

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX100/21 – CASA EX92/21 – Extension of COVID-19 Relief Measures – Amendment Instrument 2021 (No. 1)

Purpose

The purpose of *CASA EX100/21 – CASA EX92/21 – Extension of COVID-19 Relief Measures – Amendment Instrument 2021 (No. 1)* (the **exemptions amendment instrument**) is to amend *CASA EX92/21 – Flight Reviews, Proficiency Checks and Related Matters (Extensions of Time Due to COVID-19) Exemptions Instrument 2021* (the **principal exemptions instrument**).

Background

The principal exemptions instrument was a COVID-19 related, short-term relief measure, originally planned to be repealed on 31 October 2021. It made a series of exemptions from certain provisions of the *Civil Aviation Regulations 1988 (CAR)*, the *Civil Aviation Safety Regulations 1998 (CASR)* and Civil Aviation Order (CAO) 40.7 to extend the time limits for compliance with pilot proficiency check and flight review obligations because of constraints imposed by the social distancing, stay-at-home and lockdown rules applicable in parts of Australia because of the COVID-19 pandemic.

These COVID-19 constraints have been extended in time, scope and area because of the continuing impact of the pandemic. It is, therefore, necessary to amend the principal exemptions instrument, in both duration and scope, to reflect the changed circumstances.

This is done by extending the duration of the principal exemptions instrument to 31 March 2022, by providing further short extensions of renewal periods for otherwise expiring cyclical checks, and by providing longer extensions of up to 31 March 2022 where relevant operators have safety mitigations in place in the form of CASA-approved safety risk management plans.

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 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.).

In making the exemptions amendment 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.

Other legislation

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 of CASR set out flight crew licensing requirements. A series of provisions in Part 61 require that relevant pilots 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.

Under regulation 217 of CAR, relevant operators must ensure that their operating crew members undergo 2 annual proficiency checks.

CAO 82.6 creates a code of safety rule for the use of night vision imaging systems (*NVIS*) which include *NVIS* pilot proficiency checks and *NVIS* aircrew member capability check flights (*NVIS CCFs*).

The regulations in Part 65 of CASR deal with air traffic service (*ATS*) licensing and, relevantly, the holders of air traffic control (*ATC*) licences and flight service licences, the maintenance of their competency through recency and currency requirements, the persons they may supervise, and the offences that may be committed through failure to comply with these regulatory requirements.

Subsection 12 of CAO 20.11 requires that AOC holders engaged in charter operations or regular public transport operations must ensure that their relevant crew members (usually, in effect, cabin crew), who are assigned to emergency duties, complete an annual proficiency test in emergency procedures.

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.

Further details of legislation are set out in Appendix 1.

The exemptions amendment instrument

Because COVID-19 constraints have been extended in time, scope and area, it is necessary to amend the principal exemptions instrument in both duration and scope as follows.

Its repeal date has been amended from 31 October 2021 to 31 March 2022.

Sections 6 and 7 of the principal exemptions instrument had the effect of extending the time within which pilots must complete cyclical proficiency checks and flight reviews. The exemptions amendment instrument extends this time so that:

- for a proficiency check or flight review that expires after 31 July 2021 but on or before 31 December 2021 — the extension period is 2 months from the expiry date
- for a proficiency check that expires after 31 December 2021 but on or before 28 February 2022 — the extension period is 1 month from the expiry date.

However, if the pilot is conducting operations for an operator that has a safety risk management plan (*SRMP*), the extension period is the end date in the SRMP or 31 March 2022, whichever occurs first.

A SRMP is an operator's plan, approved in writing by CASA, that sets out the arrangements that operators, who have an approved training and checking organisation, must follow to enjoy the benefit of an extended exemption period. An SRMP extends an alleviation period up to 31 March 2022 and, as such, is considered by CASA to be an acceptable alternative method of achieving pilot proficiency outcomes that cannot be completed in the context of the COVID-19 pandemic.

Section 9 of the principal exemptions instrument had the effect of exempting operators with training and checking organisations from ensuring that, as otherwise required by regulation 217 of CAR, their pilots undergo 2 annual proficiency checks during the period that the pilots were taking the benefit of another proficiency check exemption in another provision of the instrument. This exemption was too narrow in scope and is now modified to apply to a proficiency check that is required by regulation 217 of CAR, but not otherwise required by Part 61, and not the subject of an exemption under another section in the instrument, provided the check is covered by the operator's SRMP.

New section 14 applies to NVIS pilots' proficiency checks, and NVIS aircrew members' NVIS CCFs under CAO 82.6, the same extensions as are described above.

Thus, for a NVIS proficiency check that is in addition to, or at variance with, any such check required under Part 61 of CASR, and for an NVIS CCF, that expires:

- after 31 July 2021 but on or before 31 December 2021 — the extension period is 2 months from the expiry date
- after 31 December 2021 but on or before 28 February 2022 — the extension period is 1 month from the expiry date.

However, if the pilot is conducting operations for an operator that has an SRMP, the extension period is the end date in the SRMP or 31 March 2022, whichever occurs first.

New section 15 applies to the holder of an ATC licence endorsed for certain duties for a particular aerodrome or in relation to particular airspace, and to the holder of a flight service licence similarly endorsed. These holders are required to meet recency

requirements based on 21-day cyclical performance, and currency requirements based on cyclical 6-monthly performance requirements. Without these, they are not authorised to carry out the relevant ATC functions, and it would be an offence to do so. The exemption applies to the extent that the licence holder would commit an offence by failing, at a particular time, to satisfy the recency and currency requirements.

The exemption applies only if the licence holder is employed by Airservices Australia and was authorised to perform the duties on 1 August 2021. By imposing conditions, the effect of the exemption is to extend the 21 days to 30 days and the 6 months to 9 months.

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.

New section 16 deals with subsection 12 of CAO 20.11 under which a crew member shall not be assigned or accept assignment to emergency duties in an aircraft engaged in a charter or a regular public transport operation unless they have undertaken and passed an annual proficiency test in emergency procedures on that type of aircraft. Under new section 16, such AOC holders and their relevant crew members are exempted from this requirement if the AOC holder has an SRMP which otherwise deals with proficiency in emergency procedures.

Other amendments, made to section 4:

- add to the Application section persons covered by the new sections mentioned above
- provide for the extra-territorial application of the principal exemptions instrument if an operator has a relevant SRMP in relation to the exemption and the operation
- disapply an exemptions if a person fails to comply with any applicable requirements of their operator's SRMP that relates to that exemption.

Legislation Act 2003

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 exemptions amendment instrument 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 exemptions amendment instrument applies to various classes of persons and is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the *Legislation Act 2003*.

Not the same in substance as the principal exemptions instrument

The principal exemptions instrument was made on 29 July 2021, registered on 3 August 2021 and tabled in the House of Representatives and the Senate on 3 August 2021. It was not, at the time of making, the subject of a disallowance motion in either House.

For certain circumstances, the *Legislation Act 2003* (the *LA*) contains prohibitions on making a legislative instrument that is the same in substance as a previous legislative instrument. The exemptions amendment instrument is not “the same in substance as” the principal exemptions instrument.

Instead it adds new relief measures without affecting the existing measures other than to extend their duration. Consequently, neither section 46 (Legislative instruments not to be remade while required to be tabled), section 47 (Legislative instruments not to be remade while subject to disallowance), nor section 48 (Remaking disallowed legislative instruments) of the *LA* are enlivened to affect the making of the exemptions amendment instrument.

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 exemptions amendment instrument as a matter of urgency in the present circumstances of the COVID-19 related lockdowns 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 exemptions amendment 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 exemptions amendment 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 exemptions amendment instrument commences on the day it is registered and the exemption amendments made by it commence then. The effect of the instrument is that the principal exemptions instrument will be expanded and extended, and then be repealed at the end of 31 March 2021. However, the commencement of various regulatory amendments on 2 December 2021 may have an impact on the application and operation of some of the exemptions and it is likely that a further exemptions amendment instrument will be made in November 2021 to address this.

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

Further details of relevant legislation

CASR Part 61 proficiency checks

A series of provisions in Part 61 require that relevant pilots complete proficiency checks appropriate to their licence and rating, within certain time cycles which create expiry dates and the need to renew the proficiency check. The provisions are the following:

- (a) 61.650 — in relation to the requirement for the holder of a multi-crew pilot licence to have an instrument proficiency check;
- (b) 61.695 — in relation to the requirement for the holder of an air transport pilot licence to have an instrument proficiency check;
- (c) 61.805 — in relation to the requirement for the holder of a pilot type rating to have an instrument proficiency check;
- (d) 61.880 — in relation to the requirement for the holder of an instrument rating to have an instrument proficiency check;
- (e) 61.1015 — in relation to the requirement for the holder of an NVIS rating to have an NVIS proficiency check;
- (f) 61.1110 — in relation to the requirement for the holder of an aerial application rating to have an aerial application rating instrument proficiency check;
- (g) 61.1180 — in relation to the requirement for the holder of a flight instructor rating to have an instructor proficiency check;
- (h) 61.1205 — in relation to the requirement for the holder of a simulator instructor rating to have an instructor proficiency check;
- (i) 61.1410 — in relation to the requirement for the holder of a flight engineer instructor rating to have an instructor proficiency check.

CASR Part 61 flight reviews

A series of provisions in Part 61 require that relevant pilots complete flight reviews appropriate to their licence and rating within certain time cycles which create expiry dates and the need to renew the flight review. The provisions are the following regulations:

- (a) 61.745 — in relation to the requirement for the holder of an aircraft class rating to have a flight review for the rating;
- (b) 61.800 — in relation to the requirement for the holder of a pilot type rating to have a flight review for the rating;
- (c) 61.925 — in relation to the requirement for the holder of a private instrument rating to have a flight review for the rating;
- (d) 61.970 — in relation to the requirement for the holder of a night VFR rating to have a flight review for the rating;
- (e) 61.1060 — in relation to the requirement for the holder of a low-level rating to have a flight review for the rating.

CASR Part 65 recency and currency requirements

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).

CAO 82.6, Appendix 3 — NVIS pilot proficiency checks and NVIS aircrew member NVIS CCFs

Under clause 21, for an NVIS pilot with 50 hours or less of NVIS flight time as an NVIS PIC, NVIS co-pilot, NVIS PICUS or NVIS pilot dual, the minimum NVIS recent experience requirements are modified:

- by reading each reference in regulation 61.1010 to “6 months”, as a reference to “3 months”
- the minimum NVIS proficiency check requirements are modified by reading each reference in regulation 61.1015 to “the 12th month”, as a reference to “the 6th month”.

Clause 21 does not amend regulations 61.1010 and 61.1015 of Part 61 of CASR 1998. In the interests of safety, it imposes AOC conditions in the form of the additional recency and proficiency check obligations that an NVIS operator must ensure are met for the conduct of NVIS operations under this Order.

Under clause 22, an NVIS aircrew member must meet minimum recency requirements or an NVIS CCF must be undertaken.

Statement of Compatibility with Human Rights

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

CASA EX100/21 – CASA EX92/21 – Extension of COVID-19 Relief Measures – Amendment Instrument 2021 (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

Purpose

The purpose of *CASA EX100/21 – CASA EX92/21 – Extension of COVID-19 Relief Measures – Amendment Instrument 2021 (No. 1)* (the **exemptions amendment instrument**) is to amend *CASA EX92/21 – Flight Reviews, Proficiency Checks and Related Matters (Extensions of Time Due to COVID-19) Exemptions Instrument 2021* (the **principal exemptions instrument**).

The principal exemptions instrument was a short-term relief measure, originally planned to be repealed on 31 October 2021. It used a series of exemptions from certain provisions of the *Civil Aviation Regulations 1988*, the *Civil Aviation Safety Regulations 1998* and Civil Aviation Order 40.7 to extend the time limits for compliance with pilot proficiency check and flight review obligations because of constraints imposed by the social distancing, stay-at-home and lockdown rules applicable in parts of Australia because of the COVID-19 pandemic.

These COVID-19 constraints have been extended in time, scope and area because of the continuing impact of the pandemic. It is, therefore, necessary to amend the principal exemptions instrument in both duration and scope.

This is done by extending the duration of the principal exemptions instrument to 31 March 2022, by providing short extensions of renewal periods for otherwise expiring cyclical checks, and by providing longer extensions of up to 31 March 2022 where relevant operators have safety mitigations in place in the form of CASA-approved safety risk management plans.

Human rights implications

The legislative instrument engages 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* because, by offering temporary relief from legislative obligations, the instrument may be said to 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, under safe and healthy working conditions, 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 exemptions amendment instrument is considered to achieve an appropriate balance.

A consequential effect of this balance is to protect the right to work of various categories of aviation personnel who might otherwise have lost that right, for example, by breaching proficiency or checking renewal requirements, and operations manual compliance requirements. Under the exemptions amendment instrument, this is avoided, for a temporary period, by extending the time within which relevant renewal may be obtained.

Human rights implications

The exemptions in the legislative instrument are compatible with the human rights and freedom 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 promote the right to life and ensure the safety of relevant aviation personnel during the COVID-19 pandemic. This is done in a 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