

Explanatory Statement

Civil Aviation Safety Regulations 1998

Part 65 (Air Traffic Service Licensing) Amendment (Fatigue Rules) Manual of Standards 2023

Purpose

The amendment instrument inserts an obligation on the holder of an air traffic control licence, or a flight service licence, who performs an air traffic service function for an air traffic service provider (an **ATS provider**), not to perform the function if the person is, or is likely to be, unfit to perform that function due to fatigue. This complements the fatigue risk management rules being inserted into the Manual of Standards issued for Part 172 of the *Civil Aviation Safety Regulations 1998 (CASR)* by the *Part 172 (Air Traffic Service Providers) Amendment (Fatigue Rules) Manual of Standards 2023* (the **Part 172 fatigue rules**). Under those rules, an ATS provider must have a fatigue risk management system (an **FRMS**) which, relevantly, establishes limits and requirements applying for its operational persons. The ATS provider has obligations to ensure that air traffic controllers and flight service officers do not perform functions if the provider reasonably believes that the person is unfit to perform the function due to fatigue.

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)(b), the Part 65 Manual of Standards (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 11.068 of CASR allows CASA, for subsection 98(5A) of the Act, to issue a legislative instrument that imposes a condition relating to a matter mentioned in that subsection on a class of authorisations. Authorisations include an ATC licence granted under regulation 65.070 of CASR and a flight service licence granted under regulation 65.125 of CASR. Under regulation 11.077 of CASR, it is a strict liability offence if a person, who holds an authorisation that is subject to a condition under regulation 11.068, contravenes the condition.

Part 172 of CASR provides for approval of ATS providers and their regulation. Under subregulation 172.022(1) of CASR, CASA may issue a Manual of Standards for Part 172 of CASR, setting out various standards for air traffic services, including procedures, systems and documents used to provide an air traffic service.

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

The amendment instrument complements the amendments of the Manual of Standards for Part 172 (the *Part 172 MOS*), being inserted by the Part 172 fatigue rules.

Under the Part 172 fatigue rules, an ATS provider must have an fatigue risk management system (*FRMS*) that meets the standards set out in Chapter 4 of the Part 172 MOS, and, by 1 September 2024, must get an FRMS implementation approval from CASA. The requirements in Chapter 4 include establishing FRMS practical operating procedures, under which the FRMS must set out maximum values and minimum values for each operational person, for matters such as the number of hours in a duty period. There are also requirements for supporting documentation which include, relevantly, FRMS training programs, training requirements and records of attendance at training, scheduled and actual duty and non-duty periods and break periods of time-in-position in a duty period.

The national ATS provider is Airservices Australia (*AA*), which has, for a number of years, been using a form of FRMS to manage its fatigue management risks.

In November 2020, the International Civil Aviation Organization (*ICAO*) amended Annex 11 to the Chicago Convention by introducing new standards that require Contracting States to the Chicago Convention (which includes Australia) to promulgate legislation for managing fatigue in the provision of air traffic control services. The new standards require an ATS provider to use either prescriptive scheduling limits (that is specified maximum duty hours/periods and minimum non-duty hours/periods) or to implement an FRMS. While AA's voluntary compliance would satisfy immediate safety requirements, the arrangement is not sufficient to demonstrate that Australia is meeting its international obligations to have adequate legislation.

At the time the new ICAO standards came into effect, AA wrote to CASA expressing its intent to continue using an FRMS into the future and undertaking to, as necessary, amend its FRMS to address any differences with the Annex 11 standards. While AA's voluntary compliance would satisfy immediate safety requirements, the arrangement is not sufficient to demonstrate that Australia is meeting its international obligations to have adequate

legislation. As a signatory to the Convention on Civil Aviation, Australia has an obligation to adopt ICAO standards unless there is a compelling reason against such an adoption.

CASA considers fatigue among aviation personnel to be a critical safety consideration. Therefore, CASA carried out a regulatory change program to introduce legislation requiring ATS providers to have and implement an FRMS approved by CASA, as well as apply relevant and complementary obligations on air traffic controllers and flight service officers.

Overview of instrument

The amendment instrument places an obligation on air traffic controllers and flight service officers to not begin to perform an air traffic control function, or flight service function (as relevant) if, due to fatigue, the person is, or is likely to be, unfit to perform a task for that function.

The instrument inserts a definition of *fatigue* which is the same definition as that in the Part 172 MOS.

CASA considers that fatigue among aviation personnel is a critical safety consideration. The obligation placed on operational persons under the instrument requires and supports those persons to act in the interests of aviation safety.

The instrument amends the Manual of Standards issued for Part 65 of CASR to insert the requirements mentioned above, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

Content of instrument

Section 1 sets out the name of the instrument.

Section 2 provides that the instrument commences on the commencement of the *Part 172 (Air Traffic Service Providers) Amendment (Fatigue Rules) Manual of Standards 2023*.

Section 3 provides that the Manual of Standards issued under regulation 65.033 is amended as set out in Schedule 1.

Schedule 1

Item [1] amends the table in section 1.2 by adding a signpost definition of *fatigue*. The definition for *fatigue* is set out in section 14.01, so that it occurs in the same location as the provisions that use the term.

Item [2] inserts a new Chapter 14 (Conditions on licences for fatigue management).

Section 14.01

This section provides for the definition of *fatigue*. The definition is identical to that used in Chapter 4 of the Part 172 MOS (which provides for the requirements for an FRMS applying to the ATS provider). For the ease of users of the Part 65 MOS, the definition has been repeated here.

The note to the definition points to the requirements, in Chapter 4 of the Part 172 Manual of Standards, for an ATS provider to have and implement a fatigue risk management system approved by CASA. This provides important context for Chapter 14.

Section 14.02

This section provides that it is a condition on an ATC licence that its holder must not begin to perform an air traffic control function if, due to fatigue, the holder is, or is likely to be, unfit to perform a task that the holder must perform for that function.

Section 14.03

This section provides that it is a condition on a flight service licence that its holder must not begin to perform a flight service function if, due to fatigue, the holder is, or is likely to be, unfit to perform a task that that the holder must perform for that function.

The note below section 14.03 explains the related obligation, placed on the ATS provider, that the provider must ensure that an ATC licence holder or flight service licence holder complies with a requirement imposed on the person by section 14.02 or 14.03.

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*). In this case, the instrument amends the Part 65 MOS and is almost immediately spent and repealed in accordance with the automatic repeal provisions in Subdivision A in Division 1 of Part 3 of Chapter 3 of the LA.

The principal instrument 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.

Consultation

CASA carried out public consultation on the proposed fatigue management standards, which included changes to the Part 65 MOS covered by this Explanatory Statement. Initially, CASA consulted on the broad concept of fatigue management standards within Policy Proposal (PP) 2207AS, which was open for public comment between 8 June 2022 and 7 July 2022. In total, there were 8 respondents to PP 2207AS. While there were recommendations for small changes to the initial proposal, feedback was supportive of the proposed standards.

CASA followed up PP 2207AS with Summary of Proposed Change (SPC) 2303AS, which was open for public comment between 17 May 2023 and 23 June 2023. The proposals in SPC 2303AS were similar to those in the original consultation except for small changes to accommodate feedback from the original consultation. There were 17 responses to the latest consultation.

The feedback supported the proposed legislative action. Consequently, CASA was confident to proceed with making the changes.

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 operational persons are already governed under AA's FRMS, which acts to prevent a licence holder from performing an ATS task if, due to fatigue, the holder is, or is likely to be, unfit to perform that task. Accordingly, the instrument does not require a relevant licence holder to start or stop doing something, or incur an expense or loss.

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

Impact on categories of operations

The instrument is likely to have a beneficial effect on all operations in Australian airspace as it provides an increased assurance to participants in the aviation transport sector that operating safety will not be compromised because an air traffic controller or a flight service officer is providing an air traffic service while unfit to do so due to fatigue.

Impact on regional and remote communities

The instrument does not have any impact on regional and remote communities as it deals solely with the management of fatigue for specialist personnel employed by a single regulated entity.

Office of Impact Analysis

The OIA has made the assessment that the impact of the instrument is minor and that an IA is not required (OIA id: 23-05269).

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 commencement of the *Part 172 (Air Traffic Service Providers) Amendment (Fatigue Rules) Manual of Standards 2023*. As an amending instrument, it is automatically repealed in accordance with section 48A of the LA.

Statement of Compatibility with Human Rights

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

Part 65 (Air Traffic Service Licensing) Amendment (Fatigue Rules) 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 amendment instrument inserts an obligation on the holder of an air traffic control licence, or a flight service licence, who performs an air traffic service function for an air traffic services provider (an ***ATS provider***), not to perform the function if the person is, or is likely to be, unfit to perform that function due to fatigue. This complements the fatigue risk management rules being inserted into the Manual of Standards issued for Part 172 of the *Civil Aviation Safety Regulations 1998 (CASR)* by the *Part 172 (Air Traffic Service Providers) Amendment (Fatigue Rules) Manual of Standards 2023* (the ***Part 172 fatigue rules***). Under those rules, an ATS provider must have a fatigue risk management system (an ***FRMS***) which, relevantly, establishes limits and requirements applying for its operational persons. The ATS provider has obligations to ensure that air traffic controllers and flight service officers do not perform functions if the provider reasonably believes that the person is unfit to perform the function due to fatigue.

CASA considers that fatigue among aviation personnel is a critical safety consideration. The obligation placed on the ATS provider's operational persons under the instrument requires and supports those persons to act in the interests of aviation safety.

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 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 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 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. The instrument imposes a new obligation on air traffic controllers and flight service officers that supports the outcome that the person does not perform an air traffic function if the person is unfit because of fatigue. This obligation complements the obligations imposed on the ATS provider under the amendments made by the Part 172 fatigue rules that insert a mandated requirement for the ATS provider to have a CASA-approved FRMS. Under the new FRMS standards, the ATS provider must not assign an operational person to perform an air traffic control function or flight service function if the provider believes the person is unfit to perform the function because of fatigue. The fatigue rules in this instrument and the Part 172 Manual of Standards fatigue rules are intended to have a beneficial impact on the work life of holders of air traffic controller and flight service licences. CASA considers that fatigue among aviation personnel is a critical safety consideration. As such, the obligation on a member of the ATS provider's personnel, arising under this instrument, is reasonable, necessary and proportionate 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 does not raise any human rights issues.

Civil Aviation Safety Authority