

Explanatory Statement

Civil Aviation Regulations 1988

Civil Aviation Safety Regulations 1998

Civil Aviation Order 95.4 (Exemption from CAR and CASR — Sailplanes and Towing Aircraft) Instrument 2021

Purpose

The purpose of *Civil Aviation Order 95.4 (Exemptions from CAR and CASR — Sailplanes and Towing Aircraft) Instrument 2021* (the **instrument**) is to repeal and reissue *Civil Aviation Order 95.4 (Exemption from provisions of the Civil Aviation Regulations 1988 — gliders, powered sailplanes and power-assisted sailplanes)* (the **previous CAO**). The instrument continues to exempt operators of sailplanes and towing aircraft from provisions of the regulations, which involves transitioning from exemptions from CAR to exemptions from their equivalent provisions in *Civil Aviation Safety Regulations 1988 (CASR)* following the commencement, on 2 December 2021, of the following legislation:

- the *Civil Aviation Safety Amendment (Part 91) Regulations 2018*;
- the *Civil Aviation Legislation Amendment (Parts 103, 105 and 131) Regulations 2019*;
- the *Civil Aviation Legislation Amendment (Flight Operations—Consequential Amendments and Transitional Provisions) Regulations 2021*.

The instrument reissues the previous CAO and is required for two main reasons: first, because the *Part 103 Manual of Standards (MOS)* that was originally intended to accompany new Part 103 of CASR will not commence as anticipated on 2 December 2021; and secondly, most of the provisions of CAR are being repealed on that date and as a result, the previous CAO will be ineffective in providing exemptions for operators of relevant aircraft as it refers to the obsolete CAR provisions. The instrument is being remade with exemptions from equivalent provisions in CASR. This will enable reasonable continuity for operators of such aircraft, whilst creating a bridge to the new flight rules under Part 91 of CASR and, eventually, to the new rules for sport and recreation aircraft under Part 103 of CASR. The opportunity has also been taken to make minor drafting improvements and updating or deleting outdated or obsolete provisions.

Legislation

Subsection 20AB (1) of the *Civil Aviation Act 1988* (the **Act**) provides that a person must not perform any duty that is essential to the operation of an Australian aircraft during flight time unless the person is authorised to do so under a civil aviation authorisation or is authorised by or under the regulations to perform that duty without the civil aviation authorisation.

For paragraph 20AB (1) (a) of the Act, a person is taken to hold a civil aviation authorisation that is in force and authorises the person to perform a duty that is essential to the operation of an unregistered Australian aircraft during flight time if:

- (a) the person holds a pilot certificate granted by a sport aviation body that administers aviation activities in the aircraft; and

(b) the person operates the aircraft in accordance with the sport aviation body's operations manual and the instrument.

Section 98 of the *Civil Aviation Act 1988* (the *Act*) empowers the Governor-General to make regulations for the Act and in the interests of the safety of air navigation. Relevantly, the Governor-General has made the CASR and *Civil Aviation Regulations 1988 (CAR)*.

Subpart 11.F of the CASR provides for the granting of exemptions from provisions of the regulations. Subregulation 11.160 (1) of CASR provides that, for subsection 98 (5A) of the Act, the Civil Aviation Safety Authority (*CASA*) may grant an exemption from compliance with a provision of the regulations.

Under subregulation 11.160 (2) of CASR, an exemption may be granted to a person or a class of persons, and may specify the class by reference to membership of a specified body or any other characteristic.

Under subregulation 11.160 (3) of CASR, an exemption may be granted on application by a person or on CASA's own initiative.

Under subregulation 11.175 (4) of CASR, in deciding whether to reissue an exemption, CASA must regard as paramount the preservation of at least an acceptable level of aviation safety. CASA has regard to the same test when deciding whether to reissue an exemption on its own initiative.

Regulation 11.205 provides that CASA may impose conditions on an exemption if 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.

Regulation 11.225 of CASR requires an exemption to be published on the Internet. Under subregulation 11.230 (1), the maximum duration of an exemption is 3 years.

Under subsection 14 (1) of the *Legislation Act 2003* (the *LA*), a legislative instrument may make provision in relation to matters by applying, adopting or incorporating provisions of an Act or disallowable legislative instrument as in force at a particular time or as in force from time to time. A legislative instrument may also make provision in relation to matters by applying, adopting or incorporating any matter contained in any other instrument or writing as in force at, or before, the time the legislative instrument commences.

Under subsection 14 (2) of the LA, unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. However, subsection 98 (5D) of the Act provides that, despite section 14 of the LA, a legislative instrument made under the Act or the regulations may apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing from time to time, even if the other instrument or writing does not yet exist when the legislative instrument is made.

Background

Part 103 of CASR was made on 12 December 2019 and commences on 2 December 2021. Part 103 of CASR sets out operating rules for a wide range of non-registered aircraft, referred to as Part 103 aircraft (regulation 103.005 of CASR), including:

- sailplanes
- powered parachutes
- gyroplanes
- gyrogliders
- hang gliders and powered hang gliders
- paragliders and powered paragliders
- rotorcraft that are prescribed in the Part 103 MOS
- weight-shift-controlled aeroplanes that are prescribed in the Part 103 MOS
- any other aeroplane that is prescribed in the Part 103 MOS - these include very light aeroplanes, covered by a range of certification criteria.

The purpose of Part 103 is to provide regulations for the operation of sport and recreational aircraft administered by an approved self-administering organisation (ASAO) under Part 149. A Part 149 ASAO certificate would list functions the organisation administers such as personnel authorisations, training, aircraft airworthiness authorisations and systems, oversight, education, enforcement.

Prior to 2 December 2021, these aircraft were operated according to a suite of exemptions in the 95 series of Civil Aviation Orders (CAO). Broadly speaking, pilots were allowed to operate the aircraft outside of the generally applied operating rules - in CARs, as long as they complied with the operations manual of the specified sport aviation body and the conditions in the CAO.

Part 103, at a practical level, sets the operating rules for these aircraft in a similar way, although the link to the sport aviation body is replaced by a link to Part 149 where the responsibility for administering the operations is held by the holder of a Part 149 certificate.

Regulation 103.015 makes provision for CASA to make a manual of standards (MOS) for various matters referred to in the regulations - for example, the kinds of aeroplanes referred to above.

In consultation with an established industry working group, CASA has opted to defer the making of the Part 103 MOS to allow further development of it. Therefore, to ensure operations of sailplanes and towing aircraft can continue after 2 December 2021, the instrument is being remade with amendments.

This instrument continues the substance of regulatory exemptions from CAR applying under the previous CAO, however, in form, the exemptions are now largely from the equivalent provisions under CASR, in particular, the new Part 91 of CASR provisions. Industry and operators should not experience any disruption to operations as a result of this instrument.

Overview of instrument

The instrument enables the continuation of exemptions for operators of sailplanes and towing aircraft from certain requirements of the CAR and enables the introduction of exemptions for those operators from certain requirements of the CASR.

The instrument reissues the previous CAO in substantially the same form, with the changes being minor drafting improvements, updating or deletion of outdated or obsolete provisions and the introduction of some new provisions. The commencement of Part 91 of CASR (on 2 December 2021) repealed certain provisions of CAR that impact the operations of sailplanes and towing aircraft. Therefore, provisions to maintain the operating environment have been drafted into the Part 103 MOS. However, because the making of the Part 103 has been deferred, equivalent provisions have been included in this instrument.

The intent of the changes is to maintain the operating environment for sailplanes and towing aircraft that existed immediately before 2 December 2021.

Documents incorporated by reference

In accordance with paragraph 15J (2) (c) of the LA, the following table contains a description of the documents incorporated by reference into the legislative instrument, the organisation responsible for each document and how they may be obtained. The table also states how the document is incorporated.

Document	Description	Manner of incorporation	Source
Civil Aviation Advisory Publication 149-1	CAAP 149 details aircraft acceptable to CASA for the aerotowing of other aircraft. Paragraph 9.4(b) of the instrument calls up CAAP 149 as part of the requirements a relevant towing aircraft must meet.	As existing from time to time. Subsection 98 (5D) of the Act authorises the incorporation of this document as in existing from time to time.	This document is available for free on the CASA website (www.casa.gov.au).
<i>Civil Aviation Legislation Amendment (Parts 103, 105 and 131) Regulations 2019</i>	Amends the CASR to repeal and replace Parts 103, 105 and 131) Incorporated for purpose of defining the commencement of the instrument.	As in force immediately before 2 December 2021. Subsection 14(1)(ab) of the <i>Legislation Act 2003</i> authorises the incorporation of this instrument as in force at a particular time.	This document is available for free on the Federal Register of Legislation.

Document	Description	Manner of incorporation	Source
<i>Civil Aviation Order 95.8</i>	Exemption from provisions of the regulations under the Civil Aviation Act 1988 — hang-gliders. Various provisions of the instrument call up CAO 95.8.	As in force from time to time. Paragraph 14(1)(a) of the <i>Legislation Act 2003</i> authorises the incorporation of this instrument as in force from time to time.	This document is available for free on the Federal Register of Legislation.
<i>Civil Aviation Regulations 1988</i>	The definition of <i>exempted provisions</i> calls up Parts 4 and 4A of the Civil Aviation Regulations 1988	As in force from time to time. Paragraph 14(1)(a) of the <i>Legislation Act 2003</i> authorises the incorporation of this instrument as in force from time to time.	This document is available for free on the Federal Register of Legislation.
<i>Civil Aviation Safety Amendment (Part 91) Regulations 2018</i>	Called up for the purpose of defining the commencement of the instrument	As in force from time to time. Paragraph 14(1)(a) of the <i>Legislation Act 2003</i> authorises the incorporation of this instrument as in force from time to time.	This document is available for free on the Federal Register of Legislation.
<i>Civil Aviation Safety Regulation 1998</i>	Various provisions of the instrument call up provisions of the <i>Civil Aviation Safety Regulations 1998</i> .	As in force from time to time. Paragraph 14(1)(a) of the <i>Legislation Act 2003</i> authorises the incorporation of this instrument as in force from time to time.	This document is available for free on the Federal Register of Legislation.

Document	Description	Manner of incorporation	Source
<i>Part 91 Manual of Standards</i>	<p>The Part 91 MOS prescribes matters relating to general operating and flight rules permitted under Part 91 to be prescribed in the MOS.</p> <p>Various provisions of the instrument call up provisions of the Part 91 MOS.</p>	<p>As in force from time to time.</p> <p>Paragraph 14(1)(a) of the <i>Legislation Act 2003</i> authorises the incorporation of this instrument as in force from time to time.</p>	<p>This document is available for free on the Federal Register of Legislation.</p>
SAB manual (Sport Aviation Body manual)	<p>The manual prepared by a sport aviation body and approved by CASA from time to time that contains:</p> <p>(a) the sport aviation body's operational and technical rules; and</p> <p>(b) the sport aviation body's administrative rules; and</p> <p>(c) any associated written directives or documents prepared by the sport aviation body.</p> <p>An SAB manual is called up by various conditions of the instrument.</p>	<p>As in existing from time to time.</p> <p>Subsection 98 (5D) of the Act authorises the incorporation of this document as existing from time to time.</p>	<p>The relevant SAB manual is available to members of the SAB.</p>

The SAB manual is available to operators and pilots who are members of the applicable SAB. CASA has incorporated the documents in the instrument because aviation safety requires the use of the information and data in the documents by aircraft operators and pilots. SABs administer a wide variety of aircraft types and operations, and to make legislation addressing all the relevant operation and technical aspects would result in lengthy and complex legislation.

Content of instrument

Subsection 1 sets out the name of the instrument: *Civil Aviation Order 95.4 (Exemptions from CAR and CASR — Sailplanes and Towing Aircraft) Instrument 2021*.

Subsection 2 sets out the duration of the instrument, specifying that it commences on 2 December 2021, immediately after the commencement of both of the following:

- (a) Schedule 1 to the *Civil Aviation Legislation Amendment (Parts 103, 105 and 131) Regulations 2019*;
- (b) the *Civil Aviation Safety Amendment (Part 91) Regulations 2018*.

The subsection states that the instrument is repealed at the end of 1 December 2024.

Subsection 3 identifies the repeal of the previous CAO registered with FRL.

Subsection 4 provides that the Order applies to:

- (a) a **relevant sailplane**, being a sailplane that is employed in private operations; and
- (b) a **relevant towing aircraft**, being:
 - (i) a powered sailplane that is towing a sailplane or hang glider; or
 - (ii) an aeroplane that is towing a sailplane.

Subsection 5 provides for definitions of terms used in the instrument. Some of the terminology has been updated since the previous CAO, to take into account changes made to Part 91 of CASR including ELT to Emergency ELT and Survival ELT. The legal citations of the sporting aviation bodies are updated from only specifically mentioning the Gliding Federation of Australia (GFA) to also include any approved Sport Aviation Body (SAB). It is expected that the GFA will be authorised as an ASAO in relation to relevant aircraft, in which case they will be treated under Part 149 as an ASAO.

Subsection 6 provides that a person performing a duty that is essential to the operation of a relevant aircraft (other than an aeroplane mentioned in sub-subparagraph 4 (b) (ii)) during flight time is authorised to do so without a civil aviation authorisation mentioned in paragraph 20AB(1)(a) of the Act. This provision, which replicates that in the previous CAO, will ensure that pilots of aircraft remain authorised to fly without being licensed by CASA. It also requires that any person making a broadcast on an aeronautical HF frequency be authorised under Part 61 or 64 of CASR.

Subsection 7 states the persons to which the exemptions are granted by CASA under the instrument and sets out which provisions of CASR are exempt provided the conditions of the Order are complied with. The exemptions include an exemption from regulation 91.190 of CASR to permit the dropping of tow ropes and tow cables, a detachable drag inducing device or water ballast. The exemptions are mostly the same in purpose as they were in the previous CAO and consistent with the previous CAO, the exemptions are subject to compliance with the conditions in the Order.

Subsection 8 sets out the general conditions that apply in relation to relevant aircraft. These include that the aircraft must not be used for flying training to enable a person to obtain a pilot certificate from a sport aviation body unless in accordance with the SAB manual. There are also restrictions on operating the aircraft as pilot in command and the use of the aircraft for flying training. Operation of the aircraft must be in accordance with the relevant sport aviation body's manual. Particular placarding also must be in place in the relevant sailplane. Apart from that, the subsection is in substantially the same form as it was in the previous CAO, with minor updates (including provisions accommodating ASAOs) and drafting improvements.

Subsection 9 sets out the flight conditions which are mostly the same as those in the previous CAO. The conditions include flight height, location and airspace restrictions, requirements to fly only in VMC, during daylight hours and in acrobatic flight within certain conditions as contained in paragraph 9.2, not to use radiotelephone equipment (subject to certain qualifications) and restrictions on the towing of aircraft. It includes requirements for the

carriage of radio communication equipment in certain circumstances and requirements for flight over a body of water.

Subsection 10 provides for an approval process for persons wishing to fly a relevant aircraft otherwise than in accordance with the Order. The subsection is in the substantially the same form as in the previous CAO. There are no express fetters on the discretionary power. Applications for approvals will be determined on a case by case basis by reference to safety considerations. There may be a range of reasons for an application under this subsection and it would not be practical or necessary for the instrument or ES to specify the factors that the decision-maker should consider in exercising the discretion. General principles of administrative law would restrict the decision-maker to decisions that are reasonable and have regard to relevant considerations. Depending on the nature of the application and the variation sought, the relevant delegate would be any of the following (who are all employees of CASA and SES equivalent officers):

- Executive Manager, National Operations & Standards
- Executive Manager, Regulatory Oversight
- Branch Manager, Sport & Recreation Aviation

An approval under this provision constitutes an *authorisation* within the meaning of regulation 11.015 of CASR. Item 1 of the Table 201.004 of CASR (see subregulation 201.004(2) of CASR) deems an adverse decision on an authorisation to constitute a reviewable decision on its merits by the Administrative Appeals Tribunal. CASA will include in any such decisions an AAT merits review notice.

Subsection 11 sets out the transitional provisions for the instrument and continues certificates, approvals and authorisations by a sport aviation body and approvals by CASA under subsection 9 of the previous CAO.

Legislation Act 2003 (the LA)

Paragraph 10 (1) (d) of the LA provides that an instrument will be a legislative instrument if it includes a provision that amends or repeals another legislative instrument. This instrument repeals *Civil Aviation Order 95.4 (Exemption from provisions of the Civil Aviation Regulations 1988 — gliders, powered sailplanes and power-assisted sailplanes)* that was registered as a legislative instrument and is, therefore, also a legislative instrument, subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Subsection 8 (4) of the LA provides that an instrument is a legislative instrument if it determines the law or alters the content of the law, rather than determining particular cases in which the law is to apply or is not to apply. As the instrument exempts sailplanes and towing aircraft from provisions of the CAR and CASR, the instrument is a legislative instrument. The instrument is therefore subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

As the instrument relates to aviation safety and is made under the CAR and CASR, Part 4 of Chapter 3 of the LA (the *sunsetting provisions*) does not apply to the instrument (item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*). However, this instrument will be repealed at the end of 1 December 2024, which will occur before the sunsetting provisions would have repealed the instrument if they had applied. Any

renewal of the instrument will be subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA. Therefore, the exemption from sunseting does not affect parliamentary oversight of this instrument.

Consultation

The instrument is a remake of the previous CAO with only minor or machinery changes and affects the operation of sailplanes and particular aeroplanes listed with a sport aviation body – the Gliding Federation of Australia (*GFA*). The GFA were represented in the industry Technical Working Group (*TWG*) and were present at the meeting of TWG members where the deferral of the making of the Part 103 MOS, and this subsequent legislative solution, was discussed. In these circumstances, CASA is satisfied that no further consultation is appropriate or reasonably practicable for the instrument for section 17 of the LA.

Sector risk, economic and cost impact

Subsection 9A (1) of the Act states that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration. Subsection 9A (3) of the Act states that, subject to subsection (1), in developing and promulgating aviation safety standards under paragraph 9 (1) (c), CASA must:

- (a) consider the economic and cost impact on individuals, businesses and the community of the standards; and
- (b) take into account the differing risks associated with different industry sectors.

The cost impact of a standard refers to the direct cost (in the sense of price or expense) which a standard would cause individuals, businesses and the community to incur. The economic impact of a standard refers to the impact a standard would have on the production, distribution and use of wealth across the economy, at the level of the individual, relevant businesses in the aviation sector, and the community more broadly. The economic impact of a standard could also include the general financial impact of that standard on different industry sectors.

The instrument makes minor or machinery changes to the previous requirements of CAO 95.4 to implement the policy of the CASR Part 103 and there will be no change to the economic or cost impact on individuals, businesses or the community. The Office of Best Practice Regulation also made an assessment that a Regulation Impact Statement was not required for the policy requirements of CASR Part 103 (OBPR id: 25640).

Office of Best Practice Regulation (OBPR)

A Regulation Impact Statement (RIS) is not required in this case, as the exemption is covered by a standing agreement between CASA and OBPR under which a RIS is not required for exemptions (OBPR id: 14507).

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights at Attachment 1 has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Making and commencement

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

The instrument commences on 2 December 2021, immediately after the commencement of both of the following:

- (i) Schedule 1 to the *Civil Aviation Legislation Amendment (Parts 103, 105 and 131) Regulations 2019*;
- (ii) the *Civil Aviation Safety Amendment (Part 91) Regulations 2018*.

The instrument is repealed at the end of 1 December 2024.

Statement of Compatibility with Human Rights

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

Civil Aviation Order 95.4 (Exemption from CAR and CASR — Sailplanes and Towing Aircraft) 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 *Civil Aviation Order 95.4 (Exemption from CAR and CASR — Sailplanes and Towing Aircraft) Instrument 2021* (the **instrument**) is to reissue *Civil Aviation Order 95.4 (Exemption from provisions of the Civil Aviation Regulations 1988 — gliders, powered sailplanes and power-assisted sailplanes)*.

The instrument enables the continuation of exemptions for operators of sailplanes and towing aircraft from certain requirements of the *Civil Aviation Regulations 1988 (CAR)* and enables the introduction of exemptions for those operators from certain requirements of the *Civil Aviation Safety Regulations 1988 (CASR)*.

The instrument reissues the previous Civil Aviation Order 95.4 in substantially the same form, with the changes being minor drafting improvements, updating or deletion of outdated or obsolete provisions and the introduction of some new provisions. The commencement of Part 91 of CASR (on 2 December 2021) will repeal certain provisions of CAR that impact the operations of sailplanes and towing aircraft. Therefore, provisions to maintain the operating environment were included in a proposed Part 103 Manual of Standards (MOS). However, because the making of the Part 103 MOS has been deferred, equivalent provisions have been included in this instrument.

The intent of the changes is to maintain the operating environment for sailplanes and towing aircraft that existing immediately before 2 December 2021.

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.

Civil Aviation Safety Authority