

## Explanatory Statement

### Civil Aviation Safety Regulations 1998

#### CASA 57/23 – Australian-administered Airspace outside Australian Territory – Temporary TIBA Areas – Directions Instrument 2023

##### Purpose

The purpose of this directions instrument is to facilitate the expeditious declaration of an acceptable form of temporary restricted areas (**TRAs**) in Australian-administered airspace that may be partially outside Australian territory.

The need for such external TRAs is present and ongoing and typically arises when there is unexpected, but unavoidable, temporary air traffic controller absence from an air traffic control (**ATC**) group responsible for providing air traffic services (**ATS**) in specified volumes of Australian-administered airspace.

In these circumstances, for immediate safety purposes, ATC sectors are replaced with an urgent TRA instrument with variation to ATS that imposes traffic information broadcast by aircraft (**TIBA**) procedures on the affected ATC sectors. TIBA procedures, and the access restrictions associated with a TRA, are contingency procedures which are intended to enhance situational awareness and protect against traffic saturation and frequency congestion within the affected airspace volume.

The instrument applies to Australian aircraft.

##### Chicago Convention

While safety restrictions may be imposed (a) on *any aircraft flying inside* Australian territory, and (b) on any *Australian aircraft flying outside* Australian territory, the Convention on International Civil Aviation (the **Chicago Convention**) does *not* permit Australia to have or enforce any flight restrictions on foreign registered aircraft in international airspace. The proposed TRAs and this directions instrument are designed to comply with this limitation and have no application to such foreign registered aircraft.

##### Australian-administered airspace

Australian-administered airspace is airspace allocated to Australia by the International Civil Aviation Organization (ICAO) under the Chicago Convention and for which Australia has accepted responsibility.

Australian-administered airspace includes the airspace over Australian territory and significant volumes of international airspace around Australia, some of which straddles Australian territory and international airspace. Australian territory includes external territories, territorial seas and related airspace.

##### Legislation — declaration designating airspace

Section 15 of the *Airspace Act 2007* (the **As Act**) provides that the Governor-General may make regulations for the As Act prescribing matters necessary or convenient for carrying out or giving effect to the As Act.

Under subsection 11(1) of the As 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 As 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 consequential *Airspace Regulations 2007* (the **AsR**) will be amended effective on and from 30 November 2023 which is when the directions instrument is expressed to commence. Hence, on and from that date, under subregulation 6(1) of the AsR, CASA may make a declaration designating **an area of Australian territory** (up to the 12 nautical miles sea boundary) to be a prohibited area or a **restricted area**.

Under subregulation 6(3) of the AsR, CASA must not declare a restricted area unless, in the opinion of CASA, it is necessary in the interests of public safety (including the safety of aircraft in flight), or for the protection of the environment, or for national security, to restrict the flight of aircraft over the area to aircraft flown in accordance with specific conditions.

Under subregulation 6(5A), CASA may, in writing, make a declaration designating a volume of Australian-administered airspace to be a danger area.

Under subregulation 6(5B), CASA must not declare a volume of airspace to be a danger area unless, in the opinion of CASA, activities dangerous to the flight of aircraft may exist in the area at specified times.

Under subregulation 6(5C), a declaration made under subregulation (5A) may designate a volume of airspace as:

- (a) a type of danger area known as a military operating area (**MOA**), as specified in the declaration; or
- (b) another type of danger area, as specified in the declaration; or
- (c) a danger area of an unspecified type.

Under subregulation 6(5D), if paragraph (5C)(a) or (b) applies, the declaration may (subject to subregulation (5E)):

- (a) impose conditions on the flight of aircraft in the area; and
- (b) specify conditions and classes of aircraft for the purposes of paragraph (a).

Under subregulation 6(5E), conditions on the flight of aircraft in so much of the area as is outside Australian territory may only be imposed in relation to Australian aircraft.

Under subregulation 6(6) and regulation 7 of the AsR, the declaration does not take effect until it is published in the Aeronautical Information Publication (the **AIP**) (for a declaration that is to have effect for longer than 3 months) or in a Notice to Airmen (**NOTAM**) (for declarations of lesser duration). Under subregulation 6(7), the declaration ceases to have effect on the day, event or circumstances specified in the declaration.

Under subregulation 7(3A), a declaration of a danger area that, in accordance with paragraph 6(5C)(a) or (b), specifies the area to be a MOA or another type of area, must set out the conditions in accordance with which the flight of aircraft in the area is permitted. A Note explains that consistent with Australia's international obligations, conditions on the

flight of aircraft in so much of the area as is outside Australian territory may only be imposed in relation to Australian aircraft.

Under subregulations 9(2) and (3) of the AsR, if an area of Australian-administered airspace has been declared under regulation 6 to be a restricted area or danger area, CASA may make a determination that the ATS to be provided for the relevant airspace are at variance with the ATS that would otherwise be provided, and cause details of the services provided to be published in the AIP or NOTAM.

### **Background**

Commencing on 30 November 2023, regulation 6 facilitates the transition of some, but not all, former *extraterritorial* restricted areas to become MOAs in which Australian aircraft (but not foreign registered aircraft) will be subject to entry conditions because of the potential hazard in such areas.

It is recommended that pilots of foreign registered aircraft voluntarily comply with the conditions for the same reason and this has been further emphasised in general explanatory information that CASA has issued for the use of the relevant industry (for example, in Aeronautical Information Circular H41/23).

The balance of the transition process will occur before the end of 27 November 2024.

In the meantime, in the interests of aviation safety, a legal means must be found both to preserve the existence of, and the safety conditions for, the former extraterritorial restricted areas until that transition process is completed.

For permanent military “restricted” areas, until 27 November 2024, this is achieved through deeming such areas to be “notional” restricted areas and enforcing them through directions. Both of these processes are accomplished through the biannual PRD instrument, the current instance of which is *CASA OAR 228/23 – Declarations and Directions in relation to Prohibited, Restricted and Danger Areas, Etc. – Permanent Instrument 2023*.

For temporary “restricted” areas for the application of TIBA procedures mentioned above, this is achieved through purported TRAs enforced through the directions instrument that is the subject of this Explanatory Statement.

### **Legislation — directions**

Section 98 of the *Civil Aviation Act 1988* (the **CA Act**) empowers the Governor-General to make regulations for the CA Act and the safety of air navigation.

Under subregulation 11.245(1) of the *Civil Aviation Safety Regulations 1998* (**CASR**), for subsection 98(5A) of the CA Act, CASA may, by instrument, issue a direction about, among other things, any matter affecting the safe navigation and operation of aircraft.

Under subregulation 11.245(2), CASA may issue such a direction: only if CASA is satisfied that it is necessary to do so in the interests of the safety of air navigation; and only if the direction is not inconsistent with the CA Act; and only for the purposes of CASA’s functions.

Under regulation 11.250 of CASR, a direction ceases to be in force on a day specified in the instrument or, if no day is specified, 1 year after the instrument commences. Under

subregulation 11.255(1), it is an offence to contravene a direction under regulation 11.245 that is applicable to the person.

Under subregulations 2C(1) and 3(2) of the *Civil Aviation Regulations 1988 (CAR)*, regulation 11.245 has, in effect, the extraterritorial application that regulation 6 of the AsR lacks.

### **The directions instrument**

The directions instrument commences on 30 November 2023, and is repealed at the end of 27 November 2024, by which time the remaining military restricted areas will have transitioned to MOAs that may exist extraterritorially and for which conditions may be imposed on Australian aircraft (but not foreign registered aircraft).

Within the same time frame, a new solution will be developed and employed to address the extraterritorial purported TRAs for application of TIBA procedures. This consultative process will be undertaken during the transition period and an enduring solution determined.

The details of the directions instrument are set out in Appendix 1.

### **Legislation Act 2003 (the LA)**

Directions under subregulation 11.245(1) of CASR are “for subsection 98(5A)” of the CA Act, that is, for regulations which empower the issue of certain instruments, like directions, in relation to “(a) matters affecting the safe navigation and operation, or the maintenance, of aircraft”, and “(b) the airworthiness of, or design standards for, aircraft”.

The directions instrument is clearly in relation to matters affecting the safe navigation and operation of aircraft. Under subsection 98(5AA) of the CA Act, a direction issued under paragraph 98(5A)(a), for such matters, is a legislative instrument if it is expressed to apply in relation to a class of persons or a class of aircraft.

The directions apply to the class of aircraft, operators, and pilots in command who may fly in Australian-administered airspace outside Australian territory and it is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

### **Sunsetting**

Under item 5 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, an instrument relating to aviation safety made under regulation 6 or 9 of the AsR is, in effect, exempted from the sunseting provisions under Part 4 of Chapter 3 of the LA.

Under item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, a direction instrument relating to aviation safety made under regulation 11.245 of CASR is, in effect, exempted from the sunseting provisions under Part 4 of Chapter 3 of the LA.

Being such an aviation safety instrument, the directions instrument is, therefore, exempted from the sunseting provisions. In policy terms, this exemption is necessary because the instrument deals with safety matters that, once identified, require a risk response or treatment plan which require a high degree of certainty in the interests of aviation safety. However, although not subject to sunseting, the directions instrument is time limited and expires at the end of 27 November 2024.

### **Incorporations by reference**

Under subsection 98(5D) of the CA Act, the directions instrument may apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing at a particular time, or from time to time.

A non-legislative instrument may be incorporated into a legislative instrument made under the CA Act, as that non-legislative instrument exists or is in force at a particular time or from time to time (including a non-legislative instrument that does not exist when the legislative instrument is made).

Under paragraph 15J(2)(c) of the LA, the Explanatory Statement must contain a description of the incorporated documents and indicate how they may be obtained.

Relevant TRA instruments as they exist from time to time are applied, adopted or incorporated into the directions instrument.

In general terms, TRA instruments, made under regulation 6 of the AsR, are not legislative instruments by virtue of paragraph (a) of item 1 of regulation 7 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. This is because they deal with safety matters that, once identified, require a risk response or treatment plan which requires a high degree of certainty in the interests of aviation safety.

When TRA instruments are made, they are expressed to operate subject to the directions instrument. They must also be NOTAM'ed (proclaimed in a formal notice to aviators) and relevant NOTAM notices also point to the directions instrument.

Although they are non-legislative instruments, despite section 14 of the LA, TRA instruments may be applied, adopted or incorporated into the legislative directions instrument as they are in force or exist from time to time, by virtue of subsection 98(5D) of the CA Act which expressly allows for this.

### **Consultation**

Under section 16 of the CA Act, in performing its functions and exercising its powers, CASA must consult government, industrial, commercial, consumer and other relevant bodies and organisations insofar as CASA considers such consultation to be appropriate.

Under section 17 of the LA, before a legislative instrument is made, CASA must be satisfied that it has undertaken any consultation it considers appropriate and practicable in order to draw on relevant expertise and involve persons likely to be affected by the proposals.

There has been informal consultation with agencies likely to be impacted by the directions instrument, namely, the Department of Defence and Airservices Australia.

Because the operation of the directions instrument is predicated upon the likely, but often unforeseeable, need for offshore TRAs of the kind already mentioned, it is not possible to identify and consult with the range of aircraft operators who may be planning, at some time in the future, to be in particular airspace that may be referenced in a TRA instrument.

CASA is satisfied that the nature, extent, and duration of the consultation it has conducted was appropriate and that no further consultation would be appropriate or necessary in these circumstances.

### **Office of Impact Analysis (OIA)**

Consistent with OIA Guidance, an Impact Analysis is not required for the directions instrument because it is a machinery direction which does not substantially alter existing arrangements and is required under the CA Act and the relevant regulations for the purposes of, and in the course of, their administration by CASA (OIA id: 14507).

### **Sector risk, economic and cost impact**

#### *Economic and cost impact*

Subsection 9A(1) of the CA Act states that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration. Subsection 9A(3) of the CA Act states that, subject to subsection (1), in developing and promulgating aviation safety standards under paragraph 9(1)(c), CASA must:

- (a) consider the economic and cost impact on individuals, businesses and the community of the standards; and
- (b) take into account the differing risks associated with different industry sectors.

The cost impact of a standard refers to the direct cost (in the sense of price or expense) which a standard would cause individuals, businesses, and the community to incur. The economic impact of a standard refers to the impact a standard would have on the production, distribution, and use of wealth across the economy, at the level of the individual, relevant businesses in the aviation sector, and the community more broadly. The economic impact of a standard could also include the general financial impact of that standard on different industry sectors.

Australian aircraft have long been subject to certain offshore airspace access controls. Consistent with the Chicago Convention, foreign registered aircraft are not so subject but, in practice, they generally voluntarily observe the access controls in the interests of aviation safety rather than alter existing practices and routes. Operators are generally familiar with TRA requirements, and operations are adjusted to them without any significant objections or impacts.

#### *Sector risks*

There are no increased, or differential, sector risks arising from the instrument.

### **Regional and remote Australia impacts**

Under paragraph 4(c) of the *Statement of Expectations for the Civil Aviation Safety Authority from 1 July 2023 to 30 June 2025* from the Minister for Infrastructure, Transport, Regional Development and Local Government, the Minister expects CASA to fully consider the impact of new regulations on general aviation, and rural and remote regions.

There are no identified rural and remote impacts that differ in any material way from the general economic and cost impacts described above.

### **Environmental impact**

Under subsection 9A(2) of the CA Act, while regarding the safety of air navigation as the most important consideration, CASA must exercise its powers and perform its functions in a manner that ensures that, as far as practicable, the environment is protected from the effects and associated effects of the operation and use of aircraft.

It is not anticipated there will be any specific negative environmental impacts as a result of the instrument. Thus, the instrument as such will have no specific new effects on the environment.

**Statement of Compatibility with Human Rights**

The Statement in Appendix 2 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the **HR Act**). The directions instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the HR Act and, to the extent that it engages relevant rights, it does so in a reasonable, necessary and proportionate way to promote relevant rights to life, to work and to safe and healthy working conditions.

**Making and commencement**

The instrument has been made by a delegate of CASA relying on the power of delegation under subregulation 11.260(1) of CASR.

The instrument commences on 30 November 2023 and is repealed at the end of 27 November 2024.

## CASA 57/23 – Australian-administered Airspace outside Australian Territory – Directions Instrument 2023 (No. 1)

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### 1 Name

This section names the instrument

### 2 Duration

This section provides for the instrument's commencement and repeal.

### 3 Repeal of instrument CASA 08/23

*CASA 08/23 – Directions – TRAs and TDAs outside Australian Territory – Instrument 2023 (No. 1)* is repealed because it would otherwise remain in force on the same day that the directions instrument commences.

### 4 Definitions

This section provides definitions for some key words and expressions in the instrument, including:

- *Australian-administered airspace*
- *Australian aircraft*
- *Australian territory*
- *external TRA*
- *TIBA area*
- *TRA*
- *TRA instrument.*

### 5 Directions for temporary restricted areas outside Australian territory

Under this section, if an instrument (a **TRA instrument**) issued by CASA's Office of Airspace Regulation (OAR) is expressed as made under either or both of regulations 6 and 9 of the AsR, and purports to create 1 or more temporary restricted areas in Australian-administered airspace outside Australian territory (an **external TRA**), then the operator of an Australian aircraft is directed to comply with the requirements of the TRA instrument and its conditions (if any) as if they applied to the operator while the aircraft is in the external TRA.

A Note explains that this section applies whether or not the TRA instrument also creates temporary restricted areas **inside Australian territory**. Such instruments for temporary areas inside Australian territory are separately valid and enforceable.

A second Note explains that it is an offence under regulation 11.255 of CASR to contravene the direction in section 5.

A third Note explains that there is no requirement for a separate subsection to deal with foreign registered aircraft. If a TRA instrument creates a TRA *inside* Australian territory, then the instrument applies to foreign registered aircraft by force of section 6 of the AsR.

However, if a TRA instrument purports to create 1 or more temporary restricted areas in Australian-administered airspace **outside** Australian territory (an **external TRA**), under the Chicago Convention, as applied by subregulation 3(3) of CAR, the directions instrument has no application to foreign registered aircraft.



For an external TRA as applied by the directions instrument, the operator of a foreign registered aircraft is not required to comply with the requirements (if any) of the instrument while the aircraft is in the external TRA. However, CASA strongly recommends that such operators should comply in the interests of aviation safety, given that the relevant reasons for the declaration of the external TRA may constitute a threat to aviation safety.

## **6 Direction – Airservices Australia – Air Traffic and Aeronautical Information Services**

Under this section, for aircraft operating in, or in the airspace adjacent to, an external TRA of a kind mentioned in section 5, Airservices Australia is directed that, as far as practical, it must provide ATS and aeronautical information services in accordance with the conditions (if any) expressed in the TRA instrument that is for the area, as if the area were a declared restricted area.

## Statement of Compatibility with Human Rights

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

### **CASA 57/23 – Australian-administered Airspace outside Australian Territory – Temporary TIBA Areas – Directions Instrument 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 legislative instrument**

The purpose of this directions instrument is to facilitate the expeditious declaration of an acceptable form of temporary restricted areas (**TRAs**) in Australian-administered airspace that may be partially outside Australian territory.

The need for such external TRAs is present and ongoing, and typically arises when there is unexpected, but unavoidable, temporary air traffic controller absence from an air traffic control (**ATC**) sector responsible for providing air traffic services (**ATS**) in specified segments of Australian-administered airspace.

In these circumstances, for immediate safety purposes, ATC sectors are replaced with an urgent TRA instrument with variation to ATS that imposes traffic information broadcast by aircraft (**TIBA**) procedures on the affected ATC sectors. TIBA procedures, and the access restrictions associated with a TRA, are contingency procedures which are intended to enhance situational awareness and protect against traffic saturation and frequency congestion within the affected airspace volume.

The instrument applies only to Australian aircraft.

#### **Human rights implications**

The directions instrument may engage the following human rights:

- the right to freedom of movement in the air under Article 12 of the *International Covenant on Civil and Political Rights* (the **ICCPR**)
- the right to life under Article 6 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**).

#### *Right to freedom of movement in the air*

The instrument may engage this right for Australian aircraft operators by making access to certain TRAs conditional. However, to ensure conformity with the Chicago Convention, the right is not engaged for foreign registered aircraft in relevant international airspace.

The right is engaged in the interests of the safety of air navigation because of the potential risks arising from short-notice unavailability of ATS in Australian-administered airspace. The operational requirement imposed to operate within a TIBA TRA area, namely, to comply

with TIBA listening watch and broadcast requirements, is not onerous and is relatively easily complied with. Other restrictions may be more onerous, for example, denial of entry, but when that occurs the reason is for the safety of the aircraft already in that airspace.

*Right to life under the ICCPR*

*Right to work and to safe and healthy working conditions under the ICESCR*

The instrument may engage these rights. This engagement is in the context of CASA's statutory purpose. The aim of CASA and its regulatory framework, including in the instrument, is to uphold aviation safety by prescribing appropriate safety rules and practices.

It is, therefore, a threshold requirement for all CASA legislative instruments that they preserve, promote and enhance aviation safety. The instrument promotes the right to life under Article 6 of the ICCPR by legislating for the safe use of threatened or potentially dangerous airspace.

As a consequence of the foregoing, for Article 7 of the ICESCR, the directions instrument will also promote the right to safe and healthy working conditions for pilots of aircraft in the relevant airspace.

For the right to work under Article 6(1) of the ICESCR, the instrument will require aircraft operators and pilots in command to observe the requirements and conditions of TRA instruments. This is reasonably required in the interests of aviation safety, is not an unduly onerous obligation, and it is not expected to result in any change of actual flying practices from those previously followed.

**Human rights implications**

The directions 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.

To the extent that the instrument does engage any of the applicable rights or freedoms, it does so either out of necessity in the interests of aviation safety, or positively to promote the right to life under the ICCPR and the right to safe and healthy working conditions under the ICESCR. Any relevant engagement is considered to be reasonable, necessary and proportionate to the risks the instrument seeks to address.

**Conclusion**

This legislative instrument is compatible with human rights, and to the extent that it engages relevant rights, it does so in a reasonable, necessary and proportionate way.

**Civil Aviation Safety Authority**