Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX05/24 — Part 91 Requirements (Anti-collision and Navigation Lights) (CASA EX86/21) Amendment Instrument 2024

**Purpose**

The purpose of *CASA EX05/24 — Part 91 Requirements (Anti-collision and Navigation Lights) (CASA EX86/21) Amendment Instrument 2024* (the ***exemption instrument***) is to enable aircraft engaged in law enforcement surveillance operations in Australian territory to not have to display external anti‑collision and navigation lights in specified circumstances. To achieve this purpose, the exemption instrument inserts into *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021* (***CASA EX86/21***) an exemption from regulation 91.180 of the *Civil Aviation Safety Regulations 1998* (***CASR***) to the extent that the regulation requires compliance by operators and pilots in command of such aircraft with specified provisions of the Part 91 Manual of Standards (the ***Part 91 MOS***) relating to the display of external lights. The exemption is subject to conditions imposed in the interests of the safety of air navigation.

**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) of CASR, 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) of CASR, 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. The preservation of an acceptable level of safety remains paramount.

Under regulation 11.205 of CASR, 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 of CASR.

Under subregulation 11.230 (1), an exemption may remain in force for 3 years or for a shorter period specified in the instrument.

**Legislation — Part 91 of CASR**

Part 91 of CASR sets out the general operating and flight rules which apply in relation to the operation of an Australian aircraft in Australian territory.

Under regulation 91.810 of CASR, the Part 91 MOS may prescribe requirements relating to the fitment and non-fitment of equipment to an aircraft, the carrying of equipment on an aircraft, and equipment that is fitted to, or carried on, an aircraft. Under subregulations 91.810 (2) and (3), a person commits an offence of strict liability if the person is subject to a requirement mentioned in the Part 91 MOS and the requirement is not met.

Section 26.22 of the Part 91 MOS deals with anti-collision lights. Subsections 26.22 (3), (4) and (5) set out requirements for the display of different types of anti-collision lights, including when they must be displayed.

Section 26.24 of the Part 91 MOS deals with navigation lights. Subsection 26.24 (1) provides that an aircraft operating by night must be fitted with navigation lights. Subsection (2) provides that navigation lights, when required to be fitted, must be displayed during a flight, and when operating on the movement area of an aerodrome.

**Other legislation**

Under subsection 14 (1) of the *Legislation Act 2003* (the ***LA***), a legislative instrument may make provision in relation to matters by applying, adopting or incorporating provisions of an Act or disallowable legislative instrument as in force at a particular time or as in force from time to time. A legislative instrument may also make provision in relation to matters by applying, adopting or incorporating any matter contained in any other instrument or writing as in force at, or before, the time the legislative instrument commences. Under subsection 14 (2) of the LA, unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. However, subsection 98 (5D) 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, even if the other instrument or writing does not yet exist when the legislative instrument is made.

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. Under subsection 13 (1) of the LA, subsection 33 (3) applies to legislative instruments as if each provision of the instrument were a section of an Act.

**Background**

Certain Australian government authorities, either themselves or by arrangement with certain aerial work operators, conduct surveillance operations (as defined in the CASR Dictionary) for law enforcement purposes. The surveillance operations serve the public interest by monitoring for organised criminal activity and potential security threats.

For surveillance operations to be effective, the aircraft must remain unseen by the target of the surveillance. In such circumstances, it is necessary for the aircraft not to display its external anti-collision and navigation lights when flying over the area within which the target is located. The pilot of the aircraft determines when it is necessary for the aircraft’s external lights not to be displayed so that the aircraft remains unseen by the target (and may do so with regard to any procedures put in place by the relevant operator). These operations are referred to as **lights‑out operations**.

CASA has previously approved the non-display of external anti-collision and navigation lights in respect of lights-out operations by means of issuing directions under regulation 196 of the *Civil Aviation Regulations 1988* (***CAR***). Regulation 196 of CAR required that external anti-collision and navigation lights be displayed during flight “unless CASA otherwise directs”. Regulation 196 of CAR was repealed on 2 December 2021 and the last of the transitional arrangements that extended the duration of instruments issued under other provisions of CAR expired at the end of 31 January 2024.

Accordingly, to be able to continue to carry out lights-out operations, the relevant operators now require an exemption from the provision in CASR and the provisions in the Part 91 MOS that require aircraft to display anti-collision and navigation lights at certain times. The exemption in the instrument is limited to aerial work operators that conduct lights-out operations, and to pilots in command of relevant aircraft operated for a lights-out operation. The exemptions apply only to operations within Australian territory in a relevant aircraft.

CASA EX86/21 makes a number of exemptions and directions relating to Part 138 and Part 91 of CASR. As the exemption instrument contains exemptions under Part 91 of CASR, it is being inserted into CASA EX86/21.

**Overview of instrument**

The exemption instrument exempts certain operators and pilots in command of aircraft used to conduct lights-out operations in Australian territory from requirements under Part 91 of CASR and the Part 91 MOS to display anti-collision and navigation lights during a lights-out operation.

The exemption is subject to a number of conditions that are designed to ensure that an acceptable level of safety is preserved. CASA expects that the Australian government agencies that conduct or arrange lights-out operations will include procedures to address any privacy concerns arising from lights-out operations. The conditions include requirements for the pilot in command to notify local air traffic service before conducting a lights-out operation, to conduct the lights-out operation under the IFR, and for the operator to equip a relevant aircraft with an operating airborne collision avoidance system (***ACAS***) that displays and alerts the pilot of nearby air traffic. The conditions also restrict the locations where external lights are turned off during a lights‑out operation, by requiring the pilot to ensure external lights are displayed in specified circumstances and are only turned off where necessary for the lights-out operation.

**Documents incorporated by reference**

In accordance with paragraph 15J (2) (c) of the LA, the exemption instrument incorporates the Part 91 MOS and the Part 138 Manual of Standards.

These are disallowable legislative instruments, incorporated as in force from time to time in accordance with subsection 14 (1) of the LA. They are freely available on the website of the Federal Register of Legislation at <https://www.legislation.gov.au/>.

**Content of instrument**

Details of the exemption instrument are set out in Appendix 1.

***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 exemption instrument amends CASA EX86/21, that was registered as a legislative instrument.

Paragraph 98 (5A) (a) of the Act provides that the regulations may empower CASA to 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 exemption instrument applies to classes of persons, being operators and pilots who conduct lights‑out operations. The exemption instrument is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under section 15G, and sections 38 and 42, of the LA.

**Sunsetting**

As the exemption instrument relates to aviation safety and is made under CASR, that means that Part 4 of Chapter 3 of the LA (the ***sunsetting 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 exemption 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 exemption instrument amends CASA EX86/21 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. CASA EX86/21 is itself repealed at the end of 1 December 2024 by virtue of the terms of section 2 of CASA EX86/21. Thus, in practice, no sunsetting 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 as far 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.

Although a formal, public consultation has not been undertaken in relation to the exemption instrument, CASA has received extensive feedback on the need for the exemption instrument from operators and Australian government agencies who have conducted lights-out operations in the past.

**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.

The economic and cost impact of the exemption instrument has been determined by:

(a) the identification of individuals and businesses affected by the exemption instrument; and

(b) consideration of how the requirements to be imposed on individuals and businesses under the instrument will be different compared to existing requirements; and

(c) consideration of community impacts, beyond those direct impacts on individuals and businesses affected by the exemption instrument, that are relevant if the exemption instrument were to result in flow-on effects to other aviation businesses, or local non-aviation businesses that experience a change in their activity due to the exemption instrument.

In terms of economic and cost impacts for subsection 9A (3) of the Act, the exemption instrument will have positive impacts for operators who earn income from conducting lights-out operations and who have made investments in staff and aircraft in the expectation of being able to continue to conduct lights-out operations.

For aviation safety reasons, the exemption instrument is specific to those operators and pilots who fall within its scope and who choose to take the benefit of the exemptions and comply with its conditions.

CASA has assessed that the economic and cost impact of the exemption instrument is not significant as the instrument effectively allows operators who conduct lights-out operations to continue to do so. The Office of Impact Analysis **(*OIA***) has also made the assessment that the impact of the exemption instrument is minor and that an Impact Analysis (***IA***) is not required. As there is no significant economic or cost impact on individuals or businesses, there will be no community impacts.

**Impact on categories of operations**

As stated above, the instrument will have a positive impact on operators who conduct lights-out operations, as it will allow such operations to continue to be conducted.

**Impact on regional and remote communities**

The exemption instrument does not have any particular impact on rural or regional communities.

**Office of Impact Analysis**

An IA is not required because the exemption instrument is covered by a standing agreement between CASA and the OIA under which an IA is not required for exemption or direction instruments (OIA id: 14507).

**Statement of Compatibility with Human Rights**

The Statement of Compatibility with Human Rights at Appendix 2 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Making and commencement**

The exemption instrument commences on the day after it is registered. The exemption instrument has been made by a delegate of CASA relying on the power of delegation under subregulation 11.260 (1) of CASR.

Appendix 1

Details — CASA EX05/24 — Part 91 Requirements (Anti-collision and Navigation Lights) (CASA EX86/21) Amendment Instrument 2024

Section 1 names the exemption instrument.

Section 2 sets out the commencement of the instrument. The instrument commences on the day after it is registered.

Section 3 amends instrument *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021* (the ***principal instrument***).

Schedule 1 sets out an amendment to the principal instrument.

Item [1] of Schedule 1inserts a new section 14A into Part 3 of the principal instrument after section 14. The new section is titled as follows:

14A Application of Part 91 requirements for anti-collision and navigation lights — exemption and conditions

All references below to subsections are to subsections of new section 14A.

Subsection (1) contains definitions for the section. Key definitions are:

***approved transponder*** has the meaning given by section 26.67 of the Part 91 MOS. Section 26.67 of the Part 91 MOS defines ***approved transponder*** as an approved Mode A/C transponder or an approved Mode S transponder.

***external lights***, for an aircraft, means anti-collision lights (as the term is used in section 26.22 of the Part 91 MOS) and navigation lights (as the term is used in section 26.24 of the Part 91 MOS).

***lights-out operation*** means a surveillance operation, conducted for law enforcement purposes by a relevant operator using a relevant aircraft, in which the relevant aircraft’s external lights are not to be displayed while flying over the relevant area.

***relevant aircraft*** means an aircraft operated by a relevant operator for a lights-out operation.

***relevant area*** means the area within which it is necessary for a relevant aircraft’s external lights not to be displayed during a lights-out operation.

***relevant air traffic service*** means the air traffic service for the airspace over the area in which a lights-out operation is conducted.

***relevant operator*** means an aerial work operator that conducts lights-out operations as, or under an arrangement with, any of the following:

(a) the Australian Federal Police;

(b) the Australian Border Force;

(c) a State or Territory police service;

(d) the Department of Home Affairs or an agency under the Department of Home Affairs.

***relevant pilot*** means the pilot in command of a relevant aircraft operated for a lights-out operation.

Subsection (2) provides that the section applies to a relevant operator and a relevant pilot in relation to the conduct of a lights-out operation in Australian territory.

Subsection (3) provides that the relevant operator and relevant pilot are each exempt from regulation 91.810 of CASR, to the extent that the regulation requires compliance with the following provisions of the Part 91 MOS in relation to the relevant aircraft:

(a) subsection 26.22 (3);

(b) subsection 26.22 (4);

(c) subsection 26.22 (5);

(d) that part of subsection 26.24 (2) that requires navigation lights fitted to the aircraft to be displayed during a flight.

Subsection (4) provides that the exemption granted to the relevant operator in subsection (3) is subject to the conditions set out in paragraphs (6) (a) and (b) and subsections (7) to (9).

Subsection (5) provides that the exemption granted to the relevant pilot in subsection (3) is subject to the conditions set out in paragraph 6 (c), subsection (8) and subsections (10) to (12).

Subsection (6) provides that, before conducting a lights-out operation:

(a) the relevant operator must notify CASA that it is an operator that conducts lights-out operations; and

(b) the relevant operator must ensure that the relevant aircraft is equipped with various functional items of equipment (specified in subparagraphs (6) (b) (i) to (iv)); and

(c) the relevant pilot must ensure that the relevant air traffic service is advised of the intention to operate in the relevant area without displaying external lights.

Subsection (7) provides that the relevant operator must ensure that only the minimum number of crew required for the lights-out operation is carried on the relevant aircraft for the operation.

Subsection (8) provides that the relevant operator and relevant pilot must ensure that the lights-out operation is conducted under the instrument flight rules.

Subsection (9) provides that the relevant operator must ensure that the operator’s operations manual contains the following:

(a) procedures regarding entry to, and exit from, a relevant area;

(b) a statement of the following requirements for the relevant pilot:

 (i) to monitor the aircraft’s tracking in accordance with regulation 91.257 of CASR and subsection 14.02 (4) of the Part 91 MOS;

 (ii) to maintain vigilance to see and avoid other aircraft in accordance with regulation 91.325 of CASR and by maintaining a scan of ACAS;

 (iii) to continuously monitor the primary communications medium used by the relevant air traffic service in accordance with regulations 91.635 and 91.640 of CASR.

Subsection (10) provides that the relevant pilot must not turn off external lighting except where it is necessary for the lights-out operation.

Subsection (11) provides that the relevant pilot must ensure that external lights are displayed while the relevant aircraft is climbing to, descending from, transiting between, or travelling to or from the relevant area.

Subsection (12) provides that the relevant pilot must turn the external lights on immediately if any of the following occurs:

(a) any item of equipment mentioned in paragraph (6) (b) fails to function as intended;

(b) the relevant pilot becomes aware of nearby air traffic and assesses that there is a potential risk of collision;

(c) a pilot of another aircraft, or the relevant air traffic service, requests that the external lights be displayed in order to identify the relevant aircraft as air traffic.

Appendix 2

**Statement of Compatibility with Human Rights**

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

CASA EX05/24 — Part 91 Requirements (Anti-collision and Navigation Lights) (CASA EX86/21) Amendment Instrument 2024

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 *CASA EX05/24 — Part 91 Requirements (Anti-collision and Navigation Lights) (CASA EX86/21) Amendment Instrument 2024* (the ***exemption instrument***) is to insert an exemption and conditions into *CASA EX86/21 – Part 138 and Part 91 of CASR – Supplementary Exemptions and Directions Instrument 2021* (***CASA EX86/21***) to enable the non-display of external anti‑collision and navigation lights by aircraft operated for surveillance operations.

The exemption instrument exempts certain aerial work operators who conduct surveillance operations for the purpose of law enforcement using relevant aircraft (defined in the exemption instrument as ***lights-out operations***) from a requirement in Part 91 of the *Civil Aviation Safety Regulations 1998* and requirements in the Part 91 Manual of Standards requiring the display of anti-collision and navigation lights during operations. The exemption instrument also provides exemptions for pilots in command of the relevant aircraft.

The exemption is subject to conditions which are designed to ensure that an acceptable level of safety is preserved. They include requirements to equip an aircraft used for lights-out operations with items that will ensure the pilot can monitor nearby air traffic and to notify local air traffic service before conducting a lights-out operation. The conditions also require the pilot to immediately turn lights back on in certain specified circumstances.

**Human rights implications**

The exemption 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 work under Article 6 of the International Covenant on Economic, Social and Cultural Rights (the ***ICESCR***)
* the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (the ***ICCPR***).

**Human rights implications**

***Right to work under the ICESCR***

The exemption instrument engages with the right to work in that it is required for aircraft operators who are engaged to conduct lights-out operations and pilots who are employed to fly aircraft operated for such operations to continue to do so.

***Right to privacy under the ICCPR***

The exemption instrument engages with the right to privacy because it enables lights‑out operations to continue to be conducted for the purposes of surveillance of persons for law enforcement purposes. However, conditions are imposed on the exemption to limit such operations by requiring the pilots of the aircraft used for the operations to ensure external lights of the aircraft are displayed in specified circumstances and only turned off where necessary for the conduct of the operations.

Given the law enforcement aims of the surveillance, the limitations on who can conduct such operations, and the conditions imposed on the exemption required to enable them to be conducted, the limitation is reasonable and proportionate. Australian government agencies that conduct or arrange lights-out operations are APP entities (within the meaning of the *Privacy Act 1988*) that are subject to the provisions of that Act. CASA would expect that the Australian government agencies that conduct or arrange lights-out operations will include procedures to address any further privacy concerns arising from lights-out operations.

**Conclusion**

This legislative instrument is compatible with human rights. To the extent that it may also limit human rights those limitations are reasonable, necessary and proportionate.

**Civil Aviation Safety Authority**