

EXPLANATORY STATEMENT

Air Navigation (Exemption for Commercial Non-Scheduled Flights) Determination 2019

The Determination exempts operators from the requirement to obtain permission from the Secretary of the Department of Infrastructure, Regional Development and Cities (the Department) for certain categories of international non-scheduled flights.

The Determination remakes, without significant changes, the *Determination under subsection 15A(3) of the Air Navigation Act 1920 – categories of commercial non-scheduled flights for which permission is not required*, made on 21 April 1997, which was due to sunset on 1 April 2019. Minor changes were made to reflect modern drafting conventions, the removal of a redundant provision that referred to previous regulations which are no longer in effect, and the updating of definitions.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Paragraphs 1 to 4 refer to machinery provisions associated with the making of this instrument, including the name of the instrument, the commencement date, the authority under which the instrument is made, and definitions.

Paragraph 5 refers to Schedule 1 of the instrument which repeals the previous Determination made in 1997.

Paragraph 6 sets out the circumstances under which permission is not required for commercial non-scheduled flights.

The Government's international aviation policy setting includes a framework which provides for the operation of non-scheduled international air services to serve specific market needs. While the large majority of international flights to and from Australia are scheduled flights operated in accordance with the provisions of an international airline licence (IAL), non-scheduled flights also have a role in promoting and facilitating Australian trade and tourism.

Non-scheduled flights are conducted outside of Australia's bilateral air services framework and provide an opportunity for operators to meet short term (seasonal) demand for the carriage of passengers and/or cargo on particular routes, to test demand in potential new markets, and to meet the needs of companies that require transportation for their own staff and cargo. The non-scheduled flight framework also caters for a range of other services including the operation of medical evacuation flights, private business flights and flights carrying equipment for special events.

The Australian Government regulates non-scheduled flights through an approvals process that enables regulatory authorities to examine compliance with relevant operational requirements and to ensure adequate consumer protection measures are in place. In addition, the approvals process tests whether the proposed non-scheduled flights meet the identified

need and ensures such flights are not a substitute for regular scheduled services as provided for under Australia's bilateral air services arrangements.

Section 15A of the Act generally prohibits non-scheduled flights to or from Australia without permission from the Secretary of the Department. However, under subsection 15A(3) of the Act, the Secretary may determine that a permission is not required in relation to a category of commercial non-scheduled flights. Paragraphs 7 to 10 describe these categories.

Paragraph 7 refers to operators of single charter flights being exempt from seeking permission from the Secretary.

Paragraph 8 exempts operators of the following passenger charter flights from seeking the permission of the Secretary:

- programs using aircraft with a capacity of 10 or fewer seats;
- programs of five or fewer using aircraft with a capacity of between 11 and 40 seats;
- programs of two or fewer using aircraft with a capacity of between 41 and 80 seats,

with operators to give the Secretary written notice, within 14 days after the end of the first flight, setting out information referred to in section 15C(1) of the Act.

The exemption from seeking the permission of the Secretary for the categories of flights set out in paragraph 8 will not apply if, after giving written notice under paragraph 8(c), the operator intends to vary a program which results in the maximum number of flights set out in Table A being exceeded.

Paragraph 9 refers to operators of own-use charter flights being exempt from seeking permission from the Secretary.

Paragraph 10 refers to operators of charter flights for the carriage of homogenous cargo being exempt from seeking permission from the Secretary.

In most circumstances, applications for permission to operate a non-scheduled flight need to be submitted to the Secretary for approval no later than 21 days in advance of the proposed flights. However, the ad-hoc nature of non-scheduled flights by small aircraft, single one-off flights and single-entity freight charter flights means such flights are often only confirmed at short notice (less than 21 days in advance). In these circumstances, the exemptions provided in the instrument enable operators of such services to respond quickly to demand without the need to seek prior permission from the Secretary to operate such services.

Operations under the categories of non-scheduled flights set out in the Determination are considered to have met identified needs and to have no substantive impact in the provision of regular scheduled services. Not having to seek prior permission from the Secretary for such operations provides operators with additional flexibility to respond quickly to the needs of industry.

Although operators are exempt from seeking the permission of the Secretary for the operation of flights under all the categories set out in the Determination, operators are still required to notify the Secretary of details of the flight(s) operated within 14 days after the end of the flight(s).

The categories of flights set out in the Determination have been in place since 1997 and are well understood and accepted by operators and key aviation stakeholders. The effect of the Determination reduces both compliance costs for operators and administrative costs for the Department. A recent stakeholder consultation process confirmed support for the continuation of the provisions of the Determination.

Operators of proposed non-scheduled flights that do not fall within the categories set out in the Determination must continue to lodge applications with the Secretary for permission to operate such flights.

Operators of all international non-scheduled flights, including those undertaken under the provisions of this determination, must comply with a number of other regulatory requirements, including those relating to safety, security, border control, and protection of the environment.

The power to make the Determination is contained in subsection 15A(3) of the *Air Navigation Act 1920*. Subsection 15A(3) allows the Secretary to make a determination that a permission is not required in relation to a category of commercial non-scheduled flights. The determination-making power in subsection 15A(3) has been delegated to the levels of Deputy Secretary and of SES2 (Executive Director) and SES1 (General Manager) in Aviation and Airports Division under the Secretary's Air Navigation Delegation Instrument 2016 (No. 1) dated 5 April 2016.

In accordance with section 18 of the Act, the Determination will be included in the Aeronautical Information Publications published under regulations made under the *Air Services Act 1995*.

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Statement of Compatibility with Human Rights

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

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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 primary purpose of this Legislative Instrument is to continue to provide a legal framework for exempting operators of certain categories of non-scheduled flights from seeking the permission of the Secretary of the Department of Infrastructure, Regional Development and Cities for such operations. The instrument is a remake, without any

significant changes, of a previous instrument that has been in place since 1997. Minor changes were made to reflect modern drafting conventions and remove redundant provisions.

The instrument is well understood and accepted by operators and key aviation stakeholders. A recent consultation process reaffirmed stakeholder support for the instrument.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.