

## **Explanatory Statement**

### **Civil Aviation Regulations 1988**

### **Civil Aviation Safety Regulations 1998**

### **CASA EX45/21 — ATSB Winching Operations Instrument 2021**

#### **Purpose**

The purpose of this instrument is to allow Australian Transport Safety Bureau (*ATSB*) personnel to safely access transport accident sites by helicopter winching, including if necessary by being winched into confined areas.

#### **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 Regulations 1988* (*CAR*) and the *Civil Aviation Safety Regulations 1998* (*CASR*).

Under subregulation 11.160 (1) of CASR, for subsection 98 (5A) of Act, CASA may, by instrument, grant an exemption from compliance with a provision of CASR or CAR or a Civil Aviation Order (*CAO*). 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.

Subregulations 11.170 (3) and 11.175 (4) of CASR provide that in deciding whether to grant or renew, respectively, an exemption, on application by a person, CASA must regard as paramount the preservation of at least an acceptable level of aviation safety.

Subregulation 11.205 (1) of CASR enables CASA to impose conditions on an exemption if this is necessary in the interests of the safety of air navigation. Under regulation 11.210, it is an offence to fail to comply with a condition of an exemption.

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

Under subregulation 151 (1) of CAR, the pilot in command of an aircraft in flight must not allow persons or objects to be picked up by the aircraft. However, under paragraph 151 (3) (a) of CAR, it is a defence to a prosecution under subregulation 151 (1) if CASA has given prior written authority for the person or object to be picked up while the aircraft was in flight.

Subregulation 250 (1) of CAR prohibits the operator of an aircraft from carrying a person on the wings or undercarriage of the aircraft, or any part of the aircraft that is not designed for the accommodation of the crew or passengers, or on anything attached to the aircraft.

Subregulation 250 (1A) of CAR similarly prohibits the pilot in command from carrying a person in those ways. However, under subregulation 250 (6), it is a defence to a prosecution under subregulation 250 (1) or (1A) if the person has CASA's permission under subregulation 250 (2). Under subregulation 250 (2), a person may, with CASA's permission given in respect of certain flights, be carried on, or in, a part of an aircraft that is not designed for the accommodation of the crew or passengers, or on, or in, anything attached to the

aircraft. Under subregulation 250 (3), CASA may, when granting a permission, specify conditions subject to which a person may be carried.

Paragraph 251 (1) (c) of CAR requires the wearing of seat belts when an aircraft is flying at a height of less than 1 000 feet above the terrain. However, under subregulation 251 (3), CASA may direct that a specified type of safety harness be worn in place of a seat belt in the circumstances set out in the direction. Under subregulation 251 (9) of CAR, it is a defence to a prosecution under paragraph 251 (1) (c) if CASA directs that seat belts need not be worn in that circumstance.

Paragraphs 3.1 and 4.1 of CAO 20.16.3, respectively, require a person to occupy a seat and wear a seat belt or safety harness while the aircraft is flying at a height of less than 1 000 feet above the terrain.

CAO 29.11 relates to winching and rappelling operations. Paragraph 3.2 of CAO 29.11 grants an exemption from compliance with paragraph 251 (1) (c) of CAR, subject to the conditions in CAO 29.11. This exemption and its conditions are continued by regulation 202.011 of CASR.

Paragraph 5.1 of CAO 29.11 specifies the requirements for an operating area over which winching may be conducted.

Paragraph 14 (1) (a) of the *Legislation Act 2003* (the *LA*) provides that a legislative instrument may apply, adopt or incorporate any matter contained in a disallowable legislative instrument, as in force at a particular time or as in force from time to time.

## **Background**

Under section 12AA of the *Transport Safety Investigation Act 2003*, the function of the ATSB is to improve transport safety by means that include independently investigating transport safety matters.

It is vital that ATSB personnel are able to access and investigate accident sites in a timely manner to preserve information. At times, an accident site may be remote or otherwise difficult to access and the best method of access involving the least risk is for ATSB personnel to be winched from a helicopter into a confined area.

ATSB has been conducting helicopter winching operations for several years under similar instruments, most recently *CASA EX54/18 — ATSB Winching Operations Instrument 2018* which expires at the end of 30 April 2021. This instrument is essentially the same as that instrument, the only substantial difference being the addition of exemptions from certain seating and seat belt wearing requirements under CAO 20.16.3 for the sake of certainty and completeness. These exemptions are counterbalanced by the directions in the instrument relating to the wearing of a winchman's or rescue harness during winching operations and are also subject to the conditions in the instrument imposed in the interests of aviation safety. The instrument is an important means of allowing ATSB to continue to conduct its accident investigations that involve helicopter winching in a timely, comprehensive and safe way.

In making the decision to grant the exemption in this instrument, CASA has regarded as paramount the preservation of at least an acceptable level of aviation safety.

### Documents incorporated by reference

Two Australian Technical Standard Orders (*ATSOs*) are incorporated by reference, namely ATSO-C1001 and ATSO-C1003. These documents are referred to in section 6 of the instrument. Under paragraph 6 (a), a winchman's or rescue harness worn by ATSB personnel must comply with ATSO-C1003 as in force from time to time. Under paragraph 6 (b), the dispatcher's restraint strap, to which the harness is to be attached, must comply with ATSO-C1001 as in force from time to time.

Under subregulation 21.601 (2) of CASR, an *ATSO* is defined as a minimum performance standard prescribed by the *Part 21 Manual of Standards Instrument 2016* (the *Part 21 MOS*) for specified articles used on civil aircraft. Subsection 13.2 (2) of the Part 21 MOS allows ATSOs to be cited by their ATSO number. ATSO-C001 is contained within Schedule 24 to the Part 21 MOS and ATSO-C003 is contained within Schedule 26. For the purposes of paragraph 14 (1) (a) of the LA, the Part 21 MOS is a disallowable legislative instrument. By virtue of section 10 of the *Acts Interpretation Act 1901* and section 13 of the LA, the reference in the instrument to an ATSO is to be construed as a reference to the ATSO as contained within the Part 21 MOS as originally made and as amended from time to time. For the avoidance of doubt, the ATSOs are expressly referred to in the instrument as being in force from time to time. The ATSOs are freely available and accessible via the internet on the Federal Register of Legislation.

Also incorporated into the instrument are 3 definitions set out in section 3.

The definition of *accident site* is taken from the *Transport Safety Investigation Act 2003*. The reference to that Act is, by virtue of section 10 of the *Acts Interpretation Act 1901*, a reference to the Act as originally enacted and as amended from time to time. The Act is freely available and accessible via the internet on the Federal Register of Legislation.

The definitions of *winch or hoist* and *winching* are taken from CAO 29.11. For the purposes of paragraph 14 (1) (a) of the LA, CAO 29.11 is a disallowable legislative instrument. The reference to that CAO is, by virtue of section 10 of the *Acts Interpretation Act 1901* and section 13 of the LA, a reference to the CAO as originally made and as amended from time to time. It is freely available and accessible via the internet on the Federal Register of Legislation.

### Content of instrument

The instrument provides an authorisation, permission and direction under CAR and exemptions under CASR from provisions of CAO 20.16.3 and CAO 29.11. The instrument is required to enable ATSB personnel to safely access accident sites by winching, including sites that are difficult to access.

Section 1 provides that the name of the instrument is *CASA EX45/21 — ATSB Winching Operations Instrument 2021*.

Section 2 sets out the duration of the instrument. The instrument commences on 1 May 2021 and will be repealed at the earlier of the following:

- the day of commencement of Schedule 1 to the *Civil Aviation Legislation Amendment (Part 138) Regulations 2018*
- the end of 30 April 2024.

Section 3 sets out the definitions for the instrument. A key term is *relevant helicopter* which is defined to mean a multi-engine helicopter that is capable of hovering out of ground effect

with one engine inoperative for the purposes of winching and which is authorised under an Air Operator's Certificate (the *AOC*) to be operated for winching. *Operator* is defined as the person who holds the AOC for the helicopter and who has been engaged by the ATSB to carry out ATSB winching operations in the helicopter. *ATSB winching operation* is defined as a flight to or from an accident site involving the winching of ATSB personnel to or from a relevant helicopter in the course of an ATSB investigation. *ATSB personnel* is defined as employees of the ATSB or persons who are engaged by the ATSB for the conduct of ATSB investigations. The terms *winching* and *winch or hoist* have the same meanings as in CAO 29.11.

Section 4 authorises the pilot in command of a relevant helicopter to pick up ATSB personnel and their objects during an ATSB winching operation.

Section 5 permits the operator and pilot in command of a relevant helicopter to carry ATSB personnel on, or in, part of the helicopter that is not designed for the accommodation of the crew or passengers, or on, or in, anything attached to the helicopter, for the winching of ATSB personnel during an ATSB winching operation.

Section 6 directs ATSB personnel to wear a winchman's or rescue harness (that is attached to a dispatcher's restraint strap or to the winch or hoist) in place of a seat belt during an ATSB winching operation to the extent necessary to winch the personnel to, or from, a relevant helicopter flying at a height of less than 1 000 feet above the terrain. The harness and strap must comply with the minimum performance standard under the relevant ATSO.

Section 7 sets out the following exemptions:

- the crew members and passengers are exempt from compliance with subparagraph 3.1 (c) of CAO 20.16.3, a provision that would otherwise require those persons to occupy "a seat of an approved type" at crucial times, including when the helicopter is flying below 1 000 feet
- the operator, crew members and passengers are exempt from compliance with paragraph 4.1 of CAO 20.16.3, a provision that would otherwise require the wearing of a safety harness, or a seat belt where a safety harness is not fitted, when the helicopter is flying below 1 000 feet
- the operator and pilot in command are exempt from compliance with paragraph 5.1 of CAO 29.11, a provision that would otherwise prevent ATSB personnel from accessing certain accident sites due to the size of the area and obstructions and hazards within the area.

Schedule 1 sets out the conditions of the instrument. The pilot in command and the operator of the helicopter must, when operating under the authorisation, permission or exemptions in the instrument, comply with the conditions that restrict carriage to ATSB personnel and operating crew, and prohibit winching over an accident site if the site can reasonably be accessed from a lawful helicopter landing site. The conditions also require the operator to conduct a pre-flight risk assessment and related mitigation processes for the operation before conducting an ATSB winching operation.

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

Paragraph 98 (5A) (a) of the Act states that CASA may issue instruments in relation to matters affecting the safe navigation and operation, or the maintenance, of aircraft.

Paragraph 98 (5AA) (a) 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 authorisation, permission, exemptions, directions and conditions in the instrument

expressly apply (variously) in relation to operators, pilots in command, crew members and passengers of relevant helicopters during ATSB winching operations. These are classes of persons.

The instrument is, therefore, a legislative instrument and subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

### **Consultation**

The instrument is required to assist in transport accident investigations by ATSB. ATSB has requested the instrument and has provided comments on a previous similar instrument. Helicopter operators and pilots (the persons principally affected by the instrument) have also operated under earlier similar instruments and the instrument does not substantially alter the existing arrangements other than to afford them with a further exemption from seating and seat belt-wearing requirements under CAO 20.16.3 for the sake of certainty and completeness. In these circumstances, CASA considers that no further consultation under section 17 of the LA is appropriate or necessary.

### **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 (OBPR id: 14507).

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

A Statement of Compatibility with Human Rights is at Attachment 1.

### **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 1 May 2021 and will be repealed at the earlier of the following:

- the day of commencement of Schedule 1 to the *Civil Aviation Legislation Amendment (Part 138) Regulations 2018*
- the end of 30 April 2024.

## Statement of Compatibility with Human Rights

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

### CASA EX45/21 — ATSB Winching Operations 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 legislative instrument is to allow Australian Transport Safety Bureau personnel (*ATSB personnel*) to safely access transport accident sites by helicopter winching, including if necessary by being winched into confined areas in connection with investigations into such accidents.

The instrument exempts crew members and passengers of winching helicopters from requirements under Civil Aviation Order 20.16.3 that would otherwise require them to occupy a seat of an approved type. It also exempts operators, crew members and passengers from the obligation to wear a seat belt or safety harness at crucial times. These exemptions allow for flexibility in mobility within the aircraft that is necessary for winching operations. The instrument also exempts operators and pilots in command from requirements under Civil Aviation Order 29.11 that would otherwise prevent ATSB personnel from accessing certain accident sites due to the size of the area and obstructions and hazards within the area.

The instrument also:

- authorises pilots in command to pick up ATSB personnel and their objects
- directs that a winchman's or rescue harness (that is attached to a dispatcher's restraint strap or to the winch or hoist) must be worn by ATSB personnel conducting the winching
- permits ATSB personnel to be carried on, or in, a part of the helicopter not designed for the accommodation of crew or passengers or on, or in, anything attached to the helicopter.

The authorisation, permission and exemptions are subject to conditions that restrict carriage on the helicopter to ATSB personnel and operating crew and prohibit winching over an accident site if the site can reasonably and lawfully be accessed from a helicopter landing site. The conditions also require the operator to conduct a pre-flight risk assessment and related mitigation processes before conducting a winching operation. These conditions are imposed by CASA in the interests of the safety of air navigation.

#### 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**