

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Infrastructure, Transport, Regional Development and Local Government

Airspace Act 2007

Airspace Amendment (Danger Areas) Regulations 2023

The *Air Services Act 1995* defines terms used in the *Airspace Act 2007* (the Act), including Australian-administered airspace, which is defined as the airspace over Australian territory; airspace that has been allocated to Australia by the International Civil Aviation Organization (ICAO) under the Chicago Convention and for which Australia has accepted responsibility; and airspace administered by Australia at the request of another country. The Act establishes the regulatory framework for administering and safely using Australian-administered airspace, considering matters such as environmental protection, airspace efficiency, equitable use of airspace for all airspace users, and national security.

Section 15 of the Act provides that the Governor-General may make regulations for the Act prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient for carrying out or giving effect to this Act.

Under subsection 11 (1) of the Act, the regulations may confer functions and powers on the Civil Aviation Safety Authority (CASA) in connection with the administration and regulation of Australian-administered airspace, which covers territorial and extraterritorial areas.

Under subsection 11 (2) of the Act, the regulations may make provision for and in relation to various matters. These include the designation of volumes of Australian-administered airspace for the purposes of restricting access to, or warning about access to, that airspace.

The *Airspace Amendment (Danger Areas) Regulations 2023* (the proposed Regulations) would make various amendments to the *Airspace Regulations 2007* (the Principal Regulations), concerning the declaration of restricted areas and danger areas outside Australian territory. This would address ICAO issuing of a deficiency of non-compliance notice to Australia in November 2019 for breaching its international obligations under the Chicago Convention. Australia ratified the Chicago Convention on 1 March 1947.

Background

The non-compliance notice relates to Australian Defence Force (Defence) aviation and naval activities undertaken outside Australian territory but within Australian administered airspace. The Principal Regulations (and previous legislation) declared nominal restricted areas for these activities for more than 70 years at some locations, with Defence as their Controlling Authority, making entry to the airspace conditional. While the practical effect was to mitigate the risk of aircraft proximity to potentially dangerous activities, this had the effect of restricting foreign registered aircraft from entering Australian administered airspace outside Australian territory. While Australia may lawfully preclude Australian registered aircraft from entering validly established Australian-administered airspace outside Australian territory, under the Chicago Convention, Australia must not restrict foreign registered aircraft from entering Australian administered airspace outside Australian territory.

Amendments

To ensure Australia complies with its international obligations, the proposed Regulations would:

- Empower CASA to declare danger areas anywhere in Australian-administered airspace, expanding its current scope of power for such declarations that are currently limited to Australian territory. Danger areas are declared to warn users of potentially dangerous activity.
- Introduce a new subset of danger areas, to be known as military operating areas (MOAs) so that foreign registered aircraft could fly through airspace outside Australian territory with warning but without restriction.
- Further enhance safety by permitting conditions of entry to be applied to Australian registered aircraft in MOAs outside Australian territory, and to both Australian and foreign registered aircraft within Australian territory. Allow variations to air traffic services in danger areas outside Australian territory, to be consistent with such variations in airspace over Australian territory. The term ‘special use airspace’ would be introduced to support usage of that term in the Aeronautical Information Publication.

The proposed Regulations would also make minor amendments to align national security wording with the *Airspace Act 2007* and clarify delegation powers.

Consultation

After the ICAO notice of deficiency in November 2019, CASA consulted with the Defence on preliminary solutions. CASA further consulted with other organisations such as the Aviation Implementation Group, Aviation Policy Group, Qantas, Virgin and the Aviation Safety Advisory Panel. The proposed solution was well received. As the proposed Regulations have no effect to the operations of Qantas and Virgin, only Qantas replied to the consultation request, advising they considered the change mostly inconsequential. In November 2021, CASA published the proposed changes on the CASA consultation hub for public comment and feedback with no adverse comment or feedback received. A CASA working group involving Airservices Australia and Defence finalised the policy reflected in the proposed Regulations. Advice from the Attorney General’s Department Office of International Law in late 2022 is reflected in the proposed Regulations. Military restricted areas outside Australian territory have existed since the 1940’s. Amending the processes and procedures associated with their usage following the ICAO notification in 2019 was a relatively complex task and this is reflected in the time to develop the proposed Regulations.

Regulation Impact Statement

A Regulation Impact Statement (RIS) was prepared by CASA for the draft *Airspace Amendment (Danger Areas) Regulations*. The RIS was assessed by the then Office of Best Practice Regulation (OBPR, now the Office of Impact Analysis) as compliant with the Best Practice Regulation requirements and contained a level of analysis commensurate with the likely impacts (OBPR21-01226). Legal advice received from the Attorney General’s Department in late 2022 prevented the previous amendment proceeding and interim legal arrangements were extended. The changes made to allow the current amendment to proceed are minor and there are no differences to the information previously stated in the RIS. The RIS is at [Attachment A](#).

The amendments are not expected to have any specific impacts on general aviation, or citizens in regional or remote Australia.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights is at Attachment B.

Commencement and making

Details of the proposed Regulations are set out in Attachment C.

The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The proposed Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003*.

The proposed Regulations would commence on 30 November 2023.

Authority: Section 15 of the
Airspace Act 2007

Airspace Regulations 2007 changes Regulation Impact Statement

Summary

The Australian Defence Force (Defence) undertakes aviation and naval activities outside Australian territory within Australian administered airspace. To ensure there is an acceptable level of safety during these activities CASA declares restricted areas that are controlled by Defence. The publication of restricted areas precludes Australian and foreign civil registered aircraft from entering these areas unless they have a clearance to enter from Defence. CASA can lawfully preclude Australian registered aircraft from entering airspace outside Australian territory but cannot prevent foreign registered aircraft from entering restricted airspace outside Australian territory. In November 2019, the International Civil Aviation Organization (ICAO) issued a notice of deficiency for non-compliance due to the publication of restricted areas outside Australian territory within Australian-administered airspace.

In accordance with international law and ICAO standards and practices related to administration of airspace outside a State's territory, danger areas can be published as a means of alerting airspace users to a potential hazard to safe flight. Danger areas do not preclude aircraft from entering the area within which operations may be hazardous to safe flight. The *Airspace Act 2007* enables publication of danger areas outside Australian territory within Australian-administered airspace, but the power to declare danger areas in such airspace is not currently provided for in the *Airspace Regulations 2007* (the Regulations). This unnecessarily limits options to address airspace risk.

In 2021 CASA implemented a temporary arrangement to mitigate risk to airspace users during military activity pending regulatory change. The arrangement was supported by a legislative instrument¹ that:

- Removes the restrictions on the passage of aircraft other than Australian registered aircraft through airspace published as permanent restricted areas/temporary restricted areas within Australian-administered airspace but outside of Australian territory, whilst actively discouraging foreign registered aircraft from flying in those areas.
- Continues to restrict Australian registered aircraft entering airspace published as a restricted area or temporary restricted area within Australian-administered airspace but outside of Australian territory.

This instrument expires in November 2022 and this RIS presents options for a permanent solution.

The removal of military restricted areas outside of Australian territory would significantly inhibit or preclude the Defence from conducting military training or exercises that are critical to ensuring capability is maintained. Defence would be unable to safely undertake activities in these areas.

To enhance the safety of airspace users during military training or exercise activity, CASA proposes an amendment to the Regulations that will enable the Office of Airspace Regulation

¹ CASA 26/21 – Direction – Australian Aircraft and Foreign Registered Aircraft in Australian-administered Airspace Instrument 2021

(OAR) of CASA to publish danger areas outside Australian territory within Australian-administered airspace. CASA also proposes the introduction of a new type of danger area known as Military Operating Areas (MOAs), to better define the nature of the risk to other airspace users. This would improve situational awareness and better inform decision making by non-participating aircraft in the vicinity of military airspace activity and not contravene ICAO standards and international law.

In addition to the regulation change, implementation of the preferred option requires the Aeronautical Information Publication (AIP) to be amended prior to a commencement date of 1 December 2022. CASA and Airservices Australia (Airservices) would provide information to all civil aviation operators to ensure that they are informed of the changes and the conditions that apply.

Glossary of technical terms

There are several terms with definitions that will be used throughout this RIS:

Restricted area – An airspace of defined dimensions, above the land areas or territorial waters of a State, within which the flight of aircraft is restricted in accordance with certain specified conditions.

Danger area – An airspace of defined dimensions within which activities dangerous to the flight of aircraft may exist at specified times.

Australian territory – refers to:

- (a) the territory of Australia and of every external Territory; and
- (b) the territorial sea of Australia and of every external Territory; and
- (c) the air space over any such territory or sea.

Australian-administered airspace – refers to

- (a) the airspace over Australian territory; and
- (b) airspace that has been allocated to Australia by ICAO under the Chicago Convention and for which Australia has accepted responsibility; and
- (c) airspace administered by Australia at the request of another country.

Problem

Airspace outside Australian territory in Australian-administered airspace is required for Defence training and exercise activity. Naval training and joint flying training exercises are conducted in the maritime environment. The offshore training activity is designed to minimise impact and risk generated closer to the Australian mainland by civil aviation activity and it also provides greater freedom of movement and flexibility for modern military aviation training. Defence aviation activities are not compatible with civil aviation and whilst there are smaller overland military restricted areas these are not adequate for large scale or high energy military training requirements, or exercises that involve naval assets.

In November 2019, ICAO issued a notice of deficiency against Australia for declaring restricted areas outside Australian territory. Australia currently has approximately 100 declarations of restricted areas in Australian-administered airspace outside Australian territory. The restriction of international aviation activity outside Australian territory is not presently supported by the Regulations.

Non-compliance with ICAO standards generates confusion and risk for international civil aviation while also having consequential economic impact if foreign registered aircraft are unlawfully required to avoid military restricted areas. There is a corresponding safety risk if airlines do not adhere to the existing danger area requirements, if those requirements are not lawfully imposed. Whilst filing a difference against one ICAO standard is unlikely to result in negative consequences, the cumulative effect of non-conformance with ICAO standards could result in other countries imposing restrictions on Australia aviation. There is not a precise number of differences Australia could file before such restrictions would be imposed, it is in Australia's interest to comply with ICAO standards unless there is a compelling reason to file a difference. ICAO will undertake an audit of Australia in 2023. Australia is preparing to defend the outcomes of a validation audit in 2017 and is striving to maximise its level of compliance consistent with Australia's safety policy objectives. Recent audits of other countries have resulted in lower than expected results due to changes in the ICAO audit methodology.

There are benefits from Australia achieving a high degree of compliance with international standards, including an enhanced reputation internationally and an increased ability to advance Australia's aviation interests within the ICAO framework. These benefits extend to increased influence in ICAO's setting of new aviation safety standards.

It is not possible to quantify the impacts of the problem. Although two other countries in the Asia-Pacific were made aware of similar issues of non-compliance at the same time as Australia, there is no other known example of prolonged non-compliance from the relevant requirement. However, the potential for adverse consequences to arise from non-compliance with treaty requirements is consistent with analogous diplomatic engagements, both within the ICAO framework and generally.

The declaration of danger areas in Australian-administered airspace outside of Australian territory is not permitted by the Regulations. This limits the options available to CASA to address airspace risk in Australian-administered airspace and there are currently 16 danger areas declared outside Australian territory.

Objective

The objectives of any options considered are to:

- maintain the safe operation of Defence and civil aviation activities
- maintain the same capacity of civil operations to use Australian airspace
- comply with ICAO standards and international law, and
- limit negative financial consequences for industry.

Only the Australian Government can achieve these aims and meet ICAO standards due to its responsibility for management of Australian airspace; without Australian Government regulations Australia will not be compliant with ICAO standards.

There are constraints on the extent to which Government action can change the architecture of Australian airspace to meet these objectives. These constraints relate to:

- geographic characteristics affecting aviation operations over land,
- the locations of established civil aviation activities,
- Defence capability to maintain Australia's national security,
- aircraft requirements (eg. Supersonic flight can only be conducted overwater. The new Joint Strike Fighter requires significant manoeuvring room etc), and
- the locations of existing Defence sites.

There are certain geographic features, such as mountainous and heavily forested areas, that present a higher risk to Defence aviation activities. Most areas of land also do not adequately represent the maritime aviation environment, thus rendering practice exercises less effective. Importantly, Defence activities undertaken in conjunction with Defence watercraft cannot be conducted over land.

In addition, aviation activities have generally established around populous areas (such as capital city aerodromes) and these act as an effective constraint on the government to make airspace changes. It is inappropriate to redesign Australian airspace to permit Defence operations that are currently conducted over sea to be conducted over populous areas.

The existing location of Defence sites act as an effective constraint for government decisions about military airspace. It is impractical to redesign Australian airspace to require Defence operations to be undertaken a significant distance from current Defence locations that act as a base for aviation assets.

Options

Option one: status quo

The status quo option would leave the Airspace Regulations unchanged and allow the current temporary instrument to expire in November 2022. CASA would continue to maintain the practice of declaring military restricted areas outside Australian territory in Australian-administered airspace. This option would not address the notice of non-compliance issued against Australia by ICAO. It would also maintain the current regulations that do not permit the declaration of danger areas outside Australian territory in Australian-administered airspace.

Option two: Removal of military restricted and danger areas

Option 2 proposes achievement of ICAO compliance by removing all permanent restricted and danger areas outside Australian territory and prohibiting the declaration of any new restricted or danger areas outside Australian territory in Australian-administered airspace.

Option three: Regulatory amendments to permit the declaration of danger areas

Option three proposes achievement of ICAO compliance through regulatory amendments that permit the declaration of danger areas outside Australian territory. This option requires an additional regulatory mechanism to regularise existing practice and:

- enhances safety for all airspace users in the vicinity of military airspace activity
- removes the risk of commercial impact on international aviation activity, and
- enables Defence to continue airspace activity outside Australian territory.

This would be achieved by:

- Introducing Military Operating Areas (MOAs) as a subset of danger areas under regulation 6.
- Amending regulation 7 to allow danger areas (including MOAs) to be subject to further conditions as detailed in the Designation of Prohibited, Restricted and Danger Areas Declaration and Determination Instrument.
- Allowing the lawful declaration of any type of danger areas within Australian-administered airspace under regulation 6 and variations to air traffic services in danger areas outside Australian territory in regulation 9.
- Amending regulation 6 to replace the term security with national security as that is the term used in the *Airspace Act 2007*.

- Amending regulation 13 to make it clearer that powers under regulations 5, 8 and 14 can be delegated. This is not related to the main issues.

Impact

Option one

The option of maintaining the practice of declaring military restricted areas outside Australian territory. There are undesirable outcomes associated with this option:

- Australia would continue being in contravention of international law by restricting passage of international aircraft outside Australian territory. As such, it may generate claims for compensation by international operators. Such unlawful publications may also raise the question of liability and compensation in the event of a collision.
- The issue of non-compliance with ICAO will not be resolved.
- Australia may suffer reputational damage and set a precedent for other countries to also declare restricted airspace unlawfully outside their territories.

There is also a degree of uncertainty as to the extent of these impacts as there is no readily available research applicable to this current issue.

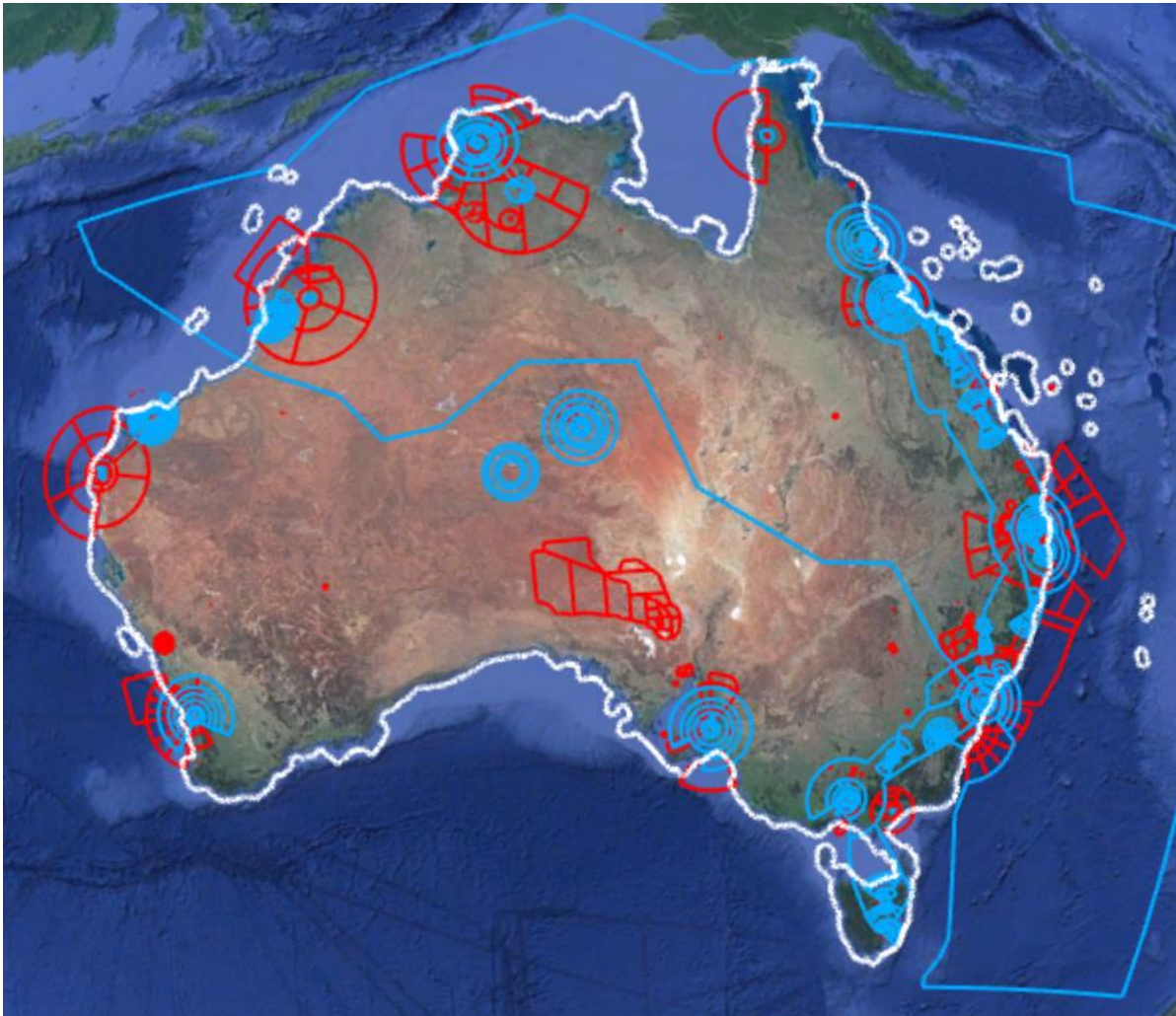
Option two

This option would not require amendments to the Regulations, but it would also limit safety mitigation in support of military aviation activities outside Australian territory and would significantly limit Australian Defence Force training capability and the subsequent impact on national security.

The removal of permanent restricted areas outside Australian territory would significantly reduce the capability of Defence to undertake aviation and naval activities.

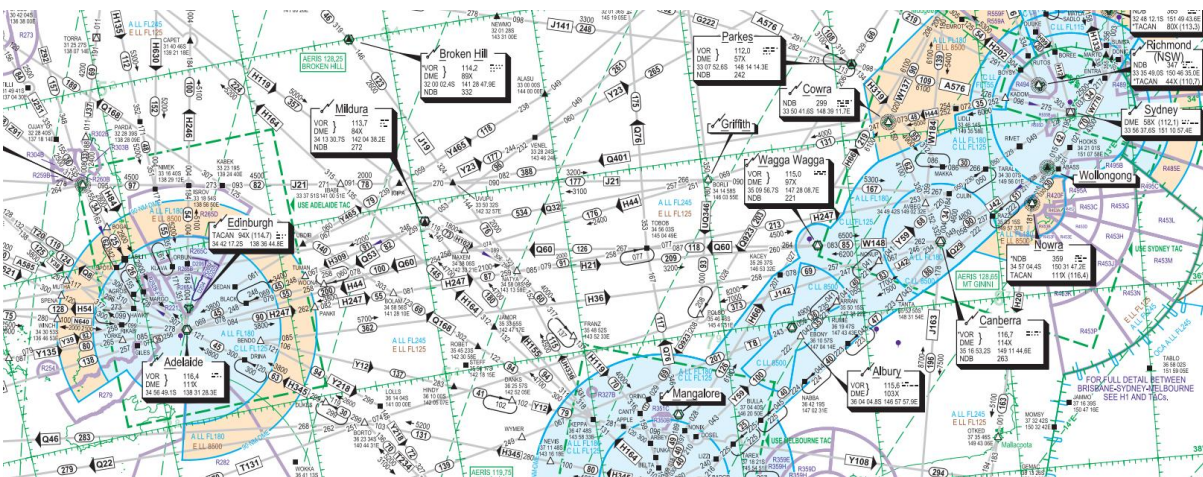
Defence may seek the declaration of permanent restricted areas within Australian territory and compete with other airspace users for priority airspace while also reducing the opportunity for equitable airspace use and greater flexibility with flight paths. Defence may also need to relocate their flying units to minimise transit times to larger volumes of training areas. Movement of Defence assets away from current bases near Australia's major population centres could degrade Defence's capability to defend those centres.

The diagram below highlights the airspace outside Australian territory currently used by Defence that would no longer be available. The diagram shows the location of the permanent restricted and danger areas (in red) controlled airspace (in blue) and the boundary of Australian territory (in white).



Defence may seek to relocate most of the red areas outside the white line to be within the white line. The relocation of these areas will impact civil air routes (see air route structure below), airport operations and flight path flexibility. The reduced flight path flexibility may result in passenger flights over Australia having an increased duration, which incurs costs for passengers in terms of their time and increased operational costs for the aircraft operating business. Also, if airspace users need to access Defence's restricted areas for commercial purposes, it will be harder to obtain clearance to enter due to higher intensity of usage.

This option may force the relocation or closure of pilot training schools that are located in areas where Defence seeks to relocate their activities.



The lack of suitable available airspace over Australian territory near Australia's east coast population centres makes this option undesirable as Defence would be unable to secure enough airspace over Australian territory to conduct their required training and exercises. Furthermore, naval operations involving aviation components conducted by Defence would create increased risk to airspace users if they were moved closer to shore.

It is also not practical for some operations that are conducted over sea to be conducted over land, or close to land, as they involve the interaction of aircraft and naval vessels.

Whilst there was no available research to specifically support the impact of this option, the impacts outlined are consistent with informal stakeholder feedback as outlined in the Consultation section.

Option three

This option expands the use of danger areas outside Australian territory, introduces MOAs as a subset of danger areas and removes the need for restricted areas outside Australian territory. MOAs will be subject to further conditions which will preclude Australian registered aircraft from entering these areas. The use of danger area declarations in Australian-administered airspace outside Australian territory is consistent with ICAO standards and international law.

Historically, Danger Areas in Australia tend to be associated with low-hazard activities, they are activated regularly, including over regional aerodromes, and flight within them by non-participating aircraft is common. However, the nature of military activities is often beyond the hazard level normally associated with these standard Danger Areas and may include live firing, remotely piloted aircraft systems, open-category activities, super-sonic flight, high-speed and abrupt manoeuvring, and nil-broadcast operations. Therefore, it is critical to aviation safety that Australia clearly distinguishes the volumes of airspace used for high-hazard military activities from Danger Areas. Without this distinction, (foreign) aircraft will not be sufficiently warned of the potential danger of operating within or transiting such areas.

This option allows Defence to continue using Australian-administered airspace outside Australian territory to conduct military exercises and training. This will facilitate large scale training activity between Australia and other countries.

This option will create a minor compliance cost for industry, in the form of updating operator expositions and other documentation to reflect the introduction of MOAs into the airspace system. Airspace users are required to update this documentation in accordance with Aeronautical Information Regulation and Control (AIRAC) cycles and this is a business-as-usual activity. However, this will not affect all airspace users as most conduct domestic operations only:

- Private operators – The vast majority conduct operations within Australian territory, negligible impact.
- Charter operators – Mostly only conduct operations within Australian territory, negligible impact.
- Sport and Recreational – Only conduct operations within Australian territory, negligible impact.
- Air Transport – Regularly conduct operations outside Australian territory, most of the impact is within this group as outlined below.

These impacts are based on CASA research, including stakeholder feedback to inform the potential magnitude of the impact. Indicatively, the Qantas Group advised that to update documentation across six of their airlines would require 140 hours of work and cost approximately \$10,000 AUD. Using these figures, the cost per airline to update documentation can be estimated as 23.3 hours at a wage rate of \$71.50 AUD. Whilst the actual number may vary

over time, CASA estimates that in addition to the Qantas group there are 14 other airlines that may be affected. The total costs to industry are estimated as below:

23.3 (hours taken to update expositions) x 71.50 AUD (wage rate including overheads) x 20 (entities affected – 6 Qantas Group entities plus 14) equals around \$33,000 AUD.

Option three ensures CASA has the capability to treat airspace risk in Australian-administered airspace and legalises current danger area declarations. This will:

- Ensure an acceptable level of safety for all airspace users in volumes of airspace used by Defence.
- Protect operations to and from offshore oil rigs.
- Treat airspace risk associated with debris from space operations over the Indian and Pacific oceans and commercial space launching originating from Australia.
- Any other circumstances such as volcanic ash or other disasters which could require treatment.

Recommended option

Option one is not recommended since it does not achieve the objective of bringing Australia into compliance with the relevant ICAO obligation nor does it comply with International law.

Option two addresses the problem of Australia's current non-conformance to ICAO standards and international law by mostly stopping current military activities outside of Australian territory. Whilst this effectively addresses that problem relative to the status quo option, option two does not achieve the objectives as effectively as option three because it will either lead to a reduction in military training exercises or the imposition of restrictions and/or costs on civil operations by the reduction of their available airspace.

Option three is recommended because:

- Relative to the status quo option, it resolves the problem of non-compliance with international law and removes the ICAO deficiency through use of a type of danger area which will not restrict foreign registered aircraft from entry.
- It meets the objectives by allowing Defence to safely continue conducting aviation and naval activities outside Australian territory in Australian administered airspace and facilitates large scale joint International and coalition exercises. The use of the term MOA will advise other airspace users of the type of hazards present.
- It meets the objectives in terms of maintaining civil operations by minimising financial impacts to industry and to Defence. Defence will not have to significantly adjust their operations and airspace over Australian territory will not come under increased pressure for military usage at the expense of civil access.
- CASA will be able to use danger areas in Australian-administered airspace outside Australian territory to alert airspace users to a potential hazard to safe flight in accordance with ICAO standards and international law.

Regulatory change also gives CASA the opportunity to improve the Regulations and better align them with the *Airspace Act 2007*.

Consultation

After the notice of deficiency against Australia was issued by ICAO, CASA conducted preliminary consultation with Defence and researched how the issue has been approached by other countries to determine how to resolve the issue. This preliminary consultation and research led to the formation of a policy proposal which was further consulted with various bodies, as below. No negative feedback has been received in relation to the policy proposal.

The Aviation Implementation Group (AIG) and Aviation Policy Group (APG) (CEO Airservices, Chief of Air Force, Secretary of the Department of Infrastructure, Transport, Regional Development and Communications and CEO CASA) have been briefed on the proposed changes, with no negative feedback received.

Informal consultation was conducted with the operators that represent the overwhelming majority of international flights in Australian airspace: Qantas, Virgin and The Board of Airline Representatives of Australia to understand potential cost implications. Only Qantas engaged with this request with potential costs noted above.

Formal consultation occurred in November 2021 with the proposed changes published on the CASA consultation hub for stakeholder comment and feedback. No comment or feedback was received.

CASA has formed a working group involving Airservices, Defence and personnel from other areas in CASA to examine the issues associated with amending the restricted areas outside Australian territory. These discussions have not resulted in changes to the policy proposal. ICAO was informed of the proposed solution in November 2021 and supported the proposal. Any changes to airspace in Australia must be fully consulted with airspace users and their feedback incorporated before such changes can be approved by CASA. If the regulation changes are approved, CASA will follow the Airspace Change Process for any changes to airspace outside Australian Territory.

Implementation

There are several processes to be undertaken to implement the recommended option and the OAR working group is continuing to work toward implementation.

Changes to Australian airspace architecture are made through the airspace change process. Permanent airspace changes require consultation and analysis in support of any decision-making process by the CASA. This work will be conducted in sufficient time to meet Aeronautical Information Publication (AIP) deadlines. The production of AIPs such as aeronautical charts or the Designated Airspace Handbook have significant lead times. For a permanent airspace change to be promulgated in these documents the legislative framework must be in place.

The pilot education plan will be developed and commence delivery in late 2022, continuing until June 2023. Defence have developed a staged approach to review the airspace and submit airspace change proposals over the next two years. Metrics associated with uptake of the information will be monitored to ensure an acceptable awareness of the changes and new operating conditions have been created. Ongoing guidance will be provided via CASA and OAR communication channels.

The *Airspace Act 2007* identifies that CASA must conduct regular reviews of Australian-administered airspace and changes made as result of the regulatory change will be reviewed in accordance with established procedures. CASA also maintains an ongoing watch of incidents and risks in airspace and any issues arising from the changes will be scrutinised.

The main risks to this implementation plan are that there could be delays to either the required regulatory changes or changes to airspace. CASA can manage such issues if they arise.

Implementation metrics

Along with the metrics associated with the uptake of information by pilots, an important metric for the successful implementation of the changes will be ICAO's assessment as to whether Australia conforms to international standards. The other metric CASA can collect is feedback from the international airlines and other airspace users as to whether the use of the new danger areas compromises the efficiency of their operations. The impacts are expected to be minor.

Conclusion

In November 2019, ICAO issued a notice of deficiency for non-compliance against Australia due to declarations of restricted areas in Australian-administered airspace outside Australian territory. These areas are currently used by Defence for military operations.

To address the non-compliance with ICAO standards CASA is proposing the declaration of danger areas in Australian-administered airspace with a specific descriptor for the nature of operations in these areas. This would enable Defence to continue to conduct training in a safe manner.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Airspace Amendment (Danger Areas) Regulations 2023

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Airspace Amendment (Danger Areas) Regulations 2023* amends the Airspace Regulations 2007 to create MOAs as a subset of danger areas, and to clarify rules about establishing danger areas in Australian administered airspace outside Australian territory. CASA will be able to declare MOAs in Australian-administered airspace both within and outside Australian territory and may vary air traffic services within danger areas in Australian-administered airspace. The term 'special use airspace' is introduced.

The amendments also align regulatory wording with the *Airspace Act 2007*, and more clearly identify which powers can be delegated under the Regulations.

Human rights implications

The amended Regulations may engage the following human rights:

- the right to life under Article 6 of the International Covenant on Civil and Political Rights (the ICCPR);
- the right to freedom of movement under Article 12 of the ICCPR;
- the right to work under Article 6 (1), and the right to safe and healthy working conditions under Article 7, of the International Covenant on Economic, Social and Cultural Rights (the *ICESCR*).

A. Right to life under the ICCPR

Article 6 of the ICCPR protects the right to life. The amendment may engage this right as it is designed to ensure that an appropriate level of airspace safety is maintained while allowing Defence to continue conducting military exercises and training. The amendments promote the right to life by legislating an airspace use aviation management structure conducive to safe flight conditions and which thereby reduces the risk of accidents and accidental death.

B. Right to freedom of movement under the ICCPR

Article 12 of the ICCPR protects the right to freedom of movement. The amendments may engage with this right. They legislatively formalise current requirements under the Chicago Convention whereby foreign registered aircraft must not be restricted from accessing Australian administered airspace outside Australian territory, although Australian registered aircraft must observe entry control conditions for the subset of danger areas known as MOAs. The human right

is in practice never infringed for relevant aircraft because transit through such areas is invariably based on established flight routes which are not affected by MOAs.

C. Right to work under the ICESCR

The right to work is protected under Article 6 (1) of the ICESCR and includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept. The amendments may engage with this right by allowing the continuation of aviation work outside Australian territory in Australian-administered airspace. The amendments do not alter the pre-existing underlying legal arrangements in relation to flight operations in Australian administered airspace, whether within or outside Australian territory, whether in Australian registered or foreign registered aircraft.

D. Right to safe and healthy working conditions under the ICESCR

Article 7 of the ICESCR protects the right to enjoyment of just and favourable conditions of work, including safe and healthy working conditions. The amendment engages with this right by formalising current safety arrangements for operations in airspace outside Australian territory in Australian-administered airspace which may be used by Defence to conduct military training and exercises. Defence must produce risk assessments and consult with other airspace users in relation to the development and formation of military operating areas.

Conclusion

The *Airspace Amendment (Danger Areas) Regulations 2023* are compatible with human rights because they do not affect the protection of human rights but promote them.

Details of the *Airspace Amendment (Danger Areas) Regulations 2023*

Section 1 - Name of Regulations

This section provides that the title of the Regulations is the *Airspace Amendment (Danger Areas) Regulations 2023*.

Section 2 - Commencement

This section provides that the Regulations commence on 30 November 2023.

Section 3 - Authority

This section provides that the Regulations are made under the *Airspace Act 2007*.

Section 4 - Schedule(s)

This section provides that each instrument that is specified in a Schedule to the instrument will be amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument will have effect according to its terms.

Schedule 1 - Amendments

Item [1] section 3

Item 1 Inserts a definition of the introduced term ‘military operating area’.

Item [2] Before subsection 6(1)

Item 2 Inserts a heading before subsection 6(1) to identify that this subsection pertains to prohibited and restricted areas only.

Item [3] subsection 6(1)

Item 3 Omits danger areas from this subsection which pertains to prohibited and restricted areas only.

Item [4] At the end of subsection 6(1)

Item 4 Adds a note to support the usage of the term ‘special use airspace’ in the Aeronautical Information Publication (AIP).

Item [5] subsection 6(3)(c)

Item 5 Inserts the word national before the word security to align terminology with the *Airspace Act 2007*.

Item [6] subsection 6(4)

Item 6 Repeals this subsection pertaining to danger area declarations consequential on Item 8.

Item [7] subsection 6(5)

Item 7 Identifies that declarations made under this subsection pertain to prohibited and restricted areas.

Item [8] After subsection 6(5)

Item 8 Inserts new provisions for the establishment of danger areas in Australian-administered airspace, including the subset of military operating areas.

Item [9] section 6 (note)

Item 9 Replaces reference to superseded legislation.

Item [10] section 7 (heading)

Item 10 Etc is inserted into heading to identify that this regulation covers more than simple publication.

Item [11] After subsection 7(3)

Item 11 Inserts provision for publication of a declaration of a military operating area or another type of danger area, as specified in the declaration, including that it must set out conditions in accordance with which the flight of the aircraft in the area is permitted.

Item [12] subsection 9(2)

Item 12 Introduces the ability for CASA to vary the air traffic services provided within a danger area anywhere within Australian-administered airspace.

Item [13] subsection 13(1)

Item 13 Inserts new wording, more clearly identifying which section or subsection may have their powers delegated, in accordance with strict conditions imposed by CASA through an internal delegations instrument.

Item [14] After subsection 13(1A)

Item 14 Stipulates the classification that a CASA staff member must hold in order to be delegated the more significant powers under the Regulations.

Item [15] In the appropriate position in Part 4

Item 15 Advises that determinations made under subsection 9(2) that were in force prior to the amendment continue to have effect.