

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.6 Amendment Instrument 2019 (No. 2)

Purpose

The purpose of *Civil Aviation Order 82.6 Amendment Instrument 2019 (No. 2)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to remove additional proficiency check requirements for night vision imaging system (**NVIS**) pilots who hold a special fire endorsement (**SFE**). The passage of time, the accumulation of industry experience and the existence of equally effective parallel checks has now made these additional requirements redundant.

The CAO amendment also renews existing exemptions from certain minimum height requirements and aircraft lighting requirements in NVIS operations.

Legislation

A wide range of statutory powers was required to make CAO 82.6 and the same powers are used to make the CAO amendment. Given their detail, they are set out in Appendix 1.

Background

CAO 82.6 established operational and airworthiness standards and approval requirements for the use of night vision goggles (**NVG**) in specialised helicopter aerial work operations. The CAO operates essentially as a set of conditions on air operator certificates (**AOCs**). It has the effect of rendering an AOC holder in breach of their AOC conditions if they make any unapproved use of NVG as a primary means of terrain avoidance for safe air navigation by means of visual surface reference external to an aircraft. (The use of NVIS in private operations is prohibited by CASA under instrument CASA 288/07, *Direction — use of night vision devices prohibited in private operations.*)

Prescribed NVIS operations include, for example, search and rescue, law enforcement, emergency medical services, marine pilot transfers, NVIS training or demonstration operations and, of particular relevance to the CAO amendment, aerial fire fighting and aerial fire fighting support.

Under subclause 5.4 in Appendix 1 of CAO 82.6, only an NVIS pilot who holds a SFE may conduct aerial fire fighting involving incendiary dropping, or aerial fire fighting support involving fire mapping. The SFE is a signed certificate of competency based on extensive relevant training and experience.

Under subclause 23.1 in Appendix 3 of CAO 82.6, an NVIS proficiency check for all NVIS pilots must be conducted by a particularly qualified pilot. The check must be in accordance with clause 21 and Part 61 of the *Civil Aviation Safety Regulations 1998 (CASR)*, which essentially mandate compliance with regulation 61.1015 of CASR.

Under subregulation 61.1015 (1), the holder of an NVIS rating is authorised to exercise the privileges of the rating only if the holder has a valid NVIS proficiency

check. Regulation 61.1015 sets out the various requirements for an NVIS pilot to obtain a valid NVIS proficiency check from a flight examiner or other qualified person, in checks which involve either periodic flight tests, operator proficiency checks, or participation in an operator's formal training and checking regime.

In addition to this, under regulation 61.1000, the holder of an NVIS rating is authorised to pilot a helicopter using NVG only if the holder has completed an operator proficiency check that covers operations at night using NVG in a helicopter of the same type.

Subclauses 23.2 and 21.4 in Appendix 3 of CAO 82.6 specify further requirements to be complied with only by an NVIS pilot with a SFE, for example, demonstration of incendiary dropping and fire mapping.

Coming on top of the usual NVIS proficiency check and operator proficiency check requirements described above, there is now a certain artificiality about these demonstration requirements in the absence of an actual fire fighting operation, and the skills generally required are capable of being checked in the course of a normal NVIS proficiency check.

NVIS pilots involved in other kinds of NVIS operations, such as search and rescue, law enforcement, emergency medical services, marine pilot transfers, NVIS training or demonstration operations are not similarly required to undergo additional and specific NVIS proficiency check requirements.

In the earlier stages of the development of safety rules for the use of NVIS in fire fighting, CASA was conscious of the safety challenges involved. However, over 10 years of experience in the regulated civilian use of NVG has been accumulated. CASA has now concluded that, at this stage in the evolution of the skills-base of NVIS-capable fire fighting operators and their pilots, a normal NVIS pilot proficiency check under subclause 23.1 of CAO 82.6 and regulation 61.1015 of CASR is sufficient to confirm an NVIS pilot's possession of the relevant skills for incendiary dropping and fire mapping without the additional obligations built into subclause 23.2.

Avoidance of doubt exemption renewal

The opportunity is also being taken to address an unrelated matter to avoid doubt in relation to it.

Under subregulation 174B (1) of the *Civil Aviation Regulations 1988 (CAR)*, the pilot in command of an aircraft must not fly at night under the visual flight rules (*V.F.R.*) at a height of less than 1 000 feet above the highest obstacle within 10 miles.

Under subsection 6 of CAO 82.6, the pilot in command of a helicopter who holds an NVIS rating is, in certain circumstances, *exempt* from compliance with this prohibition if engaged in an NVIS operation or in aerial fire mapping and it is operationally necessary to fly below the relevant lowest safe altitude (*LSALT*) that would apply but for the exemption.

Also, under subregulation 195 (1) of CAR, for night flight, the pilot in command of an aircraft and the operator must comply with the aircraft lighting rules relevantly contained in regulations 195 to 199.

Under subsection 7 of CAO 82.6, the NVIS operator and the pilot in command of a helicopter in an NVIS operation are each *exempt* from compliance with subregulation 195 (1) for a relevant navigation lighting requirement if he or she is complying with a lighting requirement of CAO 82.6 that is at variance with the relevant requirement. Because certain lighting can interfere with the effectiveness of NVIS at night, CAO 82.6 contains its own rules about the use of aircraft lighting in NVIS operations.

The exemptions in subsection 6 and 7 were made in 2007 under regulation 11.160 of CASR and under regulation 11.230 such exemptions expire after 3 years. However, since that time, *and within any 3 year period*, CAO 82.6 was periodically amended and a new compilation of the Order was registered, always containing the 2 exemptions before they would have expired. It was considered that this periodic, pro-active process precluded the 2 standing exemptions from expiring at the end of any 3 year period.

To put the matter beyond doubt, a new subsection 7A is made which provides that the exemptions contained in subsections 6 and 7 are, by force of subsection 7A, taken to be remade from the commencement of subsection 7A.

A Note explains that subsection 7A commenced on the day that the CAO amendment (*Civil Aviation Order 82.6 Amendment Instrument 2019 (No. 2)*) was registered. Within the next 12 to 18 months, that is before the expiry of that 3 year period, it is planned that CAO 82.6 will have been incorporated into the Part 91 Manual of Standards and the questions of flight below LSALT and aircraft lighting in NVIS operations will be able to be directly dealt with without need for exemptions.

Under subregulation 11.160 (2) of CASR, an exemption may be granted to a person or a class of persons. Under subregulation 11.160 (3), CASA may grant an exemption on application, or on its own initiative. For an application for an exemption, CASA must regard as paramount the preservation of an acceptable level of safety.

For making a decision on its own initiative, CASA is guided by the requirement in subsection 9A (1) of the *Civil Aviation Act 1988* (the *Act*) that in exercising its powers and functions CASA must regard the safety of air navigation as the most important consideration. In deciding to renew the 2 exemptions, CASA considered the aviation safety implications and concluded that, in the circumstances, renewal of the exemptions would not adversely affect aviation safety.

The CAO amendment

Section 1 of the CAO amendment names the instrument as the *Civil Aviation Order 82.6 Amendment Instrument 2019 (No. 2)*.

Under section 2, the instrument commences on the day it is registered.

Under section 3, it is provided that Schedule 1 amends *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007*.

Amendment item 1 in Schedule 1 contains new subsection 7A as explained above.

Under amendment item 2, Appendix 3, subclause 21.4, imposing additional NVIS proficiency check requirements on SFR holders, is repealed.

Amendment item 3 is consequential on amendment item 4 to remove mention of the SFE from the heading to subsection 23 in Appendix 3.

Under amendment item 4, Appendix 3, subclause 23 (2), imposing additional NVIS proficiency check requirements on SFR holders, is repealed.

Legislation Act 2003 (the LA 2003)

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

Consultation

The CAO amendment is entirely beneficial in the sense that it removes what would otherwise be obligations on NVIS pilots holding SFEs.

It is anticipated that, within the next 12 to 18 months, CAO 82.6 will be repealed and incorporated, in appropriately modified form, into the new Part 91 Manual of Standards under Part 91 of CASR. These proposals will be the subject of broader public and industry consultation under CASA's usual arrangements when developing the Manual.

In these circumstances, and given the timing of the 2019-2020 fire season in Australia in which NVIS pilots with SFEs will be involved, CASA considers that no further consultation on the CAO amendment is required or appropriate.

Office of Best Practice Regulation (OBPR)

The CAO amendment renews existing exemptions and removes redundant requirements. In this context, it may be considered to be of a minor or machinery nature. A Regulation Impact Statement (*RIS*) is not, therefore, required because of the standing agreement between CASA and OBPR under which a RIS is not required for minor or machinery directions, approvals, permissions or exemptions (OBPR id: 14507).

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*. To the extent that the legislative instrument may directly engage any of the applicable rights or freedoms, for example, the right to freedom of movement or the right to work, the limitation to human rights is reasonable, necessary and proportionate to protect aviation safety.

Commencement and making

The CAO amendment comes into effect on the day it is registered. It has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the Act.

Appendix 1

Legislation

A wide range of statutory powers was required to make CAO 82.6 and these are invoked for the CAO amendment as follows.

Under section 27 of the Act, CASA may issue AOCs for its functions. Under subsections 27 (2) and (9) of the Act, an aircraft operator must hold an AOC in order to operate for certain prescribed purposes. Paragraph 206 (1) (a) of CAR prescribes aerial work purposes of various kinds, including aerial spotting, flying training, ambulance functions, and purposes that are *substantially similar* to these. Substantially similar purposes are generally taken to include search and rescue, law enforcement, aerial fire fighting, aerial fire fighting support, marine pilot transfers and Department of Defence support operations.

Under paragraph 28BA (1) (b) of the Act, an AOC has effect subject to any conditions specified in the regulations or the Civil Aviation Orders (*CAOs*).

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 section 28BA of the Act (conditions on AOCs).

Under subregulation 5 (1) of CAR, where CASA is empowered to issue certain instruments, it may do so in a CAO.

Under subregulation 157 (1) of CAR, the pilot in command of an aircraft must not fly over a city, town or populous area at a height lower than 1 000 feet, or over any area at a height lower than 500 feet.

Under subregulation 174B (1) of CAR, except for take-off and landing, the pilot in command of an aircraft must not fly it at night under the V.F.R. at a height of less than 1 000 feet above the highest obstacle within 10 miles.

Under subregulation 195 (1) of CAR, at night and in conditions of poor visibility, the operator and pilot in command of an aircraft must comply with the rules in Part 13 of CAR about the lights to be displayed for the aircraft.

Under subregulation 207 (2) of CAR, a person must not use an Australian aircraft in a class of operation if the aircraft is not fitted with the instruments and equipment approved and directed by CASA. In approving or directing, CASA may have regard only to the safety of air navigation.

Under subregulation 215 (3) of CAR, CASA may give directions requiring an operator to include, revise or vary information, procedures or instructions in the operations manual (operating procedures).

Under subregulations 217 (1) and (3) of CAR, CASA may specify operators who must provide an approved training and checking organisation to ensure that members of the operator's operating crews maintain their competency.

Under subregulation 249 (1) of CAR, the pilot in command of an aircraft must not practice emergency procedures or fly low when carrying a passenger.

Under subregulation 11.160 (1) of CASR, CASA may grant an exemption from compliance with provisions of CAR and CASR.

In essence, CAO 82.6 operates as a set of conditions imposed on relevant AOC holders who wish to use NVIS. As part of this scheme, completion of various forms of NVIS pilot training or NVIS aircrew member training were required under CAO 82.6 in order to obtain NVIS qualifications. Operators approved for NVIS operations could use only qualified NVG pilots or NVG aircrew.

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 (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Appendix 2

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 imposes conditions on AOCs to which it applies.

Under subsection 8 (4) of the LA 2003, an instrument is a legislative instrument if it is made under a power delegated by the Parliament, and any provision determines the law or alters the content of the law, and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

The CAO amendment is of a legislative, “law determining” 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.

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.

Statement of Compatibility with Human Rights

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

Civil Aviation Order 82.6 Amendment Instrument 2019 (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

The purpose of *Civil Aviation Order 82.6 Amendment Instrument 2019 (No. 2)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to remove additional proficiency check requirements for night vision imaging system (**NVIS**) pilots who hold a special fire endorsement. The passage of time, the accumulation of industry experience and the existence of equally effective parallel checks has now made these additional requirements redundant.

The CAO amendment also renews existing exemptions from certain minimum height requirements and aircraft lighting requirements in NVIS operations.

Human rights implications

CAO 82.6 is a legislative instrument that, when made, may have indirectly engaged the right to freedom of movement under the *International Covenant on Civil and Political Rights*, and the right to work under the *International Covenant on Economic, Social and Cultural Rights* by placing restrictions on NVIS use and NVIS operations unless particular approvals, aviation qualifications and safety requirements were met.

However, these rights were more directly engaged by the primary requirements of the *Civil Aviation Act 1988*, the *Civil Aviation Safety Regulations 1998*, and the *Civil Aviation Regulations 1988* with respect to which the CAO amendment is made and which are designed for aviation safety and conformity with the standards of the *International Civil Aviation Organization* under the *Convention on International Civil Aviation* (the Chicago Convention).

Thus, the right to freedom of movement and employment was engaged in a way that was balanced by the objectives of achieving and improving aviation safety.

The CAO amendment does not alter any of these conclusions. However, it renews exemptions and removes redundant requirements, thereby lessening any restrictions that CAO 82.6 as a whole may impose.

The instrument is otherwise 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 otherwise engage any of the applicable rights or freedoms.

Conclusion

The legislative instrument is compatible with human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate to protect aviation safety in the operation of aircraft.

Civil Aviation Safety Authority