

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX85/21 – Part 135, Subpart 121.Z and 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 in relation to Part 135 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

Background

Part 135 of CASR applies to smaller aeroplanes used in Australian air transport operations. Part 135 works with Part 91 to provide a comprehensive code of operational safety rules for air transport operators using smaller aeroplanes.

Part 135 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 135 and Subpart 121.Z of CASR in accordance with CASA's transition policies for the FOR. Aeroplane operations under Subpart 121.Z are subject to requirements of Part 135.

There were some technical errors and omissions in Part 135 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 regulations inappropriately failed to reflect requirements of the regulations that the FOR is replacing. In other cases, exemptions are provided where relief from a requirement is considered appropriate, to facilitate implementation of FOR requirements, and to permit, for private operations, compliance with Part 135 requirements instead of Part 91 requirements.

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.

Part 2 — Exemptions from Part 135

Section 5 — Application of Part 135 – Australian air transport operations in foreign countries – exemption

This section applies to a Part 135 operation and a Subpart 121.Z operation (an operation mentioned in subregulation 121.005 (2)).

A “Subpart 121.Z operation” is the operation of a *single-engine* aeroplane for an Australian air transport operation if both of the following apply in relation to the aeroplane: (a) it has a maximum operational passenger seat configuration of more than 9; (b) it has a maximum take-off weight of *not* more than 8,618 kg.

For operations in a foreign country, this section exempts the operator and the pilot in command from complying with a provision of Part 135 to the extent that the provision is inconsistent with a law of the foreign country. The law of the foreign country prevails to the extent it is inconsistent with a provision of Part 135. There is no inconsistency, however, if the provision of Part 135 and the law of the foreign country can operate concurrently.

Section 6 — Minimum equipment list for Part 135 operations – exemption

This section applies to a Part 135 operation and a Subpart 121.Z operation.

The section provides an exemption to the operator from complying with the requirements of regulation 135.045 that there must be a minimum equipment list (*MEL*) for an aeroplane used on Instrument Flight Rules (*IFR*) and international flights in certain circumstances. The exemption applies to an operator who immediately before 2 December 2021 held an Air Operator's Certificate (*AOC*) or was an early applicant for an AOC that authorised charter operations or aerial work (air ambulance) operations in the aeroplane but did not authorise regular public transport operations in the aeroplane.

It is a condition of the exemption that the operator must not commence using the aeroplane for scheduled air transport operations.

The exemption ceases to have effect the earliest of:

- (a) the day the operator commences using the relevant aeroplane for scheduled air transport operations; and
- (b) the day an approval of a MEL for the aeroplane, under regulation 91.935, takes effect; and
- (c) the end of 3 December 2023.

Section 7 — Journey log – recording time flight begins – exemption

This section applies to a Part 135 operation and a Subpart 121.Z operation.

The section exempts the operator and pilot in command from complying with the requirement of subregulation 135.085 (2), to record in the journey log, at the time the flight begins, the actual time the flight begins as specifically required under subparagraph 135.085 (3) (d) (ii). The exemption is subject to the condition that the actual time the flight begins must be recorded in the journey log or another readily available document kept by the operator, not later than as soon as reasonably practicable after the flight ends.

Section 8 — Journey log – recording flight information – exemption

This section applies to a Part 135 operation and a Subpart 121.Z operation.

The section exempts the operator and pilot in command from complying with the requirement of subregulation 135.085 (4), to record in the journey log, as soon as practicable after the flight ends, the place of arrival and incidents and observations (if any) relevant to the flight as specifically required under paragraphs 135.085 (5) (a) and (e). The exemption is subject to the condition that these entries must be recorded in the

journey log, or another readily available document kept by the operator, not later than as soon as reasonably practicable after the flight ends.

Section 9 — VFR flight at night – instrument rating – exemption

This section applies to a Part 135 operation that is either a passenger transport operation or a medical transport operation, conducted as a Visual Flight Rules (VFR) flight at night.

The operator is exempted from compliance with regulation 135.235 in relation to paragraph 135.235 (2) (c) and subregulation 135.380 (1), in relation to paragraph 135.389 (2) (d), all of which relate to the requirement for a flight crew member to hold an instrument rating. At least one flight crew member must be authorised to pilot the aeroplane under the IFR.

Part 3 — Exemptions from Part 91 and related directions

Section 10 — Use of Part 135 flight-related documents instead of Part 91 flight-related documents – exemption and direction

The section provides for exemptions against the requirements of Division 91.C.3 (Flight related documents) when an Australian air transport operator conducts a private operation using an aeroplane referred to in regulation 135.005 or subregulation 121.005 (2) and included in the operator's operations specifications.

The flight-related document requirements under Division 135.C.3 must be complied with instead.

Directions require appropriate exposition content and that the pilot in command comply with any relevant requirements.

The term ***private operation*** is defined in the CASR Dictionary to include operations which are not conducted under an AOC, Part 138 certificate or Part 141 certificate, and are not other specified operations.

Section 11 — Application of Part 135 fuel requirements instead of Part 91 fuel requirements – exemption and direction

The section provides for exemptions against the requirements of regulation 91.455 (Fuel requirements) when an Australian air transport operator conducts a private operation using an aeroplane referred to in regulation 135.005 or subregulation 121.005 (2) and included in the operator's operations specifications.

The fuel requirements under regulation 135.215 must be complied with instead.

Directions require appropriate exposition content and that the pilot in command comply with any relevant requirements.

Section 12 — Application of Part 135 fuelling requirements instead of Part 91 fuelling requirements – exemption and direction

The section provides for an exemption against the requirements of regulation 91.510 (Fuelling requirements) when an Australian air transport operator conducts a private

operation using an aeroplane referred to in regulation 135.005 or subregulation 121.005 (2) and included in the operator's operations specifications.

The fuelling requirements under regulation 135.220 must be complied with instead.

Directions require appropriate exposition content and that the pilot in command comply with any relevant requirements.

Section 13 — Application of Part 135 passenger safety briefings, instructions and demonstrations requirements instead of Part 91 safety briefings and instructions requirements – exemption and direction

The section provides for exemptions against the requirements of regulation 91.565 (Passengers – safety briefings and instructions) when an Australian air transport operator conducts a private operation using an aeroplane referred to in regulation 135.005 or subregulation 121.005 (2) and included in the operator's operations specifications.

The safety briefings, instructions and demonstrations requirements under regulation 135.280 must be complied with instead.

Directions require appropriate exposition content and that the pilot in command comply with any relevant requirements.

Section 14 — Application of Part 135 performance requirements instead of Part 91 performance requirements – exemption and direction

This section provides for exemptions against the requirements of Subpart 91.F (Performance) when an Australian air transport operator conducts a private operation using an aeroplane referred to in regulation 135.005 or subregulation 121.005 (2) and included in the operator's operations specifications.

The performance requirements under Subpart 135.F must be complied with instead.

Directions require appropriate exposition content and that the pilot in command comply with any relevant requirements.

Section 15 — Application of Part 135 weight and balance requirements instead of Part 91 weight and balance requirements – exemption and direction

This section provides for exemptions against the requirements of Subpart 91.J (Weight and balance) when an Australian air transport operator conducts a private operation using an aeroplane referred to in regulation 135.005 or subregulation 121.005 (2) and included in the operator's operations specifications.

The weight and balance requirements under Subpart 135.J must be complied with instead.

Directions require appropriate exposition content and that the pilot in command comply with any relevant requirements.

Section 16 — Application of Part 135 equipment requirements instead of Part 91 equipment requirements – exemptions and directions

The section provides for exemptions against the requirements of Subpart 91.K (Equipment) when an Australian air transport operator conducts a private operation using an aeroplane referred to in regulation 135.005 or subregulation 121.005 (2) and included in the operator's operations specifications.

The equipment requirements under Subpart 135.K must be complied with instead.

Directions require appropriate exposition content and that the pilot in command and crew members comply with any relevant requirements.

Section 17 — Seating for crew members other than flight crew members – exemption and direction

This section applies to a Part 135 operation and a Subpart 121.Z operation that is a medical transport operation.

The section exempts crew members from compliance with regulation 91.555 (about seatbelts and shoulder harnesses at seating for crew members other than flight crew members) on condition that a series of specified requirements are met related to the restraint of persons using a safety harness and restraint strap rather than a seatbelt.

The operator must ensure that a crew member who takes advantage of the exemption complies with the conditions of the exemption that apply to the crew member.

Part 4 — Directions to Part 135 operators and Subpart 121.Z operators

Section 18 — Compliance before and after flight with flight manual instructions – direction

The operator must ensure that any activity, in relation to the flight, that occurs whether before or after the flight and that is required, under the aircraft flight manual (*AFM*) instructions for the aeroplane, to be carried out before or after the flight is carried out in compliance with any relevant requirements and limitations under the AFM instructions.

Section 19 — Taking off from and landing on narrow runways – direction

This section applies to the operator of an aeroplane for a Part 135 operation and a Subpart 121.Z operation.

The section requires operators and pilots in command to comply with the requirements under subregulations 121.220 (1) to (4), including the AFM and exposition requirements and the relevant requirements under Chapter 6 of the Part 121 Manual of Standards for narrow runway operations, as if those provisions applied to them. These requirements are applicable only apply to aeroplanes with a maximum certificated take-off weight (MCTOW) > 5,700 kg.

Section 20 — Fuelling safety procedures – direction

This section applies to a Part 135 operation and a Subpart 121.Z operation.

The section requires operators to include in their exposition procedures to be followed by crew members for the safety of passengers for the flight who, during fuelling, are embarking or disembarking, or are on board, the aeroplane. The procedures must include the normal, emergency and communication procedures.

“Crew member” in this context does not include cabin crew members or flight crew members on duty in the cockpit of the aeroplane.

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 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 of an operator:

An exposition 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 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. 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 instruments are 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 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 EX85/21 – Part 135, Subpart 121.Z and 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

Part 135 of CASR applies to smaller aeroplanes used in Australian air transport operations. Part 135 works with Part 91 to provide a comprehensive code of operational safety rules for air transport operators using smaller aeroplanes.

Part 135 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 135 and Subpart 121.Z in accordance with CASA's transition policies for the FOR.

There were some technical errors and omissions in Part 135 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 regulations inappropriately failed to reflect requirements of the regulations that the FOR is replacing. In other cases, exemptions are provided where relief from a requirement is considered appropriate, to facilitate implementation of FOR requirements, and to permit, for private operations, compliance with Part 135 requirements instead of Part 91 requirements.

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**).

Right to life under the ICCPR***Right to safe and healthy working conditions under the ICESCR***

Although the instrument contains exemptions from various provisions in Part 135 of CASR, it does so in the context of substitute, and acceptable, conditions and directions in the interests of aviation safety. To the extent that the conditions are expected to play a critical part in the avoidance of accidents and incidents, the instrument may reasonably be said to support the right to life, and to contribute to safe and healthy working conditions on board Part 135 aircraft.

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