

***Legislation (Deferral of Sunsetting—Migration Regulations 1994
(Specification of a Class of Persons)) Amendment Certificate 2024***

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Migration Regulations 1994 (Specification of a Class of Persons)) Amendment Certificate 2024* (the Amendment Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003*. It amends the *Legislation (Deferral of Sunsetting—Migration Regulations 1994 (Specification of a Class of Persons)) Certificate 2023* (the principal certificate). It is a legislative instrument for the purposes of the *Legislation Act* and must be registered on the Federal Register of Legislation. The amendment will be subject to the disallowance provisions of the *Legislation Act* as the deferred sunsetting day specified in the Amendment 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 for 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 as long as they are needed.

Subsection 50(1) of the *Legislation Act* provides that the legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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 date of an instrument for a period of 6, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the certificate instead of the scheduled sunsetting day.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 sunseting day.

Through the operation of subsection 33(3) of the *Acts Interpretation Act 1901*, the Attorney-General's power under paragraph 51(1)(c) includes the power to repeal, rescind, revoke, amend or vary such a certificate.

The Amendment Certificate amends the principal certificate, extending the previously granted deferral of sunseting for the *Migration Regulations 1994 - Specification of a Class of Persons - IMMI 12/127* ('IMMI 12/127') by an additional 12 months, resulting in a deferral of 24 months in total. IMMI 12/127, for which the previous sunseting day was 1 April 2024, will now sunset on 1 April 2025.

The ability to defer sunseting dates is an integral part of the sunseting framework. It provides the necessary flexibility to ensure the standard 10-year sunseting period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. In this case, IMMI 12/127 is expected to be remade within 24 months of the sunseting date after the Government implements the recommendations arising from the Report of the Independent Review into the Afghan Locally Engaged Employee (LEE) program (Thom Report), which was presented to Government on 20 March 2023. If the Certificate were to be disallowed, there would not be enough time to review and consult on a replacement instrument prior to the sunseting day of IMMI 12/127.

PROCESS BEFORE THE AMENDMENT CERTIFICATE WAS MADE

Regulatory impact analysis

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

IMMI 12/127 is made under paragraphs 200.211(1A)(a) and 201.211(1A)(a) of Schedule 2 to the *Migration Regulations 1994* (the 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 two classes of persons, who are citizens of Iraq and Afghanistan, and who have been employed as Locally Engaged Employees (LEE) in Iraq or Afghanistan. If these persons have been assessed to be at risk of harm as a result of their employment with the Department of Foreign Affairs and Trade (DFAT), the Department of Defence, or the Australian Federal Police 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(1A) of Schedule 2 of the Regulations. Applicants must meet the criteria in these sub-clauses to be afforded priority processing for subsequent applications for a Refugee (subclass 200) Visa or an In-Country Special Humanitarian (subclass 201) visa through Australia's Humanitarian Program.

On 21 January 2022, the interim report from the Senate Standing Committee on Foreign Affairs, Defence and Trade Inquiry on Australia's Engagement in Afghanistan recommended that the Australian Government review the operation of the Afghan LEE program to analyse and appropriately address concerns raised in evidence to the committee and ensure that programs of this nature are improved. The review was led by Dr Vivienne Thom AM, who was selected based on her substantial experience. In conducting the review, Dr Thom engaged with Ministers and relevant whole-of-government and public stakeholders. Dr Thom had access to Government records from the life span of the program.

On 20 March 2023, Dr Vivienne Thom AM delivered the Thom Report to Government. The Government accepted all eight recommendations from the Thom Report. The Department of Home Affairs is working closely with the Australian Federal Police, DFAT and the Department of Defence to implement the Thom Report's recommendations.

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 is intended to 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.

The Amendment Certificate will allow sufficient time for agencies to finalise applications for certification under the Afghan LEE and Iraq LEE programs within the timeframes set out in the Thom Report. The Amendment Certificate will avoid the need to remake IMMI 12/127 in its current form for the short period of time before it is repealed and a replacement instrument is made. As such, given that deferral of the sunset date of IMMI 12/127 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 Amendment Certificate

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunsetting day can be deferred for either six, 12, 18 or 24 months by means of a certificate made under that section.

In terms of the 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 sunsetting provisions) be likely to cease to be in force within 24 months after its originally scheduled sunsetting day, or
 - (ii) 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 or avoided, or
 - (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 the sunsetting provisions not applying to the instrument, and
- c) the Attorney-General to issue a certificate, and
- d) the explanatory statement for the certificate to include a statement for the reasons of the issue of the certificate.

The rule-maker for IMMI 12/127, the Minister for Immigration, Citizenship and Multicultural Affairs, the Hon Andrew Giles MP, provided a written application to the Attorney-General seeking an amendment of the previous deferral certificate to extend the deferral of sunsetting for IMMI 12/127 for a further 12 months, making a total of 24 months. 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 the Part 4 of Chapter 3 of the Legislation Act, be likely to cease to be in force within 24 months of its originally scheduled 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 Amendment Certificate

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

On 23 March 2023, the Attorney-General issued the principal certificate under section 51 of the Legislation Act, deferring the sunseting of IMMI 12/127 from 1 April 2023 to 1 April 2024. The rule-maker for the Instrument, the Minister for Immigration, Citizenship and Multicultural Affairs, the Hon Andrew Giles MP, subsequently sought the Attorney-General's approval to further defer the sunseting of IMMI 12/127 by an additional 12 months through the issuing of an Amendment Certificate that would defer the repeal date specified in the principal certificate. The new sunseting date for the Instrument is 1 April 2025.

Deferring the sunseting date will allow additional time to ensure the Instrument remains active while the recommendations from the Thom Report are implemented. Specifically, the additional 12-month deferral will support the implementation of recommendation 7 of the Thom report – to cease the certification of the Afghan LEE Program by 31 May 2024. Therefore, it is practical and appropriate for the existing Instrument to remain in place until it is repealed as anticipated within the next 12 months. Deferring the sunseting date of IMMI 12/127 for a further 12 months will also avoid the need to remake it for a short period of time. As such, the Amendment Certificate is consistent with the policy intent of the sunseting regime, that legislative instruments should be kept up to date and only remain in force so long as they are needed.

IMMI 12/127 will therefore likely cease to be in force in its current form within 24 months of its original sunseting day.

Further information

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

As the Amendment Certificate is a purely amending instrument, it will be automatically repealed by the operation of section 48A of the Legislation Act at the conclusion of the disallowance period. IMMI 12/127, which will now be repealed on a later day as specified in the Amendment 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 Amendment Certificate, and from the Department of Home Affairs about IMMI 12/127.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Legislation (Deferral of Sunseting– Migration Regulations 1994 (Specification of a Class of Persons)) Amendment Certificate 2024 (Amendment Certificate) is compatible with human rights and

freedoms recognised or declared in international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Human Rights Act).

Overview of the Amendment Certificate

The Amendment 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 sunseting day of an instrument for a period of 6, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the certificate instead of the scheduled sunseting day.

Through the operation of subsection 33(3) of the *Acts Interpretation Act 1901*, the Attorney-General's power under paragraph 51(1)(c) includes power to repeal, rescind, revoke, amend or vary such a certificate.

The Amendment Certificate amends the *Legislation (Deferral of Sunsetting—Migration Regulations 1994 (Specification of a Class of Persons)) Certificate 2023* (the principal certificate), extending the previously granted deferral of sunseting for IMMI 12/127 by an additional 12 months, resulting in a deferral of 24 months in total. The Instrument, for which the previous scheduled sunseting day was 1 April 2024, will now sunset on 1 April 2025.

IMMI 12/127 is expected to be repealed and replaced within 24 months of its scheduled sunseting day once the recommendations from the Thom Report have been implemented and a replacement instrument is made.

The Certificate allows IMMI 12/127 to continue to be in force for a further, but limited, period of time when it would otherwise sunset. This removes the administrative burden of remaking the Instrument which would have a limited duration prior to its expected repeal and replacement, or where circumstances prevent the making of a replacement instrument prior to the sunseting day.

Human rights implications

An amending certificate of deferral of sunseting extends the operation of the instrument but does not change or affect the rights engaged under the current instrument.

IMMI 12/127 operates to specify a class of persons who may be eligible for the grant of subclass 200 (Refugee) and subclass 201 (In-country Special Humanitarian) visa, which are part of Australia's Humanitarian visa Program, by virtue of being certified as being within a class of person that is at risk of harm as a result of their employment by an Australian agency in Iraq or Afghanistan. A locally engaged employee (LEE) who is certified under the IMMI 12/127 has an expedited processing

pathway for the grant of a Subclass 200 or a Subclass 201 visa, subject to meeting other visa requirements. The LEE can also include members of their family unit in this visa application.

IMMI 12/127 is therefore intended to benefit persons who are applying for a Subclass 200 or 201 visa on the basis of their employment in support of Australia's missions in Iraq and Afghanistan. In most cases the relevant persons are outside of Australia and grant of this visa will enable them to travel to Australia, enjoy the benefits of permanent residence in Australia and exercise their human rights in Australia. In some instances, the person may have been part of the evacuation from Afghanistan in 2021 and may already be in Australia. In these cases, the grant of this visa may promote rights relating to non-refoulement under Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Before issuing the Amendment Certificate, the Attorney-General was satisfied that IMMI 12/127 would, apart from the operation of the sunset provisions, cease to be in force within 24 months of the originally scheduled sunset day. Issuing an amending certificate of deferral therefore avoids the need to replace IMMI 12/127 in its current form for a further year, while relevant agencies continue to implement the recommendations of the Thom Report and finalise applications for certification from Afghan LEE and Iraqi LEE for the purpose of eligibility for the pathway to priority resettlement under Australia's Humanitarian Program.

Instruments that are replaced will be subject to parliamentary scrutiny and oversight through the disallowance processes unless otherwise exempt. Unless exempted from the disallowance process, the human rights impact of the remade IMMI 12/127 will be assessed at the time it is made, including through the requirement to prepare a Statement of Compatibility with Human Rights.

Conclusion

The Amendment Certificate is compatible with 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 unless otherwise exempt.

NOTES ON THE AMENDMENT CERTIFICATE

Section 1 Name

This section provides that the Amendment Certificate is named the *Legislation (Deferral of Sunsetting– Migration Regulations 1994 (Specification of a Class of Persons)) Amendment Certificate 2024*. The Amendment Certificate may be cited by this name.

Section 2 Commencement

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

Section 3 Authority

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

Section 4 Schedules

This section provides that each instrument specified in a Schedule to the Amendment Certificate is amended or repealed as set out in that Schedule, and any other items have effect according to their terms.

Schedule 1 Amendments

This schedule sets out the amendments to the principal certificate that are necessary to further defer the sunsetting of IMMI 12/127 to 1 April 2025.

Item 1 Section 4

This item amends section 4 of the principal certificate by substituting the sunsetting date of 1 April 2024 with the amended date of 1 April 2025.

Item 3**Section 5**

This item changes the self-repealing provision of the principal certificate so that it takes effect on 2 April 2025, rather than 2 April 2024.