***Legislation (Deferral of Sunsetting—Occupational Health and Safety (Maritime Industry) Instruments) Certificate 2023***

**EXPLANATORY STATEMENT**

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

**INTRODUCTION**

The *Legislation (Deferral of Sunsetting—Occupational Health and Safety (Maritime Industry) Instruments) Certificate 2023* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (the Legislation Act)*.* It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. The Certificate will be subjected to the disallowance provisions of the Legislation Act as the deferred sunsetting day specified in the Certificate is after the first anniversary of the originally scheduled sunsetting day, which means that subsection 51(4) of that Act (which provides an exemption from disallowance for deferrals of 12 months or less) does not apply.

**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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 sunsetting day.

The Certificate defers the sunsetting date of the following instruments by 24 months from 1 April 2024 to 1 April 2026 (together, the OHS (Maritime Industry) Instruments):

1. *Occupational Health and Safety (Maritime Industry) (National Standards) Regulations 2003*;
2. *Occupational Health and Safety (Maritime Industry) Regulations 1995*.

The ability to defer sunsetting dates is an integral part of the sunsetting framework. It provides the necessary flexibility to ensure the standard 10 year sunsetting period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. In this case, new instruments to replace the OHS (Maritime Industry) Instruments are expected to be developed and to commence within 24 months of the current sunsetting days to ensure that the legislative framework for work health and safety in the seafaring industry possesses safety standards that are fit for purpose. This follows a thematic review conducted by the Department of Employment and Workplace Relations (the Department) following an alignment of the sunsetting days of the OHS (Maritime Industry) Instruments under the *Legislation (Occupational Health and Safety (Maritime Industry) Instruments) Sunset‑altering Declaration 2018* to 1 April 2024.

**PROCESS BEFORE CERTIFICATE WAS MADE**

**Regulatory impact analysis**

Certificates of deferral of sunsetting 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 OHS (Maritime Industry) Instruments are made under the*Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS(MI) Act). The OHS(MI) Act provides the legislative framework for work health and safety in the seafaring industry. It also establishes, alongside the *Seafarers Rehabilitation and Compensation Act 1992*, the Seacare Scheme, a national work health and safety and workers’ compensation scheme applying to a defined segment of the seafaring industry. The OHS(MI) Act is structured around general duties of care and a cooperative framework requiring operators and employees to work together to manage work health and safety.

The OHS (Maritime Industry) Instruments support a range of obligations under the OHS(MI) Act by prescribing forms for notifying and reporting incidents, forms for provisional improvement notices and other notices and procedural matters. They also ensure compliance with national standards and expectations such as the national ban on asbestos, the national standard for manual handling and the Australian standard relating to confined spaces.

For many years, there has been debate about whether a separate national regime for the seafaring sector is required. The Seacare Scheme requires widespread reform. There is also broad support from stakeholders that the work health and safety framework provided by the OHS(MI) Act is out of date and should be aligned with model work health and safety laws provided in the *Work Health and Safety Act 2011* (WHS Act).

The original sunsetting dates of the OHS (Maritime Industry) Instruments were aligned by the *Legislation (Occupational Health and Safety (Maritime Industry) Instruments) Sunset‑altering Declaration 2018* to 1 April 2024 to facilitate a review of the OHS (Maritime Industry) Instruments and implement necessary changes based on findings. Completion of that review has been delayed due to a variety of efforts to address broad ranging issues with the Seacare Scheme.

The Seafarers and Other Legislation Amendment Bill 2016, introduced by the former government, proposed to repeal the Act and extend coverage from the WHS Act and the *Work Health and Safety Regulations 2011* to apply to the Seacare Scheme, but the Bill lapsed on Parliament’s prorogation for the 2019 Federal election.

Additionally, in 2021, an independent review of the Seacare Scheme by Finity Consulting Pty Ltd was commissioned by the former government. A report of the independent review has been presented to the Minister Employment and Workplace Relations with options for reform currently under close consideration for harmonising the OHS(MI) Act and the OHS (Maritime Industry) Instruments with the WHS Act.

With the review still underway, the Department is conducting targeted consultation with stakeholders on the utility of the framework provided by the OHS(MI) Act and the OHS (Maritime Industry) Instruments. Stakeholder consultation will inform decisions concerning the OHS(MI) Act and the OHS (Maritime Industry) Instruments. It will also inform decisions made to ensure the Seacare Scheme possesses safety standards that are fit for purpose.

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 instruments 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 instruments.

A 24 month deferral will allow sufficient time for the Department to implement the recommendations of the review in new legislation, and will avoid the need to remake the OHS (Maritime Industry) Instruments in their current form for the short period of time before they are repealed and replacement instruments are made. As such, given that deferral of the sunsetting date of the OHS (Maritime Industry) Instruments is consistent with the policy intent of the sunsetting 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 sunsetting 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:

1. the responsible rule-maker to apply to the Attorney-General in writing, and
2. the Attorney-General to be satisfied that:
	1. the instrument would (apart from the operation of the sunsetting provisions) be likely to cease to be in force within 24 months after its sunsetting day
	2. the proposed replacement instrument will not be able to be completed before the sunsetting day for reasons that the rule-maker could not have foreseen and avoided
	3. the dissolution of 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
	4. the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
3. 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 OHS (Maritime Industry) Instruments, the Minister for Employment and Workplace Relations and Minister for the Arts, the Hon Tony Burke MP, provided a written application to the Attorney-General seeking a certificate of deferral of sunsetting for the OHS (Maritime Industry) Instruments.On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the OHS (Maritime Industry) Instruments 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 their sunsetting 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 Certificate defers the sunsetting date of the OHS (Maritime Industry) Instruments to 1 April 2026 to enable the Department to complete and implement the recommendations of the review of the work health and safety framework provided by the OHS(MI) Act and the OHS (Maritime Industry) Instruments (OHS(MI) framework).

The 24 month deferral allows time for a cohesive and well-informed approach to transitioning the OHS(MI) framework to the model laws provided by the WHS Act. The deferral will allow any necessary transitional arrangements to be enacted to ensure an orderly transition to a fit for purpose work health and safety framework.

Deferring the sunsetting day prevents unnecessary duplication of legislation arising from a scenario where the OHS (Maritime Industry) Instruments would be remade while broader reform occurs, and again when the reforms are complete.

Accordingly, the OHS (Maritime Industry) Instruments will likely cease to be in force in their current form within 24 months of their original sunsetting date.

**More information**

Further details on the provisions of the Certificate are provided in Attachment A.

The OHS (Maritime Industry) Instruments which are subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, are 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 Employment and Workplace Relations about the OHS (Maritime Industry) Instruments to which the Certificate applies.

**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

The *Legislation (Deferral of Sunsetting—Occupational Health and Safety (Maritime Industry) Instruments) Certificate 2023* (the Certificate) is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

**Overview of the Certificate**

The Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*. Under that paragraph 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 originally scheduled sunsetting day. The instruments specified in the Certificate are (together, the ‘OHS (Maritime Industry) Instruments’):

1. *Occupational Health and Safety (Maritime Industry) (National Standards) Regulations 2003*;
2. *Occupational Health and Safety (Maritime Industry) Regulations 1995*.

The OHS (Maritime Industry) Instruments are expected to be repealed and replaced within 24 months of their scheduled sunsetting day as part of the review of the work health and safety framework provided by the*Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS(MI) Act) and the OHS (Maritime Industry) Instruments. The Certificate allows the OHS (Maritime Industry) 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 the instruments which would have a limited duration prior to their expected repeal and replacement, or where circumstances prevent the making of a replacement instrument prior to the sunsetting day.

**Human Rights Implications**

A certificate of deferral of sunsetting extends the operation of the instrument but does not change or affect the rights engaged under the original instrument. The OHS (Maritime Industry) Instruments engage certain rights and freedoms declared by the international instruments set out in section 3 of the Human Rights Act.

Right to just and favourable conditions of work

The OHS (Maritime Industry) Instruments engage the right to just and favourable conditions of work under article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 7 of the ICESCR provides that everyone has the right to the ‘enjoyment of just and favourable conditions of work, which ensure, in particular…[s]afe and healthy working conditions’.

The prevention of occupational accidents and diseases is a fundamental aspect of the right to just and favourable conditions of work. Australia relevantly complies with its obligation under Article 7 of the ICESCR through its system of Commonwealth, state and territory work health and safety laws.

Work health and safety is regulated at the Commonwealth, state and territory levels. However, most work health and safety laws are harmonised in accordance with the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. Safe Work Australia develops and maintains the model work health and safety laws (model laws) through a tripartite consultative process to ensure best-practice work health and safety standards in Australia.

The OHS(MI) Act and the OHS (Maritime Industry) Instruments provide a bespoke Commonwealth framework to secure the health, safety and welfare of workers for a defined segment of the Australian seafaring industry. A review of the OHS(MI) Act and the OHS (Maritime Industry) Instruments is underway, including consideration of the appropriateness of applying the model laws to the industry.

Deferring the sunsetting of the OHS (Maritime Industry) Instruments promotes the right to safe and healthy working conditions by maintaining important work health and safety regulation for the Seacare Scheme while a cohesive and well-informed approach to transition to the model laws takes place.

Right to privacy

The OHS (Maritime Industry) Instruments engage the right to privacy under article 17 of the International Covenant on Civil and Political Rights (ICCPR). Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home and correspondence. This includes the respect for informational privacy, including in respect of storing, using and sharing private information and the right to control dissemination of personal and private information. Privacy guarantees a right to secrecy from the publication of personal information. It also prohibits unlawful attacks on a person’s reputation.

The OHS (Maritime Industry) Instruments include obligations to monitor the health of employees and contractors to identify any changes in their health due to exposure, or risk of exposure, to a hazardous substance (per regulation 2.18 of the *Occupational Health and Safety (Maritime Industry) (National Standards) Regulations 2003* (OHS(MI)(NS) Regulations)).

Health monitoring for workers exposed to hazardous substances, such as asbestos, primarily involves screening for changes in a worker’s body that may indicate the development of illness or disease related to asbestos exposure. Health monitoring is required to be conducted under the supervision of a legally qualified medical practitioner who is competent in the requisite testing or medical examinations for the substance. The operator must consult with the employee or contractor on the selection of a medical practitioner.

The operator must ensure that the employee or contractor is notified of the results as soon as practicable and provided with necessary explanation of the results of the surveillance. Where adverse results from health monitoring are obtained, the operator is required to notify the inspectorate and maintain confidential records. The operator is required to obtain the written consent of the employee or contractor before records are given or shown to a person, with the exception of the operator or a person identified under regulation 2.22 of the OHS(MI)(NS) Regulations (emergency services and inspectorate/inspector operating in the course of their duties).

These actions engage the right to privacy because the information that may be obtained or disclosed could include personal and sensitive information, and non-disclosure provisions that may otherwise apply are overridden. To the extent that the right to privacy is limited by the OHS(MI)(NS) Regulations, the limitation is considered necessary for a legitimate objective.

Health monitoring is necessary to:

* detect the early signs of adverse health effects;
* help identify control measures that are not working effectively; and
* assist in protecting workers from the risk of exposure to asbestos.

Records are required to be kept confidential, with disclosure only being required in certain circumstances, to the employee or contractor and to the inspectorate (only where adverse results are received). Written consent of the employee is required for any disclosure outside of the above.

Considering the serious health effects that can arise from exposure to hazardous substances and particularly asbestos, which the OHS(MI)(NS) Regulations regulate, it is considered that the deferral of the OHS (Maritime Industry) Instruments, resulting in the continuation of this limitation on the right to privacy, is reasonable and proportionate. The OHS(MI)(NS) Regulations include the requirement for any information obtained to be recorded confidentially to limit the risk to the employees’ or contractors’ privacy.

Information collected by the Australian Maritime Safety Authority, as the inspectorate, is personal information that is also subject to the requirements of the *Privacy Act 1988*, which governs its collection, use, disclosure, storage and disposal. This provides additional protection to the information once it is received.

Presumption of innocence

The OHS (Maritime Industry) Instruments engage the presumption of innocence under article 14(2) of the ICCPR. The right to the presumption of innocence is one of the guarantees in relation to legal proceedings contained in article 14. The presumption of innocence imposes the burden of proving a charge on the prosecution and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

The presumption of innocence is required to be considered when an instrument contains an offence that requires the accused or defendant to prove or establish the absence of an element of an offence or requires the accused or defendant to establish an exception, exemption, excuse or other defence. There are a number of offence-specific defences in the OHS (Maritime Industry) Instruments which place an evidential burden of proof to establish a defence on the defendant. These include subregulation 9(2) of the *Occupational Health and Safety (Maritime Industry) Regulations 1995* (OHS(MI) Regulations) and subregulations 3.03(3), 3.05(2), 3.06(3) and (6) of the OHS(MI)(NS) Regulations.

Each of these defences imposing an evidential burden on the defendant in the OHS (Maritime Industry) Instruments is justified on the grounds that each defence involves circumstances where the relevant matter would be peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* cautions against the use of 'reasonable excuse' defences in Commonwealth laws and provides that the preference is to either rely on the *Criminal Code Act 1995* (the Criminal Code) or specific defences.

Subregulation 9(2) of the OHS(MI) Regulations provides that a person in command of the prescribed ship or prescribed unit commits an offence if the person in command engages in conduct, or allows another person to engage in conduct, that results in the alteration or disturbance of the site of an accident or a dangerous occurrence on the ship or unit and, at the time of the conduct, an inspector had not inspected the site and had not given permission in writing for the alteration or disturbance of the site.

Subregulation 9(2) provides that it is a defence to a prosecution for an offence against subregulation 9(1), if the person in command had a reasonable excuse. Subregulations 9(3) and (4) provide further explanation of the available defences to this offence and examples of what would constitute a reasonable excuse.

The imposition of an evidential burden on the defendant is appropriate in this situation. As subregulation 9(4) notes, a reasonable excuse may be that the alteration or disturbance of the site was unavoidable or that the person engaged in, or allowed another person to engage in, the conduct that resulted in the alteration or disturbance of the site of an accident or dangerous occurrence as a result of:

1. the rescue, or attempted rescue, of an injured person; or
2. the retrieval, or attempted retrieval, of the body of a deceased person; or
3. the protection, or attempted protection, of the health or safety of a person; or
4. the prevention, or attempted prevention, of damage being done to a substance or thing; or
5. the restoration, or attempted restoration, of a workplace to safe working conditions; or
6. the performance, or attempted performance, of a task necessary for the proper operation of the ship or unit.

The circumstances around the alteration or disturbance of the site are matters which are likely to be peculiarly within the knowledge of the defendant and significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. It is not possible to rely on the defences in the Criminal Code for this offence. This is because the defence of mistake of fact does not necessarily cover all situations which would be covered by reasonable excuse, as set out by regulation 9.

Therefore, overall, the OHS (Maritime Industry) Instruments are compatible with human rights because they promote the right to safe and healthy working conditions by maintaining important work health and safety regulation for the Seacare Scheme. To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

Before issuing the Certificate, the Attorney-General was satisfied that the OHS (Maritime Industry) Instruments would, apart from the operation of the sunsetting provisions, cease to be in force within 24 months of their sunsetting date. Issuing a certificate of deferral therefore avoids the need to replace the OHS (Maritime Industry) Instruments in their current form for a short period of time before they are expected to be repealed and replaced.

Instruments that are replaced will be subject to parliamentary scrutiny and oversight through the disallowance processes unless otherwise exempt. The human rights impact of the remade OHS (Maritime Industry) Instruments will be assessed at the time they are made, including through the requirement to prepare a Statement of Compatibility with Human Rights.

**Conclusion**

This Certificate is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act, as it does not raise any human rights issues, and ensures that any proposal to make a replacement instrument will be subject to parliamentary oversight and scrutiny.

**ATTACHMENT A**

**NOTES ON THE CERTIFICATE**

**Section 1 Name**

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Occupational Health and Safety (Maritime Industry) Instruments) 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 following instruments, for which the sunsetting day is 1 April 2024, are repealed by section 51 of the *Legislation Act 2003* on 1 April 2026:

1. *Occupational Health and Safety (Maritime Industry) (National Standards) Regulations 2003*;
2. *Occupational Health and Safety (Maritime Industry) Regulations 1995*.

**Section 5 Repeal of the instrument**

This section provides that the Certificate is repealed at the start of 2 April 2026.