

Replacement Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX148/21 – Amendment of CASA EX83/21 – Instrument 2021

Purpose

The purpose of this exemptions instrument is to insert a number of additional exemptions into *CASA 83/21 – Part 121 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX83/21* or the ***principal exemptions instrument***). CASA EX83/21 makes a number of exemptions and directions relating to Parts 121 and Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

These CASR Parts are elements of CASA's new Flight Operations Regulations that commence on 2 December 2021. Part 121 deals with Australian air transport operation in larger aeroplanes; Part 91 deals with the rules of the air.

The exemptions are to the operators of an aeroplane for a flight that is a Part 121 operation, and relate to who may be ground support personnel; who may be permitted to enter the cockpit of the aeroplane; use of foreign personnel for certain kinds of training and checking, use of relief pilots, and cabin crew approvals for duty. The exemptions correct technical errors and oversights in the Part 121 regulations that will be remedied on a more permanent basis when the regulations are amended in 2022.

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.

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

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.

Although no new directions are included in the exemptions instrument, the empowerment is retained for consistency with the empowerment of the principal exemptions instrument.

Description of supplementary exemptions

Section 1 provides for the naming of the *CASA EX148/21 – Amendment of CASA EX83/21 – Instrument 2021 (No. 1)*.

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

Section 3 provides that the instrument amends *CASA EX83/21 – Part 121 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021*.

Schedule 1 Amendments

Schedule 1 provides for the additional exemptions.

Amendment 1 adds new definitions to the principal exemptions instrument.

Amendment 2 inserts 8 new sections into the principal exemptions instrument as follows.

Section 14A, Ground support personnel – not direct employees – exemption applies to the operator of an aeroplane for a flight that is a Part 121 operation. It exempts the operator from compliance with training and competency assessment requirements for ground support personnel who are not its direct employees because they may be someone else's employees. The exemption is subject to the condition that the operator must be satisfied (on a reasonable basis) that the relevant person is capable of carrying out, and willing to carry out, the ground support duty in a manner that maintains aviation safety. Alternatively, the exemption applies subject to the condition that the person is supervised by the operator's qualified direct employee.

Section 14B, Ground support personnel duty statement – not direct employees – exemption is consequential on section 14A by relieving the operator from the obligation to have non-employed ground personnel duty statements.

Section 14C, Ground support personnel – direct employees – exemption, is designed to permit a direct employee to be ground support personnel while undergoing training, provided they are supervised by qualified personnel.

Section 14D, Additional persons permitted to enter the cockpit — exemption permits certain specified persons to be additional admittees to the cockpit of a Part 121 aeroplane, but only if the operator’s exposition specifies how the person’s entry is solely related to aviation safety.

Section 14E, Part 121 proficiency checks – foreign conductors of – exemption exempts the operator of an aeroplane for a flight that is a Part 121 operation from compliance with Part 121 proficiency checks under a number of relevant provisions of Part 121, but only to the extent of who may conduct the check. The condition is that the Part 121 proficiency check for which the operator takes the benefit of the exemption must be conducted by a person who is *employed by a training provider* who is authorised by the national aviation authority of a *recognised foreign State* to conduct a check that is equivalent to the proficiency check; and authorised by that national aviation authority to conduct the equivalent check.

Section 14F, Conversion training – foreign conductors of – exemption has the same effect as section 14E except in relation to conversion training rather than Part 121 proficiency checks.

Section 14G, Relief of pilot in command — exemption, exempts the operator and the pilot in command from compliance with provisions of CASR that, for flight above flight level 200, restrict, on the basis of required qualifications and experience, the persons to whom the pilot in command may delegate the conduct of the flight. This relief is permissible only in circumstances where exemptions under sections 28 and 29 of CASA EX83/21 are being used and complied with concerning the pairing of appropriately qualified pilots for flight.

Section 14H, Cabin crew approvals for duty on aeroplane types — exemption, exempts the operator of an aeroplane for a flight that is a Part 121 operation from provisions that would otherwise require individual cabin crew members to hold approvals to be assigned to duty on no more than 4 aeroplane types. The exemption is subject to the condition that *the operator* must hold a CASA approval for the cabin crew members to be so assigned.

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 sunseting 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 when it published, and sought comments on, its 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 has also received and considered additional input provided directly by operators, in finalising the new exemptions instrument when it was realised that the 8 matters mentioned above had been overlooked. 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 EX148/21 – Amendment of CASA EX83/21 – 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 exemptions instrument is to insert a number of additional exemptions into *CASA 83/21 – Part 121 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021 (CASA EX 83/21* or the ***principal exemptions instrument***). CASA EX83/21 makes a number of exemptions and directions relating to Parts 121 and Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

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Human rights implications

The legislative instrument may indirectly engage 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 right to safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social and Cultural Rights.

This engagement is in the context of CASA's statutory purpose. The aim of CASA and its regulatory framework 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 relevant exemptions permit, in a context of calibrated conditions, broader classes of person to act as ground support personnel, or to enter cockpits for safety purposes, or to be used for proficiency checks or conversion training, or as relief pilots, or cabin crew. These measures remove unnecessary restrictions without prejudice to aviation safety,

and, thereby, allow safe operations to continue in circumstances in which they might otherwise be delayed or prevented despite the availability of suitable personnel.

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