

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.0 Amendment Order (No. 1) 2007

Purpose

The purpose of *Civil Aviation Order 82.0 Amendment Order (No. 1) 2007* (the **CAO Amendment**) is to require that the holder of an air operator's certificate must obtain CASA approval before using a night vision device. This is achieved by the means, and for the reasons, set out below. The most common form of night vision device is night vision goggles (**NVG**) which is used in this statement to signify all relevant devices. The CAO Amendment operates in tandem with the direction to private operators in instrument CASA 30/07 to prohibit the use of NVG in private operations.

Legislation

Under subsection 27 (1) of the *Civil Aviation Act 1988* (the **Act**), CASA may issue air operators' certificates (**AOCs**) for aircraft. Under subsections 27 (2) and (9), except as authorised by an AOC, an aircraft shall not fly or operate in Australian territory for prescribed purposes.

Section 98 of the Act empowers the Governor-General to make regulations for the Act and the safety of air navigation. Under subregulation 206 (1) of the *Civil Aviation Regulations 1988* (**CAR 1988**), certain commercial purposes are prescribed for subsection 27 (9) of the Act, namely aerial work of various kinds, charter operations and regular public transport operations.

Under paragraph 28BA (1) (b) of the Act, an AOC has effect subject to any conditions specified in CAR 1988 or the Civil Aviation Orders (the **CAOs**).

Under subsection 28BA (2A) of the Act, if a condition specified in the CAOs is breached, while the breach continues, the AOC does not authorise any flight or operation to which the condition relates.

Part 82 of the CAOs specifies conditions on AOCs and Civil Aviation Order 82.0 (**CAO 82.0**) contains the general conditions on all AOCs.

Background

NVG for night flying are used extensively in the highly trained and disciplined arena of military aviation operations, including in the Australian Defence Force. Without high grade training and standards, the use of NVG in Australian civil aviation operations is contentious.

However, in recent years, military-trained NVG pilots and other crew members have been entering the Australian civil aviation environment and certain commercial operators have expressed an interest in exploiting NVG technology. This is particularly the case in emergency-type, specialised helicopter operations where low flight at night is required. These operations include emergency medical services, search and rescue, law enforcement, aerial fire fighting and marine pilot transfer.

Low flying at night

For practical purposes, NVG are of limited use unless the pilot in command flies under visual flight rules at night (*NVFR*) below what would otherwise be the lowest safe altitude for the flight, usually 1 000 feet above the highest obstacle within a 10 mile radius. Such flight is unlawful without a written permission from CASA under regulation 174B of CAR 1988.

Before the CAO Amendment was made, there was no express and unambiguous prohibition of the civilian use NVG in helicopters or other aircraft. It was likely, however, that such use, occurring outside an environment of proper training, proficiency, checking, standardisation and air traffic control awareness, constituted reckless operation of an aircraft under section 20A of the Act.

Proposed Civil Aviation Order 82.6 (CAO 82.6)

CASA has been developing a framework for the safe and controlled use of NVG in civilian helicopters engaged in emergency-type aerial work operations. This framework will involve a precautionary regime requiring approved operators, appropriately maintained aircraft, effective equipment, prerequisite pilot night flying licence endorsement, high level NVG training, competency and proficiency standards, training and checking organisation involvement and adherence to lowest safe altitudes unless operationally necessary to descend below them.

This framework was developed in a proposed CAO 82.6 in consultation with the Helicopter Association of Australia (the *HAA*). CASA considers that, although NVG use is a potential safety enhancer, this enhancement is only effectively obtained and maximised in an environment where training, competency, proficiency and operational standards are high. Therefore, CASA considered that the first authorised use of NVG in Australian civil aviation required higher safety standards in some areas than some operators might have preferred.

CASA proposed a 12 month trial of NVG in accordance with its proposed CAO 82.6. It was intended, after final consultations with the HAA, to issue the proposed CAO 82.6 for public consultation in the form of a notice of proposed rule making (*NPRM*), collect and consider industry-wide reactions to it and then make an appropriate CAO. This would enable suitable operators to apply for approval to join the trial if they met the safety standards for NVG operations, and for the trial to unfold for 12 months. The trial would include the reporting and documentation of any unusual NVG incidents or experiences and these used in the final assessment of how best to safely and permanently facilitate commercial and other NVG use.

It was realised, however, that the NPRM process, even if significantly shortened, would prevent the making of CAO 82.6 until at least early May 2007, with the procedures for proper assessment and approval of operators further delaying the commencement of the trial.

CASA was aware that some operators may be in a position to meet the safety requirements of the proposed CAO 82.6 and obtain an early approval to use NVG before May 2007.

In order not to disadvantage such operators, and still ensure an orderly and safer introduction of NVG into civil aviation operations, CASA has made the CAO Amendment both to prevent unapproved use of NVG, and as a preliminary step for approving suitable operators to commence the NVG trial.

This will enable some suitable operators, more advanced in their preparations, to apply for approval to commence the trial of NVG ahead of those who are more likely to wait the outcome of the NPRM process and the making of CAO 82.6.

The approval given to suitable operators will be subject to conditions and requirements similar to those contained in the proposed CAO 82.6. If the NPRM process results in the final version of proposed CAO 82.6 containing materially different conditions from those already included in early approvals, the early approvals will be modified to ensure consistency in the trial.

The CAO Amendment

The CAO Amendment amends CAO 82.0 to insert a new subsection 3D. This provides that each AOC is subject to the condition that the certificate holder may only use a night vision device as the primary means of terrain avoidance for safe air navigation by means of visual surface reference external to an aircraft in accordance with a CASA approval, including any exemptions, conditions, directions, specifications or other matter contained in the approval.

A night vision device includes the most obvious form of this equipment, namely NVG. However, it has been necessary to use a broader definition than merely NVG to ensure that other similar devices are also covered. Thus, a night vision device means night vision enhancement equipment, fitted to, or mounted in or on, an aircraft, or worn by a person in the aircraft, that can detect and amplify light in both the visual and near infra-red bands of the electromagnetic spectrum, or provide an artificial image representing topographical displays.

The new condition does not apply to the certificate of a holder who has a current CASA approval to conduct NVG operations in accordance with *Compliance Management Instruction 04/74 — Night Vision Goggles (NVG) for Helicopter Operations* or other CASA conditions. A small number of operators have such existing approvals and they will be asked to apply for approval under the new arrangements.

If CASA assesses an applicant as suitable for approval, the instrument of approval will contain certain disallowable exemptions (for example, to allow low flight), directions (for example, about the procedures to be contained in the operations manual) and specifications (for example, of operators who must have a training and checking organisation under regulation 217 of CAR 1988 to support NVG use in the trial).

Conditions for NVG approval

The conditions to be complied with by an operator who seeks approval to use NVG will include, in particular, conditions about equipment standards, and training and proficiency requirements. Guidelines and conditions for NVG use will also be published on the CASA website.

Legislative Instruments Act

Under subsection 98 (4A) of the Act, CAOs made for section 28BA of the Act are declared to be disallowable instruments. Under subparagraph 6 (d) (i) of the *Legislative Instruments Act 2003* (the **LIA**), an instrument is a legislative instrument for section 5 of the LIA if it is declared to be a disallowable instrument under legislation in force before the commencement of the LIA. The CAO Amendment is, therefore, a legislative instrument and it is subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LIA.

Consultation

Consultation under section 17 of the LIA has been undertaken with the specialised aviation industry, particularly the HAA, for the purposes of developing a proposed CAO 82.6 for NVG use. From the proposed CAO 82.6 will be drawn the conditions applying to those operators who obtain early approvals under the CAO Amendment to participate in the trial. The HAA was notified of this approach during the broader consultations on the proposed CAO 82.6.

Broader consultation has not been undertaken in this case because the CAO Amendment is of a minor or machinery nature. Specifically, it is designed to remove any residual ambiguity about whether NVG may be used without CASA approval, and provide the mechanism for that approval to be given if appropriate.

Office of Best Practice Regulation (OBPR)

Since inappropriate civilian use of NVG is almost certainly prohibited by section 20A of the Act, and existing NVG approval holders are excluded from its operation, the CAO Amendment has no commercial impact on any operator who is observing the requirements of section 20A.

OBPR, formerly the Office of Regulation Review, considered the proposals for an NVG CAO Amendment and issued RIS exception ORRID 7969. Neither a business cost calculator report nor a regulation impact statement was required because, in essence, the CAO Amendment merely removes residual legal ambiguity about whether NVG may be used without CASA approval.

Making, registration and commencement

The instrument comes into effect on the day after it is registered.

The instrument has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 84A (2) of the Act.

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