

Civil Aviation Legislation Amendment (Application of Criminal Code)
Regulations 2002 (No.)

DETAILS OF THE AMENDING REGULATIONS

Regulation 1 – Name of Regulations

Regulation 1 names the amending Regulations as the Civil Aviation Legislation Amendment (Application of Criminal Code) Regulations 2002 (No.)

Regulation 2 - Commencement

Regulation 2 provides that the Regulations commence on gazettal.

Regulation 3 – Amendment of Civil Aviation Regulations 1998

Regulation 3 provides that Schedule 1 to the Regulations amends the Civil Aviation Regulations 1998.

Regulation 4 – Amendment of Civil Aviation (Buildings Control) Regulations

Regulation 4 provides that Schedule 2 to the Regulations amends the Civil Aviation (Buildings Control) Regulations.

Schedule 1 –Amendments of Civil Aviation Regulations 1998

Schedule 2 –Amendments of Civil Aviation (Buildings Control) Regulations

The Regulations specified in Schedules 1 and 2 are amended as follows:

1. Ensuring strict liability offences remain strict liability offences

The Regulations provide that each of the offences (or particular elements of offences) listed in Tables 1.1 and 1.2 below are offences (or elements) of strict liability.

An offence of strict liability is an offence where no fault elements apply to the physical elements of the offence. A fault element can only be dispensed with in relation to an offence if the offence specifies that it is a strict liability offence. The defence of mistake of fact is available for a strict liability offence. In the absence of express reference that an offence is strict liability, a court will be obliged by the *Criminal Code Act 1995* to interpret the offence as a fault offence rather than a strict liability offence, and will require proof of fault elements in relation to the physical elements of the offence.

The regulations identified in Tables 1.1 and 1.2 below are currently strict liability offences (or contain strict liability elements of offences). The amendments will ensure that the offences (or elements of the offences) continue to operate as strict liability following application of the *Criminal Code*.

Table 1.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended	Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
8	21.3 (7), (8)	56	21.271 (2)
9	21.5 (1)	58	21.277 (1), (2)
10	21.16 (5)	61	21.293 (1), (2), (3), (4), (5)
11	21.29B (5)	62	21.303 (1)
12	21.47 (2), (3)	65	21.325 (6)
14	21.49	66	21.603
16	21.50 (1), (2)	68	21.607
18	21.99 (1), (2)	69	21.611 (2)
19	21.123 (1)	70	21.613 (2)
20	21.125 (1)	71	21.820 (2)
21	21.127 (1)	72	21.825 (3)
24	21.128 (1), (3)	73	21.830 (2)
26	21.129	74	21.835 (3)
28	21.130A (1), (2), (3), (4), (5)	75	21.840 (2)
29	21.134 (4)	76	21.850 (2)
31	21.143 (2)	78	21.855 (1)
33	21.145	79	21.865 (2)
35	21.147 (2)	80	21.870 (3)
36	21.157	81	39.3
38	21.161	82	45.035 (4)
40	21.165 (1), (2), (3)	83	45.085 (5)
42	21.166 (1), (2), (3), (4), (5)	84	45.090 (1)
44	21.176 (5)	85	45.105 (4)
46	21.181 (3), (9)	88	45.115 (2)
47	21.187 (2)	89	45.125 (1)
48	21.195A (5)	90	45.145
50	21.195B (3), (8)	92	45.155 (1), (2)
51	21.200 (5)	94	45.160
52	21.201 (2)	96	45.170
54	21.245		
55	21.261 (1), (4)		

Table 1.2 – Schedule 2 – Amendment of the Civil Aviation (Buildings Control) Regulations

Item of Schedule 2 of proposed Regulations	Provision of regulations being amended
3	3 (1)
4	4 (1)
5	5 (1)
6	6 (1)
7	10
8	11 (5)

2. Ignorance of the law is no excuse

In the regulation identified in Table 2.1 below, the prosecution may be required to prove, as part of the offence, that the defendant had knowledge of a provision of statute law or subordinate legislation referred to in the offence provision. It is generally very

difficult for the prosecution to establish such knowledge and is contrary to the maxim that ignorance of the law is no excuse. Subsections 9.3 (1) and 9.4 (1) of the *Criminal Code* provide that mistake or ignorance of statute law, or subordinate legislation, is no excuse. However, subsections 9.3 (2) and 9.4 (2) provide that subsections 9.3 (1) and 9.4 (1) do not apply if the particular statute law or subordinate legislation is expressly or impliedly to the contrary effect.

To ensure that the provisions are not interpreted to indicate contrary intention for the purposes of section 9.4 of the *Criminal Code*, the Regulations amend the offence provision identified in Table 2.1 below to provide that strict liability applies to that part of the physical element of conduct that raises the knowledge of law issues. The defence of mistake of fact will then apply.

Table 2.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
90	45.145

3. Restructuring offences to clarify defences

The Regulations amend the offence provisions identified in Table 3.1 below, to clarify that the defence to the offence does not form part of the elements of the offence for the prosecution to establish. The amendments are achieved by removing the defence from the offence provision and inserting it as new stand-alone defence provision, followed by a Note to the effect that the defendant bears an evidential burden of proof. The *Criminal Code* requires proof of defences at an *evidential* standard unless the law creating the offence expressly imposes proof at the higher *legal* standard.

Table 3.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
2	21.3 (1)

4. Restructuring offence provisions to clarify that “exceptions” are elements of the offences

The Regulations amend the offence provisions identified in Table 4.1 below, to clarify that the exception is intended to form part of the elements of the offence for the prosecution to establish. The amendments are achieved by redrafting the offences so that the use of the terms “unless” or “except” are removed and replaced by terminology that makes clear that the wording concerned forms part of the offence. The amendments are beyond the general Government policy authority in relation to harmonisation of Commonwealth offences with the Criminal Code. However, they are preferable in that it is Commonwealth Criminal Law Policy that criminal offence provisions should be structured to provide certainty and clarity in relation to the scope and effect of each offence, and to give consistency as to how criminal offences are to be interpreted by the courts. The Office of Regulation Review (ORR) has determined the amendments are mechanical and minor in nature, do not have a direct or significant impact on business and do not restrict competition, and therefore a Regulation Impact Statement is not required.

Table 4.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
22	21.128 (1)
28	21.130A (5)
42	21.166 (5)
62	21.303 (1), (1A)
66	21.603
91	45.155 (1)
92	45.155 (2)
95	45.170

5. Restructuring offence provisions to clarify physical elements of the offences

The Regulations restructure, and reword using simpler language, the offence provisions identified in Tables 5.1 and 5.2 below, to clarify the physical elements (conduct, circumstance and result) of the offences, or to make clear that the provisions, marked with an asterisk (*), provide for separate offences. The amendments do not alter the operation or the effect of the offence provisions. The amendments marked with an asterisk (*) are beyond the general Government policy authority in relation to harmonisation of Commonwealth offences with the Criminal Code. However, they are preferable in that it is Commonwealth Criminal Law Policy that criminal offence provisions should be structured to provide certainty and clarity in relation to the scope and effect of each offence, and to give consistency as to how criminal offences are to be interpreted by the courts. The Office of Regulation Review (ORR) has determined the amendments are mechanical and minor in nature, do not have a direct or significant impact on business and do not restrict competition, and therefore a Regulation Impact Statement is not required.

Table 5.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
10	21.16 (5)
11	21.29B (5)
17	21.99 (1)
29	21.134 (4)
36	21.157
43	21.176 (5)
48	21.195A (5)
51	21.200 (5)
55	21.261 (4)
70	21.613 (2)*
77	21.855 (1)
81	39.3*
90	45.145*
91	45.155 (1)
92	45.155 (2)

Table 5.2 – Schedule 2 – Amendment of the Civil Aviation (Buildings Control) Regulations

Item of Schedule 2 of proposed Regulations	Provision of regulations being amended
3	3 (1)
4	4 (1)
5	5 (1)
6	6 (1)
7	10
8	11 (5)

6. Definition of “engage in conduct”

The Regulations insert a definition of the term “engage in conduct” in the regulations identified in Tables 6.1 and 6.2 below. The amendments are a consequence of the amendments to clarify the physical elements of “conduct” and “result” in the relevant offence provisions detailed in Tables 5.1 and 5.2 above.

Table 6.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
97	Dictionary

Table 6.2 – Schedule 2 – Amendment of the Civil Aviation (Buildings Control) Regulations

Item of Schedule 2 of proposed Regulations	Provision of regulations being amended
2	2

7. Clarify the meaning of the phrase “as soon as practicable”

The Regulations amend the regulations identified in Table 7.1 below to clarify the meaning of the phrase “as soon as practicable”, by specifying a period of time as an element of the offence. The amendments are beyond the general Government policy authority in relation to harmonisation of Commonwealth offences with the Criminal Code. However, they are preferable in that it is Commonwealth Criminal Law Policy that criminal offence provisions should be structured to provide certainty and clarity in relation to the scope and effect of each offence, and to give consistency as to how criminal offences are to be interpreted by the courts. The Office of Regulation Review (ORR) has determined the amendments are mechanical and minor in nature, do not have a direct or significant impact on business and do not restrict competition, and therefore a Regulation Impact Statement is not required.

Table 7.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
28	21.130A (5)
42	21.166 (5)
60	21.293 (5)

8. Remove “aware” to allow the application of the *Criminal Code* default fault elements of intention and recklessness

The proposed Regulations will amend the provisions identified in Table 8.1 below, to omit the expression “*it is aware*”, so as to allow the application of the *Criminal Code* default fault elements. Subsection 5.1 (1) of the *Criminal Code* provides that a fault element for a particular physical element may be intention, knowledge, recklessness or negligence. Although subsection 5.1 (2) provides that subsection 5.1 (1) does not prevent offence provisions from specifying other fault elements, in the interest of consistent application of principles, an alternative fault element should only be used if none of the fault elements specified in subsection 5.1 (1) is appropriate. The *Criminal*

Code default fault elements of intention (for the conduct of reporting a defect to CASA) and recklessness (for the circumstance of the defect existing) are the appropriate elements for each of the provisions listed in Table 8.1.

Table 8.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
3	21.3 (1)
4	21.3 (2)

9. Repeal of provisions to allow the application of section 5.3 of the Criminal Code

The proposed Regulations will omit the provision identified in Table 9.1 below, to allow the application of subsection 5.4 (1) of the *Criminal Code*, which provides that a person is reckless as to the existence of circumstance (in this case, of a defect in an aircraft etc.) if he or she is aware that there is a substantial risk that it exists or will exist, and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Table 9.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
5	21.3 (3)

10. Repeal offence provisions where there is an equivalent provision in the Criminal Code

The Regulations repeal the provisions identified in Tables 10.1 and 10.2 below, as there is an equivalent provision in the *Criminal Code* (see section 136.1).

Table 10.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
1	21.2

Table 10.2 – Schedule 2 – Amendment of the Civil Aviation (Buildings Control) Regulations

Item of Schedule 2 of proposed Regulations	Provision of regulations being amended
9	16

11. Consequential amendment

The Regulations make a consequential amendment to the provision identified in Table 11.1 below. The amendment is a consequence of the amendment to subregulation 21.303 (1A) detailed at Table 4.1 above.

Table 11.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
63	21.303 (1B)

12. Drafting protocol – citation of regulations

The Regulations give effect to current drafting protocol regarding the reference to Regulations. The amendment adds the year of the Regulations to the title of the regulations identified in Table 12.2 below; that is, the citation of those Regulations becomes the Civil Aviation (Buildings Control) Regulations 1988.

Table 12.2 – Schedule 2 – Amendment of the Civil Aviation (Buildings Control) Regulations

Item of Schedule 2 of proposed Regulations	Provision of regulations being amended
1	1

13. Numbering of regulations

The Regulations introduce numbering for the provisions identified in Table 13.1 below as a consequence of the provision that the offence is of strict liability or of the restructuring of the regulation.

Table 13.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
13, 14	21.49
17	21.99 (1)
25, 26	21.129
32, 33	21.145
36	21.157
37, 38	21.161
53, 54	21.245
67, 68	21.607

14. Substitute penalty units for pecuniary penalty

The Regulations amend the provisions identified in Table 14.2 below, to update pecuniary penalties by converting them into penalty units rather than dollar amounts.

Table 14.2 – Schedule 2 – Amendment of the Civil Aviation (Buildings Control) Regulations

Item of Schedule 2 of proposed Regulations	Provision of regulations being amended
3	3 (1)
4	4 (1)
5	5 (1)

Item of Schedule 2 of proposed Regulations	Provision of regulations being amended
6	6 (1)
7	10
8	11 (5)

15. Placement of penalty provisions

The Regulations amend the provisions identified in Table 15.1 below, to place the applicable penalty provision after each offence provision, rather than at the end of the particular regulation or in the body of an offence provision. This will avoid difficulties in determining the offence provisions within the regulation, and will achieve drafting consistency. The amendments are beyond the general Government policy authority in relation to harmonisation of Commonwealth offences with the Criminal Code. However, they are preferable in that it is Commonwealth Criminal Law Policy that criminal offence provisions should be structured to provide certainty and clarity in relation to the scope and effect of each offence, and to give consistency as to how criminal offences are to be interpreted by the courts. The Office of Regulation Review (ORR) has determined the amendments are mechanical and minor in nature, do not have a direct or significant impact on business and do not restrict competition, and therefore a Regulation Impact Statement is not required.

Table 15.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
15	21.50 (1)
23	21.128 (1)
27	21.130A (1), (2), (3), (4)
39	21.165 (1), (2)
41	21.166 (1), (2), (3), (4)
57	21.277 (1)
59	21.293 (1), (2), (3), (4)
80	21.870 (3)
82	45.035 (4)
83	45.085 (5)
86, 87	45.115 (2)

16. Drafting protocol –wording of penalty unit provisions

The Regulations give effect to current drafting protocol regarding the wording of penalty unit provisions. The amendments reword the penalty unit provision of the provisions identified in Table 16.1 below.

Table 16.1 – Schedule 1 – Amendment of the Civil Aviation Regulations 1998

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
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ATTACHMENT

Item of Schedule 1 of proposed Regulations	Provision of regulations being amended
30	21.143 (2)
34	21.147 (2)
45	21.181 (9)
49	21.195B (8)
64	21.325 (6)