

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX45/19 — Take off of Aircraft with Adherence of Frost or Ice Exemption 2019

Purpose

The purpose of *CASA EX45/19 — Take off of Aircraft with Adherence of Frost or Ice Exemption 2019* (the **instrument**) is to address the need for aircraft to be able to safely begin flights with frost or ice adhering to the outside of the aircraft. The instrument exempts a pilot in command of an aircraft from the requirement under paragraph 244 (1) (c) of the *Civil Aviation Regulations 1988 (CAR)* to ensure that all external surfaces of the aircraft are completely free from frost or ice immediately before taking-off on any flight. The exemption is subject to conditions to ensure the safe take-off of aircraft with adherence of frost or ice.

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 *Civil Aviation Safety Regulations 1998 (CASR)* and CAR.

Regulation 3 of CAR sets out the application of CAR and CASR (the **regulations**).

Subregulation 3 (2) of CAR provides that, except where otherwise prescribed, the provisions of the regulations shall apply to and in relation to Australian aircraft engaged in air navigation outside Australian territory.

Under paragraph 244 (1) (c) of CAR, it is an offence if, immediately before taking-off on a flight, the pilot in command of an aircraft does not ensure that all external surfaces of the aircraft are completely free from frost and ice.

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, the Civil Aviation Safety Authority (**CASA**) may grant an exemption from a provision of the regulations.

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

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 of CASR 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 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.

Background

The instrument replaces instrument CASA EX101/16, *Exemption — take-off with traces of frost*, which applies to an aircraft with maximum take-off weight over 5 700 kg engaged in regular public transport operations or charter operations. That instrument renewed instrument CASA EX13/14. The instrument has broader application than instrument CASA EX101/16 in that it applies to all aircraft.

Having taken into account all relevant safety considerations, CASA is satisfied that an aircraft may safely conduct a take-off with frost or ice adhering to the external surfaces of the aircraft, subject to certain requirements. The instrument imposes these requirements as conditions on the exemption for the pilot in command from paragraph 244 (1) (c) of CAR.

Subregulation 138 (1) of CAR also provides that the pilot in command of an aircraft must comply with a requirement, instruction, procedure or limitation concerning the operation of the aircraft that is set out in the aircraft's flight manual. For example, aircraft manufacturers may specify in the aircraft's flight manual the amount, depth and location of frost or ice that can remain on aircraft surfaces during take-off, and procedures for removing frost or ice (e.g. use of de-icing fluids) before take-off.

The instrument will no longer be required on commencement of the *Civil Aviation Safety Amendment (Part 91) Regulations 2018* (the **Part 91 Regulations**) — see future regulation 91.705 of CASR that is set out in Schedule 1 of the Part 91 Regulations. Regulation 2 of the Part 91 Regulations states that they are to commence on 25 March 2021.

Overview of instrument

The instrument exempts a pilot in command of an aircraft from complying with paragraph 244 (1) (c) of CAR, which provides that immediately before taking-off on any flight, the pilot in command shall ensure that all external surfaces of the aircraft are completely free from frost and ice. The exemption is subject to conditions.

The conditions are that the pilot in command must ensure that the aircraft does not begin a flight with frost or ice adhering to any of the aircraft's wings, flaps, control surfaces, rotors, propellers, or stabilisers. Also, the pilot must ensure the aircraft does not begin a flight if it has frost or ice adhering to the top of the aircraft's fuselage and either the aircraft has rear-mounted engines or the adherence of the frost or ice to the top of the aircraft's fuselage is a hazard to the safe operation of the aircraft for the flight.

However, if the take-off for the flight is conducted in accordance with instructions in the aircraft's flight manual that relate to taking off under those conditions, the aircraft may take off despite having frost or ice on those external surfaces. This is consistent with the approach taken in regulation 91.075 in the Part 91 Regulations, which will allow taking off with frost, ice or snow adhered to the aircraft provided instructions in the flight manual relating to taking off are complied with.

CASA has assessed the impact the instrument will have on aviation safety and is satisfied that the conditions imposed on the exemption for the pilot in command of an aircraft are necessary in the interests of the safety of air navigation.

Document incorporated by reference

Under subsection 14 (2) of the *Legislation Act 2003* (the **LA**), unless the contrary intention appears, a legislative instrument may not incorporate any matter contained in an instrument or

other writing as existing from time to time. Paragraph 98 (5D) (a) 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.

The instrument incorporates the flight manual of each aircraft by reference. The following information about flight manuals is provided in accordance with paragraph 15J (2) (c) of the LA.

Flight manual is defined in clause 37 of Part 2 of the CASR dictionary and this definition is noted in the instrument. The definition makes clear that a flight manual includes CASA-approved and other amendments to the flight manual, and CASA-approved and other supplements to the flight manual. Accordingly, each flight manual is incorporated as existing from time to time.

A flight manual is a document that contains the information that is required to safely operate the specific aircraft. Flight manuals are publicly available but not for free. The flight manual for an aircraft is proprietary to the owner of the aircraft design (usually the manufacturer). It is made available to the aircraft operator from the relevant aircraft manufacturer and the aircraft operator provides copies to its pilots.

Where available, and by prior arrangement, CASA will make an aircraft flight manual available for inspection at a CASA office.

CASA has incorporated the flight manual for each aircraft for safety reasons and because there are no other freely-available documents serving the relevant purpose. A similar approach has been taken in future regulation 91.705 of CASR on which the exemption conditions are based.

Content of instrument

Section 1 of the instrument sets out the name of the instrument.

Section 2 sets out the duration of the instrument. The instrument commenced on the day after it was registered and will be repealed at the earlier of: the commencement of the Part 91 Regulations or the end of 30 April 2022. The reference to the end of 30 April 2022 has been included in case the commencement of the Part 91 Regulations is delayed past the last date that the instrument may remain in force under regulation 11.230 of CASR.

Section 3 repeals instrument CASA EX101/16, *Exemption — take-off with traces of frost*. The instrument replaces that instrument.

Section 4 provides an exemption for the pilot in command of an aircraft from compliance with paragraph 244 (1) (c) of CAR. CASA EX101/16 provided this exemption only for pilots in command of aircraft with a maximum take-off weight of more than 5 700 kg that are engaged in regular public transport operations or charter operations.

Section 5 sets out conditions on the exemption in section 4. The conditions are that the pilot in command of the aircraft must ensure that the aircraft does not begin a flight if the aircraft has frost or ice adhering to any of the aircraft's wings, flaps, control surfaces, rotors, propellers, horizontal stabilisers or vertical stabilisers. Also, the pilot in command must ensure that the aircraft does not begin a flight if it has frost or ice adhering to the top of the aircraft's fuselage, and either the aircraft has rear-mounted engines or the adherence of the frost or ice to the top of

the fuselage is a hazard to the safe operation of the aircraft for the flight. However, if the take-off for the flight is conducted in accordance with instructions in the aircraft's flight manual that relate to taking off under those conditions, the aircraft may take off despite having frost or ice on those external surfaces.

Legislation Act 2003

Paragraph 10 (1) (d) of the LA provides that an instrument will be a legislative instrument if it includes a provision that amends or repeals another legislative instrument. The instrument repeals instrument CASA EX101/16 that was registered as a legislative instrument and is, therefore, also a legislative instrument, subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Paragraph 98 (5A) (a) of the Act provides that CASA may 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 instrument exempts a class of persons, being the pilots in command of aircraft, from complying with paragraph 244 (1) (c) of CAR. The instrument is, therefore, a legislative instrument, and is subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Consultation

In 2011, CASA published a draft of proposed amendments to Part 91 of CASR, which included proposed standards relating to frost, ice and snow adhering to the external surfaces of an aircraft, and invited comments from the aviation industry and the general public on the draft amendments.

In 2015, CASA published a further draft of proposed amendments to Part 91 of CASR that included proposed provisions relating to aircraft taking off with frost, ice or snow adhering to the external surfaces of an aircraft. CASA again invited comments from the aviation industry and the general public on the draft provisions. The Explanatory Statement to instrument CASA EX101/16 states that that instrument took into account any comments received in response to that consultation.

As the exemption conditions in the instrument are based on the final versions of these provisions in the Part 91 Regulations, CASA is satisfied that no further consultation is appropriate or reasonably practicable for the instrument for section 17 of the LA.

Office of Best Practice Regulation (OBPR)

A Regulation Impact Statement (*RIS*) is not required in this case, as the exemption is covered by a standing agreement between CASA and OBPR, under which a RIS is not required for exemptions (OBPR id: 14507).

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*.

Making and commencement

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

The instrument commences on the day after it is registered and is repealed at the earlier of: the commencement of the Part 91 Regulations or the end of 30 April 2022.

Statement of Compatibility with Human Rights

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

CASA EX45/19 — Take off of Aircraft with Adherence of Frost or Ice Exemption 2019

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 legislative instrument exempts a pilot in command of an aircraft from the requirement under paragraph 244 (1) (c) of the *Civil Aviation Regulations 1988* to ensure that all external surfaces of the aircraft are completely free from frost or ice immediately before taking-off on any flight. The exemption is subject to conditions designed to ensure that an aircraft with adherence of frost or ice does not take off unless the take-off is safe. The instrument permits the pilot in command of an aircraft with adherence of frost or ice to take off only if the take-off is in accordance with instructions in the aircraft's flight manual that relate to taking off under those conditions.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Civil Aviation Safety Authority