

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX70/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 2)

Purpose

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020, as amended (F2020C00256) (*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 to extend a range of licence-related and other time limits in response to the COVID-19 pandemic.

The original instrument was amended by *CASA EX63/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 1)* (the **first amendment instrument**, made on 7 April 2020) essentially to add further, new, and different, exemptions to deal with other emerging impacts of the pandemic.

A second amendment instrument is now needed to continue to deal with other emerging impacts through exemptions. Once again, these are further, new, and different, exemptions and the second amendment instrument is, in no sense, the same in substance as the original instrument.

The second amendment instrument is in response to the COVID-19 pandemic social distancing rules which require relevant licence holders to avoid, as far as possible, working in close proximity to others during assessment activities. In addition, the air traffic service provider responsible for these activities (Airservices Australia) has implemented a rostering scheme which aims to mitigate operational and personnel risks associated with COVID-19 and, therefore, the availability of relevant licence holders to conduct assessments and supervision is reduced, and the ability to meet recency requirements is diminished.

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. 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 (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

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 65 of CASR deal with air traffic service licensing and, relevantly the holders of air traffic control (*ATC*) licences and flight service licences, the persons they may supervise, and the offences that may be committed through failure to comply with the regulations.

Under subregulation 65.025 (1) of CASR, the holder of an ATC licence or a flight service licence satisfies the *recency requirement* in relation to an endorsement at a particular time if he or she has performed the duties required by the relevant function at the aerodrome or in relation to the airspace to which the endorsement relates, for at least 5 hours *within the previous 21 days*.

Under subregulation 65.025 (2), if an ATS provider specifies in its operations manual that 2 or more endorsements are of like type, a licence holder who performed the duties of any of those endorsements for a total of at least 5 hours within the previous 21 days also satisfies the recency requirement.

Under paragraph 65.030 (1) (b), the holder of an ATC licence or a flight service licence satisfies the **currency requirement** in relation to an endorsement at a particular time if (among other things) within the previous 6 months, his or her performance of the relevant function at the aerodrome, or in relation to the airspace, to which the endorsement relates, has been assessed as satisfactory.

Under subparagraph 65.035 (1) (c) (i), a person may carry out an ATC function in Australian territory if, at the time the person carries out the function (among other things), he or she satisfies the recency and currency requirements in relation to the endorsement.

Under subregulation 65.035 (2), a person to whom subregulation (3) applies may carry out an ATC function in Australian territory under the supervision of a person who meets the requirements of subregulation (1).

Subregulation 65.035 (3) applies to various prescribed classes of trainees who may carry out an ATC function under appropriate licence holder supervision.

Under subregulations 65.040 (1) and (2), it is an offence if a person to whom subregulation 65.035 (3) applies (the **trainee**) fails to comply with the supervisor's directions when carrying out an ATC function under the supervision of a person who meets the requirements of subregulation 65.035 (1).

Under subregulation 65.045 (1), it is an offence for a person who is not authorised to do so by subregulation 65.035 (1) or (2) to carry out an ATC function in Australian territory.

Under subregulation 65.045 (2), it is an offence for a person to whom subregulation 65.035 (3) applies to carry out an ATC function in Australian territory if the person is not acting under the supervision of a person who meets the requirements of subregulation 65.035 (1).

Under subparagraph 65.050 (1) (c) (i), a person may carry out a flight service function in Australian territory if, at the time he or she carries out the function, he or she satisfies the recency and currency requirements in relation to the endorsement.

Under subregulation 65.050 (2), a person to whom subregulation (3) applies may carry out a flight service function in Australian territory under the supervision of a person who meets the requirements of subregulation (1).

Subregulation 65.050 (3) applies to various prescribed classes of trainees who may carry out flight service functions under appropriate licence holder supervision.

Under subregulations 65.055 (1) and (2), it is an offence if a person to whom subregulation 65.050 (3) applies (the **trainee**) fails to comply with the supervisor's directions when carrying out a flight service function under the supervision of a person who meets the requirements of subregulation 65.055 (1).

Under subregulation 65.060 (1), it is an offence for a person who is not authorised to do so by subregulation 65.050 (1) or (2) to carry out a flight service function in Australian territory.

Under subregulation 65.060 (2), it is an offence for a person to whom subregulation 65.050 (3) applies to carry out a flight service function in Australian territory if the person is not acting under the supervision of a person who meets the requirements of subregulation 65.050 (1).

The second amendment instrument

In general terms, the exemptions are designed to provide the holders of ATC licences and flight service licences that are endorsed for particular duties and functions at particular aerodromes or in relation to particular airspace, and that were in force immediately before 1 April 2020, with additional time in which to satisfy their recency and currency requirements without committing offences.

Thus, under the exemption, these licence holders would satisfy their **recency** requirement by performing relevant duties within the previous 30 days of last performance instead of the current 21 days. Under the exemptions, these licence holders would satisfy their **currency** requirement by performing relevant functions within the previous 9 months rather than the previous 6 months.

The exemptions also enable trainees to continue to be lawfully supervised by relevant licence holders who for recency and currency purposes take advantage of the exemptions.

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

Not the same in substance

For the convenience of the affected aviation industry personnel at a time of emergency, CASA has chosen to make additional exemptions as amendments to the original exemption instrument which is then compiled to contain the set for ease of reference.

Because the second amendment instrument introduces further, new, and different, exemptions to deal with other emerging impacts of the pandemic, this does not constitute the remaking of a legislative instrument that is the same in substance as an original legislative instrument, namely the first amendment instrument, CASA EX63/20, that has not have been tabled before each House of the Parliament due to the restricted sittings of the House at this time. (The original instrument was tabled on 8 April 2020.)

Under subsection 46 (1) of the *Legislation Act 2003* (legislative instruments not to be remade while required to be tabled) if a legislative instrument (the **original legislative instrument**) has been registered (in this case CASA EX63/20), no legislative instrument the same in substance as the original legislative instrument is to be made during the period defined by subsection (2) unless both Houses of the Parliament by resolution approve the making of an instrument the same in substance as the original legislative instrument.

Under subsection 46 (2), the period referred to in subsection (1) is the period starting on the day on which the original legislative instrument was registered and ending at the end of 7 days after, in effect, tabling of the instrument, in order to allow both Houses of the Parliament sufficient time to consider a remade instrument. These rules are an element of a set of rules that have their origin in controversial attempts in the 1930s to continuously remake and keep in force “same in substance” instruments that a House of the Parliament had disallowed.

These rules do not apply to the second amendment instrument because it is, quite patently, on its face, not the same in substance as the first amendment instrument which dealt with different exemptions, from different provisions of CASR, for different purposes.

The leading authority on this is *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations) [1943] HCA 21* which concerned the remaking of regulations (after parliamentary disallowance), in alleged contravention of “the same in substance” rule as it then appeared in section 49 of the *Acts Interpretation Act 1901*. Latham CJ noted that regulations should be held to be substantially the same if their material provisions, as in fact operative, produce *the same substantial result* and produce substantially, that is, in large measure, though not in all details, *the same effect* as the disallowed regulation. This is clearly not the case here vis-a-vis the first amendment instrument.

McTiernan J noted that a new regulation would be the “same in substance” as a disallowed regulation if, irrespective of form or expression, it were so much like the disallowed regulation in its general legal operation that it could be fairly said to be *the same law* as the disallowed regulation. Again, this is clearly not the case here.

Williams J noted that section 49 required that each regulation forming part of a set of regulations which has been disallowed must be contrasted with the regulation *which replaces it*. There is no replacement, as such, in operation here.

Dowsett J, in *Perrett v Attorney General of the Commonwealth of Australia [2015] FCA 834*, held that section 48 should be construed as requiring that, in order that a legislative instrument be invalid, it must be, in substance or legal effect, *identical to* the previously disallowed measure. The second amendment instrument is clearly not identical to the first amendment instrument. However, for the purposes of the second amendment instrument, it is not necessary to rely on this decision in light of CASA’s reliance on the opinions expressed in *Victorian Chamber of Manufactures v Commonwealth (Women’s Employment Regulations)* as summarised above.

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 classes of persons, namely the relevant licence holders and trainees, 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 formally 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. Nevertheless, CASA has engaged with Airservices Australia to confirm the suitability of the amendment instrument in the particular circumstances.

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 EX70/20 — Licensing, and Operator Training and Checking
(Extensions of Time Due to COVID-19) Exemptions Amendment
Instrument 2020 (No. 2)**

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] After paragraph 4 (1) (bb)

This amendment indicates that the exemption instrument also applies to a person who is the holder of an ATC licence or a flight service licence that was in force immediately before 1 April 2020; or such a person who, for subregulation 65.035 (3) or 65.050 (3) of CASR, is under the supervision of such other persons and, in either case, is not the subject of an active show cause notice.

[2] Paragraph 8 (1) (b)

This amendment clarifies the scope of the existing exemption regarding medical certificates.

[3] After section 17

This amendment inserts a new section 18 containing new exemptions.

Under subsection (1), the section applies to each person (the *licence holder*) who is the holder of one of the following licences that is endorsed for certain duties for a particular aerodrome or in relation to particular airspace (the *relevant endorsement*):

- (a) an ATC licence, so endorsed under regulation 65.085 of CASR;
- (b) a flight service licence, so endorsed under regulation 65.140 of CASR.

Under subsection (2) each licence holder to whom a provision of CASR mentioned in subsection (3) applies is exempt from the provision but only:

- (a) to the extent mentioned in subsection (4); and
- (b) if the requirement in subsection (5) is met; and
- (c) if the condition mentioned in subsection (6) is complied with.

Under subsection (3), for subsection (2), the provisions are the following:

- (a) subregulation 65.045 (1) — but only with respect to subparagraph 65.035 (1) (c) (i);
- (b) subregulation 65.060 (1) — but only with respect to subparagraph 65.050 (1) (c) (i).

Under subsection (4), for paragraph (2) (a), the exemption applies only to the extent that, but for the exemption, the licence holder would commit an offence by failing, at a particular time, to satisfy:

- (a) the applicable recency requirement under subregulation 65.025 (1) or (2) for the relevant endorsement; or
- (b) the applicable currency requirement under paragraph 65.030 (1) (b) for the relevant endorsement.

Under subsection (5), for paragraph (2) (b), the exemption applies only if the licence holder:

- (a) is employed by Airservices Australia; and
- (b) was authorised to perform the duties under the relevant endorsement on 1 March 2020.

Under subsection (6), for paragraph (2) (c), the licence holder must comply, to the extent applicable, with:

- (a) subregulations 65.025 (1) and (2) — as if the reference to 21 days was a reference to 30 days; and
- (b) paragraph 65.030 (1) (b) — as if the reference to 6 months was a reference to 9 months.

Under subsection (7), but subject to subsection (8):

- (a) a person to whom subregulation 65.035 (3) applies is exempt from subregulation 65.045 (2); and
- (b) a person to whom subregulation 65.040 (1) applies is exempt from subregulation 65.040 (2); and
- (c) a person to whom subregulation 65.055 (1) applies is exempt from subregulation 65.055 (2); and
- (d) a person to whom subregulation 65.050 (3) applies is exempt from subregulation 65.060 (2).

Under subsection (8), exemption under subsection (7) applies:

- (a) only to the extent that the person is acting under the supervision of an applicable licence holder mentioned in subsection (1), who is the subject of an applicable exemption under subsection (2); and
- (b) subject to the condition that the person complies with the directions of the person as if regulation 65.040 or 65.055 (as the case requires) continued to apply despite the supervisor acting under an applicable exemption under subsection (2).

Statement of Compatibility with Human Rights

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

CASA EX70/20 — 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, as amended (F2020C00256) (*CASA EX57/20* or the **original instrument**) contained a series of emergency exemptions from certain provisions of the *Civil Aviation Regulations 1988*, the *Civil Aviation Safety Regulations 1998* and Civil Aviation Order 20.11 to extend a range of licence-related and other time limits in response to the COVID-19 pandemic.

The second amendment instrument is in response to the COVID-19 pandemic social distancing rules which require relevant licence holders to avoid, as far as possible, working in close proximity to others during assessment activities. In addition, the air traffic service provider responsible for these activities (Airservices Australia) has implemented a rostering scheme which aims to mitigate operational and personnel risks associated with COVID-19 and, therefore, the availability of relevant licence holders to conduct assessments and supervision is reduced, and the ability to meet recency requirements is diminished.

In general terms, the exemptions are designed to provide the holders of air traffic control licences and flight service licences that are endorsed for particular duties and functions at particular aerodromes or in relation to particular airspace, and that were in force immediately before 1 April 2020, with additional time in which to satisfy their recency and currency requirements without committing offences.

Thus, under the exemption, these licence holders would satisfy their **recency** requirement by performing relevant duties within the previous 30 days of last performance instead of the current 21 days. Under the exemptions, these licence holders would satisfy their **currency** requirement by performing relevant functions within the previous 9 months rather than the previous 6 months.

The exemptions also enable trainees to continue to be lawfully supervised by relevant licence holders who for recency and currency purposes take advantage of the exemptions.

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 air traffic services and associated activities. At the same time, aviation safety requires air traffic licence holders and flight service licence holders to adhere to certain regulatory requirements concerning, for example, recency, currency, training and assessment.

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 by providing some limited extensions of time for compliance with recency, currency and training and assessment requirements.

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 recency, currency or training and assessment opportunities.

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