

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX18/22 — Amendment of CASA EX81/21 (Air Display Practice Flights and Part 173 Validation Flight Checks) Instrument 2022

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**)* to permit the conduct, in a safe manner, of certain necessary flights that would not otherwise be permitted given the current relevant provisions in Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

CASA EX81/21 made a number of exemptions against Part 91 of CASR that will facilitate implementation of Part 91 in accordance with CASA’s transition policies for Part 91 of CASR. Part 91 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 in CASA EX81/21 were designed to correct technical errors and omissions in Part 91 which gave rise to unintended obligations. Those 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 relevant areas of the aviation industry with relief from having to comply with certain requirements and directions, adherence to which at the time may not have ensured safety compliance. The new Part 91 commenced on 2 December 2021.

On further review of Part 91, post-2 December 2021, it was considered that some additional exemptions were required quite urgently: first, to allow relevant exemptions concerning air displays to also apply to practice flights for such air displays; and to remedy an oversight in relation to minimum height rules which would otherwise inappropriately apply in such a way as to prevent essential validation flight checks for terminal instrument flight procedures.

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 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.

Description of supplementary exemptions

Section 1 provides for the naming of the exemptions instrument as *CASA EX18/22 — Amendment of CASA EX81/21 (Air Display Practice Flights and Part 173 Validation Flight Checks) Instrument 2022*.

Section 2 provides for the commencement of the instrument on 18 March 2022, an urgency required, in particular, for pending validation flight checks.

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 in command of aircraft to which Part 91 applies.

Amendment 1

Currently, section 20 of the principal exemptions instrument, Air displays in Australian territory, exempts the pilot in command of an aircraft conducting an approved air display in Australian territory 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, compliance with which would otherwise make the air display all but impossible to conduct at an acceptable level of aviation safety. Mitigating conditions must be complied with concerning, for example, risk assessments and advance warning about the display.

New section 20A deals with *practice flights* for air displays. Under regulation 91.055, it is an offence if a pilot in command conducts a flight in an aircraft in such a manner that it creates a hazard to another aircraft, a person or property. For an aircraft conducting a flight in an air display, it is a reasonable safety expectation that the pilot in command, and any other crew member, would already have achieved a high degree of competence in the particular air display sequence that they propose to exhibit. Thus, practice flights before the display are essential in the interests of aviation safety.

Under new subsection 20A (1), the section applies to each pilot in command of an aircraft for a flight that is solely and demonstrably a practice flight in Australian territory for an actual or anticipated air display to be conducted in Australian territory (a *practice flight*).

Under subsection 20A (2), to avoid doubt, but without affecting subsection (1), the pilot in command of an aircraft may conduct a practice flight to become competent for an

actual or anticipated air display before receiving the display organiser's approval to participate in the display.

Under subsection 20A (3), the pilot in command is exempted from compliance with a number of provisions of CASR, subject to conditions and limitations as follows:

- (a) regulation 91.090 — in relation to airspeed limits;
- (b) regulation 91.190 — in relation to dropping items from the aircraft;
- (c) subregulation 91.455 (2) — in relation to carriage of final reserve fuel;
- (d) various provisions — in relation to maintaining a lookout for other traffic at aerodromes, joining or avoiding circuit patterns at non-controlled aerodromes, certain requirements at controlled aerodromes, the monitoring of radio frequencies during a flight, and the making of radio reports and broadcasts. Safety conditions apply, for example, for a practice flight in *controlled airspace*, the pilot must have arrangements in place with the Air Traffic Services responsible for the airspace; for a practice flight in *uncontrolled airspace*, the pilot must have arrangements in place to advise other aircraft about the practice flight; for a practice flight in the vicinity of a *non-controlled aerodrome*, the pilot in command must have first ensured that an effective ground communications station, with a qualified radio operator, is operating at all relevant times to advise other aircraft about the practice flight.

In addition, the pilot in command must monitor a separate VHF frequency, ensure that a practice flight ceases 10 minutes before the expected arrival time of any scheduled air transport operation, and ensure that a practice flight is not started or resumed until either 10 minutes after departure of any scheduled air transport operation, or the aircraft is more than 10 nautical miles away.

An important Note explains that if the pilot in command must cease a practice flight, then the radio monitoring, reporting and broadcast rule variances permitted by the exemptions also cease, and the pilot in command must resume radio monitoring, reporting and broadcasting in accordance with Part 91 requirements until the variances are permitted to resume.

Under subsections 20A (4) and (5), if the pilot in command of an aircraft in a practice flight does not start, or ceases, or suspends the flight, in accordance with subparagraph (3) (d) (vi) or (vii), then any exemption under this instrument from any radio monitoring, reporting or broadcasting rule ceases temporarily to apply to the pilot until the requirements of subparagraph (3) (d) (vi) or (vii) no longer apply to the pilot.

Under subsections 20A (4), (6) and (7), in response to a written request from CASA before a practice flight begins, or within 3 months of its completion, the pilot in command must be able to show that the flight was solely and demonstrably a practice flight.

Amendment 2

Under regulation 173.095 of CASR, a certified designer must ensure that each terminal instrument flight procedure designed under the designer's procedure design certificate is validated by a CASA pilot in accordance with any applicable standards set out in the Manual of Standards Part 173 — Standards Applicable to Instrument Flight Procedure Design (the *MOS*).

Chapter 7 of the MOS deals comprehensively with the requirements for a validation flight check. Previously, CASA pilots conducting the validation flight checks held CASA permissions, under regulation 157 of the *Civil Aviation Regulations 1988*, to fly low for the purpose of the checks. Regulation 157 has been repealed with the introduction of Part 91 of CASR, regulations 91.265 and 91.267 of which prescribe minimum height rules for flight over populous and other areas.

While these provisions provided various exclusions from the minimum height rules for certain prescribed kinds of manoeuvres where low flying is essential (and not unduly unsafe, for example, landing and take-off) no specific exclusion was prescribed for validation flight checks. Provision was made (in paragraphs 91.265 (4) (i) and 91.267 (3) (k) to exclude “aircraft engaged in a procedure to determine the suitability of an aerodrome for a landing”. However, this exclusion is considered to have a narrow and specific meaning and cannot apply to a validation flight check.

Hence, new section 24 provides the necessary exemption until such time as regulations 91.265 and 91.267 can be amended, which is anticipated to be later this year when drafting resources are expected to be available.

Subsection 24 (1) provides definitions of a CASA pilot and a validation flight check.

Under subsection 23 (2), the section applies to a CASA pilot who, as the pilot in command, conducts a validation flight check for a terminal instrument flight procedure for regulation 173.095 of CASR.

It also applies to a person who, as the pilot in command, conducts a validation flight check for a terminal instrument flight procedure for regulation 173.095 of CASR, in the circumstance mentioned in paragraph 7.1.24.3 of the Part 173 MOS. (These circumstances arise if the validation pilot is not qualified as pilot in command of a helicopter, aircraft or flight simulator to be used for a validation flight. In that case, another pilot may be assigned to be the pilot in command provided that the validation pilot occupies a seat in the cockpit and directs the conduct of the validation.)

Under subsection 24 (3), the relevant pilot is exempted from compliance with a number of provisions in regulations 91.265 and 91.267 which prescribe and mandate the minimum height rules and which make it an offence to contravene them.

Under subsection 24 (4), each of the exemptions is subject to the condition that the validation flight check must be conducted in accordance with the applicable standards set out in Chapter 7 of the MOS.

Legislation Act 2003 (the LA)

As noted above, 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 is clearly one 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 applies to a class of persons and is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

Sunsetting

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 considered that no further consultation is necessary or appropriate.

In respect of the 2 specific exemptions in the exemption instrument, it is considered that formal consultation is not appropriate given the urgency of the matters. However, there has been informal consultation with elements of the aviation industry who drew CASA's attention to the need to consider the further exemptions.

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).

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 instrument would facilitate the conduct of practice flights for air displays and validation flight checks for terminal instrument flight procedures.

In the absence of the exemption instrument, these kinds of flights would not be permitted. By making provision for them, economic and cost impacts on the relevant air display practitioners and terminal instrument flight procedure designers, are avoided.

Rural and regional impacts

The Minister's Statement of Expectations for the CASA Board states: "I expect that CASA will: ... (b) fully consider the impact of new regulations on general aviation, with a particular focus on regional and remote Australia. All Explanatory Statements drafted by CASA for subordinate legislation should identify the impact on the various categories of operations as well as on communities in regional and remote Australia served by those operations and how these impacts have been considered."

There are no identified rural and regional impacts that differ in any material way from the general economic and cost impacts described above.

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 18 March 2022.

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 EX18/22 — Amendment of CASA EX81/21 (Air Display Practice Flights and Part 173 Validation Flight Checks) Instrument 2022

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)* to permit the conduct, in a safe manner, of certain necessary flights that would not otherwise be permitted given the current relevant provisions in Part 91 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

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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, pending future amendments to Part 91 of CASR planned for later this year. Both exemptions in the instrument have the effect of facilitating, in a safe and prudent manner, particular flying operations, namely, practice flights for air displays and validation flight checks for terminal instrument flight procedure, that would otherwise not be permitted.

As such, the instrument has no direct negative effect of human rights. However, the instrument may reasonably be said to support the right to life, and to contribute to safe and healthy working conditions on board aircraft conducting the relevant flights 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