

## Explanatory Statement

### Civil Aviation Safety Regulations 1998

#### CASA EX72/24 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2024

##### Purpose

The purpose of *CASA EX72/24 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2024* (the ***exemptions instrument***) is to continue the operation of a number of exemptions from obligations under Parts 138 and 91 of the *Civil Aviation Safety Regulations 1998* (***CASR***), and a number of related directions that were granted by the Civil Aviation Safety Authority (***CASA***) in earlier instruments. The relevant obligations relate to aerial work operators, that is, ***aerial work certificate holders***, and certain others carrying out more limited aerial work operations.

That purpose is achieved by continuing the policy effect of *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021* (the ***repealed instrument***) which is repealed at the end of 1 December 2024. That instrument granted a number of exemptions from requirements imposed by Parts 91 and 138 of CASR, which were elements of the flight operations regulations. The exemptions were designed to facilitate the implementation of those Parts in accordance with CASA's transition policies for the flight operations regulations, which commenced on 2 December 2021.

The exemptions and directions in the exemptions instrument variously require operator oversight of the actions of operator personnel and otherwise are intended to maintain current regulatory requirements where the new regulations inappropriately failed to reflect requirements of the earlier regulations that the flight operations regulations were replacing. In other cases, exemptions were granted where relief from a requirement was considered appropriate, to facilitate implementation of flight operations regulations requirements, and to permit, for specified private operations, compliance with Part 138 requirements instead of Part 91 requirements.

The exemptions and directions in the repealed instrument, which required operator oversight of the actions of operator personnel, were designed to correct technical errors and omissions in Parts 138 and 91 which gave rise to unintended obligations. They were also designed to maintain pre-existing regulatory requirements where the flight operations regulations inappropriately failed to reflect requirements of the earlier regulations that the flight operations regulations replaced. A range of safety conditions were required to be complied with in order to obtain the benefit of the exemptions.

As those exemptions and directions are still required to ensure short-term certainty of regulatory requirements for the aviation industry, the exemptions instrument continues their operation on an interim basis, from 2 December 2024 to the end of 1 December 2027 to provide relief from having to comply with certain requirements, and to give directions to ensure safety compliance. It is expected that, before the exemptions and directions cease to apply, the errors and omissions concerned will be rectified by making appropriate substantive amendments to CASR to achieve the same policy objectives. Until those amendments are

made, it is considered necessary to renew the exemptions and directions to provide relief from having to comply with unnecessary requirements and to ensure safety compliance.

### **Legislation**

Section 98 of the *Civil Aviation Act 1988* (the *Act*) empowers the Governor-General to make regulations for the Act and in the interests of the safety of- air navigation. Relevantly, the Governor-General has made the CASR and *Civil Aviation Regulations 1988* (*CAR*).

### Exemptions

Subpart 11.F of CASR provides for the granting of exemptions from particular provisions of the regulations. Subregulation 11.160(1) of CASR provides that, for subsection 98(5A) of the Act, CASA may grant an exemption from compliance with a provision of the regulations.

Under subregulation 11.160(2), an exemption may be granted to a person or a class of persons, and may specify the class by reference to membership of a specified body or any other characteristic.

Under subregulation 11.160(3), an exemption may be granted on application by a person or on CASA's own initiative.

Under subregulation 11.170(3) of CASR, in deciding whether to grant an exemption, CASA must regard as paramount the preservation of at least an acceptable level of aviation safety. Under subregulation 11.175(4) of CASR, in deciding whether to reissue an exemption, CASA must regard as paramount the preservation of at least an acceptable level of aviation safety. CASA has regard to the same test when deciding whether to grant an exemption on its own initiative.

Regulation 11.205 provides that CASA may impose conditions on an exemption if necessary in the interests of the safety of air navigation. Under regulation 11.210 of CASR, it is a strict liability offence (with a penalty of 50 penalty units) not to comply with the obligations imposed by a condition.

Regulation 11.225 of CASR requires an exemption to be published on the internet. Under subregulation 11.230(1) of CASR, the maximum duration of an exemption is 3 years.

### Directions

Subpart 11.G of CASR provides for CASA to issue directions in relation to matters affecting the safety of air navigation. Under paragraph 11.245(1)(a) of CASR, CASA may, by instrument, issue a direction about any matter affecting the safe navigation and operation of aircraft. Subregulation 11.245(2) provides that CASA may issue such a direction if CASA is satisfied that it is necessary to do so in the interests of the safety of air navigation, if the direction is not inconsistent with the Act, and for the purposes of CASA's functions.

Under paragraph 11.250(a) of CASR, a direction under regulation 11.245 ceases to be in force on the day specified in the direction. Under regulation 11.255 of CASR, it is an offence of strict liability (with a penalty of 50 penalty units) to contravene a direction under regulation 11.245.

### Documents incorporated by reference

Under subsection 14(1) of the *Legislation Act 2003* (the **LA**), a legislative instrument may make provision in relation to matters by applying, adopting or incorporating provisions of an Act or disallowable legislative instrument as in force at a particular time or as in force from time to time. A legislative instrument may also make provision in relation to matters by applying, adopting or incorporating any matter contained in any other instrument or writing as in force at, or before, the time the legislative instrument commences. Under subsection 14(2) of the LA, unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. However, subsection 98(5D) of the Act provides that, despite section 14 of the LA, a legislative instrument made under the Act or the regulations may apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing from time to time, even if the other instrument or writing does not yet exist when the legislative instrument is made.

### Amendment, modification or repeal of other instruments

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. Under subsection 13(1) of the LA, subsection 33(3) applies to legislative instruments as if each provision of the instrument were a section of an Act.

### **Background**

Parts 91, and 138 of CASR are elements of the suite of CASA's flight operations regulations. Each Part commenced on 2 December 2021. Part 91 deals with the general aviation operating rules, and the rules of the air, for private operations. Part 138 applies to aircraft used in aerial work operations. Part 138 works with Part 91 to provide a comprehensive code of operational safety rules for aerial work operators, that is, **aerial work certificate holders**, and certain others carrying out more limited aerial work operations.

In 2021, CASA granted a number of exemptions and directions by making the repealed instrument to facilitate the implementation of Parts 91 and 138 in accordance with CASA's transition policies for the flight operations regulations, including to provide relief from having to comply with unintended obligations or to maintain pre-existing regulatory requirements.

On further review of those Parts, after the repealed instrument commenced, and after having regard to feedback from Australian air transport operators and other stakeholders regarding the implementation of Parts 91 and 138, CASA identified further unintended consequences arising from the commencement of the flight operations regulations. CASA dealt with those consequences by making a series of amendments to the repealed instrument that added to or amended the original exemptions and directions.

The background to, and ongoing impact of, each exemption and direction contained in the repealed instrument, and being renewed in the new instrument, was discussed in detail in the Explanatory Statements for each of the following instruments:

- *CASA EX145/21 – Amendment of CASA EX87/21 – Instrument 2021 (No. 1)*

- *CASA EX12/23 – Amendment of CASA EX87/21 – Instrument 2023 (No. 1)*
- *CASA EX60/23 – Amendment of CASA EX87/21 (Extension of Time) Instrument 2023 (No. 1)*
- *CASA EX99/23 – Amendment of CASA EX87/21 – Instrument 2023 (No. 2).*

### **Overview of instrument**

The exemptions instrument continues the operation, on an interim basis, of certain exemptions from obligations under Part 138 and 91 of CASR, and a number of related directions, that were granted by CASA in earlier instruments to deal with minor unintended consequences of amendments to CASR as they arose, or to deal with anomalies or oversights as they were identified.

The exemptions and directions are in substantially the same terms as those in the repealed instrument, with changes only relating to the commencement and repeal of the exemptions instrument. The exemptions instrument retains the same numbering to the extent possible to assist industry stakeholders so they need not update related documentation solely due to changes to numbering. CASA would also not have to update its related guidance material for the same reason.

### Aviation safety

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

CASA is satisfied that, given the nature of the exemptions involved, and the necessary conditions imposed by the exemptions instrument, an acceptable level of aviation safety will be preserved, and the safety of air navigation thereby maintained for the extended periods during which the relevant exemptions and directions will be in force.

### **Documents incorporated by reference**

Certain documents have been incorporated by reference in the exemptions instrument because aviation safety requires the use of the information and data in the documents by aircraft operators and pilots and because there are no freely available documents serving the relevant purpose.

In accordance with paragraph 15J(2)(c) of the LA, the following is a description of the documents incorporated by reference into the legislative instrument, how the documents are incorporated, the person or organisation responsible for each document and how they may be obtained.

### Aircraft flight manual instructions

***Aircraft flight manual instructions*** is defined in the CASR Dictionary to comprise the flight manual, checklists of normal, abnormal and emergency procedures for the aircraft and any operating limitation, instructions, markings and placards relating to the aircraft.

The instructions comprise information required to safely operate the specific aircraft. Instructions are incorporated as they exist from time to time, consistent with the definition of ***flight manual*** in the CASR Dictionary.

The contents of aircraft flight manual instructions are incorporated by reference in subsection 15(2), which requires the operator of an aircraft for an aerial work operation,

whether or not the operator holds an aerial work certificate, to ensure that certain activities are carried out in compliance with any relevant limitation or requirement that is set out in the aircraft flight manual instructions for the aircraft.

These documents are publicly available but not for free. The aircraft flight manual instructions for an aircraft are proprietary to the owner of the aircraft design (usually the manufacturer). The incorporated requirements are at the aircraft-specific level, and instructions are required to be provided to owners of aircraft. Where available, and by prior arrangement, CASA will make aircraft flight manual instructions available for inspection at any CASA office.

### Operations manual

An operations manual of an operator, is a document, or suite of documents, that specifies the scope of the operations and activities conducted by the operator, and sets out the plans, processes, procedures, programs and systems implemented by the operator to comply with the civil aviation legislation.

The contents of an operations manual are incorporated by reference in the following provisions (and are incorporated as in force from time to time by virtue of subsection 3(3)):

- subsection 6(3) provides that the exemption in subsection 6(2) is subject to the condition that the operator must ensure that the operations manual requirement under paragraph 138.155(1)(l) is complied with
- subsection 11(3) provides that the exemption in subsection 11(2) is subject to the condition that the pilot in command must comply with any requirements in the operations manual prepared in accordance with regulation 138.302 that are applicable to the pilot in command for the private operation
- paragraph 12(3)(b) makes it a condition of the exemption in subsection 12(2) that the pilot in command must comply with any procedures and requirements in the operations manual that are applicable or relevant to the pilot in command for the emergency service operation
- subsection 21(2) requires an aerial work certificate holder who is not required to have a training a checking system under regulation 138.125 to ensure that training and checking of the operator's operational safety-critical personnel, whether conducted by or for the operator, is conducted in accordance with the operator's operations manual and that the training or checking is conducted in accordance with the aerial work operator's operations manual.

An operations manual is not publicly or freely available. It is proprietary to the operator and will generally include commercial in confidence information about the operator's business. The incorporated requirements of a 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 manual available to its personnel who have obligations under the document.

## **Contents of instrument**

### Part 1 — Preliminary, Definitions and Application

**Section 1** set out the name of the exemptions instrument.

**Section 2** provides that the instrument commences on 2 December 2024 and is repealed at the end of 1 December 2027.

**Section 3** provides definitions for the instrument.

**Section 3A** makes it clear that the table of contents to the instrument is not part of the exemptions instrument, it is for guidance only.

**Section 4** provides that the exemptions instrument applies according to its terms.

## Part 2 Exemptions from Part 138

**Section 5** provides that an aerial work certificate holder is exempt from compliance with subregulation 138.075(1) of CASR (which requires an aerial work operator to tell CASA about the absence from duty of key personnel for longer than 30 days) on condition that the operator complies with the subregulation as if it referred to 35 days instead of to 30 days. This is being done to provide consistency with a similar provision in Part 119 of CASR.

**Section 6** provides that an aerial work certificate holder who is not required to have a safety management system under regulation 138.140 is exempted from complying with the following provisions of CASR:

- paragraph 138.050(1)(b), which makes it a condition of an aerial work certificate issued to an aerial work operator that each of the operator's key personnel must comply with each provision of Part 138 that applies to the person, each direction given to the person or obligation imposed on the person, by CASA under a provision of CASR and each other provision of the civil aviation legislation that applies to the operator's aerial work operations mentioned in the certificate
- regulation 138.055, which makes it an offence to contravene a condition imposed on and aerial work certificate.

That exemption is subject to the condition that the operator must ensure that the operations manual requirement of paragraph 138.155(1)(l) (to have an operator safety policy in the absence of a safety management system), is complied with.

**Section 7** creates an exemption from certain requirements relating to the qualifications and experience of key personnel.

Subsection 7(1) provides that the section applies to an aerial work certificate holder who, immediately before 2 December 2021, held an Air Operator's Certificate (*AOC*), or was an early applicant for an AOC, authorising aerial work operations (other than solely for ambulance functions, within the meaning of subparagraph 206(1)(a)(vii) of CAR, as in force immediately before 2 December 2021).

Subsection 7(2) provides that such an operator is exempted from the requirements of:

- paragraph 138.050(1)(b), which makes it a condition of an aerial work certificate issued to an aerial work operator that each of the operator's key personnel must comply with each of the provisions of Part 138 that apply to the person, each direction given to the person, or obligation imposed on the person, by CASA under a provision of CASR and each other provision of the civil aviation legislation that applies to the operator's aerial work operations mentioned in the certificate

- regulation 138.055, which requires an aerial work operator to comply with the conditions of its aerial work certificate.

Subsection 7(3) provides that the operator is exempt only to the extent of the requirement that the operator must comply with the certificate conditions under paragraph 138.050(1)(b) that relate to the qualifications and experience of certain persons who, on 2 December 2021, are the key personnel, or proposed key personnel, of the operator to whom the provision mentioned for the person would apply, but for the exemption, or an exemption under section 16, 21 or 46 of *CASA EX73/24 – Flight Operations Regulations – SMS, HFP&NTS and T&C Systems – Supplementary Exemptions and Directions Instrument 2024* (*CASA EX73/24*):

- the head of operations who, immediately before 2 December 2021, was the operator’s chief pilot, or chief pilot and head of training and checking — in relation to the qualifications and experience mentioned in subregulation 138.090(2) of CASR
- the head of training and checking who, immediately before 2 December 2021, was the operator’s head of training and checking (if any) — in relation to the qualifications and experience mentioned in subregulation 138.100(2)
- the safety manager (if any) who, immediately before 2 December 2021, was the operator’s safety manager — in relation to the qualifications and experience mentioned in subregulation 138.110(2).

Those exemptions are subject to the condition in subsection 7(4) that these key personnel occupied the analogous positions before to 2 December 2021 and continued to have the same qualifications and experience as they had immediately before 2 December 2021. Any change to these qualifications and experience must be approved by CASA. Compliance with the prescribed requirements under regulation 138.040 (for the issue of an aerial work certificate) must continue to be met for any change to be approved.

**Section 8** creates an exemption from certain requirements to have a training and checking system for an aerial work certificate holder who is required to have a training and checking system under regulation 138.125, and who is not exempted from that requirement by instrument *CASA EX73/24*.

Subsections 8(2) and (3) provide that such a person is exempted from the requirements of paragraph 138.050(1)(b) and regulation 138.055 (certain statutory conditions imposed on aerial work certificates) that would otherwise impose the training and checking system requirement on condition that the operator complies with the training and checking system requirements of regulation 138.125(1) as if it applied for a particular aircraft or a particular operation, and not to the operator’s aircraft and operations more generally.

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 specifies who may conduct the training and checking for a relevant aerial work operator.

**Section 9** creates an exemption from certain training and checking system requirements for operational safety-critical personnel.

Subsection 9(1) provides that section 9 applies to an aerial work certificate holder who is required to have a training and checking system, 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.

Subsection 9(2) exempts that operator from the requirements of paragraph 138.050(1)(d) and regulation 138.055, but only to the extent of subregulation 138.135(1) requirements.

**Section 9A** grants an exemption relating to flight crew training or checking 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, to permit the use of foreign providers of training and checking, and the conditions will ensure the integrity and safety of the process.

Subsection 9A(2) provides that an aerial work certificate holder to whom regulation 138.125 of CASR is exempted from compliance with regulation 138.505, in relation to training and checking, but only to the extent of who may conduct the training or checking required by Subpart 138.N of CASR. Regulation 138.505 specifies who may conduct the training and checking for a relevant aerial work operator.

Subsections 9A(3) and (4) make the exemption subject to two conditions.

Firstly, 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 to conduct equivalent training or checks
- authorised by the national aviation authority 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.

**Section 9B** applies to an aerial work certificate holder and the pilot in command conducting a night vision imaging system (*NVIS*) firebombing operation mentioned in Division 2 of Chapter 16 of the Part 138 Manual of Standards from compliance with subregulations 138.425(3), (4) and (5) of CASR, which require compliance with the Manual of Standards.

Subsection 9B(2) provides that the aerial work certificate holder and pilot in command are exempt only to the extent of the requirement under subsection 16.06(3) of the Part 138 Manual of Standards 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 safety management system and training and checking system to ensure that crews are competent for the firebombing operation.

Previously, the operator and the pilot in command were, in effect, required to ensure that each pilot of a helicopter conducting an 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 Manual of Standards before the trial results were fully evaluated, and only later realised to unnecessarily exceed the minima prescribed in the Part 138 Manual of Standards 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.

**Section 9C** exempts an aerial work operator, whether operating a registered aircraft or a foreign registered aircraft, from the requirements of regulation 138.180 of CASR, which provides that an aerial work operator contravenes the provision if a person who is a flight crew member of the operator's personnel exercises a privilege of their flight crew licence for the operator and the operator does not have a copy of the person's flight crew licence and medical certificate.

That exemption is subject to the condition that, for each flight crew member operating a registered aircraft, the operator must maintain an up-to-date record showing the currency of each flight crew member's medical certificate, flight crew licence, flight crew ratings and flight crew endorsements under the civil aviation legislation for the flight crew member to operate the aircraft, for the period during which the flight crew member exercises the privileges of their flight crew licence for the operator. A note makes it clear that a reference to a flight crew licence includes a certificate of validation of an overseas flight crew licence and that a reference to a medical certificate includes an overseas medical certificate of the holder of such a certificate of validation.

That exemption is also subject to the condition that, for each flight crew member operating a foreign registered aircraft, the operator must maintain an up-to-date record showing the currency of each flight crew member's overseas medical certificate, overseas flight crew licence, overseas flight crew ratings, overseas endorsements, certificate of validation and related overseas medical certificate as applicable, that is required under the civil aviation legislation for the flight crew member to operate the aircraft, for the period during which the flight crew member exercises the privileges of their flight crew licence for the operator. A note explains that the expressions foreign registered aircraft and civil aviation legislation are each defined in section 3 of the Act and that some other expressions used in the section are defined in the CASR Dictionary.

### Part 3 Exemptions from Part 91 and related directions

**Section 10** grants an exemption relating to the carriage of medical and identification documents. The section applies to the pilot in command of a flight conducted by an aerial work certificate holder and exempts that pilot in command from having to comply with the requirement under regulation 91.105 of CASR to ensure that flight crew members' flight crew licences or certificates of validation, and medical certificates are carried on board the aircraft. It is a condition of the exemption that the pilot in command must give written notice to CASA of the non-carriage of these documents, and any medical exemption documents, in accordance with rules in subsection 10(3) about the timing of such notice.

**Section 11** contains an exemption and direction that apply the Part 138 fuelling safety procedures instead of Part 91 fuelling requirements to persons on, boarding, or disembarking

from, aircraft used in a private operation conducted by an aerial work certificate holder. The term **private operation** is defined in the CASR Dictionary. The term includes aerial work operations not required to be conducted under an aerial work certificate, an AOC or a Part 141 certificate, as well as other excluded operations. The intent of this section, and of sections 13 and 14, is to permit holders of aerial work certificates and pilots in command to comply with certain provisions of Part 138 and the Part 138 Manual of Standards, instead of the otherwise applicable provisions of Part 91 when conducting private operations, including, for example, such repositioning or ferry flights as are private operations.

Subsections 11(2) and (3) provide for an exemption from the requirements of regulation 91.510 (Fuelling requirements) on the condition that the pilot in command complies with applicable fuelling requirements in the operator's operations manual for regulation 138.302.

Subsection 11(4) directs the operator to ensure that the requirements of regulation 138.302 are complied with and that the required procedures are carried out.

**Section 12** contains an exemption and a direction that apply the Part 138 passenger safety procedures instead of Part 91 passenger safety briefing requirements to an aerial work operation that is an emergency service operation conducted by an aerial work certificate holder.

The section exempts the pilot in command from complying with regulation 91.565 (about passenger safety briefings and instructions) when compliance is not practicable. The pilot in command must instead comply with any requirements and procedures in the operations manual in relation to passenger safety procedures in an emergency service operation. A note provides that reasons for impracticability include the urgency of the flight and the medical condition of the passenger.

Subsection 12(4) imposes a direction on the operator to ensure that the pilot in command complies with any procedures and requirements in the operations manual in relation to passenger safety procedures in an emergency service operation.

**Section 13** grants an exemption and imposes a direction that apply the Part 138 performance requirements instead of Part 91 performance requirements to a private operation (other than a limited aerial work operation) conducted by an aerial work certificate holder.

For the operation, the operator and the pilot in command of a large aeroplane are each exempted from compliance with each relevant provision in Subpart 91.F in relation to aircraft take-off and landing performance but only if the operator and the pilot in command complies with the relevant Part 138 Manual of Standards performance requirements.

The operator is directed to ensure there is compliance with the requirements of Divisions 1 and 2 of Chapter 18 of the Part 138 Manual of Standards, and that the operator's operations manual also provides for such compliance. The pilot in command is also directed to comply with the requirements in the Part 138 Manual of Standards and the operations manual that apply to the pilot in command.

**Section 14** grants an exemption and imposes a direction that apply the Part 138 weight and balance requirements instead of Part 91 weight and balance requirements to a private

operation (other than a limited aerial work operation) conducted by an aerial work certificate holder.

Subsection 14(2) exempts the pilot in command from compliance with the requirements of Subpart 91.J (Weight and Balance) but only if the operator and the pilot in command (as applicable) each comply with the directions in subsections (3) and (4).

Subsection 14(3) directs an operator to ensure that for the operation, the requirements of the provisions in Subpart 138.J are complied with and the operations manual provides for compliance with the requirements.

Subsection 14(4) directs the pilot in command to comply with any requirements of Subpart 138.J and the operations manual arising under the direction in subsection 14(3) that apply to the pilot in command.

**Section 14A** grants exemptions relating to the application of Part 91 requirements for anti-collision and navigation lights and the use of foreign registered aircraft to lights-out operation (which is defined to mean a surveillance operation, conducted for law enforcement purposes by a relevant operator using a relevant aircraft, in which the relevant aircraft's external lights are not to be displayed while flying over the relevant area).

Subsection (1) contains definitions for the section.

Subsection 14A(2) provides that the section applies to a relevant operator and a relevant pilot in relation to the conduct of a lights-out operation in Australian territory. **Relevant operator** is defined in subsection 14A(1) to mean an aerial work operator that conducts lights-out operations as, or under an arrangement with, any of the following government authorities:

- (a) the Australian Federal Police;
- (b) the Australian Border Force;
- (c) a State or Territory police service;
- (d) the Department of Home Affairs or an agency under the Department of Home Affairs.

**Relevant pilot** is defined in subsection 14A(1) to mean the pilot in command of a relevant aircraft operated for a lights-out operation.

Subsection 14A(3) provides that the relevant operator and relevant pilot are each exempt from regulation 91.810 of CASR, to the extent that the regulation requires compliance with certain provisions of the Part 91 Manual of Standards in relation to the relevant aircraft.

Subsections 14A(4) and (5) provide that the exemption granted to the relevant operator or relevant pilot is subject to the specified condition.

Subsection 14A(6) provides that, before conducting a lights-out operation:

- (a) the relevant operator must notify CASA that it is an operator that conducts lights-out operations and must ensure that the relevant aircraft is equipped with various functional items of equipment (specified in subparagraphs (6)(b)(i) to (iv)); and
- (b) the relevant pilot must ensure that the relevant air traffic service is advised of the intention to operate in the relevant area without displaying external lights.

Subsection 14A(7) provides that the relevant operator must ensure that only the minimum number of crew required for the lights-out operation is carried on the relevant aircraft for the operation.

Subsection 14A(8) provides that the relevant operator and relevant pilot must ensure that the lights-out operation is conducted under the instrument flight rules.

Subsection 14A(9) provides that the relevant operator must ensure that the operator's operations manual contains the following:

- (a) procedures regarding entry to, and exit from, a relevant area;
- (b) a statement of certain requirements for the relevant pilot.

Subsection 14A(10) provides that the relevant pilot must not turn off external lighting except where it is necessary for the lights-out operation.

Subsection 14A(11) provides that the relevant pilot must ensure that external lights are displayed while the relevant aircraft is climbing to, descending from, transiting between, or travelling to or from the relevant area.

Subsection 14A(12) provides that the relevant pilot must turn the external lights on immediately if any of the following occurs:

- (a) any item of equipment mentioned in paragraph (6)(b) fails to function as intended;
- (b) the relevant pilot becomes aware of nearby air traffic and assesses that there is a potential risk of collision;
- (c) a pilot of another aircraft, or the relevant air traffic service, requests that the external lights be displayed in order to identify the relevant aircraft as air traffic.

#### Part 4 — Directions to Part 138 aerial work certificate holders

**Section 15** contains a direction requiring compliance with flight manual instructions before and after a flight.

Subsection 15(1) provides that the section applies to the operator of an aircraft for an aerial work operation, whether or not the operator holds an aerial work certificate.

Subsection 15(2) requires the operator of an aircraft for an aerial work operation to ensure that any activity in relation to the flight, and any activity that the aircraft flight manual instructions require to be carried out before or after a flight, is carried out in compliance with any limitation or requirement that applies to the flight that is set out in the aircraft flight manual instructions for the aircraft.

Subsection 15(3) provides that the direction does not apply to a limitation or requirement if circumstances prescribed by the Part 138 Manual of Standards apply to the aircraft for the activity.

**Section 16** contains a direction that requires an aerial work certificate holder to comply with the requirements of Part 99 of CASR as if the operator were a drug and alcohol management plan (DAMP) organisation to which Part 99 applied. This direction maintains the pre-2 December 2021 position for aerial work certificate holders.

**Section 17** contains a direction that prescribes the qualifications and approvals individuals must have to conduct certain higher risk training and checking in an aircraft.

Subsection 17(1) provides that the section 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.

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.

Section 17 requires the first time implementation of a training and checking system for the holder to be treated as if it were a significant change under regulation 138.012 and for prescribed operations manual and training and checking manual content to be approved by CASA before it is implemented.

**Section 20** contains a direction to an aerial work certificate holder for operation of an aircraft that is required under section 26.60 of the Part 91 Manual of Standards to carry a life raft. The direction requires the operator's operations manual to contain the procedures to be followed by the pilot in command and other flight crew to comply with section 26.60 and procedures for determining the pyrotechnic signalling devices required to ensure the prescribed distress signals can be made. The section does not affect any requirement under regulation 138.345 of CASR, which is about survival equipment procedures.

**Section 21** contains a direction requiring an aerial work certificate holder who is not required to have a training and checking system under regulation 138.125 of CASR to ensure that the head of operations has, and competently discharges, specified duties relating to the training and checking of operational safety-critical personnel.

Paragraph 21(2)(a) requires the operator to ensure that the head of operations has, and competently discharges, the duty of ensuring that training and checking of the operator's operational safety-critical personnel, whether conducted by or for the operator, is conducted in accordance with the operator's operations manual.

Paragraph 21(2)(b) requires that, if the operator has a contract with a Part 142 operator for training or checking the operator's flight crew, the operator must ensure that the head of operations has, and competently discharges, the duties of ensuring that each person who conducts the training or checking for the Part 142 operator is authorised under Part 61 to do so, that the training or checking is conducted in accordance with the aerial work operator's operations manual and tell the Part 142 operator, in writing, of any change in the aerial work operator's operations manual.

**Section 22** contains a direction to an aerial work certificate holder who is required to have a safety management system, and who is not otherwise exempted, by another CASA instrument, from obligations in relation to the safety management system. The section requires the operator to comply with the requirements of specified protective provisions of Civil Aviation Order 82.5, as in force immediately before 2 December 2021, as they relate to safety information and as if they apply to the operator.

**Section 23** imposes a direction on the holder of an aerial work certificate for aerial operations requiring the holder, before their first use of NVIS in an NVIS operation under Part 138 of CASR to apply for, and obtain, the written approval of CASA as if the operation were a significant change of operations requiring CASA approval. If CASA gives the operator its approval for a particular NVIS operation, no subsequent approval under subsection 23(2) is required before the operator may conduct a different NVIS operation for the first time in an aerial work operation.

CASA approval for NVIS operations was a requirement under the previous, now repealed, rules in Civil Aviation Order 82.6, but its inclusion in Part 138 was inadvertently overlooked in preparation of Part 138.

Subsection 23(2) provides that, before conducting an NVIS operation for the first time in an aerial work operation, the operator concerned must apply for, and obtain, the written approval of CASA as if the first conduct of the NVIS operation were a significant change within the meaning of that expression in regulation 138.012 and as if regulations 138.062, 138.064, and 138.066 applied to the first conduct of the NVIS operation as if it were such a significant change. A note to the subsection makes it clear that section 30 of the exemptions instrument continues the operation of any approval given by CASA under the equivalent provision of the repealed instrument.

**Section 24** contains a direction requiring the retention of historical flight crew member records.

Subsection 24(1) provides that the direction applies to an aerial work certificate holder if, immediately before 2 December 2021, the holder was an AOC holder authorised to conduct aerial work operations other than aerial work (air ambulance) operations.

Subsection 24(2) requires that holder to retain each of the records held by the holder on 1 December 2021 that were required to be held under Civil Aviation Order 82.1 in safe custody, for prescribed periods. These records relate to flight crew qualifications, training, flight and duty time, and rosters. An express requirement that relevant operators must retain their existing records was inadvertently overlooked in preparation of Part 138.

Subsection 24(3) requires these pre-2 December 2021 records to be retained for the same periods of time as the equivalent records are to be retained on and after 2 December 2021.

**Section 25** imposes a direction about requirements for air crew members, including the Certificate IV in Aviation (Air Crew Officer).

Subsection 25(2) requires an aerial work certificate holder to ensure that, before making an assignment, the air crew member holds a certificate, or a statement of attainment, evidencing satisfactory completion of a Certificate IV in Aviation (Air Crew Officer), is a trainee or holds an equivalent qualification and meets the operator's training and checking requirements for air crew members or trainees (as applicable) under the operator's training and checking system.

Subsection 25(1) defines an *equivalent qualification* as a military, or overseas, qualification that has been approved in writing by CASA (including but not limited to an approval given for the purposes of CASA 132/16, CASA EX131/19, section 20A of CASA EX84/21, or

section 25 of CASA EX86/21) as being equivalent to the qualification attained by a person upon the satisfactory completion of a Certificate IV in Aviation (Air Crew Officer).

Subsection 25(3) provides that the operator may only make an assignment for the purpose of the air crew member performing one or more of the listed duties on or for a rotorcraft.

Subsection 25(5) requires an operator's exposition or operations manual to include such policies, risk assessments, management instructions, standard operating procedures, and training and checking procedures, as are needed to ensure that the requirements of section 25 are complied with and the duties mentioned in subsection 25(3), including when performed by a trainee, are carried out safely.

## Part 5 Miscellaneous Dropping Operations

**Section 26** provides that the Part applies to an operator in an aerial work operation that is a miscellaneous dropping operation.

**Section 27** defines terms used in Part 5. *Miscellaneous dropping operation* is defined to mean an operation that involves, or involves training for, dropping relevant articles from an aircraft in flight below 500 ft, but so as not to include any operation that involves spraying or broadcasting any substance.

*Relevant articles* is defined to mean any of the following:

- (a) incendiaries to initiate controlled burning;
- (b) baits for the capture or eradication of feral animals;
- (c) search and rescue equipment;
- (d) fodder for livestock;
- (e) items for disaster relief;
- (f) other articles of a nature, or articles dropped for a purpose, that is closely similar to the nature or purpose of the articles mentioned in paragraphs (a) to (e).

A note to the definition makes it clear that a relevant article does not include any substance that may be sprayed or broadcast: see the definition of *miscellaneous dropping operation*.

**Section 28** exempts the operator of an aircraft in a miscellaneous dropping operation that is an aerial work operation in the form of a dispensing operation below 500 ft under Part 138 of CASR from compliance with the following provisions of CASR:

- (a) subregulation 138.475(1), but only with respect to subparagraph 138.475(2)(c)(i), which provides that the operator of an aircraft for a flight involving an aerial work operation contravenes the subregulation if, when the flight begins, certain requirements about the qualifications of the pilot of a foreign registered aircraft) are not met;
- (b) subregulation 138.500(2A), but only with respect to subparagraph 138.500(1)(a)(i), which provides that the operator of an aircraft for a flight involving an aerial work operation in an Australian aircraft contravenes the subregulation if the operator assigns a pilot to duty as pilot in command of the aircraft for the flight and the pilot is not qualified under subregulation (1) as pilot in command for the flight, by being authorised under Part 61 to carry out, in relation to the flight, the duties assigned to the pilot by the operator of the flight.

However, paragraphs 28(c) and (d) provide that the operator is exempt only in relation to the operator's pilot in command who is entitled to, and who takes, the benefit of the exemptions

under Part 16 of *CASA EX32/24 — Flight Crew Licensing and Other Matters (Miscellaneous Exemptions) Instrument 2024 (CASA EX32/24)* and only to the extent of those exemptions as they apply to the pilot in command.

**Section 29** makes the exemption in section 28 subject to two conditions. Firstly, the operator of a miscellaneous dropping operation must have procedures in their operations manual for the particular kind of miscellaneous dropping operation conducted by the pilot in command and, secondly, the operator must ensure that the pilot in command is compliant with the conditions imposed on the pilot in command under Part 16 of CASA EX32/24.

#### Part 6 Transitional provision and consequential amendment

**Section 30** saves the operation of any approval given under the repealed instrument by CASA, that was in force immediately before the commencement of the exemptions instrument.

**Section 31** gives effect to the amendment to CASA EX32/24 in Schedule 1.

**Schedule 1** amends CASA EX32/24 to update a reference to the repealed instrument and instead refer to the exemptions instrument.

#### ***Legislation Act 2003***

Paragraph 98(5A)(a) of the Act provides that the regulations may empower CASA to issue instruments in relation to matters affecting the safe navigation and operation, or the maintenance, of aircraft. Additionally, paragraph 98(5AA)(a) of the Act provides that an instrument issued under paragraph 98(5A)(a) is a legislative instrument if the instrument is expressed to apply in relation to a class of persons. The exemptions instrument exempts operators of a relevant aeroplane and the pilot in command of an operator of a relevant aeroplane. The exemptions instrument is, therefore, a legislative instrument, and is subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

#### **Sunsetting**

Part 4 of Chapter 3 of the LA (the ***sunsetting provisions***) does not apply to the exemptions instrument because the exemptions instrument relates to aviation safety and is made under CASR (item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

However, the exemptions instrument will be repealed at the end of 1 December 2027, which will occur before the sunsetting provisions would have repealed the exemptions instrument if they had applied. Any renewal of the exemptions instrument will be subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA. Therefore, the exemption from sunsetting does not affect parliamentary oversight of the exemptions instrument.

#### **Consultation**

Under section 16 of the Act, in performing its functions and exercising its powers, CASA must consult government, commercial, industrial, 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.

Before granting the exemptions in the repealed instrument, CASA consulted the aviation community in June 2020 when it published, and sought comments on, its policy proposals that ultimately resulted in the making of the repealed instrument. From 16 July to 6 August 2021, CASA consulted the aviation community by providing descriptions of the exemptions and directions to the Implementation Technical Working Group (*TWG*) of the Aviation Safety Advisory Panel (*ASAP*) for comment. The ASAP is the primary advisory body through which CASA directs its engagement with industry and seeks input on current and future regulatory and associated policy approaches. TWG members provided a variety of comments on the exemptions and directions, mostly for clarification of intent and rationale. CASA considered all TWG input in finalising the exemptions instrument and advised the TWG of its responses and comments regarding all input from the TWG.

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 exemptions instrument is a remake of the repealed instrument with only minor or machinery changes and effects. Although a formal, public consultation has not been undertaken in relation to the exemptions instrument, there has nevertheless been informal consultation with the aviation industry in the form of industry feedback to CASA about the logistical and resource issues complicating their ability to meet the conditions and directions in the exemptions instrument.

In the circumstances, CASA is satisfied that it has undertaken such consultation as it considers appropriate and reasonably practicable.

### **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.

As the instrument replaces an expiring instrument with the same (or largely the same) provisions and conditions, there will be no change of economic or cost impact on individuals, businesses or the community.

The economic and cost impact of the instrument has been determined by:

- (a) the identification of individuals and businesses affected by the instrument; and
- (b) consideration of how the requirements to be imposed on individuals and businesses under the instrument will be different compared to existing requirements; and
- (c) a valuation of the impact, in terms of direct costs on individuals and businesses affected by the instrument to comply with the different requirements. This valuation is consistent with the principles of best practice regulation of the Australian Government; and
- (d) a valuation of the impact the different requirements 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; and
- (e) consideration of community impacts, beyond those direct impacts on individuals and businesses affected by the instrument, that are relevant if the instrument were to result in flow-on effects to other aviation businesses, or local non-aviation businesses that experience a change in their activity due to the instrument.

#### *Sector risk*

For aviation safety reasons, the instrument is specific to Australian air transport operations and aerial work operations under Part 91 and 138 of CASR, respectively.

For aviation safety reasons, the exemptions 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.

#### **Impact on categories of operations**

The exemptions instrument has an impact on the conduct of Australian air transport operations. Its provisions ensure that an appropriate level of aviation safety is assured for these operations.

#### **Impact on regional and remote communities**

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. However, smaller operators, more likely to be located in rural and regional areas, will benefit as described above.

#### **Office of Impact Analysis (OIA)**

An Impact Analysis (*IA*) is not required in this case, as the exemption is covered by a standing agreement between CASA and OIA under which an IA is not required for exemptions (OIA reference number: OIA23-06252).

#### **Statement of Compatibility with Human Rights**

The Statement of Compatibility with Human Rights at Attachment 1 has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The exemptions instrument is compatible with human rights: with its aviation safety focus, it promotes both the right to life, and the right to safe and healthy working conditions and, to the extent that it engages the right to work and the right to privacy, it does so in a way that is reasonable, necessary and proportionate in the context of aviation safety.

**Making and commencement**

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

The exemptions instrument commences on 2 December 2024 and is repealed at the end of 1 December 2027.

## Statement of Compatibility with Human Rights

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

### CASA EX72/24 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2024

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 this legislative instrument is to continue the operation of a number of exemptions from obligations under Parts 138 and 91 of the *Civil Aviation Safety Regulations 1998 (CASR)*, and a number of related directions that were granted by the Civil Aviation Safety Authority (*CASA*) in earlier instruments. The relevant obligations relate to aerial work operators, that is, ***aerial work certificate holders***, and certain others carrying out more limited aerial work operations.

That purpose is achieved by continuing the policy effect of *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021* (the ***repealed instrument***) which is repealed at the end of 1 December 2024. That instrument granted a number of exemptions from requirements imposed by Parts 91 and 138 of CASR, which were elements of the flight operations regulations. The exemptions were designed to facilitate the implementation of those Parts in accordance with *CASA*'s transition policies for the flight operations regulations, which commenced on 2 December 2021.

The exemptions and directions in this legislative instrument variously require operator oversight of the actions of operator personnel and otherwise are intended to maintain current regulatory requirements where the new regulations inappropriately failed to reflect requirements of the earlier regulations that the flight operations regulations were replacing. In other cases, exemptions were granted where relief from a requirement was considered appropriate, to facilitate implementation of flight operations regulations requirements, and to permit, for specified private operations, compliance with Part 138 requirements instead of Part 91 requirements.

The exemptions and directions in the repealed instrument, which required operator oversight of the actions of operator personnel, were designed to correct technical errors and omissions in Parts 138 and 91 which gave rise to unintended obligations. They were also designed to maintain pre-existing regulatory requirements where the flight operations regulations inappropriately failed to reflect requirements of the earlier regulations that the flight operations regulations replaced. A range of safety conditions were required to be complied with in order to obtain the benefit of the exemptions.

As those exemptions and directions are still required to ensure short-term certainty of regulatory requirements for the aviation industry, this legislative instrument continues their operation on an interim basis, from 2 December 2024 to the end of 1 December 2027 to provide relief from having to comply with certain requirements, and to give directions to ensure safety compliance. It is expected that, before the exemptions and directions cease to apply, the errors and omissions concerned will be rectified by making appropriate substantive amendments to CASR to achieve the same policy objectives. Until those amendments are made, it is considered necessary to renew the exemptions and directions to provide relief from having to comply with unnecessary requirements and to ensure safety compliance.

### **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(1) of the ICESCR
- the right to privacy under Article 17 of the ICCPR.

#### ***Right to life under the ICCPR***

#### ***Right to safe and healthy working conditions under the ICESCR***

Although this legislative instrument contains exemptions from obligations under Parts 138 and 91 of CASR, it does so in the context of substitute, and acceptable, conditions in the interests of aviation safety. To the extent that the conditions are expected to play a critical part in the avoidance of accidents and incidents, this legislative instrument may reasonably be said to support the right to life, and to contribute to safe and healthy working conditions on board the relevant aeroplanes operated in accordance with the relevant conditions.

For example, section 7 requires certain key managers of an aerial work certificate holder to have specified qualifications and experience. CASA prescribes the responsibilities of key managers and minimum qualifications and experience requirements for these managers. This is necessary to ensure that the operations are conducted safely and that managers are able to provide appropriate oversight of the activities of their personnel. For aerial work operations that are large and complex, experience above the minimum standards may be required. In all cases, the qualifications and experience required are necessary in the interests of safety, reasonable and proportionate. In some circumstances, this may affect the employability of key managers, as additional training may be required. However, the increased skill resulting from the increased training will improve the safety of aviation operations, thereby contributing to safe and healthy working conditions and, ultimately, to the right to life.

Further, the effect of Part 5 of the legislative instrument is to permit miscellaneous dropping operations below 500 ft provided the pilot in command of the relevant aircraft holds a relevant low-level rating and low-level endorsement, rather than an aerial application rating. The full range of training and skills under an aerial application rating are not required for miscellaneous dropping operations below 500 ft, but conditions in Part 5 are designed to

ensure that an acceptable level of aviation safety is preserved for working pilots in such operations.

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

Reduced costs in not having to meet the obligations as stated in CASR may have an effect of preserving operations and employment. These changes produce not immaterial cost savings that may contribute to the preservation of employment. By regranting the exemptions in the repealed instrument, this legislative instrument permits the continuation of operations that, before 2 December 2021, were considered to be safe but that may otherwise have been prevented, or whose continuation would have involved increased overhead costs. To the extent that the continuation of the exemptions relieves some operators of immediate overhead additional costs, this legislative instrument may improve the viability of the operator and, in doing so, promote the right to work.

***Right to privacy under the ICCPR***

The impact on the right to privacy of provisions that enable the collection of records

Both Parts 119 and 138 require relevant operators to keep physical copies of all flight crew member licences and medical certificates. This includes, in effect, an obligation to keep copies of licence documentation elements (such as ratings, endorsements, checks or reviews) that are not used by, or necessary for, the flight crew member in their operations for the operator. This inadvertent consequence of the regulations is unnecessarily onerous and costly for many operators and gives rise to a number of the exemptions and directions under the legislative instrument. It is not necessary for a relevant operator to collect or record sensitive information as defined in the *Privacy Act 1998*. Relevant medical certificates certify that a particular standard of medical clearance exists, commensurate with the requirements of the flight crew member's operational obligations. They do not disclose actual medical details. Also, within these constraints, the use of safety information for the purpose of maintaining or improving aviation safety, is not regarded as being for disciplinary or punitive purposes.

For example, section 9C exempts relevant operators from the existing obligation to keep "copies" of their flight crew member's flight crew licences and medical certificates, on the condition that the operators must maintain up-to-date "records" showing the currency of such of their flight crew members' licences and medical certificates, including their related ratings and endorsements, as are required under the civil aviation legislation to authorise and permit their flight crew members to carry out the operators' operations.

Section 22 directs certain aerial work certificate holders who are required to have a safety management system, to instead comply with the requirements of specified protective provisions of Civil Aviation Order 82.5, as in force immediately before 2 December 2021, as they relate to collecting safety information as if they apply to the operator.

Section 24 issues a direction to certain aerial work certificate holders requiring the continuity of retention of flight crew operational records and historical flight crew member records. These records relate to flight crew qualifications, training, flight and duty time, and rosters. Collection and recording of the information to be held by the relevant operators in the relevant records is necessary for CASA to perform its function (conferred by section 9 of the Act) of conducting the safety regulation of civil air operations in Australian territory and the operation of Australian aircraft outside Australian territory. The information is collected by

CASA to achieve the legitimate objective of ensuring that pilots meet certain medical and other standards in order to protect aviation safety.

#### The impact on privacy of provisions that facilitate surveillance

This legislative instrument further engages with the right to privacy because it enables lights-out operations to continue to be conducted for the purposes of surveillance of persons for law enforcement purposes. Section 14A grants exemptions from Part 91 requirements for anti-collision and navigation lights and the use of foreign registered aircraft to lights-out operation (which is defined to mean a surveillance operation, conducted for law enforcement purposes by a relevant operator using a relevant aircraft, in which the relevant aircraft's external lights are not to be displayed while flying over the relevant area). However, conditions are imposed on the exemption to limit such operations by requiring the pilots of the aircraft used for the operations to ensure external lights of the aircraft are displayed in specified circumstances and only turned off where necessary for the conduct of the operations.

Given the law enforcement aims of the surveillance, the limitations on who can conduct such operations, and the conditions imposed on the exemption required to enable them to be conducted, the limitation is reasonable and proportionate. Australian government agencies that conduct or arrange lights-out operations are APP entities (within the meaning of the *Privacy Act 1988*) that are subject to the provisions of that Act. CASA would expect that the Australian government agencies that conduct or arrange lights-out operations will include procedures to address any further privacy concerns arising from lights-out operations. The exemption is subject to a number of conditions that are designed to ensure that an acceptable level of aviation safety is preserved for working pilots in such operations. The conditions include requirements for the pilot in command to notify local air traffic service before conducting a lights-out operation and restrict the locations where external lights are turned off during a lights-out operation, by requiring the pilot to ensure external lights are displayed in specified circumstances and are only turned off where necessary for the lights-out operation.

#### **Conclusion**

The 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 the right to safe and healthy working conditions on board relevant aircraft and on the ground. The requirements in the instrument are considered reasonable and necessary in the interests of aviation safety. They are also considered proportionate, in the sense that any additional training and costs incurred are likely to be offset by additional work opportunities arising from being trained, and the improved safety outcomes. The latter contribute to the avoidance of accidents and incidents and, thereby, promote the right to life and the right to safe and healthy working conditions.

To the extent that it may also limit human rights those limitations are reasonable, necessary and proportionate. In particular, to the extent that the right to privacy may be engaged by the legislative instrument, the 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 engagement of the right to privacy is

considered to be limited, reasonable, necessary and proportionate in the interests of aviation safety.

### **Civil Aviation Safety Authority**