

## Replacement Explanatory Statement

### Civil Aviation Safety Regulations 1998

#### CASA EX151/21 – Amendment of CASA EX86/21 – Instrument 2021

##### Purpose

The purpose of this exemptions and directions instrument is to insert a number of additional exemptions and directions into *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX86/21* or the *principal exemptions instrument*). CASA EX86/21 makes a number of exemptions and directions relating to Parts 138 and Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)*. These CASR Parts are elements of CASA’s new Flight Operations Regulations that commence on 2 December 2021. Part 138 deals with aerial work operations and Part 91 deals with the rules of the air.

The exemptions and directions are to aerial work operators and private operators, and relate to:

- the application of Part 138 performance requirements to private operations conducted by an aerial work certificate holder
- an aerial work certificate holder’s use, for aerial work operations, of a foreign-registered aircraft in Australian territory
- an aerial work certificate holder’s night vision imaging system (NVIS) operations — the requirement is that first use of NVIS in an operation must be approved by CASA
- continuity of retention of flight crew operational records (for aerial work certificate holders who, immediately before 2 December 2021, were AOC holders authorised to conduct aerial work operations other than aerial work (air ambulance) operations) — the requirement is to retain such flight crew operational records as the operators were required to retain during the pre-2 December 2021 period.

##### Legislation — exemptions

Section 98 of the Act empowers the Governor-General to make regulations for the *Civil Aviation Act 1988* (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 (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 directions**

Section 1 provides for the naming of the *CASA EX151/21 – Amendment of CASA EX86/21 – Instrument 2021 (No. 1)*.

Section 2 provides for the commencement of the instrument on 2 December 2021.

Section 3 provides that the instrument amends *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021*.

### Schedule 1    Amendments

Schedule 1 provides for the additional exemptions and directions

Amendment 1 adds new definitions to the principal exemptions instrument.

Amendment 2 corrects errors and omission in the existing section 13. Section 13, Application of Part 138 performance requirements instead of Part 91 performance requirements — exemption and direction, applies to a private operation in an aircraft, conducted by an aerial work certificate holder, provided that the private operation is not a limited aerial work operation. For the operation, the operator and the pilot in command of *a large aeroplane* are each exempted from compliance with each relevant provision in Subpart 91.F in relation to aircraft take-off and landing performance but only if the operator and the pilot in command comply with the relevant Part 138 MOS performance requirements.

Amendment 3 inserts a new section 14A, Use of foreign-registered aircraft. It applies to an aerial work certificate holder for aerial work operations in a foreign-registered aircraft in Australian territory if, immediately before 2 December 2021, the operator held an AOC authorising the operations in the foreign-registered aircraft; and a relevant statutory agreement is in place in relation to the foreign-registered aircraft. The operator

is exempted, until the end of 30 April 2022, from statutory 90-day time limits on use of the foreign aircraft in Australia without additional approvals. The addition of 5 months allows a more effective transition period for relevant operators of foreign-registered aircraft.

Amendment 4 inserts a new section 23, First use of NVIS in an NVIS operation under Part 138 – significant change – direction. It applies to an aerial work certificate holder for aerial work operations. Before conducting an NVIS operation for the first time in an aerial work operation, the operator must apply for, and obtain, the written approval of CASA as if the operation were a significant change of operations requiring CASA approval. CASA approval for NVIS operations was a requirement under the previous, now repealed, rules in Civil Aviation Order (CAO) 82.6, but its inclusion in Part 138 was inadvertently overlooked in preparation of Part 138.

Amendment 4 also adds a new section 24, Retention of historical flight crew member records — direction. It applies to an aerial work certificate holder if, immediately before 2 December 2021, the holder was an AOC holder authorised to conduct aerial work operations other than aerial work (air ambulance) operations. The operator must retain in safe custody, for prescribed periods, each of the records held by the operator on 1 December 2021 that were required to be held under CAO 82.1. These records relate to flight crew qualifications, training, flight and duty time, and rosters. An express requirement that relevant operators must retain their existing records was inadvertently overlooked in preparation of Part 138. These pre-2 December 2021 records are to be retained for the same periods of time as the equivalent records are to be retained on and after 2 December 2021.

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

The 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.

As the instrument relates to aviation safety and is made under CASR, that means that Part 4 of Chapter 3 of the LA (the sunset provisions) does not apply to the instrument (as per item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*). The instrument deals with aviation safety matters that, once identified, require a risk response or treatment plan. Generally speaking, item 15, when invoked, is necessary in order to ensure that, in the interests of aviation safety, a relevant instrument has enduring effect, certainty and clarity for aviation operators both domestic and international.

In this case, the instrument amends the principal exemptions instrument and is almost immediately spent and repealed in accordance with the automatic repeal provisions in Subdivision A in Division 1 of Part 3 of Chapter 3 of the LA. The principal exemptions instrument is itself repealed at the end of 1 December 2024 by virtue of the terms of paragraph 2 (b) of the principal exemptions instrument. Thus, in practice, no sunset avoidance issues arise and there is no impact on parliamentary oversight.

### **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 the *principal exemptions instrument*, CASA consulted the aviation community in June 2020 when it published, and sought comments on, its policy proposals that ultimately gave rise to the exemptions and directions instrument. A summary of the consultation feedback and CASA's disposition of comments received was published on the CASA website in December 2020.

In addition, for the *principal exemptions 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. The 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, and has also received and considered additional input provided directly by operators, in finalising the new exemptions and directions instrument when it was realised that the 4 matters mentioned above had been overlooked. CASA advised the TWG of its responses and comments regarding all input from the TWG, and considers that no further consultation is necessary or appropriate.

#### **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 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 2 December 2021.

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 EX151/21 – Amendment of CASA EX86/21 – 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 exemptions and directions instrument is to insert a number of additional exemptions and directions into *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX86/21* or the *principal exemptions instrument*). CASA EX86/21 makes a number of exemptions and directions relating to Parts 138 and Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)*. These CASR Parts are elements of CASA’s new Flight Operations Regulations that commence on 2 December 2021. Part 138 deals with aerial work operations and Part 91 deals with the rules of the air.

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#### 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 right to safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social and Cultural Rights
- the right to privacy under Article 17 of the ICCPR in relation to personal records.

The instrument may engage these rights. This engagement is in the context of CASA's statutory purpose. The aim of CASA and its regulatory framework to uphold aviation safety by prescribing the conduct of individuals and organisations involved in civil aviation operations, including flight operations. It is, therefore, a threshold requirement for all CASA legislative instruments that they preserve, promote and enhance aviation safety.

Without proper mitigations, NVIS operations present an elevated level of risk compared to other operations and require CASA oversight in the form of preliminary approvals.

Pre-2 December 2021 recent historical flight crew records are essential for operators to have when planning and implementing post-2 December 2021 flight operations, training and fatigue risk management.

Thus, the requirements for NVIS approvals and flight crew records retention are intended, as far as practicable, to promote and enhance aviation safety standards for flight operations, and to promote the rights to life, and safe and healthy working conditions for pilots and crew of aircraft.

Amendments 2 and 3 in relation to aircraft take-off and landing performance, and the use of foreign-registered aircraft, are each facilitative. Exemption from the relevant Part 91 performance requirements permits continuity in use of the more relevant Part 138 performance requirements. An additional transitional period of 5 months is granted to relevant aerial work operators using foreign aircraft before they are affected by the time limitations under regulation 138.200.

### **Human rights implications**

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 promotes the right to life and promotes safe and healthy working conditions on board relevant aircraft. These measures are considered to be reasonable, necessary and proportionate in the interests of aviation safety.

### **Conclusion**

This legislative instrument is compatible with human rights.

## **Civil Aviation Safety Authority**