

***Legislation (Deferral of Sunsetting—Migration Regulations 1994  
(Specification of a Class of Persons)) Certificate 2023***

**EXPLANATORY STATEMENT**

Issued by the Attorney-General in compliance with  
section 15G of the *Legislation Act 2003*

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**INTRODUCTION**

The *Legislation (Deferral of Sunsetting—Migration Regulations 1994 (Specification of a Class of Persons)) Certificate 2023* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (Legislation Act). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. Pursuant to subsection 51(4) of the Legislation Act the Certificate will not be subject to the disallowance provisions of that Act as the deferred sunsetting day specified in the Certificate is on or before the first anniversary of the originally scheduled sunsetting day. Subsection 51(4) of the Legislation Act provides that a certificate of deferral is exempt from disallowance if it defers the sunsetting day of an instrument by up to 12 months.

**OUTLINE**

Sunsetting is the automatic repeal of legislative instruments after a fixed period. The Australian Government's sunsetting framework is established under Part 4 of Chapter 3 of the Legislation Act. The purpose of the sunsetting framework is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration. Under paragraph 51(1)(c) of the Legislation Act the Attorney-General can issue a certificate to defer the sunsetting day of an instrument for a period of either 6, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.

This allows instruments to continue to be in force for a further but limited period of time when they would otherwise sunset. This removes the administrative burden of remaking instruments which would have a limited duration prior to their repeal and potential replacement, or where circumstances prevent the making of replacement instruments prior to the sunset day.

The Certificate defers the sunset date of the *Migration Regulations 1994 - Specification of a Class of Persons - IMMI 12/127* (the Instrument) by 12 months from 1 April 2023 to 1 April 2024.

The ability to defer sunset dates is an integral part of the sunset framework. It provides the necessary flexibility to ensure the standard 10 year sunset period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. Where the deferral is for a short period (6 or 12 months), the certificate is exempt from disallowance because the instrument will shortly be reviewed and, if remade, subject to disallowance and parliamentary scrutiny. Subjecting short term certificates of deferral to disallowance would undermine the flexibility afforded by their further but strictly limited postponement of sunset. In this case, the Instrument is expected to be reviewed within 12 months of the current sunset date informed by a whole-of-government review of the Afghan Locally Engaged Employees (LEE) program led by Dr Vivienne Thom AM. If this Certificate were to be disallowed, there would not be enough time to respond to any recommendations coming out of the review prior to the sunset day.

## **PROCESS BEFORE CERTIFICATE WAS MADE**

### **Regulatory impact analysis**

Certificates of deferral of sunset are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Impact Analysis (OIA). The OIA reference for this standing exemption is ID19633.

### **Consultation before making**

Before the Certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Instrument is made under paragraphs 200.211(1A)(a) and 201.211(1A)(a) of Schedule 2 to the *Migration Regulations 1994* (the Migration Regulations), which provides that the Minister may specify, in an instrument in writing, one or more classes of persons for the purposes of the paragraphs. The Instrument specifies, inter alia, certain persons, who are citizens of Afghanistan, and who have

been employed with the Department of Foreign Affairs and Trade (DFAT), the Australian Defence Force (ADF), the Australian Agency for International Development (which is now integrated with DFAT), or the Australian Federal Police as LEE in Afghanistan. If these persons have been assessed to be at significant risk of harm as a result of their employment with DFAT, the Department of Defence, or the AFP in Iraq or Afghanistan within specified time periods, they are specified as a class of persons for the purposes of sub-clauses 200.211 (1A) and 201.211(1 A) of Schedule 2 to the Migration Regulations. If a ‘relevant Minister’ (including the Attorney-General, the Minister for Defence, the Minister for Foreign Affairs, the Minister for Home Affairs, or the Minister for Immigration and Citizenship) certifies that the person is a member of that class of persons and is at risk of harm for a reason, or reasons, that relate to the person being in that class of persons, then the person will meet the criteria in subclauses 200.211(1A) and 201.211(1A) of Schedule 2 to the Migration Regulations. This is one of the pathways which may enable the person to meet the criteria for the grant of a Subclass 200 (Refugee) or a Subclass 201 (In-Country Special Humanitarian) visa.

Certificates of deferral are machinery in nature, and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. This will minimise the administrative burden on stakeholders associated with consultation on a deferral that will only have effect for a limited amount of time. Any replacement instrument will be subject to further consultation and parliamentary oversight, including oversight of whether adequate consultation occurred with persons likely to be affected by the replacement instrument.

A 12 month deferral will allow sufficient time for the Government to consider and respond to the findings of Dr Thom’s review of the Afghan LEE program. As such, given that deferral of the sunset date of the Instrument is consistent with the policy intent of the sunset regime and does not significantly alter existing arrangements, appropriate consultation has occurred for the purposes of section 17 of the Legislation Act.

### **Statutory preconditions relevant to the Certificate**

If the statutory conditions in section 51 of the Legislation Act are met, an instrument’s sunset day can be deferred for 6, 12, 18 or 24 months by means of a certificate made under that section. In terms of process, the Legislation Act requires:

- (a) the responsible rule-maker to apply to the Attorney-General in writing, and
- (b) the Attorney-General to be satisfied that:
  - (i) the instrument would (apart from the operation of the sunset provisions) be likely to cease to be in force within 24 months after its sunset day

- (ii) the proposed replacement instrument will not be able to be completed before the sunset day for reasons that the rule-maker could not have foreseen and avoided
  - (iii) 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
  - (iv) the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
- (c) the Attorney-General to issue a certificate. The explanatory statement for the certificate must include a statement of reasons for the issue of the certificate.

The rule-maker for the Instrument, the Minister for Immigration, Citizenship and Multicultural Affairs, the Hon Andrew Giles MP, provided a written application to the Attorney General seeking a certificate of deferral of sunset for the Instrument. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Instrument would, apart from the operation of Part 4 of Chapter 3 of the Legislation Act, be likely to cease to be in force within 24 months after its sunset day. As such, the criterion in subparagraph 51(1)(b)(i) of the Legislation Act is met.

### **Statement of Reasons for issuing of the Certificate**

For the purposes of subsection 51(5) of the Legislation Act this section sets out the statement of reasons for issuing the Certificate.

The Senate Standing Committee on Foreign Affairs, Defence and Trade's January 2022 interim report of the inquiry into Australia's engagement in Afghanistan recommended that the Australian Government commission a full and thorough review of the operation of the LEE program. Consistent with this recommendation, the Certificate defers the sunset date of the Instrument to 1 April 2024 to enable the Government to consider and respond to the findings of Dr Thom's review of the Afghan LEE program. The deferral of the sunset date will facilitate both the efficient undertaking of the review and the implementation of its findings. Accordingly, the Instrument will likely cease to be in force in its current form within 24 months of its original sunset date.

### **More information**

Further details on the provisions of the Certificate are provided in [Attachment A](#).

The Instrument which is subject to the Certificate, and which will now sunset at a later day as

specified in the Certificate, is available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of the Certificate, and from the Department of Home Affairs about the Instrument to which the Certificate applies.

## NOTES ON THE CERTIFICATE

### **Section 1      Name**

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Migration Regulations 1994 (Specification of a Class of Persons)) Certificate 2023*. The Certificate may be cited by this name.

### **Section 2      Commencement**

This section provides for the Certificate to commence on the day after it is registered.

### **Section 3      Authority**

This section provides that the Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*.

### **Section 4      Deferral of sunsetting**

This section provides that the *Migration Regulations 1994 - Specification of a Class of Persons - IMMI 12/127*, for which the sunsetting day is 1 April 2023, is repealed by section 51 of the *Legislation Act 2003* on 1 April 2024.

### **Section 5      Repeal of the instrument**

This section provides that the Certificate is repealed at the start of 2 April 2024.