

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX19/21 — Examiner Proficiency Checks (Extensions of Time and Substitute Proficiency Checks) Exemption Instrument 2021 (No. 1)

Purpose

The purpose of *CASA EX19/21 — Examiner Proficiency Checks (Extensions of Time and Substitute Proficiency Checks) Exemption Instrument 2021 (No. 1)* (the **new EPC exemption**) is twofold:

- to exempt, for various periods of time (not later than 31 December 2021) certain flight examiner rating holders (**FER holders**) and certain CASA approval holders from the requirement under regulation 61.1285 of the *Civil Aviation Safety Regulations 1998 (CASR)* to have a valid examiner proficiency check (**EPC**) that would otherwise be due on 1 April 2021
- to exempt FER holders from the same requirement provided that, within certain time limits, the holder successfully completes a prescribed substitute proficiency check to be applicable for a defined period of time in place of an EPC otherwise due.

The substitute proficiency check is, in essence, the ground component of an actual EPC which would otherwise normally involve a flying or simulated flying component.

For simplicity, in this Explanatory Statement, references to an FER holder are taken to include relevant CASA approval holders under regulation 61.040 of CASR who, under the terms of their approval, are also required to have an EPC.

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 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. Part 61 of CASR sets out flight crew licensing requirements. Under regulation 61.1285, an FER holder is authorised to exercise the privileges of the rating (essentially conducting flight tests and checks) only if the holder has a valid EPC. Relevantly, a holder who has already completed an EPC is taken to have a valid EPC for the period from when the EPC was completed to the end of the 24th month after the month in which the holder's prior relevant EPC expired.

Background

CASA EX57/20 — Licensing, and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2020, as amended (***CASA EX57/20***) contained a series of exemptions from certain provisions of the *Civil Aviation Regulations 1988*, CASR and Civil Aviation Order 20.11. The instrument was designed to extend a range of licence-related and other time limits in response to the consequences of the COVID-19 pandemic. Official efforts to control the pandemic had resulted in restrictions on movement, gatherings and physical distancing in a way that made it extremely difficult or all but impossible for licence and rating holders to meet currency requirements by the timely completion of required checks.

This was the case for certain FER holders in relation to their EPCs. Specifically to address this, section 6C of *CASA EX57/20* was made (contained in amendment instrument *CASA EX132/20 — Licensing and Operator Training and Checking (Extensions of Time Due to COVID-19) Exemptions Instrument 2021 (No. 3)*, in effect on 23 September 2020.

It provided that an FER holder would be exempt from the regulation 61.1285 EPC requirement:

- (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.

Subsection (4) provided for the content of the substitute proficiency check. Essentially, such a check must comply with the requirements for an EPC 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 EPC except that, in effect, the flying components of the EPC were not required. Thus, the substitute proficiency check:

- (a) need not be conducted in an aircraft or an approved flight simulation training device; and
- (b) must be conducted as a knowledge-based assessment in accordance with clause 2 in Appendix 6 but also including, as part of the knowledge

assessment, knowledge in relation to paragraph 4.1 (c) and paragraph 4.1 (d) mentioned in Appendix 6; and

- (c) need not be assessed in accordance with the applicable standards set out in section 13 of the MOS insofar as those standards require adherence to the provisions mentioned in paragraph (d); and
- (d) need not be assessed in accordance with the standards set out in the following provisions of Appendix 6 in Schedule 6 of the MOS:
 - (i) paragraph 1 (c) (*demonstration of ability to conduct relevant flight test activities and manoeuvres*);
 - (ii) clause 3 (*the activities and manoeuvres*);
 - (iii) clause 4 (*the operational scope of the activities and manoeuvres*) other than paragraph 4.1 (c) (pre-flight briefing) and paragraph 4.1 (d) (post-flight briefing).

One consequence of these emergency COVID-19 arrangements, which was appreciated at the time, was that when the exemption instrument expired at the end of 31 March 2021, the relevant FER holders would be grounded unless they completed an actual EPC not later than 31 March 2021 and, in addition, the recurring biennial requirement to renew the EPC would, by default, continue to fall on 1 April 2021 for all of the relevant FER holders.

It would not be logistically possible for CASA to manage such a concentration of required EPCs on a particular day and consequently a Note explained that CASA intended to make future arrangements for the appropriate recognition of substitute proficiency checks in relation to compliance with EPC obligations arising after 31 March 2021 when the exemption had expired.

The purpose of the new EPC exemption is to do that for the post-31 March 2021 period. In doing so, it is CASA's intention to endeavour to restore the FER holders to their usual spread of EPC biennial cycle dates as they existed before 31 March 2020, that is before the serious impact of the pandemic on preservation of those cycles gave rise to CASA EX57/20.

The new EPC exemptions

The new exemptions do not apply to a relevant FER holder who, on commencement, is the subject of a show cause notice for potential infringements of aviation safety rules, or to a relevant FER holder who, under this instrument or instrument CASA EX57/20, undertook or undertakes, but without successful completion, an EPC or a substitute proficiency check.

For the first exemption, a ***relevant FER holder*** means an FER holder for whom, on commencement, an EPC was in effect on 1 March 2020 but not in effect on 1 December 2021.

Under the first exemption (section 6 of the instrument), the relevant FER holders are exempted from compliance with regulation 61.1285 of CASR but only to a time-limited extent provided for in a Table. The Table cross-tabulates the dates on which an FER holder's EPC expired, or would have expired, had there been no exemptions at all, with the corresponding prescribed date on which the current exemption instrument expires with respect to that particular EPC expiry date, as follows:

Table 6 (2) — Extension of exemption from EPC due date

Item	Column 1 A relevant FER holder and a relevant approval holder, for whom a valid EPC is due on:	Column 2 is exempted from compliance with regulation 61.1285 of CASR until:
1	30 April 2020	30 April 2021
2	31 May 2020	31 May 2021
3	30 June 2020	30 June 2021
4	31 July 2020	31 July 2021
5	31 August 2020	31 July 2021
6	30 September 2020	31 July 2021
7	31 October 2020	31 August 2021
8	30 November 2020	31 August 2021
9	31 December 2020	31 August 2021
10	31 January 2021	30 September 2021
11	28 February 2021	30 September 2021
12	31 March 2021	30 September 2021
13	30 April 2021	31 October 2021
14	31 May 2021	31 October 2021
15	30 June 2021	31 October 2021
16	31 July 2021	30 November 2021
17	31 August 2021	30 November 2021
18	30 September 2021	30 November 2021
19	31 October 2021	31 December 2021
20	30 November 2021	31 December 2021

A Note explains that each extension provided for under column 2, is an extension of the descending periods of extension previously provided for under CASA EX57/20 to address the effects of the COVID-19 pandemic. Since CASA EX57/20 expired at the end of 31 March 2021, the new exemption is, in effect, a limited extension of the previous extensions under CASA EX57/20. These additional extensions enable CASA and the FER holders to better stagger the time to meet the requirements under regulation 61.1285, either by way of an EPC or a substitute proficiency check.

The second exemption (in section 7 of the instrument) complements the first by providing the process for obtaining a substitute proficiency check. Obtaining a substitute proficiency check enables FER holders to exercise their privileges until the date that an actual EPC will next fall due which, in each case, will be, in effect, on the second anniversary of the *expiry* of their last actual EPC. This process will then have returned FER holders and approval holders to their original, normal 24-month cycle for EPCs.

For the second exemption, a **relevant FER holder** means an FER holder for whom, on commencement, an EPC was in effect on 1 March 2020 but not in effect on 1 March 2022.

Under the second exemption, the relevant FER holders are exempted from compliance with regulation 61.1285 of CASR but only if, on or after 23 September 2020 but before 1 March 2022, the holder undertakes and successfully completes a substitute proficiency check. However, the exemption is only for the period starting on the day after the holder successfully completes the substitute proficiency check, and ending at the end of the 24th month after the month in which the holder's last EPC *expired*.

Thus, successful completion of a substitute proficiency check will bridge the period from when the FER holder completes the substitute proficiency check and 24 months after their previous EPC expired.

The requirements of the substitute proficiency check are identical to those under CASA EX57/20, as set out above.

The differences in the definitions of a **relevant FER holder** as between section 6: holder of an EPC that was in effect on 1 March 2020 but not in effect on 1 December 2021, and section 7: holder of an EPC that was in effect on 1 March 2020 but not in effect on 1 March 2022, arise from the different purposes of the respective sections.

Section 6 is, in effect a continuation of the CASA EX57/20 instrument EPC extensions, but as if the instrument had expired on 1 December 2021, rather than 31 March 2021. This extension is not COVID-19 related but designed to facilitate the administrative and checking processes that will allow FER holders to return to their pre-existing biennial EPC cycle dates.

On its own, this would have the effect of spreading EPC due dates to on or before the exemption expiry dates in the Table above. However, those dates are not the pre-existing biennial EPC cycle dates for the FER holders. Hence, provision is made for the bridging substitute proficiency check provided it is completed between 23 September 2020 and 1 March 2022 (an extended window from the 31 March 2021 in CASA EX57/20 to facilitate those who had not completed the substitute proficiency check by 31 March 2021).

Completion of the substitute proficiency check will be treated as if it were a (near) EPC equivalent expiring 24 months from when the last actual EPC expired — thereby restoring the FER holders to their original pre-existing EPC cycle dates.

Safety considerations

One effect of the exemption will be that a period of up to 4 years may elapse between an FER holder's *completion* of an *actual* EPC which involves *flight or simulated flight* and the holder's next completion of such an EPC. However, this period will be bridged by

the requirement on the FER holder to complete (before 1 March 2022) or to already have completed (since 23 September 2020), a substitute proficiency check that is in all other respects identical to an actual EPC.

CASA considers that an acceptable level of aviation safety is preserved by the elements of the exemption instrument for the following reasons.

First, the cohort of people involved – FER holders – are, by definition, among the most senior and skilled of aviators.

Secondly, the numbers of flight tests required have been significantly reduced as a result of the COVID-19 measures, and while the distribution of anti-COVID vaccines is likely to improve matters, numbers of required flight tests are likely to increase only slowly in line with the emergence of the Australian economy from the worst of the pandemic's effects.

Thirdly, while ideally an EPC should contain a flying component to check and assess the examiner's examining skills *in flight testing conditions*, the flying component of the EPC is not intended to be a test of the examiner's actual flying skills and competence, and the temporary absence of a flying component does not directly impact on safety.

Fourthly, FER holders are subject to proficiency checks and flight reviews to ensure that their flying skill and competence is maintained, and this continues to provide an important practical safety mitigator in the absence of a formal flying component in the substitute proficiency check.

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 a class of persons, namely the relevant 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

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 for a number of reasons.

First, there is an urgency behind alerting the cohort of relevant FER holders to what their position will be post 31 March 2021.

Secondly, by acknowledging the importance of the substitute proficiency check, CASA wishes to encourage relevant FER holders to complete that check as soon as practicable and not unnecessarily defer it.

Thirdly, CASA has been in informal consultation with small numbers of the relevant FER holder cohort explaining, and seeking feedback on, the proposal which has been welcomed as providing business certainty and predictability, and as a pathway towards normalisation of the EPC renewal cycles.

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 is reasonable, necessary and proportionate.

Commencement and making

The exemption commences on 1 April 2021. It will not be repealed until 29 February 2024, by which date CASA expects that all possible permutations of EPC expiry dates and substitute proficiency check expiry dates will have been exhausted, and all relevant FER holders will have been returned to their previous EPC cycle dates.

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

CASA EX19/21 — Examiner Proficiency Checks (Extensions of Time and Substitute Proficiency Checks) Exemption Instrument 2021 (No. 1)

1 Name

This section names the instrument.

2 Duration

This section sets out the commencement and duration of the instrument.

3 Definitions

The section contains key definitions.

4 Application

This section limits the application of the instrument by excluding from it those subject to an unresolved show cause notice, and those who have failed an EPC or a substitute proficiency check. For these persons, the exemptions do not apply.

5 Dual exemptions as applicable

Under this section, each of the 2 exemptions in the instrument applies according to its terms.

6 Exemption – examiner proficiency checks – extension of time

Under this section, for the duration of the period expressed in the Table, a relevant FER holder is exempted from the requirement in regulation 61.1285 of CASR to have an EPC.

7 Exemption — substitute proficiency checks for examiners

Under this section, provision is made for FER holders to complete a substitute proficiency check which will enable their return to their original cycle of biennial EPC.

Statement of Compatibility with Human Rights

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

CASA EX19/21 — Examiner Proficiency Checks (Extensions of Time and Substitute Proficiency Checks) Exemption 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 EX19/21 — Examiner Proficiency Checks (Extensions of Time and Substitute Proficiency Checks) Exemption Instrument 2021 (No. 1)* (the **new EPC exemption**) is twofold:

- to exempt, for various periods of time (not later than 31 December 2021) certain flight examiner rating holders (**FER holders**) and certain CASA approval holders from the requirement under regulation 61.1285 of the *Civil Aviation Safety Regulations 1998 (CASR)* to have a valid examiner proficiency check (**EPC**) that would otherwise be due on 1 April 2021
- to exempt FER holders from the same requirement provided that, within certain time limits, the holder successfully completes a prescribed substitute proficiency check to be applicable for a defined period of time in place of an EPC otherwise due.

The substitute proficiency check is, in essence, the ground component of an actual EPC which would otherwise normally involve a flying or simulated flying component.

For simplicity, references to an FER holder are taken to include relevant CASA approval holders under regulation 61.040 of CASR who, under the terms of their approval, are also required to have an EPC.

Human rights implications

The exemption instrument may engage the following human rights:

- the right to work under Article 6 (1) of the International Covenant on Economic, Social and Cultural Rights (the **ICESCR**).

Right to work under the ICESCR

Without the exemption instrument, EPCs for all relevant FER holders would be due for completion not later than 31 March 2021.

It would be logistically impossible for CASA and the FER holders to complete EPCs in that way, resulting in many of the relevant FER holders being grounded from conducting flight tests, checks, and flight reviews.

Such activities constitute the bulk of the work of the holders and their major source of remuneration. They would be deprived of this remuneration in the absence of the exemption and, effectively, no longer be employed or employable until they had completed an EPC in a competitive bottleneck with all the other FER holders. CASA has only a very limited number of officers who are themselves qualified to administer an EPC that involves a flying component.

Thus, although the instrument imposes an obligation on each of the relevant FER holders to complete a substitute proficiency check, the alternative is the normal operation of the standard aviation safety requirement under regulation 61.1285 to hold a valid EPC. As of 1 April 2021, because of limited CASA resources, this would be logistically impossible without a delay which would cause the FER holder to be grounded and deprived of income.

Human rights implications

The exemption in 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, by imposing substitute proficiency checking obligations on FER holders before they may conduct flight tests, checks and flight reviews, it does so in a way that is reasonable, necessary and proportionate to ensure the continued capacity of the FER holders to conduct flight tests while preserving an acceptable level of aviation safety.

Conclusion

This legislative instrument is compatible with human rights, and to the extent that it may engage certain rights it does so in a way that is reasonable, necessary and proportionate in the interests of aviation safety.

Civil Aviation Safety Authority