

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.0 Amendment Instrument 2014 (No. 3)

Purpose

The purpose of *Civil Aviation Order 82.0 Amendment Instrument 2014 (No. 3)* (the **CAO amendment**) is to extend existing safety rules regarding alternate aerodromes and minimum safe fuel requirements for aeroplane charter operations. The extension means that the rules now also cover passenger-carrying regular public transport (**RPT**) and medical transport operations; and they also apply to Cocos (Keeling) Islands (**Cocos**).

Legislative background

Under section 27 of the *Civil Aviation Act 1988* (the **Act**), CASA may issue an Air Operators' Certificate (**AOCs**) for aviation 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**).

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 section 28BA of the Act (conditions on air operator's certificates (**AOCs**)).

Part 82 of the CAOs contains a set of standing conditions imposed on AOCs for various kinds of operations. CAO 82.0 in particular, specifies general conditions on AOCs.

Paragraph 2.1 of Civil Aviation Order 82.0 (**CAO 82.0**) defined a remote island as Christmas Island, Lord Howe Island and Norfolk Island.

Subsection 3A of CAO 82.0 stated that each AOC authorising aeroplane charter operations for the carriage of passengers to remote islands was subject to the condition that the aeroplane must be multi-engined, carry at the start total fuel not less than minimum safe fuel (**MSF**) and have as an alternative to the destination aerodrome an "alternate aerodrome" that is not itself located on a remote island.

Subsection 3A did not cover RPT operations or medical transport operations.

Under paragraph 2.3 of CAO 82.0, **MSF** is defined as the minimum amount of fuel the aeroplane should carry according to provisions in the operations manual for its calculation; or according to the manual revised in accordance with a CASA direction if the operations manual provisions are omitted or inadequate.

If the manual has no such provisions, the MSF is to be calculated in accordance with the directions set out in paragraph 2.4 of CAO 82.0. Paragraph 2.4 provides that the operator must carry the greater of 2 calculated amounts as follows.

In the first instance, calculations are based on ensuring carriage of fuel such that the aeroplane can fly with all engines operating to its destination island and then to its alternate aerodrome (not on a remote island) without using any reserve fuel.

In the second instance, calculations are based on ensuring carriage of fuel such that, if there were engine failure or loss of cabin pressure the aeroplane could fly to its destination aerodrome or its alternate aerodrome (not on a remote island), hold for a certain period of time and land.

These calculations are to be worked out using, for example, the aeroplane's flight manual (for transport category aircraft) or (for other aircraft) certain performance and fuel consumption data from the manufacturer, the operations manual, the pilot handbook or the aircraft flight manual.

Background

As mentioned, subsection 3A of CAO 82.0 did not apply to any passenger-carrying RPT operations or to any aerial work operations, including such operations in the form of medical transport operations. For such operations, there was no requirement, as there was for charter operations, to nominate a non-remote alternate aerodrome and carry MSF to fly from the destination aerodrome to that alternate aerodrome if the need arose.

Those requirements had once applied to RPT operations but this application was removed when the Civil Aviation Authority (*CAA*) approved specific RPT service routes with the aerodrome requirements included in the approval. Subsequently, under CASA, RPT Air Operator's Certificates (*AOCs*) were (and are) issued with an approval to operate within a defined area. Thus, AOCs were no longer required to have specific routes approved (which would have included alternate aerodromes, as was the case with the former CAA). However, subsection 3A was not correspondingly modified to reinstate the nomination of alternate aerodromes for RPT operations..

On 21 August 2009, CASA established a 4-phase project to review the fuel and alternate aerodrome requirements for all flights in Australia, including to remote islands. The phases were to be as follows:

- Phase 1 would consider amendments to CAOs for flights to isolated aerodromes
- Phase 2 would consider new fuel standards to be published by the International Civil Aviation Organization (*ICAO*) and whether regulations should be correspondingly amended
- Phase 3 would consider amendments to the *Civil Aviation Regulations 1988 (CAR 1988)* to require the pilot in command and the operator of a flight to take reasonable steps to ensure, *on a continuing basis* rather than only at commencement of the flight, that sufficient fuel and oil is carried to complete the flight in safety
- Phase 4 would consider publication of educational material to support changes under the previous 3 phases.

Since the primary goal of the project was to comply with the proposed new ICAO fuel standards, the project experienced delay while ICAO finalised the standards. This had the effect of compressing the phases into simultaneous elements.

This project was initiated in a context in which the following were the case:

- changed practice from the CAA to CASA in the issue of AOCs, as mentioned above
- regulation 234 of CAR 1988 (**CAR 234**) required the pilot in command and the operator to take reasonable steps to ensure that an aircraft did not *commence* a flight if the aircraft is not carrying sufficient fuel and oil to enable the proposed flight to be undertaken safely
- the Aeronautical Information Publication (**AIP**) (applying to all pilots regardless of the category of operation and, therefore, including isolated aerodromes and remote islands) stipulated that pilots should *continually ensure* (that is, not merely at commencement) that on-board fuel is not less than the fuel required to proceed to a safe landing (whether at the intended destination or otherwise) without using any of the planned fixed-fuel reserve. This stipulation was not legislative.

Against this background, on 18 November 2009, an aeromedical flight from Apia, Samoa, undertaken by Pel-Air Aviation Pty Limited, ditched in the sea off Norfolk Island. The fuel and alternate aerodrome requirements of CAO 82.0 did not apply to this particular flight because it was an aerial work operation not covered by subsection 3A of CAO 82.0.

In August 2012, the Air Transport Safety Bureau (**ATSB**) released its final report into the PelAir accident (*Investigation number AO-2009-072 – Ditching – Israel Aircraft Westwind 1124A aircraft, VH-NGA, 5 km SW of Norfolk Island Airport, 18 November 2009*).

The report's findings included the following "minor safety issue" for CASA's attention: "*The available guidance on fuel planning and on seeking and applying en route weather updates was too general and increased the risk of inconsistent in-flight fuel management and decisions to divert.*".

In response to the ATSB, CASA undertook to "*. . . endeavour to make the changes as soon as possible – subject to third party arrangements such as drafting and resource availability.*".

CASA had intended that under its revised project Phase 1 and Phase 2, CAO 82.0 would be amended to provide that all passenger-carrying RPT operations and air ambulance flights would have to observe alternate aerodrome and minimum safe fuel requirements when operating to designated remote islands, including Cocos.

CASA also intended that Phase 3 of its project would result in an amendment to CAR 234 to provide an enforceable legislative basis for the AIP stipulation mentioned above.

Under Notice of Proposed Rule Making (**NPRM**) 1003OS (published for public comment in July 2010), CASA proposed to amend CAO 82.0 to address the issue identified by the ATSB in the Norfolk Island investigation report. The NPRM proposed changes to CAO 82.0 to include Cocos as a designated remote island, and to extend the alternate aerodrome and minimum safe fuel requirements to passenger-carrying RPT operations and aerial work air ambulance flights. The NPRM closed for public comment in September 2010 and attracted responses from 5 respondents.

Among the issues raised was concern about the impact of the changes on air services from Perth direct to Cocos. CASA undertook, through its involvement in the ICAO Fuel Use Subgroup, to examine whether alternative standards might be safe and appropriate.

The Cocos air service concerns ceased to be an issue because the operator changed routing to enable the carriage of enough fuel for an alternate.

Meanwhile, the ICAO *Flight Planning and Fuel Management Manual* approached finalisation. The standards in it will be reflected in the *Civil Aviation Safety Regulations 1998 (CASR)* air transport rules (Parts 119, 121, 133 and 135). However, pending these rules being finalised, it was considered appropriate to use the CAOs to accelerate implementation of the remote island requirements which would address aspects of the ATSB “minor safety” issue.

In parallel with these developments, under NPRM 1304OS — *Regulation of aeroplane and helicopter “ambulance function” flights as Air transport operations* (published for public comment in July 2013), CASA proposed that air transport operations should include medical transport flights.

Although this NPRM did not specifically canvass an amendment to CAO 82.0 to bring this about, it did propose that medical transport operations should be regulated as air transport operations under the pending Parts 119, 121 and 133 and 135 of CASR.

It also proposed that Part 135 of CASR – *Air transport operations – small aeroplanes* and Part 121 of CASR – *Air transport operations – large aeroplanes* should include regulations requiring that air transport operators (that is passenger-carrying RPT, charter and air ambulance operators) must carry sufficient fuel to divert to an alternate aerodrome for all flights to designated remote islands.

In light of the foregoing, the CAO 82.0 amendment was developed to designate Cocos as a remote island, and to require minimum safe fuel and alternate aerodromes for all passenger-carrying flights to remote islands, including medical transport flights.

The opportunity has also been taken to clarify the drafting of the alternate aerodrome and MSF requirements.

CAO amendment

The CAO amendment, therefore, adds Cocos to the list of existing remote islands (Christmas, Lord Howe and Norfolk Islands).

The amendment also substitutes a new subsection 3A which provides that each AOC for passenger-carrying charter, or RPT, operations, or for aerial work ambulance-type functions (*medical transport operations*) is subject to the condition that a passenger must not be carried to a remote island unless the following requirements are complied with:

- the aeroplane must be multi-engined
- the pilot must nominate an alternate aerodrome
- that alternate aerodrome must not itself be on a remote island (unless CASA specifically approves)
- the aeroplane must not carry less than the MSF for the flight

- during the flight, the pilot in command must carry out in-flight fuel management to ensure that the aeroplane is always carrying sufficient fuel to enable it to reach its destination aerodrome as planned, or its alternate aerodrome if necessary, with the required minimum fuel reserves intact. In-flight fuel management requires the obtaining of in-flight weather updates.

In some medical transport operations, medical and nursing staff may not be considered as “passengers” (for example, because they have flight safety duties to perform). To protect the safety of such personnel, who are, in effect, third parties-like passengers, for medical transport operations, the full range of safety requirements described above apply whether or not a “passenger” as such is carried on the flight to a remote island.

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 registration, and to tabling and disallowance in the Parliament, under sections 24, and 38 and 42, of the LIA.

By providing that an AOC has effect subject to any conditions specified in the regulations or the 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 registration, and to tabling and disallowance in the Parliament, under sections 24, and 38 and 42 of the LIA.

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

Consultation

Virtually all of the constituent elements of the CAO amendment have been the subject of some public consultation in one form or another as described above under “Background”, including under NPRM 1003OS in 2010 and NPRM 13040 in 2013. However, because of this complex background and the extended time frame involved leading to eventual development of the proposed CAO 82.0 amendment, CASA decided to publish the CAO amendment in draft form for a further and final 4-week period of consultation before making it. This occurred on 14 August 2014. One comment was received which did not specifically address the amendment; however, the comments were noted in relation to fuel and alternate requirements for future rule making.

Office of Best Practice Regulation (OBPR)

The Office of Best Practice Regulation assessed that the proposed amendment is minor in nature and that no further analysis in the form of a Regulation Impact Statement was required (OBPR ID: 17200).

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*. To the extent that the legislative instrument may directly engage any of the applicable rights or freedoms, for example, the right to freedom of movement, the limitation to human rights is reasonable, necessary and proportionate to protect aviation safety in the operation of aircraft.

Making and commencement

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

[*Civil Aviation Order 82.0 Amendment Instrument 2014 (No. 3)*]

Statement of Compatibility with Human Rights

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

Civil Aviation Act 1988

Civil Aviation Safety Regulations 1998

Civil Aviation Order 82.0 Amendment Instrument 2014 (No. 3)

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 82.0 Amendment Instrument 2014 (No. 3)* (the **CAO amendment**) is to extend existing safety rules regarding alternate aerodromes and minimum safe fuel (**MSF**) requirements for Indian Ocean island aeroplane charter operations. The extension means that the rules also cover passenger-carrying regular public transport (**RPT**) and medical transport operations; and also apply to Cocos (Keeling) Islands (**Cocos**).

Regardless of other possible in-flight roles, medical personnel on medical transport operations are, in effect, third parties-like passengers. Therefore, to protect their safety, for medical transport operations, the requirements for alternate aerodromes and MSF apply whether or not a “passenger” as such is carried on the flight to a remote island.

Human rights implications

The legislative instrument may indirectly engage the right to freedom of movement under the *International Covenant on Civil and Political Rights* by placing restrictions on certain passenger-carrying operations unless particular fuel management and aerodrome planning requirements are met.

However, this right is more directly engaged by the primary requirements of the *Civil Aviation Act 1988*, and the *Civil Aviation Safety Regulations 1998* under which the CAO amendment is made and which are designed for aviation safety and conformity with the standards of the *International Civil Aviation Organization under the Convention on International Civil Aviation* (the Chicago Convention). Thus, the right to freedom of movement is engaged in a way that is balanced by the objectives of achieving and improving aviation safety.

The instrument is otherwise 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 otherwise engage any of the applicable rights or freedoms.

Conclusion

The legislative instrument is compatible with human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate to protect aviation safety in the operation of aircraft.

Civil Aviation Safety Authority