

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX108/22 – Amendment of CASA EX82/21 – Instrument (No. 2) 2022

Purpose

The purpose of *CASA EX108/22 – Amendment of CASA EX82/21 – Instrument (No. 2) 2022* (the **exemption instrument**) is to recast section 7AA in *CASA EX82/21 – Part 119 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX82/21* or the **principal instrument**).

The principal instrument exempted certain operations of a kind, which before 2 December 2021 had been considered to be private operations under subparagraph 2 (7) (d) (v) of the *Civil Aviation Regulations 1988 (CAR)*, from the requirements of Part 119 of CASR (**Part 119**). Part 119, in effect, would otherwise have imposed on those flights, rules essentially more suited for regulated commercial passenger transport.

On subsequent review of the principal instrument, CASA considered that some other operations of a kind, which before 2 December 2021 had also been considered to be private operations, had been inadvertently omitted from the scope of section 7AA.

In particular, the original section 7AA excluded from its scope operators who held or hold a passenger-carrying AOC which was not required for the purpose of what, before 2 December 2021, would have been considered to be a private flight.

This inadvertent exclusion was causing operators, who held such an AOC before 2 December 2021, to be operationally, financially, and administratively disadvantaged compared to operators who did not hold a passenger-carrying AOC before 2 December 2021.

The exemption instrument provides a temporary transitional solution to remedy these omissions while CASA completes a review of the sector and consults with industry to develop an enduring policy.

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 the *Civil Aviation Safety Regulations 1998 (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 of CASR.

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.).

Background

Immediately before 2 December 2021, subparagraph 2 (7) (d) (v) of CAR relevantly provided that an aircraft flying or operating for the purposes of, or in the course of, “the carriage of persons... without a charge for the carriage being made... shall be taken to be employed in private operations”.

CASA EX41/22 – Amendment of CASA EX82/21 – Instrument (No. 1) 2022 was made on 3 May 2022. It contained section 7AA which relieved certain aircraft operators who, before 2 December 2021 did **not** hold an AOC authorising passengers but were conducting private operations carrying non-paying passengers in accordance with subparagraph 2 (7) (d) (v), from the obligation to hold an AOC and otherwise comply with Part 119.

AOC holders were specifically excluded from the scope of the original section 7AA because, being AOC holders, they could operate these flights in accordance with Part 119. However, in complying with the obligations of Part 119, unanticipated and significant increases in foreign state administrative burdens have occurred. Additionally, costs are significantly higher for new operators compared to existing operators since new operators cannot access the exemption.

Part 119, and the definitions associated with Australian air transport operations, were not intended to require private operations for the carriage of non-fare paying passengers to operate under the obligations imposed by Part 119. However, that appears to have been the inadvertent effect of provisions in Part 119.

On and after 2 December 2021, under the CASR Dictionary, an operation is a ***private operation*** if the operation does not require an AOC under Part 119. Under Part 119, an ***Australian air transport operation***, in effect, requires an AOC for passenger transport conducted for hire or reward. The expression “for hire or reward” is not defined but it is considered that it may well have a broader meaning than the CAR expression “without a charge... being made”.

Now, with the benefit of the exemption, private operations with non-paying passengers can be conducted by AOC holders and non-AOC holders alike. The exemption instrument provides an equitable level of compliance for all operators obliged to comply with the requirements of Part 91 of CASR for private flights. In doing so, it also provides an acceptable level of aviation safety as the most important consideration.

CASA plans to consult the aviation industry in 2023 regarding possible changes to Part 119 or to the definitions associated with Australian air transport operations, to remove the need for an exemption and so that a longer-term solution may be devised.

Details of the exemption instrument are set out in Appendix 1.

Legislation Act 2003 (the LA)

The exemptions in the instrument are for the safe navigation and operation of aircraft and apply to classes of persons. The instrument is, therefore, 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.

Sunsetting

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 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 instrument is itself repealed at the end of 1 December 2024 by virtue of the terms of paragraph 2 (b) of the principal instrument. In any event, new section 7AA is expressed to be repealed at the end of 1 December 2023, by which time a more permanent solution than an exemption should be in place. Thus, in practice, no sunset avoidance issues arise and there is no impact on parliamentary oversight.

Incorporations by reference

Under subsection 98 (5D) of the Act, the exemption 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. No documents are applied, adopted or incorporated for the purposes of the exemption 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 as far 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.

CASA consulted the relevant aviation industry for the purposes of the principal instrument. However, CASA has not engaged in further consultation on the exemption instrument because that instrument arises from significant informal feedback from the industry that the principal instrument had unforeseen impact and had not achieved its ultimately intended effects.

Office of Impact Analysis (OIA)

An Impact Analysis (*IA*) is not required because the instrument is covered by a standing agreement between CASA and the OIA under which an IA is not required for exemption or direction instruments (OIA id: 14507).

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.

In terms of economic and cost impacts for subsection 9A (3) of the Act, the exemption instrument will relieve operators from the additional Part 119 compliance costs that would otherwise have arisen when conducting the kinds of "private operations" covered by the instrument.

It is not anticipated there will be any negative environmental impacts as a result of this exemption, compared to the baseline that existed on 1 December 2021, since the exemption is enabling a continuation of existing practices.

There is no significant differential sector risk arising from the exemption instrument whose purpose is to preserve a pre-2 December 2021 status quo that was and is considered to offer an acceptable level of aviation safety.

Regional and remote Australia impacts

The Minister's Statement of Expectations 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."

The exemption related to private operations involving passenger-carrying flights is expected to have a neutral impact in regional and remote communities.

Statement of Compatibility with Human Rights

The Statement in Appendix 2 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, the right to work, 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 the day after it is registered.

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

Details — CASA EX108/22 – Amendment of CASA EX82/21 – Instrument (No. 2) 2022

- 1 Name**
This section names the instrument.
- 2 Commencement**
Under this section, the instrument commences on the day after it is registered.
- 3 Amendment of CASA EX82/21**
Under this section, Schedule 1 amends *CASA EX82/21 – Part 119 of CASR – Supplementary Exemptions and Directions Instrument 2021*.

Schedule 1 Amendments

- [1] Section 7AA**
The amendments recasts section 7AA - Certain operations not air transport — exemption.

- (1) Subsection (1) provides definitions for the section. In particular, it defines ***exempted transport operation***. There are the 3 kinds of operations that are covered by the exemption instrument.

First, the operation or use of an aircraft by a company, a partnership, or a sole trader:

- for the carriage of passengers, or goods (not being goods for sale or exchange)
- where the predominant purpose of the carriage is to facilitate the conduct of the operator's business
- where the facilitation is merely ancillary to conducting the business
- where no passenger gives any reward for the carriage of themselves, or otherwise shares in the costs of the carriage
- where the carriage of any passenger, or the passenger's notional share of the costs of the carriage, is not rewarded by anyone else
- where the aircraft is flown by a pilot who is a related pilot, or a professional pilot employed by the business to fly the aircraft
- where the aircraft used has a maximum certificated passenger seating capacity that is not greater than 19.

Secondly, the operation of an aircraft directly by a government organisation:

- for the carriage of passengers, or goods (not being goods for sale or exchange)
- where the predominant purpose of the carriage is to facilitate the conduct of the government organisation's official activities
- where the facilitation is merely ancillary to conducting those activities
- where no passenger gives any reward for the carriage of themselves, or otherwise shares in the costs of the carriage

- where the carriage of any passenger, or the passenger's notional share of the costs of the carriage, is not rewarded by anyone else
- where the aircraft is flown by a pilot who is a professional pilot employed by the government organisation to fly the aircraft
- where the aircraft used has a maximum certificated passenger seating capacity that is not greater than 19.

Thirdly, the operation of an aircraft for the transportation of any of the following:

- the owner of the aircraft (the *owner*)
 - a passenger directly associated with the owner
- PROVIDED THAT:
- the owner is not given any reward for the transportation
 - the aircraft is flown by the owner, or by a professional pilot
 - the passenger is being transported for recreational purposes.

Other defined terms include:

- government organisation
- professional pilot
- related pilot
- reward.

- (2) Under this subsection, the operator of an exempted transport operation is exempted from compliance with the following:
- (a) for an aeroplane:
- (i) Part 119 of CASR (the Australian air transport operations rules); and
 - (ii) Subpart 91.F of CASR (these are the basic aeroplane performance requirements – under the conditions below, they are replaced by relevant rules under Part 121 of CASR;
- (b) for a rotorcraft — Part 119 of CASR.
- (3) Under this subsection, the exemptions for an aeroplane are subject to specified air transport aeroplane performance requirements under relevant regulations in Part 121 of CASR and its Manual of Standards (*MOS*). (Part 121 of CASR deals with the safety of air transport operations.) These are conditions in the interests of aviation safety. The relevant Part 121 provisions relate to compliance with the aeroplane's aircraft flight manual instructions (regulation 121.390), and the Part 121 MOS rules in relation to take-off performance (under regulation 121.395) and landing performance (under regulation 121.420).
- (4) Under this subsection, provision is made for the requirements under subsection (3) to be so read and applied that they achieve the intent of the exemption instrument. This is required so that the Part 121 provisions, expressed for a different context, can apply to the context of the exempted transport operations "*mutatis mutandis*". This Latin expression is a shorthand phrase with a settled legal meaning to convey the idea that relevant provisions are to be read with correspondingly necessary adjustments made to fit the different context.
- (5) Under this subsection, section 7AA ceases to have effect at the end of 1 December 2023.

Statement of Compatibility with Human Rights

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

CASA EX108/22 – Amendment of CASA EX82/21 – Instrument (No. 2) 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

The purpose of *CASA EX108/22 – Amendment of CASA EX82/21 – Instrument (No. 2) 2022* (the **exemption instrument**) is to recast section 7AA in *CASA EX82/21 – Part 119 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX82/21* or the **principal instrument**).

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On subsequent review of the principal instrument, CASA considered that some other operations of a kind, which before 2 December 2021 had also been considered to be private operations, had been inadvertently omitted from the scope of section 7AA.

In particular, the original section 7AA excluded from its scope operators who held or hold a passenger-carrying AOC which was not required for the purpose of what, before 2 December 2021, would have been considered to be a private flight.

This inadvertent exclusion was causing operators, who held such an AOC before 2 December 2021, to be operationally, financially, and administratively disadvantaged compared to operators who did not hold a passenger-carrying AOC before 2 December 2021.

The exemption instrument provides a temporary transitional solution to remedy these omissions while CASA completes a review of the sector and consults with industry to develop an enduring policy.

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******Right to work under the ICESCR***

This engagement is in the context of CASA's statutory purpose. The aim of CASA and its regulatory framework is 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 instrument permits the continuation of operations that, prior to 2 December 2021, were considered to be safe but that may otherwise have been prevented, or whose continuation would have involved increased overhead costs. Reduced costs may have an effect on preserving operations and employment.

The instrument's conditions are designed to ensure an acceptable level of safety is preserved.

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, the right to work, and 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