

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX69/20 – EPC Requirements for ATOs Transitioning to the FER (Extensions of Time Due to COVID-19) – Exemption Amendment Instrument 2020 (No. 1)

Purpose

The purpose of this instrument, *CASA EX69/20 – EPC Requirements for ATOs Transitioning to the FER (Extensions of Time Due to COVID-19) – Exemption Amendment Instrument 2020 (No. 1)* (**CASA EX69/20**), is to amend an existing exemption from certain provisions of Part 61 of the *Civil Aviation Safety Regulations 1998* (**CASR**) to accommodate recent impacts from the effects of the COVID-19 pandemic.

The original exemption was a facilitative mechanism to allow former approved testing officers (**ATOs**) who had transitioned to the new (equivalent) status of flight examiner rating (**FER**) holder, to complete a required examiner proficiency check (**EPC**) according to a staggered timetable. However, for the last remaining cohort of some 50 transitioned FER holders, the social distancing rules required to be observed during the COVID-19 pandemic make completion of their EPC impracticable within the original timeframe.

Consequently, CASA has amended the original exemption instrument to extend the relevant dates by 3 months to new specific completion dates.

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 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.).

Legislation — CASR Part 61

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, which commenced on 1 September 2014, set out flight crew licensing requirements. (References below to provisions that commence with the numerals “61” are to Part 61.) Prior to 1 September 2014, flight tests and rating renewals for the various flight crew licences and ratings were conducted by CASA delegates known as ATOs.

Under regulation 202.261 of CASR 1998, a delegation, issued to a person before 1 September 2014, to give a permission to conduct a flight activity such as flight testing, was described as an *old authorisation*, for example, an ATO delegation.

Under regulation 202.261 of CASR 1998, a *new authorisation* means a flight crew licence, rating or endorsement granted under Part 61.

Under subregulation 202.263 (1) of CASR 1998, an old authorisation that was in force immediately before 1 September 2014, is continued in force on and after 1 September 2014, according to its terms. It is known as a *continued authorisation*.

Under subregulation 202.263 (2) of CASR 1998, Part 61 applies to a continued authorisation “as if it were the equivalent new authorisation”. The Part 61 equivalent to an ATO delegation is an FER.

Examiner proficiency checks

Under subregulation 61.1285 (1), the holder of an FER is authorised to exercise the privileges of the rating (or delegation) only if the holder has a valid EPC.

Under subregulation 61.1285 (2), the holder is taken to have a valid EPC during the following periods:

- (a) the period from when the holder passes the flight test for the rating to the end of the 24th month after the month in which the holder passes the flight test;
- (b) if:
 - (i) the holder passes the flight test for a flight examiner endorsement; and
 - (ii) the flight test is conducted more than 6 months after the holder passes the flight test for the rating;
 the period from when the holder passes the flight test for the endorsement to the end of the 24th month after the month in which the holder passes the flight test for the endorsement;
- (c) if the holder successfully completes an examiner proficiency check — the period from when the holder successfully completes the check to the end of the 24th month after the month in which the holder successfully completes the check;

- (d) if:
 - (i) the holder is taken to have a valid examiner proficiency check under any of paragraphs (a) to (c) (the ***existing check***); and
 - (ii) within 3 months before the validity of the existing check expires, the holder successfully completes an examiner proficiency check; the period from when the validity of the existing check expires to the end of the 24th month after the validity of the existing check expires.

Under subregulation 61.1285 (4), for paragraphs (2) (c) and (d), the holder successfully completes an examiner proficiency check if:

- (a) the examiner proficiency check is conducted in an aircraft or an approved flight simulation training device for the proficiency check; and
- (b) a person mentioned in subregulation (5) assesses the holder's competency to conduct flight testing as meeting the standards mentioned in the Part 61 Manual of Standards for a flight examiner rating; and
- (c) the person endorses the holder's licence document to the effect that the holder has completed the examiner proficiency check on the date stated.

Under subregulation 61.1285 (5), for paragraph (4) (b), the persons are:

- (a) CASA; and
- (b) the holder of an approval under regulation 61.040 to conduct the proficiency check.

Background

The original exemption instrument (*CASA EX70/18 – EPC requirements for ATOs transitioning to the FER – Exemption 2018 (CASA EX70/18)*) extended the time within which certain FER holders, who have the privilege of conducting flight tests and proficiency checks, must themselves complete an EPC.

The FER holders were those persons who held a CASA delegation as ATOs and who were granted an FER under subregulation 202.272 (2) of CASR, to take effect on 1 September 2018. Subregulation 202.272 (2) was a transitional provision to enable the conversion of old authorisations, like ATO delegations, into new authorisations, like FERs, granted under Part 61 of CASR.

The instrument also applied to a small number of former ATO delegation holders who had been granted an earlier FER but for a set of privileges different from those granted under the FER that took effect on 1 September 2018.

CASA EX70/18 was designed to manage the transition of these FER holders by creating a regular cycle for completion of their EPCs. The transition was to be over a 2-year period that would have ended in August 2020.

A “calendar” spread or stagger mechanism was used in CASA EX70/18, matching an FER holder's birthday month in an odd or even year with a designated date between 30 September 2018 and 31 August 2020, as *the last date by which* he or she must complete their EPC.

Thus, Schedule 1 of CASA EX70/18 contained a “calendar” whose effect was that for an FER holder whose birthday occurs during a month mentioned in the Table, the

holder must complete an EPC by not later than a corresponding date depending on whether the holder's year of birth was an odd or even number.

However, the social distancing rules and consequential aviation impacts due to the COVID-19 pandemic now make practical adherence to that timeframe by the remaining cohort of some 50 previous ATOs very difficult to achieve. CASA has decided, therefore, to provide these transitioned FER holders with an additional 3 months in which to schedule and complete their EPC. This is done by amending the calendar in Schedule 1 of CASA EX70/18. In simplified terms, the Table is amended so that for a birthday that occurs in the month of March, April, May, June, July, or August for a year of birth that is an even number (for example, 1970, 1972), an EPC must be completed by not later than 3 months after the previously prescribed date, as follows:

For a birthday month of	Uneven year: N.A.	In an even year, the previous completion date was:	And the new completion date is:
March		31 March 2020	30 June 2020
April		30 April 2020	31 July 2020
May		31 May 2020	31 August 2020
June		30 June 2020	30 September 2020
July		31 July 2020	31 October 2020
August		31 August 2020	30 November 2020

CASA EX69/20 is expressed to operate until it is repealed at the end of 30 November 2020, the final extended completion date for the last category of members of the cohort. Consequently, the end date of the original exemption, into which CASA EX69/20 will be inserted for compilation purposes, is also amended to be 30 November 2020.

In deciding on a modified exemption for this remaining cohort of FER holders, and in determining the extended spread or stagger mechanism, aviation safety is the most important consideration. CASA is satisfied that, despite the new 3-month delay, the proposal preserves a level of aviation safety that is acceptable, specifically in the context of the status and experience of the particular transitioning ATOs, and the unavoidable circumstance of the impact of social distancing rules on the practicality of completing the relevant EPCs sooner.

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 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.

However, in this case, the exemptions are urgent, and 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, therefore, CASA considers that no consultation is required because of the necessity to promulgate, as soon as possible, the fact of the exemption and the proposed extended stagger dates (the first of which expires on 30 June 2020) so that those wishing to gain the benefit of the exemption can plan accordingly within the contingencies of the current COVID-19 pandemic.

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 date it is registered and is repealed at the end of 30 November 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.

Statement of Compatibility with Human Rights

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

Civil Aviation Safety Regulations 1998

CASA EX69/20 – EPC Requirements for ATOs Transitioning to the FER (Extensions of Time Due to COVID-19) – Exemption 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

The purpose of this instrument, *CASA EX69/20 – EPC Requirements for ATOs Transitioning to the FER (Extensions of Time Due to COVID-19) – Exemption Amendment Instrument 2020 (No. 1) (CASA EX69/20)*, is to amend an existing exemption from certain provisions of Part 61 of the *Civil Aviation Safety Regulations 1998 (CASR)* to accommodate recent impacts from the effects of the COVID-19 pandemic.

The original exemption was a facilitative mechanism to allow former approved testing officers who had transitioned to the new (equivalent) status of flight examiner rating (**FER**) holder, to compete a required examiner proficiency check (**EPC**) according to a staggered timetable. For the last remaining cohort of some transitioned 50 FER holders, the social distancing rules required to be observed during the COVID-19 pandemic make completion of their EPC impracticable within the original timeframe.

Consequently, CASA has amended the original exemption instrument to extend the relevant dates by 3 months to new specific completion dates.

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, examiner proficiency checks.

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 for key aviation personnel like flight examiners.

Because of its temporary, calibrated and conditional nature, the 3-month extension of time provided for in the exemption instrument is considered to achieve an appropriate, short-term balance.

A consequential effect of the careful balance described above is to protect the right to work of flight examiners who might otherwise have lost that right, for example, by being unable to complete their examiner proficiency check within an original timetable made impracticable by the COVID-19 pandemic.

Human rights implications

The 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*. 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.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Civil Aviation Safety Authority