

***Legislation (Deferral of Sunsetting—Migration Agents Instruments)
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 Agents Instruments) 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 subject 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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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 sunseting date of the following instruments by 24 months from 1 April 2024 to 1 April 2026 (together, the ‘Migration Agents Instruments’):

- a) *Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017;*
- b) *Migration Agents Registration Application Charge Regulations 1998;*
- c) *Migration Agents Regulations 1998;*
- d) *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018.*

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 Migration Agents Instruments are expected to be remade within 24 months of the sunseting date due to ongoing reviews into the migration advice industry undertaken by the Department of Home Affairs (the department). A Bill is also expected to be introduced to Parliament in early 2024 to strengthen the regulation of registered migration agents (RMAs). Should the Bill be enacted, amendments will be required to each of the Migration Agents Instruments. If the Certificate were to be disallowed, there would not be enough time to review and remake of the Migration Agents Instruments prior to their 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 Migration Agents Instruments are made under the *Migration Act 1958* and broadly deal with the governance of registered migration agents, who provide professional advice in relation to Australia’s

migration system. The Migration Agents Instruments are integral to the regulation of the migration advice industry, including to protect consumers and to safeguard the integrity of the Australian visa system.

The migration advice industry has been the subject of substantial review in the last three years. The Migration Agents Instruments Review was delivered by the department in September 2021, which identified that significant revisions are required to the migration agent framework. The Review was delivered following extensive consultation, including with the Office of the Migration Agents Registration Authority, the Australian Border Force and with the public. The migration advice industry was further identified in the department's comprehensive Review of the Migration System, delivered in March 2023. Specific consultation on the Certificate by the department has occurred internally with the department's Legal Group and the Office of the Migration Agents Registration Authority (OMARA), whose principle function is to regulate RMAs. It is anticipated that further internal and external consultation will take place as part of remaking the Migration Agents Instruments.

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 provide sufficient time for the department to consider and implement changes required to the Migration Agents Instruments as part of intended changes to strengthen the regulation of RMAs and additional measures arising from the Rapid Review report. This will avoid the need to remake the Migration Agents Instruments in their current form for the short period of time before they are repealed and replacement instruments are made. As such, given that the deferral of the sunset date of the Migration Agents Instruments 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 sunset 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 Migration Agents Instruments, Minister for Immigration, Citizenship and Multicultural Affairs, the Hon Andrew Giles MP, provided a written application to the Attorney-General seeking a certificate of deferral of sunset for the instruments. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Migration Agents 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 reasons for issuing the Certificate.

The Certificate defers the sunset date of the Migration Agents Instruments by 24 months to 1 April 2026 to enable the department to implement necessary changes arising from ongoing reviews into the migration advice industry, including the recent Rapid Review undertaken by the department, and expected legislative changes to strengthen the regulation of Registered Migration Agents (RMAs).

The Migration Agents Instruments broadly deal with the governance of RMAs. The *Migration Agents Regulations 1998* (Migration Agents Regulations) prescribe the circumstances in which individuals must obtain status as a RMA in order to provide immigration assistance. The Migration Agents

Regulations further outline the process for registration, the ongoing obligations for an RMA, and other miscellaneous provisions regarding RMAs.

The *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018* prescribes the qualifications, examination and language requirements for an individual seeking RMA status.

The *Migration Agents Registration Application Charge Regulations 1998* specify the amount and collection of a financial charge for those seeking initial or ongoing status as an RMA.

Lastly, the *Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017* prescribes the requirements for the delivery of and attendance at continuing professional development activities, which ensure the accuracy and currency of an RMA's advice.

The Migration Agents Instruments are currently due to sunset on 1 April 2024, following the alignment of their sunset dates by the *Legislation (Migration Agents Instruments) Sunset-altering Declaration 2019* to enable the department to conduct their thematic review.

The Migration Agents Instrument Review, delivered by the department in September 2021, identified that significant revisions are required to the migration agent framework, following extensive consultation, including with government stakeholders and with the public. The migration advice industry was further identified in the department's comprehensive Review of the Migration System, delivered in March 2023. The review noted the need for stronger regulation of migration agents in order to ensure the integrity of the visa system.

High profile media coverage of unscrupulous RMAs has also resulted in increased public scrutiny of the migration advice industry; most notably the airing of the 60 Minutes 'Trafficked' series in late-2022, which revealed corrupt conduct by several RMAs, including those allegedly involved in facilitating and supporting the sex trafficking of migrants. The then Minister for Home Affairs, the Hon Clare O'Neil MP, subsequently commissioned former Victorian Chief Police Commissioner Christine Nixon to undertake the Rapid Review, being an independent report into potential linkages between Australia's migration system and sex trafficking.

In the context of recent scrutiny of the migration advice industry, the department intends to progress a new legislative package to strengthen the integrity of the migration advice industry. A Bill was expected to be introduced to Parliament in late-2023. Should the Bill be enacted, amendments will

likely be required to each of the Migration Agents Instruments. Further amendments may also be required subject to the Government's response to the Rapid Review report.

The legislative instruments relating to the charging framework for application fees for RMAs and continuing professional development provider fees (Migration Agent Charging Framework) will also need to be remade. The Migration Agent Charging Framework was considered as part of the 2019-20 *Home Affairs Portfolio Charging Review*, which identified a significant misalignment between expenses and revenue. As a result, amendments are required to the *Migration Agents Registration Application Charge Regulations 1998* and the *Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017*.

A 24-month deferral will provide additional time to align policy development aimed at strengthening the regulation of RMAs linked to the Rapid Review report recommendations with any proposed amendments to, and subsequent remaking of, the Migration Agents Instruments. The deferral will avoid the need to remake the Migration Agents Instruments in their current form for the short period of time before they are repealed and replacement instruments are made. Accordingly, the Migration Agents Instruments will likely cease to be in force in their current form within 24 months of their original sunseting date.

More information

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

The Migration Agents 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 Home Affairs about the instruments to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation Deferral of Sunsetting—Migration Agents Instruments 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 instruments specified in the Certificate are (together, the ‘Migration Agents Instruments’):

- e) *Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017*
- f) *Migration Agents Registration Application Charge Regulations 1998*
- g) *Migration Agents Regulations 1998*
- h) *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018.*

The Migration Agents Instruments are expected to be repealed and replaced within 24 months of their scheduled sunseting day as a result of changes required to strengthen the regulation of registered migration agents (RMAs) following a number of reviews into the industry.

The Certificate allows the Migration Agents 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 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 Migration Agents Regulations engage the right to privacy, as declared by the international instruments set out in section 3 of the Human Rights Act.

Article 17 of the ICCPR provides protection against arbitrary or unlawful interference with a person’s privacy, including their family, home and correspondence, and unlawful attacks on a person’s honour or reputation. Article 17 also provides a person the right to the protection of the law against such interference or attacks.

Sections 9B, 9C and 9D of the Migration Agent Regulations prescribe the circumstances in which the personal information of an RMA or an inactive migration agent (former RMA) can be disclosed under the Migration Act 1958 (the Migration Act), and therefore does limit the right to privacy under Article 17 by allowing the release of personal information in the prescribed circumstances, and without the individual's express consent.

These provisions of the Migration Agent Regulations support the legitimate purpose of regulating RMAs. They enable the collection and disclosure of personal information by the Secretary, by the review authority, and by the Office of the Migration Agents Registration Authority (OMARA), which has the responsibility for regulating RMAs.

The collection and disclosure of personal information is reasonable, necessary and proportionate to enable referral of a current or former RMA for complaints, possible offences or mandatory sanctioning under the Migration Act and to enable the collection of information about the conduct of RMAs.

Deferring the sunseting of the Migration Agent Regulations will continue the circumstances in which the personal information can be disclosed. This is reasonable, necessary and proportionate to ensure that RMAs can continue to be referred for complaints, possible offences under the Act and mandatory sanctioning, if required, and that information about the conduct of RMAs can continue to be collected, while ongoing work is undertaken to strengthen the regulatory framework for RMAs.

Therefore, overall, the Migration Agents Instruments are compatible with human rights, and 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 Migration Agents 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 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 Migration Agents 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, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate purpose. 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—Migration Agents Instruments) 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 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:

- a) the *Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017*
- b) the *Migration Agents Registration Application Charge Regulations 1998*
- c) the *Migration Agents Regulations 1998*
- d) the *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018*.

Section 4 (note) Deferral of sunsetting

This note provides that the instruments deferred in the provision previously had their sunsetting days aligned to 1 April 2024 by the *Legislation (Migration Agents Instruments) Sunset-altering Declaration 2019*.

Section 5 Repeal of the instrument

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