

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX94/23 – Amendment of CASA EX82/21 – Instrument 2023 (No. 2)

Purpose

The purpose of *CASA EX94/23 – Amendment of CASA EX82/21 – Instrument 2023 (No. 2)* (the **exemption instrument**) is to amend and repeal a number of exemptions and directions contained within *CASA EX82/21 – Part 119 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX82/21* or the **principal instrument**). CASA EX82/21 makes a number of exemptions and directions relating to Part 119 of the *Civil Aviation Safety Regulations 1998 (CASR)*. Part 119 of CASR is one of CASA’s new Flight Operations Regulations (**FOR**) that commenced on 2 December 2021.

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. The preservation of an acceptable level of safety remains paramount.

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.).

Legislation — directions

Section 98 of the Act empowers the Governor-General to make regulations for the Act and the safety of air navigation.

Under subregulation 11.245 (1) of CASR, for subsection 98 (5A) of the Act, CASA may, by instrument, issue a direction about, among other things, 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 to do so in the interests of the safety of air navigation; and only if the direction is not inconsistent with the Act; and only for the purposes of CASA's functions.

Under regulation 11.250 of CASR, 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.

Background

Analysis by CASA of feedback from Australian air transport operators and other stakeholders regarding the implementation of civil aviation legislation relating to Australian air transport operations requires amendments to be made to the principal instrument.

The exemption instrument amends the principal instrument to allow more time for relevant operators to transition to full compliance with the FOR.

The exemption instrument permits the continuation of operations, and the continued employment of certain key personnel, that might otherwise have ended through failure to comply with the relevant provisions of the FOR. The conditions and directions in the exemption instrument are designed to allow for a further period of transition while ensuring that an acceptable level of safety is preserved.

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

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, 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 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 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 section 2 of the principal instrument (as amended). Thus, in practice, no sunseting 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.

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.

The following documents are applied, adopted or incorporated for the purposes of the exemption instrument.

Document	Description	Manner of incorporation	Source
Civil Aviation Order 82.0	Sets out requirements for AOC holders' key personnel.	As in force immediately before 2 December 2021.	This document is available for free on the Federal Register of Legislation.
Civil Aviation Order 82.3	Sets out requirements for, in effect, Australian air transport operators on smaller aircraft.	As in force immediately before 2 December 2021.	This document is available for free on the Federal Register of Legislation.

Document	Description	Manner of incorporation	Source
Operator expositions	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.	As in force from time to time by virtue of subsection 98 (5D) of the <i>Civil Aviation Act 1988</i> , and in accordance with the definition of exposition in the CASR Dictionary.	These are the proprietary intellectual and commercial property of specific operators 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.
Operator safety information	This is defined in subsection 19 (1) of the exemption instrument.	As in force from time to time by virtue of subsection 98 (5D) of the <i>Civil Aviation Act 1988</i> .	This are the proprietary intellectual property of individual operators.

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.

Although a formal, public consultation has not been undertaken in relation to this instrument, there has nevertheless been considerable informal consultation with the aviation industry in the course of determining what amendments were needed to the principal instrument. There has been industry feedback to CASA via multiple communication channels, either directly from individuals, or from representative aviation sector associations.

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 requirements that might otherwise have involved compliance costs.

Sector risks

For aviation safety reasons, the exemption instrument is specific to those operators who fall within its scope and who choose to take the benefit of the exemptions and comply with its conditions.

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 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.

Making and commencement

The instrument commences on 2 December 2023. The instrument has been made by a delegate of CASA relying on the power of delegation under subregulation 11.260 (1) of CASR.

Details – CASA EX94/23 – Amendment of CASA EX82/21 – Instrument 2023 (No. 2)

- 1 Name**
This section names the instrument.
- 2 Commencement**
Under this section, the instrument commences on 2 December 2023.
- 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* (the *principal instrument*).

Schedule 1 Amendments

- [1] Section 2**
This amendment modifies the date of repeal of the principal instrument to be the end of 1 December 2024.
- [2] Subsection 3 (1), definition of CAR**
This amendment redefines the meaning of CAR (the *Civil Aviation Regulations 1988*) to be the version as in force from time to time. Particular provisions will refer to CAR as in force immediately before 2 December 2021 where that version is intended to be the operative version for the provision.
- [3] Subsection 7AA (5)**
Under section 7AA, exempted transport operations are non-revenue business facilitation operations, government organisation operations, and non-revenue owner transportation operations. In effect, not being air transport operations, these operations are exempted from Part 119 of CASR (regulating air transport operations for an aeroplane and a rotorcraft) and Subpart 91.F of CASR (regulating performance for an aeroplane).

This amendment extends the life of section 7AA, Certain operations not air transport — exemption, from the end of 1 December 2023 to the end of 1 December 2024. Compensating safety conditions are imposed.
- [4] Section 8**
Section 8 exempts a grandfathered cohort of heads of flight operations (*HOF*) of operators of single-pilot type certificated aircraft who, pre-2 December 2021, were in charter or air ambulance operations, but not regular passenger transport operations, from the requirement under Part 119 of CASR to hold an air transport pilot licence, provided they continued to meet the previous Civil Aviation Order standards for a Chief Pilot. Through a “cease to have effect” date, this transitional concession potentially expired on 1 September 2023.

The amendment reinstates section 8 and replaces the previous expiry with a future date to be announced in writing by CASA, and communicated to relevant operators at least 3 months before it occurs. CASA is working with relevant operators to reach a point where exemption is not required, but with limited resources it is not possible at this stage to specify a date of effect for completion

of that process. The principal instrument expires at the end of 1 December 2024 and it will be possible then to reassess what progress has been made towards this goal.

[5] Section 10

Section 10 exempts a grandfathered cohort of heads of flight operations (*HOF*) of operators of single-pilot type certificated aircraft who, pre-2 December 2021, were in lower capacity charter or air ambulance operations, or regular passenger transport operations and not required to have 2 pilots, from the requirement under Part 119 of CASR to hold an air transport pilot licence, provided they continued to meet the previous Civil Aviation Order standards for a Chief Pilot. Through a “cease to have effect” date, this transitional concession potentially expired on 1 September 2023.

The amendment reinstates section 10 and replaces the previous expiry with a future date to be announced in writing by CASA, and communicated to relevant operators at least 3 months before it occurs. CASA is working with relevant operators to reach a point where exemption is not required, but with limited resources it is not possible at this stage to specify a date of effect for completion of that process. The principal instrument expires at the end of 1 December 2024 and it will be possible then to reassess what progress has been made towards this goal.

[6] Sections 12 and 13

Sections 12 and 13, which introduced enhanced HOTC minimum experience standards designed to align the Part 119 and 138 of CASR HOTC experience requirements, are repealed. However, CASA has identified that mandating a training experience requirement for all Australian air transport operator HOTCs unfairly penalises Australian air transport operators of smaller scale and complexity, noting that CASA retains the power to direct Australian air transport operators (see regulation 119.105) to have higher minimum qualification and experience standards where this is appropriate for an operator’s size, scale and complexity of operations.

[7] Section 14

Section 14 exempted an Australian air transport operator of larger aircraft or aircraft in medical transport operations from the obligation to have training and checking system processes for ground-based operational safety-critical personnel, subject to various safety conditions. The section ceased to have effect at the end of 1 September 2023.

The amendment reinstates section 14 and replaces the previous expiry with a future date to be announced in writing by CASA, and communicated to relevant operators at least 3 months before it occurs. CASA is working with relevant operators to reach a point where exemption is not required, but with limited resources it is not possible at this stage to specify a date of effect for completion of that process. The principal instrument expires at the end of 1 December 2024 and it will be possible then to reassess what progress has been made towards this goal.

[8] Section 15

Section 15 was a direction to an Australian air transport operator to include in its exposition information on how its training and checking system complies with the training and checking system obligations for ground-based operational

safety-critical personnel for when exemption from subregulation 119.117 (4) of CASR expired on 2 September 2023.

The amendment reinstates section 15 as a direction, and replaces the previous expiry with a future date to be announced in writing by CASA, and communicated to relevant operators at least 3 months before it occurs. CASA is working with relevant operators to reach a point where exemption is not required, but with limited resources it is not possible at this stage to specify a date of effect for completion of that process.

The principal instrument expires at the end of 1 December 2024 and it will be possible then to reassess what progress has been made towards this goal.

[9] Section 17

Section 17 was a direction aligned with the implementation methodology for training and checking systems, safety management systems and human factors and non-technical skills training and assessment programs, contained in CASA EX87/21. The effect of the direction was that CASA's formal approval of any of these mechanisms was required before an Australian air transport operator could rely on them to satisfy any civil aviation legislation requirement for them. However, CASA is simultaneously removing many of the formal approval requirements within CASA EX87/21 and, therefore, this direction is no longer required as it is inconsistent with the new revised implementation methodologies.

[10] After subsection 18 (1)

Section 18 applies to certain Australian air transport operators of larger aircraft to whom regulation 119.195 applies and who are, thereby, required to have a flight data analysis program (*FDAP*). These operators are exempted from paragraph 119.195 (3) (d) of CASR which requires that no punitive action may be taken against an identified person in relation to data. This is designed to encourage safety data reporting without fear of recriminations, and thus enable remedial, rather than punitive, safety action to be taken as necessary. Section 18 applies the more detailed protective provisions that were in place under Civil Aviation Order (*CAO*) 82.5 from 14 December 2020 until immediately prior to 2 December 2021. These provisions implemented changes to ICAO standards and recommended practices that occurred after the registration of Part 119 of CASR. It is intended that, at the next appropriate opportunity, congruent amendments will also be made to regulation 119.195.

This amendment inserts a Note to explain that for operators who have the benefit of exemption from regulation 119.195 under Part 11 of CASA EX87/21, the narrower section 18 exemption would not apply until that exemption expires.

[11] Subsection 18 (4), including the Note

As mentioned above, section 18 exempts an Australian air transport operator from an FDAP requirement, and substitutes a revised requirement based on the more contemporary provisions under CAO 82.5, as in force immediately before 2 December 2021. Subsection 18 (4) was expressed to cease the exemption's effect at the end of 1 December 2024.

However, this is also the date for expiry of the overall exemption instrument, and its inclusion in section 18 is redundant. Subsection 18 (4) is, therefore, repealed.

[12] Subsection 19 (1)

Section 19 is a direction to an Australian air transport operator who is required to have a safety management system (*SMS*) and an FDAP, and who is not otherwise exempted, by another CASA instrument, from obligations in relation to the SMS and FDAP. This direction is complementary to the exemption in section 18 and its associated safety conditions.

The relevant operators are directed to comply with the former provisions of CAO 82.5, as in force immediately before 2 December 2021, that require the operator to have a documented process for ensuring that safety information (as defined) is properly used and analysed, and that persons who report safety data or information are protected from punitive action, and their identity is protected. This does not prevent an operator from using safety information for the purposes of taking preventive, corrective or remedial action that is necessary to maintain or improve safety.

The amendment provides a more expansive definition of what constitutes safety data by including data or information that has been approved, whether directly or indirectly, by CASA as fulfilling the relevant SMS or FDAP obligations of the operator under the civil aviation legislation. Notes further explain some of the expressions used.

[13] Subsection 19 (4)

Subsection 19(4) was expressed to cease the direction's effect at the end of 1 December 2024. However, this is also the date for expiry of the overall exemption and direction instrument, and its inclusion in section 19 is redundant. Subsection 19 (4) is, therefore, repealed.

Statement of Compatibility with Human Rights

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

CASA EX94/23 – Amendment of CASA EX82/21 – Instrument 2023 (No. 2)

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 EX94/23 – Amendment of CASA EX82/21 – Instrument 2023 (No. 2)* (the **exemption instrument**) is to amend and repeal a number of exemptions and directions contained within *CASA EX82/21 – Part 119 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX82/21* or the **principal instrument**). *CASA EX82/21* makes a number of exemptions and directions relating to Part 119 of the *Civil Aviation Safety Regulations 1998 (CASR)*. Part 119 of CASR is one of CASA’s new Flight Operations Regulations (**FOR**) that commenced on 2 December 2021.

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 further amends the principal instrument to allow more time for relevant operators to transition to full compliance with the flight operations regulations (**FOR**) that commenced on 2 December 2021.

Through exemptive provisions, the instrument permits the continuation of operations and certain key personnel employment that might otherwise cease through failure to comply with the relevant provisions of the FOR. The instrument's conditions and directions are designed to allow for a further period of transition while ensuring that 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