

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 1)

Purpose

The purpose of *Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 1)* (the **CAO amendment**) is to repeal certain provisions in *Civil Aviation Order 48.1 Instrument 2013* (the **new CAO 48.1**) and in *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)* (the **2016 CAO 48.1 amendments**).

Background

The new CAO 48.1 contains various aviation fatigue management rules.

The relevant provisions to be repealed are those which would otherwise require **operators** (meaning all AOC holders and Part 141 flight training operators) to submit to CASA, by 30 April 2018, draft operations manual amendments or a proposed fatigue risk management system (**FRMS**) as part of the operators' preparation for compliance with the new CAO 48.1 on and from the final implementation date of 31 October 2018.

The purpose of the repeals is to take account of the implications for the new CAO 48.1 that will likely arise from an independent review of fatigue management rules.

This review was established by CASA in 2017 and the final report of the review team is due to be received on 9 March 2018. While CASA does not wish to anticipate the recommendations from the review team, the interim report received on 20 December 2017, makes it clear that changes to the new CAO 48.1 will be recommended.

Consideration and implementation of appropriate changes through amendments to the new CAO 48.1 will require more time to be finalised than is available prior to 30 April 2018.

Relevant operators preparing draft operations manual amendments or a proposed FRMS for early submission to CASA by 30 April 2018 would likely be doing so on the basis of new CAO 48.1 requirements which are likely to be modified.

Therefore, in order to introduce a greater degree of certainty for such operators, the requirement to prepare draft operations manual amendments or a proposed FRMS for early submission to CASA is being removed entirely. It will be reconsidered in the broader context of the recommendations of the review team. The final implementation date of 31 October 2018 for the new CAO 48.1 remains but its appropriateness will also be reviewed as part of the reconsideration mentioned above.

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.

The CAO amendment

The CAO amendment repeals paragraphs 4.9 and 4B.6 of the new CAO 48.1. These paragraphs provided that for relevant AOC holders and Part 141 operators, respectively, draft operations manual amendments or a proposed FRMS was to be submitted to CASA by 30 April 2018.

Two consequential amendments arise from the effects of the 2016 CAO 48.1 amendments. This instrument contained various changes to the new CAO 48.1 which would not take effect until 31 October 2018. However, relevant operators could voluntarily opt to be subject to the new CAO 48.1 as if it were already amended.

Two amendments contained in the 2016 CAO 48.1 amendments referred to paragraphs 4.9 and 4B.6 of the new CAO 48.1. Relevant operators opting into the 2016 CAO 48.1 amendments would, therefore, also have been required to submit draft operations manual amendments or a proposed FRMS to CASA by 30 April 2018. The removal of these 2 amendments with their mentions of paragraphs 4.9 and 4B.6 is consequential on the removal of paragraphs 4.9 and 4B.6 from the new CAO 48.1.

Legislation Act 2003 (the LA 2003)

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

Consultation

CASA has not consulted directly on the CAO amendment because CASA has concluded that consultation would not be appropriate, or reasonably practicable, at this time. This is because the imminence of the 9 March 2018 date for the final report of the review team and the need to remove from relevant operators the potential uncertainty that this development would otherwise create in relation to the continuing applicability of the 30 April 2018 submission date.

CASA is satisfied that the extension of time is not likely to give rise to any aviation safety issues.

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 in 2013 and assessed by OBPR as adequate (OBPR id: 14395). It was attached to the Explanatory Statement for the new CAO 48.1. Insofar as the CAO amendment merely involves *the removal* of an obligation to submit draft operations manual amendments or a proposed FRMS to CASA by 30 April 2018, 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 *Civil Aviation Act 1988* (the *Act*). The CAO amendment commences on the day after registration.

[*Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 1)*]

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)*, 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, 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 was replaced by regulation 210A (see below) and is relevant in relation to 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 is 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, 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 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 is relevant in relation to the eventual repeal of CAO Part 48. Regulation 210A took effect on 4 December 2013.

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 (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)*, 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, solely for the eventual purpose of repealing CAO Part 48.

Why the CAO is a legislative instrument

First, 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 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 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 2018 (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 *Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 1)* (the **CAO amendment**) is to repeal certain provisions in *Civil Aviation Order 48.1 Instrument 2013* (the **new CAO 48.1**) and in *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)* (the **2016 CAO 48.1 amendments**).

The relevant provisions are those which would otherwise require **operators** (meaning all AOC holders and Part 141 flight training operators) to submit to CASA, by 30 April 2018, draft operations manual amendments or a proposed fatigue risk management system (**FRMS**) in preparation for compliance with the new CAO 48.1 on and from 31 October 2018.

An independent review of new CAO 48.1 is due to report on 9 March 2018. The review may give rise to a need to amend the new CAO 48.1. Relevant operators preparing draft operations manual amendments or a proposed FRMS for early submission to CASA by 30 April 2018 would be doing so on the basis of new CAO 48.1 requirements which are likely to be modified as a result of the review. Therefore, to address this uncertainty the requirement to make the submissions to CASA by 30 April 2018 is being removed entirely.

Human rights implications

This amendment 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*. 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