

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX100/22 – Amendment of CASA EX85/21 – (Miscellaneous Revisions) Instrument 2022

Purpose

CASA EX85/21 – Part 135, Subpart 121.Z and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX85/21) made a number of exemptions against Part 135, Subpart 121.Z and Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)* to facilitate implementation of Part 135 and Subpart 121.Z of CASR in accordance with CASA's transition policies for these new Parts. Part 135 deals with Australian air transport operations in smaller aeroplanes. Part 91 contains the rules of the air. Certain single engine aeroplanes on Australian air transport operations under Subpart 121.Z are subject to requirements of Part 135.

CASA EX100/22 – Amendment of CASA EX85/21 – (Miscellaneous Revisions) Instrument 2022 (the amendment instrument) amends CASA EX85/21 to permit the operator of an aeroplane for a flight that is a Part 135 operation or a Subpart 121.Z operation to use a foreign training and checking provider.

The amendment instrument also implements a deferral, until 2 December 2023, of requirements for certain aeroplanes to be fitted with certain equipment.

Background

Foreign training providers

Regulation 135.387 of CASR specifies who may conduct relevant training and checking for a Part 135 operation or a Subpart 121.Z operation.

The amendment instrument inserts a new section 9D into CASA EX85/21 to exempt the operator of an aeroplane for a flight that is a Part 135 operation or a Subpart 121.Z operation from compliance with regulation 135.387 but only to the extent of who may conduct the training or checking.

However, the exemption is subject to 2 conditions.

First, the training or checking must be conducted by a person who is:

- employed by a training provider authorised by the national aviation authority of a recognised foreign State (the *NAA*) to conduct equivalent training or checks
- authorised by the NAA to conduct the equivalent training or checking.

Secondly:

- each person who conducts the training or checking for the foreign training provider must be appropriately authorised to conduct the training or checking
- the foreign training provider must be notified, in writing, of any change in the operator's exposition relating to the training or checking that the foreign training provider conducts.

The exemption will permit the use of foreign providers of training and checking, and the conditions will ensure the integrity and safety of the process.

Deferral of TAWS and AECTM equipment mandates

CASR Subpart 121.Z applies to single-engine aeroplanes in Australian air transport operations with a maximum operational seating configuration (*MOPSC*) of more than 9 and a maximum take-off weight (*MTOW*) of not more than 8,618kg.

The amendment instrument implements the deferral, until 2 December 2023, of the requirement for an aeroplane to be fitted with automatic electronic trend monitoring (*AECTM*) equipment under regulation 121.770 of CASR, and terrain awareness warning system (*TAWS*) equipment under regulation 121.775 of CASR (both in Subpart 121.Z of CASR), subject to safety conditions requiring, respectively, alternative engine oil monitoring, or compliance with pre-2 December 2021 mandates for similar equipment.

The pre-2 December 2021 requirements were contained in Civil Aviation Order 20.18 (*CAO 20.18*) which was effectively repealed on 2 December 2021 when its empowering provisions under the *Civil Aviation Regulations 1988* were repealed.

Subsection 9.1C of this CAO prescribed the circumstances in which an approved GPWS or TAWS-B+ system was required.

Subparagraph 9.1D (d) prescribed the technical performance standards for an approved GPWS.

Paragraph 9.2 required a GPWS to be capable of providing automatically a timely and distinctive warning of an aeroplane's potentially hazardous proximity to the earth's surface.

Using the Part 135 Manual of Standards which relevantly applied to CASR Subpart 121.Z, CASA's implementation policy for the effective introduction of new equipment mandates under Part 121 of CASR (for large aeroplanes) deferred such mandates, that would otherwise have been effective on and from 2 December 2021, until 2 December 2023.

However, TAWS and AECTM mandates for aeroplanes in Subpart 121.Z operations were not similarly deferred, because it was expected that relevant operators would take advantage of an alternative exemption instrument, CASA EX137/21. This instrument exempted operators of aeroplanes in an Australian air transport operation with a MOPSC of 10-13 from Part 121 of CASR. CASA has been made aware, informally, by relevant operators that, for operational reasons, various operators elected not to take the benefit of CASA EX137/21.

CASA has, therefore, acted to defer the relevant equipment mandates for these operators also, subject to safety conditions.

AECTM

The primary purpose of AECTM equipment is to provide forewarning of impending serious engine problems by monitoring engine health against multiple set parameters.

It is a compensating safety condition of the relevant exemption from regulation 121.770 of CASR that the operator must have procedures in their exposition to ensure that the relevant aeroplane engine oil consumption is monitored in accordance with the engine

manufacturer's recommendations, and any anomalies checked and corrected. The exemption ceases to have effect on 2 December 2023.

TAWS and GPWS

The operator of an aeroplane for a flight that is a Subpart 121.Z operation is exempted from compliance with regulation 121.775 of CASR in relation to the fitment of a TAWS to the aeroplane.

There are no specific conditions for the operator of a piston-engine aeroplane; or if the relevant operation is in a turbine-engine aeroplane carrying 9 or less passengers.

However, depending on the MTOW of the relevant aircraft, conditions do apply if the flight is a passenger transport operation, under the IFR, with more than 9 passengers; and is conducted in a turbine-engine aeroplane.

If the aeroplane has a MTOW greater than 5,700 kg, and immediately before 2 December 2021 the aeroplane would have been required to be fitted with a prescribed GPWS as required under subparagraph 9.1C (c) of CAO 20.18 as then in force, the aeroplane must be fitted with 1 a TAWS-Class A or an approved GPWS compliant with the requirements mentioned in subparagraph 9.1D (b) and paragraph 9.2 of CAO 20.18, as in force immediately before 2 December 2021.

If the aeroplane has a MTOW of 5,700 kg or less, and immediately before 2 December 2021, the aeroplane would have been required to be fitted with a prescribed GPWS as required under subparagraph 9.1C (c) of CAO 20.18 as then in force; or a TAWS-B+ system under subparagraph 9.1C (e) of CAO 20.18 as then in force, the aeroplane must be fitted with a TAWS-B+ system; or a TAWS-Class A; or an approved GPWS compliant with the requirements mentioned in subparagraph 9.1D (b) and paragraph 9.2 of CAO 20.18, as in force before 2 December 2021.

The TAWS or GPWS required to comply with the conditions of the exemption must be operative unless the relevant flight begins from an aerodrome where inoperative equipment of this kind cannot be repaired or replaced, and not more than 24 hours have elapsed since the unserviceability was first discovered.

Alternatively, the equipment may be inoperative if the flight is operated under an authorised weather forecast which shows that the flight can be conducted in VMC by day when operating below relevant minimum heights and the flight is actually conducted in VMC by day below the relevant minimum heights.

This section ceases to have effect on 2 December 2023.

The amendment instrument also provides for a Table of Contents for CASA EX85/21, and corrects 2 typographical errors.

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 (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.

Although no new directions are included in the amendment instrument, the empowerment is retained for consistency with the empowerment of CASA EX85/21.

Description of supplementary exemptions

The amendment instrument would commence on the day after it is registered. It amends CASA EX85/21 to the effect described in detail under Background.

Aviation safety

In determining whether to issue the amendment instrument, CASA had regard to the safety of air navigation as the most important consideration.

CASA is satisfied that, given the nature of the amendments involved, and the necessary conditions imposed by the principal instrument itself, an acceptable level of aviation safety will be preserved, and the safety of air navigation thereby maintained.

Legislation Act 2003 (the LA)

Exemptions under Subpart 11.F of CASR are “for subsection 98 (5A)” of the Act, that is, for regulations which empower the issue of certain instruments, like exemptions, in relation to “(a) matters affecting the safe navigation and operation, or the maintenance, of aircraft”, and “(b) the airworthiness of, or design standards for, aircraft”.

The amendment instrument is clearly one in relation to matters affecting the safe navigation and operation of aircraft. Under subsection 98 (5AA) of the Act, an exemption issued under paragraph 98 (5A) (a), for such matters, is a legislative instrument if expressed to apply in relation to a class of persons, a class of aircraft or a class of aeronautical products (as distinct from a particular person, aircraft or product).

The amendment instrument is generic in nature and applies to classes of persons. It is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under section 15G, and sections 38 and 42, of the LA.

Sunsetting

As the amendment instrument relates to aviation safety and is made under CASR, that means that Part 4 of Chapter 3 of the LA (the sunseting 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 amendment 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 is purely an amending instrument which is automatically repealed by section 48A of the LA. CASA EX85/21 is self-repealed at the end of 1 December 2024 by virtue of the terms of paragraph 2 (b) of that instrument.

Thus, in practice, no sunseting avoidance issues arise. The fact that the instrument is formally not subject to sunseting does not, therefore, impact on the potential for parliamentary oversight.

Incorporations by reference

Under subsection 98 (5D) of the Act, the instrument may apply, adopt or incorporate any matter contained in any instrument or other writing. A non-legislative instrument may be incorporated into a legislative instrument made under the Act as that non-legislative instrument exists or is in force at a particular time or from time to time (including a non-legislative instrument that does not 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. There are no such specific documents.

References to provisions of CASR are taken to be as they are in force from time to time, by virtue of paragraph 13 (1) (c) of the LA. CASR is freely available online on the Federal Register of Legislation.

An incorporated document is described below, together with the manner of incorporation and how it may be obtained.

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.

An exposition is not publicly or freely available. It is proprietary to the operator who owns its intellectual property 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.

The foreign training provider provisions in the amendment instrument are designed to give the operator of an aeroplane for a flight that is a Part 135 operation or a Subpart 121.Z operation the flexibility to use a foreign training and checking provider, coupled with standard prudential processes to assure the integrity and safety of training and checking conducted by such foreign providers.

The elements of the amendment instrument related to equipment required to be fitted to an aeroplane used in a Subpart 121.Z operation are deferrals that are beneficially designed to give effect to CASA's transitional policy for the introduction of the flight operations regulations. CASA had received informal industry feedback about the need for such deferrals.

Therefore, CASA considered that formal consultation was neither necessary nor appropriate before making the amendment instrument.

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).

Economic and cost impact, and sector risks

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.

In terms of economic and cost impacts for subsection 9A (3) of the Act, the amendment instrument will impose an obligation on relevant operators to ensure that relevant foreign provider personnel are authorised, and appropriately informed on exposition changes. However, the new requirements are aligned with the requirements already in place for operators electing to contract with a domestic flight training provider for training and checking services. Hence, while some additional cost impact may likely be involved in such new assurance processes, in the overall context of the relevant operators it is likely to be minimal and not material.

In relation to the elements of the amendment instrument that defer the requirement for certain aeroplanes to be fitted with AECTM or TAWS, the deferral of these regulatory requirements will defer any economic and cost impacts that might otherwise have arisen for applicable operators.

Sector risks

For aviation safety reasons, the amendment instrument is specific to those Part 135 and Subpart 121.Z operators who fall within its scope and who choose to take the benefit of the exemptions and comply with its conditions.

Rural and regional impacts

The Minister's Statement of Expectations for the CASA Board states: "I expect that CASA will: ... (b) fully consider the impact of new regulations on general aviation, with a particular focus on regional and remote Australia. All Explanatory Statements drafted by CASA for subordinate legislation should identify the impact on the various categories of operations as well as on communities in regional and remote Australia served by those operations and how these impacts have been considered."

There are no identified rural and regional impacts that differ in any material way from the general economic and cost impacts, or sector risks described above.

Environmental impact

Under subsection 9A (2) of the Act, while regarding the safety of air navigation as the most important consideration, CASA must exercise its powers and perform its functions in a manner that ensures that, as far as practicable, the environment is protected from the effects and associated effects of the operation and use of aircraft.

It is not anticipated there will be any negative environmental impacts as a result of the amendment instrument, as compared to the baseline that existed on 1 December 2021, since the instrument does not create any new environmental impacts arising from flight operations.

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 amendment instrument is compatible with human rights: with its aviation safety focus, it promotes the right to life, and the right to safe and healthy working conditions. By imposing some short-term costs it may impact on the right to work, but only in an indirect and likely minimal way if at all.

The amendment instrument achieves these likely outcomes in a way that is reasonable, necessary and proportionate in the context of aviation safety.

Commencement and making

The amendment instrument commences on the day after it is registered, and is automatically repealed under section 48A of the LA.

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 EX100/22 – Amendment of CASA EX85/21 – (Miscellaneous Revisions) Instrument 2022

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

CASA EX85/21 – Part 135, Subpart 121.Z and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX85/21) made a number of exemptions against Part 135, Subpart 121.Z and Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)* to facilitate implementation of Part 135 and Subpart 121.Z of CASR in accordance with CASA's transition policies for these new Parts. Part 135 deals with Australian air transport operations in smaller aeroplanes. Part 91 contains the rules of the air. Certain single engine aeroplanes on Australian air transport operations under Subpart 121.Z are subject to requirements of Part 135.

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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 *ICCPR*)
- the right to safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social and Cultural Rights (the *ICESCR*)
- the right to work under Article 6 of the *ICESCR*.

Right to life under the ICCPR

Right to safe and healthy working conditions under the ICESCR

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.

The legislative instrument permits the operator of an aeroplane for a flight that is a Part 135 operation or a Subpart 121.Z operation to use a foreign training and checking provider. However, it also contains processes designed and intended to further assure the integrity and safety of the conduct of the training and checking by the foreign provider.

The relevant equipment deferrals are subject to conditions that on a transitional basis, safe and effective alternative equipment is fitted.

Right to work under the ICESCR

Implementing the new processes mentioned above may impose an overhead cost on relevant operators and may, consequently affect the right to work through cost-induced reduction in opportunities for work. However, such an impact is, in the context, hypothetical, and would, in any event, almost certainly be immaterial.

Although substitute equipment is required in the interests of safety, it is possible that transitional equipment deferrals may ensure continued operations on an advantageous basis.

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