

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1)

Purpose

The purpose of *Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to make a number of miscellaneous amendments to improve the application of CAO 82.6.

The intention behind the changes is to provide the relevant sector of the aviation industry with greater operational flexibility in NVIS operations while preserving acceptable levels of aviation safety. This is possible in recognition of increased industry experience since the first introduction of CAO 82.6 in 2007 when a high degree of caution, prudence and trial experimentation was required. However, the civilian use of NVIS has matured considerably over the past 13 years allowing for increased flexibility for operators.

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. CAO 82.6 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 aerial fire fighting and aerial fire fighting support.

The CAO amendment

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

In general terms, the CAO amendment:

- provides a number of new and necessary definitions to support the other changes being made by the CAO amendment (amendment nos. 1, 3, 6)
- makes drafting improvements and clarifications, and removes spent and unnecessary provisions (amendment nos. 7, 8, 11, 13, 14, 17, 19, 21, 22, 23, 28, 29, 30 and 34)

- makes provision for, and modifies the definition of, an **NVIS operation** in relation to including an operation under the instrument flight rules (**IFR**) as well as the visual flight rules (**VFR**) (amendment nos. 4 and 10)
- permits the conduct of NVIS flight below lowest safe altitude (LSALT) under the IFR in VMC thus enhancing safety and avoiding the need for unnecessary cancellation of IFR during the course of an NVIS operation; residual operational risks will be slightly reduced because the relevant air traffic service (ATS) will be providing continuous SAR coverage and ongoing traffic information and separation (amendment nos. 9 and 10)
- creates a new kind of NVIS operation in the form of a disaster or emergency relief operation, and makes consequential amendments to embed this new operation in the Civil Aviation Order (**CAO**); a disaster or emergency relief operation is an operation by an operator who has been requested by the government of a State or Territory which has declared a disaster or a state of emergency, to carry out an operation requiring use of NVIS to assist in controlling, mitigating or managing the effects of the disaster or emergency, and that is not otherwise an NVIS operation under the CAO (amendment nos. 5 and 14)
- abolishes the special fire endorsement as it is now unnecessary in the context of the licensing requirements under Part 61 of the *Civil Aviation Safety Regulations 1998* (**CASR 1998**); the requirement for a special endorsement was an early precautionary approach which is now inconsistent with requirements for more complex NVIS operations, for example, NVIS firebombing operations, which do not require any special endorsement; to support the change, the post-NVIS endorsement experience requirements to be imposed on pilots by NVIS operators are also expanded; there is no increase in residual risk from removing the special fire endorsement (amendment nos. 2, 12, 15 and 27)
- revises the requirements for what an NVIS operator's operations manual must contain in relation to an NVIS pilot (amendment nos. 15 and 16)
- revises the passenger requirements on an NVIS flight to demonstrate NVIS technology (to remove the previous requirement for reading a placard about the safety of the flight) (amendment no. 18)
- revises certain weather requirements for a single NVIS pilot when he or she is the only NVIS crew member for an NVIS operation in an NVFR capable aircraft (amendment no. 20)
- provides for specific minimum NVIS in-flight cloud requirements while allowing scope for applications to CASA to approve lower minima if safe (amendment no. 24)
- provides for lower distance from cloud in VMC in Class C airspace, the criteria now being "clear of cloud" (also amendment no. 24)
- provides a process for CASA to approve a lower in-flight visibility to apply in certain NVIS operations, down from 5 000 m to 3 000 m if safe (amendment nos. 25 and 26)
- makes supporting amendments, and provides exemptions from certain *Civil Aviation Regulations 1988* (**CAR 1988**) provisions, in order to support the new

criteria in the provisions for in-flight visibility, distance from cloud, and in-flight cloud requirements (amendment nos. 9 and 10)

- allows NVIS co-pilot time to count towards meeting minimum NVIS recent experience and NVS proficiency check requirements; an increased number of NVIS operations now involve the use of NVIS co-pilots as a risk mitigator, rather than single pilots for whom the provision was originally designed; without the amendment, NVIS co-pilots' flight time is not relevantly counted and NVIS operators are having to conduct NVIS proficiency checks on NVIS co-pilots at more frequent intervals, and provide increased recency for co-pilots, without attendant gains in safety (amendment nos. 31 and 32)
- allows more flexibility in the timing for the conduct of NVIS aircrew member capability check flights (*CCFs*); the amendment makes the CCF timing requirement for NVIS aircrew members the same as the proficiency check timing requirement for NVIS pilots, that is, the check can be completed up to 90 days before expiry without affecting the expiry date (amendment no. 33).

Legislation Act 2003 (the LA 2003)

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

Consultation

Under section 16 of the *Civil Aviation Act 1988 (the Act)*, in performing its functions and exercising its powers, CASA must consult government, industrial, commercial consumer and other relevant bodies and organisations insofar as CASA considers such consultation to be appropriate.

Under section 17 of the LA 2003, before a legislative instrument is made, CASA must be satisfied that it has undertaken any consultation it considers appropriate and practicable, in order to draw on relevant expertise and involve persons likely to be affected by the proposals.

CASA engaged in such consultation during the period between 10 March 2020 to 31 August 2020. First, CASA consulted with the NVIS Technical Working Group (*TWG*) of the Aviation Standards Advisory Panel, an aviation industry consultation forum established by CASA. All of the substantive policy changes embodied in the CAO amendment emanated from discussions and exchanges between CASA and the TWG with a view to enhancing the safety and capability of NVIS operations.

Secondly, a draft version of the CAO amendment was placed on the CASA website with a general invitation to comment before 31 August 2020. CASA specifically followed up on the invitation with members of the TWG and a range of NVIS operators. All comments were considered by CASA and the draft CAO amendment was modified as appropriate.

CASA is satisfied that the proposed changes to NVIS operations reflected in the CAO amendment align with relevant industry requests for flexibilities before the overall CAO is reviewed and revised for incorporation into the Part 91, 133 or 138 Manuals of Standards in 2021. CASA is satisfied that the nature, extent, and duration of the consultation it carried out was appropriate and that no further consultation would be appropriate in these circumstances.

Office of Best Practice Regulation (OBPR)

The CAO amendment introduces modifications and alleviations that will reduce some NVIS operator administrative and operating costs. It does this because it:

- renews existing exemptions and removes redundant requirements
- provides greater operational flexibility for certain NVIS operators using IFR
- adds a new category of operation to the definition of *NVIS operations* to broaden the opportunity to use NVIS
- ameliorates some lighting, weather and navigational requirements
- enables NVIS co-pilot NVIS flying hours to be counted for NVIS recent experience and proficiency check requirements
- provides NVIS aircrew members with greater flexibility in renewing NVIS CCF.

In this context, the CAO amendment may be considered to be of a 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 4 of the Explanatory Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that the legislative instrument may indirectly engage any of the applicable rights or freedoms (for example, the right to work and rights at work, the right to enjoyment of just and favourable conditions of work, and the right to life) the limitation to human rights is reasonable, necessary and proportionate to protect aviation safety, and also has the effect of advancing the rights mentioned.

Commencement and making

The CAO amendment commences 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. Other provisions required CASA permission or exemption (as embodied in the CAO).

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 1988 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 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 1988, where CASA is empowered to issue certain instruments, it may do so in a CAO.

Under subregulation 157 (1) of CAR 1988, absent appropriate permission, 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 1988, except for take-off and landing, absent appropriate exemption, the pilot in command of an aircraft must not fly it at night under the VFR at a height of less than 1 000 feet above the highest obstacle within 10 miles.

Under subregulation 195 (1) of CAR 1988, at night and in conditions of poor visibility, absent appropriate exemption, the operator and pilot in command of an aircraft must comply with the rules in Part 13 of CAR 1988 about the lights to be displayed for the aircraft.

Under subregulation 207 (2) of CAR 1988, 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 1988, 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 1988, 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 1988, absent appropriate exemption, 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 1998, CASA may grant an exemption from compliance with provisions of CAR 1988 and CASR 1998.

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.

Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1)

Details of the CAO amendment are as follows.

1 Name of instrument

The provision names the instrument as the *Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1)*.

2 Commencement

Under this provision, the instrument commences on the day it is registered.

3 Amendment of Civil Aviation Order 82.6

Under this provision, Schedule 1 amends *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (as amended)*.

Schedule 1 Amendments

[1] Subsection 1, definition of **LSALT**

Under this amendment, rather than having a special CAO 82.6 meaning, *lowest safe altitude*, or **LSALT**, has the same meaning as in the CASR Dictionary. A Note explains that under Part 1 of the CASR Dictionary, *lowest safe altitude* (LSALT) has the same meaning as in the AIP (namely: The lowest altitude which will provide safe terrain clearance at a given place).

[2] Subsection 1, definition of **special fire endorsement**

This amendment removes the definition of a *special fire endorsement* as these endorsements are no longer required and have been replaced with relevant NVIS operator training. (See also amendment nos. 12 and 27.)

[3] Subsection 1, Definitions

This amendment inserts some new definitions.

In particular:

A new NVIS operation is identified as *disaster or emergency relief* and is defined as meaning an operation:

- by an operator who has been requested, by the government of a State or Territory which has declared a disaster or a state of emergency, to carry out an operation requiring use of NVIS to assist in controlling, mitigating or managing the effects of the disaster or emergency
- that is not otherwise an NVIS operation under CAO 82.6.

An *NVFR capable* helicopter, means that the aircraft is:

- equipped for flight in night VMC in accordance with the regulations
- operated by a crew who meet the relevant requirements for NVFR flight under Part 61 of CASR 1998.

An **IFR capable** helicopter, means that the aircraft is:

- equipped for IFR flight in accordance with the regulations
- operated by a crew who meet the relevant requirements for IFR flight under Part 61 of CASR 1998.

An **NVIS co-pilot** means a person who:

- is the holder of an NVIS rating with an NVIS endorsement in accordance with Part 61 of CASR 1998
- is not an NVIS pilot in command (**PIC**), an NVIS PIC under supervision or an NVIS pilot dual.

[4] Subsection 1, definition of NVIS operation, the chapeau

This amendment modifies the definition of an **NVIS operation** to include an operation under the IFR as well as the VFR.

[5] Subsection 1, definition of NVIS operation, after paragraph (e)

This amendment adds **disaster or emergency relief**, as defined, to the list of approved NVIS operations.

[6] After subsection 1

This amendment removes any doubt that the abbreviations IFR, IMC, VFR and VMC, as used in CAO 82.6, have the same meaning as I.F.R., I.M.C., V.F.R., and V.M.C., respectively, which was an obsolete style for these initialisms used in CAR 1988.

[7] Paragraph 4.2

This amendment is essentially subparagraph (a) of paragraph 4.2. The paragraph has been recast to remove subparagraph (b), a time-limited provision which is now redundant.

[8] Paragraph 4.3

This amendment is essentially subparagraph (a) of paragraph 4.3. The paragraph has been recast to remove subparagraph (b), a time-limited provision which is now redundant.

[9] Subsections 6, 7 and 7A

6 Exemption — minimum height for VFR flights at night

Under this amendment, the exemption in subsection 6 from compliance with subregulation 174B (1) of CAR 1988 (thereby allowing an NVIS aircraft to fly below 1 000 feet at night under the VFR but, because of safety concerns, not in aerial fire fighting support other than fire mapping) is recast for greater clarity without altering its meaning.

6A Exemption — minimum height for IFR flights at night

Under this amendment, the new exemption in subsection 6A is from compliance with regulation 178 of CAR 1988 (thereby allowing an NVIS aircraft to fly below LSALT at night under the IFR but, because of safety concerns, not in aerial fire fighting support other than fire mapping). However, conditions attached to the exemption apply only if:

- the NVIS pilot uses NVIS for the operation only in accordance with CAO 82.6 and the operator's operations manual
- it is operationally necessary to fly below the relevant LSALT that would apply but for this exemption
- the NVIS operation is conducted in VMC in accordance with clause 10 in Appendix 3 of this CAO; and a distance for flight visibility and a distance from cloud that are equal to or greater than the applicable distances determined under either:
 - instrument CASA 143/10 — as if it applied to the operation; or
 - clauses 10A and 11 in Appendix 3 as if they applied to the operation — but only to the extent that such compliance would be inconsistent with CASA 143/10.

6B Exemption — distance for flight visibility and distance from cloud

Under this amendment, the new exemption in subsection 6B:

- is from compliance with subregulation 172 (2) of CAR 1988 (thereby allowing an NVIS aircraft to fly in flight visibility or vertical and horizontal distances from cloud at variance from the limits determined by CASA under CASA 143/10); but
- requires compliance with clauses 10A and 11 in Appendix 3 of CAO 82.6 (inserted by the CAO amendment).

7 Exemption — navigation lights

Under this amendment, the exemption from compliance with subregulation 195 (1) of CAR 1988 for a navigation lighting requirement is remade in identical form. Under regulation 11.230 of CASR 1998, exemptions are limited to a maximum duration of 3 years. This remaking of subsection 7, along with the other exemptions, ensures that each of the exemptions in the CAO is of the same duration. However, it is expected that the NVIS requirements under the CAO will have been revised, recast and absorbed into the Part 91, 133 or 138 MOS a considerable time before 3 years have elapsed.

Under this amendment, the new exemption in subsection 7A exempts the NVIS operator, and the pilot in command of a helicopter in an NVIS operation, from compliance with regulation 249 of CAR 1988 (which prohibits the carriage of passengers in flying training, emergency or low flying practice or test flights). However, the exemption applies to the limited extent that a passenger may only be carried if the carriage is solely for the purposes of, and strictly in accordance with, the requirements of CAO 82.6. It is unlikely that an NVIS operation on

which a passenger is permitted in accordance with this CAO would infringe regulation 249 but the exemption is for an abundance of caution.

[10] Appendix 1, subclause 5.1

This amendment is consequential on the making of the exemption in subsection 6A, *Exemption — minimum height for IFR flights at night*, which permits certain flight below LSALT at night under the IFR, subject to conditions.

[11] Appendix 1, subclause 5.2, including the Note

This amendment removes a redundant provision about equipment, the requirements for which already exist elsewhere in the regulations.

[12] Appendix 1, subclause 5.4

This amendment removes the requirement for certain NVIS pilots to hold a special fire endorsement. (See also amendment 2 and 27.)

[13] Appendix 1, clause 11

This amendment aligns NVIS pilot requirements with the requirement for such pilots under Part 61 of CASR and removes a requirement for unnecessary additional proficiency checks.

[14] Appendix 1, subclause 14.4

This amendment recasts the requirements for an NVIS aircrew member qualification, and has the implied effect of including the new NVIS operation, disaster or emergency relief. It also ensures that an NVIS aircrew member qualification is not a general qualification but is specific to the particular kinds of NVIS operations for which the relevant NVIS operator is approved and for which the person has been appropriately trained.

A Note explains that an NVIS aircrew member qualification may be awarded to cover more than 1 particular NVIS operation but only if the NVIS operator is approved for each of the operations, and the operations manual contains relevant training procedures for multiple awards.

[15] Appendix 2, subclause 4.3.2

This amendment revises what an NVIS operator's operations manual must contain in relation to an NVIS pilot. The manual must set out the post-NVIS endorsement experience required before a person may be a pilot in command of any particular NVIS operation, and include the following:

- the minimum pilot experience for the particular NVIS operation
- the training required to ensure that the pilot is competent to conduct the NVIS operation
- the requirements and authorisations for the pilot who is to conduct the training
- how pilot competency will be assessed at the completion of the training
- what (if any) additional recency is required for the particular NVIS operation.

[16] Appendix 2, after paragraph 4.3.8 (b)

This amendment revises what an NVIS operator's operations manual must contain in relation to helicopter landing sites (*HLS*) by requiring the inclusion of:

- appropriate lighting requirements for a relevant alternate HLS, to ensure that it complies with clause 11A of Appendix 3 (new in this CAO amendment)
- a statement of the operator's policy, and the risk management procedures, for operations to which clause 11A of Appendix 3 applies.

[17] Appendix 3, paragraph 7 (f)

This amendment recasts paragraph 7 (f) to better express its intent in relation to the carriage of persons whose presence is required for the purpose of the NVIS operation.

[18] Appendix 3, subparagraph 7 (g) (ii)

This amendment revises passenger requirements on an NVIS flight to demonstrate NVIS technology, to require that the passenger:

- is briefed, orally or in writing, on the risks associated with the flight
- signs an acknowledgement that he or she has been so briefed, either orally or in writing (as the case may be) on those risks.

[19] Appendix 3, clause 7, Note 1

Paragraph 7 (f), specifies, as 1 of the categories of passengers who may be carried in an NVIS operation, "other persons whose presence is necessary for the success or completion of the operation". This amendment inserts a new explanatory Note for paragraph 7 (f). The Note now states that for paragraph 7 (f), a person whose presence may be required for the purpose of an NVIS operation is to be determined on the basis of the specific nature of the operation and could include, for example, police, fire fighting, rescue, SES, defence, medical, scientific, nursing, or paramedical personnel; marine pilots in transfer; or persons who are apprehended, evacuated, rescued or being transported as an integral part of the operation.

[20] Appendix 3, subclause 8.3A

This amendment revises certain weather requirements for a single NVIS pilot when he or she is the only NVIS aircrew member for an NVIS operation in an NVFR capable aircraft. The new requirement is the pilot must comply with night VFR weather minima and may not use clauses 10 and 10A (new distance from cloud requirements in this CAO amendment).

[21] Appendix 3, subclause 8.4

This amendment removes the redundant word "qualified" from mentions of NVIS pilots and NVIS aircrew members, expressions which are already defined to mean appropriately qualified persons.

[22] Appendix 3, paragraph 8.4A (a)

This amendment is similar in effect to amendment 21.

[23] Appendix 3, paragraph 8.4A (b)

This amendment is similar in effect to amendment 21.

[24] Appendix 3, clause 10

This amendment replaces the former clause 10, which provided for the now redundant standard reduced flight planning weather minima, with a new clause 10 which provides for specific minimum NVIS in-flight cloud requirements as follows:

Table 10.1 — In-flight cloud requirements for an NVIS flight

Item	NVIS helicopter and crew	Kind of NVIS flight	Minimum in-flight cloud requirement
1	NVFR capable	Under the VFR	No more than scattered cloud up to 2 000 ft AGL within 2 NM either side of track.
2	IFR capable	Under the VFR	No more than scattered cloud up to 1 000 ft above the highest obstacle within 2 NM either side of track
		Under the IFR below LSALT	

Note **NVFR capable** and **IFR capable** are defined in subsection 1, Definitions.

Under clause 10, an operator may apply in writing to CASA to approve minimum in-flight cloud requirements that are lower than those prescribed under item 1 or item 2 in Table 10.1. CASA may approve lower minimum in-flight cloud requirements if:

- the operator’s application includes a detailed risk assessment
- given the risks, approval of lower minimum in-flight cloud requirements (including subject to conditions if required) would not have an adverse effect on aviation safety.

If CASA approves lower minimum in-flight cloud requirements, the requirements for the operation and the CASA approval must be set out in the operator’s operations manual.

Clause 10A

This amendment also inserts a new clause 10A, *Lower distance from cloud in VMC — Class C airspace*, which provides that, for subregulation 172 (2A) of CAR 1988, despite a distance from cloud requirement under section 4 and items 2 and 3 in Schedule 1 of instrument CASA 143/10, for an NVIS operation in VMC in Class C airspace, for vertical and horizontal distance from cloud the determined standard is “**clear of cloud**”.

[25] Appendix 3, clause 11

This amendment is consequential on amendment 26.

[26] Appendix 3, after subclause 11.1 and the Note

Under subclause 11, an NVIS operation in-flight visibility of 5 000 m applies with prescribed actions required if it cannot be maintained. This amendment provides a process for a lower in-flight visibility to apply in certain circumstances. Thus, for subregulation 172 (2A) of CAR 1988, a new minimum flight visibility requirement of not less than 3 000 m may apply for

an NVIS operation in VMC for a particular class of airspace if CASA approves an application for it. CASA may approve the new minimum if:

- the operator's application includes a detailed risk assessment
- given the risks, approval (including subject to conditions, if required) would not have an adverse effect on aviation safety.

If CASA approves the new minimum, the requirements for the operation and the CASA approval must be set out in the operator's operations manual.

Alternate aerodrome lighting

Under this amendment, specific alternate aerodrome lighting requirements are expressed for an NVIS operation that is conducted by a single NVIS pilot as the only NVIS aircrew member.

[27] Appendix 3, clause 16

This amendment repeals provisions relating to the special fire endorsement. (See also amendment nos. 2, 12 and 27.)

[28] Appendix 3, subclause 17.1

This amendment is essentially subclause 17.1. The subclause has been recast to remove paragraph (b), a time-limited provision which is now redundant.

[29] Appendix 3, paragraphs 17.2 (b) and (c)

Under this amendment, paragraph 17.2 (c) is removed because it is a time-limited provision which is now redundant.

[30] Appendix 3, clause 20

This amendment repeals clause 20 — *I.F.R. requirements*, because they are now either covered by Part 61 of CASR 1998 or subsumed under other requirements of the CAO.

[31] Appendix 3, subclause 21.1

This amendment inserts mention of an NVIS co-pilot so that the NVIS recent experience and proficiency check requirements also apply to this pilot.

[32] Appendix 3, subclause 21.2

This amendment has the same effect as amendment no. 31.

[33] Appendix 3, clause 22, Table 22.1, each column of the row for NVIS CCF

This amendment allows an NVIS aircrew member to conduct a relevant NVIS CCF within the 90 days (rather than the 30 days) before it expires.

[34] Appendix 3, paragraphs 23.1 (b) and (c)

Under this amendment, paragraph 23 (1) (c) is removed because it is a time-limited provision which is now redundant.

Appendix 3**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 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 purpose of *Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to make a number of miscellaneous amendments to improve the application of CAO 82.6.

The intention behind the changes is to provide the relevant sector of the aviation industry with greater operational flexibility in NVIS operations while preserving acceptable levels of aviation safety. This is possible in recognition of increased industry experience since the first introduction of CAO 82.6 in 2007 when a high degree of caution, prudence and trial experimentation was required. However, the civilian use of NVIS has matured considerably over the past 13 years allowing for increased flexibility for operators.

Human rights implications

CAO 82.6 is a legislative instrument that, when made, may have indirectly engaged certain rights under the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* by placing restrictions on the use in low level night flying of night vision imaging systems (NVIS), and on the conduct of 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).

Nevertheless, the CAO amendment may indirectly engage the following human rights without imposing unacceptable limitations, as follows:

- the right to work and rights at work under Article 6 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)
- the right to enjoyment of just and favourable conditions of work, including safe and healthy working conditions under Article 7 of the ICESCR
- the right to life under Article 6 of the International Covenant on Civil and Personal Rights (**ICCPR**).

Article 6 of the ICESCR

Article 6 of the ICESCR protects the right to work and rights at work.

The right to work includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. Rights in work include the enjoyment of just and favourable conditions of work and to form and join trade unions.

The UN Committee on Economic Social and Cultural Rights has stated that the right to work affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.

The Committee has also stated that, for the right to work, the labour market must be open to everyone. In particular, there can be no discrimination in access to and maintenance of employment on the grounds enumerated in article 2 of ICESCR, namely race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the intention or effect of impairing or nullifying exercise of the right to work. Age should be considered to be a status on which discrimination under article 2 of ICESCR is prohibited. Limiting the work entitlements of non-citizens would not constitute unlawful discrimination under article 2 of ICESCR.

Article 4 of ICESCR provides that countries may subject economic social and cultural rights only to such limitations “as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. The UN Committee has stated that such limitations must be proportional, and must be the least restrictive alternative where several types of limitations are available, and that even where such limitations are permitted, they should be of limited duration and subject to review. Measures that are retrogressive to the realisation of economic, social and cultural rights must also be properly justified. A retrogressive measure is one that reduces the extent to which an economic, social and cultural right is guaranteed.

The CAO amendment may limit the right to work and rights at work because, as with much civil aviation safety regulation, it imposes limitations and restraints on what pilots may do when flying aircraft using NVIS.

However, these limitations are considered permissible for safety reasons.

The CAO amendment is, therefore, considered to be a reasonable, necessary and proportionate requirement in the context of aviation safety.

Article 7 of the ICESCR

Article 7 of the ICESCR protects the right to enjoyment of just and favourable conditions of work, including safe and healthy working conditions. The imposition of reasonable limitations and restraints on what pilots may do when flying aircraft using NVIS is considered permissible for safety reasons and protects the right to enjoyment of just and favourable conditions of work, including safe and healthy working conditions.

Article 6 of the ICCPR

Article 6 of the ICCPR protects the right to life.

Under human rights law, countries and agents of the country must not deprive a person of life arbitrarily or unlawfully. In particular, countries also have a duty to take appropriate steps to protect the right to life.

The imposition of reasonable safety limitations and restraints on what pilots may do when flying aircraft using NVIS protects the right to life.

Article 12 of the ICCPR

Article 12 of the ICCPR states that everyone lawfully within the territory of a state shall, within that territory, have the right of liberty of movement. This right shall not be subject to any restrictions *except* those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

Limitations and restraints on what pilots may do when flying aircraft using NVIS engages that right but in a way that is balanced by the objectives of achieving and improving aviation safety in night flying using NVIS and thus falls within the exception.

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

To the extent that the legislative instrument may indirectly engage any of the applicable rights or freedoms mentioned above, the limitation to human rights is reasonable, necessary and proportionate to protect aviation safety, and also has the direct effect of advancing the rights mentioned.

The legislative instrument is, therefore, 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 at night using NVIS.

Civil Aviation Safety Authority