



Defence Amendment (Defence Aviation Areas) Regulations 2018

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 15 March 2018

Peter Cosgrove
Governor-General

By His Excellency's Command

Darren Chester
Minister for Defence Personnel

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1 Name

This instrument is the *Defence Amendment (Defence Aviation Areas) Regulations 2018*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	At the same time as Part 2 of Schedule 1 to the <i>Defence Legislation Amendment (Instrument Making) Act 2017</i> commences.	26 March 2018

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Defence Act 1903*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Defence Regulation 2016

1 Subsection 6(1)

Insert:

air turbulence means a movement of air with an upward vertical velocity of 4.3 metres per second.

decision has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

interest, in relation to land, has the same meaning as in the *Lands Acquisition Act 1989*.

Ministerial declaration means a declaration by the Minister under section 117AC of the Act declaring an area to be a defence aviation area.

object includes a tree, any other natural obstacle, a building, vehicle, vessel or machine.

Regulatory Powers Act means the *Regulatory Powers (Standard Provisions) Act 2014*.

2 Subsection 57(2)

Omit “continue”, substitute “continues”.

3 After Part 11

Insert:

Part 11A—Defence aviation areas

Division 1—General

68A Application

This Part is made for the purposes of Part IXD of the Act.

68B Interpretation

For the purposes of this Part:

- (a) a reference to the height of an object on land 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; and
- (b) 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; and
- (c) a reference to constructing a building, structure or object includes a reference to:
 - (i) causing or permitting a building, structure or object to be constructed, altered or extended; or

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- (ii) bringing a building, structure or object into a defence aviation area;
and
 - (d) a reference to the marking or lighting of a building, structure or object is to be read as a reference to marking or lighting the building, structure or object in such manner that the existence of the building, structure or object can be recognised by day and by night from an aircraft; and
 - (e) 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:
 - (i) that is, or may become, an obstacle or hazard to aircraft; or
 - (ii) that interferes, or may interfere, with the control of aircraft; or
 - (iii) that interferes, or may interfere, with aviation-related communications, navigation or surveillance required for the control of aircraft or for the defence of Australia.

Division 2—Requirements in relation to defence aviation areas

Subdivision A—Construction of buildings, structures and objects

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

- (1) A person commits an offence if:
 - (a) the person constructs a building, structure or object within an area; and
 - (b) the area is a defence aviation area; and
 - (c) the building, structure or object exceeds the height restriction applying to the building, structure or object within the defence aviation area as specified in a Ministerial declaration for the defence aviation area; and
 - (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 applying to the building, structure or object.

Penalty: 20 penalty units.

- (2) Strict liability applies to paragraphs (1)(b), (c) and (d).

Note: For strict liability, see section 6.1 of the *Criminal Code*.

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

- (1) A person commits an offence if:
 - (a) the person constructs a building, structure or object within an area; and
 - (b) the area is a defence aviation area; and
 - (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 as specified in a Ministerial declaration for the defence aviation area; and
 - (d) the person does not have a valid approval under section 68F to construct the building, structure or object.

Penalty: 20 penalty units.

- (2) Strict liability applies to paragraphs (1)(b), (c) and (d).

Note: For strict liability, see section 6.1 of the *Criminal Code*.

68E Applications for approval

- (1) A person may apply to the Minister for approval to construct, within a defence aviation area, a building, structure or object that:
- (a) exceeds the height restriction (the **relevant height restriction**) applying to the building, structure or object within the defence aviation area, or part of the defence aviation area, specified in a Ministerial declaration for the defence aviation area; or
 - (b) is likely to:
 - (i) generate plumes or air turbulence above the relevant height restriction; or
 - (ii) cause plumes or air turbulence to be generated above the relevant height restriction.
- (2) An application for approval must:
- (a) be in writing and signed by, or on behalf of, the applicant; and
 - (b) be given to the Minister; and
 - (c) specify the height of the building, structure or object proposed to be constructed; and
 - (d) state the purpose for which the building, structure or object is proposed to be used; and
 - (e) state whether in connection with the building, structure or object any object hazardous to:
 - (i) aircraft; or
 - (ii) aviation-related communications, navigation or surveillance;is proposed, or is likely, to be brought into the defence aviation area; and
 - (f) specify the height of any other objects that may reasonably be expected to be within the defence aviation area in connection with the building, structure or object; and
 - (g) 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 the building, structure or object is to be constructed; and
 - (h) include a detailed description of measures to prevent or reduce any hazards to:
 - (i) aircraft; or
 - (ii) aviation-related communications, navigation or surveillance;that may reasonably be expected to be caused by the building, structure or object; and
 - (i) if the building, structure or object is likely to generate plumes or air turbulence, or to cause plumes or air turbulence to be generated, above the relevant height restriction—include a detailed description of the likely plumes or air turbulence and the measures to prevent or reduce any hazards to:
 - (i) aircraft; or
 - (ii) aviation-related communications, navigation or surveillance;

that may reasonably be expected to be caused by the plumes or air turbulence.

- (3) The Minister may, by notice in writing, require an applicant to provide such further information with respect to an application as is reasonably required for a proper consideration of the application.
- (4) The Minister is not required to consider, or further consider, the application until the further information is provided.

68F Grant or refusal of approval

- (1) The Minister may, by instrument in writing, grant, or refuse to grant, approval to construct a building, structure or object within a defence aviation area.
- (2) An approval may be subject to such conditions as the Minister considers necessary to prevent or reduce hazards to:
 - (a) aircraft; or
 - (b) aviation-related communications, navigation or surveillance.
- (3) Without limiting subsection (2), an approval may be subject to such conditions with respect to any or all of the following:
 - (a) the position of the building, structure or object;
 - (b) its shape, size or height;
 - (c) the manner of its construction;
 - (d) the materials of which it is to be constructed;
 - (e) the purpose for which it may be used;
 - (f) the manner in which it is to be marked;
 - (g) the height of any apparatus to be used in its construction;
 - (h) the manner in which that apparatus is to be marked.
- (4) The conditions must be specified in the approval.
- (5) The Minister must not:
 - (a) refuse to grant approval; or
 - (b) grant approval subject to conditions; or
 - (c) impose, either at the time of approval or by subsequent variation, conditions with respect to the marking or lighting of a building, structure or object;except for the purpose of preventing or reducing hazards to:
 - (d) aircraft; or
 - (e) aviation-related communications, navigation or surveillance.

68G Conditions of approval to be complied with

A person commits an offence if:

- (a) an approval is granted under section 68F; and
- (b) the approval is subject to a condition; and
- (c) the person fails to comply with the condition.

Penalty: 20 penalty units.

Subdivision B—Hazardous objects

68H Hazardous objects

- (1) A person commits an offence if:
 - (a) the person brings into, or has within, a defence aviation area an object; and
 - (b) the object is hazardous to:
 - (i) aircraft; or
 - (ii) aviation-related communications, navigation or surveillance; and
 - (c) the person does not have a valid approval under section 68K to bring into, or have within, the defence aviation area the object.

Penalty: 20 penalty units.

- (2) A person commits an offence if:
 - (a) the person uses an object in a defence aviation area; and
 - (b) the object is used in a manner that is hazardous to:
 - (i) aircraft; or
 - (ii) aviation-related communications, navigation or surveillance; and
 - (c) the person does not have a valid approval under section 68K to use the object in that manner in the defence aviation area.

Penalty: 20 penalty units.

68J Applications for approval

- (1) A person may apply to the Minister for approval to do either or both of the following:
 - (a) bring into, or have within, a defence aviation area an object of a kind mentioned in paragraph 68H(1)(b);
 - (b) use an object in a defence aviation area in the manner mentioned in paragraph 68H(2)(b).
- (2) An application must be in the form approved by the Minister and must contain the information required by the form.
- (3) The Minister may, by notice in writing, require an applicant to provide such further information with respect to an application as is reasonably required for a proper consideration of the application.
- (4) The Minister is not required to consider, or further consider, the application until the further information is provided.

68K Grant or refusal of approval

- (1) The Minister may, by instrument in writing, grant, or refuse to grant, an approval for the purposes of subsection 68J(1).
- (2) An approval may be subject to such conditions as the Minister considers necessary to prevent or reduce hazards to:
 - (a) aircraft; or
 - (b) aviation-related communications, navigation or surveillance.

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- (3) Without limiting subsection (2), an approval may be subject to conditions with respect to any or all of the following:
- (a) the time when the object may be brought into the defence aviation area;
 - (b) the period during which it may remain in the defence aviation area;
 - (c) the position of the object;
 - (d) its shape or size;
 - (e) the purpose for which it may be used;
 - (f) the manner in which it may be used;
 - (g) the times during which it may be used;
 - (h) the manner in which it is to be marked.
- (4) The conditions must be specified in the approval.
- (5) The Minister must not:
- (a) refuse to grant approval; or
 - (b) grant approval subject to conditions; or
 - (c) impose, either at the time of approval or by subsequent variation, conditions with respect to the marking or lighting of a building, structure or object;
- except for the purpose of preventing or reducing hazards to:
- (d) aircraft; or
 - (e) aviation-related communications, navigation or surveillance.

68L Conditions of approval to be complied with

A person commits an offence if:

- (a) an approval is granted under section 68K; and
- (b) the approval is subject to a condition; and
- (c) the person fails to comply with the condition.

Penalty: 20 penalty units.

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

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

- (1) If there is within a defence aviation area:
- (a) a building, structure or object that exceeds the height restriction applying to the building, structure or object within the defence aviation area as specified in a Ministerial declaration for the defence aviation area; or
 - (b) a building, structure or object that 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 as specified in a Ministerial declaration for the defence aviation area; or
 - (c) any other object that constitutes or may constitute a hazard to:
 - (i) aircraft operating in, or in the vicinity of, the defence aviation area; or
 - (ii) aviation-related communications, navigation or surveillance;
- the Minister may, by notice in writing, give directions with respect to:

- (d) the removal (in whole or in part), within a time of not less than 28 days specified in the notice, of the whole or a specified part of the building, structure or object; or
 - (e) the marking, lighting, screening, modification or relocation of the building, structure or object within a time specified in the notice.
- (2) The Minister may give a direction under subsection (1) only if the Minister is reasonably satisfied that it is necessary to do so for the purpose of preventing or reducing hazards to:
- (a) aircraft; or
 - (b) aviation-related communications, navigation or surveillance.
- (3) The time specified in a notice must be a reasonable time in all the circumstances.
- (4) The powers conferred by subsection (1) may be exercised in relation to a building, structure or object whether or not approval has been granted under section 68F or 68K.
- (5) A notice under subsection (1) in relation to a building, structure or object may be given to any person whom the Minister reasonably believes occupies, or has an interest in, the land on which the building, structure or object is situated.
- (6) A notice under subsection (1) must not be given to a person unless it is reasonable that the person should be required to comply with the requirement of the notice.
- (7) A person commits an offence if:
- (a) a notice is given to the person under this section; and
 - (b) the person:
 - (i) fails to comply with a direction in the notice; or
 - (ii) fails to comply with a direction within the time specified in the notice.

Penalty: 20 penalty units.

68N Removal or marking of buildings, structures or objects in urgent situations

- (1) This section applies if the Minister is satisfied on reasonable grounds that:
- (a) a building, structure or object within a defence aviation area; or
 - (b) plumes or air turbulence generated by a building, structure or object within a defence aviation area; or
 - (c) the use of an object within a defence aviation area;
- constitutes, contributes to or results in, a serious and imminent risk to aircraft or aviation-related communications, navigation or surveillance.
- (2) Despite section 68M, the Minister may, by notice in writing, give directions with respect to the following:
- (a) the removal of the whole or a specified part of the building, structure or object within a time specified in the notice;
 - (b) the marking, lighting, screening, modification or relocation of the building, structure or object within a time specified in the notice.
- (3) The time specified in the notice must be reasonable in all the circumstances.

Note: The notice may require immediate compliance if the circumstances are sufficiently serious.

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- (4) A notice under subsection (2) must not be given to a person unless it is reasonable that the person should be required to comply with the requirement of the notice.
- (5) A person commits an offence if:
- (a) a notice is given to the person under this section; and
 - (b) the person:
 - (i) fails to comply with a direction in the notice; or
 - (ii) fails to comply with a direction within the time specified in the notice.

Penalty: 20 penalty units.

Division 3—Monitoring

68P Provisions subject to monitoring under the Regulatory Powers Act

For the purposes of subsection 117AE(1) of the Act, the following provisions of this Part are prescribed:

- (a) section 68C;
- (b) section 68D;
- (c) section 68G;
- (d) section 68H;
- (e) section 68L;
- (f) section 68M;
- (g) section 68N.

68Q Information subject to monitoring under the Regulatory Powers Act

For the purposes of subsection 117AE(2) of the Act, the following provisions of this Part are prescribed:

- (a) section 68E;
- (b) section 68J.

Division 4—Compensation

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

- (1) For the purposes of paragraph 124(1)(r) of the Act, the Commonwealth is, subject to subsection (2), liable to pay a reasonable amount of compensation to a person if:
- (a) the value of land is diminished as a result of a Ministerial declaration and the person has an interest in the land; or
 - (b) because of the removal under this Part of a building, structure or object from a defence aviation area the person suffers loss or damage, or incurs expense, as a direct result of that removal; or
 - (c) because of the marking or lighting under this Part of a building, structure or object in a defence aviation area the person suffers loss or damage, or incurs expense, as a direct result of that marking or lighting.
- (2) Paragraphs (1)(b) and (c) do not apply in relation to a building, structure or object if:

- (a) the building, structure or object was constructed within a defence aviation area without a valid approval under section 68F; or
 - (b) the person brings the object into, or has the object within, a defence aviation area without a valid approval under section 68K; or
 - (c) the person uses the object in a defence aviation area in a manner that is hazardous to:
 - (i) aircraft; or
 - (ii) aviation-related communications, navigation or surveillance; without a valid approval under section 68K; or
 - (d) an approval in force under section 68F or 68K in relation to the building, structure or object, or a condition to which such an approval is subject, is contravened.
- (3) If the Commonwealth and the person do not agree on the amount of compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

68S Compensation for acquisition of property

- (1) If the operation of this Part would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to the person.
- (2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Division 5—Review of decisions

68T Review by Administrative Appeals Tribunal

Applications may be made to the Administrative Appeals Tribunal for review of:

- (a) a decision under subsection 68F(1) to refuse to grant approval to construct a building, structure or object; or
- (b) a decision under subsection 68F(2) to impose a condition subject to which a building, structure or object may be constructed; or
- (c) a decision under subsection 68K(1) to refuse to grant approval for the purposes of subsection 68J(1); or
- (d) a decision under subsection 68K(2) to impose a condition on an approval for the purposes of subsection 68J(1); or
- (e) a direction under subsection 68M(1) or 68N(2) to remove a building, structure or object; or
- (f) a direction under subsection 68M(1) or 68N(2) with respect to the marking, lighting, screening, modification or relocation of a building, structure or object.

4 After subsection 82(1)

Insert:

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- (1A) The Minister may, by instrument in writing, delegate his or her powers under Part 11A to the following:
- (a) an officer of the Navy who holds a rank that is not below the rank of Lieutenant Commander;
 - (b) an officer of the Army who holds a rank that is not below the rank of Major;
 - (c) an officer of the Air Force who holds a rank that is not below the rank of Squadron Leader;
 - (d) an APS employee who holds, or performs the duties of, a position not below APS6 position in the Department.

5 Before section 85

Insert:

Division 1—General

6 In the appropriate position in Part 17

Add:

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

90 Definitions

In this Division:

affected land has the same meaning as in the old regulations.

commencement day means the day on which this Division commences.

old regulations means the *Defence (Areas Control) Regulations 1989* as in force immediately before the commencement day.

91 Things done by, or in relation to, the Minister

If, before the commencement day, a thing was done by, or in relation to, the Minister under the old regulations, then the thing is taken, on and after that day, to have been done by, or in relation to, the Minister under this instrument.

92 Things started but not finished by the Minister

- (1) This section applies if:
 - (a) before the commencement day, the Minister started doing a thing under the old regulations; and
 - (b) immediately before that day, the Minister had not finished doing that thing.
- (2) The Minister may, on and after the commencement day, finish doing the thing under this instrument.

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

- (1) This section applies if:

- (a) an appeal or application (the *old appeal or application*) was made to the Administrative Appeals Tribunal under the old regulations before the commencement day; and
 - (b) before the commencement day, the old appeal or application had not been determined under the old regulations.
- (2) Despite the repeal of the old regulations by Schedule 2 to this instrument, the old regulations continue to apply in relation to the old appeal or application as if the repeal had not happened.

94 Transitional—applications under old regulations continue to have effect

- (1) This section applies if:
- (a) an application was made under regulation 8 of the old regulations for approval to construct a building on land this is affected land (the *relevant land*); and
 - (b) immediately before the commencement day, the application had not been finally determined; and
 - (c) on or after the commencement day, the Minister declares an area to be a defence aviation area under section 117AC of the Act; and
 - (d) the relevant land falls within the defence aviation area; and
 - (e) either:
 - (i) the building exceeds the height restriction applying to the building within the defence aviation area, or part of the defence aviation area, specified in the declaration; or
 - (ii) the building is likely to generate plumes or air turbulence above that height restriction.
- (2) At and after the time the declaration takes effect, the application is taken to be (and may be dealt with as) an application made under section 68E of this instrument to construct the building in the defence aviation area.

95 Transitional—approvals under old regulations continue in force

- (1) This section applies if:
- (a) immediately before the commencement day, an approval under regulation 10 of the old regulations (including any conditions to which the approval was subject) was in force in relation to a building on land that is affected land (the *relevant land*); and
 - (b) on or after the commencement day, the Minister declares an area to be a defence aviation area under section 117AC of the Act; and
 - (c) the relevant land falls within the defence aviation area.
- (2) At and after the time the declaration takes effect, the approval (including any conditions to which the approval was subject) has effect as if the approval had been given under section 68F of this instrument in relation to the building.

Schedule 2—Repeals

Defence (Areas Control) Regulations 1989

1 The whole of the instrument

Repeal the instrument.