b)(i), the letter must clearly explain the circumstances that make it likely that the instrument(s) will cease within 24 months after the sunsetting day. This means, for example, that for an instrument sunsetting on 1 April 2018, the Attorney-General must be satisfied that it is likely to cease at some point between 1 April 2018 and 1 April 2020.*
>
> *For example, if arguing subparagraph 51(1)(b)(ii): Following the unexpected outbreak of the Apple Virus in 2017, which significantly reduced the supply of apples in Australia, the Government decided to delay the implementation of the Smith Review until 2018. This means that the new replacement Regulations cannot be made before the current ones sunset on 1*

April 2018. I am therefore seeking a deferral on the basis that these circumstances were not foreseeable or avoidable.

For example, if arguing subparagraph 51(1)(b)(iii): On 1 September 2018 you gave policy approval to exempt the Regulations from the operation of the sunsetting framework on the basis that they are designed to be enduring and not subject to regular review (MC18-000001 refers). However, as the Regulations will sunset on 1 October 2018, it is unlikely that the exemption will be in effect before the Regulations sunset. As such, I seek your approval to defer the sunsetting of the Regulations by 12 months to prevent them from sunsetting before the exemption can be put in place.

[If seeking a 18 or 24 month deferral: provide a summary of the instrument's engagement with human rights and freedoms.]

Note: If approved, the explanatory statement associated with the certificate of deferral for 18 or 24 months will need to have a human rights statement of compatibility prepared, pursuant to section 9 of the Human Rights (Parliamentary Scrutiny) Act 2011 (HRPS Act). Does the instrument and its proposed deferral engage any of the human rights and freedoms recognised or declared by the international instruments in section 3 of the HRPS Act? If yes, what specific rights are involved? This should be set out in the initial application as it will be included in the Explanatory Statement for the certificate of deferral.

[Sign off]

Appendix H – Template application for exemption

- Please refer to 2.3 Exemptions from sunsetting and read section 7 of this template (notes) before completing your application.
- Complete a separate application for each instrument or class of instruments and keep your application concise (no more than 4 pages). Additional information can be attached.
- Ensure the application is provided under cover of a letter from the current rule-maker for the instrument(s).

1. PROPOSED SCOPE OF EXEMPTION

Please identify the legislative instrument(s) for which you are seeking an exemption, including the legislation it is made under.

It is preferable for an exemption application to be framed in terms of the specific instrument or instruments for which the exemption is to apply (e.g. the Y Regulations and the Z Rules). This is because most of the policy criteria are satisfied by a feature of the instrument itself, and not the instrument-making power in the enabling legislation. However, the application should also address the effect of exempting other instruments made under the relevant instrument-making power as this is likely to be how the exemption will be framed.

Alternatively, the application may be framed only in terms of:

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

These alternative approaches may be appropriate where the instrument-making power has not yet been exercised (e.g. where the application relates to instruments made under an Act that is currently before Parliament) or where there is a large number of instruments made under a particular provision. An application framed around the enabling provision or Act must demonstrate that all instruments, existing and future, that have been or can be made under that provision or Act would satisfy one or more of the policy criteria. It is not enough to simply apply the criteria to the enabling provision or Act itself.

2. DESCRIPTION OF THE INSTRUMENT(S) COVERED BY THIS PROPOSAL

Please list all instruments currently on the FRL that would be covered by this proposed exemption if it is approved. Do not include solely commencing, amending or repealing instruments (as these are covered by automatic and bulk repeal provisions in the Legislation Act). If there are many 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 its 'View Series' page on the FRL, and
- its scheduled sunset date.

Describe:

- what the instrument(s) proposed to be covered by this exemption do, and
- what would happen if the instrument(s) were required to be **reviewed and replacement instruments were to be made every 10 years** due to their scheduled sunsetting (rather than what would happen if the instrument(s) were allowed to sunset).

Please keep it factual; use relevant statistics and quotes from key stakeholders if applicable.

3. BASIS FOR PROPOSED EXEMPTION

New exemptions will only be granted if exceptional policy circumstances exist. It is well-established practice that an assessment of whether it is appropriate to exempt an instrument from sunsetting is conducted on the basis of the criteria set out below.

Please address each criterion that applies. It is strongly recommended that agencies choose one or two relevant criteria and focus on developing robust justifications based on those particular criteria. Attempting to address all of the criteria is likely to result in a self-contradicting application.

3.1 The rule-maker has been given a statutory role independent of government, or is operating in competition with the private sector.

3.2 The instrument is designed to be enduring and not subject to regular review.

3.3 Commercial certainty would be undermined by sunsetting.

3.4 The instrument is part of an intergovernmental scheme.

3.5 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.

In exceptional circumstances, an exemption may also be granted on the basis of the following criteria:

3.6 The instrument is:

- *sufficiently large and complex that the administrative burden associated with remaking the instrument would outweigh any regulatory benefit*
- *subject to regular review, <u>and</u>*
- *subject to regular amendment.*

3.7 The instrument governs a scheme that is applicable to a permanently closed class of persons.

4. ALTERNATIVE REVIEW ARRANGEMENTS

What arrangements have been or will be put in place to ensure that the instrument(s) covered by your application are subject to periodic review, and will be kept up to date and only remain in force for so long as they are needed?

The purpose of providing this information is to demonstrate to the Attorney-General that the instrument(s) covered by this application will be kept up to date in future, despite being exempt from the regular review and replacement processes under the sunsetting framework.

5. OTHER ISSUES

5.1 Human rights compatibility

If approved, the explanatory statement associated with the sunset-altering instrument will need to have a human rights statement of compatibility prepared, pursuant to section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (HRPS Act). Do the instruments to be exempted engage any of the human rights and freedoms recognised or declared by the international instruments in section 3 of the HRPS Act? If yes, what specific rights are involved?

5.2 Consultation

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

6. CONTACT DETAILS IN REQUESTING AGENCY

Please provide contact details at action officer and SES level, including email and phone details.

7. NOTES

7.1 Purpose of sunsetting

Section 49 of the Legislation Act establishes that the purpose of sunsetting 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. Sunsetting is an opportunity for agencies to review their legislative instruments and ensure that legislative instruments are clear, fit for purpose and impose the lowest possible regulatory burden in order to achieve their purpose.

7.2 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 replacing. 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.

7.3 After making an exemption request

The Attorney-General's Department will consult with you on your request.

7.4 Contacts

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

Attorney-General's Department—Administrative Law Section
02 6141 2736
sunsetting@ag.gov.au

For other enquiries:

Office of Parliamentary Counsel—FRL and sunset date questions

Aasha Swift
02 6120 1340
Aasha.Swift@opc.gov.au

Nikki Conduit
02 6120 1323
Nikki.Conduit@opc.gov.au

Office of Best Practice Regulation—Regulatory impact assessment questions

02 6271 6270
Helpdesk-OBPR@pmc.gov.au

Attorney-General's Department—Human rights questions

humanrights@ag.gov.au

Appendix I – Common models of legislative review

- Please refer to Part 5 Review of sunsetting instruments.

The table below 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 senior executive or rule-maker.

When it comes to engagement, remember also that:

- section 17 of the *Legislation Act 2003* requires the rule-maker of a legislative instrument to be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake, has been undertaken, and
- section 15J of the Legislation Act requires the explanatory materials for new and replacement instruments to explicitly address the issue of consultation.

MODEL		SCOPE	INDEPENDENCE	COMMUNITY ENGAGEMENT
If the last review was more than five years ago, or if significant issues have emerged since the last review				
A	**Public review**	Broad scope	A formal review panel should be established that: • is chaired by somebody independent of the responsible agency, and • includes, or is advised by a separate group of, stakeholder representatives. The merits of a COAG reform project or interagency working group should be tested with relevant agencies.	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. 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.
B	**Semi-public review**	Narrow but complex scope	A formal review panel should be established and chaired by somebody independent of the responsible agency. The merits of a COAG reform project or interagency working group should be considered.	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. 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. 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.

MODEL		SCOPE	INDEPENDENCE	COMMUNITY ENGAGEMENT
C	**Targeted review**	Narrow and simple scope	A formal review panel should be established but it is not essential to include non-government members. The review may be undertaken by an external consultant if desired, e.g. for workload or expertise reasons. The merits of an interagency working group should be considered.	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. 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.
In all other cases				
D	**In-house review**		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. In some cases, desk-top review within the responsible line area may be appropriate for simple and machinery instruments that are unlikely to draw significant stakeholder interest.	Targeted consultation may be appropriate to confirm that there are no major issues requiring attention. If in doubt, consult the relevant rule-maker. 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.

Appendix J – 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 external territories and the Jervis Bay Territory, or any other legislative instrument made or approved by the Governor-General.

OPC also provides a range of drafting and drafting-related services to agencies on a billable basis. Agencies will be invoiced directly by OPC for the drafting of sunsetting instruments, such as certificates of deferral and declarations of alignment.

Other services available on a billable basis from OPC 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.

While developing legislative proposals, agencies can obtain quick off-the-cuff advice from OPC client advisers about drafting matters that arise.

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.

As a general guide drafting instructions should 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 replacement instrument is to be the same in substance
- technical or structural changes that may be necessary or desirable
- commencement, transitional and application provisions
- apart from a new name for the instrument, OPC would also normally renumber the existing provisions and may suggest that they be restructured for consistency with current drafting style and conventions
- consequential amendments to other instruments and Acts that may be necessary, noting that if amendments to Acts are required, this should be identified as early as possible, as significant additional time will be required for both drafting and passage of amending legislation
- whether the sunsetting instrument is within the scope of the instrument-making power of the enabling legislation, and whether there are any provisions that would benefit from rewriting for greater clarity or to remove interpretative doubt.

If an agency needs or wishes to use OPC's drafting services to draft a replacement for a particular instrument, OPC appreciates early instructions. The following provides a guide to the time OPC requires to replace, without significant changes, instruments of varying lengths:

- a 10 page instrument - six weeks
- a 50 page instrument - six months
- a 100 page instrument - 12 months, and
- a 200 page instrument - two years.

Even where the agency has identified minimal changes, OPC will still need to review and update the instrument to bring it up to date with current drafting practices.