

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 48.1 Amendment Instrument 2017 (No. 1)

Purpose

The purpose of the *Civil Aviation Order 48.1 Amendment Instrument 2017 (No. 1)* (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 for 6 months, until 31 October 2018, the date by which all Air Operator Certificate holders (**AOC holders**) and Part 141 flight training operators (**Part 141 operators**) must comply with the new CAO 48.1
- extending for 6 months, to 30 April 2018, the date by which all AOC holders and Part 141 operators must have submitted to CASA their draft operations manual amendments required in preparation for compliance with the new CAO 48.1 from 31 October 2018.

The extensions provide further opportunity for AOC holders and Part 141 operators to prepare their organisations for transition to the requirements of the new CAO 48.1, will enable CASA to continue facilitating the conduct of a comprehensive independent review of CAO 48.1, and provide sufficient time for AOC holders and Part 141 operators to be alerted to any modifications to current requirements that might emerge from that review.

Legislation

Under section 27 of the *Civil Aviation Act 1988* (the **Act**), CASA may issue AOCs with respect to aircraft for the purposes of its functions. 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, with respect to any matter in relation to which regulations may be made for the purposes of, relevantly, section 28BA of the Act.

Section 98 of the Act empowers the Governor-General to make regulations for the Act and in the interests of 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**), wherever CASA is empowered or required under the regulations to issue a direction, CASA may, unless the contrary intention appears, issue the direction in the CAOs.

Under regulation 210A of CAR, CASA may give directions to the holder of a flight crew licence or an aircraft operator about any of the matters prescribed in relation to flight time limitations.

Regulation 335 of CAR provides that a CAO made under the former regulation 5.55 and in force immediately before 1 December 2014 continues in force according to its terms as if it had been made on 1 September 2014 under regulation 210A.

Under subregulation 215 (3) of CAR, 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 (3A), an operator must not contravene a direction.

Under subregulation 11.068 (1) of the *Civil Aviation Safety Regulations 1998 (CASR)*, 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.

Background

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 operators
- with delayed effect until 1 May 2017 — for 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)*), principally to provide additional compliance options 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 available. Under the new CAO 48.1 (as relevantly amended), all AOC holders and Part 141 operators were to comply with the new CAO 48.1 from 1 May 2017.

By virtue of the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 3)* (the **CAO amendment 2016**), the provisions under which the new CAO 48.1 were to take effect were modified by:

- extending for 12 months, until 1 May 2018, the date by which all AOC holders and Part 141 operators had to comply with the new CAO 48.1
- extending for 12 months, until 31 October 2017, the date by which all AOC holders and Part 141 operators had to submit to CASA their draft operations manual amendments required in preparation for compliance with the new CAO 48.1 on and from 1 May 2018.

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 AOC holders and Part 141 operators to gain a better understanding of the basis for, and requirements in, new CAO 48.1.

In addition, as a result of feedback from the aviation industry, particularly obtained from various CASA workshops between May and July 2016, CASA has 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. This independent review commenced in August 2017, and is expected to be completed in early 2018.

The CAO amendment

CASA has made the CAO amendment to further 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 2018 and substitute 31 October 2018, for consistency with the Schedule 1 amendments mentioned above.

Legislation Act 2003 (the LA)

Under subregulation 5 (1) of CAR, 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. The CAO is, therefore, a legislative instrument and is subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

Subregulation 11.068 (1) of CASR 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 is subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

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, 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 15G, and 38 and 42, of the LA.

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.

The instrument is, therefore, a legislative instrument, and is subject to tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

Consultation

CASA has not consulted directly on the CAO amendment because CASA is satisfied that no consultation is appropriate or reasonably practicable for this instrument for section 17 of the LA.

This is because the imminence of the 31 October 2017 deadline for preparation and submission of operations manual amendments, makes it imperative for CASA to inform AOC holders and Part 141 operators as soon as reasonably possible that this deadline has been extended by 6 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.)

CASA has not lightly decided on a period of delay. However, it has been necessary to consider the requirements and logistics of the 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 Part 141 operators, 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 Act, Part 48 preserves an acceptable level of aviation safety in the transitional short-term.

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights at Attachment 1 has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The instrument does not engage any of the applicable rights or freedoms, and is compatible with human rights, as it does not raise any human rights issues.

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 after registration.

[Civil Aviation Order 48.1 Amendment Instrument 2017 (No. 1)]

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 2017 (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 the *Civil Aviation Order 48.1 Amendment Instrument 2017 (No. 1)* (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 for 6 months, until 31 October 2018, the date by which all Air Operator Certificate holders (**AOC holders**) and Part 141 flight training operators (**Part 141 operators**) must comply with the new CAO 48.1
- extending for 6 months, to 30 April 2018, the date by which all AOC holders and Part 141 operators must have submitted to CASA their draft operations manual amendments required in preparation for compliance with the new CAO 48.1 from 31 October 2018.

The extensions provide further opportunity for AOC holders and Part 141 operators to prepare their organisations for transition to the requirements of the new 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 continue facilitating the conduct of a comprehensive independent review of CAO 48.1, and provide sufficient time for AOC holders and Part 141 operators to be alerted to any modifications to current requirements that might emerge from that review.

Human rights implications

This legislative 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