

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX87/24 – Amendment of CASA EX92/22 – Exemptions and Directions Instrument 2024

Purpose

The purpose of *CASA EX87/24 – Amendment of CASA EX92/22 – Exemptions and Directions Instrument 2024* (the **exemption amendment instrument**) is to amend *CASA EX92/22 – Part 137 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2022 (CASA EX92/22)*.

CASA EX92/22 provides (among other things) a single instrument within which exemptions and directions that relate to Part 137 of CASR (**Part 137**) and any related Part 137-specific exemptions from provisions of Part 91 of CASR (**Part 91**), may be included.

Part 137 applies to aerial application operations using aeroplanes and Part 91 sets out general operating and flight rules.

The single instrument assists stakeholders to identify the exemptions and directions issued in relation to Part 137. It also assists CASA to monitor the volume of such exemptions and directions so that it may ensure they are addressed in future amendments to Part 137 as soon as practicable.

The exemption amendment instrument adds a new Part 4 to CASA EX92/22 to exempt firefighting operations in an aeroplane from certain prescribed minimum height and lateral separation requirements in relation to occupied buildings in non-populous areas (essentially unoccupied, or sparsely occupied, areas outside cities and towns).

Legislation — exemptions

Section 98 of the *Civil Aviation Act 1988* (the **Act**) empowers the Governor-General to make regulations for the Act and the safety of air navigation.

Subpart 11.F of the *Civil Aviation Safety Regulations 1998 (CASR)* deals with exemptions. Under subregulation 11.160(1), and for subsection 98(5A) of the Act, CASA may, by instrument, grant an exemption from a provision of CASR in relation to a matter mentioned in subsection 98(5A). Subsection 98(5A) matters are, in effect, those affecting the safety, airworthiness or design of aircraft.

Under subregulation 11.160(2), an exemption may be granted to a person or a class of persons. Under subregulation 11.160(3), CASA may grant an exemption on application, or on its own initiative.

Under subregulation 11.170(3), for an application for an exemption, CASA must regard as paramount the preservation of an acceptable level of safety.

For making a decision on its own initiative, CASA is guided by the requirement in subsection 9A(1) of the Act that in exercising its powers and functions CASA must regard the safety of air navigation as the most important consideration. The preservation of an acceptable level of safety also 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.

Legislation — *Acts Interpretation Act 1901*

Under subsection 33(3) of the *Acts Interpretation Act 1901* where regulations empower the making of an instrument like the principal instrument, the power includes a parallel power to amend that instrument.

Background

Under subregulation 137.140(3) of CASR, the pilot in command of an aeroplane engaged in an application operation over an area that is **not** a populous area must not fly lower than 350 feet above ground level (AGL) while closer than 100 metres, measured horizontally, from an occupied building. Non-compliance would be a strict liability offence.

Under regulation 137.010, an ***aerial application operation*** includes “a flight that is carried out by an aeroplane to apply application material”. ***Application material*** includes water, or other material which includes fire retardant. ***Apply*** means to drop or spray the material onto the ground or water. Such operations are sometimes referred to colloquially as firebombing.

Despite subregulation 137.140(3) of CASR, under subregulation 137.140(4) the aeroplane may fly closer than prescribed to an occupied building and to the ground but only if:

- (a) more than 48 hours before the proposed operation, the occupier of the building was notified in writing about the operation and did not object to the operator about it; or
- (b) if it was not reasonably practicable to give written notice — the occupier was notified verbally before the operation and did not object to the operator about it.

However, fires often require an immediate, large, and targeted, aerial firefighting response. Delays through adherence to notice and consent procedures can endanger life and property, both on the ground and in the air.

Aerial work operations in the form of emergency service operations (ESOs) under Part 138 of CASR and the Part 138 Manual of Standards are not subject to the same constraints in their firefighting operations the purpose of which is to save people, property or animals.

CASA has, in the past, issued exemption instruments exempting identified Part 137 operators from compliance with subregulation 137.140(3) of CASR. However, these individual exemptions expire at the end of 30 November 2024.

CASA has decided to issue, effective on and from 1 December 2024, a broader exemption from compliance with subregulation 137.140(3) of CASR, with revised safety conditions, to enable any Part 137 operator in an aerial application operation that is an ***emergency service firefighting operation over a non-populous area*** to respond immediately to the fire without specific notice or consent.

An emergency service firefighting operation means an operation that is conducted:

- under the authority of an AOC that authorises aerial application operations
- under an arrangement or agreement between the AOC holding operator and a prescribed ***authority of the Commonwealth, a State, or a Territory***
- at the direction of the Authority, for the purpose of dropping water or a retardant over either or both of:
 - an occupied building
 - an area that is closer than 100 metres, measured horizontally, from an occupied building.

The relevant operation must be conducted without unacceptable risks and may only be targeted on or at a specific occupied building, if:

- the Authority has given express instructions to that effect
- in the absence of such instructions — the relevant pilot, on the scene, reasonably considers that such targeting is necessary to prevent the spread of fire
- the relevant pilot reasonably believes that the building is not, or is no longer, an occupied building, and such targeting may prevent the spread of fire.

The relevant operator is directed to ensure that:

- their relevant pilot complies with the conditions in the instrument

- on and from 31 March 2025 — their operations manual contains appropriate procedures for the purposes of paragraph (a).

The 4-month grace period is designed to give relevant operators time to draft procedures, submit them to CASA for approval, and receive approval while continuing to use their existing or adapted procedures for relevant operations. However, the conditions on pilots and the direction to relevant operators apply immediately on and from 1 December 2024.

Aviation safety

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

CASA is satisfied that, given the nature of the exemption itself, and its particular conditions, 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 amendment instrument is clearly 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 amendment instrument is generic in nature and applies to classes of persons. It is, therefore, a legislative instrument, subject to registration, and tabling and disallowance in the Parliament, under section 15G, and sections 38 and 42, of the LA.

Sunsetting

As the exemption amendment instrument relates to aviation safety and is made under CASR, that means that Part 4 of Chapter 3 of the LA (the sunset provisions) does not apply to the instrument (as per item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

The exemption amendment 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.

The exemption amendment instrument amends CASA EX92/22, 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. CASA EX92/22 is repealed at the end of 30 November 2025 by virtue of the terms of section 2. Thus, in practice, no sunset avoidance issues arise and there is no impact on parliamentary oversight.

Incorporations by reference

Under subsection 98(5D) of the Act, the exemption amendment 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.

Amendments to the operator's operations manual are incorporated into the exemption amendment instrument.

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.

An operations manual, for an operator, generally means the manual as changed from time to time.

An operations manual is not publicly or freely available. It is proprietary to the operator who creates it and owns its intellectual property, and it will generally include commercial in confidence information about the operator's business. The incorporated requirements of operations manuals are at the operator-specific level and apply only to the operator and its personnel. Further, the operator is under obligations to make the operations manual available to its personnel who have obligations under the document.

However, CASA has previously undertaken that it will, as far as practicable, make arrangements with any relevant operator to make a suitably redacted copy of the operations manual available for requested inspection by appointment at a relevant CASA office.

There are no other incorporations in the exemption amendment instrument.

Consultation

Under section 16 of the Act, in performing its functions and exercising its powers, CASA must consult government, industrial, commercial consumer and other relevant bodies and organisations as far as CASA considers such consultation to be appropriate.

Under section 17 of the LA, before a legislative instrument is made, CASA must be satisfied that it has undertaken any consultation it considers appropriate and practicable in order to draw on relevant expertise and involve persons likely to be affected by the proposals.

Exemptions from regulatory requirements are considered to be beneficial for those to whom they apply, who voluntarily elect to take advantage of them, and who comply with their conditions. It is, therefore, rarely necessary to engage in extensive public consultation on a proposed exemption. However, it is CASA's policy to consult, where possible, in an

appropriate way with those parts of the aviation industry most likely to avail themselves of, or be affected by, an exemption so that they may have the opportunity to comment on the possible or likely terms, scope and appropriateness of the exemption.

Although a formal, public, consultation has not been undertaken in relation to the exemption amendment instrument, CASA has consulted with a number of operators who hold current exemption instruments in relation to subregulation 137.140(3) of CASR. CASA has also consulted with the Aerial Application Association of Australia, the peak industry body representing Part 137 operators. All of those consulted supported the exemption amendment instrument and its safety conditions.

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: OIA23-06252).

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 amendment instrument will enable relevant operators to conduct effective firebombing operations in association with relevant firefighting authorities.

Sector risks

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

The exemption amendment instrument, in facilitating rapid and targeted aerial firefighting responses to fires on the ground, is anticipated to protect the environment.

Statement of Compatibility with Human Rights

The Statement in Appendix 3 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The exemption amendment instrument is compatible with human rights and, to the extent that it may engage or impinge on any of those rights, it either promotes the rights, or impinge of the right in a restricted way that is reasonable, necessary and proportionate in the context of aviation safety.

Making and commencement

The exemption amendment instrument commences on 1 December 2024 after it has been registered. The exemption amendment instrument has been made by a delegate of CASA relying on the power of delegation under subregulation 11.260(1) of CASR.

Details of:**CASA EX87/24 – Amendment of CASA EX92/22 – Exemptions and Directions Instrument 2024**

1 Name

This section names the instrument.

2 Commencement

Under this section, the instrument commences on 1 December 2024.

3 Amendment of instrument CASA EX92/22

Under this section, Schedule 1 amends *CASA EX92/22 – Part 137 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2022*.

Schedule 1 Amendments**[1] After Part 3 — New Part 4**

This amendment inserts new Part 4 into *CASA EX92/22 – Part 137 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2022*, headed “Part 4 — Minimum height and lateral separation — firefighting operations”.

11 Definitions, etc.

This new section defines key words and phrases, including: *Authority, authority of the Commonwealth, a State, or a Territory* and *emergency service firefighting operation*.

12 Application of Part

Under this section, the new Part 4 applies, according to its terms, to a relevant pilot and a relevant operator for a relevant operation.

A Note explains that the instrument has no application in relation to dropping water or a retardant **outside** 100 metres, measured horizontally, from an occupied building in an area that is not a populous area. Such activity as this is already permitted by subregulation 137.140(3) of CASR.

13 Exemption

Under this section, a relevant pilot is exempted from compliance with subregulation 137.140(3) of CASR.

A Note explains that under subregulation 137.140(3) of CASR, it is an offence if the pilot in command of an aeroplane engaged in an aerial application operation, in an area that is **not** a populous area, flies lower than 350 feet AGL, while closer than 100 metres horizontally, from an occupied building.

Under subregulation 137.140(4), the aeroplane may fly closer than so provided for if a prescribed written or verbal notice was given to the occupier and the occupier did not object to the operation.

However, fires often require an immediate response. Delays through adherence to notice and consent procedures can endanger life and property, both on the ground and in the air. Conditions and directions, specified below, are designed to address these issues.

14 Conditions — the relevant operation

Under this section, the exemption under section 13 is subject to various safety conditions so that:

- (a) the relevant operation must be conducted without:
 - (i) adverse effects on the safety of air navigation; or
 - (ii) unacceptable risks to the safety of any person in the relevant aeroplane; or
 - (iii) unacceptable risks to the safety of any person on the ground;
- (b) the relevant operation may only be targeted on or at a specific occupied building, if:
 - (i) the Authority has given express instructions to that effect; or
 - (ii) in the absence of such instructions — the relevant pilot, on the scene, reasonably considers that such targeting is necessary to prevent the spread of fire; or
 - (iii) the relevant pilot reasonably believes that the relevant building is not, or is no longer, an occupied building, and such targeting may prevent the spread of fire.

A Note explains that it is for the Authority, in the exigencies of an emergency service firefighting operation, to determine the appropriate means of providing such instructions to the pilot.

15 Directions — the relevant operator

Under this section, a relevant operator is directed to ensure that:

- (a) their relevant pilot complies with the conditions in the instrument; and
- (b) on and from 31 March 2025 — their operations manual contains appropriate procedures for the purposes of paragraph (a).

A Note explains that the 4-month grace period is designed to give relevant operators time to draft procedures, submit them to CASA for approval, and receive approval while continuing to use their existing or adapted procedures for relevant operations. The conditions under section 14, and the direction under paragraph 15(a), apply immediately on and from 1 December 2024.

Statement of Compatibility with Human Rights

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

CASA EX87/24 – Amendment of CASA EX92/22 – 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 exemption amendment instrument adds a new Part 4 to *CASA EX92/22 – Part 137 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2022* to exempt firefighting operations in an aeroplane from certain prescribed minimum height and lateral separation requirements in relation to occupied buildings in non-populous areas.

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*).

Right to life under the ICCPR

This engagement is in the context of CASA’s statutory purpose which includes safety relevantly in the air and on the ground. The aim of CASA and its regulatory framework is to uphold aviation safety by regulating the conduct of individuals and organisations involved in civil aviation operations, including firefighting. It is, therefore, a threshold requirement for all CASA legislative instruments that they preserve, promote and enhance aviation safety.

Human rights implications

The exemption amendment 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.

Conclusion

This legislative instrument is compatible with human rights.

Civil Aviation Safety Authority