

EXPLANATORY STATEMENT

Issued by authority of the Minister for Defence Personnel

Subject – *Defence Act 1903*

Defence Amendment (Defence Aviation Areas) Regulations 2018

1. The *Defence Act 1903* (the Act) has been amended by the *Defence Legislation Amendment (Instrument Making) Act 2017* to insert new Part IXD – Defence aviation areas. Part IXD enables the Minister to declare an area to be a defence aviation area, including height restrictions that apply to buildings, structures and objects within the area. New section 117AD of the Act provides that the regulations may prescribe certain matters in relation to defence aviation areas.
2. The *Defence Amendment (Defence Aviation Areas) Regulations 2018* (the Amending Regulations) are made under section 117AD of the Act.
3. The Amending Regulations insert new Part 11A – Defence aviation areas in the *Defence Regulation 2016* (the Regulation). Together with Part IXD of the Act and declarations made under section 117AC of the Act, new Part 11A replaces the content of the *Defence (Areas Control) Regulations 1989*, which were scheduled to sunset on 1 April 2018.

Purpose of the *Defence Amendment (Defence Aviation Areas) Regulations 2018*

4. The Amending Regulations regulate the construction and use of certain buildings, structures and objects in defence aviation areas in order to prevent, remove or reduce hazards to aircraft and aviation-related communications, navigation or surveillance. In civil aviation, similar content is included in regulations made under the *Airports Act 1996* and the *Civil Aviation Act 1988*, but these regulations do not generally apply in relation to defence aviation.
5. The key features of new Part 11A are:
 - requirements to obtain approval before constructing a building, structure or object that either exceeds the height restrictions applying in a defence aviation area, or that will generate air turbulence or plumes above the height restrictions in a defence aviation area;
 - requirements to obtain approval before bringing in, having or using an object that is hazardous to aviation in a defence aviation area;
 - offences associated with constructing a building, structure or object, or bringing in, having or using an object without a relevant approval, or in a way that breaches conditions of an approval;
 - power to direct the removal, marking, lighting, screening, modification or relocation of a building, structure or object in a defence aviation area that exceeds the height

restrictions or is otherwise hazardous to aviation, and offences if a person fails to comply with a notice;

- prescribed provisions that are subject to monitoring under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014*, as modified by section 117AF of the Act;
- provisions providing for compensation to cover loss of land value, loss or damage or expenses incurred in certain circumstances, or any acquisition of property that may occur;
- merits review by the Administrative Appeals Tribunal of decisions to refuse to grant an approval or to grant an approval on conditions, and directions in relation to the removal, marking, lighting, screening, modification or relocation of a building, structure or object.

6. The new scheme for defence aviation areas is substantially the same as the scheme that was previously provided for in the *Defence (Areas Control) Regulations 1989*. There have, however, been some enhancements:

- Defence aviation areas are declared in separate legislative instruments, rather than being defined in schedules to the regulations. This enables greater flexibility in adjusting boundaries and height restrictions as required.
- The regulations now deal with the use of hazardous objects, not just bringing or having hazardous objects. Many objects only become hazardous to aviation when they are used (such as firearms or drones), while others (such as a construction crane) may be hazardous simply by being present in the area.
- The regulations now include an approval process for buildings, structures and objects that generate air turbulence or plumes above the relevant height restrictions, even if the building itself does not exceed the height restrictions. While a building or object that generates hazardous air turbulence or plumes can be regulated as a hazardous object, including this new approval process encourages developers and others to consider these issues as early as possible.
- There is now power to direct the removal, marking, lighting, screening, modification or relocation of a building, structure or object with less than 28 days notice if it constitutes or contributes to a serious and imminent risk to aviation.
- Compliance with provisions of the regulations can be monitored using the standard provisions in Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014*, as modified by section 117AF of the Act. The previous regulations included broad powers to enter properties to ensure compliance with the regulations, without any limitations on those powers (for example, there was no requirement to obtain a warrant or the consent of an occupier, as will now be the case).
- Offences have been reviewed to ensure that the appropriate person can be prosecuted. Strict liability has been removed from most offences, and retained only where necessary to ensure the offence can be effectively prosecuted.

- The compensation provisions have been simplified, in line with similar compensation provisions dealing with defence areas under Part 11 of the Regulation.

Authority for *Defence Amendment (Defence Aviation Areas) Regulations 2018*

7. Without limiting the regulation-making power in section 124, new section 117AD of the Act provides that the regulations may prescribe matters providing for and in relation to:

- the regulation or prohibition of the construction or use of buildings, structures or objects within defence aviation areas
- the regulation or prohibition of the bringing of objects into, or having objects within, defence aviation areas
- the removal, marking, lighting, screening, modification or relocation of buildings, structures or objects within defence aviation areas.

8. Subsections 117AE(1) and (2) of the Act provide for regulations made under section 117AD to prescribe certain provisions in the regulations as being subject to monitoring under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014*.

9. Paragraph 124(1)(w) provides for penalties, not exceeding 20 penalty units, for offences against the regulations.

Operation of the *Defence Amendment (Defence Aviation Areas) Regulations 2018*

10. Attachment A provides a provision-by-provision description of the operation of the Amending Regulations.

Legislative instrument

11. The Amending Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

12. The Amending Regulations commence at the same time as Part 2 of Schedule 1 to the *Defence Legislation Amendment (Instrument Making) Act 2017* commences. The commencement of that Act has been fixed by proclamation as being 26 March 2018.

Consultation

13. The Attorney General's Department and the Department of Infrastructure, Regional Development and Cities were consulted on the proposed Regulations and agreed that they were appropriate. There was a comprehensive review of the 1989 Regulations by Defence which identified a number of enhancements to enable the proposed Regulations to work more effectively for both Defence and the public. Because the proposed Regulations do not change the current scheme in a manner which disadvantages persons whose property might be affected, there was no consultation of the public.

14. The Amending Regulations were drafted by the Office of Parliamentary Counsel.

Attachments

A: Provisions in *Defence Amendment (Defence Aviation Areas) Regulations 2018*

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Defence Amendment (Defence Aviation Areas) Regulations 2018

1. These Regulations are 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 Regulations

2. The *Defence Amendment (Defence Aviation Areas) Regulations 2018* (the Amending Regulations) amend the *Defence Regulation 2016* (the Regulation) and repeal the *Defence (Areas Control) Regulations 1989*. New Part 11A is inserted in the Regulation which, together with Part IXD of the *Defence Act 1903* (the Act) and declarations made under that part, replace the content of the *Defence (Areas Control) Regulations 1989*. The *Defence (Areas Control) Regulations 1989* were scheduled to sunset on 1 April 2018.

3. New Part 11A of the Regulation helps prevent and reduce hazards to defence aviation by:

- providing for an approval process for the construction and use of buildings, structures and objects in defence aviation areas that are taller than the relevant height restrictions, or are otherwise hazardous to aviation;
- creating offences for people who construct or use buildings, structures and objects otherwise than in accordance with approvals;
- enabling the Minister to give directions for the removal, marking, lighting, screening, modification or relocation of buildings, structures or objects that are hazardous to aviation;
- prescribing certain provisions as being subject to the monitoring powers in Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act), as modified by section 117AF of the Act;
- providing for compensation for diminution of land value, loss or damage in certain circumstances, and on just terms in the event anything amounts to an acquisition of property;
- enabling merits review by the Administrative Appeals Tribunal of decisions relating to approvals or directions to remove, mark, light, screen, modify or relocate a building, structure or object.

Human rights implications

4. The Amending Regulations engage the following human rights:

- Right to privacy (Article 17 of the ICCPR)

- Right to life (Article 6 of the International Covenant on Civil and Political Rights (ICCPR))
- Prohibition against torture, cruel, inhuman or degrading treatment (Article 7 of the ICCPR)
- Right to be presumed innocent (Article 14(2) of the ICCPR)

Right to privacy

5. Section 68P operates with subsection 117AE(1) of the Act to make certain provisions in the Regulation subject to monitoring under Part 2 of the Regulatory Powers Act, as modified by section 117AF of the Act. Section 68Q operates with subsection 117AE(2) of the Act to make certain provisions in the Regulation subject to monitoring under Part 2 of the Regulatory Powers Act. The effect of sections 68P and 68Q is to give an authorised person power to enter premises with a warrant or by consent to ensure compliance with the provisions listed in section 68P, and to determine whether the information given in applications for approval under provisions listed in section 68Q is correct. The authorised person's powers include:

- Examining or observing any activity conducted on the premises
- Inspecting, examining, taking measurements or conducting tests on any thing on the premises
- Inspecting any document on the premises
- Asking questions and, if entry was under a warrant, requiring any person on the premises to answer any questions
- Taking any action, including removing, destroying or modifying a building, structure or object, in order to ensure compliance with one of the provisions listed in section 68P.

6. For example, an authorised person could enter premises by consent or under warrant and remove a building taller than the relevant height restrictions if the building was constructed without approval (to ensure compliance with section 68C), or to apply markings to a building in accordance with a notice given under section 68M if the person has not complied with the notice themselves.

7. The exercise of these powers is a limitation on the right to privacy, as it enables intrusion into a person's home and private life. The limitation is, however, reasonable, necessary and proportionate in pursuit of a legitimate objective.

8. The application of the modified monitoring powers to the provisions listed in sections 68P and 68Q is essential to the effective operation of the defence aviation area scheme, which has been enacted in pursuit of the legitimate objective of ensuring the safety of defence aviation. They provide a mechanism to deal with hazardous buildings, structures and objects if people are unwilling to comply with requirements themselves.

9. In practice, use of the monitoring powers would be rare. In the vast majority of cases, Defence is able to reach agreement with landowners in relation to aviation hazards. However, there may be situations where an authorised person may need to enter premises to inspect or remove a hazard against the wishes of the occupant. For example, a crane operator may be under pressure from a client or time clauses in a contract, so may not wish to have their crane lowered to a safe level at the times specified in an approval condition. A landowner may refuse to remove obstacles that have been erected without approval.

10. The availability of the modified monitoring powers ensures that these types of hazards can be dealt with, notwithstanding the refusal of individuals to comply. In addition, the existence of these powers, even though used infrequently, provides incentive to people to act cooperatively and reach an agreement with Defence about potential hazards on their properties.

11. There are a number of safeguards in place which ensure that the intrusion on privacy is limited. For example:

- Only an authorised person, or a person assisting the authorised person, can enter premises under a monitoring warrant. An authorised person is a defence aviation area inspector, who is a person appointed by the Secretary or Chief of the Defence Force after being satisfied that the person has the knowledge, training or experience to properly exercise their powers. This would include appropriate knowledge, training or experience to properly exercise the modified monitoring powers.
- The authorised person can only enter premises by consent or under a warrant issued by a magistrate. Previously, under the *Defence (Areas Control) Regulations 1989*, entry onto premises was permitted with the authorisation of the Minister (or delegate) – there was no requirement to obtain a warrant or consent.
- The provisions that are subject to monitoring are all directly targeted at removing or reducing hazards to aviation. The monitoring powers cannot be used for any other purpose.

12. Accordingly, the operation of sections 68P and 68Q, which work to trigger the monitoring powers in Part 2 of the Regulatory Powers Act, as modified by section 117AF of the Act, are reasonable, necessary and proportionate to the pursuit of a legitimate objective.

Right to life; prohibition against torture, cruel, inhuman or degrading treatment

13. One aspect of the modified monitoring powers is the power in subsection 117AF(3) of the Act for the authorised person to use such force against persons and things as is necessary and reasonable in the circumstances. The ability to use force against the person raises the question of whether there is any interference with the right to life or the prohibition against torture, cruel, inhuman or degrading treatment. As the monitoring powers are available because of the operation of section 68P of the Regulation, these rights are addressed here, even though the use of force provision is in the Act.

14. When using the modified monitoring powers to remove a hazardous object, it may be necessary to use force against a person who is interfering in that removal. For example, if a

landowner is physically trying to prevent an authorised person from dismantling an obstacle or lopping a hazardous tree, it may be necessary to physically remove or restrain that person in order to safely undertake that action. There are several reasons why such use of force is extremely unlikely to limit either the right to life or the prohibition against torture, cruel, inhuman or degrading treatment.

- Under subsection 117AF(3) of the Act, only an authorised person may use force against a person. Before appointing a defence aviation area inspector (who is an authorised person), the Secretary or the Chief of the Defence Force must be satisfied that the person has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector. Since those powers include power to use necessary and reasonable force, this would include having the knowledge, training or experience necessary to properly exercise the power to use force.
- Use of force is limited to what is necessary and reasonable. Factors that may be relevant in determining what is reasonable include the urgency of the aviation situation, other avenues available to remove or reduce the hazard, the effect not removing or reducing the hazard will have on safety or operational requirements, and the particular circumstances of the person in question (for example, any attributes that suggest the person is particularly vulnerable). Apart from a situation involving self-defence, it is difficult to imagine a scenario which would justify the deliberate use of lethal force or force that would cause serious injury to a person. If an authorised person uses force beyond what was necessary and reasonable, they would be subject to the ordinary criminal law, and could be investigated and prosecuted in the same way as any other person. A person subjected to the use of force would be able to report to the police or complain to Defence.
- Authorised persons will not be armed, and their capacity to use force is therefore limited. In practice, in a scenario where a person is interfering with the ability of an authorised person to remove or reduce a hazard in accordance with a monitoring warrant, it is far more likely that the authorised person will request police assistance rather than attempt to use force themselves.

15. Accordingly, there is no limitation in the Amending Regulations on the right to life or the prohibition against torture, cruel, inhuman or degrading treatment.

Presumption of innocence

16. Strict liability applies to some elements of the offences in sections 68C and 68D of the Regulation, which raises the question of whether these provisions limit the presumption of innocence. Strict liability allows for the imposition of criminal liability without the need to prove fault in relation to some elements of the offence, although the defence of mistake of fact remains available to a defendant.

17. Under sections 68C and 68D, it is an offence to construct a building, structure or object in a defence aviation area that is either taller than the relevant height restriction (section 68C) or will generate plumes or air turbulence above the relevant height restriction

(section 68D), unless the Minister has given approval for the building, structure or object. The application of strict liability means that it is not necessary to prove a fault element in relation to: whether the area is a defence aviation area, whether the building, structure or object (or associated plumes or air turbulence) exceeds the relevant height restrictions, or that there is no Ministerial approval in place.

18. Applying strict liability to these offences is reasonable, necessary and proportionate in pursuit of a legitimate objective.

19. The purpose of these provisions is to further the safety of defence aviation by deterring people from constructing buildings, structures and objects that exceed certain height requirements without an approval. This is a legitimate objective, as it is focussed on the safety of aircrew and passengers, as well as people on the ground.

20. Requiring proof of a fault element (likely recklessness) for each element of these offences would make successful prosecution extremely difficult, undermining their usefulness as a mechanism to support aviation safety. Applying strict liability is reasonable, necessary and proportionate in pursuit of a legitimate objective. The equivalent offence in the previous *Defence (Areas Control) Regulations 1989* also included strict liability elements.

21. Applying strict liability means that the onus is on the person to inform themselves of planning requirements before building. Defence has taken a number of actions to ensure that people are readily able to determine their obligations under these regulations. For example:

- Maps of defence aviation areas, including in interactive and accessible formats, will be available the Defence website, together with guidance on how to apply for approvals and other information about, for example, hazardous objects.
- Defence has been working with (and will continue to work with) local councils and other planning authorities who receive planning and building applications. When a proposed development in a defence aviation area is likely to exceed the relevant height restrictions, the person will typically be advised of the additional defence requirements and may be referred to Defence.

22. The offence does not apply if the Minister has given approval for the construction. Approval applications are assessed on a case by case basis, and the only available reason for refusing an application is for the purpose of preventing or reducing hazards to aircraft or aviation-related communications, navigation or surveillance.

23. The maximum penalty (20 penalty units) for the offence is consistent with the Attorney-General's Department Guide to Framing Commonwealth Offences, Infringement Powers and Enforcement Powers, as it relates to strict liability offences.

Conclusion

24. The Amending Regulations are compatible with human rights. Limitations on the right to privacy and the presumption of innocence are to achieve legitimate objectives, and are reasonable, necessary and proportionate to achieve those objectives. The Amending Regulations do not limit the right to life or the prohibition against torture, cruel, inhuman or degrading treatment.

Darren Chester
Minister for Defence Personnel

ATTACHMENT A – PROVISIONS IN *DEFENCE AMENDMENT (DEFENCE AVIATION AREAS) REGULATIONS 2018*

Section 1 – Name

1. Section 1 provides for the Amending Regulations' name: *Defence Amendment (Defence Aviation Areas) Regulations 2018*.

Section 2 – Commencement

2. Section 2 provides for the Amending Regulations to commence at the same time as Part 2 of Schedule 1 to the *Defence Legislation Amendment (Instrument Making) Act 2017* commences. That Act inserts new Part IXD – Defence aviation areas in the *Defence Act 1903* (the Act), which provides authority for the Amending Regulations. The relevant Part of that Act commences on a day to be fixed by proclamation, which has been proclaimed to be 26 March 2018.

Section 3 - Authority

3. Section 3 provides that the Amending Regulations are made under the *Defence Act 1903*.

Section 4 - Schedules

4. Section 4 provides that instruments specified in a Schedule to the Amending Regulations are amended or repealed as set out in the Schedule. Other items in a Schedule to the Amending Regulations have effect according to their terms. This section, together with Schedule 2, operates to repeal the *Defence (Areas Control) Regulations 1989*.

Schedule 1 – Amendments

5. Schedule 1 provides for amendments to the *Defence Regulation 2016* (the Regulation), including the insertion of new definitions, insertion of new Part 11A, and insertion of transitional provisions.

Item 1 – Subsection 6(1)

6. This item inserts several new definitions in section 6 of the Regulation.
- 'Air turbulence' is defined as a movement of air with an upward vertical velocity of 4.3 metres per second. The concept of 'air turbulence' is a new one – it is used in several sections in new Part 11A in the context of buildings, structures or objects that generate air turbulence above the relevant height restrictions. The definition is based on the level of air turbulence provided for in regulation 6A of the Airports (Protection of Airspace) Regulations 1996.
 - 'Decision' has the same meaning as in the Administrative Appeals Tribunal Act 1975. This is identical to the definition that was in the Defence (Areas Control) Regulations 1989. The term is used in the provision providing for merits review by the Administrative Appeals Tribunal.
 - 'Interest', in relation to land, has the same meaning as in the Lands Acquisition Act 1989. This means any legal or equitable estate or interest in land, a restriction on the

use of land, or any other right, charge, power or privilege over or in connection with land. This is a slightly broader definition than was used in the Defence (Areas Control) Regulations 1989. The new definition has been included to enhance consistency with other Commonwealth laws. The term is used in the provisions dealing with compensation.

- ‘Ministerial declaration’ refers to a declaration made by a Minister under section 117AC of the Act, declaring an area to be a defence aviation area.
- ‘object’ includes trees, other natural obstacles, buildings, vehicles, vessels and machines. This is not an exhaustive list of all the things that can be objects for the purposes of the regulations – objects such as firearms, which would not necessarily fall within one of the items on this list, are included.
- ‘Regulatory Powers Act’ means the Regulatory Powers (Standard Provisions) Act 2014.

Item 2 – Subsection 57(2)

7. This item makes a minor grammatical correction to subsection 57(2) of the Regulation. The Amending Regulations provided a convenient opportunity to make this correction.

Item 3 – After Part 11

8. This item inserts new Part 11A – Defence aviation areas after Part 11 of the Regulation. Part 11A consists of new sections 68A to 68T.

Division 1 – General

Section 68A – Application

9. New section 68A provides that Part 11A is made for the purposes of Part IXD of the Act. This makes it clear that the new provisions have no application except in relation to defence aviation areas declared under Part IXD.

Section 68B - Interpretation

10. New section 68B provides some definitions that apply in Part 11A:

- A reference to the height of an object is to be read as a reference to the height of the highest point of the object above the lowest point of the natural ground level of the land covered by the object (paragraph 68B(a)). This is identical to a provision in the Defence (Areas Control) Regulations 1989.
- A reference to the height of an object at sea is to be read as a reference to the height of the highest point of the object above mean sea level (paragraph 68B(b)). This is a new provision that has been added because a defence aviation area can be declared in relation to an area of sea (subsection 116AC(1) of the Act).
- A reference to constructing a building, structure or object includes references to causing or permitting a building, structure or object to be constructed, altered or extended, or bringing a building, structure or object into a defence aviation area

(paragraph 68B(c)). This substantially replicates a provision in the Defence (Areas Control) Regulations 1989.

- A reference to marking or lighting a building, structure or object is to be read as a reference to marking or lighting a building, structure or object so that the existence of the building, structure or object can be recognised by day and by night from an aircraft (paragraph 68B(d)). This substantially replicates a provision in the Defence (Areas Control) Regulations 1989.
- A reference to an object hazardous to aircraft or to aviation-related communications, navigation or surveillance is to be read as a reference to an object: that is, or may become, an obstacle or hazard to aircraft; that interferes, or may interfere, with the control of aircraft; or that interferes, or may interfere, with aviation-related communications, navigation or surveillance required for the control of aircraft or for the defence of Australia (paragraph 68B(e)). This substantially replicates a provision in the Defence (Areas Control) Regulations 1989.

Division 2 – Requirements in relation to defence aviation areas

11. This Division includes the key provisions dealing with approval processes for constructing buildings, hazardous objects, and with the removal or marking of buildings, structures or objects if they are hazardous.

Subdivision A – Construction of buildings, structures and objects

12. This subdivision outlines offences and an approval process related to constructing buildings, structure and objects that are taller than the relevant height restrictions, or that generate plumes and air turbulence above the relevant height restrictions.

Section 68C – Construction of buildings, structures and objects in defence aviation areas above specified height restrictions

13. This section establishes an offence if all of the following occur:
- a. A person constructs a building, structure or object within an area (paragraph 68C(1)(a))
 - b. The area is a defence aviation area (paragraph 68C(1)(b))
 - c. The building, structure or object exceeds the height restriction applying to it within the defence aviation area, as specified in the Ministerial declaration for the defence aviation area (paragraph 68C(1)(c))
 - d. The person does not have a valid approval under section 68F to construct the building, structure or object at a height that exceeds the height restriction. (paragraph 68C(1)(d)).
14. The maximum penalty for this offence is 20 penalty units, which is the maximum penalty that can be provided for in regulations under the Act (paragraph 124(1)(w) of the Act).

15. This offence is one of several mechanisms in the regulations to ensure that construction in defence aviation areas is not hazardous to aviation, and is an important measure to support safety in defence aviation. It does not prohibit construction above the declared height restrictions with approval, which will be considered on a case by case basis having regard to the safety implications of a particular application. The offence also does not prohibit construction below the declared height restrictions.

16. Strict liability applies in relation to the elements in paragraphs (b), (c) and (d). This means that, to prove the offence, it is not necessary to prove a fault element (recklessness) in relation to: whether the area was a defence aviation area, whether the building exceeded the height restriction, and whether there was no valid approval. Requiring proof of each of these fault elements would make a successful prosecution of this offence extremely difficult, which would undermine the usefulness of this offence as a mechanism in support of aviation safety. The maximum penalty for the offence is consistent with Attorney-General's Department Guide to Framing Commonwealth Offences, Infringement Powers and Enforcement Powers.

17. Applying strict liability means that a person is responsible for informing themselves of the requirements before beginning construction, and obtaining approval if necessary. Defence has taken a number of actions to ensure that people can readily access information about defence aviation areas. For example:

- Maps of defence aviation areas, including in interactive and accessible formats, will be available on the Defence website, together with guidance on the requirements for approval applications and information about hazardous objects. Defence's website (including in interactive and accessible formats).
- Defence has is working with, and will continue to work with, local councils and other planning authorities. If a person applies for a building or development permit with the local council, the council will advise them that they may be subject to limitations associated with the defence aviation area, and will typically refer them to Defence.

18. The offence in section 68C is substantially the same as the offences that were previously in regulations 3 to 7 of the Defence (Areas Control) Regulations 1989.

Section 68D – Construction of buildings, structures and objects in defence aviation areas that generate plumes or air turbulence above specified height restrictions

19. This section establishes an offence if all of the following occur:

- a. A person constructs a building, structure or object within an area (paragraph 68D(1)(a));
- b. The area is a defence aviation area (paragraph 68D(1)(b))
- c. The building, structure or object generates plumes or air turbulence, or causes plumes or air turbulence to be generated, above the height restriction applying to the building, structure or object within the defence aviation area (paragraph 68D(1)(c))
- d. The person does not have a valid approval under section 68E to construct the building, structure or object (paragraph 68D(1)(d)).

20. The maximum penalty for this offence is 20 penalty units.

21. This offence deals with a situation where the hazard to aviation comes not from the structure itself, but from plumes and air turbulence that are generated as part of its operation. The ordinary meaning of ‘plume’ applies here – relevantly including a stream of smoke or vapour issuing from a stack and blown by the wind, or a flow of matter, especially waste material or other pollutant, spreading from a source. Plumes can affect visibility, creating a hazard to aviation. Air turbulence, which is defined in section 6 of the Regulation, can interfere with the safe operation of aircraft. This offence could apply, for example, if the height of a proposed factory building would be less than the applicable height restriction, but plumes that would be generated when the factory is in operation would rise to heights above the height restriction, potentially creating a hazard. Similarly, a wind turbine might itself be shorter than the applicable height restriction, but it may generate air turbulence at the defined level that goes above the height restriction, potentially creating a hazard. Plumes and air turbulence that do not reach the relevant height restriction are not affected by this section.

22. Plumes and air turbulence that constitute aviation hazards can also be managed after construction by the operation of the hazardous objects provisions in sections 68H to 68L, or by directions made under sections 68M and 68N. However, including this offence, and outlining an application process, encourages developers and others to consider potentially hazardous emissions earlier in the process. Section 68D does not preclude a situation where a building or structure may generate plumes or air turbulence above the relevant height restriction. Applications for approval will be considered on a case by case basis, having regard to the safety implications of the particular proposal.

23. The offence in section 68D mirrors the structure of the offence in section 68C, including the application of strict liability to paragraphs (b), (c) and (d).

Section 68E – Applications for approval

24. This section provides a process for a person to apply to the Minister for approval to construct buildings, structures and objects taller than the relevant height restrictions (paragraph 68E(1)(a)). It also provides a process to apply to the Minister for approval to construct buildings, structures and objects that are likely to generate plumes or air turbulence above the relevant height restrictions (paragraph 68E(1)(b)).

25. Subsection 68E(2) outlines the requirements for an application:

- It must be in writing and signed by or on behalf of the applicant (paragraph 68E(2)(a)).
- It must be given to the Minister (paragraph 68E(2)(b)).
- It must specify the height of the proposed building, structure or object (paragraph 68E(2)(c)).
- It must state the proposed purpose of the building, structure or object (paragraph 68E(2)(d)).
- It must state whether any object hazardous to aviation is proposed, or likely, to be brought into the area in connection with the proposed building, structure or object

(paragraph 68E(2)(e)), and specify the height of those objects (paragraph 68E(2)(f)). This would include objects associated with the construction process (such as a construction crane).

- It must be accompanied by plans, including elevation views, that show the shape, size, position, geographic coordinates and material of the building, structure or object, and the contours of the land on which it is to be constructed (paragraph 68E(2)(g)).
- It must include a detailed description of any measures that will be taken to prevent or reduce hazards to aviation that may be caused by the building, structure or object (paragraph 68E(2)(h)).
- If the building, structure or object is likely to generate plumes or air turbulence above the relevant height restrictions, the application must include a detailed description of the likely plumes and air turbulence and measures to prevent or reduce hazards to aviation that they may cause (paragraph 68E(2)(i)).

26. This detailed list of requirements for approval applications ensure that the onus and expense is on applicants to gather and produce the necessary information to make a decision about an approval application. It is not the Minister's or Defence's responsibility to, for example, pay for expert reports modelling likely plumes or air turbulence that will be generated by the proposed building – this is part of the applicant's responsibility.

27. If necessary, the Minister may seek further information from an applicant by notice in writing (subsection 68E(3)). The Minister is not required to consider, or further consider, an application until the further information requested has been provided (subsection 68E(4)).

Section 68F – Grant or refusal of approval

28. An application for approval may be granted or refused, by instrument in writing (subsection 68F(1)). The instrument granting or refusing an application is not a legislative instrument. A decision to grant an approval may be subject to conditions the Minister considers necessary for preventing or reducing hazards to aviation (subsection 68F(2)).

29. Subsection 68F(3) lists some types of conditions that may be included in an approval:

- The position, shape, size or height of a building, structure or object
- The manner of its construction
- The materials of which the building, structure or object is to be constructed
- The purpose for which it may be used
- The manner in which it is to be marked
- The height of any apparatus used in construction, and how that apparatus is to be marked.

30. This is not an exhaustive list of the types of conditions that could be included. Other conditions might relate to periods when particular construction apparatus can be used, or requirements to notify Defence ahead of using particular construction apparatus. The conditions are to be specified in the approval (subsection 68F(4)).

31. The only reason for refusing to grant approval, or imposing conditions on approval (either at the outset or through subsequent variations), is for the purpose of preventing or

reducing hazards to aircraft or aviation-related communications, navigation or surveillance (subsection 68F(5)).

Section 68G – Conditions of approval to be complied with

32. This section provides for an offence if a person fails to comply with a condition on an approval. The maximum penalty for the offence is 20 penalty units.

33. This offence is similar to the offence that was previously in regulation 11 of the Defence (Areas Control) Regulations 1989. However, that offence only applied to the person who was granted approval, and was an offence of strict liability. Limiting the offence to the person who was granted approval was problematic, noting that there may be multiple parties involved in the construction. Accordingly, the offence in section 68G applies to any person, regardless of whether they were the applicant who obtained the approval. Since strict liability has been removed, it will be necessary to establish that a person was reckless as to the existence of the condition to prove the offence.

Subdivision B – Hazardous objects

34. This subdivision provides offences and an approval process for objects that are hazardous to aviation, even if they are not taller than the relevant height restrictions.

Section 68H – Hazardous objects

35. This section provides for offences in relation to bringing, having or using hazardous objects in defence aviation areas.

36. It is an offence for a person to bring into a defence aviation area, or have within a defence aviation area, an object that is hazardous to aviation, unless the person has a valid approval under section 68K (subsection 68H(1)). This offence covers objects that could be inherently hazardous, such as tall or reflective objects that may interfere with the safe operation of aircraft without being used in any way.

37. It is also an offence for a person to use an object in a defence aviation area in a manner that is hazardous to aviation without a valid approval (subsection 68H(2)). This offence covers objects that are hazardous when used – such as firearms or drones.

38. The maximum penalty for each offence is 20 penalty units.

39. The first of these two offences is based on the offence in regulation 12 of the Defence (Areas Control) Regulations 1989. The second offence, relating to use of an object, has been added to remove any doubt that using an object in a hazardous way was covered by the offence.

40. The previous offence was also an offence of strict liability, which is no longer the case. The terms ‘hazard’ and ‘hazardous’ are not defined in either the Act or the Regulation, and it would not always be obvious to a person that a particular object, or the way it is being used, is hazardous to aviation. Removing strict liability means that there is a fault element of recklessness in relation to the circumstance of whether an object or its use is hazardous to aviation. This means it would be difficult to prosecute someone who inadvertently caused a hazard of this nature in a way that was not widely known to be hazardous to aviation.

Recklessness would be more apparent in cases where a person had previously been warned that the object or its use is hazardous (for example by being sent a notice under section 68M or 68N), or where the object or its use was obviously hazardous (such as firing weapons into the air).

Section 68J – Applications for approval

41. This section establishes a process for applying to the Minister for approval to bring in, have or use a hazardous object in a defence aviation area (subsection 68J(1)). The application is to be in the form approved by the Minister, and must contain the information required by the form (subsection 68J(2)). This flexible approach to the form of the application, as compared to the detailed requirements listed in subsection 68E(2)), means that application requirements can be easily modified to take account of commonly occurring hazards.

42. The Minister may require an applicant to provide further information that is reasonably required to properly consider the application (subsection 68J(3)), and is not required to consider, or further consider, the application until the further information is provided (subsection 68J(4)).

Section 68K – Grant or refusal of approval

43. The Minister may grant or refuse to grant an application for approval, by instrument in writing (subsection 68K(1)). This instrument is not a legislative instrument. The Minister may impose conditions on an approval (subsection 68K(2)), which must be specified in the approval instrument (subsection 68K(4)). Subsection 68K(3) is a non-exhaustive list of the types of conditions that might be imposed:

- The time when an object may be brought into the defence aviation area
- The period during which an object may remain in a defence aviation area
- The position, shape or size of the object
- The purpose for which an object may be used
- The manner in which an object may be used
- The times when an object may be used
- The manner in which an object may be marked.

44. The only reason the Minister may refuse to grant approval, or impose conditions on approval (either at the outset or through variations at a later date), is to prevent or reduce hazards to aircraft or aviation-related communications, navigation and surveillance.

Section 68L – Conditions of approval to be complied with

45. This section establishes an offence if a person fails to comply with the condition of an approval in relation to a hazardous object. The maximum penalty for the offence is 20 penalty units. This offence mirrors the offence in section 68G.

Subdivision C – Buildings, structures or objects may be removed or marked etc.

46. This subdivision provides a process for giving directions to remove, mark, light, screen, modify or relocate buildings, structures or objects in a defence aviation area that are hazardous to aviation, with associated offences for failing to follow directions. In addition to

providing a mechanism to remove or mark etc. hazardous objects, the existence of these powers is an important deterrent – for example, some people might be willing to incur the penalties associated with constructing a building that is higher than the relevant height restriction, but may be less willing to incur the expense of removing or modifying the building.

Section 68M – Removal or marking etc. of buildings, structures or objects

47. This section provides that the Minister may give directions, by notice in writing, for the removal (in whole or in part) of a building, structure or object in a defence aviation area (paragraph 68M(1)(d)), or for the marking, lighting, screening, modification or relocation of a building, structure or object in a defence aviation area (paragraph 68M(1)(e)). A notice may be given in any of the following circumstances:

- There is a building, structure or object that exceeds the relevant height restriction (paragraph 68M(1)(a))
- There is building, structure or object that generates plumes or air turbulence above the relevant height restriction (paragraph 68M(1)(b))
- There is any other object that constitutes or may constitute a hazard to aircraft operating in, or in the vicinity of the defence aviation area, or to aviation-related communications, navigation or surveillance (paragraph 68M(1)(c)).

48. The notice must specify the time within which it must be complied with, which must be reasonable in all the circumstances (subsection 68M(3)). The time specified in a notice relating to removal of a building, structure or object must be at least 28 days (paragraph 68M(1)(d)).

49. The Minister may only give a direction under this section if reasonably satisfied that it is necessary to do so for the purpose of preventing or reducing hazards to aircraft or aviation-related communications, navigation surveillance (subsection 68M(2)). A direction may be given regardless of whether the building, structure or object was previously the subject of an approval under section 68F or section 68K (subsection 68M(4)). So, for example, the construction of a building taller than the height restriction may have been approved, but at a later date the existence of that building proves to be hazardous to aviation. It is expected that this scenario would be extremely rare, but might be necessary if there is a necessary change to the way aircraft operate in a defence aviation area. This type of scenario would also trigger the compensation provision in section 68R.

50. The notice may be given to any person the Minister reasonably believes occupies, or has an interest in, the land on which the building, structure or object is situated (subsection 68M(5)), but must not be given to a person unless it is reasonable that they be required to comply with it (subsection 68M(6)).

51. Subsection 68M(7) establishes an offence if a person who has been given a notice fails to comply with a direction in the notice within the time specified in the notice. The maximum penalty for this offence is 20 penalty units.

Section 68N – Removal or marking of buildings, structure or objects in urgent situations

52. This section provides for the removal or marking of buildings, structures or objects that constitute, contribute to or result in a serious and imminent risk to aviation (subsection 68N(1)). Notices given under this section have different requirements to those in section 68M in relation to the time specified in the notice, and the person to whom the notice is given.

53. Subsection 68N(2) provides that the Minister may direct, by notice in writing, the removal, marking, lighting, screening, modification or relocation of a building, structure or object within a time specified in the notice. There is no minimum time provided for (compare with paragraph 68M(1)(d)), but the time specified must be reasonable in all the circumstances (subsection 68N(3)). The note to subsection 68N(3) states that the notice may require immediate compliance if the circumstances are sufficiently serious. The notice may only be given to a person if it is reasonable that they be required to comply with it (subsection 68N(4)), but there is no requirement to give it to the occupier or another person with an interest in the land. For example, in an urgent situation, it may be appropriate to give a notice directly to a crane operator who is on site to lower a crane.

54. Subsection 68N(5) establishes an offence if a person who has been given a notice fails to comply with it within the time specified. The maximum penalty for this offence is 20 penalty units.

Division 3 – Monitoring

55. This division prescribes which provisions and information in the regulations are subject to monitoring under Part 2 of the Regulatory Powers (Standard Provisions) Act 2014 (the Regulatory Powers Act), as provided for in section 117AE of the Act.

Section 68P – Provisions subject to monitoring under the Regulatory Powers Act

56. The following provisions are subject to monitoring under Part 2 of the Regulatory Powers Act:

- Section 68C – Construction of buildings, structures and objects in defence aviation areas above specified height restrictions. This section establishes the offence for constructing a building, structure or object taller than the relevant height restriction without approval.
- Section 68G – Conditions of approval to be complied with. This section establishes the offence for failing to comply with a condition of an approval to construct a building, structure or object.
- Section 68H – Hazardous objects. This section establishes the offences for bringing, having or using a hazardous object in a defence aviation area.
- Section 68L – Conditions of approval to be complied with. This section establishes the offence for failing to comply with a condition of an approval relating to a hazardous object.

- Section 68M – Removal or marking etc. of buildings, structures or objects. This section requires people to comply with directions to remove, light, screen, modify or relocate buildings, structures or objects within the time specified in a notice.
- Section 68N – Removal or marking of buildings, structures or objects in urgent situations. This section requires people to comply with directions to remove, light, screen, modify or relocate a building, structure or object within the time specified in the notice.

57. This section operates to make each of the listed sections subject to monitoring under Part 2 of the Regulatory Powers Act. That is, the powers in Part 2 of the Regulatory Powers Act can be used to monitor whether the listed sections have been, or are being, complied with. The monitoring powers in Part 2 of the Regulatory Powers Act include:

- Entering premises by consent or under a warrant
- Examining or observing any activity conducted on the premises
- Inspecting, examining, taking measurements or conducting tests on any thing on the premises
- Making images or any recording of the premises or any thing on the premises
- Inspecting any document on the premises
- Take extracts from, or make copies of, any document on the premises
- Taking equipment and materials as required onto the premises for the purposes of exercising monitoring powers
- Asking questions and, if entry was under a warrant, requiring any person on the premises to answer any questions.

58. Under section 117AF of the Act, the monitoring powers may also be used to ensure compliance with the listed sections, and there is an additional monitoring power to take any action believed necessary to ensure compliance with the listed sections.

59. Accordingly, this section operates to enable an authorised person, by consent or under a warrant, to enter premises to ensure compliance with one of the listed sections, and to take any action believed necessary to ensure compliance. This means, for example, that an authorised person could enter premises by consent or under warrant to remove a building taller than the relevant height restrictions that has been constructed without approval (to ensure compliance with section 68C), or to apply markings to a building in accordance with a notice under section 68M if the person has not complied with the notice themselves.

60. The application of the modified monitoring provisions to the listed sections is essential for the scheme to operate effectively, as it provides a very real incentive to comply with requirements in the first instance. The maximum penalties available for the offences would not always provide a sufficient deterrent, particularly when dealing with developments that may generate millions of dollars in profits.

Section 68Q – Information subject to monitoring under the Regulatory Powers Act

61. The following information is subject to monitoring under Part 2 of the Regulatory Powers Act:

- Information given under section 68E (applications for approval in relation to the construction of buildings, structures or objects)
- Information given under section 68J (applications for approval in relation to hazardous objects).

62. This section operates so that information given by a person in an application for approval (including information given subsequently in response to a request for further information) is subject to the monitoring powers in Part 2 of the Regulatory Powers Act. That is, the powers in Part 2 of the Regulatory Powers Act can be used to monitor whether the information is correct. The modification of the monitoring powers in section 117AF of the Act do not apply in relation to the information provided under the listed sections.

Division 4 – Compensation

63. This division provides for reasonable compensation if there is a loss of land value, if a person has suffered loss or damage, or incurred expense, or if the operation of Part 11A would result in the acquisition of property otherwise than on just terms.

Section 68R – Compensation for diminution of land value, loss or damage

64. This section provides that the Commonwealth is liable to pay a reasonable amount of compensation if:

- The value of land is diminished because the Minister has declared a defence aviation area (paragraph 68R(1)(a)). Ministerial declarations declaring defence aviation areas that are substantially the same as the prescribed areas under the Defence (Areas Control) Regulations 1989 will not result in the value of the land being diminished, so compensation will not be payable in relation to those declarations.
- A person has suffered loss or damage, or incurred expense, as a direct result of the removal of a building, structure or object from a defence aviation area (paragraph 68R(1)(b)). This is limited by subsection 68R(2).
- A person has suffered loss or damage, or incurred expense, as a direct result of the marking or lighting of a building, structure or object (paragraph 68R(1)(c)). This is limited by subsection 68R(2).

65. Subsection 68R(2) provides that compensation in relation to the removal, marking or lighting or building, structure or object is not payable in the following circumstances:

- The building, structure or object was constructed without a valid approval under section 68F (paragraph 68R(2)(a)). That is, compensation will only be available if a person is required to remove, mark or light a building that was built consistently with an approval, or where no approval was required.
- The person brings the object into, or has the object within, a defence aviation area without a valid approval under section 68K (paragraph 68R(2)(b)). That is, compensation will only be available if a person is required to remove an object that was brought into the area with an approval, or where no approval was required (because the object was not always hazardous).

- The person uses the object in a manner that is hazardous to aviation without a valid approval under section 68K (paragraph 68R(2)(c)). That is, compensation will only be available if a person is required to remove an object that was being used consistently with an approval, or where no approval was required (because the use of the object was not always hazardous).
- An approval in force under section 68F or section 68K in relation to the building, structure or object, or a condition of an approval, is contravened (paragraph 68R(2)(d)). That is, if the construction or the use of the object is inconsistent with the approval that has been given – for example a building is constructed taller than was approved under section 68F.

66. Under subsection 68R(3), if the person and Commonwealth do not agree on the amount of compensation, the person may institute court proceedings for the recovery of a reasonable amount determined by the court.

67. This compensation provision covers the same types of loss as in regulations 17 and 18 of the Defence (Areas Control) Regulations 1989. However, the process for claiming compensation has been significantly simplified, and now mirrors the process for claiming compensation in relation to defence areas in Part 11 of the Regulation.

Section 68S – Compensation for acquisition of property

68. This section provides for compensation if the operation of Part 11A would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) otherwise on just terms (subsection 68S(1)). It is unlikely that this section will be required – the operation of Part 11A is unlikely to result in an acquisition of property, and if it does, is likely to be adequately compensated under section 68R. The inclusion of this section is to ensure that, if there is any acquisition of property, Part 11A is consistent with the Constitution.

69. The process for claiming compensation under this section is the same as under section 68R (subsection 68S(2)).

Division 5 – Review of decisions

Section 68T – Review by Administrative Appeals Tribunal

70. This section provides for merits review by the Administrative Appeals Tribunal of certain decisions made under Part 11A. The following decisions can be reviewed by the Administrative Appeals Tribunal:

- A decision to refuse to grant approval to construct a building, structure or object under subsection 68F(1) (paragraph 68T(a))
- A decision to impose a condition on an approval to construct a building, structure or object under subsection 68F(2) (paragraph 68T(b))
- A decision to refuse to grant approval in relation to a hazardous object under subsection 68K(1) (paragraph 68T(c))
- A decision to impose a condition on an approval in relation to a hazardous object under subsection 68K(2) (paragraph 68T(d))

- A direction to remove a building, structure or object under subsection 68M(1) or subsection 68N(2) (paragraph 68T(e))
- A direction to mark, light, screen, modify or relocate a building under subsection 68M(1) or subsection 68N(2) (paragraph 68T(f)).

71. The list of reviewable decisions corresponds to the decisions that were reviewable under the Defence (Areas Control) Regulations 1989. However, under those regulations, compensation decisions were also reviewable by the Administrative Appeals Tribunal. Since the new compensation provisions have been simplified to mirror the compensation process in Part 11 of the Regulation, merits review by the Administrative Appeals Tribunal is no longer available for those decisions.

Item 4 – After subsection 82(1)

72. This item inserts subsection 82(1A) which provides for the Minister to delegate his or her powers under Part 11A. The Minister may delegate to ADF officers at or above the rank of Squadron Leader (or equivalent) and to APS employees at or above the APS6 classification. The delegation levels were determined having regard to the nature of the powers in question, and how they may need to be administered in practice.

73. For administrative purposes (as opposed to the exercise of military command responsibilities), the APS6 classification is treated in Defence as comparable to the military ranks listed in this item. Defence is an increasingly integrated work environment, where ADF members and APS employees work together. Delegated decision-making under Part 11A may be conducted by both ADF members and APS employees, depending on the circumstances.

74. The Minister's powers in Part 11A include: receiving applications in relation to construction or buildings, structures and objects; determining the form of and receiving applications in relation to hazardous objects; requesting further information in relation to an application; approving applications; refusing applications; approving applications with conditions; giving directions in relation to the removal of buildings etc; and giving directions in relation to the marking, lighting, screening, modification and relocation of buildings etc. These are powers that, by their nature, will sometimes be appropriate to make at a local level in relation to a particular defence aviation area, especially where decisions need to be made quickly and having regard to the peculiarities of aviation requirements in that area. Commanders and other staff responsible for the day to day decision-making at defence airfields will often be at the levels outlined in this item, and the ability to delegate to these levels will improve the ability to effectively administer new Part 11A of the Regulation.

Item 5 – Before section 85

75. This item inserts a new division heading before the existing transitional headings in the Regulation. The new heading corresponds to the division heading for the transitional provisions that are added by item 6.

Item 6 – At the end of Part 17

76. This item inserts a series of transitional provisions at the end of the Regulation to ensure a smooth transition from the Defence (Areas Control) Regulations 1989 to the new scheme.

Division 2 – Amendments made by *Defence Amendment (Defence Aviation Areas) Regulations 2018*

77. The new transitional provisions are contained in a new division.

Section 90 – Definitions

78. This section consists of several definitions that apply in relation to the transitional provisions.

- ‘affected land’ has the same meaning as in the Defence (Areas Control) Regulations 1989
- ‘commencement day’ means the day the division commences (which is 26 March 2018)
- ‘old regulations’ means the Defence (Areas Control) Regulations 1989, as in force immediately before the commencement day

Section 91 – Things done by, or in relation, the Minister

79. This section provides that anything done by the Minister under the old regulations is taken to have been done under the Regulation.

Section 92 – Things started but not finished by the Minister

80. This section provides that anything started by the Minister under the old regulations can be finished by the Minister under the Regulation.

Section 93 – Transitional – appeals to the Administrative Appeals Tribunal made, but not determined, before commencement

81. This section provides that, if there are any appeals and applications to the Administrative Appeals Tribunal made under the old regulations which have not yet been determined, the old regulations continue to apply in relation to that appeal or application.

Section 94 – Transitional – applications under old regulations continue to have effect

82. This section provides that, where an application for approval to construct a building, structure or object was made under the old regulations, that application is taken to have been made under new section 68E (provided the relevant land is within a declared defence aviation area and the building, structure or object exceeds the relevant height restriction or will generate plumes or air turbulence above the height restriction).

Section 95 – Transitional – approvals under old regulations continue in force

83. This section provides that, if there was an existing approval in force under the old regulations (including any conditions of approval), the approval is taken to be an approval under new section 68F, provided the relevant land is within a defence aviation area declared by the Minister.

