

Explanatory Statement

Civil Aviation Safety Regulations 1998

Airspace Regulations 2007

CASA OAR 210/22 – Temporary Restricted Areas Etc. – Declaration, Direction and Determination (Southern Launch VS02 and VS03 Campaigns) Instrument 2022

Purpose

The purpose of this instrument is to provide for the safety of aviation in certain areas of Australian-administered airspace during the course of approved rocket launch activity (code named VS02 and VS03) by SouthernLaunch.Space Pty Ltd (***Southern Launch***). Acting under an approval issued by the Australian Space Agency, Southern Launch is a corporation that owns and operates ranges for the purposes of rocket launches into space.

The instrument designates those parts of the areas that are inside Australian territory to be temporary restricted areas for proposed launches. A temporary restricted area is a volumes of airspace where, for a period of less than 3 months, as a result of activities in, or impacting on, the area, aviation safety requires that aircraft flight over the area be restricted and only permitted in accordance with specified conditions.

The instrument also directs that those parts of the relevant areas that are outside Australian territory (but inside Australian-administered airspace) are to be temporary notional restricted areas for the launches. However, in this case, the airspace is over the high seas and is, therefore, subject to international freedom of navigation rights under the Chicago Convention. Hence, the conditional access rules that apply to Australian-registered aircraft do not apply in the same way to 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. 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*.

Under subsection 11 (1) of the *As Act*, the regulations may confer functions and powers on CASA in connection with the administration and regulation of Australian-administered airspace.

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

For this purpose, under subregulation 6 (1) of the *Airspace Regulations 2007* (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, restricted or danger area (***P, R*** or ***D area***).

Under subregulation 6 (2) of the AsR, CASA must not declare a prohibited area unless, in the opinion of CASA, it is necessary for reasons of military necessity to prohibit the flight of aircraft over the 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 security, to restrict the flight of aircraft over the area to aircraft flown in accordance with specific conditions.

Under subregulation 6 (4) of the AsR, CASA must not declare a danger area unless, in the opinion of CASA, there exists within or over the area an activity that is a potential danger to aircraft flying over the area.

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) of the AsR, the declaration ceases to have effect on the day, event or circumstances specified in the declaration.

Under subregulations 9 (2) and (3) of the AsR, if an area of Australian territory has been declared under regulation 6 to be a restricted area or danger area, CASA may make a determination that the air traffic services (*ATS*) to be provided for the relevant airspace are services that 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.

Directions for airspace outside Australian territory

As noted above, CASA's powers under the AsR are limited to Australian territory. Hence, it is necessary to use CASA powers of direction which are not so limited. CASA has, therefore, used its direction powers to make appropriate designations of airspace outside Australian territory in Australian-administered airspace.

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, the Civil Aviation Safety Authority (*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, a direction ceases to be in force on a day specified in the instrument or, if no day is specified (as is the case here), 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.

The instrument, therefore, includes provisions directing that certain airspace in Australian-administered airspace outside Australian territory be treated as if it were a notional restricted area.

Chicago Convention

While safety restrictions may be imposed (a) on any aircraft flying inside Australian territory, and (b) on any Australian-registered aircraft flying outside Australian territory, the Chicago Convention does not permit Australia to enforce flight restrictions on foreign registered aircraft in international airspace.

Some declared parts of Australian-administered airspace outside Australian territory are used by Australia for rocket launches, presenting potential dangers to aircraft overflying the relevant airspace unless appropriate protocols are put in place and suitable precautions are taken by pilots.

Background

As a result of proposed rocket launches between 14 and 20 December 2022, it is necessary, in the interests of aviation safety, to declare and direct 6 relevant areas of identified airspace to be:

- temporary restricted areas (for the parts of the areas inside Australian territory); and
- temporary notional restricted areas (for the parts of the areas in Australian-administered airspace outside Australian territory).

The declaration and direction will allow the establishment of safety rules and safety protocols for civil aircraft entry to the relevant area for the duration of the rocket launch activity.

In summary, for the parts of the relevant areas that are inside Australian territory, entry is conditional on Controlling Authority approval.

For the parts of the relevant areas that are outside Australian territory, entry by Australian-registered aircraft is conditional on Controlling Authority approval. Consistent with the Chicago Convention requirements, for foreign registered aircraft, Controlling Authority approval is recommended, and pilots are recommended to take precautions and make relevant radio contacts for any potential danger to the aircraft from the rocket launch activity.

Details of the 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 in the declaration instrument are 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. By virtue of the presence of directions, the whole instrument 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 *Airspace Regulations 2007* 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 the 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 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 may be required to be certain and enduring in the interests of aviation safety.

In this case, the instrument is only in force for 7 days before it is self-repealed. Thus, in practice, no sunseting avoidance issues arise. The fact that the instrument is formally not subject to sunseting does not, therefore, impact on the potential for parliamentary oversight.

Incorporations by reference

Under subsection 98 (5D) of the CA Act, the instrument may apply, adopt or incorporate any matter contained in any instrument or other writing.

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 NOTAMs are incorporated into the instrument. A NOTAM is an aviation information notice to aviators to alert them to aviation matters and hazards, including the nature and times of activities in relevant airspace that might affect flight planning and air navigation. They are available free from Airservices Australia.

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.

CASA has consulted Southern Launch and Airservices Australia about the proposed rocket launches. Southern Launch, as the airspace change proponent, has also engaged with relevant

airspace user forums. Because the length of time that the relevant airspace would be under restriction would, in practice, be short, there were no objections to the proposed activity within the context of a restricted airspace arrangement.

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

Office of Impact Analysis (OIA)

Consistent with Office of Impact Analysis Guidance, an Impact Analysis is not required for the temporary instrument because it does not substantially alter existing arrangements and is required under the CA Act, the As 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.

The declaration and direction will temporarily require aircraft to observe the restricted area's access conditions and protocols. Operators are familiar with these kinds of requirements, and operations are adjusted to them without any significant objections or material economic or commercial impacts.

Therefore, in terms of economic and cost impacts for subsection 9A (3) of the CA Act, the instrument will have no material, economic or cost impact on aircraft operators in their continuing operations.

Sector risks

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

Regional and remote Australia impacts

The Minister's Statement of Expectations for the CASA Board states: "I expect that CASA will: ... (b) fully consider the impact of new regulations on general aviation, with a particular focus on regional and remote Australia. All Explanatory Statements drafted by CASA for subordinate legislation should identify the impact on the various categories of operations as well as on communities in regional and remote Australia served by those operations and how these impacts have been considered."

There are no identified regional 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 that the restricted airspace as such will cause any specific negative environmental impacts. 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 direction 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.

Commencement and making

As required by subregulations 6 (6) and 7 (1) of the AsR, following registration, the instrument commences on 14 December 2022, and is self-repealed at the end of 20 December 2022.

The instrument has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the Act.

Appendix 1**CASA OAR 210/22 – Temporary Restricted Areas Etc. – Declaration, Direction and Determination (Southern Launch VS02 and VS03 Campaigns) Instrument 2022**

1 Name

This section names the instrument.

2 Duration

Under this section the instrument commences on 14 December 2022 and is repealed at the end of 20 December 2022.

3 Definitions

This section provides some key definitions.

4 Declaration and direction – temporary restricted area etc.

- (1) Under this subsection, the part of each relevant area that is inside Australian territory is declared to be a temporary restricted area.
- (2) Under this subsection, the part of each relevant area that is outside Australian territory is declared to be a temporary notional restricted area.
- (3) This subsection provides that Schedule 1 contains the conditions that must be complied with for the flight of an aircraft within each relevant area.

5 Activation of the relevant area

Under this section, the declaration and direction for the relevant area are activated in accordance with the activation clause in Schedule 1.

However, if an aircraft operates in, or in the airspace adjacent to, a relevant area (the *critical zone*) otherwise than in accordance with the conditions in Schedule 1 for the relevant area, then activation of the relevant area is suspended until the aircraft is no longer so operating in the critical zone of the area.

6 Determination that ATS are at variance with Annex 11

Under this section, the ATS to be provided for the part of each relevant area that is inside Australian territory are the services set out in Schedule 1, and may be services that are at variance with the ATS that would otherwise be provided in accordance with Annex 11 to the Chicago Convention.

7 Direction that ATS are at variance with Annex 11

Under this section, the ATS to be provided for the part of each relevant area that is in Australian-administered airspace outside Australian territory are the services set out in Schedule 1, and may be services that are at variance with the ATS that would otherwise be provided in accordance with Annex 11 to the Chicago Convention.

Schedule 1 Specification of temporary restricted and notional restricted areas and ATS variance

Schedule 1 describes each of the 6 relevant areas, the particulars of its air traffic services, its lateral and vertical limits, its activation trigger, its conditions of entry, and its controlling authority.

Statement of Compatibility with Human Rights

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

CASA OAR 210/22 – Temporary Restricted Areas Etc. – Declaration, Direction and Determination (Southern Launch VS02 and VS03 Campaigns) Instrument 2022

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 instrument is to provide for the safety of aviation in certain areas of Australian-administered airspace during the course of approved rocket launch activity by SouthernLaunch.Space Pty Ltd (*Southern Launch*). Acting under an approval issued by the Australian Space Agency, Southern Launch is a corporation that owns and operates ranges for the purposes of rocket launches into space.

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The instrument also directs that the parts of the relevant areas that are outside Australian territory are to be temporary notional restricted areas for the launches. However, in this case, the airspace is over the high seas and is, therefore, subject to international freedom of navigation rights under the Chicago Convention. Hence, the conditional access rules that apply to Australian-registered aircraft do not apply in the same way to foreign registered aircraft.

Human rights implications

The direction 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 aircraft by making access to certain restricted and notional restricted areas conditional. However, to ensure conformity with the Chicago Convention, the right is not engaged for foreign registered aircraft over the high seas.

The right is engaged in the interests of the safety of air navigation because of the potential risks arising from the rocket launching activity in the relevant 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 the airspace where the rocket launching activity is taking place.

As a consequence of the foregoing, for Article 7 of the ICESCR, the direction 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 restricted and notional restricted airspace requirements. This is reasonably required in the interests of aviation safety and it is not expected to result in any material change in actual flying activities from those previously followed.

Human rights implications

The 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