

## Explanatory Statement

### Civil Aviation Safety Regulations 1998

#### CASA EX98/23 – Amendment of CASA EX86/21 – Instrument 2023 (No. 2)

##### Purpose

The purpose of *CASA EX98/23 – Amendment of CASA EX86/21 – Instrument 2023 (No. 2)* (the **exemption instrument**) is to amend, repeal and insert a number of exemptions and directions contained within *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX86/21)* or the **principal instrument**. CASA EX86/21 makes a number of exemptions and directions relating to Part 138 of the *Civil Aviation Safety Regulations 1998 (CASR)*. Part 138 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 aerial work operators and other stakeholders regarding the implementation of civil aviation legislation relating to aerial work operations requires amendments to be made to the principal instrument.

Along with some minor corrections, the exemption instrument amends the principal instrument to allow more time for relevant operators to transition to full compliance with the FOR, while ensuring that an acceptable level of safety is preserved.

The instrument also removes certain crew aeronautical experience requirements for night vision imaging system (*NVIS*) firebombing operations. These requirements were carried over from an early trial but not re-evaluated for non-trial use, and in practice they are unnecessarily inconsistent with the requirements for other similar *NVIS* operations.

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 is applied, adopted or incorporated for the purposes of the exemption instrument.

<b>Document</b>	<b>Description</b>	<b>Manner of incorporation</b>	<b>Source</b>
Operator safety information	This is defined in subsection 22 (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 is 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 exemption instrument, the amendments to the principal instrument have arisen from informal consultation with the aviation industry relating to the continuing implementation of the FOR in relation to aerial work operators. The amendments to the principal instrument are consequential on, or aligned with, changes in the FOR implementation methodology contained within *CASA EX99/23 – Amendment of CASA EX87/21 – Instrument 2023 (No. 2)*, which amends *CASA EX87/21 – Flight Operations Regulations – SMS, HFP&NTS and T&C Systems – Supplementary Exemptions and Directions Instrument 2021*.

## **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 EX98/23 – Amendment of CASA EX86/21 – Instrument 2023 (No. 2)

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- 1 Name**  
This section names the instrument.
- 2 Commencement**  
Under this section, the instrument commences on 2 December 2023.
- 3 Amendment of CASA EX86/21**  
Under this section, Schedule 1 amends *CASA EX86/21 – Part 138 and Part 91 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 6 (2)**  
This amendment corrects a provision citation.
- [4] Subsection 7 (1)**  
This amendment is consequential on the amended definition of CAR.
- [5] Subsection 7 (2)**  
This amendment corrects a provision citation.
- [6] Subsection 8 (2)**  
This amendment corrects a provision citation.
- [7] Section 9**  
Section 9 applied to an aerial work certificate holder who is required to have a compliant training and checking system that covers ground-based operational safety-critical personnel. In respect of those personnel only, it exempts the operator from the requirement that its training and checking system must otherwise cover them, but subject to the condition that the system must include a description of how the operator will satisfy itself that such personnel are and remain competent. The section was expressed to cease to have effect at the end of 1 September 2023.  
  
The amendment reinstates section 9, in almost exactly the same form except that it is expressed to cease to have effect at the end of a date to be specified in writing by CASA, of which CASA will give at least 3 months' notice. 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.

**[7A] After section 9A in Part 2**

This new section applies to an aerial work certificate holder (the *operator*) and the pilot in command conducting an NVIS firebombing operation mentioned in Division 2 of Chapter 16 of the Part 138 MOS. Previously, the operator and the pilot in command were, in effect, required to ensure that each pilot of a helicopter conducting a night vision imaging system (*NVIS*) firebombing operation had certain general aeronautical experience as a pilot in command, and some firebombing experience either by day or night. These experience minima were for an earlier NVIS trial designed to help establish appropriate aeronautical experience thresholds for firebombing. On 2 December 2021, they were automatically carried over into the Part 138 MOS before the trial results were fully evaluated, and only later realised to unnecessarily exceed the minima prescribed in the Part 138 MOS for other NVIS operations of equal or greater complexity (for example, winching). It is not considered that the removal of this particular experience requirement creates any aviation safety deficit in the context of the relevant operations.

The amendment exempts the operator and the pilot in command from subregulations 138.425 (3), (4) and (5) (which require compliance with the MOS), but only to the extent of the requirement under subsection 16.06 (3) of the Part 138 MOS in relation to the aeronautical experience of the crew for the operation. A Note explains that crew minimum experience requirements are managed by operators under their SMS and Training and Checking system to ensure that crews are competent for the firebombing operation.

**[8] Section 17**

This section replaces section 17. It applies to an aerial work certificate holder who, immediately before 2 December 2021, conducted aerial work operations in an aircraft and did not hold an approval under subregulation 217 (3) of CAR, as in force immediately before 2 December 2021, for an applicable training and checking organisation.

The amendment prescribes the qualifications and approvals individuals must have to conduct certain higher risk training and checking in an aircraft. Alternatively, the operator must hold CASA's approval that their training and checking system produces an equivalent safety outcome. Analogous requirements apply for the use of a foreign registered aircraft.

This amendment is consequential to changes in the FOR implementation methodology contained within *CASA EX99/23 – Amendment of CASA EX87/21 – Instrument 2023 (No. 2)*, which amends *CASA EX87/21 – Flight Operations Regulations – SMS, HFP&NTS and T&C Systems – Supplementary Exemptions and Directions Instrument 2021*. Those changes remove the previous requirement for certain Part 138 operators to obtain CASA's approval of their training and checking system before implementing it. This amendment ensures the maintenance of an acceptable level of aviation safety.

**[9] Section 18**

Section 18 was a direction aligned with the implementation methodology for safety management systems 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 aerial work 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] Subsection 22 (1)**

Section 22 is a direction to an aerial work certificate holder who is required to have a safety management system (SMS), and who is not otherwise exempted, by another CASA instrument, from obligations in relation to the SMS.

The relevant operators are directed to comply with the former provisions of Civil Aviation Order (**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. These former provisions of CAO 82.5 implemented changes to ICAO standards and recommended practices that occurred after the registration of Part 138 of CASR. It is intended that, at the next appropriate opportunity, congruent amendments will also be made to Part 138.

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.



## Statement of Compatibility with Human Rights

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

### CASA EX98/23 – Amendment of CASA EX86/21 – 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 EX98/23 – Amendment of CASA EX86/21 – Instrument 2023 (No. 2)* (the **exemption instrument**) is to amend, repeal and insert a number of exemptions and directions contained within *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX86/21)* or the **principal instrument**. CASA EX86/21 makes a number of exemptions and directions relating to Part 138 of the *Civil Aviation Safety Regulations 1998 (CASR)*. Part 138 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 and, thereby, contribute to safe and healthy working conditions for crew and ground staff.

The instrument further amends the principal instrument to allow more time for relevant operators to transition to full compliance with the FOR. The instrument’s conditions and directions are designed to allow for this longer 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**