

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.5 Amendment Order (No. 1) 2011

Legislative background

Under section 27 of the *Civil Aviation Act 1988* (the *Act*), CASA may issue Air Operators' Certificates (*AOCs*) with respect to aircraft for the purpose of safety regulation. Under section 28 of the Act, CASA must issue the AOC if satisfied that the applicant can comply with the requirements of Australian civil aviation safety legislation.

Under paragraph 28BA (1) (b) of the Act, an AOC has effect subject to any conditions specified in the regulations or Civil Aviation Orders (the *CAOs*).

Additionally, under subsection 98 (4A) of the Act, CASA may issue CAOs, not inconsistent with the Act, in respect to any matter in relation to which regulations may be made for the purposes of, relevantly, section 28BA of the Act (conditions on AOCs).

Part 82 of the CAOs specifies conditions on AOCs for various kinds of operations. CAO 82.5 contains conditions on AOCs that authorise regular public transport operations in high capacity aircraft, i.e. aircraft certificated as having a maximum seating capacity exceeding 38 seats or a maximum payload exceeding 4 200 kilograms.

Background

ICAO audit of CASA

One of the recommendations of the ICAO audit in February 2008 was that CASA should provide legislative rules for cockpit voice recorder (*CVR*) and flight data recorder (*FDR*) records to be preserved for examination if an aircraft carrying such recorders was involved in a relevant accident or incident.

Previous CAO amendment

Civil Aviation Order 82.5 Amendment Order (No. 3) 2010 (the *previous CAO amendment*) implemented CASA's response to this recommendation.

CASA's response was based on the preservation of the relevant records in the event of an *immediately reportable matter* and a *foreign immediately reportable matter* occurring to an aircraft that is carrying a CVR or FDR.

Effect of previous CAO amendment

Under the previous CAO amendment, and using the effect of provisions in the *Transport Safety Investigation Act 2003* (the *TSI Act*) and the *Transport Safety Investigation Regulations 2003* (the *TSI Regulations*), an *immediately reportable matter* was an aviation accident and incident event mentioned in a list of such events which must be reported to the Australian Transport Safety Bureau (the *ATSB*) for it to determine whether a safety investigation should occur.

Under the previous CAO amendment, a *foreign immediately reportable matter* was defined as a matter relating to the safety of transport by means of aircraft that must be reported to an authority of a foreign country under a law of that country.

As the investigating bodies and, therefore, the bodies to which relevant matters were to be reported, under the previous CAO amendment the ATSB, and an authority of a foreign country under a law of that country, were designated as responsible authorities. Within certain prescribed time limits, each responsible authority was to determine how long CVR and FDR records were to be preserved for the purposes of the responsible authority.

Removal of foreign immediately reportable matter

Following a preliminary review of the way in which the previous CAO amendment would and was operating, for reasons of practicality, CASA decided to remove the notion of foreign immediately reportable matters from the scheme.

It was considered that imposition of foreign immediately reportable matters obligations on Australian AOC holders would not result in any enhanced preservation of relevant CVR and FDR records for Australian purposes.

However, it could result in the operator, *solely because of the previous CAO amendment*, being subject to 2 separate determinations of how long to preserve CVR and FDR records — a determination by the foreign country authority, if it made one, and a determination by the ATSB. It was the objective of the previous CAO amendment specifically to assist ATSB in the preservation of relevant records.

The new CAO amendment

Therefore, under Schedule 1 of *Civil Aviation Order 82.5 Amendment Order (No. 1) 2011* (the ***new CAO amendment***), a small number of technical amendments are made to remove references to foreign immediately reportable matters and foreign responsible authorities.

As a result, under the new CAO amendment, relevant Australian and foreign aircraft, in Australian airspace, would be subject to the CAO's records preservation requirement for ATSB purposes.

Also, relevant Australian aircraft, in foreign airspace, would be subject to the CAO's records preservation requirement for ATSB purposes.

However, relevant Australian aircraft, in foreign airspace, would not be subject to the CAO's records preservation requirement for the foreign country's purposes. (Of course, the foreign country may have its own analogous rules which the Australian operator must observe in that country.)

Legislative Instruments Act 2003 (the LIA)

Paragraph 28BA (1) (b) of the Act provides that an AOC has effect subject to any conditions "specified in the regulations or Civil Aviation Orders".

Subsection 98 (4A) of the Act provides that CASA may issue CAOs with respect to any matter in relation to which regulations may be made for the purposes of section 28BA.

Under subsection 98 (4B) of the Act, a CAO issued under subsection 98 (4A) is stated to be a legislative instrument and is, therefore, subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LIA.

By providing that an AOC has effect subject to any conditions specified in the regulations or CAOs, paragraph 28BA (1) (b) of the Act is a separate head of power for the making of

relevant CAOs. For section 5 of the LIA, such CAOs would be legislative instruments subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LIA.

The new CAO amendment is made under both paragraph 28BA (1) (b) and subsection 98 (4A) of the Act and is a legislative instrument.

Consultation

Appropriate consultation under section 17 of the LIA had been undertaken in relation to the previous CAO amendment. Further consultation was not considered necessary for the new CAO amendment which would have no effect on previously consulted parties.

Office of Best Practice Regulation (OBPR)

OBPR did not require a Regulation Impact Statement for the previous CAO amendment because a preliminary assessment of business compliance costs indicated that that amendment would have only a nil to low impact on business (OBPR ID No. 11939). Given the narrowed focus of the new CAO amendment, this remains the case.

Commencement and making

The new CAO amendment commences on the day after it is registered. The new CAO amendment has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the Act.

[Civil Aviation Order 82.5 Amendment Order (No. 1) 2011]