

## **Explanatory Statement**

### **Civil Aviation Safety Regulations 1998**

#### **CASA EX81/21 – Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021**

##### **Purpose**

The purpose of this instrument is to make a number of exemptions and directions for Part 91 of the *Civil Aviation Safety Regulations 1998* (**CASR**).

##### **Background**

Part 91 of CASR is a comprehensive code of general flight and operational safety rules for Australian-registered aircraft wherever located, and for foreign-registered aircraft in Australian territory. Part 91 contains the baseline rules for “private operations”.

The Part 91 rules are added to or replaced, as appropriate, by flight and operational rules for air transport operations, aerial work operations and other operations that are addressed in other Parts of the CASR.

Part 91 is a part of the suite of CASA’s new Flight Operations Regulations (**FOR**). The FOR includes new Parts 91, 119, 121, 133, 135 and 138 of CASR, each of which commences on 2 December 2021.

The instrument will facilitate implementation of Part 91 in accordance with CASA’s transition policies for the FOR.

There were some technical errors and omissions in Part 91 which give rise to unintended obligations. These will be rectified in the next set of amendments to the Part but, in the meantime, until those amendments are made, it is necessary to use exemptions to provide relief from having to comply with certain requirements and directions to ensure safety compliance.

The exemptions and directions in this instrument variously require operator oversight of the actions of operator personnel and otherwise are intended to maintain current regulatory requirements where the FOR inappropriately failed to reflect requirements of the regulations that the FOR is replacing. The directions that auditors of operations and personnel on training flights must be trained and competent is not expected to impose any new significant burden on aircraft operators.

##### **Legislation — exemptions**

Section 98 of the *Civil Aviation Act 1988* (the **Act**) empowers the Governor-General to make regulations for the Act and the safety of air navigation.

Subpart 11.F of CASR deals with exemptions. Under subregulation 11.160 (1), and for subsection 98 (5A) of the Act, CASA may, by instrument, grant an exemption from a provision of CASR in relation to a matter mentioned in subsection 98 (5A). Subsection 98 (5A) matters are, in effect, those affecting the safety, airworthiness or design of aircraft.

Under subregulation 11.160 (2), an exemption may be granted to a person or a class of persons. Under subregulation 11.160 (3), CASA may grant an exemption on application, or on its own initiative. Under subregulation 11.170 (3), for an application

for an exemption, CASA must regard as paramount the preservation of an acceptable level of safety. For making a decision on its own initiative, CASA is guided by the requirement in subsection 9A (1) of the Act that in exercising its powers and functions CASA must regard the safety of air navigation as the most important consideration.

Under regulation 11.205, CASA may impose conditions on an exemption if this is necessary in the interests of the safety of air navigation. Under regulation 11.210, it is a strict liability offence not to comply with the obligations imposed by a condition. Under regulation 11.225, CASA must, as soon as practicable, publish on the internet details of all exemptions under Subpart 11.F.

Under subregulation 11.230 (1), an exemption may remain in force for 3 years or for a shorter period specified in the instrument.

Under subregulation 11.230 (3), an exemption, in force in relation to a particular aircraft owned by a particular person, ceases to be in force when the aircraft ceases to be owned by that person. Under regulation 11.235, an exemption is not transferable (as between operators, aircraft, etc.).

### **Legislation — directions**

Under paragraph 11.245 (1) (a) of CASR, for subsection 98 (5A) of the 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.

### **Description of supplementary exemptions and supplementary directions**

#### Part 1 — Preliminary, Definitions and Application

Section 2 — Duration provides that the instrument commences on 2 December 2021 and is repealed at the end of 1 December 2024.

Section 3 — Definitions provides definitions for the instrument.

Section 4 — Application provides that the instrument applies according to its terms to the operator and the pilot in command of an aircraft to which Part 91 applies and, according to its terms, to certain other persons.

#### Part 2 — Directions

##### **Section 5 — Flight manual instructions – direction**

This direction requires pilots in command of an aircraft to comply with the requirements and limitations of the aircraft flight manual instructions for activities that occur before, during or after a flight. The relevant provision of Part 91 (91.095) incorrectly requires compliance with the flight manual instructions only during a flight.

## Section 6 — Recreational aviation medical practitioner’s certificate – direction

This direction requires pilots in command to ensure that a flight crew member’s recreational medical certificate or medical exemption is carried on board the aircraft, in circumstances where the flight crew member does not hold a medical certificate. This requirement does not apply if aerobatic manoeuvres will be conducted on the flight and carriage of the document would present a safety risk. The relevant provision of Part 91 (91.105) failed to take into account that a pilot may not have a medical certificate (as defined) and may instead be the holder of a recreational aviation medical practitioner’s certificate or a medical exemption. This direction will also ensure that Part 91 is consistent with comparable requirements in Part 61 of CASR.

## Section 7 — Photographic identity documents – direction

This direction requires pilots in command to ensure that the photographic identification document referred to in paragraph 91.105 (2) (b) is not more than 10 years old and has not expired or been cancelled. This direction will ensure that Part 91 is consistent with comparable requirements in Part 61 of CASR.

## Section 8 — Requirements for permitted persons conducting audits – direction

This direction requires aircraft operators to ensure that a “permitted person” carried on an aircraft during a training flight for the purpose of conducting an audit of the operation has been trained and that the operator is satisfied that they are competent and have the skills, knowledge and experience required to conduct the audit. The relevant provision of Part 91 (91.725) is silent on this matter. The direction will provide a more consistent approach in meeting the intent of the regulation as regards the carriage of auditors on training flights.

## Section 9 — Requirements for crew members carrying out audits, checks, examinations etc. – direction

The direction is substantially the same as the direction in section 8, but in respect of the qualifications of a *crew member* carried on a training flight for the purpose of conducting an audit of a person on board.

## Section 10 — Training for a foreign class rating or type rating – direction

This direction is required to ensure that only permitted persons, up to a maximum of 4, are carried on a flight involving training for a class or type rating that would be granted under the law of a foreign country. The need for this direction arises because the expression “flight training” in subparagraph 91.725 (2) (b) (i) is a defined term in the CASR Dictionary to mean training for a qualification under Part 61 of CASR, and does not encompass training for equivalent foreign licence qualifications.

Section 11 is reserved.

### Part 3 — Exemptions and related directions

#### Section 12 — Maintaining a continuous watch for ATS standard visual signals – exemption

The exemption from, in effect, paragraph 91.405 (2) (a), and the related condition, have the effect of requiring a pilot in command to maintain a *visual* watch for instructions given visually by Air Traffic Services (*ATS*) for an aerodrome using standard visual signals when it is not possible for the pilot to maintain a continuous *listening* watch for ATS communications as otherwise required by paragraph 91.405 (2) (b).

#### Section 13 — Safety when rotorcraft operating on the ground – exemption

This exemption is required to acknowledge that, in the case of a foreign-registered rotorcraft, the person operating the rotorcraft on the ground may be someone authorised to pilot the rotorcraft by the State of the *operator* rather than by the State of registry.

#### Section 14 — Pilot permission for carriage of animals – exemption and direction

This exemption is required to acknowledge that, for regulation 91.620, permission to bring an animal on an aircraft may be given by an Australian air transport operator or an aerial work operator (an aerial work certificate holder), rather than by the pilot in command. In such cases, both the operator and the pilot in command must take reasonable steps to ensure that carriage of the animal does not have an adverse effect on the safety of air navigation.

#### Section 15 — Communication monitoring in controlled airspace – exemption

This exemption is required to acknowledge, for regulation 91.635, that a pilot in a control seat who is not the pilot in command may, on occasion, be the pilot who is monitoring air traffic control communications when the aircraft is in controlled airspace.

#### Section 16 — Training for certain activity ratings or endorsements – exemption

This exemption has the effect of permitting one additional “permitted person” on a training flight that is for a low-level rating or an aerial application rating or their foreign equivalent, under regulation 91.725. The regulation permits up to 3 permitted persons on board the aircraft. This exemption permits up to 4 permitted persons.

#### Section 17 — Rotorcraft simulation of emergency and abnormal situations – exemption

This exemption has the effect of permitting one additional “permitted person” on a training flight that is the simulation of an emergency or abnormal situation, under regulation 91.725. The exemption provides for up to 4 permitted persons to be on board, but only for a flight of a rotorcraft and only if the 4<sup>th</sup> permitted person is essential to the safe conduct of the flight.

#### Section 18 — Multi-engine rotorcraft – simulation of engine failure at night – exemption

This exemption has been issued in recognition that, for regulation 91.775 purposes, the simulation, in a multi-engine rotorcraft, of an engine failure at night in visual meteorological conditions (*VMC*) may be conducted outside the circling area of an

aerodrome, for the training, checking and testing of air crew and other training, *provided that* a night vision imaging system (*NVIS*) is being used as the primary means of terrain avoidance by the pilot in command and any pilot undergoing training.

### ***Legislation Act 2003 (the LA)***

The exemptions and directions in this instrument are for the safe navigation and operation of aircraft and apply to classes of persons. The instrument is a legislative instrument under the Act and the LA and subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

### **Incorporation by Reference**

In accordance with paragraph 15J (2) (c) of the *Legislation Act 2003* and subsection 98 (5D) of the Act, the legislative instrument applies, adopts or incorporates matters contained in the following instruments:

- aircraft flight manual instructions
- exposition or operations manual, or training and checking manual of an operator.

Subsection 98 (5D) of the Act permits a non-legislative instrument to be incorporated as in force or existing at a particular time or from time to time, including a non-legislative instrument that does not exist when the legislative instrument is made.

Each incorporated document is described below, together with the manner of incorporation and how it may be obtained.

### **Aircraft flight manual instructions:**

“Aircraft flight manual instructions” is defined in the CASR Dictionary to comprise the flight manual, checklists of normal, abnormal and emergency procedures for the aircraft and any operating limitation, instructions, markings and placards relating to the aircraft. The instructions comprise information required to safely operate the specific aircraft. Instructions are incorporated as they exist from time to time, consistent with the definition of “flight manual” in the CASR Dictionary.

These documents are publicly available but not for free. The aircraft flight manual instructions for an aircraft is proprietary to the owner of the aircraft design (usually the manufacturer). The incorporated requirements are at the aircraft-specific level, and instructions are required to be provided to owners of aircraft. Where available, and by prior arrangement, CASA will make aircraft flight manual instructions available for inspection at any CASA office.

### **Exposition or operations manual or training and checking manual of an operator:**

An exposition or operations manual, or a training and checking manual of an operator, is a document, or suite of documents, that specifies the scope of the operations and activities conducted by the operator, and sets out the plans, processes, procedures, programs and systems implemented by the operator to comply with the civil aviation legislation.

An “exposition”, for an operator generally means the exposition as changed from time to time, in accordance with the definition of “exposition” in the CASR Dictionary. Manuals are also incorporated as in force from time to time.

An exposition or an operations manual or a training and checking manual is not publicly or freely available. They are proprietary to the operator and will generally include

commercial in confidence information about the operator's business. The incorporated requirements of an exposition or manual are at the operator-specific level and apply only to the operator and its personnel. Further, the operator is under obligations to make the exposition or manual available to its personnel who have obligations under the document.

### **Consultation**

Under section 16 of the 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.

Exemptions from regulatory requirements are considered to be beneficial for those to whom they apply, who voluntarily elect to take advantage of them, and who comply with their conditions. It is, therefore, rarely necessary to engage in extensive public consultation on a proposed exemption. However, it is CASA's policy to consult, where possible, in an appropriate way with those parts of the aviation industry most likely to avail themselves of, or be affected by, an exemption so that they may have the opportunity to comment on the possible or likely terms, scope and appropriateness of the exemption.

For this instrument, from 16 July to 6 August 2021, CASA consulted the aviation community by providing descriptions of the exemptions and directions to the Implementation Technical Working Group (**TWG**) of the Aviation Safety Advisory Panel (**ASAP**) for comment. ASAP is the primary advisory body through which CASA directs its engagement with industry and seeks input on current and future regulatory and associated policy approaches.

Comments provided by one TWG member in relation to the exemption in section 12 of the instrument resulted in a substantive modification of the exemption to reflect that the watch for visual signals from ATS relates to situations where radiocommunications cannot be maintained. Comments from another member of the TWG, in relation to the circling area of the aerodrome mentioned in the exemption in section 18 of the instrument, resulted in the development of additional guidance material and text for inclusion in the AIP.

Other questions and comments from TWG members related to the requirements of regulations 91.195 and 91.200 in relation to rotorcraft operations under Part 133 of CASR, and on the rationale behind regulation 91.430 for rotorcraft operation on the ground and the exemption provided in section 13 of the instrument. CASA considered all TWG input in finalising the exemption instrument, and advised the TWG of its responses and comments regarding all input from the TWG.

### **Office of Best Practice Regulation (OBPR)**

A Regulation Impact Statement (**RIS**) is not required because the instrument is covered by a standing agreement between CASA and OBPR under which a RIS is not required for Exemption or Direction instruments (OBPR id: 14507).

### **Statement of Compatibility with Human Rights**

The Statement in Appendix 1 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The exemption instrument is compatible with human rights: with its aviation safety focus, it promotes both the right to life, and the

right to safe and healthy working conditions and, to the extent that it engages the right to work, it does so in a way that is reasonable, necessary and proportionate in the context of aviation safety.

**Commencement and making**

The new exemption instrument commences on the day after it is registered and is repealed at the end of 1 December 2024.

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

## Statement of Compatibility with Human Rights

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

### CASA EX81/21 – Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021

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 make a number of exemptions and directions for Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

Part 91 of CASR is a comprehensive code of general flight and operational safety rules for Australian-registered aircraft wherever located, and for foreign-registered aircraft in Australian territory. Part 91 contains the baseline rules for “private operations”.

The Part 91 rules are added to or replaced, as appropriate, by flight and operational rules for air transport operations, aerial work operations and other operations that are addressed in other Parts of the CASR.

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There were some technical errors and omissions in Part 91 which give rise to unintended obligations. These will be rectified in the next set of amendments to the Part but, in the meantime, until those amendments are made, it is necessary to use exemptions to provide relief from having to comply with certain requirements and directions to ensure safety compliance.

The exemptions and directions in this instrument variously require operator oversight of the actions of operator personnel and otherwise are intended to maintain current regulatory requirements where the FOR inappropriately failed to reflect requirements of the regulations that the FOR is replacing. The directions that auditors of operations and personnel on training flights must be trained and competent is not expected to impose any new significant burden on aircraft operators.

### **Human rights implications**

The legislative instrument engages with the following human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- the right to life under Article 6 of the International Covenant on Civil and Political Rights (the **ICCPR**)
- the right to safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social and Cultural Rights (the **ICESCR**)
- the right to work under Article 6 (1) of the ICESCR.

#### ***Right to life under the ICCPR***

#### ***Right to safe and healthy working conditions under the ICESCR***

#### ***Right to work under the ICESCR***

The instrument requires certain persons who conduct an audit of an aircraft operation or of a person on board on aircraft, to be trained, competent and have the necessary skill, knowledge and experience to conduct the audit. In some circumstances, this may affect the ability of an auditor to conduct the audit, as additional training may be required. However, the increased skill resulting from the increased training will improve the safety of audited and subsequent operations, thereby contributing to safe and healthy working conditions and, ultimately, to the right to life.

The requirements in the instrument are considered reasonable and necessary in the interests of the aviation safety. They are also considered proportionate, in the sense that any additional training and costs incurred by the auditor are likely to be offset by additional work opportunities arising from the auditor being trained, and the improved safety outcomes.

### **Human rights implications**

The exemptions and direction in the legislative instrument are 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*. To the extent that the instrument engages certain of these rights, it does so in a way that is reasonable, necessary and proportionate to promote the rights to life, work and safe and healthy working conditions.

### **Conclusion**

This legislative instrument is compatible with human rights, and to the extent that it may engage certain rights it does so in a way that is reasonable, necessary and proportionate in the interests of aviation safety.

## **Civil Aviation Safety Authority**