

## **Explanatory Statement**

### **Civil Aviation Act 1988**

### **Civil Aviation Order 48.1 Amendment Instrument 2013 (No. 1)**

#### **Purpose**

The purpose of *Civil Aviation Order 48.1 Amendment Instrument 2013 (No. 1)* (the **CAO amendment**) is to delete from the *Civil Aviation Order 48.1 Instrument 2013* (the **new CAO 48.1**) 3 references to “4 December 2013” and insert “1 September 2014”.

This is consequent upon the registration of the *Civil Aviation Legislation Amendment (Flight Crew Licensing Suite) Regulation 2013* (the **date amendment regulations**) on 25 November 2013.

These regulations changed from “4 December 2013”, to “1 September 2014”, the date of commencement of the *Civil Aviation Legislation Amendment Regulation 2013 (No. 1)* (the **licensing suite regulations**).

#### **Background**

The licensing suite regulations establish a new legislative regime for flight crew licensing. To do so, the licensing suite regulations repeal Part 5 of the *Civil Aviation Regulations 1988 (CAR 1988)* which contains the current legislative rules for flight crew licensing (see item 5 in Schedule 2 of the licensing suite regulations).

However, Part 5 also contains regulation 5.55 of CAR 1988, under which CASA may give directions establishing flight and duty time limitations for holders of flight crew licences. Such directions have been given in **CAO Part 48** (comprising CAO 48.0, CAO 48.1, CAO 48.2, CAO 48.3 and CAO 48.4).

As a result of the date amendment regulations, the licensing suite regulations will repeal regulation 5.55 of CAR 1988 on 1 September 2014 (not 4 December 2013), and replace it with a new and similar directions power under regulation 210A of CAR 1988. However, a new regulation 335 of CAR 1988, inserted by the licensing suite regulations will have the effect of continuing in force CAO Part 48 as if it had been made on 1 September 2014 (not 4 December 2013).

#### **The new CAO 48.1**

In July 2011, the International Civil Aviation Organization (**ICAO**) issued Standards and Recommended Practices (**SARPs**) for fatigue risk management. The new CAO 48.1 was CASA’s regulatory response to the ICAO SARPs and it prescribes flight time limitations and fatigue self-management obligations.

The new CAO 48.1 commenced on 30 April 2013 with a view to requiring full compliance on and from 30 April 2016. It is addressed to AOC holders and their flight crew members.

The new CAO 48.1 repeals CAO Part 48 and replaces it but does so essentially by means of imposing fatigue risk management standards on AOC holders as conditions of their AOCs under paragraph 28BA (1) (b) of the *Civil Aviation Act 1988* (the **Act**), rather than by means of directions.

### **The CAO repeals**

To achieve this, subsection 3 of the new CAO 48.1 repeals CAO Part 48 from 30 April 2016. To avoid doubt, certain related Civil Aviation Amendment Orders (*CAAOs*) are also repealed effective on 30 April 2016.

To further avoid doubt, the new CAO 48.1 also contained a provision that on 30 April 2016, CAO Part 48 and each related CAAO “as continued in force by subregulation 335 (2) of CAR 1988 as if it had been made on 4 December 2013 under regulation 210A of CAR 1988, is repealed”.

As mentioned above, the date amendment regulations have substituted “1 September 2014” for “4 December 2013” as the commencement date for the new flight and duty time limitations head of power in new regulation 210A of CAR 1988, and as the commencement date for the continuation in force of CAO Part 48 under new regulation 335 of CAR 1988.

It is, therefore, necessary to amend the mention of “4 December 2013” to “1 September 2014” in the new CAO 48.1 so that it is consistent with the date change of the licensing suite regulations.

### **Heads of power**

Regulation 5.55 of CAR 1988, and its replacement in regulation 210A, were used among the heads of power for the new CAO 48.1 to facilitate the eventual repeal of CAO Part 48 which was made under regulation 5.55 and which, from 1 September 2014 (not 4 December 2013), is continued in force under regulation 210A by virtue of regulation 335.

Other than to facilitate that eventual repeal, and for ensuring that CAO Part 48 would no longer apply to new and early opt-in AOC holders covered by the new CAO 48.1, regulation 5.55 of CAR 1988 was not required as a head of power for the making of the new CAO 48.1 because conditions on AOCs were used as the vehicle to impose the new fatigue risk management obligations.

Regulation 210A of CAR 1988 was included with the heads of power: (a) to support the eventual repeal of CAO Part 48 on 30 April 2016, and (b) to support the interim non-application of CAO Part 48 to persons who become new or early opt-in AOC holders after commencement of the new CAO 48.1 (that is, after 30 April 2013).

Regulation 210A does not take effect until 1 September 2014 (not 4 December 2013), but its inclusion in the new CAO 48.1 was in accordance with the anticipatory powers provided by section 4 of the *Acts Interpretation Act 1901*.

The combined effect of the repeal paragraphs in subsection 3 of the new CAO 48.1 was designed to avoid any doubt about the operation of the new CAO 48.1 and the repeal of CAO Part 48 on 30 April 2016.

Paragraphs 3.1 and 3.2 of the new CAO 48.1 repeal CAO Part 48 on 30 April 2016. To avoid doubt, paragraph 3.3 of the new CAO 48.1 provided that the CAO Part 48, *as continued in force on 1 September 2014 (not 4 December 2013) by regulation 335*, is repealed on 30 April 2016.

Paragraphs 4.2 and 4.6 of the new CAO 48.1 have the effect of CAO Part 48 no longer applying to new or early opt-in AOC holders after 30 April 2013.

### **Definition of flight crew licence**

Similar considerations apply to the definition of *flight crew licence* in the new CAO 48.1.

Previously, the licensing suite regulations would have commenced on 4 December 2013, meaning that for the purposes of the new CAO 48.1 (which formally commenced in April 2013), the definition of *flight crew licence* would have 2 sources: (a) the definition that applied for CAR Part 5 purposes before 4 December 2013; and (b) the new definition that applied on and from 4 December 2013 as a result of the new licensing rules to be established by the licensing suite regulations.

The mentions of “4 December 2013” are, therefore, amended to become “1 September 2014”.

### **Retrospectivity**

Although the date change for the licensing suite regulations effected by the date change regulations occurred on 26 November 2013 (the day after registration on 25 November 2013) and before the CAO amendment, no issues of prejudicial retrospectivity arise from the CAO amendment now amending the new CAO 48.1 to be consistent with this date.

Until 1 September 2014 actually occurs, the change of date has no effect on anyone affected by the new CAO 48.1, whether they be new AOC holders and their flight crew members (*FCMs*) or existing AOC holders and their *FCMs*.

### **Legislative Instruments Act 2003 (LIA 2003)**

The new CAO 48.1 was a legislative instrument under the various different requirements set out in Appendix 1. The CAO amendment, as an amending instrument, is similarly a legislative instrument.

### **Consultation**

The substitution of “1 September 2014” for “4 December 2013” in subsection 3 (Repeals) and subsection 6 (definition of *flight crew licence*) of the new CAO 48.1 consequential on the date change regulations, does not involve any change to the application or operation of the new CAO 48.1. On this basis, no specific formal consultations were considered necessary or appropriate

### **Statement of Compatibility with Human Rights**

The Statement in Appendix 2 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement indicates that the CAO amendment 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*.

### **Office of Best Practice Regulation (OBPR)**

A Regulation Impact Statement (*RIS*) was not prepared by CASA for the CAO amendment because, given its nature and context, this was unnecessary. A *RIS* for the new CAO 48.1 was prepared by CASA and assessed by OBPR as adequate (OBPR id: 14395). It was attached to the Explanatory Statement for the new CAO 48.1.

**Making and commencement**

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

The CAO amendment commences on the day after registration.

*[Civil Aviation Order 48.1 Amendment Instrument 2013 (No. 1)]*

### **Why the CAO is a legislative instrument**

First, under subregulation 5 (1) of CAR 1988, wherever CASA may issue a direction under the regulations, CASA may issue the direction in a CAO. Under subsections 98 (5) and 98 (5AAA) of the Act, where the regulations provide for certain instruments to be issued in the form of CAOs, such CAOs are legislative instruments. The new CAO 48.1 contains directions made under regulation 215 of CAR 1988. The new CAO 48.1 was, therefore, a legislative instrument and it is subject to registration, and tabling and disallowance in the Parliament, under sections 24, and 38 and 42, of LIA 2003.

Secondly, subregulation 11.068 (1) of the *Civil Aviation Safety Regulations 1998* expressly provides that the imposition of conditions on a class of authorisations (like flight crew licences) may be by means of a legislative instrument. The new CAO 48.1 imposed conditions on flight crew licences under subregulation 11.068 (1). The new CAO 48.1 was, therefore, a legislative instrument and it is subject to registration, and tabling and disallowance in the Parliament, under sections 24, and 38 and 42, of LIA 2003.

Thirdly, 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”. By so providing, paragraph 28BA (1) (b) of the Act is considered to be a separate head of power for the making of relevant CAOs. The new CAO 48.1 imposed conditions on AOCs to which it applies. For section 5 of LIA 2003, and the definition of a legislative instrument, such a CAO is of a legislative character and is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 24, and 38 and 42, of LIA 2003.

Fourthly, 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. The new CAO 48.1 imposed conditions on AOCs to which it applies. 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 registration, and tabling and disallowance in the Parliament, under sections 24, and 38 and 42, of LIA 2003.

The new CAO 48.1 instrument was made under these various heads of power and was a legislative instrument, and the CAO amendment, as an amending instrument, is similarly a legislative instrument.

## Statement of Compatibility with Human Rights

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

### Civil Aviation Order 48.1 Amendment Instrument 2013 (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 *Civil Aviation Order 48.1 Amendment Instrument 2013 (No. 1)* (the **CAO amendment**) is to delete from the *Civil Aviation Order 48.1 Instrument 2013* three references to “4 December 2013” and insert “1 September 2014”.

This is a technical amendment designed to achieve consistency, consequent upon the registration of the *Civil Aviation Legislation Amendment (Flight Crew Licensing Suite) Regulation 2013* (the **date change regulations**) on 25 November 2013.

The date change regulations changed from “4 December 2013”, to “1 September 2014”, the date of commencement of the *Civil Aviation Legislation Amendment Regulation 2013 (No. 1)* (the **licensing suite regulations**). A provision in the licensing suite regulations was also referred to in the CAO amendment along with mention of its 4 December 2013 date of effect. Since that date of effect is changed to 1 September 2014, a similar change must be made to the CAO amendment.

#### 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*. The instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

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

**Civil Aviation Safety Authority**