

***Legislation (Deferral of Sunsetting—Autonomous Sanctions Instruments)
Certificate 2022***

EXPLANATORY STATEMENT

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

INTRODUCTION

The *Legislation (Deferral of Sunsetting—Autonomous Sanctions Instruments) Certificate 2022* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (Cth) (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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on the 1 April or 1 October immediately on or following the tenth anniversary of its registration.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 The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 2022 to 1 April 2024:

- (a) the *Autonomous Sanctions Regulations 2011* (Cth) (the Regulations); and
- (b) the *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth) (the Declaration).

The Certificate also defers the sunsetting date of the *Autonomous Sanctions (Export Sanctioned Goods – Syria) Designation 2012* (the Designation) by 18 months from 1 October 2022 to 1 April 2024.

(Together, the ‘Autonomous Sanctions Instruments’.)

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 Best Practice Regulation (OBPR). The OBPR 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.

As part of the Government Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) inquiry into the use of sanctions to target human rights abuses, in which the Government announced reforms to the autonomous sanctions framework, the Government committed to a broader review of the autonomous sanctions framework timed to coincide with the scheduled sunseting review of the Regulations. This review will include consideration of the efficacy of the initial stage of the reforms. Relevant agencies, including the Attorney-General’s Department and the Departments of Defence, Home Affairs and the Prime Minister and Cabinet, were consulted on the proposed alignment of this review with the sunseting and remaking of the Regulations, while the Department of Foreign Affairs and Trade undertook specific consultation on the deferral of sunseting with the Attorney-General’s Department.

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 the deferral. 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 and 18 month deferral will allow sufficient time for further consultation prior to the replacement instruments being made. The deferral will avoid the need to remake the Autonomous Sanctions Instruments in their current form for the short period of time before they are repealed and replacement instruments made. As such, deferral of the sunseting date of the Autonomous Sanctions Instruments is consistent with the policy intent of the sunseting regime, and does not significantly alter existing arrangements.

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 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 Autonomous Sanctions Instruments, the Minister for Foreign Affairs, Senator the Hon Marise Payne, provided a written application to the Attorney-General seeking a certificate of deferral of sunset for the Autonomous Sanctions Instruments. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Autonomous Sanctions 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 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 the reasons for issuing the Certificate.

The *Autonomous Sanctions Act 2011* (the Act) provides for autonomous sanctions measures to be applied by regulation. The Regulations facilitate the conduct of Australia's relations with certain countries through the imposition of a range of autonomous sanctions (including restrictions on trade in goods and services, restrictions on engaging in commercial activities, targeted financial sanctions (including asset freezes) on designated persons and entities and travel bans on certain persons). The Declaration supports the sanctions measures in the Regulations by specifying provisions of a law of the Commonwealth that are a 'sanction law' for the purposes of the offence provisions in the Act. The Designation lists goods designated under subregulation 4(3) of the Regulations to be export sanctioned goods for Syria for the purposes of the Regulations.

In late 2020, JSCFADT concluded its year-long inquiry into the use of targeted sanctions to address human rights abuses and tabled its report.

On 5 August 2021, the Government tabled its response to the JSCFADT report. The Government has agreed to incorporate human rights and corruption sanctions within Australia's autonomous sanctions framework via changes to the Act and the Regulations. These changes were implemented via the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021* which commenced on 8 December 2021. The Government has also announced a broader review of the entire autonomous sanctions framework, to be finalised within 12 months of these initial amendments to the Act. Accordingly, the Autonomous Sanctions Instruments will cease to be in force in their current form within 24 months of their original sunset day.

More information

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

The Autonomous Sanctions 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 Foreign Affairs about the Autonomous Sanctions Instruments to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting—Autonomous Sanctions Instruments) Certificate 2022* (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

This 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 this Certificate are (together, the ‘Autonomous Sanctions Instruments’):

- (a) the *Autonomous Sanctions Regulations 2011* (the Regulations);
- (b) the *Autonomous Sanctions (Sanction Law) Declaration 2012* (the Declaration); and
- (c) the *Autonomous Sanctions (Export Sanctioned Goods – Syria) Designation 2012* (the Designation).

The Autonomous Sanctions Instruments are expected to be repealed and replaced within 24 months of their scheduled sunsetting date as part of a review of the autonomous sanctions framework. The Certificate allows the Autonomous Sanctions 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.

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 Autonomous Sanctions Instruments engage certain rights and freedoms declared by the international instruments set out in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Autonomous sanctions are measures not involving the use of armed force which the Australian Government imposes and implements as a matter of foreign policy. Sanctions measures include restrictions on trade in goods and services (including to give effect to arms embargos), restrictions on engaging in commercial activities, targeted financial sanctions (including asset freezes) on designated persons and entities and travel bans on certain persons. Sanctions are a discretionary tool which the Government can apply, where appropriate, to address egregious situations of international concern. Such situations include serious violations on human rights and the proliferation of weapons of mass destruction. Autonomous sanctions, as implemented through the Autonomous Sanctions Instruments, advance human rights by restricting the flow of arms and related materiel and certain other goods and services between Australia and sanctioned countries. In doing so, sanctions reduce the capability for human rights abuses to be perpetrated within sanctioned countries. Sanctions therefore support the right to life (Article 6 of the International Covenant on Civil and Political Rights (the ICCPR) and the right not to be subjected to cruel, inhuman or degrading treatment or punishment (Article 3 of the

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT) and Article 7 of the ICCPR).

Autonomous sanctions also give the Minister the power to list, by legislative instrument, persons for targeted financial sanctions and travel bans. The specific human rights implications of particular listings are set out in the Statement of Compatibility with Human Rights that accompany a legislative instrument listing persons when that instrument is made. These legislative instruments have the potential to impact the following rights: the right to privacy (Article 17 ICCPR), right to respect for the family (article 17 and 23 ICCPR), right to an adequate standard of living (article 11 ICESCR, right to freedom of movement (article 12 ICCPR)), non-refoulement (article 3 CAT; articles 6 and 7 ICCPR), and the right to equality and non-discrimination (article 26 ICCPR). However, the limitations on these rights and freedoms are permissible in the circumstances and consistent with our international obligations.

The rights engaged under the Autonomous Sanctions Instruments are not substantially changed or affected by the issuing of the Certificate. The deferral of the sunseting date of the Autonomous Sanctions Instruments does not affect the operation of the Autonomous Sanctions Instruments, and therefore does not change the effect of the rights already engaged. Further, the effect of the issuing of the Certificate under section 51 of the Legislation Act ensures appropriate safeguards for regular review are retained, by limiting the extended operation of the Autonomous Sanctions Instruments to a maximum of 24 months.

Before issuing the Certificate, the Attorney-General was satisfied that the Autonomous Sanctions Instruments would, apart from the operation of the sunseting provisions, cease to be in force within 24 months of their sunseting date. Issuing a certificate of deferral therefore avoids the need to replace the Autonomous Sanctions 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 Autonomous Sanctions Instruments will be assessed at the time any replacement instruments are made, including through the requirement to prepare a further 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—Autonomous Sanctions Instruments) Certificate 2022*. 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 sunseting

This section provides that the following instruments, for which the sunseting day is 1 April 2022, are repealed by section 51 of the *Legislation Act 2003* on 1 April 2024:

- the *Autonomous Sanctions Regulations 2011*;
- the *Autonomous Sanctions (Sanction Law) Declaration 2012*.

This section also provides that the *Autonomous Sanctions (Export Sanctioned Goods - Syria) Designation 2012*, for which the sunseting day is 1 October 2022, 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.