

Explanatory Statement

Airspace Regulations 2007

Civil Aviation Safety Regulations 1998

CASA OAR 024/24 — CASA OAR 228/23 Amendment Instrument 2024 (No. 1)

Purpose

The purpose of this amendment instrument is to amend *CASA OAR 228/23 – Declarations and Directions in relation to Prohibited, Restricted and Danger Areas, Etc. – Permanent Instrument 2023* (the **principal instrument**) to designate and direct 6 additional areas outside Australian territory in Australian-administered airspace to be directed notional restricted areas.

Restricted areas are typically volumes of airspace within which CASA considers it necessary to restrict the flight of aircraft to those flown in accordance with specified conditions in the interests of, for example, public safety, including the safety of aircraft in flight.

Airspace over the high seas is subject to international freedom of navigation rights under the Convention on International Civil Aviation (the **Chicago Convention**). Hence, conditional access rules do not apply to foreign registered aircraft.

Prima facie this would also apply to Australian aircraft. However, such an outcome may jeopardise the safety of Australian aircraft. Hence, for particular areas outside Australian territory in Australian-administered airspace CASA directs that they be notional restricted areas with access conditions applicable to Australian aircraft only.

The 6 additional areas that are the subject of the amendment instrument are long-standing military restricted areas and were intended to be included in the principal instrument that came into force on 30 November 2023. During preparation of the draft principal instrument, a word processing malfunction caused them to be omitted. Their omission was not noticed until a review of the principal instrument identified them as missing from Schedule 3.

Australian-administered airspace

Australian-administered airspace is airspace that has been 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 the Civil Aviation Safety Authority (**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.

Under subregulation 6(1) of the *Airspace Regulations 2007* (the **AsR 2007**), CASA may make a declaration designating an area of **Australian territory** (up to the 12 nautical miles sea boundary) to be, relevantly, a restricted area.

Under subregulation 6(3) of AsR 2007, 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(6) and regulation 7 of AsR 2007, a 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 AsR 2007, a declaration ceases to have effect on the day, event or circumstances specified in the declaration.

Under new subregulation 9(2) of AsR 2007, if a volume of airspace has been declared under regulation 6 (as amended) to be a restricted area, then 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 in accordance with the Chicago Convention.

Under subregulation 9(3), CASA must cause details of these varied services to be published in the AIP or NOTAM.

Legislation — directions

Under paragraph 11.245(1)(a) of the *Civil Aviation Safety Regulations 1998* (**CASR**), for subsection (5A) of the *Civil Aviation Act 1988* (the **CA Act**), CASA may, by instrument, issue a direction about 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 in the interests of safety, only if the direction is not inconsistent with the 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, 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.

Background

The definitive description of Australian-administered airspace is compiled and monitored by Airservices Australia (**AA**). Currently, these descriptions are published twice yearly in an

alternating 24- or 28-week cycle, in AA's *Designated Airspace Handbook* (the **DAH**) of the AIP. The last iteration of this was effective on and from 30 November 2023.

All of the restricted (R) areas in Australian-administered airspace were published in the DAH. However, in using the DAH to update the previous declarations and determinations for the purposes of CASA's legally enforceable instrument for November 2023, there occurred an omission of 6 R areas that were intended to be directed notional restricted areas outside Australian territory in Australian-administered airspace. Internal investigations have identified a word processing malfunction as the cause of the omissions which went unnoticed in such a large document. (Measures have been put in place to avoid a repetition of this error.)

Directions for airspace outside Australian territory

As noted above, CASA's powers to declare enforceable restricted areas under AsR 2007 are limited to Australian territory. Hence, it was necessary to use CASA's powers of direction to make appropriate enforceable designations of airspace outside Australian territory in Australian-administered airspace.

The principal instrument included provisions directing that certain airspace in Australian-administered airspace outside Australian territory was to be treated as if it were a notional restricted area.

The amendment instrument would restore the 6 missing areas to Schedule 3 as areas of Australian territory to be directed notional restricted areas outside Australian territory in Australian-administered airspace.

For subregulation 6(6) of AsR 2007, the amendment instrument cannot take effect until published. An AIP SUP has been prepared for this purpose and will be available on the AA website.

Details of the amendment 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 principal instrument were 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. An amendment to such an instrument is also a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

Sunset

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

AsR 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 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, it is likely that the principal instrument, as amended by the amendment instrument, will be repealed on 13 June 2024, when the next DAH comes into force. Thus, in practice, no sunseting avoidance issues arise. The fact that the principal instrument, as amended, 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.

There are no such specific documents incorporated into the amendment instrument.

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.

The amendment instrument is correcting inadvertent omissions from the principal instrument and no consultation is either required or appropriate.

Office of Impact Analysis (OIA)

Consistent with Office of Impact Analysis Guidance, an Impact Analysis is not required for the direction 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.

The amendment instrument contains provisions to subject Australian aircraft to certain offshore airspace access controls. Consistent with the Chicago Convention, foreign registered aircraft are not so subject, but in practice they generally observe the access controls rather than alter existing practices and routes. Operators are familiar with these requirements, and operations have been adjusted to them without any significant objections or impacts. Therefore, in terms of economic and cost impacts for subsection 9A(3) of the CA Act, the inclusion in the principal instrument of the missing 6 areas will have no detrimental 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.

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 amendment instrument which 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.

Making and commencement

The instrument has been made by the Branch Manager, Air Navigation, Airspace & Aerodromes, National Operations & Standards Division, a delegate of CASA, relying on the power of delegation under subregulation 11.260(1) of CASR.

As required by subregulations 6(6) and 7(1) of AsR 2007, following registration, the instrument commences on 16 February 2024.

Details of:**CASA OAR 024/24 — CASA OAR 228/23 Amendment Instrument 2024 (No. 1)**

1 Name

This section names the instrument.

2 Commencement

Under this section, the instrument commences on 16 February 2024. A Note explains that the amendment instrument only takes effect when it is published in an Aeronautical Information Circular (AIC) on 16 February 2024.

3 Amendment of *CASA OAR 228/23 – Declarations and Directions in relation to Prohibited, Restricted and Danger Areas, Etc. – Permanent Instrument 2023*

Under this section, Schedule 1 amends *CASA OAR 228/23 – Declarations and Directions in relation to Prohibited, Restricted and Danger Areas, Etc. – Permanent Instrument 2023*.

Schedule 1

Schedule 1 inserts the 6 omitted areas. They are each described by aviation code letters and numbers, name (all share the name Learmonth in WA), status, reason for the restriction (military flying), lateral and vertical limits, hours of activity, and controlling authority.

Statement of Compatibility with Human Rights

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

CASA OAR 024/24 — CASA OAR 228/23 Amendment Instrument 2024 (No. 1)

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 amendment instrument is to amend *CASA OAR 228/23 – Declarations and Directions in relation to Prohibited, Restricted and Danger Areas, Etc. – Permanent Instrument 2023* (the **principal instrument**) to designate and direct 6 additional areas outside Australian territory in Australian-administered airspace to be directed notional restricted areas.

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Human rights implications

The declaration 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, for example, certain kinds of military flying in 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 threatened or potentially dangerous airspace.

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 notional restricted airspace requirements. This is reasonably required in the interests of aviation safety and it is not expected to result in any change of actual flying practices from those previously followed.

Human rights implications

The declaration 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