

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020.

Purpose

The purpose of this instrument is to use 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.

Those who are subject to these time limits are liable to breach them through no fault of their own. This is because action to avoid such breaches may involve testing, checking, training or other 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 Australia.

Some of the time-based limits relate to using flight simulators, whether in Australia or overseas, which are not currently available due to COVID-19 related travel restrictions and the need to maximise the remedial effects of the social distancing rules. Some other obligations are imposed on operators, like having an up-to-date operations manual, which would be prohibitively expensive to achieve if it were to take account of all of the exemptions in this instrument for the, hopefully, short time that the pandemic lasts.

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 12 months.

Legislation — CASR, CAR and CAO 20.11

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 65 set out air traffic services personnel licensing requirements. (References below to provisions that commence with the numerals "61" are to Part 61, and to "65" are to Part 65; the abbreviation "reg" is used to cover sub-provisions in a regulation. The following sections are numbered to cross-reference to the sections of the exemption instrument.)

The exemption instrument

1 Name

This section names the instrument as *CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020*.

2 Duration

This section provides that the instrument commences on 1 April 2020. It is repealed at the end of 31 March 2021.

3 Definitions

This section provides for useful definitions.

4 Application

The instrument is expressed to apply:

- (a) to a person who:
 - (i) is the holder of a flight crew licence that is in force immediately before the commencement of this instrument; and

- (ii) is not the subject of a show cause notice that was active immediately before the commencement of this instrument (an *active show cause notice*); and
- (b) to a person who:
 - (i) is the holder of an AOC that was in force immediately before the commencement of this instrument; and
 - (ii) is not the subject of an active show cause notice; and
- (c) to any other person on whom an obligation is imposed under a provision of this instrument, provided the person is not the subject of an active show cause notice.

In addition, it is provided that an exemption under this instrument does not apply to or for a person who before the expiry of any period to which an exemption under this instrument would otherwise apply, has attempted or attempts, but without completion and success, any relevant proficiency check, flight review, recent experience, medical examination, training or test. This is in the interests of aviation safety.

5 Exemptions — regulation 61.065

Reg 61.065 makes the conduct of unauthorised Part 61 activities an offence. The exemption instrument, in effect, permits certain otherwise unauthorised activities and hence, reg 61.065 is exempted from.

6 Exemptions — 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 a night vision imaging system (*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) 61.1285 — in relation to the requirement for the holder of a flight examiner rating to have an examiner proficiency check;
- (j) 61.1410 — in relation to the requirement for the holder of a flight engineer instructor rating to have an instructor proficiency check;

- (k) 61.1470 — in relation to the requirement for the holder of a flight engineer examiner rating to have an examiner proficiency check.

The exemption would apply only to the extent that the provision has the effect of imposing an expiry date on the validity of the holder's required proficiency check under the applicable regulation. Section 5 then provides for the particular exemption to expire at certain times, creating for particular proficiency check requirements a relevant extension of 3, 2 or 1 month beyond their expiry, or for an AOC holder, an extension until 30 June 2020. However, if the AOC holder has a safety risk mitigation plan approved by CASA (an *approved safety plan*) the extension is until the end of 31 March 2021. The purpose of the reducing the extension period over time is to reduce the impact of having a large number of pilots requiring a check or review at the end of the extension period and to allow a return to normal checking and reviewing activities in a reasonable timeframe.

7 Exemptions — Part 61 flight reviews and recent experience

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) 61.1055 — in relation to the requirement for a flight review or that the holder of a low-level rating must have recent experience;
- (f) 61.1060 — in relation to the requirement for the holder of a low-level rating to have a flight review for the rating.

The exemption would operate in the same way as for proficiency checks. The exemption would apply only to the extent that the provision has the effect of imposing an expiry date on the validity of the holder's required flight review under the applicable regulation. Section 6 then provides for the particular exemption to expire at certain times, creating for particular flight review requirements a relevant extension of 3, 2 or 1 month beyond their expiry, or for an AOC holder, an extension until 30 June 2020. These reducing extension periods are made to reduce the impact of the eventual return to normal operations. However, if the AOC holder has an approved safety plan, the extension is until the end of 31 March 2021.

8 Exemptions — medical certificates

A series of provisions in Parts 61 and 65 require that relevant pilots, air traffic controllers and flight service operators to 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 provisions are the following:

- (a) subregulations 61.114 (2) and (4);
- (b) regulation 61.118;
- (c) paragraphs 61.235 (2) (c) and (4) (b);
- (d) regulation 61.340;
- (e) subregulations 61.405 (1) and (2);
- (f) subregulations 61.410 (1) and (2);
- (g) subregulation 61.415;
- (h) paragraph 61.420 (b);
- (i) subregulations 61.465 (2) and (3);
- (j) subregulation 61.1155 (2);
- (k) subregulation 61.1225 (1);
- (l) subregulations 61.1300 (3) and (5);
- (m) regulation 61.1345;
- (n) regulation 61.1530;
- (o) subregulation 141.210 (1);
- (p) subregulation 141.290 (1);
- (q) subregulation 142.245 (1);
- (r) subregulation 142.365 (1);
- (s) paragraph 65.035 (1) (d);
- (t) regulation 65.045;
- (u) paragraph 65.050 (1) (d);
- (v) regulation 65.060;
- (w) regulation 172.110;
- (x) subregulations 172.120 (1) and (2).

These provisions 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.

The section 8 exemptions would authorise the licence holders and other aviation authorisation holders to continue to use their existing medical certificates for the exercise of the privileges of their licences or other aviation authorisation, for a period of 6 months beyond the certificates' current expiry dates. The exemption would also relieve the operators from their associated obligations in relation to the required currency of medical certificates.

The exemptions would apply only with respect to a medical certificate that was current at the start of 1 March 2020, and only if all relevant requirements, conditions or limitations (however expressed) of the medical certificate are otherwise complied with, and continue to be complied with, by the holder.

9 Exemptions — operations manual

Provisions in reg 215 of the CAR require that relevant operators have up-to-date operations manuals and that their operations personnel comply with them. The provisions are the following:

- (a) subregulation 215 (2);
- (b) subregulation 215 (5);
- (c) subregulation 215 (9).

Without an exemption, these provisions would require the operations manuals to reflect all of the changes being brought about by this exemption instrument, thereby requiring the manuals to be extensively amended and revised, and also requiring personnel to comply with the revised manuals. Clearly, for the duration of a temporary emergency, this would be both extremely costly and unreasonable. The exemption in section 9 relieves from the compliance obligations for an operator who has an approved safety plan, until the end of 31 March 2021; and otherwise — only until the end of 30 June 2020.

10 Exemptions — training and checking requirements

Provisions in reg 217 of the CAR require relevant operators to ensure that their operating crew members undergo 2 annual proficiency checks. The provisions are the following:

- (a) subregulation 215 (2);
- (b) subregulation 215 (5);
- (c) subregulation 215 (9).

In implementing this requirement, it would be extremely difficult, if not impossible, for operators and operating crew members to observe the social distancing rules. The exemption, therefore, relieves from compliance with these obligations. For an operator who has an approved safety plan, the relief is until the end of 31 March 2021 — that is, the exemption applies until then. For other operators, it applies only until the end of 30 June 2020.

11 Exemptions — training requirements for dangerous goods

A series of provisions in Part 92, of CASR dealing the air transportation of dangerous goods, require that a range of organisations involved in the transportation of dangerous goods must ensure that their employees undergo biennial training. The provisions are the following:

- (a) subregulations 92.095 (2) and (3) — for an Australian aircraft operator;
- (b) subregulations 92.100 (1) and (2) — for an Australian ground handling agent;
- (c) subregulations 92.105 (1) and (2) — for an Australian freight forwarder;
- (d) subregulations 92.115 (2) and (3) — for an Australian screening authority;
- (e) subregulations 92.120 (1) and (3) — for a person who ships dangerous goods;
- (f) subregulations 92.140 (5) — for a person who gives instruction as part of a training course for Group E employees and employees of a screening authority.

Much of this training is classroom-based or conducted in a restricted location and hence impracticable in the present circumstances of maximising the effects

of the social distancing rules. Hence, if the relevant operator or person has an approved safety plan the exemption will apply from the beginning of 1 July 2020 until the end of 31 March 2021. Without a plan, it will apply only until the end of 30 June 2020.

For safety reasons, for operators and persons who do not have such a plan, the exemption applies only if, before an employee first performs relevant duties for the person, the person informs the employee, in general terms, of the employee's safety obligations. Similarly, if there is no approved safety plan, existing employees, for whom the biennial training would otherwise have occurred during the period from the commencement of the instrument until the end of 30 June 2020, must be reminded, in general terms, of the employee's safety obligations.

12 Exemptions — drug and alcohol education program requirements

A series of provisions in Part 99 of CASR, dealing with the requirement for certain SSAA employees of DAMP organisations to receive, in effect, classroom training under aviation drug and alcohol education programs (**DAMPs**) must be completed before expiry dates applicable to relevant employees. The provisions are the following:

- (a) paragraph 99.045 (d);
- (b) paragraph 99.080 (1) (a).

A DAMP organisation is, in effect, one that is required to have a DAMP because its activities involve or support, aviation and in consequence could affect aviation safety. An SSAA employee (a safety sensitive aviation activity employee) is, in effect, one who performs work that could affect aviation safety.

The exemption will offer relief similar to that applicable for dangerous goods by limiting the duration of the exemption and subjecting it to certain conditions. Thus, the exemption applies to each of the relevant provisions only to a time-limited extent.

If the DAMP organisation has an approved safety plan, the exemption will apply from the beginning of 1 July 2020 until the end of 31 March 2021. If there is no such plan, the exemption will apply only until the end of 30 June 2020.

For a DAMP organisation that does not have an approved safety plan, before an employee *first performs* duties as an SSAA employee or DAMP supervisor for the person, the person informs the employee or supervisor, in general terms, of the employee's safety obligations. Similarly, if there is no approved safety plan, an existing DAMP employee or supervisor, for whom refresher training would otherwise have occurred during the period from the commencement of this instrument until the end of 30 June 2020, must be reminded, in general terms, of the employee's or supervisor's safety obligations.

13 Exemptions — proficiency in emergency procedures

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

The operators and the crew members are exempted from this obligation for a period of time. Thus, if the AOC holder has an approved safety plan, the exemption will endure to exempt from the testing obligation from the beginning of 1 July 2020 until the end of 31 March 2021. However, if the AOC holder does not have an approved safety plan this particular exemption will expire at the end of 30 June 2020.

For AOC holders who do not have an approved safety plan, before *first-time assignment* to emergency duties, the crew member must be informed by the AOC holder, in general terms, of the crew member's safety obligations. Similarly, a relevant crew member who has already been proficiency tested at least once, and for whom the next proficiency test would otherwise have occurred during the period from the commencement of the instrument until the end of 30 June 2020, must be reminded, in general terms, of the his or her safety obligations.

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 a class of persons (the particular FER 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 epidemic 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 was urgently registered on Friday afternoon, 27 March 2020, and this 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 1 April 2020 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.

Statement of Compatibility with Human Rights

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

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The purpose of this instrument is to use 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.

Those who are subject to these time limits are liable to breach them through no fault of their own. This is because action to avoid such breaches may involve testing, checking, training or other 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 Australia.

Some of the time-based limits relate to using flight simulators, whether in Australia or overseas, which are not currently available due to COVID-19 related travel restrictions and the need to maximise the remedial effects of the social distancing rules. Some other obligations are imposed on operators, like having an up-to-date operations manual, which would be prohibitively expensive to achieve if it were to take account of all of the exemptions in this instrument for the, hopefully, short time that the pandemic lasts.

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, drug and alcohol education 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, drug and alcohol education 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