

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 3)

Purpose

The purpose of *Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 3)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to prescribe alternative air operator certificate (**AOC**) conditions for foreign-registered aircraft and their foreign crew members to carry out aerial fire fighting and aerial fire fighting support operations using night vision imaging systems (**NVIS**).

CAO 82.6 is a code regulating the use of NVIS for Australian-registered aircraft and Australian-licensed crew members. NVIS may not be used other than in accordance with the CAO. CAO 82.6 regulates by means of imposing AOC conditions on AOC holders who conduct these operations. CAO 82.6 does not cover foreign-registered aircraft and their foreign crew members who, therefore, may not carry out such NVIS operations.

The CAO amendment is designed to make provision for foreign-registered aircraft and their foreign crew members to use NVIS in NVIS fire fighting operations. Australia is currently in the midst of the 2020/2021 fire season and the amendment is urgently required to replace exemptions which permit such operations but about whose validity there is some doubt. It is considered prudent to resolve this doubt through the CAO amendment.

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 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 also 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, aerial fire fighting and aerial fire fighting support (including fire mapping), emergency medical services, disaster or emergency relief, marine pilot transfers, Department of Defence support, NVIS positioning, training or demonstration operations. NVIS operations are, by definition, intrinsically more dangerous than many other forms of aviation and require specific safety rules to be complied with.

CAO 82.6 contains those specific safety rules and is, essentially, a set of AOC conditions that must be observed in order to conduct NVIS operations. Only approved NVIS operators may conduct such operations. CASA grants approval only to AOC holders who comply with CAO 82.6.

AOC holders for foreign-registered aircraft and their foreign crew members cannot comply with the AOC conditions in CAO 82.6 in relation to the following (for convenience, referred to as *lifted AOC conditions*):

- the licensing, competency, proficiency and recency of crew members
- the training and checking of crew members
- the maintenance of NVIS equipment.

Australia makes valuable use of foreign-registered aircraft and their foreign crew members during the Australian fire season. In order to continue to do so, it is necessary to “lift” the “lifted AOC conditions” from these operators and replace them with alternative AOC conditions that they can comply with and that will still enable safe operations. The CAO amendment does this as follows.

It only applies to an NVIS operation that is aerial fire fighting or aerial fire fighting support (a *relevant operation*); and only for such operations conducted by an AOC holder in a foreign-registered aircraft (the *relevant operator*) by crew members qualified to conduct equivalent operations in the State of registry of the aircraft (the *relevant State*).

Under the CAO amendment, CASA may approve the relevant operator for a relevant operation *as if* the relevant provisions of CAO 82.6 had been complied with, provided that CASA has the operator’s satisfactory safety case and operations manual, and provided that CASA is satisfied that alternative AOC conditions are complied.

These alternative AOC conditions are *the AOC conditions set out in CAO 82.6, but as modified* so that the “lifted AOC conditions” do not apply but in their stead:

- CASA must be satisfied that the crew members are qualified to use NVIS in operations equivalent to a relevant operation, in the relevant State (*equivalency of qualifications*)
- the NVIS equipment must be maintained by an organisation that CASA has determined is equivalent to an organisation prescribed by CAO 82.6, or as otherwise determined in writing by CASA
- further, CASA must be satisfied that the equivalency of qualifications would be likely to achieve the same degree of aviation safety as would otherwise be achieved if new subsection 8A did not apply.

These prescriptions then constitute the applicable AOC conditions for AOC holders in relevant NVIS operations using foreign-registered aircraft and foreign-qualified crew members.

The application and the operation of the CAO amendment is clear and certain — in effect, each existing requirement in CAO 82.6 in relation to a “lifted AOC condition” is replaced by a requirement for equivalency of qualifications, as confirmed by CASA. For a suitable AOC holder, CASA will issue an instrument of:

- approval to conduct the specific NVIS fire fighting operations;
- satisfaction (a) that there is equivalency of qualifications and (b) of the likelihood of the same degree of aviation safety as would otherwise pertain under CAO 82.6 unamended; and
- determination of how NVIS equipment is to be maintained.

Under the CAO amendment, such an instrument must be expressed to expire not later than 12 months after it is issued.

Avoidance of legal doubt

CASA has recently been requested to issue exemptions from CAO 82.6 to permit the use of foreign-registered aircraft and their foreign crew members to carry out aerial fire fighting and aerial fire fighting support operations using NVIS. However, as noted above, it is, at best, highly doubtful that legislation permits the granting of exemptions from CAO 82.6.

CAO 82.6 is structured as a set of AOC conditions, expressly made under paragraph 28BA (1) (b) and subsection 98 (4A) of the *Civil Aviation Act 1988* (the *Act*) which, combined, contain CASA’s empowerment for the making of Civil Aviation Orders (*CAOs*) that impose AOC conditions.

In contrast to this power directly under the Act, whereby CASA may issue AOC-related CAOs of its own initiative, subsection 98 (5) of the Act empowers the making of *regulations* which provide that CASA may issue CAOs in relation to various matters unrelated to AOC conditions.

Under subsection 98 (5A) of the Act, the regulations may also empower CASA to issue various instruments, in exercise of which power regulation 11.160 of the *Civil Aviation Safety Regulations 1998* (*CASR*), authorises CASA to grant exemptions, including exemptions from CAOs.

However, there being, in effect, 2 sources of empowerment for CASA to issue CAOs — directly under the Act of its own initiative, or indirectly under the regulations, a power of exemption conferred indirectly under the regulations will not legally extend to allow interference with a CAO made directly under the Act.

Such a power of exemption would be analogous to a “Henry VIII clause” — a form of express empowerment which would enable a subordinate regulation to change the effect of its own empowering Act. There are no express words in the Act to such effect. For this reason, prudence at least suggests proceeding by way of CAO amendment.

AAT review

Decisions made pursuant to civil aviation orders are construed as decisions made under the Act (see Jane Mathews J, President of the AAT, in *Seaview Lord Howe Pty Limited and ANOR and Civil Aviation Safety Authority* [1995] AATA 565. Therefore,

decisions under the CAO amendment (for example, in relation to approvals, satisfactions and determinations) are reviewable under paragraph 31 (1) (a) of the Act as being in the nature of permissions or permits.

The CAO amendment

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

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 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 does not consider consultation to be necessary or appropriate in this case for a number of reasons.

First, Australia is currently in the midst of the 2020/2021 fire season. The amendment is urgently required as a matter of prudence to ensure the legality of fire fighting operations by relevant foreign-registered aircraft. The relevant AOC holders have already sought exemptions, as described above, and appropriate and lawful approvals will now be considered as alternatives in a way that is not to the prejudice or detriment of those operators. In these circumstances, CASA considers that further consultation would delay implementation of the changes and add nothing of value and, therefore, not be appropriate.

Secondly, during the course of 2021, and before 2 December 2021, CASA proposes to review the entirety of CAO 82.6 with a view to reforms and revisions that will be incorporated into CASR (for empowerment) and then, as amendments, into a Manual of Standards (*MOS*), most likely the Part 91 MOS (concerning general flying rules) and the Part 138 MOS (concerning aerial work operations). This process, which will include consideration of the amendments in the CAO amendment will be the subject of extensive consultation in the usual way. CASA considers that to advance a very small part of that consultation for the CAO amendments would delay immediate implementation of the changes and add nothing of value and, therefore, not be appropriate.

Thus, consistent with the requirements imposed on it by Parliament under section 16 of the Act and section 17 of the LA 2003, CASA considers that no consultation is appropriate.

Office of Best Practice Regulation (OBPR)

In the circumstances, the CAO amendment 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). For relevant operators, the changes introduced by the CAO amendment will have the beneficial effect of providing access to the application of CAO 82.6 and will otherwise have a neutral effect on operational costs.

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 the *Civil Aviation Regulations 1988 (CAR)* prescribes aerial work purposes of various kinds.

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

Under subregulation 157 (1) of CAR, 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, 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, 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 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, 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, CASA may grant an exemption from compliance with provisions of CAR and CASR. (The CAO is a vehicle for some such exemptions.)

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. 3)

1 Name of instrument

This section names the instrument.

2 Commencement

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

3 Amendment of Civil Aviation Order 82.6

Under this section, Schedule 1 amends CAO 82.6

Schedule 1 Amendments

[1] Paragraph 8.1

This amendment is consequential on amendment 2.

[2] After subsection 8, insert subsection 8A

This amendment inserts a new subsection, **8A — Alternative AOC conditions for aerial fire fighting or aerial fire fighting support.**

- 8A.1 Under this paragraph, the alternative AOC condition prescribed by subsection 8A applies only for an NVIS operation that is each of the following:
- (a) aerial fire fighting or aerial fire fighting support (a *relevant operation*);
 - (b) conducted by an AOC holder in a foreign-registered aircraft (the *relevant operator*);
 - (c) carried out by crew members holding foreign licences, ratings, endorsements and qualifications, however described, that permit the conduct of operations equivalent to a relevant operation, in the State of registry of the aircraft (the *relevant State*).
- 8A.2 Under this paragraph, CASA may approve, in writing, the relevant operator for a relevant operation as if the relevant provisions of this Order, including subclause 2.2 of Appendix 1 (approval to conduct an NVIS operation), had been complied with, provided that:
- (a) CASA is satisfied that the relevant operator and the crew members comply with alternative AOC conditions in accordance with this subsection; and
 - (b) the relevant operator provides CASA with a satisfactory safety case for the conduct of the relevant operations; and
 - (c) the relevant operator provides CASA with its operations manual which must include provisions for the conduct of a relevant operation.
- 8A.3 Under this amendment, alternative AOC conditions for a relevant operation are the AOC conditions already set out in CAO 82.6, but as modified so that conditions in relation to the following:
- (a) the licensing, competency, proficiency and recency of crew members;
 - (b) the training and checking of crew members;

(c) the maintenance of NVIS equipment;
do not apply to the relevant operator or the crew members.

- 8A.4 Under this paragraph, the alternative AOC conditions mentioned in paragraph 8A.3 apply for a relevant operator only if:
- (a) CASA is satisfied (as expressed in writing) that the requirements in subparagraphs 8A.5 (a), (b) and (c):
 - (i) are complied with; and
 - (ii) would be likely to achieve the same degree of aviation safety as would otherwise be achieved if this subsection did not apply; and
 - (b) the requirement in subparagraph 8A.5 (d) is met.
- 8A.5 Under this amendment, the requirements are:
- (a) each flight crew member must hold such foreign licences, ratings and endorsements as qualify the member to use NVIS in operations equivalent to a relevant operation, in the relevant State;
 - (b) each aircrew member must hold such foreign qualifications as would qualify the member to participate in operations equivalent to a relevant operation, in the relevant State;
 - (c) each crew member must be subject to such a foreign regime of training, checking, competency and proficiency as would permit the member to carry out operations equivalent to a relevant operation, in the relevant State;
 - (d) the NVIS equipment must be maintained:
 - (i) by an organisation that CASA has determined in writing is equivalent to an organisation mentioned in subclause 3A.5 of Appendix 3; or
 - (ii) as otherwise determined in writing by CASA.
- 8A.6 Under this amendment, an instrument mentioned in subclause 8A.5 must be expressed to expire not later than 12 months after it is issued.
- A Note explains that CASA may use a single instrument to express the approval under paragraph 8A.2, the satisfaction under paragraph 8A.4, and the determination or approval under subparagraph 8A.5 (d).

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. 3)

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. 3)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to prescribe alternative air operator certificate (AOC) conditions for foreign-registered aircraft and their foreign crew members to carry out aerial fire fighting and aerial fire fighting support operations using night vision imaging systems (NVIS).

CAO 82.6 is a code regulating the use of NVIS for Australian-registered aircraft and Australian-licensed crew members. NVIS may not be used other than in accordance with the CAO. CAO 82.6 regulates by means of imposing AOC conditions on AOC holders who conduct these operations. CAO 82.6 does not cover foreign-registered aircraft and their foreign crew members who, therefore, may not carry out such NVIS operations.

The CAO amendment is designed to make provision for foreign-registered aircraft and their foreign crew members to use NVIS in NVIS fire fighting operations. Australia is currently in the midst of the 2020/2021 fire season and the amendment is urgently required to replace exemptions which permit such operations but about whose validity there is some doubt. It is considered prudent to resolve this doubt through the CAO amendment.

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.

These rights included:

- 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**).

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).

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 is wholly facilitative and, as such, does not directly engage the rights described above. It may, however, indirectly engage the right to work by requiring certain CASA approvals before foreign-registered aircraft and their foreign crew members to carry out aerial fire fighting and aerial fire fighting support operations using NVIS.

However, as such, the CAO amendment is 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 entry control before foreign-registered aircraft and their foreign crew members to carry out aerial fire fighting and aerial fire fighting support operations 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, and the right to life.

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 CAO amendment may also indirectly engage the right to life by the imposition of reasonable safety measures requiring foreign crew members to be appropriately qualified and proficient in carrying out aerial fire fighting and aerial fire fighting support operations using NVIS. As such, the CAO amendment protects the right to life for such crew members and persons on the ground in fire zones.

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.

Safety limitations and restraints on foreign-registered aircraft and their foreign crew members in carrying out aerial fire fighting and aerial fire fighting support operations using NVIS indirectly engages the right to freedom of movement 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