

Replacement Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX146/21 – Amendment of CASA EX81/21 – Instrument 2021

Purpose

The purpose of this exemption instrument is to insert a number of additional exemptions into *CASA EX81/21 – Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX81/21 or the principal exemptions instrument)*.

CASA EX81/21 makes a number of exemptions against Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)* that will facilitate implementation of Part 91 in accordance with CASA’s transition policies for Part 91. Part 91 of CASR is a comprehensive code of general flight and operational safety rules for Australian-registered aircraft wherever located, and for foreign-registered aircraft in Australian territory. Part 91 contains the baseline rules for “private operations”.

The previous exemptions were designed to correct technical errors and omissions in Part 91 which gave rise to unintended obligations. These errors and omissions will be rectified in the next set of amendments to the Part but, in the meantime, until those amendments are made, it was considered necessary to use exemptions to provide relief from having to comply with certain requirements and directions to ensure safety compliance. The new Part 91 commences on 2 December 2021.

On further review of Part 91, it was considered that some additional exemptions were required.

Legislation — exemptions

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

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

Under subregulation 11.160 (2), an exemption may be granted to a person or a class of persons. Under subregulation 11.160 (3), CASA may grant an exemption on application, or on its own initiative. Under subregulation 11.170 (3), for an application for an exemption, CASA must regard as paramount the preservation of an acceptable level of safety. For making a decision on its own initiative, CASA is guided by the requirement in subsection 9A (1) of the Act that in exercising its powers and functions CASA must regard the safety of air navigation as the most important consideration.

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.

Legislation — directions

Under paragraph 11.245 (1) (a) of CASR, for subsection (5A) of the Act, CASA may, by instrument, issue a direction about 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 in the interests of safety, only if the direction is not inconsistent with the Act, and only for the purposes of CASA's functions.

Under regulation 11.250, 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.

Description of supplementary exemptions

Section 1 provides for the naming of the *CASA EX146/21 – Amendment of CASA EX85/21 – Instrument 2021*.

Section 2 provides for the commencement of the instrument on 2 December 2021.

Section 3 provides that the instrument amends *CASA EX81/21 – Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021*.

Schedule 1 – Amendments

Schedule 1 provides for additional exemptions for pilots and operators of aircraft to which Part 91 applies.

Amendment 1

This amendment adds new definitions to the principal exemptions instrument.

Amendment 2

This amendment adds a new direction to the operator of an Australian aircraft or a foreign-registered aircraft (a **relevant aircraft**) that, before operating a flight into, out of, or at, a military aerodrome, the operator must obtain permission to operate from the relevant military authority. When conducting operations at a joint military/civilian aerodrome, the operator and the pilot in command of a relevant aircraft must each comply with the applicable requirements for the aerodrome contained in the authorised aeronautical information, unless those requirements are contrary to the civil aviation legislation.

Amendment 3

This amendment inserts 4 new sections.

The first new section is 19, Minimum heights – IFR flights – exemption, which exempts the pilot in command of an aircraft for an IFR flight from prescribed minimum height requirements when taking off, provided that the pilot in command ensures that the aircraft clears all obstacles by a safe margin.

The second new section is 20, Air displays in Australian territory — exemption which applies to the pilot in command of an aircraft conducting an approved air display in

Australian territory. The pilot in command is exempted from compliance with a series of provisions in Part 91 concerning airspeed limits, dropping things from aircraft, final reserve fuel requirements, aerodrome and airspace arrangements, and radio call requirements which would otherwise make the air display impossible. Mitigating conditions must be complied with concerning, for example, risk assessments and advance warning about the display.

The third new section is 21, Compliance with flight manual — exemption, which exempts the pilot in command of an aircraft to which Part 91 applies from compliance with aircraft flight manual instructions – but subject to the condition that the pilot complies with *the requirements and limitations* set out in the aircraft flight manual instructions. This is designed to overcome a drafting error in the definition of ***aircraft flight manual instructions*** whose effect is to erroneously include the flight manual and certain associated documents when it should have been confined to *the requirements and limitations* set out in the aircraft flight manual instructions.

The fourth new section is 22, Hot fuelling aircraft — exemption, which applies to the pilot in command of a turbine-powered aeroplane used to conduct parachute operations, and operated under a parachute operations approval issued by a Part 105 ASAO (an Approved Self-Administering Aviation Organisation). The pilot in command is exempted from regulation 91.505, which regulates hot fuelling of aircraft, because otherwise the regulation would not permit existing hot refuelling practices commonly undertaken by turbine-powered parachuting aircraft for Part 105 ASAOs. Safety conditions will apply, including that the exposition of the Part 105 ASAO must include hot refuelling requirements equivalent to those permitted in aerial work operations.

Legislation Act 2003 (the LA)

The exemptions in this instrument are for the safe navigation and operation of aircraft and apply to classes of persons. The instrument is a legislative instrument under the Act and the LA and subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

As the 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 instrument deals with aviation safety matters that, once identified, require a risk response or treatment plan. Generally speaking, item 15, when invoked, is necessary in order to ensure that, in the interests of aviation safety, a relevant instrument has enduring effect, certainty and clarity for aviation operators both domestic and international.

In this case, the instrument amends the principal exemptions instrument and is almost immediately spent and repealed in accordance with the automatic repeal provisions in Subdivision A in Division 1 of Part 3 of Chapter 3 of the LA. The principal exemptions instrument is itself repealed at the end of 1 December 2024 by virtue of the terms of paragraph 2 (b) of the principal exemptions instrument. Thus, in practice, no sunset avoidance issues arise and there is no impact on parliamentary oversight.

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 insofar 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.

For the principal exemptions instrument, CASA consulted the aviation community in June 2020 on the policy proposals that ultimately gave rise to the exemptions and directions instrument. A summary of the consultation feedback and CASA's disposition of comments received was published on the CASA website in December 2020.

In addition, for the principal exemptions 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.

CASA considered all TWG input and, in finalising this exemption instrument, has also received and considered additional input about transitional issues. CASA advised the TWG of its responses and comments regarding all input from the TWG, and considers that no further consultation is necessary or appropriate.

Office of Best Practice Regulation (OBPR)

A Regulation Impact Statement (*RIS*) is not required because the instrument is covered by a standing agreement between CASA and OBPR under which a RIS is not required for Exemption or Direction instruments (OBPR id: 14507).

Statement of Compatibility with Human Rights

The Statement in Appendix 1 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The exemption instrument is compatible with human rights: with its aviation safety focus, it promotes both the right to life, and the right to safe and healthy working conditions, and it does so in a way that is reasonable, necessary and proportionate in the context of aviation safety.

Commencement and making

The instrument commences on 2 December 2021.

The instrument has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the Act.

Statement of Compatibility with Human Rights

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

CASA EX146/21 – Amendment of CASA EX81/21 – Instrument 2021

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 exemption instrument is to insert a number of additional exemptions into *CASA EX81/21 – Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX81/21 or the principal exemptions instrument)*.

CASA EX81/21 makes a number of exemptions against Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)* that will facilitate implementation of Part 91 in accordance with CASA’s transition policies for Part 91. Part 91 of CASR is a comprehensive code of general flight and operational safety rules for Australian-registered aircraft wherever located, and for foreign-registered aircraft in Australian territory. Part 91 contains the baseline rules for “private operations”.

The previous exemptions were designed to correct technical errors and omissions in Part 91 which gave rise to unintended obligations. These errors and omissions will be rectified in the next set of amendments to the Part but, in the meantime, until those amendments are made, it was considered necessary to use exemptions to provide relief from having to comply with certain requirements and directions to ensure safety compliance. The new Part 91 commences on 2 December 2021.

On further review of Part 91, it was considered that some additional exemptions were required.

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*).

Right to life under the ICCPR

Right to safe and healthy working conditions under the ICESCR

The instrument is a transitional measure which exempts or relieves from regulatory obligations. As such, it has no direct negative effect of human rights. However, though it does contain exemptions from various provisions of Part 91, 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, the instrument may reasonably be said to support the right to life, and to contribute to safe and healthy working conditions on board aircraft operated in accordance with the relevant conditions.

Human rights implications

This legislative instrument is compatible with human rights and to the extent that it may engage certain rights it does so in a way that promotes the right to life and promotes safe and healthy working conditions on board relevant aircraft. These measures are considered to be reasonable, necessary and proportionate in the interests of aviation safety.

Conclusion

This legislative instrument is compatible with human rights.

Civil Aviation Safety Authority