

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 48.1 Amendment Instrument 2015 (No. 1)

Purpose

The purpose of *Civil Aviation Order 48.1 Amendment Instrument 2015 (No. 1)* (the **CAO amendment**) is to delay for 12 months, from 30 April 2016 until 1 May 2017, the full implementation of *CAO 48.1 Instrument 2013 (new CAO 48.1)*.

New CAO 48.1 provides Air Operator Certificate holders (**AOC holders**) and flight crew members (**FCMs**) with a comprehensive regulatory framework for the more effective management of fatigue risk in aviation operations.

Under new CAO 48.1, and subject to transitional arrangements, from 30 April 2013, for first-time AOC holders and their FCMs, this new framework replaced the previous rules for flight and duty time limitations contained in Part 48 of the Civil Aviation Orders (**Part 48 CAOs**).

Previously, under new CAO 48.1, and subject to transitional arrangements, a 3-year transition period was provided. Thus, 30 April 2016 was set as the final date by which existing, “grandfathered”, AOC holders (that is, holding an AOC immediately before 30 April 2013), and their FCMs, had to transition from limitations contained in Part 48 CAOs to the new framework. Under the CAO amendment, the final date for the transition period is extended to 1 May 2017, to allow for a 4-year transition period.

Previously, under new CAO 48.1, grandfathered AOC holders, if they so choose, could voluntarily “early-opt-in” to the new framework before the 30 April 2016. Under the CAO amendment, this early-opt-in transition period is also extended to 1 May 2017.

Legislation

Because of its detail, the legislative basis for the CAO is set out in Appendix 1.

Background

New CAO 48.1 and the new flight and duty time limitations it embodies, represent a significant step forward in aviation safety through fatigue risk management. However, CASA has decided that AOC holders should have more time to fully comprehend and prepare for the new requirements. Hence, CASA has extended by 12 months, from 30 April 2016 to 1 May 2017, the date for full implementation of the new framework for all AOC holders — an overall transition period of 4 years.

This will not, however, prevent AOC holders who wish to operate under the new framework from voluntarily opting into it by telling CASA in writing of the date from which they intend to comply with new CAO 48.1.

The CAO amendment

Subsection 3 of new CAO 48.1 provides for the repeal of the previous Part 48 CAOs from 30 April 2016. The CAO amendment defers this repeal date until 1 May 2017.

Subsection 4 of new CAO 48.1 sets out how and when the new CAO 48.1 will take effect for different classes of AOC holders and FCMs (existing AOC holders; new AOC holders; early-opting-in AOC holders etc.).

Thus, individuals or corporations who become relevant AOC holders *for the first time* after the commencement of new CAO 48.1 (and their FCMs), are immediately subject to the requirements of new CAO 48.1 and Part 48 CAOs (although not expressly repealed until 1 May 2017 (previously, 30 April 2016) are taken not to apply to them.

Otherwise, new CAO 48.1 applies to grandfathered AOC holders and FCMs only on and from 1 May 2017 (previously, 30 April 2016).

However, under paragraph 4.4 as amended, up until immediately before 1 May 2017 (previously, 30 April 2016), grandfathered AOC holders can voluntarily choose an early-opt-in to the new CAO 48.1 regime by informing CASA in writing of the date from which they intend to comply with new CAO 48.1. The holder may notify different dates for specified operations.

Some AOC holders may choose to do this because they have the organisational capacity and resources to take advantage of the new regime, whereas other AOC holders may require the full transitional period until 1 May 2017 (previously, 30 April 2016) to prepare for the change-over.

For those who chose an early-opt-in, they are immediately subject to the requirements of new CAO 48.1, operations manual amendments must have been made (and furnished to CASA) and Part 48 CAOs (although not expressly repealed until 1 May 2017 (previously, 30 April 2016)) are taken not to apply to them.

However, not all AOC holders will choose to do this and some will prefer to await the 1 May 2017 implementation date.

In light of this, an additional amendment is designed to pro-actively encourage relevant AOC holders to prepare for the full implementation of the new framework on 1 May 2017.

New paragraph 4.9 requires that, *by not later than 31 October 2016* (6 months after the previous 30 April 2016 deadline, but 6 months before the new 1 May 2017 deadline), grandfathered AOC holders *who have not already done so*, must give CASA a copy of the draft amendments that are to be made to their operations manual to enable compliance with new CAO 48.1 by 1 May 2017. (Alternatively, if applicable, the grandfathered AOC holder must give CASA a completed CASA Form 824B — Application for Approval of a Fatigue Risk Management System.)

New paragraph 4B.6 has the same effect as new paragraph 4.9 for grandfathered Part 141 operators (that is, operators authorised under Part 141 of the *Civil Aviation Safety Regulations 1998 (CASR 1998)* to conduct flight training and who are treated as if they were AOC holders).

These amendments are intended to pro-actively encourage grandfathered AOC holders, in the interests of aviation safety, to prepare in good time for the full

implementation of the new fatigue risk management arrangements on 1 May 2017, by having draft amended operations manuals ready and supplied to CASA.

New paragraph 4.5 contains a drafting improvement to clarify that, where paragraph 4.4 applies, the requirements of new CAO 48.1 take effect, from the specified date, for *all* of the AOC holder's operations, or for *specified operations only*, as the case may be.

New paragraph 4.6 also contains a drafting improvement to clarify that, where paragraph 4.5 applies, then, despite subsection 3 (the repeal of Part 48 CAOs), from the date specified under paragraph 4.4, Part 48 CAOs (and exemptions issued under it) no longer apply for *all* of the AOC holder's operations, or for *specified operations only*, as the case may be.

References to "flying training" are removed from subparagraphs 4B.1 (a) and (b) as it was not intended that AOC holders who became grandfathered Part 141 operators must have held AOCs "for flying training" as such, in order to take advantage of the delayed and transitional taking of effect of new CAO 48.1 for Part 141 operators.

This is a beneficial amendment that does not cause prejudice to any person. In any event, neither the CAO amendment instrument, nor these specific amendments removing references to "flying training", are expressed to take retrospective effect in a way that would infringe subsection 12 (2) of the *Legislative Instruments Act 2003*.

Legislative Instruments Act 2003 (LIA 2003)

The CAO is a legislative instrument under various different requirements, as set out in Appendix 2.

Consultation

On 5 August 2015, CASA announced that it planned to extend the transition period for full implementation of new CAO 48.1 by 12 months. Proposed amendments to new CAO 48.1 which included amendments providing for the extension, were published for comment on 13 August 2015. CASA received 20 responses to the consultation draft from industry of which 5 commented on the extension to the transition period. The respondents provided either positive feedback regarding the extension, or sought a longer transition period.

CASA also received informal industry feedback which was generally supportive of the proposed extension of time. There was 1 instance of a dissenting position which argued that the transition period should remain fixed to the original date set out in new CAO 48.1 (i.e. 30 April 2016).

All comments, both formal and informal, were carefully considered before CASA arrived at its view. While the desire for a longer transition period is understood, on balance CASA does not agree that a longer transition period would be appropriate in the interests of aviation safety.

The new fatigue risk management arrangements embodied in new CAO 48.1 are considered to offer enhanced aviation safety over existing arrangements. While it is important that AOC holders be allowed a reasonable transition period to prepare for the new arrangements, that period has now been extended to an overall period of 4 years. A further extension of time would delay implementation of this more

comprehensive and effective fatigue risk management regime against the interests of aviation safety.

CASA recognises that safety is also impacted by the rate and extent of change to an operator's processes and operations, particularly taking into account other regulatory reforms currently underway. Thus, reasonable time must be afforded to industry to ensure a safe transition to the new rules. The additional 12 month extension offers a further period of time for AOC holders to liaise with CASA to ensure new or revised procedures are implemented in accordance with the new rules.

Further amendments to new CAO 48.1 have also been proposed. These amendments will improve new CAO 48.1 by providing more flexibility based on further consideration of industry practices, thus not unduly disadvantaging AOC holders. Consultation on these amendments is ongoing. It was determined that bringing forward the amendments pertaining to the extension to the transition period would give industry stakeholders more certainty about when compliance would be required.

Statement of Compatibility with Human Rights

The Statement in Appendix 3 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. It indicates that the CAO 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) for new CAO 48.1 was prepared by CASA and assessed by OBPR as adequate (OBPR id: 14395). The CAO amendment is a consequential instrument which delays for 12 months, from 30 April 2016 until 1 May 2017, the full implementation of new CAO 48.1. OBPR has noted the change to the full implementation date.

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 *Civil Aviation Act 1988* (the *Act*).

The CAO amendment commences on the day after registration on the Federal Register of Legislative Instruments.

[Civil Aviation Order 48.1 Amendment Instrument 2015 No. 1]

Legislation — legislative basis for the CAO amendment.

New CAO 48.1 and the CAO amendment apply to AOC holders as conditions imposed on each AOC as follows.

Under section 27 of the Act, CASA may issue 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).

Section 98 of the Act empowers the Governor-General to make regulations for the Act and the safety of air navigation. Under subsections 98 (5A) and (5AA) of the Act, the regulations may empower CASA to issue instruments in relation to matters affecting the safe navigation and operation of aircraft, which, if applicable to a class of persons, would be legislative instruments.

Under subregulation 215 (3) of the *Civil Aviation Regulations 1988 (CAR 1988)*, CASA may give a direction:

- (a) requiring an operator to include particular information, procedures and instructions in the operations manual; or
- (b) requiring the operator to revise or vary the information, procedures and instructions contained in the operations manual.

Under subregulation 215 (3), an operator must not contravene a direction. Under subregulation 215 (4), a direction does not have effect in relation to a person until it has been served on the person (which may be effected through a Gazette notice for the CAO containing the direction).

Under subregulation 11.068 (1) of the *Civil Aviation Safety Regulations 1998 (CASR 1998)*, for subsection 98 (5A) of the Act, CASA may issue a legislative instrument that imposes a condition on a specified class of authorisations (including, by virtue of regulation 11.015, flight crew licences of FCMs). Under subregulation 11.068 (2), the class of authorisations may include authorisations granted *before* the imposition of the condition. Under subregulation 11.068 (3), a condition imposed by a legislative instrument issued under subregulation (1) is taken to be a condition of *every* authorisation of the class mentioned in the instrument.

Under regulation 210A of CAR 1988, CASA may give directions about flight time limitations. Under subregulation 5 (1) of CAR 1988, wherever CASA is empowered or required under the regulations to issue any direction, CASA may, unless the contrary intention appears, issue the direction in the CAOs. Under subregulation 5 (3),

if a direction relating to a person is issued in the CAOs, the direction is taken to have been served on the person on the date on which the making of the Order is notified in the *Gazette*.

New CAO 48.1 pre-dated the commencement of regulation 210A of CAR 1988. It was not made under regulation 210A, or under regulation 210A's earlier repealed predecessor, regulation 5.55 of CAR 1988.

The cornerstone of the empowerment of new CAO 48.1 is paragraph 28BA (1) (b) and subsection 98 (4A) of the Act, as conditions on AOC holders. AOC holders (and their FCMs) are the persons to whom new CAO 48.1 (and the CAO amendment) is addressed.

However, regulation 210A is included in the heads of power for new CAO 48.1 (and the CAO amendment) because regulation 335 of CAR 1988 makes regulation 210A the successor provision to repealed regulation 5.55 under which Part 48 CAOs were made. When new CAO 48.1 comes fully into effect for all AOC holders (and their FCMs) (on 1 May 2017 by virtue of the CAO amendment), Part 48 CAOs will be automatically repealed by virtue of subsection 3 of new CAO 48.1. That repeal is empowered by regulation 210A (and supported by section 33 (3) of the *Acts Interpretation Act 1901*).

Further background information on the legislative basis for new CAO 48.1 and, consequentially, the CAO amendment, is in the Explanatory Statement for new CAO 48.1.

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 CAO contains directions made under regulation 215 of CAR 1988. The CAO is, 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 the LIA 2003.

Secondly, subregulation 11.068 (1) of CASR 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 CAO imposes conditions on flight crew licences under subregulation 11.068 (1). The CAO is, 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 the 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 CAO imposes conditions on AOCs to which it applies. For section 5 of the 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 the 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 CAO imposes 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 the LIA 2003.

The CAO is made under these various heads of power and is 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 2015 (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

Civil Aviation Order 48.1 Instrument 2013 (new CAO 48.1) provides Air Operator Certificate holders and flight crew members with a comprehensive regulatory framework for the more effective management of fatigue risk in aviation operations.

The purpose of *Civil Aviation Order 48.1 Amendment Instrument 2015 (No. 1)* (the **CAO amendment**) is to amend new CAO 48.1 to delay for 12 months, from 30 April 2016 until 1 May 2017, the full implementation of new CAO 48.1 and, thereby, provide relevant parts of the aviation industry with more time to fully comprehend and prepare for the new fatigue risk management requirements.

Human rights implications

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*. 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