

# Chapter 2

## Provisions of the bill

### Introduction

2.1 The provisions of the bill contained in Schedule 1 of the bill amend the *Defence Act 1903* (Defence Act) and the *Defence Force Regulations 1952* (Defence Force Regulations). These amendments include adding the Woomera Prohibited Area (WPA) to the definition of 'defence premises', inserting a new 'Part VIB–The Woomera Prohibited Area' into the Defence Act and replacing regulation 36 relating to compensation.

### *Part 1 – General amendments*

2.2 Item 3 of Part 1 - General Amendments inserts a new 'Part VIB–The Woomera Prohibited Area' to the Defence Act. The new Part will:

- include definitions for the Part;
- provide that the Rules may prescribe an area as the WPA and prescribe zones and exclusion periods within those zones;
- provide for the application of Part VII of the Defence Force Regulations;
- create an offence of being in the WPA without permission;
- provide for the Rules regarding standing permission to be at a place in the WPA;
- provide for the permits for persons to be at places in the WPA;
- provide that the Minister may give written permission for person to be at a place with the WPA;
- create an strict liability offence of failure to comply with a condition of permission to be at a place in the WPA;
- provide the Minister may suspend permission 'if the Minister considers it necessary for the purposes of the defence of Australia';
- provide the Minister may give a direction to persons within the WPA and create an offence of failure to comply with a direction;
- provide for the payment of compensation by the Commonwealth where the operation of Part VIB results in the acquisition of property from a person;
- provide that the Rules may limit the amount payable by the Commonwealth for loss or damage;
- provide for the review of decisions by the Minister and the Administrative Appeals Tribunal;
- provide for the delegation of the Minister's powers; and

- provide for the Minister to make the WPA Rules, including Rules for infringement notices and establishment of a demerit points system.

### ***Part 2 – Amendments relating to the operation of Part VII of the Defence Force Regulations 1952***

2.3 In contrast to the previous similar bills considered by the committee, Schedule 1 of the current bill also includes 'Part 2 – Amendments relating to the operation of Part VII of the Defence Force Regulations 1952' which validates past declarations and act and 'modernises' compensation regulations.

### **Part 1**

#### ***Definition of 'defence premises'***

2.4 Item 1 of Part 1 repeals the existing definition of 'defence premises' in existing section 71A(1) of the Defence Act and substitutes a new definition. The new definition of 'defence premises' is substantially the same as the existing one, but adds 'the Woomera Prohibited Area' to the definition.

#### ***The Woomera Prohibited Area***

2.5 Item 2 of Part 1 inserts a definition of the Woomera Prohibited Area into existing section 71A(1) noting it 'means the area prescribed under subsection 72TA(1)'. Subclause 72TA(1) in the proposed new 'Part VIB–The Woomera Prohibited Area' provides that the Rules may prescribe an area as the Woomera Prohibited Area. Subclause 72TA(2) provides that the area (a) must be intended for use for the purpose of testing war materiel; and (b) may be used for those purposes. Subclause 72TA(2) provides the Rules may define different zones within the WPA and prescribe exclusion periods within those zones, when non-Defence users may be excluded from the area.

#### ***Permissions and permits***

##### *Standing permission*

2.6 Subclause 72TD(1) provides that the Rules may provide for permission for a person to be at a place in the WPA. This permission may be subject to conditions set out in the Rules and the Rules may make provision for, and in relation to, other matters in relation to standing permission (subclauses 72TD(2) and (3)).

##### *Permits*

2.7 Clause 72TE in proposed new Part VIB provides that the Rules may make provision for permits that provide permission for persons to be at a place in the WPA.

##### *Minister's permission*

2.8 Clause 72TF provides that the Minister may, on request, give written permission for a person to be at a place in the WPA. The permission must specify the person by name and be granted in accordance with any requirements set out in the Rules. The permission may be subject to conditions imposed by the Minister set out in the permission or conditions set out in the Rules.

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### *Suspension of permission*

2.9 Clause 72TH provides that the Minister may suspend permission if the Minister considers it necessary for the purposes of the defence of Australia. The suspension must be in writing and in accordance with any requirements set out in the Rules. The EM states that this clause would allow the Minister to suspend 'a permission issued under clauses 72TD (standing permission), 72TE (permit) and 72TF (Minister's permission). The EM gave the example of an urgent national Defence requirement and the Minister utilising the power to suspend permission to 'remove non-defence users from the [WPA]'<sup>1</sup>.

### *Offences*

2.10 The bill also creates offences related to the proposed permit and permission arrangements for accessing the WPA. In particular, clause 72TC provides that a person commits an offence if a person is at a place in the WPA and the person is not: (a) a member of the Defence force; (b) the Secretary; or (c) an APS employee in the Department. The offence does not apply if the person has permission to be at the place. The penalty for the offence is imprisonment for two years or 120 penalty units or both.

2.11 Under clause 72TG, a person also commits an offence if the person has permission to be at a place in the WPA and fails to comply with a condition of the permission. The penalty for the offence is 60 penalty units.

2.12 Subclause 72TG(2) provides that the offence is a strict liability offence.

### *Application of proposed Part VIB and Part VII of the Defence Force Regulations*

2.13 Clause 72TB in the new 'Part VIB—The Woomera Prohibited Area' addresses the application of the existing regulation of access to the WPA to existing users and the potential transfer of these users to the new permit regime created by the bill. The EM notes:

Clause 72TB sets out the instances in which Part VII of the *Defence Force Regulations 1952* will continue to apply to the Woomera Prohibited Area, instead of this Part, after this Part commences.<sup>2</sup>

2.14 Subclause 72TB(1) provides that after the commencement of Part VIB, Part VII of the Defence Force Regulations (Part VII) which deals with Defence Areas, applies only to a number of persons including:

- an Aboriginal person in the WPA exercising native title rights or rights under the *Native Title Act 1995*;
- a person in the WPA, acting for, or behalf of, South Australia;
- a person who holds an existing pastoral lease and is in the WPA for purposes related to the lease; and

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1 EM, p. 8.

2 EM, p. 5.

- a person acting for, or on behalf of, a person who is the owner or operator of the Tarcoola to Darwin railway.

2.15 Subclause 72TB(2) then provides that if Part VII of the Defence Force Regulations applies to the person, this Part does not apply to the person.

2.16 Subclauses 72TB(3) and (4) deal with the effect of permits on existing authority. Subclause 72TB(3) provides that subclauses 72TB(1) and (2) 'do not prevent a person from applying for a permit'. Subclauses 72TB(4) provides that authority under Part VII of the Defence Regulations is 'revoked to the extent that a permit provides (or provided) permission for a person to be at a place'.

2.17 The committee notes that the EM for the bill refers to subclauses 72TB(5) and (6). These subclauses do not exist in the text of the current bill and appear to be a minor drafting error. They appear to refer to subclauses 72TB(3) and 72TB(4) respectively. The EM states:

Subclause 5 provides that a person who has authority under Part VII of the Regulations may apply for a permit to access the Woomera Prohibited Area under this Part.

Subclause 6 provides that if a permit is obtained under this Part, that person's authority under Part VII of the Regulations is revoked to the extent of the permit under this Part.<sup>3</sup>

### ***Ministerial directions***

2.18 Subclause 72TJ(1) provides that the Minister may direct a person to do, or not to do, one or more specified acts or things in relation to the WPA, if the Minister considers it necessary for the purposes of the defence of Australia; or to protect human life.

2.19 The Minister appears to have a broad discretion in making directions. While subclause 72TJ(2) outlines matters which a Minister's direction may include (such as a direction to leave a place or area). The EM provides an example:

[T]his power would allow the Minister to evacuate the Woomera Prohibited Area of non-defence users in situations where evacuation is necessary to protect the safety of non-defence users.<sup>4</sup>

2.20 Subclause 72TJ(3) clarifies that this does not limit subclause 72TJ(1). Subclause 72TJ(4) provides that a direction issued under subclause 72TJ(1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The EM explains:

A direction is exempt from the *Legislative Instruments Act 2003* because it would be issued in circumstances where non-defence users in the Woomera Prohibited Area must do certain activities with immediate effect. A direction would be issued to ensure non-defence activity did not interfere with defence activity in the Woomera Prohibited Area in, for instance, a

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3 EM, p. 6.

4 EM, p. 8.

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time of war, or to protect the safety of non-defence users. As a direction would have to be complied with immediately to have the intended effect, the normal processes for a legislative instrument would make a direction unworkable.<sup>5</sup>

2.21 New subclause 72TJ(5) creates an offence if a person who is given a direction under subclause 72TJ(1) refuse or fails to comply with the direction. The penalty is imprisonment for 5 years or 300 penalty units. A rationale for the relatively heavy penalty for the proposed offence is outlined in the EM:

The severe penalty is intended to act as a strong deterrent, as failing to comply with a direction has the potential to place human life in danger or prejudice national security. Further, failure to comply with a direction may delay defence activity at a time of heightened Australian Defence Force operations or, more significantly, at a time of national emergency when defence activity at Woomera may need to be intensified.<sup>6</sup>

### ***Compensation***

2.22 Subclause 72TK(1) provides that if the operation of this Part results in an acquisition of property from a person other than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

2.23 Under subclause 72TK(2) if the person and the Commonwealth do not agree on amount of compensation, the person may institute proceedings in court for recovery of reasonable amount of compensation as the court determines.

2.24 Clause 72TL provides that the Rules may limit amounts payable by the Commonwealth in respect of loss of damage in the WPA arising from a breach of a common law or statutory duty of care in relation to the use of the WPA for the purposes of testing war materiel.

### ***Delegation***

2.25 Clause 72TN provides that the Minister may delegate, in writing, certain powers to Department of Defence officers or ADF officers of specified rank, an equivalent rank or higher. In particular:

- power under clause 72TF (Minister's permission) may be delegated to an APS6 Department of Defence officer or an ADF officer with the rank of Commander, Lieutenant Colonel, Wing Commander or higher;
- power under clause 72TJ(1)(b) (Minister may give directions to protect human life) may be delegated to an Executive Level 2 Department of Defence officer or an ADF officer with the rank of Navy Captain, Colonel, Group Captain or higher; and

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5 EM, p. 8.

6 EM, p. 8.

- power under clause 72TM (power to review the above decisions) may be delegated to a Senior Executive Service Band 2 officer in the Department of Defence.

### ***Review of decisions***

#### *Internal review*

2.26 The EM notes that subclause 72TM(1) provides for an internal review process to allow the Minister to review decisions made under clauses 72TF (Minister's permission), 72TH (suspension of permission) and 72TJ (directions by Minister):

A person affected by a decision made under those clauses may apply in writing to the Minister seeking to have the decision reviewed. The Minister must review the decision and confirm, vary or revoke the original decision. The Minister must notify the applicant of the reviewed decision within 20 days of receiving the person's application.<sup>7</sup>

#### *Administrative Appeals Tribunal review*

2.27 Subclause 72TM provides that applications may be made to the Administrative Appeals Tribunal (AAT) to review a decision made by the Minister under clause 72TF (Minister's permission). The EM includes two reasons for why decisions under clauses 72TH (suspension of permission) and 72TJ (directions by Minister) are exempt from review by the AAT. Firstly, because these are decisions which will 'affect the safety of people in the [WPA] and will need to be complied with immediately'. Secondly, these are decisions that 'affect the defence of Australia'. The EM uses the example of a 'urgent national Defence requirement and states '[i]n such an instance, the Minister for Defence is best placed to determine use of a national defence asset and review of such a decision could put national security at risk'.<sup>8</sup>

### ***The Rules***

2.28 Clause 72TP(1) provides that the Minister may make, by legislative instrument and with the agreement of the Industry Minister, the WPA Rules. Subclause 72TP(2) clarifies the Rules may 'prescribe fees for doing any act or providing any service for the purposes of this Part' and 'make provision for, and in relation to, the review of decisions made under this Part or the Rules'. Subclause 72TP(3) further clarifies that a fee prescribed under 72TP(2) must not be 'such as to amount to taxation'.

#### *Infringement notices*

2.29 Subclause 72TP(4) provides that the Rules may provide for a person who is alleged to have committed an offence under subclause 72TG(1) (failing to comply with a condition of permission) to pay a penalty as an alternative to prosecution. The penalty must not exceed one fifth of the maximum fine a court could impose as a penalty for that offence.

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7 EM, pp 9-10.

8 EM, p. 10.

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### *Demerit points*

2.30 Under subclause 72TP(6) the Rules may establish a demerit points systems under which a permit may be suspended or cancelled if the permit holder accrues a number of demerit points. The legislative framework paper released in 2013 provided additional detail on the proposed demerit point system:

The proposed demerit point system would suspend a non-Defence user's access to the WPA if they accumulate a specified number of points within a specified period...The demerit points system would permit one warning each year in the case of safety or security issues (unless the permit holder enters a place which is enclosed or guarded, in which case there is no warning) and two warnings for other conditions. Following this, there would be a three month suspension from accessing the WPA.<sup>9</sup>

## **Part 2**

2.31 Item 4 inserts new section 121A in the Defence Act which provides that any declaration or past act taken under regulation 35 in relation to the WPA is taken to have always been valid. The EM states that '[t]his section is inserted to avoid any doubt on the past applicability of the Defence Force Regulations to Woomera Prohibited Area which may arise as a result of the establishment of the new access regime by the Bill'.<sup>10</sup>

2.32 Part 2 also includes amendments to Defence regulations relating to compensation in relation to existing regulation 34 and 35. Regulation 34 provides that the Minister may authorise entry and use of any area of land or water 'necessary or expedient in the interests of the safety or defence of Australia to carry out operations for the testing of war material'. Regulation 35 provides the Minister may declare a place to be a prohibited area in certain circumstances including to 'carry out operations for the testing of war material'.

2.33 Existing regulation 36 provides that:

### **Compensation**

Where:

(a) any person suffers loss or damage by reason of anything done in pursuance of regulation 34 in relation to any land or water in which he has any legal or equitable interest; or

(b) by reason of the operation of regulation 35 a person ordinarily resident in a prohibited area at the time when the area becomes a prohibited area suffers any loss or damage;

the Commonwealth shall be liable to pay to him such compensation as is determined by agreement between him and the Minister or, in the absence

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<sup>9</sup> Department of Defence, *Legislative framework to implement the co-existence model for the Woomera Prohibited Area*, April 2013, p. 8.

<sup>10</sup> EM, p. 11.

of agreement, by action by him against the Commonwealth in a court of competent jurisdiction.

2.34 Item 5 repeals existing regulation 36 and substitutes:

**Compensation for acquisition of property**

(1) If the operation of regulation 34 or 35 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 the Federal Court of Australia or another court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

2.35 The EM states that the amendment 'modernises the existing compensation provisions in regulation 36 of the *Defence Force Regulations 1952 so that it reflects modern drafting terminology by providing for reasonable compensation where the operation of regulation 34 or 35 would result in an acquisition of property otherwise than on just terms*'.<sup>11</sup>

**Financial impact statement and future cost recovery**

2.36 The EM to the bill indicated that it is anticipated that the new access arrangements will result in increased non-Defence access which will require increased management and coordination by Defence. It noted that:

The estimated \$5.0 million annual costs associated with the amendment in the Bill creating new administration arrangements for the access to the WPA represent existing funding and will continue to be met from within the existing appropriation to the Department of Defence.<sup>12</sup>

2.37 However, the EM also noted that the Rules may provide for the introduction of a cost recovery model 'at some point in the future' to recover the expenses Defence incurs in managing non-Defence access to the WPA.<sup>13</sup> This presumably refers to paragraph 72TP(2)(a) which provides that the Rules may 'prescribe fees for doing any act or providing any service for the purposes of this Part and prescribe the circumstances and ways in which fees can be refunded, waived or reduced'.

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11 EM, p. 12 [emphasis in original].

12 EM, p. 4.

13 EM, p. 4.