

## **EXPLANATORY STATEMENT**

Minute No. 49 of 2018 - Minister for Infrastructure, Transport and Regional Development

Subject - *Air Navigation 1920*

*Air Navigation (Essendon Fields Airport) Regulations 2018*

### **INTRODUCTION**

The *Air Navigation Act 1920* (the Act) gives effect to the International Convention on Civil Aviation (the Chicago Convention) which regulates all aspects of international air transport.

Section 26 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed.

The Air Navigation (Essendon Fields Airport) Regulations 2018 (the Regulations) are to remake the Air Navigation (Essendon Fields Airport) Regulations 2001 (the 2001 Regulations) which are due to sunset on 1 October 2019. The Regulations remake the 2001 Regulations in substantially the same form and amend Regulation 6 to increase maximum take-off weight for aircraft operating at the airport in non-curfew hours from 45,000kg to 50,000kg.

### **OUTLINE**

The Regulations establish a framework for the restriction of aircraft movements at Essendon Fields Airport, including a limit on allowable maximum take-off weights and a curfew in place between the periods of 11pm-6am daily for all aircraft.

The Regulations:

- amend previous regulation 6 to allow aircraft between 45,000kg to 50,00kg to operate at Essendon Fields Airport subject to strict conditions specified in Section 6, subparagraph (2)(b);
- amend the 2001 Regulations to include delegation provisions to delegate powers to Australian Public Service Executive Level 1 or higher positions. Those exercising delegations must be either sufficiently senior to exercise the power or function, or, have appropriate qualifications or expertise to exercise the function; and
- modernise drafting language and structure through a simplified outline of the Regulations compared with the 2001 Regulations.

The impact on industry and the community of the Regulations will be minimal as the increased allowable maximum take-off weight will not result in large numbers of additional jet aircraft movements at the airport. Jet aircraft of this type comprise approximately 5 per cent of total movements, which is expected to be maintained in the future. The increased maximum take-off weight allows older, less efficient aircraft to be replaced with newer, more efficient aircraft. The replacement of aircraft will not result in an increase in overall noise exposure for the surrounding community. There are no changes to permitted movements during the curfew which balances protection of the community with the facilitation of industry productivity and growth.

## **Regulatory impact analysis**

The regulatory impact was assessed using the Preliminary Assessment tool approved by the Office of Best Practice Regulation (OBPR). The OBPR considered that the amended Regulations could be expected to have a minor impact on industry and the community. A certification letter has been provided to OBPR recommending that the Regulations be remade with minor amendment, and that a Regulation Impact Statement is therefore not required for this Regulation (OBPR 24228).

## **Consultation before making**

These reforms were put forward to public consultation in August 2018, for which there were eleven responses. This was a significant reduction to previous consultation in 2017 regarding more substantial changes which drew over 300 submissions. In order to address community concerns, this proposal incorporates a number of changes based on feedback received:

- No change to curfew arrangements, and jet movements would not be allowed during curfew (aside from the currently permitted emergency services operations).
- Increasing the maximum weight to 50,000kg rather than 55,000kg (which was proposed in 2017), and restricting the increase to business jets while excluding regular public transport aircraft.

Details of the Regulations are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights is set out in [Attachment B](#) prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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

The Regulations are a legislative instrument for the purpose of the *Legislation Act 2003*.

The Regulations commenced on the day after registration.

**Details of the *Air Navigation (Essendon Fields Airport) Regulations 2018***

Section 1 – Name of Regulation

This section provides the title of the Air Navigation (Essendon Fields Airport) Regulations 2018.

Section 2 – Commencement

This instrument commenced on the day after registration.

Section 3 – Authority

This Instrument is made under the *Air Navigation Act 1920*.

Section 4 – Schedules

This section provides that 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.

Section 5 - Definitions

This section provides definitions for a number of terms with the amendments being:

The definition of *Annex* is amended to reflect the current version of Annex 16, Volume I which is in force at the commencement of the Regulations. The *Air Navigation Act 1920* does not permit the incorporation of instruments as in force from time-to-time; the definition is therefore amended to reflect the current version of Annex 16. Annex 16, Volume I is available to purchase on the International Civil Aviation Organization (ICAO) website [//store.icao.int/annex-16-environmental-protection-volume-1-aircraft-noise-multilingual.html](http://store.icao.int/annex-16-environmental-protection-volume-1-aircraft-noise-multilingual.html). Aircraft operators can request a copy of Annex 16, Volume I from the Department of Infrastructure, Regional Development and Cities without charge.

The definition of *Maximum Take-off Weight* has been amended to reference the definition in the Civil Aviation Regulations 1988.

The definition of *noise certificate* has been added to the Regulations, and has the same meaning as in the Air Navigation (Aircraft Noise) Regulations 2018.

The definition of *noise emissions level* has been replaced with *noise level* and incorporates modernised drafting style but no substantive change.

Section 6 – Aircraft with a maximum take-off weight of 45,000kg or more

This section specifies that aircraft with a maximum take-off weight of 45,000kg or more must not take off or land at Essendon Fields Airport with the exception of aircraft with a maximum take-off weight between 45,000kg and no more than 50,000kg that meet the following criteria:

- must be certified with no more than 19 passenger seats;
- must not be engaged in regular public transport operations;
- must not operate during the curfew period;
- must meet the noise standards set out in Chapter 4 or 14 of Volume I of Annex 16 to the Chicago Convention; and
- must use only the minimum reverse thrust necessary for a safe landing.

The reversal of the evidential burden of proof applies to this offence as it is likely to be within the particular knowledge of the defendant. The offence provision was reviewed and retained to ensure a sufficient deterrence effect against non-compliance.

The offence provisions have existed since the introduction of the 2001 Regulations and have resulted in no breaches within the past 17 years. Conduct of a more severe nature in breach of the Regulations would contravene fundamental values and be harmful to society. The operations of aircraft at airports are a social license between the community and industry to balance protection of the community with the ability to facilitate industry productivity and growth.

The offence provisions have been developed consistent with the *Attorney-General's Department Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers (Offences Guide)*. The penalty in this section, under subsection 13.3(3) of the *Criminal Code*, is unchanged at 50 penalty units.

#### Section 7 – Curfew period

This section stipulates that the curfew period starts at 11pm one day and ends at 6am the next day.

#### Section 8 – Prohibition on taking off or landing during curfew periods

This section makes it an offence for an aircraft to take-off or land at Essendon Fields Airport during the curfew period unless permitted to do so under Part 4.

The reversal of the evidential burden of proof applies to this offence as it is likely to be within the particular knowledge of the defendant.

The offence provisions have existed since the introduction of the 2001 Regulations and have resulted in no breaches within the past 17 years. Conduct of a more severe nature in breach of the Regulations would contravene fundamental values and be harmful to society. The operations of aircraft at airports are a social license between the community and industry to balance protection of the community with the ability to facilitate industry productivity and growth.

The offence provision was reviewed and retained to ensure a sufficient deterrence effect against non-compliance. The offence provisions have been developed consistent with the *Attorney-General's Department Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers (Offences Guide)*. The penalty in this section, under subsection 13.3(3) of the *Criminal Code*, is unchanged at 50 penalty units.

### Section 9 – Alternate airport

This section makes it a strict liability offence for a flight to list Essendon Fields Airport as an alternate airport if the flight is scheduled to end during a curfew period. An alternate airport is an airport to which the flight may proceed when it becomes inadvisable to land at the airport of intended landing. This section applies to scheduled flights, meaning a flight operating according to a set timetable with a regular frequency and routing.

The offence provisions have existed since the introduction of the 2001 Regulations and have resulted in no breaches within the past 17 years. Conduct of a more severe nature in breach of the Regulations would contravene fundamental values and be harmful to society. The operations of aircraft at airports are a social license between the community and industry to balance protection of the community with the ability to facilitate industry productivity and growth.

Strict liability is applied to this offence to provide a deterrent effect in order to protect the community surrounding Essendon Fields Airport from aircraft noise during sensitive times. The offence provision was reviewed and retained to ensure a sufficient deterrence effect against non-compliance. The offence provisions have been developed consistent with the *Attorney-General's Department Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers (Offences Guide)*. The penalty in this section, under subsection 13.3(3) of the *Criminal Code*, is unchanged at 50 penalty units.

### Section 10 – Flight plans

This section makes it an offence for the operator of an aircraft to take-off from or land at Essendon Fields Airport during the curfew period if a flight plan has not been lodged with Airservices Australia, unless the operator reasonably believes that the aircraft will land before the curfew period and a dispensation has been granted (section 15); or the aircraft is involved in an emergency (section 14).

The reversal of the evidential burden of proof applies to this offence as it is likely to be within the particular knowledge of the defendant.

The offence provisions have existed since the introduction of the 2001 Regulations and have resulted in no breaches within the past 17 years. Conduct of a more severe nature in breach of the Regulations would contravene fundamental values and be harmful to society. The operations of aircraft at airports are a social license between the community and industry to balance protection of the community with the ability to facilitate industry productivity and growth.

The offence provision was reviewed and retained to ensure a sufficient deterrence effect against non-compliance. The offence provisions have been developed consistent with the *Attorney-General's Department Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers (Offences Guide)*. The penalty in this section, under subsection 13.3(3) of the *Criminal Code*, is unchanged at 50 penalty units.

### Section 11 – Taxi clearance received, or taxiing for take-off started, before start of curfew period

This section permits an aircraft with a maximum take-off weight less than 45,000kg to take-off during a curfew period if the aircraft received taxi clearance for the take-off before the start of the curfew period or, when air traffic control is not available, if the aircraft began taxiing for take-off before the start of the curfew period.

### Section 12 – Propeller-driven aircraft

This section permits propeller-driven aircraft with a maximum take-off weight less than 45,000kg to take-off from or land at Essendon Fields Airport during a curfew period if a noise certificate issued under the Air Navigation (Aircraft Noise) Regulations 2018 is in force for the aircraft. For aircraft over 8,618kg maximum take-off weight the aircraft's noise levels must not exceed 90 Effective Perceived Noise in decibels (EPNdB) on take-off and 95 EPNdB on landing.

### Section 13 – Helicopters

This section permits a helicopter with a maximum take-off weight less than 45,000kg to take-off from or land at Essendon Fields Airport during a curfew period if a noise certificate issued under the Air Navigation (Aircraft Noise) Regulations 2018 is in force for the helicopter.

### Section 14 – Aircraft involved in emergencies or police operations

This section permits an aircraft with a maximum take-off weight of no more than 50,000kg involved in an emergency to take-off from or land at Essendon Fields Airport despite the provisions of section 6 (maximum take-off weight), section 8 (curfew period) or section 10 (flight plans). It also allows an aircraft which was required to land at Essendon Fields Airport due to an emergency to take-off during the curfew period to enable it to resume a flight.

An emergency includes a search and rescue operation, a medical emergency, a natural disaster or a mercy flight. A mercy flight is a flight to transport a person in urgent need of medical attention, to transport an organ for urgent transplant, or to rescue a person from a dangerous situation. An emergency also includes situations where the pilot has declared an in-flight emergency, the aircraft has insufficient fuel to be diverted to another airport, or there is an urgent need for the aircraft to land or take-off to ensure safety or security or avoid property damage.

This section also permits an aircraft involved in a Victoria Police operation to take-off from or land at Essendon Fields Airport despite the provisions of section 6 (maximum take-off weight) or section 8 (curfew period). This includes flights operated by the Victoria Police Air Wing as well as flights conducted on behalf of Victoria Police by other operators.

### Section 15 – Dispensations in exceptional circumstances

This section permits the Secretary to grant dispensations from sections 8 or 10 in exceptional circumstances. Curfew dispensations may include conditions and must relate to a single take-off or landing. An application need not be in writing, however, as soon as practicable the operator must provide a written statement explaining the exceptional circumstances with an offence clause and penalty of 10 penalty units for failure to submit the written statement. The dispensation need not be in writing but the Secretary must keep a record of the dispensation and reasons for granting it.

The offence provision was reviewed and retained to ensure a sufficient deterrence effect against non-compliance. The offence provisions have been developed consistent with the *Attorney-General's Department Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers (Offences Guide)*.

### Section 16 – Giving information to the Secretary

This section permits the Secretary to require information from the operator of an aircraft regarding compliance with the regulations including, for example, information about the noise level of an aircraft or information about a take-off or landing, within 30 days of the request for the information.

The privilege against self-incrimination is not expressly outlined in this section, on the basis that it applies automatically for individuals unless it is expressly or impliedly overridden. There is nothing in this provision to expressly override the privilege. Further, the privilege does not attach to bodies corporate hence may be inapplicable for many users of Essendon Fields Airport.

This section includes an offence for an operator to knowingly or recklessly fail to comply with a notice issued by the Secretary with an unchanged penalty of 10 penalty units. The offence provision was reviewed and retained to ensure a sufficient deterrence effect against non-compliance. The offence provisions have been developed consistent with the *Attorney-General's Department Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers (Offences Guide)*.

### Section 17 – Delegation

This section permits the Secretary to delegate in writing any of the Secretary's powers under these regulations (other than the power of delegation) to an APS employee of the Department who holds or performs the duties of an Executive Level 1 position or higher. In granting this delegation, the Secretary will only delegate powers to relevant officers with defined roles and who possess relevant qualifications and attributes.

The Secretary would limit this delegation to officers within the Aviation and Airports business division performing the role of 'Curfew Duty Officer' or employed in a specific aviation environment/curfew regulation role. Such officers would have completed relevant training and possess the appropriate qualifications and expertise.

The Secretary would have regard to the seniority of the positions under subsection 17(2)(a) and, in practice the Secretary would also have regard to subsection 17(2)(b) because only those with the requisite expertise are appointed to the 'Curfew Duty Officer' roster following the successful completion of mandatory training.

### Section 18 – Savings of delegations

This section allows the transition of the delegations under the 2001 Regulations to apply for delegations used under the Regulations.

### Schedule 1 – Repeals

This section is to repeal the whole of the Air Navigation (Essendon Fields Airport) Regulations 2001.

## Statement of Compatibility with Human Rights

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

### Air Navigation (Essendon Fields Airport) Regulations 2018

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 Regulations

The *Air Navigation (Essendon Fields Airport) Regulations 2018* (the Regulations) are to remake the Air Navigation (Essendon Fields Airport) Regulations 2001 which are due to sunset on 1 October 2019, with modernised drafting language and amendment to the maximum take-off weight for aircraft permitted to operate at Essendon Fields Airport.

The Regulations establish a framework for the restriction of aircraft movements at Essendon Fields Airport, including a limit on allowable maximum take-off weights and a curfew in place between the periods of 11pm-6am daily for all aircraft. The curfew period and related protections remain unchanged.

The Regulations include delegation provisions to delegate powers to Australian Public Service Executive Level 1 or higher positions.

The amendment to increase the maximum take-off weight from 45,000kg to 50,000kg will permit newer and larger corporate jet aircraft to operate at Essendon Fields Airport. Community protections have been maintained by the inclusion of additional criteria for aircraft within the 45,000kg to 50,000kg to minimise the potential noise impact. Despite their larger size and higher weights, these aircraft are expected to operate with similar noise footprints as older, smaller aircraft. Noise certification data and initial noise modelling indicate the newer aircraft will not be significantly louder than older types, and are expected to be quieter on most flights at Essendon Fields Airport.

The impact on industry and the community of the Regulations will be minimal as the increased allowable maximum take-off weight will not result in large numbers of additional jet aircraft movements at the airport.

#### Human rights implications

This Legislative Instrument engages the following rights:

- The criminal process rights in Article 14 of the *International Covenant on Civil and Political Rights*.
- The legislative instrument includes a strict liability offence (section 6) and reversals on the burden of proof (sections 6, 8 and 10). These are considered permissible limitations for the following reasons:
  - a) Conduct of such nature in breach of the Regulations by the operation of aircraft above the regulated maximum take-off weight or in breach of the regulated curfew period would contravene fundamental values and be harmful to society, in particular the community surrounding Essendon Fields Airport.



- b) The operations of aircraft at airports are a social licence between the community and industry to balance protection of the community with the ability to facilitate industry productivity and growth. The community surrounding Essendon Fields Airport has an expectation of protection from aircraft noise during sensitive times.
- c) Conduct in contravention of the applicable Regulations is entirely within the control of the defendant and the reversal of the evidential burden of proof relates to evidential matters likely to be within the particular knowledge of the defendant.
- d) The offences are considered appropriate to provide protection to the community through applying a deterrent effect to operators at Essendon Fields Airport.
- e) The offence provisions have been developed consistent with the *Attorney-General's Department Guide to Framing Commonwealth Offence, Infringement Notices and Enforcement Powers (Offences Guide)*.

### **Conclusion**

The Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Michael McCormack MP**