

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Regulations 1988

Civil Aviation Safety Regulations 1998

Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 2)

Purpose

The *Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 2)* (the **current CAO amendment**) extends aviation industry preparation time before *Civil Aviation Order 48.1 Instrument 2013* (the **new CAO 48.1**) as amended by *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1)* (the **2016 CAO 48.1 amendments**) takes full effect.

The previous implementation date was 31 October 2018. However, on 9 March 2018, CASA's independent review of the fatigue risk management rules (the **independent review**) recommended that a number of further amendments be made to the new CAO 48.1. These proposals required safety assessment, policy development and legislative drafting which has been on-going and is now almost finalised.

In the meantime, CASA wishes to provide the aviation industry with certainty about the new time frame for what is proposed and that is the purpose of the current CAO amendment.

Thus, the new CAO 48.1, as amended by both the 2016 CAO 48.1 amendments and by the further amendments just alluded to, will take full effect as follows: on and from 30 September 2019 for the regular public transport (**RPT**) operations, in high capacity aircraft, of air operator certificate (**AOC**) holders; and on and from 26 March 2020 for operations of AOC holders that are not for RPT in high capacity aircraft, and for Part 141 flight training organisations. These dates are subject to the continuing availability of early opting-in.

Legislation

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

Background

The new CAO 48.1 contains various aviation fatigue risk management rules for a range of different aircraft operations conducted by AOC holders and Part 141 operators.

The principal rules commenced on 30 April 2013 for new AOC holders, and on 1 September 2014 for new Part 141 operators (these are certificated pilot training organisations for somewhat less complex aircraft flight training – more complex flight training is conducted by AOC holders known as Part 142 operators).

The position of pre-existing AOC holders and Part 141 operators was preserved through “grandfathering”, which meant that the rules in the new CAO 48.1 would not take effect for them until a date specified by the new CAO 48.1 (the last date being 31 October 2018) – unless the holders or operators opted-in to the new rules earlier.

The 2016 CAO 48.1 amendments modified the new CAO 48.1 on a similar basis, that is, to take effect on a future date (the last date being 31 October 2018) but subject to earlier opting-in.

As noted above, the previous full implementation date of 31 October 2018 is revised by the current CAO amendment to maximise industry preparation time and to accommodate further refinements to the fatigue risk management rules arising from the independent review.

In effect, the rules in the new CAO 48.1, as amended by the 2016 CAO 48.1 amendments, and as prospectively to be further amended by amendments under development based on the recommendations of the independent review, will take their full effect on and from 30 September 2019 for the RPT operations, in high capacity aircraft, of AOC holders; and on and from 26 March 2020 for operations of AOC holders that are not for RPT in high capacity aircraft, and for operations of Part 141 operators.

In the current CAO amendment these dates are referred to in a shorthand way as “the transition date”, which expression is then defined to mean the respective dates.

Earlier opting-in will remain possible for members of either of these classes up to the respective full implementation dates.

The current CAO amendment

The specific details of the various amendments in the current CAO amendment are set out in Appendix 2.

Legislation Act 2003 (the LA 2003)

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

Consultation

Following the report of the independent review, CASA invited industry and public feedback to assist CASA in developing an appropriate response to the review’s recommendations. This period of consultation occurred between 21 March 2018 and 22 April 2018. CASA received 26 responses from a wide range of stakeholders including unions, industry organisations, a number individuals, and various operators involved in a wide range of operations (for example, aerial mustering, aerial application, rotary, charter, and small and large air operations).

The feedback received was provided to a technical working group of the Aviation Safety Advisory Panel — the primary representative advisory body through which CASA engages with the aviation industry. Following advice from the technical working group, CASA prepared a detailed response to the independent review, including the implementation timetable which is the subject of the current CAO amendment.

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 current 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.

In so far as the current CAO amendment merely beneficially extends the preparation time available for AOC holders and Part 141 operators before the full implementation of the new fatigue risk management rules, no further RIS is required.

Making and commencement

The current 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 current CAO amendment commences on the day after registration.

[Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 2)]

Legislation — legislative basis for the new CAO 48.1

Under section 27 of the *Civil Aviation Act 1988* (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, with 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 Order is registered.

Under former 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 former 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 new CAO 48.1, 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 new CAO 48.1 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 new CAO 48.1, 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 (3A), 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) of CAR, 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 11.068 (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, for making relevant amendments and also for the purpose of eventually repealing CAO Part 48.

Details of *Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 2)*

1 Name

Under this section, the instrument is named the *Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 2)*.

2 Commencement

Under this section, the instrument is expressed to commence on the day after registration. This gives the amendment instrument legal existence and force. However, some of the amendments contained within it take effect subject to other provisions in the new CAO 48.1, for example, opting-in provisions.

3 Amendment of *Civil Aviation Order 48.1 Instrument 2013*

Under this section, Schedule 1 contains the amendments to *Civil Aviation Order 48.1 Instrument 2013* (the *new CAO 48.1*).

4 Amendment of *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1) (as amended)*

Under this section, Schedule 2 contains the amendments to *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1) (as amended)* (the *2016 CAO 48.1 amendments*).

Schedule 1 *Civil Aviation Order 48.1 Instrument 2013*

This Schedule contains the amendments to the new CAO 48.1 that are necessary to postpone, until “the transition date”, the effective date for full implementation of the new fatigue risk management rules.

[1] Paragraphs 3.1, 3.2 and 3.3

These paragraphs provide for the repeal of the old fatigue risk management rules in CAO Part 48 which are being replaced by the new CAO 48.1. The amendment inserts the new final repeal date, namely, 26 March 2020.

[2] Before paragraph 4.1

Subsection 4 deals with timing for the taking effect, and transitional taking effect, of the new fatigue risk management rules. The amendment creates, in a new paragraph 4.1A, a new definition, namely, *the transition date*. This means:

- 30 September 2019 — for the RPT operations, in high capacity aircraft, of any AOC holder to whom Civil Aviation Order (*CAO*) 82.5 applies. (CAO 82.5 contains the AOC conditions for RPT high capacity operations.); or
- 26 March 2020 — for operations of any AOC holder not described in the dot point above, and any Part 141 operator.

A Note explains that a “high capacity aircraft” is defined in subsection 2 of CAO 82.0 as “an aircraft that is certified as having a maximum seating capacity exceeding 38 seats or a maximum payload exceeding 4 200 kg”.

[3] Subparagraph 4.2 (a)

Subparagraph 4.2 (a) has the effect that AOC holders and flight crew members who became such on a particular date after the commencement of the new CAO 48.1 (30 April 2013) but before the old full implementation date (31 October 2018) are immediately bound by the new CAO 48.1 rather than the old fatigue risk management rules which might not have been finally repealed by that particular date. The amendment replaces mention of 31 October 2018 with the transition date (as defined).

[4] Paragraphs 4.3 and 4.4

Paragraph 4.3 provides for the new CAO 48.1 to apply to transitional AOC holders on and from 31 October 2018. (These are the grandfathered AOC holders, that is, those holders who held their AOCs before 30 April 2013 and who have not opted-in. The amendment replaces the 31 October 2018 date with mention of “the transition date”, as defined).

Paragraph 4.4 deals with a grandfathered AOC holder’s opting-in “before 31 October 2018”. The amendment replaces the 31 October 2018 date with mention of “the transition date”, as defined.

[5] and [6] for Subsection 4B

Subsection 4B defines and deals with “grandfathered” Part 141 operators to whom the new CAO 48.1 would not apply until 31 October 2018, subject to their earlier opting-in. The amendment in item 6 replaces the 31 October 2018 date with mention of “the transition date”, as defined. The amendment in item 5 inserts a definition of “the transition date” namely, 26 March 2020.

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

The 2016 CAO 48.1 amendments amend the new CAO 48.1, with full operation of the amendments on and from 31 October 2018 (subject to earlier opting-in). This Schedule contains the amendments to the 2016 CAO 48.1 amendments that are necessary to postpone, until “the transition date”, the date for full implementation of the new fatigue risk management rules.

[1] and [2] for Section 2

Section 2 is the commencement provision. Subsection 2.2 provides for the commencement of the 2016 CAO 48.1 amendments on 31 October 2018. Subsection 2.3 provides for early opting-in. The amendments in these items replace subsections 2.2 and 2.3 and add a new subsection.

Under new subsection 2.2, section 3 (in effect, the actual 2016 CAO 48.1 amendments) commences on 30 September 2019. However, this is subject to new subsections 2.2A and 2.3.

Under new subsection 2.2A, despite subsection 2.2, and subject to subsection 2.3 (for early opting-in under section 4), section 3 does not take effect until 26 March 2020 for the operations of any AOC holder that are not regular public transport operations, in high capacity aircraft, to which CAO 82.5 applies, or for Part 141 operators.

Under new subsection 2.3, despite subsections 2.2 and 2.2A, section 3 takes effect for a person in accordance with section 4 which contains the opting-in rules.

A Note explains that the effect of subsection 2.2 is that the amendments to *Civil Aviation Order 48.1 Instrument 2013* contained in Section 3 (that is, in effect, Schedule 1 of the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1) (as amended)*) commence on 30 September 2019 for the regular public transport operations, in high capacity aircraft, of an AOC holder. But such AOC holders may opt-in earlier.

A second Note explains that subsection 2.2A delays the effect of amendments to *Civil Aviation Order 48.1 Instrument 2013*, contained in Section 3 (that is, in effect, Schedule 1 of the *Civil Aviation Order 48.1 Amendment Instrument 2016 (No. 1) (as amended)*), until 26 March 2020 for the operations of any AOC holder that are not regular public transport operations in high capacity aircraft, or any Part 141 operator. But such AOC holders and Part 141 operators may opt-in earlier.

A third Note explains that subsection 2.3 enables the early opt-in process mentioned in section 4.

[3], [4]

and [5] for Section 4

Section 4 deals with early opting-in to the 2016 CAO 48.1 amendments for AOC holders and Part 141 operators.

Under subsection 4.2, AOC holders and Part 141 operators for whom the new CAO 48.1 has taken effect may opt-in to the 2016 CAO 48.1 amendments before 31 October 2018. These would be holders or operators who became such on or after 30 April 2013, or grandfathered holders or operators who had already opted-in to the new CAO 48.1. The amendment in item 4 replaces the 31 October 2018 date with mention of “the transition date”, as defined.

Subsection 4.3 provides for the 2016 CAO 48.1 amendments to take effect for opted-in AOC holders and Part 141 operators. A Note explains how this would work in practice and, in doing so, refers to the 31 October 2018 date. The amendment in item 5 replaces the 31 October 2018 date with mention of “the transition date”, as defined.

Subsection 4.1 contains some definitions for section 4. The amendment in item 3 inserts a new definition, namely, ***the transition date***. This means:

- 30 September 2019 — for the RPT operations, in high capacity aircraft, of any AOC holder to whom CAO 82.5 applies. (CAO 82.5 contains the AOC conditions for RPT high capacity operations.); or
- 26 March 2020 — for operations of any AOC holder not described in the dot point above, and for any Part 141 operator.

Why the current CAO amendment 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 new CAO 48.1 contains directions made under regulation 215 of CAR. The new CAO 48.1 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 new CAO 48.1 imposes conditions on flight crew licences under subregulation 11.068 (1). The new CAO 48.1 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 new CAO 48.1 imposes conditions on AOCs to which it applies. For subsection 8 (4) of the LA 2003, the definition of a legislative instrument, such a CAO is of a legislative or law-making character. The new CAO 48.1 is, therefore, a legislative instrument and 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 new CAO 48.1 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. The new CAO 48.1 is, therefore, a legislative instrument and subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA 2003.

For the reasons set out above, the new CAO 48.1 was a legislative instrument. The current CAO amendment is also a legislative instrument on the same basis.

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. 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

Civil Aviation Order 48.1 Instrument 2013 (the **new CAO 48.1**) contains various aviation fatigue risk management rules for a range of different aircraft operations conducted by holders of air operator certificates (**AOC holders**) and by Part 141 operators, that is certain pilot training organisations.

Civil Aviation Order 48.1 Amendment Instrument 2018 (No. 2) (the **current CAO amendment**) extends the industry preparation time before the new CAO 48.1, as amended, takes full effect.

The previous implementation date was 31 October 2018. However, CASA's independent review of the fatigue rules (9 March 2018) has recommended that a number of amendments be made to the new CAO 48.1. These require safety assessment, policy development and legislative drafting which has been on-going and is now almost finalised.

As a result of this, the new CAO 48.1, as amended, will take full effect as follows: on and from 30 September 2019 for the regular public transport operations, in high capacity aircraft, of AOC holders; and on and from 26 March 2020 for operations of AOC holders that are not for RPT in high capacity aircraft, and for Part 141 operators.

Human rights implications

The 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