

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX101/22 – Amendment of CASA EX86/21 (Miscellaneous Revisions) – Instrument 2022

Purpose

CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX86/21) made 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.

CASA EX101/22 – Amendment of CASA EX85/21 – (Miscellaneous Revisions) Instrument 2022 (the **amendment instrument**) amends CASA EX86/21 to permit an aerial work certificate holder (the **operator**) to whom subregulation 138.125 (3) of CASR applies to use a foreign training and checking provider.

Background

Regulation 138.125 of CASR specifies the aerial work operators who must have a specified training and checking system (a **relevant aerial work operator**). Regulation 138.505 of CASR specifies who may conduct the training and checking for a relevant aerial work operator.

The amendment instrument inserts a new section 9A into CASA EX86/21 to exempt a relevant aerial work operator from compliance with regulation 138.505 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 training and checking manual 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.

The amendment instrument also provides a definition for use in section 9A, repeals a spent provision (section 14A) 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 the principal exemptions instrument.

Description of supplementary exemptions

The instrument would commence on the day after it is registered. It amends CASA EX86/21 to the effect described in detail under Background.

Aviation safety

In determining whether to issue the exemption 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 exemption 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 exemption 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 exemption 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 exemption 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 EX86/21 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.

Training and checking manual of an operator

A training and checking manual of an operator is a document that specifies the scope of the training and checking activities conducted by the operator, and sets out the plans, processes, procedures, programs and systems implemented by the operator to comply with its training and checking obligations under the civil aviation legislation.

A training and checking manual, for an operator generally means the training and checking manual as changed from time to time.

A training and checking manual 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 a training and checking manual are at the operator-specific level and apply only to the operator and its personnel. Further, the operator is under obligations to make the training and checking manual available to its personnel who have obligations under the document.

However, CASA will, as far as practicable, make arrangements with any relevant operator to make a suitably redacted copy of the exposition available for requested inspection by appointment at a relevant CASA office.

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 amendment instrument is designed to give relevant aerial work operators 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. Therefore, CASA considered that formal consultation was neither necessary nor appropriate before making the exemption instrument.

Office of Impact Analysis (OIA)

An Impact Analysis (*IA*) is not required because the instrument is covered by a standing agreement between CASA and OIA under which an IA is not required for Exemption or Direction instruments (OIA 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 exemption instrument will impose an obligation on relevant operators to ensure that relevant foreign provider personnel are authorised, and appropriately informed on training and checking manual 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.

Sector risks

For aviation safety reasons, the exemption instrument is specific to the relevant aerial work 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 exemption 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 exemption 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 exemption instrument achieves these likely outcomes in a way that is reasonable, necessary and proportionate in the context of aviation safety.

Commencement and making

The 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 EX101/22 – Amendment of CASA EX86/21 – (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 EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX86/21) made 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 *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.

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.

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