

## **Explanatory Statement**

### **Civil Aviation Act 1988**

### **Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 2)**

#### **Purpose**

The purpose of the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 2)* (the **CAO amendment**) is to amend the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)* (the **previous CAO amendment**) to correct a technical error.

#### **Legislation**

The legislative basis for the CAO amendment is the same as that for the principle instrument, *Civil Aviation Order 48.1 instrument 2013*. Because of its detail, this basis set out in Appendix 1.

#### **Background**

The previous CAO amendment was registered on 4 July 2016. Its purpose was to revise and refine *Civil Aviation Order 48.1 Instrument 2013* (the **new CAO 48.1**) in light of operational and other feedback received by CASA from the aviation industry on the implications and effects of new CAO 48.1 since its introduction in 2013.

A technical error has been identified in the previous CAO amendment. In brief, certain amendments in new Appendix 4B (for medical transport operations and emergency service operations) and to existing Appendix 5 (for aerial work operations and flight training associated with aerial work) placed a requirement on an AOC holder to consider situations when a flight crew member is *called out from standby* to commence non-flying duties before a flight duty period.

The requirement should have been expressed to apply to *any* situation when a flight crew member was required to commence non-flying duties before a flight duty period, and not confined exclusively to occasions when being called out from standby.

The CAO amendment corrects this error effective from the day of registration. The consequence of the correction is that, from the day of registration, the relevant provisions in Appendix 4B and Appendix 5 will have the same effect as the provisions had in Appendix 5 before the previous CAO amendment took effect (on 5 July 2016).

The previous CAO amendment was brought into existence as a legislative instrument on the day after its registration (5 July 2016) but the amendments that it made were expressed to not commence until 1 May 2017. However, provision was made for relevant operators (**opting-in operators**) to voluntarily choose to be covered by the amendments at an earlier date that they notified to CASA. As of the commencement of the CAO amendment (day of registration), no such operators have so notified CASA. Thus, the CAO amendment amends the previous CAO amendment from the day of registration with no unintended consequences.

#### **The CAO amendment**

The detail of the CAO amendment is set out in Appendix 4.

**Legislation Act 2003 (the LA 2003)**

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

**Consultation**

The previous CAO amendment was the subject of extensive consultation, as detailed in the Explanatory Statement that accompanied it. That consultation was conducted on the basis that the previous CAO amendment did not contain the identified technical error.

The purpose of the CAO amendment is to correct the error. The erroneous provisions would not have come into force until 1 May 2017 and did not purport to apply to any person before that date because there have been no relevant opting-in operators.

In these circumstances, CASA is satisfied that the consultation undertaken in respect of the previous CAO amendment was appropriate and that further consultation on the CAO amendment would not be appropriate.

**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 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)**

OBPR assessed the proposed changes to the previous CAO amendment as minor and that no further analysis in the form of a Regulation Impact Statement was required (OBPR ID: 14395). Consequently, no further analysis in the form of a Regulation Impact Statement was required for the CAO amendment.

**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 of registration.

*[Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 2)]*

### **Legislation — legislative basis for *Civil Aviation Order 48.1 Instrument 2013* and amendments to it**

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 5 (1) of the *Civil Aviation Regulations 1988 (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*.

Under subregulation 5.55 (1) of CAR 1988, CASA may give directions to an aircraft operator or the holder of a flight crew licence about:

- (a) the number of hours that the holder may fly in any period as a member of the flight crew of an aircraft; and
- (b) the length of each tour of duty undertaken by the holder; and
- (c) the length of reserve time for the holder; and
- (d) the rest periods that must be taken by the holder; and
- (e) the circumstances in which the holder must not:
  - (i) fly as a member of the flight crew of an aircraft; or
  - (ii) perform any other duty associated with his or her employment; and
- (f) the circumstances in which an operator must not require the holder:
  - (i) to fly as a member of the flight crew of an aircraft; or
  - (ii) perform any other duty associated with the holder's employment.

Under subregulations 5.55 (2), (3) and (4), contravention of a direction is a strict liability offence (with a defence of reasonable excuse to be established under an evidential burden).

Regulation 5.55 of CAR 1988, and its substitute in regulation 210A (see below), is used as a head of power solely to facilitate the eventual repeal of CAO Part 48 and the individual CAOs within it, all of which were made under regulation 5.55 and, from 4 December 2013, are continued in force under regulation 210A by virtue of regulation 335 (see below). Regulation 5.55 was not used or required as a head of power for the making of the CAO which relies on the other heads of power mentioned for the instrument.

However, the *Civil Aviation Legislation Amendment Regulation 2013* (the **amendment regulation**) has certain possible affects which the CAO has addressed. Thus, item 5 in Schedule 2 of the amendment regulation, which commenced on 4 December 2013, had the effect (from that date) of repealing regulation 5.55 (as part of a larger repeal of Part 5) and inserting a new regulation 210A into CAR 1988, in effect remaking regulation 5.55 but in a modified form (item 18 in Schedule 2).

The amendment regulation also made regulation 335 of CAR 1988 which provides that a CAO made under regulation 5.55 and in force immediately before 4 December 2013 continues in force according to its terms “as if” it had been made on 4 December 2013 under regulation 210A (item 41 in Schedule 2).

Although not needed as a head of power for the making of the CAO, regulation 210A of CAR 1988 is included with the heads of power to support the eventual repeal of CAO Part 48 on 1 May 2017. Regulation 210A took effect on 4 December 2013.

Under subregulation 215 (3) of 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, as noted above, 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). 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 subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal any such instrument. Subsection 33 (3) of the *Acts Interpretation Act 1901* is used, in association with regulation 210A of CAR 1988, solely for the purpose of repealing CAO Part 48.

### **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 15G, and 38 and 42, of the LA 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 15G, and 38 and 42, of the LA 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 subsection 8 (4) of the LA 2003, the definition of a legislative instrument, such an CAO is of a legislative character 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 2003.

Fourthly, under paragraph 28BA (1) (b) of the Act, 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 15G, and 38 and 42, of the LA 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 2016 (No. 2)**

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 the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)* was to revise and refine *Civil Aviation Order 48.1 Instrument 2013* in light of operational and other feedback received by CASA from the aviation industry. The purpose of the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 2)* is to amend the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)* to correct a technical error as follows.

Certain amendments in new Appendix 4B (for medical transport operations and emergency service operations) and to existing Appendix 5 (for aerial work operations and flight training associated with aerial work) placed a requirement on an AOC holder to consider situations when a flight crew member is *called out from standby* to commence non-flying duties before a flight duty period. The requirement should have been expressed to apply to *any* situation when a flight crew member was required to commence non-flying duties before a flight duty period, and not confined exclusively to occasions when being called out from standby. The CAO amendment corrects this error effective from the day of registration.

#### **Human rights implications**

These corrected provisions in the CAO amendment are 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**

## Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 2)

### 1 Name of instrument

Under this section, the instrument is named as the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 2)*.

### 2 Commencement

Under this section, the instrument commences on the day of registration.

### 3 Amendment of Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)

Under this section, Schedule 1 amends the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)* (the *previous CAO amendment*).

## Schedule 1 Amendments

### [1] Item [128], new Appendix 4B, new subclause 1.6

This amendment amends the amendment in Item [128] of the previous CAO amendment to omit the erroneous references to “call out from standby”. The new clause 1.6 now provides that if, in the 8 hours immediately before a flight duty period (an *FDP*) (the *8 hour period*), a flight crew member (an *FCM*) performed duties other than conducting a flight in an aircraft (*non-flying duties*) the maximum permissible duration of the FDP must be decreased by the greater of 30 minutes, or the total duration of the non-flying duties performed during the 8 hour period.

The consequence of the correction is that, from the day of registration, the relevant provisions in Appendix 4B will have the same effect as the analogous provisions had in Appendix 5 before the previous CAO amendment took effect (on 5 July 2016).

### [2] Item [128], new Appendix 4B, new subclause 1.7

This amendment omits new subclause 1.7 consequentially on the amendment in item [1].

### [3] Item [128], new Appendix 4B, new subclause 1.8

This consequential amendment renumbers the previous subclause 1.8 (which is not otherwise affected by the technical error) as 1.7.

### [4] Item [132], Appendix 5, subclause 1.2

This amendment amends the amendment in Item [132] of the previous CAO amendment to omit the erroneous references to “call out from standby”. The new clause 1.2 now provides that if, in the 8 hours immediately before an FDP (the *8 hour period*), an FCM performed duties other than conducting a flight in an aircraft (*non-flying duties*) the maximum permissible duration of the FDP must be decreased by the greater of 30 minutes, or the total duration of the non-flying duties performed during the 8 hour period.

The consequence of the correction is that, from the day of registration, the relevant provisions in Appendix 5 will have the same effect as the provisions

had in Appendix 5 before the previous CAO amendment took effect (on 5 July 2016).

**[5] Item [132], Appendix 5, subclause 1.2A**

This amendment omits new subclause 1.2A consequentially on the amendment in item [4].

---