***Legislation (Deferral of Sunsetting—Control of Naval Waters Regulation) Certificate 2025***

**EXPLANATORY STATEMENT**

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

**INTRODUCTION**

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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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

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, the CNW Regulation is expected to be remade within 24 months of the sunsetting date as a result of a review by the Department of Defence (Defence). If the Certificate were to be disallowed, there would not be enough time to review and remake the Instrument prior to the sunsetting day.

**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 CNW Regulation is made under the *Control of Naval Waters Act 1918* (CNW Act). The CNW Regulation provides for the control of the passage, anchorage, mooring, manning, cleaning and loitering of vessels in naval waters and the entry onto and construction on foreshores of naval waters by people. It creates offences for persons failing to comply with these controls and provides certain control mechanisms for practical enforcement of naval water restrictions.

Defence is currently undertaking a nationwide review of naval waters. External consultation will commence in early 2025, with the completion of the review expected by the end of 2025.

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 Defence to complete the review, allow government to consider options, and to develop a replacement instrument that is fit for purpose. This will avoid the need to remake the CNW 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 sunsetting date of the CNW Regulation 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:
3. 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
4. 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
5. 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
6. the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
7. 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 CNW Regulation, the Deputy Prime Minister and Minister for Defence, the Hon Richard Marles MP, provided a written application to the Attorney‑General seeking a certificate of deferral of sunsetting for the Instrument.On the basis of the information contained in the statement of reasons below, the Attorney‑General is satisfied that the CNW 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 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 CNW Regulation by 24 months to 1 April 2027 to enable Defence to complete the review, put options to government and develop a replacement instrument.

Defence is currently undertaking a nationwide review of naval waters. The last major review of naval waters was in 2009. This review included 23 areas of naval waters across 5 States and Territories. A number of the existing areas need to be modified and expanded (due to increased security requirements and/or new infrastructure development) and a small number revoked as they are no longer needed. There is also a requirement for new naval waters to be created in certain locations of key importance to Defence, including both Defence establishments and civil port facilities.

The intent is to complete the review by the end of 2025, allowing sufficient time for government consideration of options, and to develop a replacement instrument that is fit for purpose before 1 April 2027.

A 24 month deferral of the sunsetting day will allow sufficient time for the amendments to the CNW Regulation to be made, as well as to principal legislation, if required, and avoid the need to remake the CNW Regulation in its current form for the short period of time before it is repealed and replaced following completion of the review.

Accordingly, the CNW Regulation will likely cease to be in force in its current form within 24 months of its original sunsetting date.

**More information**

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

The CNW Regulation 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 Defence about the Instrument to which the Certificate applies.

**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

The *Legislation (Deferral of Sunsetting—Control of Naval Waters Regulation) Certificate 2025* (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 Instrument specified in the Certificate is the *Control Naval Waters Regulation 2015* (CNW Regulation).

The CNW Regulation is expected to be repealed and replaced within 24 months of its scheduled sunsetting day as a result of the review currently being undertaken.

The Certificate allows the CNW Regulation 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 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 CNW Regulation engages certain rights and freedoms declared by the international instruments set out in section 3 of the Human Rights Act.

The CNW Regulation engages minimally with both Article 12(3), the right to freedom of movement, and Article 14(2), the presumption of innocence, under the International Covenant on Civil and Political Rights (ICCPR).

Freedom of movement

The CNW Regulation provides for the curtailment of freedom of movement within naval waters and on their foreshores. The ICCPR provides that it is permissible to interfere with the right to freedom of movement for, amongst other things, national security, public order and public health. It is in the legitimate interest of the Commonwealth to control the movement of vessels in dedicated naval waters to ensure the safety of the public, Commonwealth and private property, the security of naval vessels and the defence of the Commonwealth.

The CNW Regulation provides that prior to restricting the entry into naval waters, the superintendent is to be satisfied that public safety, the safety of property or the defence of the Commonwealth requires the restriction. Additionally, a superintendent shall have regard to the purpose of the Commonwealth’s use of those waters, the time of such use, the risk of injury to persons, the risk of interference with or damage to Commonwealth or other property and the forms of communication and time available for giving a notice of restriction. Superintendents are to control the naval waters in such a fashion as to have minimal impact on the right to freedom of movement.

Presumption of innocence

The presumption of innocence is affected by the CNW Regulation as subsection 9(2), 9(6), 11(2), 12(2), 13(2), 13(4), 14(2), 14(4), 15(2), 16(2), 17(2), 18(2), 21(4), 22(4), 24(2), 25(5), 25(7) and 26(2) place a burden of proof on a defendant. However, that burden is only evidential in accordance with section 13.3 of the *Criminal Code*. Each subsections 9(2), 9(6), 11(2), 12(2), 13(2), 13(4), 15(2), 16(2), 18(2), 25(5), 25(7) and 26(2) provide for a defence of reasonable excuse for the relevant conduct (which is the conduct of a vessel's master) and provides for the defendant (who is the master of the vessel) to bear the burden of proof. In each of those cases the relevant conduct will be that of the defendant and therefore it is regarded as not unreasonable in the circumstances for a defendant to carry the burden of proof for a matter that may be solely within the defendant's knowledge.

Subsection 14(2) provides for the defendant to carry the burden of proof of the reasonableness of their excuse for entry into or remaining within naval waters, or their foreshore, within 100 metres of an installation without the written permission of the naval superintendent of those waters. The relevant conduct will be that of the defendant and therefore it is regarded as not unreasonable in the circumstances for a defendant to carry the burden of proof for a matter that may be solely within the defendant's knowledge. Subsection 14(4) makes similar provision for a person interfering with an installation.

Subsection 21(4) provides for the defendant to carry the burden of proof of the reasonableness of their excuse for causing or permitting material to be placed in or nearby (where the material is likely to be washed into) naval waters without the naval superintendent's written permission. It is regarded as not unreasonable in the circumstances for a defendant to carry the burden of proof for a matter that may be solely within the defendant's knowledge.

Subsection 22(4) provides for the defendant to carry the burden of proof of the reasonableness of their excuse for causing or permitting a vessel to be cleaned within naval waters without the naval superintendent's written permission. It is regarded as not unreasonable in the circumstances for a defendant to carry the burden of proof for a matter that may be solely within the defendant's knowledge.

Subsection 24(2) provides the defendant carries the burden of proof for establishing that: they are a member of the Australian Defence Force, the Australian Federal Police, or a State or Territory Police Force; or Service of a State or Territory performing duties in naval waters; and that their conduct which resulted in the discharge of a gun, firearm or air-gun over naval waters was in the course of their duties. It is regarded as not unreasonable in the circumstances for a defendant to carry the burden of proof of these matters as they may be solely within the knowledge of the defendant.

Therefore, overall, the CNW Regulation is compatible with human rights because to the extent that the instrument limits human rights, those limitations are reasonable, necessary and proportionate.

Before issuing the Certificate, the Attorney-General was satisfied that the CNW Regulation would, apart from the operation of the sunsetting provisions, cease to be in force within 24 months of its sunsetting 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 CNW 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 to the extent that it limits human rights, those limitations are reasonable, necessary and proportionate.

**ATTACHMENT A**

**NOTES ON THE CERTIFICATE**

**Section 1 Name**

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Control of Naval Waters Regulation) Certificate 2025*. 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 *Control of Naval Waters 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.