

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Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration.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The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day.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

Through the operation of subsection 33(3) of the *Acts Interpretation 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 *Airports (Protection of Airspace) Regulations 1996* ('Airspace Protection Regulations') by an additional 12 months, resulting in a deferral of 24 months in total. The Airspace Protection Regulations, for which the previous sunseting day was 1 April 2025, will now sunset on 1 April 2026.

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 Airspace Protection Regulations is expected to be remade within 24 months of the original sunseting date as a result of a review by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department). If the Amendment Certificate were to be disallowed, there would not be enough time to 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 Amendment Certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Airspace Protection Regulations is made under the *Airports Act 1996*. The Airspace Protection Regulations sets out a regulatory framework for managing intrusions into protected airspace around federally leased airports in the interests of safety, efficiency or regularity of air transport operations.

The department is proposing to consult with stakeholders on reform options that could be incorporated with the re-making of the Airspace Regulations that will create efficiencies, improve assessment timeframes and provide greater clarity for industry seeking determinations on applications for intrusions into protected airspace.

Consultation and work on remaking the Airspace Protection Regulations has been deferred previously to assist stakeholders to manage the time required for meaningful engagement in the review, while also recovering from the extensive impacts of COVID-19 on the aviation industry. The department recommenced its consultation in 2022 on the sunseting regulations, but the proposed changes to the Obstacle Limitation Surface (OLS) through a project of the International Civil Aviation Organization (ICAO) have required a review of options previously identified to ensure alignment. Renewed stakeholder engagement is now to commence on options that both address more immediate measures to improve efficiencies in the assessment process and take into consideration the forthcoming changes to international standards.

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. Consultation on the deferral itself has not occurred to minimise the administrative burden on stakeholders noting the deferral will only have effect for a limited amount of time. Any replacement instrument will be subject to ongoing consultation and parliamentary oversight, including oversight of whether adequate consultation occurred with persons likely to be affected by the replacement instruments.

The Amendment Certificate will allow sufficient time for the department to conduct the review and implement reform, including remaking the Airspace Protection Regulations. The Amendment Certificate will avoid the need to remake the Airspace Protection Regulations 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 sunseting date of the Airspace Protection Regulations is consistent with the policy intent of the sunseting 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 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 Airspace Protection Regulations, the Minister for Infrastructure, Transport, Regional Development and Local Government, the Hon Catherine King MP, provided a written application to the Attorney-General seeking an amendment of the previous deferral certificate to extend the deferral of sunset for the Instrument 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 Airspace Protection Regulations 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 original 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 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 24 August 2018, the Attorney-General issued the *Legislation (Airport Instruments) Sunset-altering Declaration 2018*. This instrument aligned the sunset date of the Airspace Protection Regulations from 1 April 2019 to 1 April 2024. This was done in order to facilitate a single thematic review alongside two other instruments.

On 25 March 2022, the Attorney-General issued the Principal Certificate under section 51 of the Legislation Act, deferring the sunset of the Airspace Protection Regulations from 1 April 2024 to 1 April 2025. This deferral was granted to assist stakeholders to manage the time required for meaningful engagement in the review of the Airspace Protection Regulations to ensure alignment with proposed changes to the Obstacle Limitation Surface (OLS) through a project of the International Civil Aviation Organization (ICAO), while also recovering from the extensive impacts of COVID-19

on the aviation industry. The rule-maker for the Airspace Protection Regulations, the Minister for Infrastructure, Transport, Regional Development and Local Government, the Hon Catherine King MP, subsequently sought the Attorney-General's approval to defer the sunseting of the Instrument by a further 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 2026.

Deferring the sunseting date will allow additional time to complete a review of the Instrument, to align with Australia's consideration and implementation of ICAO's reforms.

The Airspace Protection Regulations sets out the regulatory framework for managing intrusions into protected airspace around federally leased airports, which includes the OLS. The Standards and Recommended Practices (SARPs) for establishing an OLS are set out under Annex 14 to the Convention on International Aviation (the Chicago Convention) by ICAO. The Airspace Protection Regulations supports Australia's continued compliance with international obligations, in the interest of safety, efficiency and regularity of air transport operations into and out of federally leased airports.

ICAO is proposing significant changes to the international standards for the OLS framework and the protection of airspace. In May 2023, ICAO consulted member states on the proposed reforms.

ICAO is expected to issue a determination on its proposed OLS changes in 2025, with member states, including Australia, to implement the changes shortly thereafter. Implementation will require further changes to the regulatory settings, which, depending on the timing of the determination, may be able to be made concurrently with the work to remake the Instrument prior to the new sunseting date. Regardless of the timing of the ICAO advice, the reform options now being considered by the department will be complementary to the changes being proposed through ICAO.

The department is proposing to consult with a range of affected stakeholders including airports, airlines and other aviation industry bodies, as well as state, territory and local government planning authorities near airports on the regulatory changes.

Accordingly, the Airspace Protection Regulations will likely cease to be in force in its current form within 24 months of its original sunseting date.

### **More information**

Further details on the provisions of the Amendment 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. The Airspace Protection Regulations, 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 Infrastructure, Transport, Regional Development, Communications and the Arts about the Instrument to which the Amendment Certificate applies.

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

The *Legislation (Deferral of Sunsetting—Airports Instruments) Amendment Certificate 2024* (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 (Parliamentary Scrutiny) Act 2011* (the 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 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.

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 Principal Certificate, extending the previously granted deferral of sunsetting for the *Airports (Protection of Airspace) Regulations 1996* ('Airspace Protection Regulations') by an additional 12 months, resulting in a deferral of 24 months in total. The Airspace Protection Regulations, for which the previous sunsetting day was 1 April 2025, will now sunset on 1 April 2026.

The Airspace Protection Regulations is expected to be repealed and replaced within 24 months of its scheduled sunsetting day as part of a review of the legislative framework.

The Amendment Certificate allows the Airspace Protection Regulations 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 sunset day.

### **Human Rights Implications**

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

The Airspace Regulations engages the following rights and freedoms declared by the international instruments set out in section 3 of the Human Rights Act:

- The right to liberty of movement
  - This right is negatively engaged for example, by control of vehicle movement in prescribed airspace. However, the control of vehicle movements is necessary in the interests of public safety.
- The right to freedom of thought, conscience and religion or belief
  - This right is negatively engaged for example, by restrictions on planning or land use that may make it difficult to establish places of religious worship. However, this protection would only be invoked where a religious building would intrude into prescribed airspace, and therefore is necessary in the interests of public safety.
- The right to privacy
  - This right is negatively engaged for example, by the collection of personal information from individual and corporate proponents who make application for approval for controlled activities in airspace. However, the collection of personal information is proportionate and compliant with the *Privacy Act 1988*.
- The right to security of the person
  - This right is negatively engaged for example, by allowing a public authority to cordon off, and control movement within, an area to be declared as prescribed airspace. However, that control of movement within prescribed airspace is necessary for the safety of aircraft operations and public safety.
- The right to a fair trial and fair hearing
  - This right is negatively engaged for example, by imposing strict liability for infringement notices. However, the framing and operation of strict liability offences is only applied to minor offences and where a high volume of contraventions is expected. The infringement notices are applied consistently with the Guide to

Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, published by the Attorney-General's Department.

- The right to health
  - This right is positively engaged for example, by ensuring safe and healthy working conditions by protecting public, airport and proponent employees whilst ensuring the safe passage and movement of aircraft.
- The right to an adequate standard of living
  - This right is negatively engaged for example, by restricting or placing conditions on the construction of dwellings within prescribed airspace. However, restrictions are only to the extent necessary to protect airspace for the safety of aircraft operations and the public.
- The right to enjoy and benefit from culture
  - This right is negatively engaged for example, by regulating the conduct of commercial activity on the traditional lands of Indigenous Australians. However, restrictions only apply where commercial activity on traditional lands would conflict with safety, efficiency and regularity of aircraft operations out of an aerodrome.

For the reasons outlined above, the Airports Protection Regulations is compatible with human rights because it positively promotes and engages some rights. To the extent that the engagement is negative and limits human rights, those limitations are reasonable, necessary and proportionate to achieving the objective of safe, efficient and regular aircraft operations at federally leased airports.

Before issuing the Amendment Certificate, the Attorney-General was satisfied that the Airspace Protection Regulations 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.

Any replacement instrument will be subject to parliamentary scrutiny and oversight through the disallowance processes unless otherwise exempt. The human rights impact of the remade Airspace Protection Regulations will be assessed at the time it is made, including through the requirement to prepare a Statement of Compatibility with Human Rights.

## **Conclusion**

This Amendment 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 any limitations on



human rights are minor in nature and necessary and proportionate to establishing a system for the protection of airspace at, and around airports in the interest of the safety, efficiency or regularity of future air transport operations into or out of airports. Any proposal to make a replacement instrument will be subject to parliamentary oversight and scrutiny.

## NOTES ON THE AMENDMENT CERTIFICATE

### **Section 1      Name**

This section provides that the Amendment Certificate is named the *Legislation (Deferral of Sunsetting—Airport Instruments) 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 2003*.

### **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 sunseting of the *Airports (Protection of Airspace) Regulations 1996* to 1 April 2026.

### **Item 1              Section 4**

This item amends section 4 of the Principal Certificate by inserting new numbering (subsection 4(1)) for existing provisions which set out the sunseting dates for the *Airports (Building Control)*

*Regulations 1966 and the Airports (Environment Protection) Regulations 1997*. This is a consequential amendment to item 3, which inserts a new subsection 4(2) to substitute the sunseting date for the *Airports (Protection of Airspace) Regulations 1996* of 1 April 2025 with the amended date of 1 April 2026.

**Item 2**                      **Paragraph 4(b)**

This item repeals the paragraph 4(b) of the Principal Certificate. New subsection 4(2) (inserted by Item 3) will replace paragraph 4(b), by setting out the new sunseting date for the *Airports (Protection of Airspace) Regulations 1996*.

**Item 3**                      **At the end of section 4**

This item inserts new subsection 4(2) to substitute the sunseting date for the *Airports (Protection of Airspace) Regulations 1996*, from 1 April 2024 to 1 April 2026 under section 51 of the Legislation Act.

**Item 4**                      **Section 5**

This item changes the self-repealing provision of the Principal Certificate so that it takes effect on 2 April 2026, rather than 2 April 2025.