

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX132/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 3)

Purpose

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020, as amended (F2020C00325) (*CASA EX57/20*) contained a series of emergency exemptions from certain provisions of the *Civil Aviation Regulations 1988*, 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.

CASA EX57/20 reflects the effects of 2 amending instruments made in April 2020 because further responses were needed to provide calibrated alleviation to sectors of the aviation industry faced with ongoing border closures, lockdown restrictions and social and physical distancing requirements caused by the pandemic.

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 3) (the **third amendment**) makes further adjustments considered necessary in what is a generally dynamic and unpredictable set of circumstances.

In general terms, the exemptions are designed to further extend the already extended time provided for pilots and others to satisfy flight proficiency, flight review and medical certification requirements. The exemptions also confine some of the future extensions of medical certification renewal times to operations or flight tests conducted within Australia on or after 23 September 2020. However, it is still expected that the exemptions instrument will not be required beyond 31 March 2021.

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 third amendment, 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, expiring at the end of 31 March 2021.

Legislation — CASR

Section 98 of the Act empowers the Governor-General to make regulations for the Act and the safety of air navigation. Part 61 of CASR sets out flight crew licensing requirements.

A series of provisions in Part 61 require that relevant pilots and flight examiners complete proficiency checks and flight reviews appropriate to their licence and rating, within certain time cycles which create expiry dates and the need for renewals.

A series of provisions in Parts 61 and 65 require that relevant pilots, air traffic controllers and flight service operators have valid medical certificates which have not passed their expiry date.

A series of provisions in Part 141 for the operator's head of operations, and in Part 142 for the operator's head of operations, and in Part 172, require relevant personnel to have valid medical certificates which have not passed their expiry date.

The various provisions, as applicable, cover the many categories of pilots, including student pilots, persons undergoing flight tests, recreational pilots, private pilots, commercial, multi-crew and air transport pilots, flight activity endorsement holders, flight instructors, flight examiners, flight engineers, glider pilots, air traffic controllers and relevant personnel of air traffic service providers. They also cover circumstances in which a valid, that is current, medical certificate must be carried or produced.

Third amendment

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

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

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.

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 appropriate 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.

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 23 September 2020.

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 EX132/20 — Licensing, and Operator Training and Checking
(Extensions of Time Due to COVID-19) Exemptions Amendment
Instrument 2020 (No. 3)**

1 Name

This provision names the instrument.

2 Commencement

Under this provision, the instrument commences on 23 September 2020.

3 Amendment of CASA EX57/20

Under this provision, Schedule 1 amends CASA EX57/20 (as amended).

Schedule 1 Amendments

[1] Section 2, the chapeau

This amendment is a drafting support for amendment 2.

[2] After subsection 2 (1)

This amendment is designed to explain the essentially temporary and contingent nature of the exemptions instrument driven as it is by the unpredictable impacts of the pandemic. The amendment provides that the instrument may be repealed, or repealed and replaced, or amended, by CASA sooner than its stated expiry date of the end of 31 March 2021 if CASA considers that such action is required and safe in the context of any ongoing COVID-19 pandemic.

[3] Subsection 4 (1)

This amendment is a drafting support for amendment 4.

[4] After subsection 4 (2)

This amendment is required for essentially the same reasons as are set out for amendment 2. It provides that exemption from the requirements of a provision to which the instrument applies, ceases to apply to a person if the person is unable to demonstrate to CASA, on request, that Australian or foreign laws in response to the COVID-19 pandemic make it impossible, impracticable or unreasonable for the person to comply with the requirements of the provision.

[5] Paragraph 6 (3) (i)

This amendment (removing mention of regulation 61.1285 in relation to examiner proficiency checks) is a drafting support for amendment 12.

[6] Subsection 6 (4), the chapeau

This amendment is a drafting support for amendment 11, explained under amendment 8.

[7] Subparagraph 6 (4) (b) (ii)

This amendment is a technical drafting improvement. Previously it was considered that the appropriate application of subsection 6 (7) was implied by the terms of subsection 6 (6) when it included the words “subject to subsection (7)”. However, this amendment makes the appropriate application of subsection 6 (7) explicit without having to resort to an implication.

[8] Paragraph 6 (5) (a)

Previously under section 6 of CASA EX57/20, the holder of a flight crew licence, or of certain analogous CASA approvals, is exempted from certain provisions in Part 61 of CASR listed in the instrument to the extent that the provision imposes an expiry date on the validity of the holder's proficiency check under the provision, provided the holder completes the proficiency check within a prescribed extended time. The third amendment extends these extended times.

For a holder conducting operations on their own behalf, the new times are as follows:

- (a) for a proficiency check, under an applicable regulation, that expires after 31 March 2020 but on or before 31 October 2020 — the extension period is 3 months from the expiry date;
- (b) for a proficiency check, under the applicable regulation, that expires after 31 October 2020 but on or before 31 December 2020 — the extension period is 2 months from the expiry date;
- (c) for a proficiency check, under an applicable regulation, that expires after 31 December 2020 but on or before 28 February 2021 — the extension period is 1 month from the expiry date.

For a holder conducting operations on behalf of an AOC holder, with or without a safety risk mitigation plan approved by CASA, the extended times under CASA EX57/20 are unchanged.

However, under new subsection 6 (8), the holder of an aerial application rating (**AAR**), whose AAR proficiency check under regulation 61.1110 of CASR expires after 31 March 2020, is given an extension period as follows:

- (a) when conducting operations for an AOC holder who implements a safety risk mitigation plan approved by CASA — until the end of 31 March 2021; or
- (b) if paragraph (a) does not apply — for the extension period mentioned above as if the holder were conducting operations on their own behalf.

[9] Paragraph 6 (5) (b)

This amendment is part of the sequence of amendments for the purposes of the explanation given under amendment 8.

[10] Paragraph 6 (5) (c)

This amendment is part of the sequence of amendments for the purposes of the explanation given under amendment 8.

[11] After subsection 6 (7)

This amendment is part of the sequence of amendments for the purposes of the explanation given under amendment 8.

[12] After section 6 — new sections 6A, 6B and 6C

This amendment inserts 3 new sections into CASA 57/20.

6A Exemptions – examiner proficiency checks – options

This amendment provides that the holder of a flight examiner rating and the holder of an approval under regulation 61.040 are exempted from the requirement under regulation 61.1285 or regulation 61.040, respectively as applicable, to have a valid proficiency check for the purposes of the regulation, but only to the extent provided for under new section 6B or 6C.

A Note explains that the effect of section 6A is that there are 2 alternative avenues for a relevant flight examiner to be exempted from the requirement under regulation 61.1285 to have a valid proficiency check.

6B Exemptions – examiner proficiency checks – timing

Previously, section 6 of CASA EX57/20 provided exemptive relief for flight examiners and certain analogous CASA approvals, from the flight examiner proficiency check. However, it has been necessary to modify this by making separate and different provision for such flight examiners. Thus, these holders are exempted from regulation 61.1285 of CASR to the extent that the provision imposes an expiry date on the validity of the holder's proficiency check, provided the holder completes the proficiency check within a prescribed extended time as follows:

- (a) for a proficiency check, under an applicable regulation, that expires after 31 March 2020 but on or before 31 July 2020 — the extension period is 6 months from the expiry date;
- (b) for a proficiency check, under an applicable regulation, that expires after 31 July 2020 but on or before 30 September 2020 — the extension period is 5 months from the expiry date;
- (c) for a proficiency check, under an applicable regulation, that expires after 30 September 2020 but on or before 30 November 2020 — the extension period is 4 months from the expiry date;
- (d) for a proficiency check, under an applicable regulation, that expires after 30 November 2020 but on or before 31 January 2021 — the extension period is 2 months from the expiry date;
- (e) for a proficiency check, under an applicable regulation, that expires after 31 January 2021 but on or before 28 February 2021 — the extension period is 1 month from the expiry date.

6C Exemptions — substitute proficiency checks for examiners

This amendment provides that the holder of a flight examiner rating and the holder of an approval under regulation 61.040 which requires (the *requirement*) the holder to have a valid proficiency check are exempted from regulation 61.1285 or 61.040, respectively as applicable, essentially in accordance with, subsections (3) and (4).

Under subsection (3), the exemption applies to the holder:

- (a) only if, on or after 23 September 2020 and before 31 March 2021, the holder undertakes and successfully completes a substitute proficiency check in accordance with subsection (4); and
- (b) only for the period:
 - (i) starting on the day after the holder successfully completes the substitute proficiency check; and
 - (ii) ending at the end of 31 March 2021.

Under subsection (4), the substitute proficiency check must comply with the requirements for an examiner proficiency check under section 13, and Appendix 6 in Schedule 6, of the Part 61 Manual of Standards (the *MOS*) as if the substitute proficiency check were an examiner proficiency check, except that the substitute proficiency check must focus on the knowledge and briefing requirements and need not be conducted in an aircraft or an approved flight simulation training device. A Note also explains that CASA intends to make future arrangements for the appropriate recognition of substitute proficiency checks in relation to compliance with examiner proficiency check obligations arising after 31 March 2021.

[13] Subparagraph 7 (4) (b) (ii)

This amendment is a technical drafting improvement. Previously it was considered that the appropriate application of subsection 6 (7) was implied by the terms of subsection 6 (6) when it included the words “subject to subsection (7)”. However, this amendment makes the appropriate application of subsection 6 (7) explicit without having to resort to an implication.

[14] Paragraph 7 (5) (a)

Previously under section 6 of CASA EX57/20, the holder of a flight crew licence, or a balloon flight crew licence, or of certain analogous CASA approvals, is exempted from certain provisions in Part 61 of CASR in relation to flight reviews and recent experience to the extent that the provision imposes an expiry date on the validity of the holder’s proficiency check provided the holder completes the proficiency check within a prescribed extended time. The third amendment extends these extended times.

For a holder conducting operations on their own behalf, the new times are as follows:

- (a) for a proficiency check, under an applicable regulation, that expires after 31 March 2020 but on or before 31 October 2020 — the extension period is 3 months from the expiry date;
- (b) for a proficiency check, under the applicable regulation, that expires after 31 October 2020 but on or before 31 December 2020 — the extension period is 2 months from the expiry date;
- (c) for a proficiency check, under an applicable regulation, that expires after 31 December 2020 but on or before 28 February 2021 — the extension period is 1 month from the expiry date.

For a holder conducting operations on behalf of an AOC holder, with or without a safety risk mitigation plan approved by CASA, the extended times under CASA EX57/20 are unchanged.

[15] Paragraph 7 (5) (b)

This amendment is part of the sequence of amendments for the purposes of the explanation given under amendment 14.

[16] Paragraph 7 (5) (c)

This amendment is part of the sequence of amendments for the purposes of the explanation given under amendment 14.

[17] Paragraph 8 (3) (d)

The effect of this amendment is that, with effect on and from 23 September 2020, only operations conducted in Australia on or after 23 September 2020 and before the end of 31 March 2021 will attract the medical certification renewal further extension.

[18] Subsection 8 (4)

Previously, under CASA EX57/20, various persons were exempted from various medical certificate requirements for 6 months from the date that the medical certificate would normally expire in accordance with its expressed expiry date. With the ongoing pandemic, it is necessary to modify this to 12 months. Thus, for a medical certificate that would normally expire in accordance with its expressed expiry date between the start of 1 April 2020 and the end of 31 March 2021, the exemption period is the period ending at the end of 31 March 2021.

[19] Before subsection 8A (1)

The effect of this amendment is that, for a flight test that is to be conducted on or after 23 September 2020 and before the end of 31 March 2021, the medical certification renewal further extension only applies if the flight test is to be conducted in Australia.

[20] Subparagraph 8A (1) (a) (ii)

This amendment is consequential on amendment 21, and recognises that some relevant flight tests attracting the medical certification renewal extension of time may now be conducted in 2021 before the end of 31 March 2021.

[21] Subsection 8A (4)

Previously, under CASA EX57/20, various persons relevant to the conduct of flight tests were exempted from various medical certificate requirements for 6 months from the date that the medical certificate would normally expire in accordance with its expressed expiry date. With the ongoing pandemic, it is necessary to modify this to 12 months. Thus, the exemption applies to the relevant provisions only for the duration of, a relevant flight test taken between the start of 1 April 2020 and the end of 31 March 2021.

[22] Paragraph 15 (5) (a)

Previously under CASA EX57/20, the holder of an AOC that authorises the conduct of aerial application operations under Part 137 of CASR was, for an extension period, exempt from provisions that required that operator to ensure that the pilot in command complied with the requisite licensing provisions of Part 61 and the Part 137 operator proficiency check requirements of Part 137 of CASR.

The third amendment extends the AOC holder's extension period as follows:

- (a) for a proficiency check, under an applicable regulation, that expires after 31 March 2020 but on or before 31 October 2020 — the extension period is 3 months from the expiry date;
- (b) for a proficiency check, under the applicable regulation, that expires after 31 October 2020 but on or before 31 December 2020 — the extension period is 2 months from the expiry date;
- (c) for a proficiency check, under an applicable regulation, that expires after 31 December 2020 but on or before 28 February 2021 — the extension period is 1 month from the expiry date.

[23] Paragraph 15 (5) (b)

This amendment is part of the sequence of amendments for the purposes of the explanation given under amendment 19.

[24] Paragraph 15 (5) (c)

This amendment is part of the sequence of amendments for the purposes of the explanation given under amendment 19.

Statement of Compatibility with Human Rights

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

CASA EX132/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 3)

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 (F2020C00325) (**CASA EX57/20**) 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.

CASA EX57/20 reflects the effects of 2 amending instruments made in April 2020 because further responses were needed to provide calibrated alleviation to sectors of the aviation industry faced with ongoing border closures, lockdown restrictions and social and physical distancing requirements caused by the pandemic.

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Amendment Instrument 2020 (No. 3) (the **third amendment**) makes further adjustments considered necessary in what is a generally dynamic and unpredictable set of circumstances.

In general terms, the exemptions are designed to further extend the already extended time provided for pilots and others to satisfy flight proficiency, flight review and medical certification requirements. However, it is still expected that the exemption instrument will not be required beyond 31 March 2021, its original 12-month maximum permitted duration.

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 aviation licence and certificate holders to adhere to certain regulatory requirements concerning, for example, proficiency, recency, currency, medical certification, 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 third amendment is considered to achieve an appropriate balance by providing some further limited extensions of time for compliance with relevant obligations for the time-triggered renewal of licence and certification attributes.

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 proficiency, recency, currency, and medical certification if the further extensions of time for compliance were not available.

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