

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX17/22 – Obtaining Experience for Grant of RePL for Medium RPA, and for RePL Upgrade to Different Category of Small or Medium RPA – Exemption Instrument 2022

Purpose

CASA EX38/21 – Obtaining Experience for Grant of RePL for Medium RPA, and for RePL Upgrade to Different Category of Small or Medium RPA – Exemption Instrument 2021 (CASA 38.21) was an exemption instrument which commenced on 14 April 2021 to make it more practical for remote pilot licence (**RePL**) holders to gain experience in operating other remotely piloted aircraft (**RPA**) with a view to obtaining a licence upgrade for a different *type* of RPA or for a different *category* of RPA.

The then (and still current) rules for such upgrades in Part 101 of the *Civil Aviation Safety Regulations 1998 (CASR)* provide a person with 2 upgrade pathways: through an approved training organisation or through a Civil Aviation Safety Authority (**CASA**) flight test. Generally, for medium RPA, CASA flight testing is the most practical option for some RePL upgrades, but some of the rules make it difficult for applicants to acquire sufficient operating experience with the relevant medium RPA to ensure that the flight test can be conducted safely. The exemption applies to exempt from these rules.

When CASA EX38/21 was registered on 14 April 2021, it was expected that, by 31 March 2022, regulatory amendments would have been made to amend the regulations in Part 101 of CASR whose inadvertent effect was to prevent the easier accumulation of relevant experience for upgrading purposes. However, due to resourcing obstacles and competing priorities, it is now tentatively expected that the Part 101 amendments may not be made and registered until December 2022, giving rise to the need to reissue it.

CASA EX17/22 – Obtaining Experience for Grant of RePL for Medium RPA, and for RePL Upgrade to Different Category of Small or Medium RPA – Exemption Instrument 2022 is a reissue of CASA EX38/21 in virtually identical terms except duration. It is expressed to expire at the end of 30 September 2023. As soon as the regulatory amendments mentioned above are made, the exemption instrument will be repealed. While December 2022 is a finalisation target date, CASA has no real certainty on when relevant regulation amendments of this nature will get drafting priority in an election year or its aftermath, hence the extended expiry date.

Legislation — exemptions

Section 98 of the *Civil Aviation Act 1988* (the *Act*) empowers the Governor-General to make regulations for the Act and the safety of air navigation.

Subpart 11.F of CASR deals with exemptions. Under subregulation 11.160 (1), and for subsection 98 (5A) of 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.).

Background

Under subregulation 101.295 (2) (all provisions denoted with the prefix “101.” are to Part 101 of CASR), CASA must grant a RePL to an applicant if the person has passed a relevant theory or knowledge examination (paragraph 101.295 (2) (a)), and completed, relevantly, a RPL training course (subparagraph 101.295 (2) (b) (i)) *or* a CASA flight test (subparagraph 101.295 (2) (b) (iii)), *and* has at least 5 hours’ experience in operating an RPA under standard RPA operating conditions (paragraph 101.295 (2) (c)).

Standard RPA operating conditions are defined in regulation 101.238 and are designed to constrain and limit the extent and scope of an RPA’s operation.

Due to the limited numbers of approved training organisations offering training courses for medium RPA in particular, there are limited opportunities for a person to complete a training course as an alternative to completing a CASA flight test. Consequently, given the number of CASA offices across Australia, seeking a CASA flight test is often the most practical and preferred option. However, unless the applicant already has flying experience, a flight test may present some safety concerns, including to the CASA person conducting the flight test.

Under subregulation 101.252 (2), a person commits an offence of strict liability if the person operates an RPA and does not hold a RePL that authorises the person to operate the RPA. This does *not apply* in relation to the operation of an *excluded RPA*.

Under paragraph 101.237 (6) (a), a small RPA (with a gross weight of more than 2 kg but not more than 25 kg) is an *excluded RPA* if it is being operated in standard RPA operating conditions by a person for the sole purpose of meeting the experience requirement mentioned in paragraph 101.295 (2) (c) for the grant of a RePL.

Thus, no offence is committed by a relevantly unlicensed person complying with paragraph 101.237 (6) (a). This provision provides some flexibility for a person to accumulate operating experience prior to attempting a flight test for a RePL for a small RPA.

However, while this applies for a person attempting to upgrade from a RePL for a very small RPA (gross weight of more than 250 g but not more than 2 kg) to a RePL for a small RPA, it does not apply for an upgrade from a RePL for a small RPA to a medium RPA (gross weight of more than 25 kg but not more than 150 kg). A medium RPA is not an excluded RPA for paragraph 101.237 (6) (a). This prevents a person with a RePL for a small RPA from operating a medium RPA under standard RPA operating conditions with a view to gaining experience for a medium RPA flight test conducted by CASA. Consequently, there is an elevated safety risk to the CASA person conducting the flight test.

The same problem arises if a person seeks to upgrade their RePL *for a different category of RPA*. Under paragraph 101.237 (6) (b), a small RPA is an *excluded RPA* if it is being operated in standard RPA operating conditions by the holder of a RePL for the sole purpose of getting practical experience and gaining competency in the operation of an RPA *of a category that is specified in the licence*. For the purposes of a category upgrade, the relevant new category will obviously not be specified in the person's RePL.

In addition to these issues, under regulation 101.270, a person commits an offence if they conduct operations using RPA and they do not hold a certificate as an RPA operator (a **ReOC holder**) that authorises them to conduct the operations. This offence provision does not apply in the case of an excluded RPA — such as a small RPA operated under subregulation 101.237 (6) in standard RPA operating conditions to gain operating experience for a flight test. But the provision does apply in the other contexts mentioned above involving RePL upgrades to a medium RPA, or RePL upgrades to a different *category* of small or medium RPA.

The exemption instrument is designed to address these issues by allowing relevant operating experience for a type or category flight test to be obtained without committing an offence and without the need to be a ReOC holder.

It had originally been thought that subregulation 101.237 (8) avoided the issues described above. It provides that *any* RPA is an excluded RPA if it is being operated by a person for the purpose of the person receiving training from a ReOC holder authorised to conduct training in the relevant RPA.

However, to be such a training ReOC holder, CASA requires that the ReOC holder's Chief Remote Pilot must hold the applicable RePL rating for the relevant RPA (because of the competency requirements indicated under paragraphs 101.340 (1) (b) and 101.342 (c)). Once again, the only reasonably practical way for this to occur at present is through the Chief Remote Pilot passing a relevant CASA flight test for the relevant type or category of RPA, thereby giving rise to the same issues about facilitating the accumulation of relevant operating experience as described above.

Proposed regulation amendments to address these issues will remove the need for the exemption instrument by the time it expires at the end of 30 September 2023 (noting it may be repealed earlier).

The exemption instrument

Under section 4 of the instrument, a RePL holder for a small RPA who operates the *same category* of medium RPA is exempted from compliance with the requirements of subregulation 101.252 (2), but only to the extent that the holder would otherwise commit an offence because the medium RPA is not an excluded RPA.

Under section 5, the exemption in section 4 is subject to the condition that the RePL holder may operate the medium RPA only if all of the following requirements are met, namely, that the operation is:

- (a) conducted under the standard RPA operating conditions mentioned in regulation 101.238;
- (b) for the purpose of either or both of the following:
 - (i) meeting the experience requirement mentioned in paragraph 101.295 (2) (c) for the grant of a RePL for the same category of medium RPA (*relevant RePL*);
 - (ii) getting practical experience and gaining competency in the operation of the medium RPA for the grant of the relevant RePL;
- (c) for the purposes of preparation to undertake a flight test conducted by CASA under subparagraph 101.295 (2) (b) (iii) for the grant of the relevant RePL.

Under section 6, a RePL holder for a category of small or a medium RPA who operates a different category of small or medium RPA is exempted from compliance with the requirements of subregulation 101.252 (2) of CASR, but only to the extent that the holder would otherwise commit an offence because:

- (a) for the medium RPA — it is not an excluded RPA; and
- (b) for the small or medium RPA — the holder does not hold a RePL for the different category.

Under section 7, the exemption in section 6 is subject to the condition that the RePL holder may operate the different category of small or medium RPA but only if all of the following requirements are met, namely, that the operation is:

- (a) in the different category of small RPA or medium RPA that is of the same type of small RPA or medium RPA as is already included in the holder's RePL;
- (b) conducted under the standard RPA operating conditions mentioned in regulation 101.238;
- (c) for the purpose of either or both of the following:
 - (i) meeting the experience requirement mentioned in paragraph 101.295 (2) (c) for the grant of a RePL for the different category of small RPA or medium RPA (a *RePL upgrade*);
 - (ii) getting practical experience and gaining competency in the operation of the small RPA or medium RPA for the RePL upgrade;
- (d) for the purposes of preparation to undertake a flight test conducted by CASA under subparagraph 101.295 (2) (b) (iii) for the grant of the RePL upgrade.

Under section 8, a person is exempted from compliance with the requirements of regulation 101.270 of CASR but only to the extent that the person would otherwise commit an offence under paragraph 101.270 (2) (b) because the person is not a ReOC holder authorising the conduct of an operation that complies with the requirements of sections 4 and 5, or sections 6 and 7, as the case requires.

Under section 9, the exemption in section 8 is subject to the condition that:

- (a) sections 4 and 5, or sections 6 and 7, as the case may be, apply to the person; and

- (b) the person complies with the relevant conditions in those sections, as applicable.

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 RPA operators 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.

Sunsetting

As the instrument relates to aviation safety and is made under CASR, that means that Part 4 of Chapter 3 of the LA (the sunset provision) does not apply to the instrument (as per item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*). The instrument deals with aviation safety matters that, once identified, require a risk response or treatment plan. Generally speaking, item 15, when invoked, is necessary in order to ensure that, in the interests of aviation safety, a relevant instrument has enduring effect, certainty and clarity for aviation operators both domestic and international.

In this case, the instrument is expressed to be repealed at the end of 30 September 2023 (and in practice likely before that). Thus, in practice, no practical sunset avoidance issues arise and there is no impact on parliamentary oversight.

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.

When CASA made CASA EX38/21, CASA considered that it was not appropriate to formally consult in relation to the exemption instrument because of the urgent need to continue to facilitate RPA type and category upgrades but in a way that protects the personal safety of CASA staff conducting the relevant RPA flight tests. Such staff may otherwise be exposed to some risk of injury in flight testing applicants who had no experience in operating the particular type or category of RPA for which they seek to be flight tested. The other alternative of not offering CASA flight tests is not acceptable given the currently limited other avenues and locations for applicants to become qualified for RePL type and category upgrades, the vast majority of which are required for business or public utility purposes. These circumstances remain the same for the present renewal of the instrument as such.

Nevertheless, while CASA EX38/21 was still in force, CASA was engaged in consultation on a range of proposed miscellaneous amendments to Part 101. The possible incorporation, into those regulations, of the arrangements reflected in CASA EX38/21, was made part of that consultation process which involved the relevant Technical Working Group of the Aviation Safety Advisory Panel (14, 15 and 20 July 2021) and, later, with many organisations and individuals involved in RPA operations and training (15 December 2021 to 7 February 2022). Incorporation was strongly supported, from which may be inferred support for reissue of the exemption pending the making of appropriate regulation amendments.

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).

Sector risk, economic and cost impact

Subsection 9A (1) of the Act states that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration. Subsection 9A (3) of the Act states that, subject to subsection (1), in developing and promulgating aviation safety standards under paragraph 9 (1) (c), CASA must:

- (a) consider the economic and cost impact on individuals, businesses and the community of the standards; and
- (b) take into account the differing risks associated with different industry sectors.

The cost impact of a standard refers to the direct cost (in the sense of price or expense) which a standard would cause individuals, businesses, and the community to incur. The economic impact of a standard refers to the impact a standard would have on the production, distribution, and use of wealth across the economy, at the level of the individual, relevant businesses in the aviation sector, and the community more broadly. The economic impact of a standard could also include the general financial impact of that standard on different industry sectors.

In terms of economic and cost impacts for section 9A (3) of the Act, the exemption instrument would facilitate the conduct of CASA flight tests for RePL type and category upgrades in circumstances where without the safe option of such a flight tests, there would be few practical options for such upgrades.

In the absence of the exemption instrument, flight testing would be less safe and applicants may be less likely to pass the test because of difficulties in lawfully accumulating the necessary operating experience. Failure to pass the test may interfere with their employment opportunities in the remote aircraft sector and lead to further expense in retesting.

By offering previously unavailable avenues to the accumulation of operating experience and, as a result, safe flight testing conducted by CASA, the exemption instrument would reduce economic and cost impacts for relevant upgrade applicants who would otherwise have to find currently limited places on RPL training courses, with consequential delays in qualifying.

Rural and regional impacts

The Minister’s Statement of Expectations states: “I expect that CASA will: ... (b) fully consider the impact of new regulations on general aviation, with a particular focus on regional and remote Australia. All Explanatory Statements drafted by CASA for subordinate legislation should identify the impact on the various categories of operations as well as on communities in regional and remote Australia served by those operations and how these impacts have been considered.”

There are no identified rural and regional impacts that differ in any material way from the general economic and cost impacts described above.

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 (the right to work), it does so in a way that is reasonable, necessary and proportionate.

Commencement and making

The new exemption instrument commences on 1 April 2022 and is repealed at the end of 30 September 2023 though, in practice, its repeal is hoped and expected to come about considerably earlier than that.

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 EX17/22 – Obtaining Experience for Grant of RePL for Medium RPA, and for RePL Upgrade to Different Category of Small or Medium RPA – Exemption Instrument 2022

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

Overview of the legislative instrument

CASA EX38/21 – Obtaining Experience for Grant of RePL for Medium RPA, and for RePL Upgrade to Different Category of Small or Medium RPA – Exemption Instrument 2021 (CASA 38.21) was an exemption instrument which commenced on 14 April 2021 to make it more practical for remote pilot licence (**RePL**) holders to gain experience in operating other remotely piloted aircraft (**RPA**) with a view to obtaining a licence upgrade for a different *type* of RPA or for a different *category* of RPA.

The then (and still current) rules for such upgrades in Part 101 of the *Civil Aviation Safety Regulations 1998 (CASR)* provide a person with 2 upgrade pathways: through an approved training organisation or through a Civil Aviation Safety Authority (**CASA**) flight test. Generally, for medium RPA, CASA flight testing is the most practical option for some RePL upgrades, but some of the rules make it difficult for applicants to acquire sufficient operating experience with the relevant medium RPA to ensure that the flight test can be conducted safely. The exemption applies to exempt from these rules.

When CASA EX38/21 was registered on 14 April 2021, it was expected that, by 31 March 2022, regulatory amendments would have been made to amend the regulations in Part 101 of CASR whose inadvertent effect was to prevent the easier accumulation of relevant experience for upgrading purposes. However, due to resourcing obstacles and competing priorities, it is now tentatively expected that the Part 101 amendments may not be made and registered until December 2022, giving rise to the need to reissue it.

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Human rights implications

The exemption instrument may engage the following human right, namely, 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

The effect of current rules for relevant RPA upgrades in Part 101 of CASR is that CASA flight testing is the only realistic option. The exemption instrument is designed to make it easier for applicants to accumulate the RPA operating experience necessary to pass a flight test without jeopardising the safety of the flight tester.

However, acquiring this experience is subject to conditions which constrain the way the person operates the relevant RPA. These constraints are reasonable, proportionate and necessary in the interests of aviation safety. The exemption instrument, therefore, recognises the right to work of this class of persons and, in effect, provides them with a more realistic means of upgrading their RePLs.

In the absence of the exemption instrument, flight testing would be less safe and applicants may be less likely to pass the test because of difficulties in lawfully accumulating the necessary operating experience. Failure to pass the test may interfere with their employment opportunities in the RPA sector and lead to further expense in retesting. The exemption instrument will make both of these outcomes less likely until such time as the rules can be amended, currently expected to be by December 2022.

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*.

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