

Explanatory Statement

Civil Aviation Act 1988

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

Purpose

The purpose of the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 3)* (the **CAO amendment**) is to modify the provisions under which *Civil Aviation Order 48.1 Instrument 2013* (the **new CAO 48.1**) takes effect, by:

- extending, until 1 May 2018, the date by which **operators** (meaning all AOC holders and Part 141 flight training operators) must comply with the new CAO 48.1; the previous date was 1 May 2017 — thus the extension is for 12 months
- extending, until 31 October 2017, the date by which all operators must have submitted to CASA their draft operations manual amendments required in preparation for compliance with the new CAO 48.1 on and from 1 May 2018; the previous date was 31 October 2016 — thus, this extension is also for 12 months.

The purpose of these extensions of time is to provide further time and opportunity for operators to prepare their organisations for transition to the requirements of CAO 48.1, and for CASA to prepare and make available additional resources, templates and other advisory materials for the transition. The extension will also enable CASA to facilitate the conduct of a comprehensive independent review of CAO 48.1, and provide sufficient time for operators to be alerted to any modifications to current requirements that might emerge from that review.

Legislation

Because of its detail, the legislative basis for the new CAO 48.1, which is in effect also the basis for the CAO amendment, is set out in Appendix 1.

Historical background to 2016/2017 dates

The new CAO 48.1 was made on 28 March 2013 to set out new rules for fatigue risk management for certain operators and their flight crew members (**FCMs**).

New CAO 48.1 commenced on 30 April 2013:

- with immediate effect — for those who were or would become new **AOC** holders after that date
- with delayed effect until 1 May 2017 — for existing (**grandfathered**) AOC holders (that is, those holding an AOC immediately before 30 April 2013)
- with immediate effect from a self-specified and CASA-notified, date of effect before 1 May 2017 — for grandfathered AOC holders who voluntarily opted to transition to the new CAO 48.1 on that earlier date.

Following amendments to new CAO 48.1 that commenced on 1 September 2014, the new CAO 48.1 took effect as follows:

- with immediate effect — for new Part 141 flight training operators (**Part 141 operators**)

- with delayed effect until 1 May 2017 — for existing (**grandfathered**) Part 141 operators (that is, those who were flight training under an AOC immediately before 1 September 2014)
- with immediate effect from a self-specified and CASA-notified, date of effect before 1 May 2017 — for grandfathered Part 141 operators who voluntarily opted to transition to the new CAO 48.1 on that earlier date.

On 5 July 2016, further amendments were made to the new CAO 48.1 (in *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)*) (the **July CAO amendment**), principally to provide additional fatigue risk management regimes for balloon operators, for medical transport and emergency service operators, and for daylight aerial work operations, and flight training associated with aerial work. These amendments were to commence on 1 May 2017, though voluntary early opt-in was, and is, available.

Under the new CAO 48.1 (as relevantly amended) all operators were to comply with the new CAO 48.1 from 1 May 2017.

Background to 2017/2018 date extension

Since 2013, the aviation industry has provided valuable feedback to CASA on the implications and effects of the new rules. This feedback has been sought and welcomed by CASA. It has enabled CASA to continue to refine its understanding of current industry fatigue risk management practices and, against that background, review and revise the limitations and requirements in new CAO 48.1. It has also enabled operators to gain a better understanding of the basis for, and requirements in, new CAO 48.1.

Nevertheless, for a number of reasons, CASA has concluded that it is necessary to extend the dates for the final implementation of new CAO 48.1.

- 1 The new CAO 48.1 both modifies the current approach to fatigue risk management in aviation, and, specifically through the opportunity to gain CASA approval for use of a fatigue risk management system (an **FRMS**), offers operators a flexible and dynamic approach to fatigue risk management. However, many operators who might make use of this FRMS approach are still working through its implications and coming to terms with its requirements, and would welcome further time and support in which to do so.
- 2 CASA has also agreed with industry concerns that the July CAO amendment, which can be voluntarily adopted, has been made too close to the 31 October 2016 deadline for relevant draft operations manual amendments to be prepared and submitted to CASA by operators who might wish to make that further voluntary transition. That timing has also resulted in CASA not yet having finalised and made available the full range of resources, templates and other advisory materials that would be expected to support effective understanding of, and transition to, the July CAO amendment.
- 3 In addition, as a result of feedback from the aviation industry, particularly obtained from various CASA workshops between May and July 2016, CASA has also decided to conduct a comprehensive independent review of the limitations and requirements in new CAO 48.1 to ensure that there is a broad,

sufficient and reliable understanding of the scientific basis on which these limitations and requirements in new CAO 48.1 have been arrived at.

To allow time for each of these matters to be properly addressed, CASA has used the CAO amendment to amend the new CAO 48.1 and extend:

- from 1 May 2017 until 1 May 2018, the time by which all AOC holders and Part 141 operators must comply with new CAO 48.1
- from 31 October 2016 until 31 October 2017, the time by which all relevant operators must have submitted to CASA their draft operations manual amendments made in preparation for compliance with the new CAO 48.1 on 1 May 2018.

The CAO amendment

CASA has made the CAO amendment to extend the relevant time frames as mentioned above. These amendments are set out in Schedule 1 of the CAO amendment. To achieve the purposes set out above, it is also necessary to amend the July CAO amendment. Amendments in Schedule 2 of the CAO amendment, therefore, amend the July CAO amendment, to remove mention of 1 May 2017 and substitute 1 May 2018, for consistency with the Schedule 1 amendments mentioned above. A textual amendment in Schedule 2 also makes it clear that *new* AOC holders and *new* Part 141 operators, no less than grandfathered operators, may voluntarily transition early to the July CAO amendment.

More detailed explanations for the amendments are set out in Appendix 2.

Legislation Act 2003 (the LA 2003)

The CAO amendment is a legislative instrument under various requirements, as set out in Appendix 3.

Consultation

CASA has not consulted directly on the CAO amendment because CASA has concluded that consultation would not be appropriate, or reasonably practicable, in the circumstances.

This is because the imminence of the 31 October 2016 deadline for preparation and submission of operations manual amendments, makes it imperative for CASA to inform operators as soon as reasonably possible that this deadline has been extended by 12 months and thus, a failure to meet it will not result in a breach of AOC conditions. (A breach of AOC conditions is otherwise considered by CASA, and the aviation industry, to be a very serious matter.)

It has not been possible for CASA to sooner conclude that extensions of time were required. CASA is committed to supporting operators in their transition to new CAO 48.1, including to fatigue risk management systems, and has not lightly decided on a period of delay. However, it has been necessary to consider many issues around the comprehension and preparedness of industry to transition to the new CAO 48.1, CASA's own state of readiness to support operators, specifically in relation to the July CAO amendment, and the requirements and logistics of the proposed comprehensive independent review of new CAO 48.1.

CASA is satisfied that the extension of time is not likely to give rise to any aviation safety issues during the extension period because, whether through new CAO 48.1, or the superseded Part 48 which is only transitionally available to grandfathered operators only, operators must have in place fatigue risk management regimes. Although new CAO 48.1 enhances safety outcomes in keeping with a key element of the overriding objective of the *Civil Aviation Act 1988* (the *Act*), Part 48 preserves, though in the transitional short term only, an acceptable level of aviation safety.

Statement of Compatibility with Human Rights

The Statement in Appendix 3 is prepared in accordance with Part 4 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)

A Regulation Impact Statement (*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 in 2013. Insofar as the CAO amendment is merely an extension of the time frames for the staged implementation of new CAO 48.1, no further RIS is required.

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 of registration.

[Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 3)]

Legislation — legislative basis for CAO 48.1

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 CAO is registered.

Under subregulation 5.55 (1) of CAR 1988, CASA could 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 was 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 effects 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 2018. 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 registration of the CAO containing the direction (see subregulation 5 (3), as amended by item 5 in *Civil Aviation Legislation Amendment (Miscellaneous Measures) Regulation 2016*).

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.

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

1 Name of instrument

Under this section, the instrument is named as the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 3)*.

2 Commencement

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

3 Amendment of Civil Aviation Order 48.1 Instrument 2013

Under this section, Schedule 1 amends *Civil Aviation Order 48.1 Instrument 2013*.

4 Amendment of Civil Aviation Order 48.1 Instrument 2013

Schedule 2 amends *Civil Aviation Order 48.1 Instrument 2013*.

Schedule 1 Amendments — Civil Aviation Order 48.1 Instrument 2013

[1] to [3] Paragraphs 3.1, 3.2 and 3.3

These amendments omit mention of 1 May 2017 and insert 1 May 2018.

[4] to [6] Subparagraph 4.2 (a), and paragraphs 4.3 and 4.4

These amendments omit mention of 1 May 2017 and insert 1 May 2018.

[7] Paragraph 4.9

This amendment omits mention of 31 October 2016 and inserts 31 October 2017.

[8] to [9] Paragraphs 4B.2 and 4B.3

These amendments omit mention of 1 May 2017 and insert 1 May 2018.

[10] Paragraph 4B.6

This amendment omits mention of 31 October 2016 and inserts 31 October 2017.

Schedule 2 Amendment — Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1) (as amended)

[1] Subsection 2.2

This amendment omits mention of 1 May 2017 and inserts 1 May 2018.

[2] Subsection 4.2

This amendment makes it clear that *new* AOC holders and *new* Part 141 operators, and not only grandfathered operators, may voluntarily transition early to the July CAO amendment.

[3] Subsection 4.2

This amendment omits mention of 1 May 2017 and inserts 1 May 2018.

[4] Paragraph 4.3 (b), the Note, paragraph (a)

This amendment omits mention of 1 May 2017 and inserts 1 May 2018.

[5] Paragraph 4.3 (b), the Note, paragraph (c)

This amendment omits mention of 1 May 2017 and inserts 1 May 2018.

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. 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 the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 3)* (the **CAO amendment**) is to modify the provisions under which *Civil Aviation Order 48.1 Instrument 2013* (the **new CAO 48.1**) takes effect, by:

- extending, until 1 May 2018, the date by which **operators** (meaning all AOC holders and Part 141 flight training operators) must comply with the new CAO 48.1; the previous date was 1 May 2017 — thus the extension is for 12 months
- extending, until 31 October 2017, the date by which all operators must have submitted to CASA their draft operations manual amendments required in preparation for compliance with the new CAO 48.1 on and from 1 May 2018; the previous date was 31 October 2016 — thus this extension is also for 12 months.

The purpose of these extensions of time is to provide further time and opportunity for operators to prepare their organisations for transition to the requirements of CAO 48.1, and for CASA to prepare and make available additional resources, templates and other advisory materials for the transition. The extension will also enable CASA to facilitate the conduct of a comprehensive independent review of CAO 48.1, and provide sufficient time for operators to be alerted to any modifications to current requirements that might emerge from that review.

Human rights implications

These modifications to the new CAO 48.1 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