

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1)

Purpose

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 (F2020L00337), (CASA EX57/20 or the original instrument) contained a series of emergency exemptions from certain provisions of the *Civil Aviation Regulations 1988 (CAR)*, the *Civil Aviation Safety Regulations 1998 (CASR)* and Civil Aviation Order 20.11 (*CAO 20.11*) to extend a range of licence-related and other time limits.

The purpose of *CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1)* (the **amendment instrument**) is to amend *CASA EX57/20* by correcting minor editorial errors, recasting some existing provisions for greater clarity, and incorporating further emergency exemptions, similar to those in *CASA EX57/20*, from certain provisions of *CAR* and *CASR*.

As with the original instrument, without these new exemptions, those who are subject to time limits or other relevant requirements are liable to breach regulatory requirements through no fault of their own, because action to avoid such breaches may involve activity that would break, weaken or undermine the social distancing rules required in Australia because of the COVID-19 pandemic and the consequent state of emergency.

Legislation — exemptions

Subpart 11.F of *CASR* deals with exemptions. Under subregulation 11.160 (1), and for subsection 98 (5A) of the *Civil Aviation Act 1988* (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. 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 (but not an exceptional circumstances exemption for regulation 11.185 about major emergencies) 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.).

Regulation 11.185 of CASR is similar to regulation 11.160, but is used for exceptional circumstances, for example, in a large-scale emergency such as currently prevails in Australia because of the COVID-19 pandemic.

For such an exemption, CASA must regard as paramount the preservation of the highest level of aviation safety that is practicable in the circumstances.

In making the instrument, CASA has arrived at exemption provisions which will preserve the highest level of aviation safety that is reasonably practicable in the circumstances of the COVID-19 pandemic. Thus, both the paramountcy of aviation safety and the practicability of achieving it as the most important consideration in CASA's assessment, have been preserved in the proportionate approach adopted and the conditions imposed.

There is a time limit of 12 months on an exceptional circumstances exemption. The exemption instrument will, therefore, remain in force for the original period of 12 months.

Legislation — CASR and CAR

Section 98 of the Act empowers the Governor-General to make regulations for the Act and the safety of air navigation.

The regulations in Part 61 set out flight crew licensing requirements. The regulations in Part 137 set out requirements for aerial application operations in aeroplanes. The regulations in Parts 141 and 142 set out requirements for flight training operators. The regulations in Part 5 of CAR set out balloon flight crew licensing requirements. (References below to provisions that commence with the numerals: "61" are to Part 61, "137" are to Part 137, "141" are to Part 141 and "142" are to Part 142.

The amendment instrument

In general terms, the exemptions relate to medical certificate exemptions for commercial pilot licence and air transport pilot licence flight tests by a certain class of applicants; exemptions from certain penalty provisions for Part 141 operators, Part 142 operators; exemptions for Part 137 operators from operator proficiency check requirements and operations manual requirements; and to holders of balloon flight crew licences.

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

Legislation Act 2003 (the LA)

As noted above, exemptions under Subpart 11.F of CASR 1998 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 classes of persons, including flight crew licence and balloon flight crew licence holders, AOC holders, Part 137, 141 and 142 certificate holders 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.

Consultation

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.

The exceptions to this are when matters are urgent, and when CASA considers that the relevant state of affairs as well as informal feedback suggests that consultation would add little if anything to the proposed solution but would delay its promulgation to those who need to plan to take advantage of it.

In this case, CASA considers that no consultation is required because of the necessity to make and register the exemption as a matter of urgency in the present circumstances of the COVID-19 pandemic so that those in the aviation industry who are affected know as soon as possible where they stand and that relief has been provided for certain time-based obligations.

It should be noted that, to this end, the exemption instrument CASA EX57/20 was urgently registered on Friday afternoon, 27 March 2020, and the Explanatory Statement followed on Tuesday, 31 March 2020.

Office of Best Practice Regulation (OBPR)

A Regulation Impact Statement (*RIS*) is not required because the exemption instrument is covered by a standing agreement between CASA and OBPR under which a RIS is not required for an exemption (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 and, to the extent that it engages certain rights, it does so in a way that, in the context of the COVID-19 pandemic, as far as practicable, promotes rather than limits those rights.

Commencement and making

The exemption commences on the day it is registered and is repealed at the end of 31 March 2021.

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

**CASA EX63/20 — Licensing, and Operator Training and Checking
(Extensions of Time Due to COVID-19) Exemptions Amendment
Instrument 2020 (No. 1)**

- 1 Name**
This provision names the instrument.
- 2 Duration**
Under this provision, the instrument commences on the day of registration, and is repealed at the end of 31 March 2021, the same date as the original 12-month instrument.
- 3 Amendment of CASA EX57/20**
Under this provision, Schedule 1 amends the original instrument.

Schedule 1 Amendments

- [1] Subsection 3 (1), Definitions**
This amendment inserts some useful definitions.
- [2] After subsection 3 (1), Definitions**
Under this amendment, a reference to anything approved by CASA means approved by CASA in writing.
- [3] After paragraph 4 (1) (b)**
Under this amendment, the applicability of the original instrument is extended to, first, to a person who is the holder of a Part 141 certificate or a Part 142 authorisation that was in force immediately before the commencement of the instrument; and is not the subject of an active show cause notice; and secondly, to a person who is the holder of a balloon flight crew licence that was in force immediately before the commencement of the instrument and is not the subject of an active show cause notice. Show cause notices relate to potential infringements of the regulations and, for safety reasons, the exemptions do not extend to such cases where the matters remain unresolved.
- [4] Paragraph 6 (2) (b)**
Under this amendment, an incorrect mention of a medical certificate is replaced with the correct mention of an approval.
- [5] Section 7, the heading**
Under this amendment, a section heading is corrected.
- [6] Subsection 7 (1)**
Under this amendment, provision is made to extend the flight review exemptions to holders of balloon flight crew licences as well as, currently, holders of flight crew licences
- [7] Paragraph 7 (3) (f)**
Under this amendment, the flight review exemption will apply in relation to the commercial pilot (balloon) licence (a *CPL (balloons)* biennial flight review.

[8] Paragraph 8 (2) (x)

Under this amendment, the 6-month extension to medical certificates is made to also apply to holders of balloon flight crew licences, persons attempting CPL (balloons) flight tests, with corresponding relief in relation to the obligation to produce a current medical certificate on request.

[9] After subparagraph 8 (3) (a) (i)

This amendment is consequential on Amendment [8].

[10] After section 8**8A Exemptions — medical certificates for certain flight tests**

Under this amendment, which inserts a new section 8A, certain applicants for commercial pilot licences and air transport pilot licences are exempted from certain medical certificate requirements in relation to relevant flight tests conducted in an aircraft.

The section applies to applicants who hold a class 2 medical certificate, and who, at any time after 1 January 2018, held a class 1 medical certificate which has expired, or will expire before the applicant takes a relevant flight test in 2020.

The section also applies to Part 141 and Part 142 operators, and their heads of operations, with respect to the applicants.

These persons are, in effect, exempted from applicable requirements to hold a valid class 1 medical certificate for the flight test, and from applicable penalty provisions imposed if a person is flight tested without a valid class 1 medical certificate for the flight test. However, the exemption applies only for, and for the duration of, a flight test taken in 2020 after the commencement of the amendment instrument.

[11] Subsection 9 (4)

This amendment reformulates the duration of the exemptions in relation to operations manual requirements to allow safety risk mitigation plans (which allow for a longer duration) to be approved by CASA both before and after 30 June 2020.

[12] Subsection 10 (2)

This amendment reformulates the duration of the exemptions in relation to bi-annual training and checking requirements to allow safety risk mitigation plans (which allow for a longer duration) to be approved by CASA both before and after 30 June 2020.

[13] Paragraphs 12 (3) (a) and (b)

This amendment reformulates the duration of the exemptions in relation to the requirements imposed on drug and alcohol plan (DAMP) organisations to conduct certain training within certain time limits. The reformulation enables safety risk mitigation plans (which allow for a longer duration) to be approved by CASA both before and after 30 June 2020.

[14] Paragraph 12 (3) (c)

This amendment corrects a typographical error.

[15] Paragraphs 13 (2) (a) and (b)

This amendment reformulates the duration of the exemptions from obligations for the completion of an annual proficiency test in emergency procedures imposed on AOC holders and their crew members. The reformulation enables safety risk mitigation plans (which allow for a longer duration) to be approved by CASA both before and after 30 June 2020.

[16] Paragraph 13 (2) (c)

Under this amendment, an incorrect mention of a flight crew member is replaced with the correct mention of a crew member which has a broader meaning.

[17] Paragraph 13 (2) (c)

This amendment corrects a typographical error.

[18] After section 13

This amendment creates 4 new categories of exemptions.

14 Exemptions — Parts 141 and 142 operators

New section 14 applies to a Part 141 operator and a Part 142 operator (an *operator*), and an operator's head of operations and exempts them from a range of applicable offence and other provisions as follows:

- (a) subregulation 141.110 (1) — with respect to the head of operations regarding subparagraphs (4) (b) (i) and (iv) — this offence provision applies, in the context of the exemption instrument, in relation to the head of operations not being able to carry out his or her responsibilities in relation to prescribed proficiency checks under paragraph 141.130 (2) (h) which links to subparagraphs 141.130 (4) (b) (i) and (iv);
- (b) subregulation 141.175 (1) — under this offence provision, the operator would commit an offence because, in the context of the exemption instrument, the instructors do not meet the instructor proficiency check or flight review requirements in Part 61;
- (c) subregulation 141.185 (1) — the operator would commit an offence because, in the context of the exemption instrument, the instructors might not have completed their standardisation and proficiency checks under regulation 141.190;
- (d) subregulation 141.265 (1) — the operator would commit an offence if the operations manual is not complied with because, in the context of the exemption instrument, the checks it describes might not be carried out;
- (e) subregulation 141.290 (1) — the operator would commit an offence because the pilot in command, in the context of the exemption instrument, might not be authorised under Part 61 because of provisions for flight reviews and proficiency checks;
- (f) subregulation 141.300 (1) — the operator would commit an offence because, in the context of the exemption instrument, the pilot in command might not be authorised under Part 61 because of provisions for flight reviews and proficiency checks;
- (g) paragraph 142.100 (1) (d) — for the head of operations – the head of operations, in the context of the exemption instrument, might, for the

purposes of the AOC authorising Part 142 activities, fail to comply with prescribed requirements from which the head is exempted;

- (h) paragraph 142.120 (1) (b) — for the head of operations – the head of operations, in the context of the exemption instrument, might, for the purposes of the certificate authorising Part 142 activities, fail to comply with prescribed requirements from which the head is exempted;
- (i) subregulation 142.165 (1) — this offence provision applies to the head of operations not being able to carry out his or her responsibilities under paragraphs 142.190 (2) (l) and (n) only because, in the context of the exemption instrument, the personnel might not comply with the requirements in Part 61 for flight reviews and proficiency checks;
- (j) subregulation 142.225 (1) — the operator would commit an offence because, in the context of the exemption, the personnel would not be complying with the exposition because they do not meet the proficiency check or flight review requirements in Part 61;
- (k) subregulation 142.230 (1) — the operator would commit an offence only because the personnel would not, in the context of the exemption instrument, be authorised under Part 61 because they do not meet the proficiency check or flight review requirements in Part 61;
- (l) subregulation 142.320 (1) — the operator would commit an offence because, in the context of the exemption instrument, the instructors might not have completed their standardisation and proficiency checks under regulation 142.325;
- (m) subregulation 142.345 (1) — the operator would commit an offence because, in the context of the exemption, the operator might not be compliant with its exposition because the checks it describes might not be carried out;
- (n) subregulation 142.365 (1) — with respect to paragraphs 142.340 (1) (i), (k), and (s) — the operator would commit an offence because, in the context of the exemption, the pilot in command might not be authorised under Part 61 because of provisions for flight reviews and proficiency checks;
- (o) subregulation 142.375 (1) — the operator would commit an offence because, in the context of the exemption, the pilot in command might not be authorised under Part 61 because of the other provisions such as flight reviews and proficiency checks.

The exemptions would apply only to the extent that a contravention of, or a failure to comply with, the provision arose strictly and directly from compliance with the terms and conditions of another exemption under the instrument.

The exemptions would also only apply until the end of 30 June 2020 if the operator did not have a safety risk mitigation plan approved by CASA (an *approved safety plan*); or until the end of 31 March 2021 if the operator did have an approved safety plan.

15 Exemptions – Part 137 operators – operator proficiency checks

Under this new section, each person (an *operator*) who is the holder of an AOC that authorises the conduct of aerial application operations under Part 137 of CASR is exempted from regulation 137.235 (in relation to Part 61 pilot licencing requirements) and regulation 137.240 (operator proficiency check requirements). However, the exemption applies only if the pilot in command of

the operator's aeroplane held a valid operator proficiency check on 1 March 2020.

In addition, the duration of the exemptions is limited as follows:

- (b) for an operator proficiency check that expires after 1 March 2020 but on or before 31 July 2020 — the extension period is 3 months from the expiry date; and
- (c) for an operator proficiency check that expires after 31 July 2020 but on or before 30 September 2020 — the extension period is 2 months from the expiry date; and
- (d) for an operator proficiency check that expires after 30 September 2020 but on or before 30 November 2020 — the extension period is 1 month from the expiry date.

16 Exemptions – Part 137 operators – operations manuals

Under this new section, AOC holders for Part 137 aerial application operations, their crew member and other persons engaged on the operations are exempted from the following provisions:

- (a) regulation 137.055 — making it an offence if an aerial application operation is not conducted in accordance with the operations manual, which may occur in the context of the exemption instrument;
- (b) regulation 137.080 — in relation to making operations manual changes, a requirement that could be breached in the context of the exemption instrument;
- (c) regulation 137.085 — in relation to the process for changing certain procedures, a requirement that could be breached in the context of the exemption instrument.

The exemptions apply only to the extent that, because of the effect of another exemption in the exemption instrument, the operator would have to amend or revise, and make available, the operations manual to comply with regulation 137.055; or the crew member or other persons would have to comply with instructions in the operations manual that are no longer appropriate solely because of the effect of the other exemptions. In addition, the exemptions only apply if the operator ensures that the crew members and other persons are informed of the applicable effects of the exemption instrument.

The exemptions would also only apply until the end of 2020.

17 Exemptions — balloon flight instructors

This new section applies to a person (the *holder*) who is the holder of a balloon flight crew licence that was in force immediately before the commencement of this instrument; who is not the subject of an active show cause notice; who is required to hold a flight instructor (balloon) rating to conduct a range of balloon training and checking activities mentioned in paragraph 16.5 of Civil Aviation Order 40.7; who on 1 March 2020 held a flight instructor (balloon) rating that was in force; and who is, or is employed by, a balloon AOC holder authorised to conduct balloon training and checking etc.

Such a holder is exempt from the following provisions to the extent that the provision requires a person to be the holder of a flight instructor (balloon) rating that is in force:

- (a) sub-subparagraph 4.6 (b) (ii) — to be pilot in command for a holder of the Class 1 (R) endorsement who is completing requirements for the removal of a restriction on his or her endorsement; and
- (b) sub-subparagraph 5.2 (d) (ii) — to conduct Class 2 balloon endorsement proficiency check flights; and
- (c) sub-subparagraph 5.7 (b) (ii) — to be pilot in command for a holder of the Class 2 (R) endorsement who is completing requirements for the removal of a restriction on his or her endorsement.

However, the exemption applies only to the extent that the holder's flight instructor (balloon) rating expired after 1 March 2020 and has not been renewed; and an unsuccessful attempt to pass the flight test for renewal of the holder's flight instructor (balloon) rating has not been made; and if the relevant AOC holder does not have a safety risk mitigation plan approved by CASA (an ***approved safety plan***) — only until the end of 30 June 2020; and if the relevant AOC holder operator has an approved safety plan — until the end of 31 March 2021.

Statement of Compatibility with Human Rights

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

CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 No. 1)

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

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020 (F2020L00337) (CASA EX57/20 or the original instrument) contained a series of emergency exemptions from certain provisions of the *Civil Aviation Regulations 1988 (CAR)*, the *Civil Aviation Safety Regulations 1998 (CASR)* and Civil Aviation Order 20.11 (*CAO 20.11*) to extend a range of licence-related and other time limits.

The purpose of *CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1)* (the **amendment instrument**) is to amend *CASA EX57/20* by correcting minor editorial errors, recasting some existing provisions for greater clarity, and incorporating further emergency exemptions, similar to those in *CASA EX57/20*, from certain provisions of *CAR*, and *CASR*.

As with the original instrument, without these new exemptions, those who are subject to time limits or other relevant requirements are liable to breach regulatory requirements through no fault of their own, because action to avoid such breaches may involve activity that would break, weaken or undermine the social distancing rules required in Australia because of the COVID-19 pandemic and the consequent state of emergency.

In general terms, the exemptions relate to medical certificate exemptions for commercial pilot licence and air transport pilot licence flight tests by a certain class of applicants; exemptions from certain penalty provisions for Part 141 operators, Part 142 operators; exemptions for Part 137 operators from operator proficiency check requirements and operations manual requirements.

Human rights implications

The exemption instrument may engage the following human rights:

- 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*)
- the right to work under Article 6 (1) of the *ICESCR*.

Right to life under the ICCPR***Right to safe and healthy working conditions under the ICESCR******Right to work under the ICESCR***

The COVID-19 pandemic has given rise to the need to observe Australian Government social distancing rules to prevent people contracting or spreading the virus. These rules apply to all, including to protect the life, health and safety of personnel engaged in aviation operations and associated activities like training. At the same time, aviation safety requires pilots and others to adhere to certain regulatory requirements concerning, for example, medical certification, ongoing operational review, proficiency, training, checking, certain rating renewal and operations manual compliance.

It follows that if essential aviation services are to be safely continued, a careful and calculated balance has had to be struck between these competing objectives. Because of their temporary, calibrated and conditional nature, the range of exemptions in the exemption instrument is considered to achieve an appropriate balance including, for example, by requiring approved safety risk mitigation plans for exemptions from time-based requirements that might last for some months. The requirement for such approved plans will, in turn, contribute to protecting the right to life through approved safety risk mitigation measures that will minimise the risk of accidents and prevent accidental death.

A consequential effect of the careful balance described above is to protect the right to work of various categories of aviation personnel who might otherwise have lost that right, for example, by losing medical certification, ongoing operational review, proficiency, training, checking, rating renewal and operations manual compliance.

Human rights implications

The exemptions in the legislative instrument are 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*. To the extent that the instrument engages certain of these rights, it does so in a way that is reasonable, necessary and proportionate to ensure the safety of relevant aviation personnel during the COVID-19 pandemic, but also in a calculated and balanced way that does not undermine aviation safety.

Conclusion

This legislative instrument is compatible with human rights, and to the extent that it engages certain rights it does so in a way that, in the context of the COVID-19 pandemic, as far as practicable, promotes rather than limits those rights.

Civil Aviation Safety Authority