

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.7 Amendment Instrument 2019 (No. 1)

Purpose

The purpose of *Civil Aviation Order 82.7 Amendment Instrument 2019 (No. 1)* (**CAO 82.7 amendment**) is to revise the requirements for approval as a Chief Pilot for the holder of a balloon Air Operator's Certificate (**AOC**). In doing so, some balloon class endorsement eligibility requirements are modified in the interests of aviation safety.

The CAO 82.7 amendment is made in association with *Civil Aviation Order 40.7 Amendment Instrument 2019 (No. 1)* (the **CAO 40.7 amendment**) which revises the requirements for hot air balloon class endorsements and modifies some balloon class endorsement eligibility requirements in the interests of aviation safety.

Legislation

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, 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).

Using these heads of power, CASA made Civil Aviation Order 82.7 – Air Operators' Certificates authorising aerial work operations and charter operations in balloons (**CAO 82.7**).

Under paragraph 5.1 of CAO 82.7, the Chief Pilot of a balloon AOC holder must hold appropriate endorsements to permit him or her to act as pilot in command of all operations authorised by the operator's AOC.

Paragraph 5.2 sets out in a Table the minimum qualifications that the Chief Pilot must hold for different "Groups" of hot air balloons, by reference to their cubic volumes, in terms of total flight time and aeronautical experience.

Subregulation 5.01 (1) of the *Civil Aviation Regulations 1988* (**CAR**), changed the way in which hot air balloon endorsements are classified from 5 to 3 classes. Thus, class, for a balloon class endorsement, is defined in Table 5.01 as follows:

Item	Class of balloon	Description of balloon
1	Class 1	Hot air balloons that have a volume of not more than 260 000 cubic feet
2	Class 2	Hot air balloons that have a volume of more than 260 000 cubic feet
3	Class 3	Gas balloons

The 5-class structure appeared in regulation 5.148 of CAR before it was repealed in 2013 and replaced by the new 3-class definition in the Table above. Previously, subsection 12 of Civil Aviation Order 40.7 set out the eligibility requirements for these 5 classes of balloon endorsements.

Since 2013, it had been found practicable to consider that the cubic feet requirement of the old Class 3 exactly corresponded to the cubic feet requirement of the new Class 1 (not more than 260 000 cubic feet); and, similarly, that the cubic feet requirement of the old Class 4 exactly corresponded to the cubic feet requirement of the new Class 2 (more than 260 000 cubic feet); and that the old Class 5 corresponded to the new Class 3 (gas balloons), and CASA acted accordingly.

However, in the interests of greater certainty, CASA considered that it is necessary to repeal subsection 12 of CAO 40.7 and replace it with provisions which more precisely reflected contemporary hot air balloon classifications.

This revision, contained in the CAO 40.7 amendment, was also driven by the necessity, from a safety perspective, to clarify and improve eligibility requirements for Class 1 and Class 2 balloon endorsements.

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 CAO 82.7 amendment is largely consequential on the CAO 40.7 amendment. It replaces the Table of Chief Pilot requirements mentioned above with a new Table. This shows the minimum total flight time requirements and the aeronautical experience requirements for Chief Pilots of balloon AOC holders who operate Class 1 or Class 2 balloons or combinations of Class 1 and Class 2 hot air balloons.

Transitional provisions in the CAO amendment ensure that a person who on or after the commencement is the subject of an application to CASA by an operator for approval of the person as a Chief Pilot must comply with the requirements in subclauses 5.2, 5.3 and 5.4 (the *transitional clauses*). In addition, a person (a *grandfathered person*), who immediately before the commencement is a Chief Pilot, is deemed to have complied with the transitional clauses, and, to that extent, to have been approved accordingly, until the later of:

- (a) the expiry of the Chief Pilot approval; or
- (b) the day that is 3 months after the commencement.

No prejudice arises from the transitional provisions because all Chief Pilots as of the end of 31 August 2019, and any persons whose relevant operator applications remained unresolved as of the end of 31 August 2019, have qualifications that exceed those required by Table 5.2.

The CAO amendments

Further details of the CAO 82.7 amendment are set out in Appendix 2.

Incorporation of documents

No documents are incorporated into the CAO 82.7 amendment.

Legislation Act 2003 (the LA)

The CAO 82.7 amendment is a legislative instrument under various different requirements, as set out in Appendix 2.

Consultation

CASA published proposed amendments to CAO 40.7 – *Aircraft endorsements (balloons) and flight instructor (balloons) ratings* and CAO 82.7 – *Air Operators' Certificates authorising aerial work operations and charter operations in balloons* on the CASA Consultation Hub from 15 February to 15 March 2019. CASA invited industry and the public to comment. CASA used a questionnaire/survey methodology to obtain a range of views and comments on the CAO 82.7 amendment.

There were 10 respondents to the consultation and they were broadly representative of the ballooning industry. Of the 10, 7 supported the proposals and 1 gave qualified support, with the remaining 2 not expressing a definitive view.

Given this general level of support, CASA decided to proceed with the CAO amendments, and considered that no further consultation was necessary or 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, although the CAO 82.7 amendment may negatively engage, both directly and indirectly some of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, it does so in a reasonable, necessary and proportionate way so that the CAO 40.7 amendment is compatible with those rights and freedoms. By also enhancing aviation safety through the revision of some Chief Pilot qualification requirements, the CAO 82.7 amendment also positively engages the right to life in a potentially dangerous aviation activity.

Office of Best Practice Regulation (OBPR)

OBPR determined that no further analysis in the form of a Regulation Impact Statement was required regarding the changes made by the CAO 82.7 amendment (OBPR ID: 25301).

Making and commencement

The CAO 82.7 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 82.7 amendment commences on 1 September 2019.

Details of Civil Aviation Order 82.7 Amendment Instrument 2019 (No. 1)

1 Name of instrument

This subsection names the instrument.

2 Commencement

Under this subsection, the instrument commences on 1 September 2019.

3 Amendment of *Civil Aviation Order 82.7*

This subsection makes Schedule 1 which contains the amendments to CAO 82.7.

Schedule 1 Amendment

[1] Appendix 2, after paragraph 3.2 (b)

Amendment No. 1 adds a new safety responsibility for Chief Pilots, namely, to ensure that all flight crew members are competent to fly the class and type of balloon that they are rostered to fly under the AOC, whether as pilot in command (*PIC*) or as PIC under supervision (*PICUS*).

[2] Appendix 2, subclause 5.2, including the Table

Amendment No. 2 contains new subclauses 5.2, 5.3 and 5.4 which essentially create a new Table 5.2 which provides for the Chief Pilot requirements. Some of the requirements refer to full-time or part-time employment with the relevant AOC holder. Subclause 5.3 defines *full-time* as being employed for at least 38 hours per week, and defines *part-time* as being employed for at least 20 hours per week.

A new subsection 6 contains transitional application provisions for subclauses 5.2, 5.3 and 5.4. Thus, a person who on, or after the commencement, is the subject of an application to CASA by an operator, for approval of the person as a Chief Pilot, must comply with the requirements in subclauses 5.2, 5.3 and 5.4 (the *transitional subclauses*).

In addition, a person (a *grandfathered person*), who immediately before the commencement is a Chief Pilot, is deemed to have complied with the transitional subclauses, and, to that extent, to have been approved accordingly, until the later of:

- (a) the expiry of the Chief Pilot approval; or
- (b) the day that is 3 months after the commencement.

Table 5.2 Chief Pilot requirements

Type of balloon	Number of balloons operated at the same time	Minimum total flight time requirements	Required experience in aerial work and charter	Other requirements

Type of balloon	Number of balloons operated at the same time	Minimum total flight time requirements	Required experience in aerial work and charter	Other requirements
Class 1 balloon used for balloon AOC operations	1	250 hours as pilot in command (<i>PIC</i>) of a balloon	A minimum of 24 months' experience as a balloon pilot	The Chief Pilot: (a) must hold the balloon class endorsement for the balloon type used by the AOC holder; and (b) must be employed by the AOC holder on at least a part-time basis; and (c) must not be the Chief Pilot for another AOC holder.
Class 1 balloon used for balloon AOC operations	2 or 3	250 hours as PIC, including 100 hours as PIC in balloon AOC operations	A minimum of 12 months' experience as a balloon pilot for a balloon AOC holder	The Chief Pilot: (a) must hold the balloon class endorsements for all of the balloon types used in the AOC holder's fleet; and (b) must be employed by the AOC holder on a full-time basis; and (c) must not be the Chief Pilot for another AOC holder.
Class 1 balloons used for balloon AOC operations	4 or more	350 hours as PIC, including 300 hours as PIC in balloon AOC operations	A minimum of 24 months' experience as pilot for a balloon AOC holder	The Chief Pilot: (a) must hold the balloon class endorsements for all of the balloon types used in the AOC holder's fleet; and (b) must be employed by

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				the AOC holder on a full-time basis; and (c) must not be the Chief Pilot for another AOC holder.
Class 1 balloons and Class 2 balloons used for balloon AOC operations	1 or more Class 1 balloons and 1 or more Class 2 balloons	350 hours as PIC, including 300 hours as PIC in balloon AOC operations	A minimum of 24 months' experience as pilot for a balloon AOC holder	The Chief Pilot: (a) must hold the balloon class endorsements for all of the balloon types used in the AOC holder's fleet; and (b) must be employed by the AOC holder on a full-time basis; and (c) must not be the Chief Pilot for another AOC holder.
Class 2 balloons used for balloon AOC operations	1 or more	350 hours as PIC, including 300 hours as PIC in balloon AOC operations	A minimum of 24 months' experience as pilot for a balloon AOC holder	The Chief Pilot: (a) must hold the balloon class endorsements for all of the balloon types used in the AOC holder's fleet; and (b) must be employed by the AOC holder on a full-time basis; and (c) must not be the Chief Pilot for another AOC holder.

Why the CAO is a legislative instrument

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 82.7 amendment imposes conditions on balloon AOCs to which it applies. For subsection 8 (4) of the LA (the definition of a *legislative instrument*) such a CAO has a legislative character (it determines and alters the law and imposes obligations) 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.

Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

Civil Aviation Order 82.7 Amendment Instrument 2019 (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 82.7 Amendment Instrument 2019 (No. 1)* (**CAO 82.7 amendment**) is to revise the requirements for approval as a Chief Pilot for the holder of a balloon Air Operator's Certificate (**AOC**), and, in doing so, to modify some balloon class endorsement eligibility requirements in the interests of aviation safety.

The CAO 82.7 amendment is made in association with *Civil Aviation Order 40.7 Amendment Instrument 2019 (No. 1)* (the **CAO 40.7 amendment**) which revises the requirements for hot air balloon class endorsements and modifies some balloon class endorsement eligibility requirements in the interests of aviation safety.

Human rights implications

The instrument engages some human rights protections as follows.

Article 6 of the International Covenant on Civil and Political Rights (ICCPR)

Under Article 6 of the ICCPR, persons have a right to life, an important element of which is the right to be protected from accidental death by the presence and operation of a legal framework for effective deterrence against preventable accidents.

The increased Chief Pilot requirements are expressly designed to protect life — the lives of pilots, passengers and people on the ground. To this extent, the new CAO promotes the right to life and the right to safe and healthy working conditions for aviators.

Articles 6, 7 and 8 of the ICCPR

Under Articles 6, 7 and 8 of the ICCPR, a person has a right to work. The increased requirements for a person to qualify as a Chief Pilot may qualify that right for persons who fail to meet the requirements. However, these requirements are not unduly onerous when compared to the significant responsibilities which a Chief Pilot has for the safety of ballooning operations. For example, a Chief Pilot must:

- (a) ensure that the operator's flying operations are conducted in compliance with the aviation legislation; and
- (b) arrange flight crew rosters; and
- (c) maintain a record of the existence, validity, recency and limitation of flight crew licences, ratings and group endorsements; and
- (d) ensure that a flight crew member does not fly a balloon if he or she suffers from fatigue, illness or injury; and

- (e) ensure compliance with balloon loading procedures, including loading documents and passenger manifests; and
- (f) monitor operational standards, and supervise the training and checking of flight crew; and
- (g) conduct proficiency tests for emergency procedures; and
- (h) maintain a complete and up-to-date reference library of operational documents; and
- (j) allocate balloons; and
- (k) ensure that each flight crew member, before beginning a flight, has studied all available information appropriate to the intended flight.

The consequences of a fatal ballooning accident caused by a lack of effective oversight of ballooning operations by a Chief Pilot must be addressed in advance by ensuring that only the most experienced and competent people will be approved by CASA to be Chief Pilots. In these circumstances, the requirements are reasonable, necessary and proportionate to protect aviation safety in Australia.

Conclusion

While the CAO 82.7 amendment may both directly and indirectly engage some of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, it does so in a lawful, reasonable and proportionate way with the intention of promoting the right to life through aviation safety. As such, the CAO 82.7 amendment is compatible with those rights and freedoms.

Civil Aviation Safety Authority