

## **Explanatory Statement**

### **Civil Aviation Act 1988**

### **Civil Aviation Safety Regulations 1998**

### **Civil Aviation Order 48.1 Amendment Instrument 2021 (No. 1)**

#### **Purpose**

The *Civil Aviation Order 48.1 Amendment Instrument 2021 (No. 1)* (the **CAO amendment**) makes a number of minor or machinery amendments to ensure that, on and from 2 December 2021, when new flight operations regulations (**FORs**) commence, the *Civil Aviation Order 48.1 Instrument 2019* (the **principal CAO**) takes account of their relevant legislative changes commencing on that date.

#### **Legislation**

The legislative basis for the principal CAO, which is, in effect, also the basis for the current CAO amendment, is set out in Appendix 1.

#### **Background**

Before the CAO amendment was made, the purpose of the principal CAO was to provide Air Operator Certificate (**AOC**) holders, flight crew members (**FCMs**), and Part 141 operators (flight training organisations under the *Civil Aviation Safety Regulations 1998* (**CASR**)) with a comprehensive regulatory framework for the more effective management of fatigue risk in aviation operations.

The principal CAO makes use of international standards concerning fatigue, and reflects advanced international scientific understanding of fatigue, fatigue risk and fatigue risk management. The CAO prescribes both specified flight and duty time limitations, minimum rest requirements and fatigue self-management obligations, while also permitting customised, data-driven fatigue risk management systems tailored to AOC holders' own operational characteristics and experiences.

As such, the principal CAO sets standards for the management of fatigue and fatigue risk. These standards must be complied with to address the safety implications of FCM fatigue in the interests of aviation safety.

Prior to 2 December 2021, aerial work operations were conducted under operators' AOCs. Effective on and from 2 December 2021, under Part 138 of CASR, these operators will operate under Part 138 certificates not AOCs. However, it is necessary in the interests of aviation safety that their operations remain subject to fatigue risk management under the principal CAO. This is ensured because compliance with the principal CAO is expressed in the principal CAO to be a condition of a Part 138 certificate.

The essential purpose of the CAO amendment is to modify references in the principal CAO to take account of this and make other minor, consequential changes.

#### **The current CAO amendment**

The specific details of the various amendments in the CAO amendment are set out in Appendix 2.

### **Incorporations by reference**

Under subsection 98 (5D) of the Act, the MOS may apply, adopt or incorporate any matter contained in any instrument or other writing. A non-legislative instrument may be incorporated into a legislative instrument made under the Act, as that non-legislative instrument exists or is in force at a particular time or from time to time (including a non-legislative instrument that does not exist when the legislative instrument is made). The CAO amendments do not incorporate any instruments or documents.

### **Legislation Act 2003 (the LA 2003)**

Paragraph 28BA (1) (b) of the *Civil Aviation Act 1988* (the *Act*) provides that an AOC has effect subject to any conditions specified in the Civil Aviation Orders (the *CAOs*). By so providing, paragraph 28BA (1) (b) of the Act is a separate head of power for the making of relevant CAOs.

The principal CAO imposed 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 principal CAO was, 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.

Further, under paragraph 28BA (1) (b) of the Act, an AOC has effect subject to any conditions specified in the CAOs. 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 principal CAO imposed 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 principal CAO 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.

By logical extension, the CAO amendment is also a legislative instrument on the same basis.

As the instrument relates to aviation safety and is made under the Act and the CASR, Part 4 of Chapter 3 of the LA (the sunset provisions) does not apply to the instrument (as per item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*). The instrument deals with aviation safety matters that, once identified, require a risk response or treatment plan. As such, the instrument is intended to have enduring operation and it would not be appropriate for it to be subject to sunset.

The exemption from the sunset provisions affects parliamentary oversight by not requiring the instrument to be remade at the end of the sunset period (remaking would have the effect that the whole instrument must be re-tabled and would become subject to disallowance in the Parliament under sections 38 and 42 of the LA). However, it is likely that, over time, further MOS amendments will be made and these will be subject to tabling and disallowance in the Parliament in the normal way.

### **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.

The CAO amendment contains minor or machinery amendments that are consequential on the commencement, on 2 December 2021, of the *Civil Aviation Safety Amendment (Part 138) Regulations 2018* (as amended). Part 138 of CASR regulates aerial work operations.

As noted above, prior to 2 December 2021, aerial work operations were conducted under operators' AOCs. Effective on and from 2 December 2021, under Part 138, these operators will operate under aerial work certificates not AOCs. However, it is necessary in the interests of aviation safety that their operations, which are essentially unchanged in nature from before 2 December 2021, remain subject to fatigue risk management under the principal CAO. Relevant sectors of the aviation industry were previously consulted for the purposes of *Civil Aviation Safety Amendment (Part 138) Regulations 2018* (as amended). CASA considered that no further consultation was required or appropriate for this particular consequential minor or machinery CAO amendment.

#### **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*. As a set of minor or machinery consequential amendments, the CAO amendment as such does not give rise to any human rights issues.

#### **Office of Best Practice Regulation (OBPR)**

As a set of minor or machinery consequential amendments, the CAO amendment as such does not affect any existing cost impact that might arise from the principal CAO which has ongoing, unchanged, application.

#### **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 Act. The CAO amendment commences on 2 December 2021.

## Legislation — legislative basis for Civil Aviation Order 48.1

Under section 27 of the *Civil Aviation Act 1988* (the *Act*), CASA may issue Air Operator Certificates (*AOCs*) with respect to aircraft for the purpose of safety regulation. Under section 28 of the Act, CASA must issue the AOC if satisfied that the applicant can comply with the requirements of Australian civil aviation safety legislation.

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

Additionally, under subsection 98 (4A) of the Act, CASA may issue CAOs, not inconsistent with the Act, in respect to any matter in relation to which regulations may be made for the purposes of, relevantly, section 28BA of the Act (conditions on AOCs).

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 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 the scope of regulation 11.015 which defines an authorisation, flight crew licences and Part 141 certificates). 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 (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 amend any such instrument. Subsection 33 (3) is used, to support the making of relevant amendments to the principal CAO.

## Details of Civil Aviation Order 48.1 Amendment Instrument 2021 (No. 1)

### 1 Name of instrument

This section names the CAO amendment.

### 2 Commencement

This section commences the instrument on 2 December 2021, at the same time as Part 138 of CASR.

### 3 Amendment of *Civil Aviation Order 48.1 Instrument 2019*

This section amends *Civil Aviation Order 48.1 Instrument 2019* (the *principal CAO*).

## Schedule 1 Amendments

[Editorial note: Individual CAOs are considered to be “Sections” of the overall Civil Aviation Orders. Therefore, in the hierarchy of provisions in an individual CAO, the highest element is a “subsection” followed by a paragraph, etc.].

### [1] Subsection 2, the Note

This amendment repeals a redundant Note.

### [2] Paragraph 4.1, the heading and the chapeau

This amendment updates the application of the principal CAO. It continues to apply, on and from 2 December 2021, to the previously identified classes of AOC and certificate holders.

### [3] Subparagraphs 4.1 (c), (d) and (e)

This amendment adds a Part 138 certificate to the list of aviation authorisations to which the principal CAO applies. It also corrects the omission of mention of a flight crew member (*FCM*) on a private flight. Some provisions of the principal CAO refer to such FCMs.

### [4] Subparagraph 4.3 (b), including the Note

This amendment adds a Part 138 certificate to the list of aviation authorisations on which the principal CAO imposes conditions under regulation 11.068 of CASR in the same way as they are imposed on Part 141 certificates. The related Note is correspondingly updated. Thus, the principal CAO is made to apply to these certificates, including Part 138 certificates, in the same way as it applies to AOCs.

### [5] Subparagraph 4.3 (c)

This amendment is consequential on amendment 3.

### [6] Paragraph 4.4

This amendment is consequential on amendment 3.

### [7] Paragraph 4.5

This amendment repeals paragraph 4.5 which is now redundant because of amendment 3.

**[8] Paragraph 4.6**

This amendment repeals paragraph 4.6 which is now redundant because of amendment 3.

**[9] Subsection 5**

This amendment replaces subsection 5 with an up-to-date statement of how, without affecting the principal CAO as in force immediately before 2 December 2021, the principal CAO takes effect, namely:

- (a) for an operator who holds an AOC or a certificate mentioned in paragraph 4.1 which includes the Part 138 certificate — on and from 2 December 2021; and
- (b) for a person who is issued with an AOC or certificate mentioned in paragraph 4.1 — on and from the day the AOC or certificate is issued; and
- (c) for a flight crew member of an operator or person mentioned in subparagraph (a) or (b) — on and from the day mentioned in subparagraph (a) or (b) for the operator or person; and
- (d) for a flight crew member on a flight conducted as a private operation — on and from 2 December 2021.

In addition, each flight crew member of an operator or person mentioned in paragraph 5.1 must comply with the applicable requirements of this CAO that apply to, and take effect for, the operator or person in accordance with this subsection.

This amendment does not materially change how the principal CAO applies on and after 2 December 2021 as compared to how it applied before 2 December 2021.

**[10] Paragraph 5A.2, the Note**

Subsection 5A is preserved but this amendment updates its Note to state that, in effect for drafting and reading convenience, the expression AOC holder includes the holder of a Part 138 certificate or a Part 141 certificate.

**[11] Subsection 5AB**

This amendment repeals a spent provision which is, therefore, redundant.

**[12] Subsection 6, Definitions, paragraph 6.1****[13] Subsection 6, Definitions, paragraph 6.1, definition of AOC holder, or holder (including the Note)**

These amendments insert new definitions consequential on the inclusion in the principal CAO of references to Part 138 operators and Part 138 certificates.

- [14] **Subsection 6, Definitions, paragraph 6.1, definition of *crew member*, including the Note**
- [15] **Subsection 6, Definitions, paragraph 6.1, definition of *flight crew licence***  
 These amendments update definitions to be consistent with those in the CASR Dictionary.
- [16] **Subsection 6, Definitions, paragraph 6.1, definition of *mustering operation***  
 Without changing its essential elements, this amendment updates a definition to be consistent with the Part 138 MOS, effective on and from 2 December 2021.
- [17] **Paragraph 6.5**  
 This amendment is consequential on amendment 3 to add mention of Part 138 certificate
- [18] **Subsection 10, Note 1**  
 This amendment is consequential on amendment 3 to add mention of a Part 138 operator.
- [19] **Subsection 12**  
 This amendment substitutes use of the term “non-private” for the word “commercial” since the latter is no longer relevantly used to describe operations.
- [20] **Paragraph 16.2**  
 This amendment is consequential on amendment 3 to add mention of a Part 138 operator.
- [21] **Appendix 1, subclause 3.1, Note 1**
- [22] **Appendix 2, subclause 7.7, Note 1**
- [23] **Appendix 3, subclause 5.7, Note 1**
- [24] **Appendix 4, subclause 5.7, Note 1**
- [25] **Appendix 4A, subclause 4.3, Note 1**
- [26] **Appendix 4B, subclause 3.7, Note 1**
- [27] **Appendix 5, subclause 3.7, Note 1**
- [28] **Appendix 6, subclause 4.7, Note 1**  
 These amendments update a regulatory reference about the responsibility and authority of the pilot in command, from CAR (regulation 224) to CASR (regulation 91.215) as the former provision is being repealed.
- [29] **Appendix 7, subclause 2.6, including the Note**  
 This amendment includes mention of an exposition as well as an operations manual as a location for flight risk management system details. This reflects requirements in documentation that will exist from 2 December 2021 under the FORs.

## 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 2021 (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 Amendment Instrument 2021 (No. 1)* (the **CAO amendment**) makes a number of minor or machinery amendments to ensure that, on and from 2 December 2021, the *Civil Aviation Order 48.1 Instrument 2019* (the **principal CAO**) takes account of other legislative changes commencing on that date. It does so without bringing about any change to the previously existing fatigue risk management obligations under the principal CAO.

As a set of minor or machinery consequential amendments, the CAO amendment as such does not give rise to any human rights issues.

#### 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*.

#### Conclusion

This legislative instrument is compatible with human rights.

**Civil Aviation Safety Authority**