

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX82/21 – Part 119 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 119 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

Background

Part 119 of CASR applies to operators of Australian air transport operations. Part 119 works with Parts 91, 121, 133 and 135 of CASR to provide a comprehensive code of safety rules for Australian air transport operators.

Part 119 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 119 in accordance with CASA's transition policies for the FOR.

There were some technical errors and omissions in Part 119 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.

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 119 of CASR applies.

Part 2 — Directions

Section 5 — Use of EFBs – direction

This section requires an Australian air transport operator to have CASA approval for its first use of an electronic flight bag (*EFB*) in an operation. This does not apply to an operator who immediately before 2 December 2021 had a charter, regular public transport or aerial work (air ambulance) Air Operator's Certificate (*AOC*) and was in compliance with the requirements of paragraph 11.1 and Appendix 9 of Civil Aviation Order (*CAO*) 82.0 (concerning requirements to be met under that CAO for the use of an EFB).

Operators who make use of EFBs must include in their exposition, procedures and instructions on their use and management, and how the operator will obtain CASA approval of changes to EFB use.

Section 6 — Operation of foreign-registered aircraft – direction

The section prohibits an Australian air transport operator from operating a foreign-registered aircraft in an Australian air transport operation for the first time, or changing the operation of a foreign-registered aircraft (other than permanently ceasing its operation), unless CASA approves the operation of the aircraft or changed operation. The operator's application for the change must be accompanied by the information described in paragraphs 28A (1) (c) to (h) of the Act (concerning a range of details about the aircraft).

If the foreign aircraft was being operated by the operator immediately before 2 December 2021 and was the subject of an agreement mentioned in paragraphs 28A (1) (a) or (b) of the Act that indicated the period of time that the aircraft may be operated by the operator, the operator must not operate the aircraft outside that time period.

However, this section does not apply to an Australian air transport operator in relation to the operation of an aircraft registered in New Zealand and operated under an Australian AOC with Australia New Zealand Aviation privileges, or to an aircraft for the operation of which the operator holds a permission under section 27A of the Act (Permission for operation of foreign registered aircraft without AOC).

Part 3 — Exemptions and directions

Section 7 — Significant change of type or model of aircraft – exemption

This section exempts an Australian air transport operator from complying with subsections 119.090 (1) and (4) in relation to a significant change mentioned in subparagraph 119.020 (a) (viii) — change to types and models of aircraft used in the operator's Australian air transport operations. The exemption is subject to the condition that specified changes of the use of aircraft are treated as if they were a significant change requiring CASA pre-approval.

Section 8 — HOFO requirements – exemption

This section applies to an Australian air transport operator who immediately before 2 December 2021 held an AOC or was an early applicant for an AOC or AOC variation that authorised the use of single-pilot certificated aircraft for charter operations or aerial work (air ambulance) operations, and not for regular public transport operations.

Where the operator's head of flying operations (**HOFO**) on 2 December 2021 was the operator's chief pilot immediately before 2 December 2021 but did not hold an air transport pilot licence (**ATPL**), the HOFO is exempted from the licence requirements of regulation 119.135. It is a condition of the exemption that the HOFO meets the requirements in subclause 4.3 in Appendix 1 of CAO 82.0 (which prescribes the chief pilot requirements, namely, holding a licence with the appropriate endorsements and ratings to be the pilot in command of any operation under the AOC).

This section ceases to have effect the earliest of: the end of 1 March 2023, the day the operator commences scheduled air transport operations, and the day the HOFO ceases to be the operator's HOFO.

Section 9 — HOFO requirements – directions

This section relates to the exemption in section 8. It provides that, whether with an incumbent HOFO, or with a new HOFO, the operator must not commence scheduled air transport operations until CASA, in writing, approves the operator's exposition content in relation to the HOFO's compliance with the relevant licensing requirements.

Section 10 — HOTC requirements – exemption

This section applies to an Australian air transport operator who immediately before 2 December 2021 held an AOC or was an early applicant for an AOC or AOC variation that authorised the use of single-pilot certificated aircraft for regular public transport operations, charter operations or aerial work (air ambulance) operations in other than high capacity aircraft.

Where the operator's head of training and checking (*HOTC*) on 2 December 2021 was the operator's chief pilot immediately before 2 December 2021 but did not hold an ATPL, the HOTC is exempted from the licence requirements of regulation 119.145. It is a condition of the exemption that the HOTC meets the requirements in subclause 4.3 in Appendix 1 of CAO 82.0 (which prescribes the chief pilot requirements, namely, holding a licence with the appropriate endorsements and ratings to be the pilot in command of any operation under the AOC).

This section ceases to have effect the earliest of: the end of 1 March 2023, the day the operator commences scheduled air transport operations in a high capacity aircraft or other aircraft that would have required 2 pilots under subsection 8 of CAO 82.3, and the day the HOTC ceases to be the operator's HOTC.

Section 11 — HOTC requirements – directions

This section relates to the exemption in section 10. It provides that, whether with an incumbent HOTO, or with a new HOFO, the operator must not commence scheduled air transport operations in a high capacity aircraft, or another aircraft that would have required 2 pilots under subsection 8 of CAO 82.3, until CASA, in writing, approves the operator's exposition content in relation to the HOTO's compliance with the relevant licensing requirements.

Section 12 — HOTC experience requirements – exemption

This section applies to the HOTC of an Australian air transport operator. It exempts the HOTC from the experience requirements set out in paragraph 119.145 (3) (b) and subregulation 119.145 (4), on condition that other specified minimum experience requirements are met.

Section 13 — HOTC experience requirements – direction

This section relates to the exemption in section 12. It requires the operator to ensure that the minimum experience requirements for the HOTC are met, as applicable.

Section 14 — Training and checking for operational safety-critical personnel – exemption

The section applies to an Australian air transport operator who is required under subregulation 119.170 (4) to extend its training and checking system to operational safety-critical personnel who are **not** flight crew or cabin crew. The operator is exempted from complying with subregulation 119.170 (4), but only in respect of operational safety-critical personnel who are not flight crew, cabin crew, *or other crew members with duties for the flying or safety of the aircraft*, and only on condition that the operator’s training and checking system describes how the operator ensures that these personnel are competent and are not likely to have an adverse effect on safety, and for immediate action to be taken if such personnel lose competence or are likely to have an adverse effect on safety.

This section ceases to have effect at the end of 1 March 2023.

Section 15 — Training and checking for operational safety-critical personnel

This section relates to the exemption in section 14. It requires the operator to include in its exposition how its training and checking system applies to operational safety-critical personnel who are not flight crew, cabin crew or other crew members with duties on board aircraft for the flying or safety of the aircraft, when the operator ceases to take advantage of the exemption in section 14 or when the exemption ceases to have effect.

Section 16 — Authorised persons acting in the absence of key personnel – exemption

The section exempts Australian air transport operators from complying with subparagraph 119.205 (1) (e) (iv) (about naming each person authorised to carry out the responsibilities of a key person when that person is absent or cannot carry out the responsibilities). This is to acknowledge that an operator may chose not to name such an authorised person in their exposition.

Section 17 — Safety systems – direction

This section applies to an Australian air transport operator who immediately before 2 December 2021 was authorised to conduct charter operations or aerial work (air ambulance) operations and was not required to have a safety system for the operations. It provides that a “first of” safety system (including exposition content) and nominated key personnel must be pre-approved by CASA as if this were a significant change.

A “safety system” for this section means one or more of the following: a safety management system, a human factors principles and non-technical skills training program, or a training and checking system.

Section 18 — FDAP – exemption

This section applies to an Australian air transport operator to whom, on and after 2 December 2021, regulation 119.195 applies (concerning flight data analysis program (**FDAP**) requirements). The section exempts the operator from complying with paragraph 119.195 (3) (d) (avoidance of negative action arising from FDAP data) on condition that the operator complies with specified protective provisions of CAO 82.5 in relation to the FDAP and as if they applied to the operator. The provisions of the

CAO relate to the use and disclosure of safety information, and control uses of the information than may be considered disciplinary or punitive.

Section 19 — Safety information – direction

This section applies to an Australian air transport operator who is not taking the benefit of certain exemptions from the requirements to have a safety management system or FDAP. The exemptions are contained in *CASA EX87/21 – Flight Operations Regulations – SMS, HFP&NTS and T&C Systems – Supplementary Exemptions and Directions Instrument 2021*.

The section requires the operator to comply with the requirements of specified protective provisions of CAO 82.5, as in force immediately before 2 December 2021, as they relate to any safety information and as if they continued to apply to the operator. The specified provisions relate to the use and disclosure of the safety information and control uses of the information that may be considered disciplinary or punitive.

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 exposition 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.

An exposition 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.

An exposition is not publicly or freely available. It is proprietary to the operator and will generally include commercial in confidence information about the operator’s business. The incorporated requirements of an exposition 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 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. TWG members provided a variety of comments on the exemptions and directions, mostly for clarification of intent and rationale. 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 and the right to privacy, it does so in a way that is reasonable, necessary and proportionate in the context of aviation safety.

Commencement and making

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

The instrument 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 EX82/21 – Part 119 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 119 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

Part 119 of CASR applies to operators of Australian air transport operations. Part 119 works with Parts 91, 121, 133 and 135 of CASR to provide a comprehensive code of safety rules for Australian air transport operators.

Part 119 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 119 in accordance with CASA's transition policies for the FOR.

There were some technical errors and omissions in Part 119 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.

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
- the right to privacy under Article 17 of the ICCPR.

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 key managers of an Australian air transport operator to have specified qualifications and experience. CASA prescribes the responsibilities of key managers and minimum qualifications and experience requirements for these managers. This is necessary to ensure that the operations are conducted safely and that managers are able to provide appropriate oversight of the operations and of the activities of their personnel. For Australian air transport operations that are large and complex, qualifications or experience above the minimum standards may be required. In some circumstances, this may affect the employability of key managers, as additional training or experience may be required. However, the increased skill resulting from the increased training will improve the safety of aviation 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 are likely to be offset by additional work opportunities arising from being trained, and the improved safety outcomes.

Right to privacy under the ICCPR

Under sections 18 and 19 of the instrument, an Australian air transport operator collects safety information, generated by the SMS or FDAP, about the operator's operations and the performance of operational safety-critical personnel during operations. Under Civil Aviation Order 82.5, this information must not be used for disciplinary or punitive purposes, or made available for use outside the operator's organisation (other than as required by law).

Within these constraints, the use of safety information for the purpose of maintaining or improving aviation safety, is not regarded as being for disciplinary or punitive purposes.

However, collected information may be used for safety enforcement purposes if it is determined that there are facts and circumstances that reasonably indicate that the event concerning which the safety information has been collected is likely to have been caused by *gross negligence, recklessness, or wilful and deliberate misconduct*, or is part of a *pattern of repetitive conduct*, reflected in acts or omissions involving the same or substantially similar conduct by the same person over a relevant period of time.

In the context of air transport operations which present obvious aviation risks and dangers, these requirements reflect a balance between the interests of aviation safety and protection of the privacy and collected information about operational safety-critical personnel. They are, therefore, reasonable, necessary and proportionate in the interests of aviation safety.

Human rights implications

The exemptions and directions 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.

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