

# ***Legislation (Deferral of Sunsetting—Customs Regulation) Certificate 2024***

## **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—Customs Regulation) Certificate 2024* (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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 after the day on which 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 sunseting date of the *Customs Regulation 2015* (Customs Regulation) by 24 months from 1 April 2025 to 1 April 2027.

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, the Customs Regulation is expected to be remade within 24 months of the sunseting date as part of a review of customs laws, which will be required once broader trade reforms have been implemented during the 2024-25 financial year. The 24-month period will provide sufficient time for the Department of Home Affairs (the Department) to conduct further industry consultation, assess the Customs Regulations under a fit-for-purpose test to ensure that the new instrument reflects impending changes in the border environment and customs law, and properly remake the Customs Regulations which is a lengthy instrument of over 146 pages. If the Certificate were to be disallowed, there would not be enough time to conduct this further review and remake the Instrument prior to the sunseting day.

## **PROCESS BEFORE CERTIFICATE WAS MADE**

### **Regulatory impact analysis**

Certificates of deferral of sunseting 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 Customs Regulation is made under section 270 of the *Customs Act 1901*. The Instrument supports Australia's customs and trade practices and provides for matters to give effect to the operation of the Customs Act or for the conduct of any business relating to customs.

As part of broader trade reforms, the Department has undertaken industry consultation on a range of matters related to the Customs Regulation, including as part of the work of the Simplified Trade System. A 24-month deferral will allow sufficient time for further consultation.

The Australian Border Force (ABF) convenes regular industry consultative forums, comprising membership from industry peak bodies, major industry stakeholders and other Australian Government agencies including the National Committee on Trade Facilitation (NCTF) and the Compliance Advisory Group (CAG).

The NCTF is a forum for government and industry stakeholders to discuss strategic issues relating to trade facilitation in the domestic and international trade environment, including monitoring of Australia's implementation of the World Trade Organization's Agreement on Trade Facilitation. NCTF membership is comprised of representatives from peak bodies involved in the shipping, transportation, customs broking, freight forwarding, import and export industries; business councils; academia; and relevant Government agencies.

The CAG is a collaborative forum for Government and industry to co-design solutions for trade and goods compliance issues.

The ABF expects that in order to maximise the benefits of the Customs Regulation, further consultation with these stakeholders will be required to ensure that the remade instrument benefits from broader input alongside the ongoing work on the Simplified Trade System which may identify specific areas of action.

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 instruments.

A 24-month deferral will allow sufficient time for the Department to integrate outcomes from broader trade reforms into the Customs Regulation assessment and, following further consultation, remake the lengthy instrument. This will avoid the need to remake the Customs Regulation 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 the Customs Regulation 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 sunseting 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 sunseting provisions) be likely to cease to be in force within 24 months after its sunseting day
  - (ii) the proposed replacement instrument will not be able to be completed before the sunseting 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 Customs Regulation, the Minister for Home Affairs, the Hon Clare O'Neil MP, provided a written application to the Attorney-General seeking a certificate of deferral of sunseting for the Instrument. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Customs Regulation 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 sunseting 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 sunseting date of the Customs Regulation by 24 months to 1 April 2027 to enable the Department to integrate any outcomes from broader customs reforms into a fit-for-purpose test assessment of the Instrument, which will involve further industry consultation and significant drafting resources to remake this lengthy instrument.

The fit-for-purpose assessment of the Customs Regulation intends to take into account changes in the border environment including the development of the Australian Trusted Trader Scheme and

Australia entering into eleven additional free trade agreements. Areas where reform may be considered include the fit and proper person test, licensing, and the Australian Border Force (ABF) powers. These reforms may need to be incorporated into the Customs Regulation.

Additionally, the Government's broader trade reforms such as the next stage of the Simplified Trade System Agenda that will occur during the 2024-25 financial year necessitate the need to review the operation of customs laws. As such, it is timely to review the Customs Regulation in that context and improve on their operation to ensure the Customs Regulation remains fit for purpose with any forthcoming changes including information and communication technology and the use of artificial intelligence.

Finally, technical issues throughout the Customs Regulation result in provisions that, while effective operationally, could be significantly improved to support traders and ABF operations. A deferral would allow time to ensure consultation occurs and updates are made while supporting broader reforms.

Accordingly, the Customs Regulation 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 Customs Regulation, which is the subject of 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.

### **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

The *Legislation (Deferral of Sunsetting—Customs Regulation) Certificate 2024* (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 sunseting 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 sunseting day. The Instrument specified in the Certificate is the *Customs Regulation 2015*.

Section 270 of the *Customs Act 1901* (the Act) provides that the Governor-General may make regulations prescribing all matters which by the Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed to give effect to the Act. The *Customs Regulation 2015* (Customs Regulation) commenced on 1 April 2015.

It is expected that the Customs Regulation will be repealed and replaced within 24 months of its scheduled sunseting day once a replacement instrument is made following broader trade reforms and further assessment of, and consultation on, the Customs Regulation.

The Certificate allows the Customs Regulation to continue to be in force for a further, but limited, period of time after the day on which it would otherwise sunset. This removes the administrative burden of remaking the Customs Regulation 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**

A certificate of deferral of sunseting extends the operation of the instrument but does not change or affect the rights engaged under the original instrument.

The Customs Regulation engage certain rights and freedoms declared by the international instruments set out in section 3 of the Human Rights Act. The Instrument is compatible with human rights because it is consistent with Australia's human rights obligations and, to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

The Certificate engages the following human rights:

- The right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR)
- The right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The right to humane treatment in detention in Article 10 of the ICCPR

- The right to protection from all forms of sexual exploitation and sexual abuse in Article 34 of the Convention on the Rights of the Child (CRC)
- Right to the presumption of innocence in Article 14 of the ICCPR.

#### Right to privacy in Article 17 of the ICCPR

Parts 6, 7, 14 and 15 of the Customs Regulation engage the right to privacy contained in Article 17 of the ICCPR because they require the collection of personal information to satisfy various reporting and record keeping requirements in the Act.

Part 6 of the Customs Regulation requires the collection of personal information from proprietors of duty free shops such as the proprietor's name, the name of shop and the address where the shop is located. This information is used in considering applications for permission to operate a duty free shop. Part 6 also requires collecting personal information from relevant travellers for the purposes of proof of travel, issuing invoices relating to the sale of duty free goods, and the storage and delivery of such goods. These conditions are reasonable, necessary and proportionate to maintaining an effective system for the regulation of duty free goods which helps support the protection Australia's supply chains.

Part 7 of the Customs Regulation requires the collection and storage of personal information in relation to persons who enter cargo terminals. The collection of personal information includes the person's full name and the unique identifier on the identification used by the person (such as an electronic access card, a transport security identification card, or driver's licence or passport). This information is collected for the purposes of record keeping requirements for cargo terminals and is consistent with obligations imposed on other entities involved in the cargo supply chain, including customs depot and warehouse licence holders. It provides the Australian Border Force (ABF) with greater visibility of persons entering and operating in cargo terminals as they could have access to, and interfere with, cargo which is subject to customs control. These conditions are a reasonable, necessary and proportionate response to protecting Australia's cargo supply chain against criminal infiltration.

Part 14 in the Customs Regulation prescribes matters relating to the secure storage of the records of an external search and an internal non-medical scan, which may be conducted under the Customs Act, and engages the right to privacy by both promoting and limiting it. This section promotes the right to privacy of persons subject to an external search or an internal non-medical scan, as it requires the secure storage of search records and also requires the person responsible for the custody of search records to keep a register of certain details relating to the record. These details include the name of persons moving or removing the records, the reason for the removal and the date of the removal.

The collection of personal information about persons moving or removing search records limits the right to privacy. However, this condition is reasonable, necessary and proportionate as it is aimed at the legitimate objective of ensuring the privacy of persons subject to an external search or an internal non-medical scan by providing for a clear chain of custody of persons accessing the search records and ensuring that only those who have a legitimate need to move or remove the records can do so.

Part 14 of the Customs Regulation also engages the right to privacy by prescribing detention places and standards with respect to detention places for the purposes of an external search and an internal search. These places and standards promote the right to privacy as, in relation to an external search, they ensure that a detention place is a separate room and that persons inside a detention place are concealed from the view of persons outside, and that the place is secured against unauthorised access. In relation to an internal search, they ensure that the detention place is either a separate room or is in a hospital or surgery or practising rooms of a medical practitioner registered or licensed under a law of a State or Territory. These requirements promote the detainee's right to privacy as they ensure that the detainee is concealed from the view of other persons.

Part 15 of the Customs Regulation applies to matters associated with administering the infringement notice scheme under the Customs Act. Part 15 engages the right to privacy because it requires the collection of personal information in order to issue an infringement notice. To the extent that an individual's right to privacy is affected by this subdivision, the impact is not arbitrary. It is reasonable, necessary and proportionate to support the legitimate objectives of the infringement notice scheme.

#### Right to health in Article 12 of the ICESCR

Division 2 of Part 14 in the Customs Regulation also engages the right to health. Article 12 of the ICESCR recognises the right of everyone to enjoy the highest attainable standard of physical and mental health.

Division 2 of Part 14 of the Customs Regulation provides that an internal search or the recovery of an internally concealed substance or thing, conducted under the Customs Act, may be carried out at a hospital or the surgery or practising rooms of a medical practitioner registered or licensed under a law of a State or Territory.

The Customs Regulation engages the right to attain the highest standard of health by ensuring that, when an internal search is carried out or recovery of anything identified during an internal search is conducted, it may be carried out at either a hospital or a surgery or other practising rooms of a medical practitioner registered or licensed under a law of a State or Territory providing for the



registration of medical practitioners. This ensures that such procedures are conducted in appropriate settings, by a medical practitioner.

#### Right to humane treatment in detention in Article 10 of the ICCPR

Division 2 of Part 14 in the Customs Regulation also engages the right to humane treatment in detention pursuant to Article 10(1) of the ICCPR.

Division 2 of Part 14 of the Customs Regulation prescribes detention places and standards with respect to detention places for the purposes of an external search and an internal search conducted under the Customs Act. These places and standards promote the right to humane treatment in detention as, in relation to an external search, they ensure that a detention place is a separate room and that persons inside a detention place are concealed from the view of persons outside, the place is secured against unauthorised access and the place has reasonably comfortable ventilation and illumination. In relation to an internal search, they ensure that the detention place is either a separate room or is in a hospital or surgery or practising rooms of a medical practitioner registered or licensed under a law of a State or Territory.

#### Rights of the child in Article 34 of the CRC

Section 131 of the Customs Regulation prescribes items of child abuse material as ‘restricted goods’ for the purposes of a strict liability offence punishable under subsection 233BABA(3)(b) of the Customs Act. This provision seeks to protect the rights of the child consistent with Article 34 of the CRC by taking steps to prevent and punish the exploitation of children through child abuse materials.

#### Right to the presumption of innocence in Article 14 of the ICCPR

Division 4 of Part 17 in the Customs Regulation contains two offences which engage the right of presumption of innocence, as recognised under Article 14(2) of the ICCPR: an offence of making an alteration to a customs document, and an offence of using or having in their possession a customs document that has been altered. It is a defence to these offences if the person proves that the alteration was made with the authority of the Collector. These defences place an evidentiary burden on a person who is charged with an offence of altering a customs document. This means that the person would need to prove on the balance of probabilities that they had the authority of the Collector to alter a customs document. Although this section places an evidential burden on the accused, it is reasonable, as the person charged with the offence has the requisite knowledge and evidence to demonstrate that they were given the authority of the Collector to alter the customs document. Ensuring that persons do not alter customs document is necessary to ensure the integrity of the customs system.

Before issuing the Certificate, the Attorney-General was satisfied that the Customs Regulation would, apart from the operation of the sunset provisions, cease to be in force within 24 months of their sunset date. Issuing a certificate of deferral therefore avoids the need to replace the Instrument in its current form for a short period of time before it is 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 Customs Regulation will be assessed at the time it is 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 because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate. Any proposal to make a replacement instrument will be subject to parliamentary oversight and scrutiny, unless exempt.

## NOTES ON THE CERTIFICATE

### **Section 1      Name**

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Customs Regulation) Certificate 2024*. 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 *Customs Regulation 2015*, for which the sunsetting day is 1 April 2025, is repealed by section 51 of the *Legislation Act 2003* on 1 April 2027.

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

This section provides that the Certificate is repealed at the start of 2 April 2027.