



Sunsetting Legislative Instruments

July 2022

Summary

This guidance note provides information about the [Australian Government Guide to Regulatory Impact Analysis](#) 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 *Legislation Act 2003* (Legislation Act). Some of those instruments have significant impacts on businesses, community organisations or individuals. Under the Australian Government's regulatory impact analysis framework, the decision to continue such instruments would normally require the completion of a Regulation Impact Statement (RIS).

Due to the large number of sunseting instruments, an alternative process has been established 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. This assessment must be informed by a consultation process with affected stakeholders. If the assessment demonstrates the instrument is operating effectively and efficiently, no RIS will be required. The agency would certify the assessment by their Secretary, Deputy Secretary, equivalent agency head or delegate in a letter (Appendix 2). This letter will be published in lieu of publishing a RIS.

If the sunseting instrument is being remade with amendments that will change some aspect of its substance or effect, a RIS may still 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 'insufficient' with the Government's RIS requirements. A post-implementation review¹ 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. This must be completed regardless of whether a RIS or self-assessment is required. Regulatory costs must be quantified in a manner consistent with the Regulatory Burden Measurement framework.²

¹ See guidance on *Post-Implementation Reviews* at obpr.pmc.gov.au.

² See guidance on the *Regulatory Burden Measurement framework* at obpr.com.au.

Context

Both the Legislation Act and the Government's RIS 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 sunset provisions in the Legislation Act. 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 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 Legislation Act.

RIS requirements for sunset instruments

For each sunset instrument that an agency is seeking to remake, the agency is required to consult with the Office of Best Practice Regulation (OBPR) to determine whether the instrument has a regulatory impact. To determine this, the OBPR considers the scope of the impacts on business, community groups and individuals as part of a threshold test.³ The impact of remaking a sunset instrument is assessed relative to the status quo of there being no instrument in place (i.e. the instrument sunset).

Threshold test: does the instrument have a regulatory impact?

This guidance note primarily applies to sunset instruments that are to be remade and in their operation have a more than minor regulatory impact. Please note that there are no RIS requirements for legislative instruments that are being permitted to sunset, regardless of the associated regulatory impacts.

An instrument is considered to have minor or no regulatory impact if in its operation:

- there would be no or only a minor impact on businesses, community organisations or individuals compared with the status quo of the instrument not being in place; or
- it is purely concerned with the operation of the machinery of government.

Table 1 summarises different sunset instrument scenarios, and actions required for each under the Government's Regulatory Impact Analysis framework. For instruments with regulatory impacts, an agency may need to complete a RIS or prepare a self-assessment letter to the OBPR, and/or complete a regulatory costing.

Please consult Table 2 for regulatory costing requirements.

³ A full definition of 'minor or machinery in nature' is in the *User Guide to the Australian Government Guide to Regulatory Impact Analysis*.

Table 1: Regulatory impact analysis requirements for a sunseting instrument

Scenario	Regulatory Impact Analysis requirements
1. The instrument sunsets (including where that sunseting date has been altered by a certificate of deferral or sunset-altering instrument). ⁴	No RIS required.
2. The instrument granted an exemption from sunseting.	No RIS required. The agency to engage with OBPR closer to the new sunset date.
3. The instrument to be remade (regardless of whether the instrument is to be remade with/without significant changes) is assessed by the OBPR as having a minor or no impact on businesses, community organisations or individuals in its operation compared to the status quo that the instrument is not in place.	No RIS required.
4. The instrument to be remade is assessed by the OBPR as having more than minor impacts on businesses, community organisations or individuals in its operation compared to the status quo that the instrument is not in place. Instrument is to be remade without significant changes.	Following consultation, the agency may assess the regulations are operating efficiently and effectively, and certify this in a letter, in lieu of a RIS process (Appendix 2).
5. The instrument to be remade has more than minor impacts compared to the status quo that the instrument is not in place, and is being remade with significant changes.	A RIS is required to be finalised with the OBPR before the decision is made to remake the regulations. The RIS is only required to reflect the proposed changes to the instrument.
6. The instrument expires or ceases (<i>but does not sunset</i>). The agency is seeking to remake new instrument.	If impacts are more than minor compared to the status quo that the instrument is not in place, a RIS is required. Regulatory costs/savings will need to be quantified within the RIS. No RIS is required if the impacts are no more than minor.

⁴ Under the Legislation Act, 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 under Scenario 4

Due to the large number of sunseting instruments, the OBPR provides agencies with the option of using a streamlined process in lieu of preparing a RIS. This applies when the agency:

- has considered the necessity for the regulation to continue and found that there is a genuine need for ongoing regulation in some form
- has 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
- intends for the sunseting instrument to be remade without significant changes.

In this situation, the agency 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, an agency's Secretary, Deputy Secretary, equivalent agency head or delegate may write a letter to OBPR. The letter must certify that they have reviewed and assessed the performance of the regulatory instrument and found that it is achieving its objectives efficiently and effectively. The certification letter needs to state that the agency's 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 Regulatory Impact Analysis requirements for the remaking of the sunseting instrument. An agency may still choose to complete a RIS instead.

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

Regulatory Costs / Saving

For instruments with regulatory impacts, an agency must complete a regulatory costing consistent with the regulatory Burden Measurement framework. Please note the specific calculation requirements for each Scenario explained below.

Under Scenario 1 in Table 1, the regulatory costs or savings of the instrument sunseting must be costed. If the existence of the instrument imposes a net regulatory burden, then the cessation of its operation will reflect a regulatory saving of the same magnitude.

In Scenarios 3, 4 and 5, the regulatory costing is the difference of the proposed changes to the existing regulations. The regulatory costing must measure the proposed changes against the status quo if the unamended instrument were permitted to continue. Therefore, costings should reflect the net impact of those changes, whether regulatory (net cost) or deregulatory (net saving). This must be calculated in accordance with the Regulatory Burden Measurement framework.

Under Scenario 6 in Table 1, regulatory costs/savings are calculated against the fact that the instrument ceases to exist.

Table 2 outlines how regulatory costs/savings must be recorded and provided to the OBPR relevant to each scenario.

Table 2: Regulatory costing requirements for a sunseting instrument

Scenario (see Table 1 for details)	Regulatory Costing Requirements
1	Regulatory savings are quantified, recorded and provided to the OBPR.
2	Nil required. The instrument continues without change.
3	If the instrument is remade with changes, regulatory savings are quantified, recorded and provided to the OBPR as well as kept by the agency. Note: regulatory costing is not required where the instrument is remade without changes.
4	Regulatory costs and savings are quantified and recorded in the certification letter (Appendix 2).
5	Any regulatory costs/savings need to be quantified as part of the development of the RIS.
6	Regulatory costs/savings do not need to be quantified. If a RIS is required, they need to be quantified as part of the development of the RIS.

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 the agency has not formally applied to the Attorney-General to treat those regulations as part of a thematic review.

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

The agency is 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), or delegate. The consultation should be designed to obtain information on whether the instrument is operating effectively and efficiently.

For further guidance on consultation, please see OBPR's [Best Practice Consultation guidance note](#).

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.

Certification not possible

In some cases, it may be that the only feasible option is to remake a sunseting regulation without changes, despite problems with its performance. If the agency's 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 the agency may wish to consider continuing the regulation unchanged as one of the options in the RIS. The agency needs to undertake consultation on the options as in a normal RIS process, and the RIS will be published on the OBPR's website (<https://obpr.pmc.gov.au/published-impact-analyses-and-reports>) once it has been completed and a decision has been announced.

A RIS is also required if the instrument is being remade with changes that would have a more than minor impact on businesses, community organisations or individuals in its operation. If the instrument is being remade with changes, the RIS is only required to reflect the proposed changes. These regulatory costs should be calculated using the [Regulatory Burden Measurement framework](#). For all other impacts in the RIS, the comparison of impacts is against the base case of the regulation having sunset (which is the status quo if no action is taken).

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 the agency suspects that a RIS might be required for the remaking of a particular instrument or set of instruments, they should contact the 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, the 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 Legislation Act to align the sunseting 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 streamline 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, for both agencies and affected stakeholders.

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

If a RIS is required

The OBPR will assess the agency's RIS in the same way as it assesses all others. It is best to discuss with the 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 the agency has prepared a RIS, it will be published on the Department of the Prime Minister and Cabinet's website (<https://obpr.pmc.gov.au/published-impact-analyses-and-reports>) once the decision has been announced. The RIS must also be included in the instrument's explanatory material.
- If the agency has 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, equivalent agency head level, or delegate) 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](#).

Further assistance

For questions or 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.

For further information on the sunseting process for legislative instruments, contact the Attorney-General's Department (sunsetting@ag.gov.au) or the [Office of Parliamentary Counsel](#).

Appendix 1: Frequently asked questions

What is sunseting 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 Legislation Act, subordinate legislation sunsets on the relevant sunseting date about 10 years after its registration. The Legislation Act provides for the short-term deferral of sunseting 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 sunseting regime as a whole. The Legislation Act also contains measures to stagger the sunseting date for the 'backlog' of instruments that predated the sunseting regime, to avoid peaks in the number of sunseting instruments.

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 of the following apply:

- The nature of the regulatory impacts on business, community organisations, or individuals is minor or unchanged.
- The scope of the impacts is minor or unchanged.

For detailed advice on remaking a sunseting instrument, the agency should contact the Attorney-General's Department or the Office of Parliamentary Counsel.

Instruments seeking exemptions—does the agency still need to do a RIS?

If the agency seeks an exemption from sunseting, they do not need to prepare a RIS or regulatory costings if the Attorney-General grants the exemption.

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

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

A threshold decision for the responsible agency is whether the sunseting 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 Jason Lange
Executive Director
Office of Best Practice Regulation
Department of the Prime Minister and Cabinet

Dear Mr Lange

[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 *Legislation 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 also note that the regulatory burden to business, community organisations or individuals has been quantified using the Australian Government's *Regulatory Burden Measurement framework*. These are provided below.

Average annual regulatory costs (from business as usual)				
Change in costs (\$ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	\$	\$	\$	\$

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>