

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX161/21 — Miscellaneous Flight Operations Exemptions and Approvals (Transitional) Instrument 2021

Purpose

The purpose of *CASA EX161/21 — Miscellaneous Flight Operations Exemptions and Approvals (Transitional) Instrument 2021* (the **instrument**) is to facilitate a smooth transition from the former legislation to the new flight operations regulations (**FOR**) suite. The FOR relevantly include Parts 91, 121, 135 and 138 of the *Civil Aviation Safety Regulations 1998 (CASR)*. Part 91 of CASR sets out the general “rules of the air” and is the foundation for all aviation operations. Parts 121 and 135 of CASR set out the standards for the conduct of Australian air transport operations in larger aeroplanes and smaller aeroplanes, respectively. Part 138 of CASR sets out the standards for the conduct of aerial work operations.

The instrument makes a new exemption for the pilot in command of an aeroplane who was subject to an instruction under subregulation 240 (1) of CAR to be exempt from the flight preparation (Part 121 alternate aerodromes) requirements contained in Part 121 of CASR and its associated Manual of Standards. Additionally, the instrument provides for the holder of certain “approvals, permissions and authorisations” under a provision of CAR or a CAO to be approved to hold an approval under a provision of CASR. This will facilitate the smooth transition to the new regulations by exempting persons subject to an instruction from unnecessary regulatory requirements, and providing for the continuation of certain approvals, permissions and authorisations.

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.

Legislation — approvals

Regulations 91.045, 121.010, 135.020 and 138.025 of CASR empower CASA to grant an approval if a provision of those Parts or their associated Manual of Standards refer to a person holding an approval under the relevant regulation.

Under regulation 11.015 of the CASR, an approval of this type is an authorisation under Part 11 of CASR, with Subpart 11.BA of CASR applying to the authorisation.

Regulation 11.055 sets out criteria that apply to CASA when granting an authorisation. Regulation 11.056 provides that an authorisation may be granted subject to any condition that CASA is satisfied is necessary in the interests of the safety of air navigation. Under regulation 11.077, a person commits an offence of strict liability if the person breaches a condition of an authorisation.

Background

Multiple provisions of the *Civil Aviation Legislation Amendment (Flight Operations—Consequential Amendments and Transitional Provisions) Regulations 2021* (the **CATS regulations**) save the effect of some civil aviation authorisations for a limited period, where they originate from a regulation within the *Civil Aviation Regulations 1988* (the **CAR**). This is done by granting either the equivalent approval required under the FOR or an exemption from a new FOR requirement.

However, other requirements to hold an authorisation are contained within Civil Aviation Orders (**CAO**) that lose their empowering regulation due to the repeal of many CAR by the CATS regulations or are contained within CAO empowered by the *Civil Aviation Act 1988* (the **Act**) that are being amended to significantly change the kinds of operations to which they apply, thereby removing the authorisations from the CAO.

For a number of subject matter areas, the FOR contains a requirement for a person to hold an approval that is equivalent, to varying degrees, to existing civil aviation authorisations (whether called permission, approval, determination, authorisation etc) that were required under a CAO and are not saved by the CATS regulations.

Without the issue of this instrument, holders of authorisations that are not saved by the CATS regulations, and which require equivalent kinds of new approvals in the FOR, would have to re-apply for a new approval equivalent to their existing and in-force authorisation. This is not in accordance with CASA's FOR transitional policy.

Documents incorporated by reference

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 (including a non-legislative instrument) does not yet exist when the legislative instrument is made.

Under paragraph 15J(2)(c) of the LA, the Explanatory Statement must contain a description of the incorporated documents and indicate how they may be obtained. The instrument makes reference to provisions in other parts of the same legislative framework, for example, the following Parts of CASR, in force from time to time, and freely available on the Federal Register of Legislation:

- Part 91, which sets out certain standards, including rules of the air, that are applicable to all operations (unless an alternative rule is stated to apply);
- Part 121, which sets out the standards for the operational, procedural and safety risk management standards for the conduct of Australian Air Transport operations in larger aeroplanes;
- Part 135, which sets out the standards for the operation of smaller aeroplanes for an Australian air transport operation; and
- Part 138, which sets out the operational, procedural and safety risk management standards for the conduct of aerial work operations in aeroplanes and rotorcraft.

Additionally and in accordance with paragraph 15J (2) (c) of the LA, the following table contains a description of the documents incorporated by reference in the instrument and how they may be obtained. The table also states how the document is incorporated.

Document	Description	Manner of incorporation	Source
<i>Civil Aviation Order 20.11</i>	CAO 20.11 sets out the requirements for emergency and lifesaving equipment and passenger control in emergencies for all Australian registered aircraft. This document is mentioned in the table in Schedule 1 of the instrument.	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
<i>Civil Aviation Order 20.91 (Instructions and directions for performance-based navigation) Instrument 2014</i>	CAO 20.91 sets out the requirements and standards for performance-based navigation in Australian airspace. This document is mentioned in the table in Schedule 1 of the instrument.	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.

Document	Description	Manner of incorporation	Source
<i>Civil Aviation Amendment Order (No. R24) Instrument 2004 (CAO 29.4)</i>	<p>CAO 29.4 sets out the requirements and standards for the conduct of air displays.</p> <p>This document is mentioned in the table in Schedule 1 of the instrument.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
<i>Civil Aviation Order 29.11</i>	<p>CAO 29.11 sets out the requirements for helicopter winching and rappelling operations for air service operations.</p> <p>This document is mentioned in the table in Schedule 1 of the instrument.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
<i>Civil Aviation Order 82.0 Instrument 2014</i>	<p>CAO 82.0 sets out the conditions that air operator certificates are authorised for the conduct of aerial work, charter and regular air transport operations.</p> <p>This document is called up paragraph 4(f) and numerous items in the table in Schedule 1 of the instrument.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
<i>Civil Aviation Order 82.3</i>	<p>CAO 82.3 sets out the conditions on Air Operators' Certificates authorising regular public transport operations in other than high-capacity aircraft.</p> <p>This document is mentioned in the table in Schedule 1.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.

Document	Description	Manner of incorporation	Source
<i>Civil Aviation Order 82.5</i>	<p>CAO 82.5 sets out the conditions on Air Operators' Certificates authorising regular public transport operations in high-capacity aircraft.</p> <p>This document is mentioned in the table in Schedule 1.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
<i>Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007</i>	<p>CAO 82.6 sets out the requirements for the use of night vision imaging systems in helicopters.</p> <p>This document is mentioned in the table in Schedule 1 of the instrument.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
Part 91 Manual of Standards	<p>The Part 91 MOS sets out the “rules of the air”.</p> <p>This document is mentioned in section 4 and the table in Schedule 1 of the instrument.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
Part 121 Manual of Standards	<p>The Part 121 MOS sets out the standards for the operational, procedural and safety risk management standards for the conduct of Australian Air Transport operations in larger aeroplanes.</p> <p>This document is mentioned section 4 of the instrument.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
Part 135 Manual of Standards	<p>The Part MOS sets out the standards for the operation of smaller aeroplanes for an Australian air transport operation.</p> <p>This document is mentioned in the table in Schedule 1 of the instrument.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.

Document	Description	Manner of incorporation	Source
Part 138 Manual of Standards	<p>The Part 138 MOS sets out the operational, procedural and safety risk management standards for the conduct of aerial work operations in aeroplanes and rotorcraft.</p> <p>This document is mentioned in the table in Schedule 1 of the instrument.</p>	As in force or existing from time to time.	This document is available for free on the Federal Register of Legislation.
Subregulation 37 (1) of CAR	<p>Subregulation 37 (1) of CAR empowers CASA to approve a defect in, an Australian aircraft, or any aircraft included in a class of aircraft, as a permissible unserviceability in relation to the aircraft.</p> <p>This document is mentioned in the table in Schedule 1 of the instrument.</p>	As in force on 1 December 2021.	This document is available for free on the Federal Register of Legislation.
Regulation 240 of CAR	<p>Regulation 240 of CAR empowers CASA, in relation to the planning of flights by the pilot in command, to issue instructions about certain matters.</p> <p>This document is mentioned in the table in section 4 of the instrument.</p>	As in force on 1 December 2021.	This document is available for free on the Federal Register of Legislation.
Operator's aerial work certificate	<p>A certificate issued by CASA for an operator which stipulates the operations an operator can conduct.</p> <p>This document or set of documents is mentioned in section 5 and the table in Schedule 1 of the instrument.</p>	As the certificate exists from time to time.	Held by the operator.

Document	Description	Manner of incorporation	Source
Operator's operations manual	<p>A manual or set of documents for the use and guidance of the operations personnel of an operator.</p> <p>This document or set of documents is mentioned in the table in Schedule 1 and is called up by section 6 of the instrument.</p>	As in force at the commencement of the instrument.	Held by the operator.

In accordance with subsection 98 (5D) of the Act, an operator's aerial work certificate and operations manual is incorporated by reference. An operator's aerial work certificate is incorporated as it exists from time to time, whereas an operator's operations manual is incorporated as in force at the commencement of the instrument.

An aerial work certificate is issued by CASA to a specific operator and stipulates the operations an operator can conduct. A certificate is not transferable, and is not freely available. Each operator will have access to their certificate as necessary for compliance with the instrument.

An operations manual is developed by a specific operator to outline their operations and compliance with applicable legislation. As such, a manual is commercial in confidence and therefore not freely available. Each operator will have access to their manual as necessary for compliance with the instrument.

CASA has incorporated an operator's aerial work certificate and operations manual in the instrument because aviation safety requires the use of the information and data in these documents by aircraft operators and because there are no freely available documents serving the relevant purpose.

Content of instrument

Section 1 provides for the naming of the *CASA EX161/21 — Miscellaneous Flight Operations Exemptions and Approvals (Transitional) Instrument 2021*.

Section 2 provides for the commencement of the instrument on 2 December 2021 immediately after the commencement of Schedules 1 and 3 to the *Civil Aviation Legislation (Flight Operations—Consequential Amendments and Transitional Provisions) Regulations 2021* and CASR Parts 91 and 121. The instrument will be repealed at the end of 1 December 2024.

Section 3 provides definitions for the instrument.

Section 4 provides that the pilot in command of an aircraft who, immediately before the commencement of this instrument, was subject to an instruction under subregulation 240 (1) of CAR is, on and from that commencement, exempt from compliance with subregulation 121.170 (1) of CASR to the extent that the provision requires the flight preparation (Part 121 alternate aerodromes) requirements (the corresponding new requirements) to be met for the flight. Additionally, the operator of an aeroplane in relation to which an exemption applies under paragraph 4(a) of the instrument in respect of a flight in the aeroplane, is exempt from compliance with subregulation 121.170 (1)

of CASR for a flight in the aeroplane to the extent that the provision requires the corresponding new requirements to be met for the flight. Section 4 also sets out the conditions that must be met to utilise the exemption, and the cessation time for the exemption.

Section 5 provides for the holder of approval, permission or authorisation under a provision of CAR or a CAO to be approved to hold an approval under a provision of CASR, by reference to the table in Schedule 1 of the instrument. Section 5 provides that an approval, permission or authorisation under a provision of CAR or a CAO mentioned for an item in column 3 of the table in Schedule 1 that was in force immediately before the commencement of this instrument, is, on and from that commencement, an approval made under a provision of CASR mentioned in column 4 for the item and is subject to the same terms and conditions that were in force under the old authorisation immediately before that commencement and any other conditions mentioned in column 5 for the item. This section also sets out the general conditions applicable for each approval, and the cessation time for the approval.

The Table in Schedule 1 provides detail of:

- the subject matter relevant to the approval (column 2);
- the “old” authorisation granted under a provision of CAR or a CAO (column 3);
- the corresponding “new” approval made under CASR (column 4); and
- any additional conditions that must be met for the “new” approval (column 5).

Legislation Act 2003 (the LA)

Subsection 8 (4) of the LA provides that an instrument is a legislative instrument if it is made under a power delegated by the Parliament, and any provision determines the law or alters the content of the law, and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right. Additionally, paragraph 98 (5AA) (a) of the Act provides that an instrument issued under paragraph 98 (5A) (a) is a legislative instrument if the instrument is expressed to apply in relation to a class of persons. The instrument applies in relation to classes of persons, persons who were subject to an instruction under subregulation 240 (1) of CAR or holders of an approval, permission or authorisation under a provision of CAR or a CAO and who therefore are exempt from certain requirements or are approved to hold a corresponding approval under CASR. The instrument is, therefore, a legislative instrument, and is subject to 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, 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, items in the instrument will be spent within 3 years of the commencement date, in accordance with the cessation provisions in paragraphs 4(g) and 5(d) of the instrument. The 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 sunsetting does not affect parliamentary oversight of this instrument.

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.

The exemptions continue the existing conditions as provided for by CAR 240 with effect immediately prior to December 2021. Additionally, the instrument provides for the continuation of certain approvals, permissions and authorisations issued under a provision of CAR or a CAO under CASR.

The broad framework of this instrument was identified in the CASA Transition Policy for the FOR, and also in Advisory Circular 1-03, a document issued by CASA. It has also been discussed with the Aviation Safety Advisory Panel Implementation Technical Working Group and raised directly with CASA via direct correspondence. CASA is satisfied that no further consultation is necessary.

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 requirements in this instrument are transitional in nature and are designed to avoid imposing additional costs on operators.

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 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 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 EX161/21 — Miscellaneous Flight Operations Exemptions and Approvals (Transitional) 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 *CASA EX161/21 — Miscellaneous Flight Operations Exemptions and Approvals (Transitional) Instrument 2021* (the **instrument**) is to facilitate a smooth transition from the former legislation to the new flight operations regulations (**FOR**) suite. The FOR relevantly include Parts 91, 121, 135 and 138 of the *Civil Aviation Safety Regulations 1998 (CASR)*. Part 91 of CASR sets out the general “rules of the air” and is the foundation for all aviation operations. Parts 121 and 135 of CASR set out the standards for the conduct of Australian air transport operations in larger aeroplanes and smaller aeroplanes, respectively. Part 138 of CASR sets out the standards for the conduct of aerial work operations.

The instrument makes a new exemption for the pilot in command of an aeroplane who was subject to an instruction under subregulation 240 (1) of CAR to be exempt from the flight preparation (Part 121 alternate aerodromes) requirements contained in Part 121 of CASR and its associated Manual of Standards. Additionally, the instrument provides for the holder of certain “approvals, permissions and authorisations” under a provision of CAR or a CAO to be approved to hold an approval under a provision of CASR. This will facilitate the smooth transition to the new regulations by exempting persons subject to an instruction from unnecessary regulatory requirements, and providing for the continuation of certain approvals, permissions and authorisations.

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

The instrument is a transitional measure and facilitates the smooth transition to the new regulations by allowing certain persons to be exempt from unnecessary regulatory requirements, and providing for the continuation of certain approvals, permissions and authorisations.

In relation to a pilot in command, although the instrument contains exemptions from various provisions of the relevant FOR, it does so in the context of substitute, and acceptable, conditions 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 aircraft operated in accordance with the relevant conditions.

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