



SUNSETTING LEGISLATIVE INSTRUMENTS

February 2016

Summary

This guidance note provides information about the *Australian Government Guide to Regulation* requirements as they apply to sunseting instruments that have a regulatory impact on businesses, community organisations or individuals.

From 1 April 2015, thousands of instruments began to sunset in the absence of any intervention under the *Legislative Instruments Act 2003* (LIA). Some of those instruments have significant impacts on businesses, community organisations or individuals. Under the Australian Government's regulatory impact analysis rules, the decision to continue such instruments would normally require the completion of a Regulation Impact Statement (RIS).

Because of the large number of sunseting instruments, an alternative process will apply in cases where the sunseting instrument is being remade without significant change. In those cases, where a RIS would otherwise have been required, under the alternative process an agency will be allowed to self-assess the performance of the instrument. If it is found through the assessment to be operating effectively and efficiently, no RIS will be required. The agency's assessment of performance will be published in lieu of publishing a RIS. This assessment must be informed by a formal consultation process with affected stakeholders.

If the sunseting regulatory instrument is being remade with amendments that will change some aspect of its substance or effect, a RIS may need to be completed. Also, if the instrument was not assessed as operating effectively and efficiently, a RIS must be completed before the instrument is remade (whether with or without amendment).

If no RIS or self-assessment was completed when one would have been required, the agency with policy responsibility for the instrument will be deemed non-compliant with the Government's best practice regulation requirements and a post-implementation review will be required.

The agency must complete a regulatory costing to quantify the costs imposed on businesses, community organisations and/or individuals if the instrument ceases, or where there are changes to the instrument, regardless of whether a RIS or self-assessment is required. If the instrument is changed in a way that increases the regulatory burden, the agency must also identify regulatory cost offsets. Regulatory costs and offsets must be quantified in a manner consistent with the Regulatory Burden Measurement framework and must be reported to your portfolio Regulatory Reform Unit in the quarterly reporting process.

Context

Both the LIA and the Government's best practice regulation requirements seek to ensure that suitable review mechanisms exist so that legislative instruments remain fit-for-purpose, necessary and relevant.

All legislative instruments are subject to the sunseting provisions in the LIA. Under those provisions, instruments that are not exempted will be automatically repealed (*sunsetting*) after about 10 years unless action is taken to preserve them. In coming years, thousands of legislative instruments are due to sunset.

In this guidance note, the term *regulatory instruments* is used to refer to all legislative instruments that have a regulatory impact on business, community organisations or individuals. *Sunsetting regulatory instruments* are those that are due to sunset under the LIA.

Best practice regulation requirements for sunseting instruments

Table 1 summarises the actions required under the Government’s regulatory impact analysis framework. For instruments with regulatory impacts, you may need to complete a RIS, write a self-assessment letter to the Office of Best Practice Regulation (OBPR), or complete a regulatory costing. For illustrative purposes, the table refers to an instrument with a \$10 million impact.

Table 1: Regulatory impact analysis requirements for sunseting instrument with \$10 million impact

Scenario	Regulatory impact analysis requirement	Regulatory costing	
		Offset required (cost)	Contribution to target (saving)
Instrument ceases when permitted to sunset (including where that sunseting date has been altered by a certificate of deferral or sunset-altering instrument)	No RIS required.	Nil	\$10m
Instrument granted an exemption from sunseting	No RIS required.	Nil	Nil
Instrument remade without significant change	Either a letter to OBPR certifying that the instrument has been reviewed and found to be effective and efficient, or a RIS.	Nil	Nil
Instrument remade with deregulatory change that reduces regulatory cost impact to \$6m	A RIS is required.	Nil	\$4m
Instrument remade with regulatory change that increases regulatory cost impact to \$15m	A RIS is required. Offsets must be identified.	\$5m	Nil

Threshold test: does the instrument have a regulatory impact?

Most of this guidance note applies only to sunseting instruments with a regulatory impact.

An instrument is considered to have no regulatory impact if:

- there would be no or only a minor impact on businesses, community organisations or individuals if it were to sunset
- it is purely concerned with the operation of the machinery of government.

For each sunseting regulatory instrument that you are seeking to have remade, you need to consult OBPR to determine whether the instrument has a regulatory impact. To determine this, OBPR considers whether the impacts from the regulation are minor or machinery in nature.¹ The impact of remaking a sunseting instrument is calculated relative to no instrument being in place.

Do you need to do a RIS?

No RIS will be required if:

- the instrument is allowed to sunset
- the instrument has no regulatory impact
- the instrument has been granted an exemption from sunseting under the LIA²
- the Attorney-General has issued a section 51 certificate of deferral or a section 51A sunset-altering instrument under the LIA.³

Other sunseting instruments that are being remade require either a RIS or agency certification (covered below).

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 sunseting date has been altered by a certificate of deferral or sunset-altering instrument)
- the instrument is being actively repealed
- the instrument is being remade with changes (regardless of whether the changes are deregulatory).

If the instrument ceases operation, 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).

¹ A full definition of 'minor or machinery in nature' is in the *User Guide to the Australian Government Guide to Regulation*.

² Exemptions from sunseting 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.

³ Under the LIA, the sunseting 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 sunseting date of an instrument by up to 12 months. A sunset-altering instrument aligns the sunseting 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 sunseting date of an included instrument by up to five years.

Agency self-assessment and certification

Because of the large number of sunseting instruments, OBPR gives you the option of using a streamlined process in lieu of preparing a RIS. This 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 instrument and found that it is fit for purpose (that is, the regulation is efficient and effective in achieving the Government's objectives), and
- intend the sunseting instrument to be remade without significant changes.

In this situation, you would ordinarily need to prepare a RIS (since this is a change to the status quo, which is that the instrument sunsets). However, in these particular circumstances, instead of completing a RIS, 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 regulatory instrument and found that it is achieving its objectives efficiently and effectively. 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 included as Appendix 2 to this guidance note.

This process is considered to meet the Australian Government's RIS requirements for the remaking of the sunseting instrument. You may still choose to complete a RIS instead.

In other circumstances, a RIS is required (for example, if your assessment finds that the regulatory instrument has not been effective at achieving the Government's objectives, or if the instrument is being changed).

If the instrument is being remade with changes, the RIS is only required to reflect the proposed changes. In some cases, it may be that the only feasible option is to remake the regulation without changes, despite problems with its performance. A RIS is still required in such cases.

It is your responsibility to contact OBPR early in the process of remaking sunseting instruments. You should allow enough time to incorporate the RIS into the decision making process.

Assessing the performance of the regulation

The assessment of whether a sunseting instrument is operating effectively and efficiently needs to be informed by data about the performance and impacts of the instrument. Obtaining data on impacts almost always requires direct consultation with affected stakeholders. Consultation for multiple sunseting instruments affecting a single stakeholder group can be conducted together, even if you have not formally applied to the Attorney-General to treat those regulations as part of a thematic review.

The consultation can be conducted online. Give stakeholders clear information on the consultation process you are following and specify the information you are seeking, and the preferred mode for responses. You could consider issuing a discussion paper to provide this information.

In developing a consultation process, you should bear in mind the advice in the *Best practice consultation guidance note*.

You are responsible for the proposed approach to consultation, which must be certified by the relevant departmental secretary or deputy secretary (or agency head or deputy head). The consultation should be designed to obtain information on whether the instrument is operating effectively and efficiently.

Definitions: Effective and efficient

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.

For both effectiveness and efficiency, the baseline for comparison should be a case where no regulation is in force.

If your assessment of regulatory performance indicates that the sunseting regulation is either not effective or not efficient, a RIS will be required to have the regulation remade. In most cases, the performance assessment will indicate that changes to the regulation are desirable, but you may wish to consider continuing the regulation unchanged as one of the options in the RIS. You need to undertake consultation on the options as in a normal RIS process, and the RIS will be published on the OBPR website once it has been completed and a decision has been announced.

Interaction between this process and other reviews

Where an instrument that is sunseting is subject to a review, if remaking the instrument requires a RIS, it makes sense for that review to be designed to meet the RIS requirements where possible. OBPR can advise on draft terms of reference to ensure that the proposed review meets the RIS requirements.

In some cases, an existing review will already have considered the issues of regulatory performance or other matters relevant to a RIS. Where such a review exists, there is no need to conduct additional regulatory impact analysis, as long as the review was conducted recently enough for its findings to remain relevant for the RIS.

If you suspect that a RIS might be required for the remaking of a particular instrument or set of instruments, you should contact OBPR as soon as possible, preferably 12 months before the proposed date of commencement of the new or amended instrument. This allows for the RIS to be finalised early enough for remade instruments to be subject to the normal parliamentary process for legislative instruments, including any disallowance period that might apply.

Thematic reviews

Related instruments can be grouped for a thematic review, and their sunseting dates altered to enable this. In most cases, OBPR considers the combined impacts of those instruments together in a single RIS process. Applications for sunset-altering instruments to enable thematic review are made to the Attorney-General.

For more information about applying for a thematic review, contact the Administrative Law and Legislative Frameworks Section in the Attorney-General's Department.

Handling thematic reviews

Where the Attorney-General has issued a sunset-altering instrument under the LIA to align the sunset dates of two or more instruments to enable a thematic review, regulatory impact analysis framework questions should apply to the group of instruments as a whole.

To further smooth processes under this option, sunseting regulations from multiple thematic reviews can be grouped, and the process applied to the group. A request for input from the public through established channels, such as a current website, will be an adequate form of consultation. This should reduce the costs of consultation, both for agencies and for affected stakeholders.

If you are undertaking a thematic review, you should contact OBPR to discuss how the RIS requirements will apply in that process.

If a RIS is required

OBPR will assess your RIS in the same way as it assesses all others. It is best to meet OBPR early in the process to establish the scope and expectations for the RIS.

Transparency and publication of documents

The following documents are published under the Australian Government's RIS requirements:

- If you have prepared a RIS, it will be published on the OBPR website once the decision has been announced. The RIS must also be included in the instrument's explanatory material.
- If you have assessed the regulatory performance of the sunseting instrument and determined that the instrument is performing effectively and efficiently, that assessment (signed off at secretary, deputy secretary or equivalent agency head level) will be published.

Regulatory costings

Where a regulatory costing is required, the regulatory costs must be quantified using the Regulatory Burden Measurement framework discussed in the *Regulatory Burden Measurement framework* guidance note. If the costing indicates an increase in the regulatory burden on businesses, community organisations or individuals, you also need to identify regulatory cost offsets.

Further assistance

If you have any questions or require any further assistance on RISs or regulatory costings in the sunseting process, contact OBPR by email at helpdesk-obpr@pmc.gov.au or call (02) 6271 6270.

If you require further information on the sunseting process for legislative instruments, contact the Attorney-General's Department or the Office of Parliamentary Counsel.

Appendix 1: Frequently asked questions

What falls under the definition of ‘remaking an instrument without significant changes’?

For the purposes of the RIS requirements, an instrument has been remade without significant changes if all of the following apply:

- The nature of the regulatory impacts on business, community organisations, or individuals is unchanged.
- The scope of the impacts is unchanged.
- The entities that are affected by the regulation are the same both before and after the instrument has been remade.
- The entities that would have been affected by the regulation in the future are the same before and after the instrument has been remade.

For detailed advice on remaking a sunset instrument, you should contact the Attorney-General’s Department or the Office of Parliamentary Counsel.

Instruments seeking exemptions—do you still need to do a RIS?

If you seek an exemption from sunset, you do not need to prepare a RIS or regulatory costings if the Attorney-General grants the exemption.

If the exemption is not granted, you may need to take some action to meet the RIS requirements if the instrument has a need to continue in some form. If you decide that the instrument should be remade without significant changes, you should review the regulatory performance of the existing instrument. However, there may be other criteria in this guidance note that mean you do not have to do a RIS (for example, if the impacts of the instrument are purely machinery in nature).

What is sunset legislation?

A sunset provision or clause is a measure within an Act or regulation that provides that the law shall cease to have effect after a specific date, unless further action is taken to extend it.

At the Australian Government level, under the *Legislative Instruments Act 2003* (LIA), subordinate legislation sunsets on the relevant sunset date about 10 years after its registration. The LIA provides for the short-term deferral of sunset in specific circumstances, the altering of sunset dates to allow for thematic review of related instruments, and for some limited categories of instrument, exemption from the sunset regime as a whole. The LIA also contains measures to stagger the sunset date for the ‘backlog’ of instruments that predated the sunset regime, to avoid peaks in the number of sunset instruments.

How do I determine whether or not the sunset legislation is still required?

A threshold decision for the responsible agency is whether the sunset instrument will still be required or is spent or otherwise redundant.

If the instrument is not required, it will sunset without further action. Alternatively, the instrument may be nominated for inclusion in a bulk repeal regulation coordinated by the Attorney-General’s Department.

Appendix 2: Certification letter template

Mr Peter Saunders
First Assistant Secretary
Office of Best Practice Regulation
Regulatory Reform Division
Department of the Prime Minister and Cabinet

Dear Mr Saunders

[Title of sunseting regulation]

I am writing to the Office of Best Practice Regulation (OBPR) regarding the <title of sunseting regulation>, which, as per the *Legislative Instruments Act 2003*, had been scheduled to sunset on <date>. <However, it has been decided that the instrument is to be remade without significant amendment>.

The <name of agency> certifies that <title of sunseting regulation> is operating effectively and efficiently, and that therefore a Regulation Impact Statement is not required for this regulation to be remade.

The assessment that the regulation is operating effectively and efficiently has been informed by a consultation process which involved <list the main stakeholders consulted>, over the period <specify period of consultation>.

I acknowledge that OBPR will publish this letter for transparency purposes.

If you have any queries about this advice, please contact <contact name> on <XXXX XXXX>, or <contact email address>. *{This paragraph will be excluded from publication for privacy}*

Yours sincerely

<Name>
<Secretary/Deputy Secretary/Agency Head etc>
<Department/Agency>

<Date>