

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Regulations 1988

Civil Aviation Safety Regulations 1998

Civil Aviation Order 48.1 Amendment Instrument 2020 (No. 1)

Purpose

The *Civil Aviation Order 48.1 Amendment Instrument 2020 (No. 1)* (the **CAO amendment**) defers for 12 months, from 1 July 2020 to 1 July 2021, the date on which *Civil Aviation Order 48.1 Instrument 2019* (the **new CAO 48.1**) takes full effect for virtually all air operator certificate (**AOC**) holders and Part 141 operators. It also defers, from 1 October 2020 to 1 October 2021, the date on which the new CAO 48.1 takes full effect in relation to a fatigue risk management system (**FRMS**) applied for before 30 June 2021 by other AOC holders and Part 141 operators.

Over past months, relevant parts of the aviation industry have been endeavouring to make appropriate administrative arrangements and operations manuals amendments in order to comply with the new CAO 48.1 for the expected transition dates mentioned above.

However, for most of that time, industry has been affected by disruption from the impact of the COVID-19 pandemic, including border closures and the social distancing rules imposed by Commonwealth, State and Territory governments. The 12-month deferral of the transition dates is, therefore, a COVID-19 pandemic-driven mitigation measure for relevant aircraft operators to provide them with sufficient time to adjust operations, identify and make arrangements for the timely application of an appropriate Appendix or Appendices.

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.

Under both the new CAO 48.1 and its earlier versions, the fatigue rules, in one form or another, have been in force continuously since 30 April 2013 for new AOC holders, and from 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).

However, the position of the pre-30 April 2013 AOC holders, and also of the relevant pre-1 September 2014 Part 141 operators, has been continuously preserved through “grandfathering”, which meant that the rules in the new CAO 48.1 (and its predecessor CAOs) would not take effect for them until a later date, unless they chose to opt in to the new rules.

That later date has been amended on a number of occasions. However, under the new CAO 48.1, the later date was expressed in the definition of **transition date** in subsection 5 which provided as follows:

transition date, for a person, means 1 of the following:

- (a) 1 July 2020 — unless paragraph (b) applies;
- (b) 1 October 2020 — but only if the person:
 - (i) is:
 - (A) an AOC holder, other than an AOC holder engaged in regular public transport (**RPT**) operations in high capacity aircraft to whom CAO 82.5 applies; or
 - (B) a Part 141 operator; and
 - (ii) applied to CASA for an FRMS on or before 30 June 2020.

The purpose of the CAO amendment is to extend all of the abovementioned dates by 12 months. If they so choose, earlier opting in will remain possible for members of either of these classes up to the respective revised transition dates.

To assist with proper preparations and a smooth transition, the CAO amendment also requires each relevant operator's chief executive officer (however described) to submit to CASA a Fatigue Compliance Declaration form for the operations that the operator will conduct on and after 1 July 2021 (or, if an opt in is involved, on and after the specified date — later mentions of "1 July 2021" should be read as including this expanded meaning).

Appendix 2 of this Explanatory Statement contains a copy of the Fatigue Compliance Declaration form for information (it is watermarked "Sample" and is not for use — the form for the purposes of completion may be accessed on the CASA website.)

The Fatigue Compliance Declaration form must be accompanied by the operator's up-to-date operations manual for the relevant operations. These materials may be submitted to CASA at any time up to and including 1 July 2021 or the specified date.

The operator's operations manual must properly reflect the operations that the operator will conduct on and after 1 July 2021 (the **relevant operations**). Regulation 215 of the *Civil Aviation Regulations 1988 (CAR)* does not require an operations manual to be approved by CASA as such and regulation 215 will continue to apply. However, an operator's operations manual that fails to correctly reflect relevant operations is liable to be the subject of adverse action in subsequent planned CASA surveillance and audit activities.

Relevant operators are encouraged to submit their Fatigue Compliance Declaration forms and revised operations manuals at their earliest convenience rather than later when unforeseeable contingencies affecting the operator might cause delay resulting in a failure to meet the relevant transition date. The transition date is mandatory and a failure to comply with it will constitute an unacceptable breach of AOC or Part 141 certificate conditions.

The current CAO amendment

The specific details of the various amendments in the CAO amendment are set out in Appendix 3.

Legislation Act 2003 (the LA 2003)

The current CAO amendment is a legislative instrument under various requirements, as set out in Appendix 4.

Consultation

During February and March 2020, CASA was in contact with relevant aviation industry organisations about their obligations and preparedness in relation to the then upcoming transition dates of 1 July 2020 and 1 October 2020. As a result of this, by late March 2020, CASA was aware that, because of the rapidly deteriorating COVID-19 situation, industry would face serious difficulties in meeting those transition dates. It was evident that, because of the impacts of the pandemic, many aviation operations and plans might have to change, both during the pandemic and after it, and such likelihood, overlaid with general uncertainty, would affect and disrupt the transition plans and activities of many operators. Against such a background, and taking into account aviation safety, CASA decided to defer the transition dates by 12 months.

Statement of Compatibility with Human Rights

The Statement in Appendix 5 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The CAO amendment is compatible with human rights. To the extent that it engages certain rights (to life, to work, to a safe and healthy workplace), it does so in a way that, in the context of the COVID-19 pandemic, as far as practicable, promotes and protects those rights. To the extent that the CAO amendment may engage the right to privacy and may limit it, the limitation is reasonable, necessary and proportionate in the interests of aviation safety.

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. Having assessed the CAO amendment, OBPR considers that it will have only a minor impact and that a further Regulation Impact Statement is not required (OBPR id: 25114).

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 of registration.

Legislation — legislative basis for the new 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, 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). Under subsection 98 (4B), such a CAO is a legislative instrument.

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 subregulations 5 (1) and (1A) of 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 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 an 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).

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, for making relevant amendments and also for the purpose of eventually repealing the former CAO Part 48.



Australian Government
Civil Aviation Safety Authority

Fatigue Compliance Declaration

CAO 48.1 Instrument 2019

ORGANISATION DETAILS	
Operator's Legal Name	ARN
ABN	ACN
I, _____, confirm that our operations will, from the transition date(s) mentioned below, function in compliance with CAO 48.1 Instrument 2019 and the appendix or appendices ticked below.	
BASIC LIMITS	Transition Date (no later than 30/06/2021)
<input type="checkbox"/> Appendix 1 - Basic limits	
I am satisfied having made appropriate enquiries that our Operations Manual is compliant with CAO 48.1 Instrument 2019 and Appendix 1.	
Signed (CEO/Accountable Manager): _____	

Continue if intending to use any of **Appendices 2 to 6**

ENHANCED OPERATOR OBLIGATIONS (Section 15)	Transition Date (no later than 30/06/2021)
<input type="checkbox"/> Appendix 2 – Any multi-pilot operations except flight training	
<input type="checkbox"/> Appendix 3 – Any multi-pilot operations except company operations and flight training	
<input type="checkbox"/> Appendix 4 – Any operation	
<input type="checkbox"/> Appendix 4A – Any balloon operation	
<input type="checkbox"/> Appendix 4B – Any medical transport operations and emergency service operations	
<input type="checkbox"/> Appendix 5 – Any aerial work operations and flight training associated with aerial work	
<input type="checkbox"/> Appendix 5A – Any daylight aerial work operations and flight training associated with aerial work	
<input type="checkbox"/> Appendix 6 – Any flight training, proficiency check or flight review	
REQUIRED ATTACHMENT	
<input type="checkbox"/> Operations Manual	<input type="checkbox"/> Fatigue section of manual (only)
I am satisfied having made appropriate enquiries that our Operations Manual is compliant with CAO 48.1 Instrument 2019, the appendices ticked above and, in particular, the enhanced fatigue management obligations specified in subsection 15 of CAO 48.1 Instrument 2019.	
Signed (CEO/Accountable Manager): _____	

I verify that:

- this declaration is correct
- required attachments are included in the e-mail

Send an e-mail with this form and relevant documents to the local CASA regional office.

Details of Civil Aviation Order 48.1 Amendment Instrument 2020 (No. 1)

1 Name of instrument

Under this section, the instrument is cited as the *Civil Aviation Order 48.1 Amendment Instrument 2020 (No. 1)*.

2 Commencement

Under this section, the instrument commences on the day of registration.

3 Amendment of *Civil Aviation Order 48.1 Instrument 2019*

Under this section, Schedule 1 amends *Civil Aviation Order 48.1 Instrument 2019*.

Schedule 1 *Civil Aviation Order 48.1 Instrument 2019*

[1] Paragraph 5.1

This amendment adds a new definition, namely that for a *Fatigue Compliance Declaration form*, which is the CASA form of that name, approved in writing by CASA from time to time. A Note explains that the Fatigue Compliance Declaration form is available on the CASA website.

[2] Paragraph 5.1, definition of *transition date*

Under this amendment, the definition of *transition date* is amended so that the operative dates for the full taking effect of the new CAO are postponed for 12 months. A Note explains that if the extended 30 June 2021 application date for a FRMS is not complied with by a relevant AOC holder or Part 141 operator, a trial FRMS approval under Appendix 7 will not be issued by CASA for the extended 1 October 2021 transition date and operators must be operating under 1 or more of the other Appendices, with or without minor variation, from 1 July 2021.

[3] After subsection 5A

This amendment inserts a new subsection 5AB, titled *Fatigue Compliance Declaration form and operations manual — submission to CASA*.

5AB.1 Under paragraph 5AB.1, for an AOC holder or a Part 141 operator to whom the subsection applies, the person's AOC or Part 141 certificate is subject to the condition that the person must comply with the subsection.

A Note explains that a person would be in breach of its AOC conditions (for a person who is an AOC holder) or of the regulation 11.068 of CASR conditions imposed on its Part 141 certificate by virtue of this CAO (for a person who is a Part 141 operator) if the person fails to comply with the subsection. A breach of such conditions is considered by CASA to be a serious infringement and can result in suspension or cancellation of a certificate.

5AB.2 Under this paragraph, subsection 5AB applies to a person who is an AOC holder or a Part 141 operator to whom, by virtue of a relevant provision of subsection 5, this CAO takes effect on and from 1 July 2021; or for a person to whom paragraph 5.7 applies. (Subsection 5 contains existing saving and transitional provisions; paragraph 5.7 provides for a person to opt in to the new CAO 48.1 on and from the specified date.)

5AB.3 Under this paragraph, not later than 1 July 2021 or the specified date, as the case requires, the person must submit to CASA:

- a CEO-signed, dated, accurate and completed Fatigue Compliance Declaration form for the operations that the person will conduct on and after 1 July 2021 or the specified date
- the person's up-to-date operations manual for the operations.

A Note explains that these materials may be submitted to CASA at any time up to and including, but not later than, 1 July 2021 or, for opted in operators, the specified date. Early submission is encouraged.

5AB.4 Under this subsection, the term *operations manual* is defined in terms of existing relevant definitions.

[4] Subsection 6, definition of AOC holder, or holder

This amendment indicates that in new subsection 5AB (as well as in old subsections 4 and 5), the expression "AOC" does *not* include a Part 141 certificate holder. In other sections AOC holder is used as a convenient shorthand for both kinds of operators.

Why the current CAO amendment is a legislative instrument

First, under subregulations 5 (1) and (1A) 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 Part 141 certificates) may be by means of a legislative instrument. The new CAO 48.1 imposes conditions on Part 141 certificates 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 a separate head of power for the making of relevant CAOs, as confirmed by the drafting in subsections 98 (4A) and (4B). 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, by logical definition, 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 2020 (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 *Civil Aviation Order 48.1 Instrument 2019* (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.

Civil Aviation Order 48.1 Amendment Instrument 2020 (No. 1) (the **CAO amendment**) defers for 12 months, from 1 July 2020 to 1 July 2021, the date on which the new CAO 48.1 takes full effect for most air operator certificate (**AOC**) holders and Part 141 operators. It also defers, from 1 October 2020 to 1 October 2021, the date on which the new CAO 48.1 takes full effect in relation to a fatigue risk management system (**FRMS**) applied for before 30 June 2021 by other AOC holders and Part 141 operators.

Over past months, relevant parts of the aviation industry have been endeavouring to make appropriate administrative arrangements and operations manuals amendments in order to comply with the new CAO 48.1 for the expected transition dates mentioned above.

However, for most of that time, industry has been affected by disruption from the impact of the COVID-19 pandemic and the social distancing rules imposed by Commonwealth, State and Territory governments. The 12-month deferral of the transition dates is, therefore, a COVID-19 pandemic-driven mitigation measure for relevant aircraft operators to provide them with sufficient time to adjust operations, identify and make arrangements for the timely application of an appropriate Appendix or Appendices.

To assist with proper preparations and a smooth transition for grandfathered operators over this extended 12-month period, the CAO amendment also requires the operator's chief executive officer (however described) to submit to CASA a Fatigue Compliance Declaration Form for the operations that the operator will conduct on and after 1 July 2021 (or, if an opt in is involved, the specified date).

The Fatigue Compliance Declaration form submitted to CASA must be accompanied by the operator's up-to-date operations manual for the relevant operations. These materials may be submitted to CASA at any time up to and including, but not later than, 1 July 2021 or for opted in operators, the specified date.

Human rights implications

The exemption instrument may engage the following relevant human rights:

- the right to life under Article 6 of the International Covenant on Civil and Political Rights (the *ICCPR*)
- the right to work under Article 6 (1) of the International Covenant on Economic, Social and Cultural Rights (the *ICESCR*)
- the right to safe and healthy working conditions under Article 7 of the ICESCR
- the right to privacy under Article 17 of the ICCPR.

Right to life under the ICCPR

Right to safe and healthy working conditions under the ICESCR

Right to work under the ICESCR

Article 6 of the ICCPR provides that every human being has the inherent right to life, which shall be protected by law, with no one arbitrarily deprived of life.

Article 6 (1) of the ICESCR protects the right to work which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept.

This right is complemented by Article 7 of the ICESCR which provides for the right to safe and healthy working conditions.

Each of these rights may be engaged by the CAO amendment as described below.

The COVID-19 pandemic has given rise to the need to observe Commonwealth, State and Territory government social distancing rules to prevent people contracting or spreading the virus. These rules apply to all, including to protect the life, health and safety of personnel engaged in aviation operations, and, as far as possible, to preserve the viability of the operations themselves. At the same time, aviation safety requires pilots and operators to adhere to certain regulatory requirements for safety, including current rules in relation to the management of fatigue risks.

The new CAO 48.1 was due to take full effect on relevant transition dates, including 1 July 2020. As noted above, over past months, in the lead up to that date, relevant parts of the aviation industry have been endeavouring to make appropriate administrative arrangements and operations manuals amendments in order to comply with the new CAO 48.1 for its expected take effect date.

However, for most of that time, industry has been affected by the disruption caused by the impact of the COVID-19 pandemic, including border closures and social distancing rules. The 12-month deferral is, therefore, a COVID-19 pandemic-driven mitigation measure for relevant aircraft operators to provide sufficient time for those operators to adjust operations, and identify and make arrangements for the application of an appropriate Appendix or Appendices for compliance from the deferred transition date. They, and their pilots, remain subject to the relevant pre-1 July 2020 fatigue risk management rules that were already applicable to them and which, given the circumstances, CASA considers preserve a sufficient degree of aviation safety for the duration of the deferral period.

Without this deferral in the context of the COVID-19 restrictions, relevant operators may not have been able to comply with the new rules, their aircraft may have been grounded from relevant operations, and their pilots may have lost opportunities to be employed in those operations.

The deferral is supported by requirements to ensure that conscientious preparations for transition continue, for example, through operations manual revision, training, and rostering system updates.

It is considered, therefore, that deferral will contribute to protecting the right to life by minimising the risks of pandemic-distorted compliance, and will also consequentially protect the right to work and the right to safe and healthy working conditions.

Right to privacy under the ICCPR

The right to protection against arbitrary and unlawful interference with privacy, contained in Article 17 of the ICCPR, provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, nor to unlawful attacks on their honour and reputation. The right to privacy may be engaged when personal information is collected, used and stored.

Under the CAO amendment, the chief executive officers of relevant operators must submit to CASA Fatigue Compliance Declaration forms disclosing their plans for future operations that will fall under the new fatigue rules when they take full effect on 1 July 2021. The forms must be accompanied by revised operations manuals, showing how fatigue risk management requirements for those operations and their flight crew will be implemented.

However, these disclosure obligations are essential in the interests of aviation safety. They are designed to ensure that, in the context of the extended time available for compliance, proper, conscientious and effective action is directed and taken at the highest level of responsibility for each relevant operator to be ready to transition beyond the COVID-19 pandemic in 12 months' time.

The protections afforded by the *Privacy Act 1988* (the ***Privacy Act***) continue to apply to all of the information submitted by operators to CASA under the requirements of the CAO amendment. The Privacy Act contains the Australian Parliament's expressed requirements for the protection of collected personal information from inappropriate use and, aside from strict compliance with it, CASA is not in a position to alter or improve upon the requirements of this legislation.

To the extent that the provisions of the CAO amendment may limit the rights protected under Article 17 of the ICCPR, the limitations are necessary to protect aviation safety. Thus, the limitations imposed on the Article 17 rights are reasonable and proportionate to ensure the proper administration and effectiveness of Australia's aviation safety system.

Human rights implications

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*. To the extent that the instrument engages certain

of these rights, it does so in a way that both promotes the right to life and is otherwise reasonable, necessary and proportionate to ensure the safety of relevant aviation personnel during the COVID-19 pandemic.

Conclusion

This legislative instrument is compatible with human rights as described above. This outcome is achieved in a calculated and balanced way that does not undermine aviation safety.

Civil Aviation Safety Authority