

Explanatory Statement

Civil Aviation Safety Regulations 1998

Part 65 (Air Traffic Services Licensing) Amendment (English Language Proficiency) Manual of Standards 2023

Purpose

The purpose of the instrument is to amend the Manual of Standards issued under Part 65 (the **Part 65 MOS**) of the *Civil Aviation Safety Regulations 1998 (CASR)* to formally adopt the International Civil Aviation Organization (**ICAO**) standards for English language proficiency for holders of air traffic controller licences and flight service licences. The standards being adopted include that air traffic services (**ATS**) functions must not be carried out if the licence holder does not hold a current aviation English language proficiency (Part 65) assessment.

Legislation

Section 98 of the *Civil Aviation Act 1988* (the **Act**) empowers the Governor-General to make regulations for the Act and in the interests of the safety of air navigation. Relevantly, the Governor-General has made CASR.

Part 65 of CASR establishes the regulatory requirements for air traffic service personnel licensing. Regulation 65.033 is the general power for the making of a Manual of Standards for Part 65. Under paragraph 65.033(1)(c), the Part 65 MOS may provide for requirements and standards to be met by an applicant for, and the holder of, an authorisation granted under Part 65.

Regulation 65.070 provides for eligibility for the grant of an air traffic controller licence (an **ATC licence**). Paragraph 65.070(1)(c) requires a person to have successfully completed the training (including any examination or assessment) specified in the Part 65 MOS for the licence or a rating and endorsement on the licence. Paragraph 65.070(1)(e) requires the person to speak English clearly, and understand spoken English, to a standard that allows clear spoken two-way communication in the course of performing an air traffic control function.

Regulation 65.125 provides for eligibility to be granted a flight service licence with a traffic information service rating. Paragraph 65.125(1)(c) requires a person to have successfully completed the training (including any examination or assessment) specified in the Part 65 MOS for the licence or a rating and endorsement on the licence. Paragraph 65.125(1)(e) requires the person to speak English clearly, and understand spoken English, to a standard that allows clear spoken two-way communication in the course of performing a flight service function.

Subpart 11.G of CASR provides for the Civil Aviation Safety Authority (**CASA**) to issue directions in relation to matters affecting the safety of air navigation. Under paragraph 11.245(1)(a) of CASR, CASA may, by instrument, issue a direction about any matter affecting the safe navigation and operation of aircraft. Subregulation 11.245(2) of CASR provides that CASA may issue such a direction if CASA is satisfied that it is necessary to do so in the interests of the safety of air navigation, if the direction is not inconsistent with the Act, and for the purposes of CASA's functions.

Under paragraph 11.250(a) of CASR, a direction under regulation 11.245 ceases to be in force on the day specified in the direction. Under regulation 11.255 it is an offence of strict liability to contravene a direction under regulation 11.245.

Under subsection 14(1) of the *Legislation Act 2003* (the **LA**), a legislative instrument may make provision in relation to matters by applying, adopting or incorporating provisions of an Act or disallowable legislative instrument as in force at a particular time or as in force from time to time. A legislative instrument may also make provision in relation to matters by applying, adopting or incorporating any matter contained in any other instrument or writing as in force at, or before, the time the legislative instrument commences. Under subsection 14(2) of the LA, unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. However, subsection 98(5D) of the Act provides that, despite section 14 of the LA, a legislative instrument made under the Act or the regulations may apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing from time to time, even if the other instrument or writing does not yet exist when the legislative instrument is made.

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. Under subsection 13(1) of the LA, subsection 33(3) applies to legislative instruments as if each provision of the instrument were a section of an Act.

Background

Part 65 of CASR was made in 2002. In 2003, ICAO gave notice that detailed standards for English language proficiency would come into effect at the end of 2008. CASA determined that the standards were relevant for Australian ATS personnel, and CASA Notice of Proposed Rule Making (NPRM) 0707AS in 2007 included a specific proposal to expand the existing language requirements to comply with the ICAO standards. However, despite favourable responses, it has not been possible to make the necessary changes to Part 65 of CASR.

In the intervening time, the national ATS provider, Airservices Australia, voluntarily introduced the ICAO English language proficiency standards for all its operational staff. CASA introduced ICAO-compliant standards for English language proficiency within Parts 61 (flight crew licensing) and 64 (authorisations for non-licensed personnel) of CASR.

Although voluntary compliance with ICAO standards achieves the objective of the standards, it is not sufficient for demonstrating compliance with the ICAO standard as State parties needs to have appropriate regulations in place. The voluntary arrangement is not consistent with the scheme set out in Parts 61 and 64 of CASR for English language proficiency.

Overview of instrument

The instrument inserts Chapter 13 into the Part 65 MOS, which includes requirements for an applicant for an ATC licence, or a flight service licence, to have a current aviation English language proficiency (Part 65) assessment. This is an assessment that the person meets level 4, 5 or 6 of the ICAO language proficiency standards, as they have been set out in the

Part 61 Manual of Standards. The Part 61 Manual of Standards sets out the ICAO standards specified in Annex 1 to the Chicago Convention.

The instrument also makes provision in the Part 65 MOS for a direction made under regulation 11.245 of CASR, to require a person who is the holder of an ATC licence, or a flight service licence, to keep the person's aviation English language proficiency (Part 65) assessment current. Under the ICAO standards, and Parts 61 and 64 of CASR, an aviation English language proficiency assessment remains current as follows:

- for a person who has met the ICAO level 6 English language proficiency standards—
indefinitely
- for a person who has met the ICAO level 5 English language proficiency standards—
for 6 years beginning on the day the assessment is conducted
- for a person who has met the ICAO level 4 English language proficiency standards—
for 3 years beginning on the day the assessment was conducted.

Contravention of a direction made under regulation 11.245 of CASR is an offence under regulation 11.255 of CASR. In accordance with regulation 11.250, the direction has limited duration. Under subsection 13.04(5), the direction self-repeals at the end of July 2026, approximately 3 years after the making of the direction. CASA intends to amend Part 65 as originally intended to expand the existing English language proficiency requirements to comply with the ICAO standards, and intends to renew the direction as needed until amendment of the regulations is achieved.

The instrument includes savings provisions under which a person who holds an English language proficiency assessment under Airservices Australia's existing voluntary arrangements is taken to hold an aviation English language proficiency (Part 65) assessment for as long as the original assessment remains current.

The instrument amends the Part 65 MOS, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

Documents incorporated by reference

In accordance with subsection 98(5D) of the Act, the instrument incorporates the ICAO aviation English language proficiency standards mentioned in:

- (a) the Part 61 Manual of Standards; and
- (b) Annex 1 to the Chicago Convention.

The Part 61 Manual of Standards is a legislative instrument and is incorporated as in force from time to time (specifically the aviation English language proficiency standards that essentially replicate the relevant aviation English language proficiency standards in Annex 1 to the Chicago Convention). The Part 61 Manual of Standards sets out the requirements and standards for the issue of flight crew licences and ratings, and their privileges. It is freely available on the Federal Register of Legislation.

Annex 1 to the Chicago Convention is incorporated by subsection 13.05(3), in item 6 of the instrument. Subsection 13.05(3) is a savings provision that preserves an assessment of a person, made at any time before 1 September 2014, by a language proficiency assessor who is a member of the ATS provider's personnel, that a person meets the ICAO level 6 English language proficiency standards mentioned in Annex 1. Therefore, the Annex is incorporated

as existing or in force at the time of an assessment, which could be any time up until 1 September 2014.

The current edition of Annex 1 is freely available from the ICAO eLibrary at: <https://elibrary.icao.int>. Earlier editions of Annex 1 are publicly available from ICAO for a fee (<https://store.icao.int/>). CASA has incorporated the document because there is no freely available document that would serve the same purpose. The Part 61 Manual of Standards that sets out the ICAO standards did not come into force until 1 September 2014. Where practicable, by prior arrangement with CASA, a copy of earlier editions of Annex 1 can be made available for viewing free of charge at any office of CASR.

Content of instrument

Section 1 sets out the name of the instrument.

Section 2 states that the instrument commences on the day after it is registered.

Section 3 provides that the Part 65 MOS is amended as set out in Schedule 1.

Schedule 1

Items 1 to 3 of Schedule 1 amend Section 1.2 to include signposts in the general definitions section of new definitions that are used in new Chapter 13 of the Part 65 MOS. These are:

- ***aviation English language proficiency (Part 65) assessment***
- ***aviation English language proficiency assessor***
- ***current*** (as it relates to an aviation English language proficiency (Part 65) assessment)
- ***Part 65 language assessor***.

Item 4 substitutes a new Section 4.1.8, about language proficiency for candidates for an ATC licence, to require a candidate to have a current aviation English language proficiency (Part 65) assessment. The note provides a signpost to Chapter 13, which provides for how an assessment can be obtained and what requirements are to be met.

Item 5 substitutes a new Section 10.1.6, about language proficiency for candidates for a flight service licence, to require a candidate to have a current aviation English language proficiency (Part 65) assessment, similarly as for ATC licence candidates, including the note pointing to new Chapter 13.

Item 6 of Schedule 1 include a new Chapter 13, English Language Proficiency.

Section 13.01 sets out definitions for key concepts used in the Chapter.

Section 13.02 provides for the application process for an aviation English language proficiency assessment, and for the requirements to be met for an applicant to pass the assessment. Application can be made in the first instance to CASA or to a ***Part 65 language assessor*** (defined in section 13.01). A Part 65 language assessor is a member of the ATS provider's personnel who holds a limited approval under regulation 61.270, which regulation permits CASA to issue approvals to persons to conduct assessments of whether a person meets the ICAO level 4, 5 or 6 aviation English language proficiency standards. In actuality, persons approved under regulation 61.270 may be authorised to conduct only level 6 assessments (rather than the full range), which is the current situation for assessors in the

voluntary scheme within Airservices Australia, the national ATS provider. This limits the person to the assessment of the most fluent level of aviation English.

Subsection 13.02(3) provides that if CASA or the Part 65 language assessor are not satisfied the person meets the ICAO level 6 standard, the application must be referred to an aviation English language proficiency assessor. On its terms, under regulation 61.270, this would be a person whose approval under that regulation would permit the person to conduct assessments in relation to all the ICAO levels.

Section 13.02 generally replicates the scheme in regulation 61.255 for flight crew licensing, but substitutes a Part 65 language assessor for an examiner under Part 61, as a person who can do an initial assessment of an applicant's language proficiency.

Section 13.03 provides for the duration of assessments, and establishes the concept of how long an assessment remains **current**, along the same lines as the Part 61 scheme, set out in regulation 61.260 of CASR. A person who has attained ICAO level 6 has an assessment that remains current, indefinitely. An ICAO level 5 assessment remains current for 6 years from the date of the assessment, and a level 4 remains current for 3 years from the assessment date.

Section 13.04 provides directions to the ATC and flight services licence holders and ATS providers to ensure aviation English language proficiency (Part 65) assessments are kept current and ATS functions, or flight service functions, are not performed without these assessments being current. This section is repealed at the end of 31 July 2026. A self-repeal date is provided for the purposes of regulation 11.250 of CASR which limits the duration of directions made under regulation 11.245.

Section 13.05 is a savings provision that provides that a person holding an English language proficiency assessment under a pre-existing voluntary arrangement will be considered to hold an aviation English language proficiency (Part 65) assessment for as long as the original assessment remains current. Persons who had been assessed under Airservices Australia's voluntary schemes as meeting the ICAO level 6 aviation English language proficiency standards will not need to redo the assessment under new Chapter 13.

Legislation Act 2003

Paragraph 10(1)(d) of the LA provides that an instrument will be a legislative instrument if it includes a provision that amends or repeals another legislative instrument. The instrument amends the Part 65 MOS, that was registered as a legislative instrument and is, therefore, also a legislative instrument, subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Part 4 of Chapter 3 of the LA (the ***sunsetting provisions***) does not apply to the instrument, because the instrument relates to aviation safety and is made under CASR (item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

The instrument amends a Manual of Standards that deals with aviation safety matters and is intended to have enduring operation. It, therefore, would not be appropriate for it to be subject to sunsetting. The exemption from the sunsetting provisions affects parliamentary oversight by not requiring the instrument to be remade and subject to further tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

The directions in the instrument that are made under regulation 11.245 of CASR will self-repeal approximately 3 years after making, on 31 July 2026. In the case of those provisions, a further direction or a more permanent requirement to require holders of ATC licences or flight service licences to have a current aviation English language proficiency (Part 65) assessment will be subject to further parliamentary scrutiny.

Consultation

ICAO implemented standards for English language proficiency in 2008. At the time, CASA determined that the standards were relevant for Australian air traffic services personnel and consulted with industry about expanding the existing language requirements to comply with the ICAO standard. However, despite favourable responses, it was not possible to carry out the proposed amendment to Part 65 of CASR.

CASA engaged in public consultation, from 20 April to 7 May 2023, on its proposal to amend the Part 65 MOS to achieve the same outcome originally proposed for amendments to Part 65 of CASR, and for this purpose released a Summary of Proposed Change outlining the proposed amendments to the Part 65 MOS. CASA received 5 responses. The feedback clearly supported the proposed amendment. It was apparent that all respondents recognised the importance of clear communications in aviation and having appropriate standards to facilitate such communication. Given this feedback, CASA proceeded with the amendments to the Part 65 MOS as consulted.

Sector risk, economic and cost impact

Subsection 9A(1) of the Act states that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.

Subsection 9A(3) of the Act states that, subject to subsection (1), in developing and promulgating aviation safety standards under paragraph 9(1)(c), CASA must:

- (a) consider the economic and cost impact on individuals, businesses and the community of the standards; and
- (b) take into account the differing risks associated with different industry sectors.

The cost impact of a standard refers to the direct cost (in the sense of price or expense) which a standard would cause individuals, businesses and the community to incur. The economic impact of a standard refers to the impact a standard would have on the production, distribution and use of wealth across the economy, at the level of the individual, relevant businesses in the aviation sector, and the community more broadly. The economic impact of a standard could also include the general financial impact of that standard on different industry sectors.

CASA has assessed that the economic and cost impact of the instrument is not significant. This is because it mandates a scheme that is currently being undertaken voluntarily by Airservices Australia for all its operational staff, and the savings provision preserves the existing aviation English language proficiency assessments held by the operational staff affected by the instrument.

The Office of Impact Analysis (**OIA**) has also made the assessment that the impact of the instrument is minor and that an Impact Analysis (**IA**) is not required. As there is no significant economic or cost impact on individuals or businesses, there will be no community impacts (OIA id: 23-04999).

Impact on categories of operations

The instrument is likely to have a beneficial effect on all operations in controlled air space given the higher standard that aviation English language will be assessed against.

Impact on regional and remote communities

The instrument does not have any impact on regional and remote communities as it deals solely with the English language proficiency skills of air traffic control personnel.

Office of Impact Analysis

An IA is not required in this case as the amendments were assessed as unlikely to have more than a minor regulatory impact (OIA id: 23-04999).

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights at Attachment 1 has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Making and commencement

The instrument has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73(2) of the Act.

The instrument commences on the day after it is registered. As an amending instrument, it is automatically repealed in accordance with section 48A of the LA. Section 13.04, that is inserted by the instrument into the Part 65 MOS, self-repeals at the end of 31 July 2026.

Statement of Compatibility with Human Rights

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

Part 65 (Air Traffic Services Licensing) Amendment (English Language Proficiency) Manual of Standards 2023

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 Safety Authority (**CASA**) amends the Manual of Standards issued for Part 65 (the **Part 65 MOS**) of the *Civil Aviation Safety Regulations 1998 (CASR)* to formally adopt the International Civil Aviation Organization standards for English language proficiency, for holders of air traffic controller licences and flight service licences. The standards being adopted include that air traffic services (**ATS**) functions must not be carried out if the licence holder does not hold a current aviation English language proficiency (Part 65) assessment. In making this amendment, CASA has regarded as paramount the preservation of at least an acceptable level of aviation safety.

Human rights implications

The Part 65 MOS amendments may engage the following human rights:

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

Right to life under the ICCPR

Right to safe and healthy working conditions under the ICESCR

The instrument may engage these rights. This engagement is in the context of CASA's statutory purpose. The aim of CASA and its regulatory framework, including Part 65 of CASR and the Part 65 MOS, is to uphold aviation safety by prescribing the conduct of individuals and organisations involved in providing air traffic control services. It is, therefore, a threshold requirement for all CASA legislative instruments that they preserve, promote, and enhance aviation safety. Accordingly, the amendments to the Part 65 MOS are crafted and intended, as far as practicable, to promote and enhance aviation safety standards for the provision of air traffic control (**ATC**) services. The instrument promotes the right to life under Article 6 of the ICCPR by legislating for safer conditions that will minimise the risk of accidents and prevent accidental death. Thus, for Article 7 of the ICESCR, the instrument also promotes the right to safe and healthy working conditions for providers of air traffic controller services and all entities that use these services.

Right to work

The instrument may engage the right to work that is protected under Article 6(1) of the ICESCR. This right includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept.

The instrument does not directly address the right to work. However, its provisions may have an impact on the way that the work involved in safely operating an aircraft is carried out. New obligations of care and skill are imposed on holders of air traffic controller and flight services licences to this end. Failure to follow the relevant requirements of the Part 65 MOS will result in licence holders not being authorised to perform a function for the ATS provider. However, in the interests of aviation safety, it is necessary that the holders of an ATC licence, or flight services licence, and ATS providers follow these rules.

Therefore, in the circumstances, the obligations arising under the instrument are reasonable, necessary and proportionate requirements under aviation safety law to ensure aviation safety.

Accordingly, any potential limitation on the right to work is itself necessary, reasonable and proportionate in achieving the aim of protecting and improving aviation safety consistent with the objects of the Act and the regulations.

Conclusion

This legislative instrument is compatible with human rights as it promotes human rights and any potential limitation on human rights is necessary, reasonable and proportionate to improving aviation safety.

Civil Aviation Safety Authority