

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 104.0 Amendment Instrument 2013 (No. 1)

Purpose

The purpose of *Civil Aviation Order 104.0 Amendment Instrument 2013 (No. 1)* (the **CAO amendment**) is to establish the conditions under which a person or organisation holding a certificate of approval under regulation 30 of the *Civil Aviation Regulations 1988 (CAR 1988)* for maintenance of aircraft, may carry out maintenance on warbirds, and historic and replica aircraft (**WHR**). The CAO amendment operates in tandem with instrument CASA 197/13, *Maintenance on warbird and historic and replica aircraft (WHR) — direction and licence condition*, which directs who may carry out certain maintenance.

Legislation

Section 98 of the *Civil Aviation Act 1988* (the **Act**) empowers the Governor-General to make regulations for the Act and the safety of air navigation. Regulation 30 of CAR 1988 prescribes that a person engaged in the maintenance of aircraft must hold CASA's certificate of approval (**COA**) for the activity.

Under subregulation 30 (3) of CAR 1988, CASA may, for safety purposes, include in such a COA an endorsement that the certificate is granted subject to conditions specified in the CAOs. CAO 104.0 (Certificates of approval — application, grant and conditions) was made under subregulation 30 (3) for the purpose of prescribing such conditions.

Background

A **WHR** means an aircraft that is manufactured for an armed force; or an historic or replica aircraft that (generally) meets the airworthiness requirements for the issue of a standard certificate of airworthiness and issued with a special certificate of airworthiness for limited category aircraft, or an experimental certificate for aircraft.

WHR (generally ex-military, historic and replica aircraft) often present maintenance issues which require special maintenance, and specialist maintenance training and skills. Most of these aircraft are not type rated under the aircraft engineer licence (**AEL**) requirements of Part 66 of CASR 1998 and generally there is, therefore, no specific training requirement associated with the exercise of AEL privileges. However, the aircraft systems are different from those taught during category training, giving rise to a need for specific training and authorisation before Part 66 licence privileges can safely be exercised for such aircraft.

The CAO amendment establishes the conditions under which a person or organisation holding a COA under regulation 30 of CAR 1988 for maintenance of aircraft (a **COA holder**) may carry out maintenance on WHR. The effect will be to place such a COA holder in a similar position to that of an approved maintenance organisation (an **AMO**) under Part 145 of the *Civil Aviation Safety Regulations 1998 (CASR 1998)*.

Under Part 145 of CASR 1998, AMOs already have the facility to train and authorise specialist maintainers of WHR. However, existing COA holders who are not AMOs

have not had access to similar training, authorising and maintaining opportunities for WHR purposes. This will change provided the COA holder meets a generally similar range of safety conditions and requirements with respect to the training, qualifications, experience and authorisation of persons who carry out the maintenance of WHR.

The CAO amendment complements the contemporaneous direction instrument, CASA 197/13, *Maintenance on warbird and historic and replica aircraft (WHR) — directions and licence condition*. Without affecting the safety regime already established by Part 145 of CASR 1998, this instrument sets out directions which must be observed in carrying out maintenance on WHR.

The requirements for WHR set out in the direction and the related CAO amendment will, in due course, be codified in regulatory amendments to CASR 1998.

CAO amendment

The CAO amendment inserts a new subsection 8 into CAO 104.0, for the training and assessment of those who carry out maintenance on WHR. The CAO amendment also adds a new Appendix 3, setting out in 2 Parts, 2 lists of the various WHR affected by the requirements of subsection 8.

Under paragraphs 8.1, 8.2 and 8.4, a COA holder must not permit a person to carry out Part 1 WHR maintenance unless the person has been issued with the holder's certification authorisation for carrying out the maintenance. In addition, the COA holder must ensure that an employee does not carry out Part 1 WHR maintenance except in accordance with the particular limitations of a certification authorisation which the holder is empowered to issue only to an employed authority or type rating holder or a trained WHR employee, and only for up to 2 years duration.

Part 1 WHR maintenance means maintenance on a WHR mentioned in Part 1 of Appendix 3 of CAO 104.0.

A ***WHR employee*** means an employee of a COA holder who is a CASR 1998 Part 66 category B1 licence holder (in a subcategory relevant to the WHR on which he or she proposes to carry out maintenance under new subsection 8), or a category B2 licence holder.

An ***authority or type rating holder*** means a person who holds an airworthiness authority under subregulation 33B (1) of CAR 1988 to carry out WHR maintenance or to conduct non-destructive testing (***NDT***); or who holds an aircraft welding authority under subregulation 33D (1) of CAR 1988; or who holds an authorisation under subregulation 42ZC (6) of CAR 1988 to carry out maintenance on class B aircraft (that is not transport category, and not operating under an air operator's certificate (an AOC)) for paragraph 42ZC (4) (e) of CAR 1988. Additionally, an ***authority or type rating holder*** means the holder of a category B1 or B2 licence with a rating for a type rated aircraft that is a WHR. A Note explains that *type rated aircraft type* is defined in Part 3 of the Dictionary in CASR 1998.

An ***employed authority or type rating holder*** means a person who is an authority or type rating holder employed by a COA holder.

Under paragraph 8.3, before issuing a certification authorisation to a WHR employee, the COA holder must provide, and the WHR employee must successfully complete, training and assessment in Part 1 WHR maintenance in accordance with the COA holder's quality control manual. A Note explains that this training and assessment is not required for an employed authority or type rating holder.

A ***trained WHR employee*** means a WHR employee who has successfully completed training and assessment in accordance with subsection 8, and who holds a current certification authorisation from the COA holder authorising the employee to perform particular maintenance on a WHR mentioned in Part 1 of Appendix 1.

Under paragraph 8.5, a certification authorisation may be reissued after initial issue (see paragraph 8.4) for further periods of not more than 2 years to an employed authority or type rating holder; or to a trained WHR employee if he or she has successfully completed the COA holder's reassessment of competency for Part 1 WHR maintenance. (This reassessment must also be provided for in the holder's quality control manual.)

Under paragraph 8.6, before providing training and assessment or reassessment of competency, the COA holder must be a CASA delegate for subregulation 42ZC (6) of CAR 1988 who may authorise a person for the purposes of paragraph 42ZC (4) (e).

Under paragraph 8.7, the COA holder must give a notice of completion of training and assessment, or reassessment, to the relevant WHR employee as soon as the employee has successfully completed the training and assessment, or reassessment, and been issued, or reissued, with a certification authorisation. A Note explains that with training, assessment and certification authorisation, the WHR employee becomes a trained WHR employee. With reassessment of competency and certification authorisation, a trained WHR employee is permitted to continue as a trained WHR employee. Part 1 WHR maintenance may only be carried out by an employed authority or type rating holder or by a trained WHR employee to whom the COA holder has issued certification authorisations.

Under paragraph 8.8, the COA holder must retain in safe custody, for at least 2 years after the WHR employee has left the employment, a perfectly legible copy of the notice of completion of training and assessment.

Under paragraph 8.9, a certification authorisation for Part 1 WHR maintenance may only be issued to: an employed authority or type rating holder; or to a trained WHR employee if the person holds a licence in the category mentioned in the corresponding item in column 2 of Part 1 of the table.

Under paragraph 8.10, a certification authorisation issued for an aircraft mentioned in an item in column 1 of a Part of the table may be identified by reference to the suggested identification (if any) mentioned for the item in column 3 of the Part.

Under paragraph 8.11, a COA holder may carry out maintenance on an aircraft mentioned in an item in column 1 of Part 2 of the table in Appendix 3 only if the maintenance is carried out by an employed authority or type rating holder (whether or not the person holds a certification authorisation); or by a WHR employee (whether or not the person is a trained WHR employee, and whether or not the person holds a

certification authorisation) — but only if the person holds a licence in the category mentioned in the corresponding item in column 2 of Part 2 of the table.

Under paragraph 8.12, a COA holder may carry out maintenance on a WHR that is not mentioned in either Part 1 or Part 2 of the table in Appendix 3 (an *unlisted WHR*) but only if the maintenance is carried out as if the unlisted WHR were a WHR listed in Part 1 of Appendix 3; and each of the requirements under subsection 8 for Part 1 WHR maintenance applied to maintenance of the unlisted WHR. To avoid any doubt, those requirements include the requirements for qualifications, training, assessment, reassessment, certificate authorisations, delegations, notices and records.

Under paragraph 8.13, for paragraph 8.12, a WHR with an airframe mentioned in column 1 of Part 2 of the table in Appendix 3 whose piston engine type has been modified to be a turbine engine type, is deemed to be an unlisted WHR.

Paragraph 9.1 provides that subsection 8 does not affect the operation of regulation 42G of CAR 1988. A Note explains that regulation 42G of CAR 1988 concerns who may be qualified as an “appropriate person” to conduct the independent inspection required when an aircraft flight control system is assembled, adjusted, repaired, modified or replaced in the course of maintenance on the aircraft.

Paragraph 9.2 provides that subsection 8 does not affect the operation of paragraph 42ZC (4) (d) of CAR 1988. A Note explains that paragraph 42ZC (4) (d) of CAR 1988 concerns maintenance, specified in Schedule 8 of CAR 1988, that may be carried out by a pilot of a Class B aircraft. A second Note explains that under instrument CASA 155/11, for paragraph 42ZC (4) (e) of CAR 1988, each subcategory B1 licence holder, or category B2 licence holder, is authorised to carry out the maintenance mentioned in Schedule 8 of CAR 1988 on any class B aircraft, including a WHR.

A new Appendix 3 is inserted in CAO 104.0 containing the Part 1 and Part 2 lists of WHR to which the relevant provisions of the CAO amendment apply.

Legislative Instruments Act 2003 (the *LIA*)

Under paragraph 98 (5A) (a) of the Act, the regulations may empower CASA to issue instruments in relation to matters affecting the maintenance of aircraft. Under subsection 98 (5AA) of the Act, an instrument issued under paragraph 98 (5A) (a) is a legislative instrument subject to the LIA (other than Part 6 concerning sunset) if it is expressed to apply in relation to a class of persons, aircraft or aeronautical products.

Under subsection 98 (5AB) of the Act, an instrument issued under paragraph 98 (5A) (a) is *not* a legislative instrument if it is expressed to apply in relation to a *particular* person, aircraft or aeronautical product.

Under subregulation 30 (3) of CAR 1988, CASA may make CAOs in relation to endorsements appearing on certificates of approval, to the effect that the approval is issued subject to conditions mentioned in the CAOs.

Made under subregulation 30 (3) of CAR 1988, the CAO amendment is an instrument affecting the maintenance of aircraft and is of general application. It is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 24, and 38 and 42, of the LIA.

Consultation

Details of the nature and extent of the consultation CASA considered appropriate for this instrument are set out in Appendix 1.

Statement of Compatibility with Human Rights

The Statement in Appendix 2 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The CAO instrument does not engage any of the applicable rights or freedoms, and is compatible with human rights, as it does not raise any human rights issues.

Office of Best Practice Regulation (OBPR)

The instrument has only a nil to low impact on business. A regulatory impact statement (*RIS*) for the CAO amendment is not required for OBPR purposes because a preliminary assessment of business compliance costs indicates that the amendment will have only a nil to low impact on business. For this reason, OBPR granted a RIS exemption (Id. No. 14197).

Commencement, making and taking effect

The CAO amendment commences on 1 October 2013.

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.

Under paragraph 8AA.1 of the CAO amendment, subsection 8 takes effect for a COA holder and its employees on and from 1 October 2014, unless another date applies under subsection 8AA.

Under paragraph 8AA.2, if a person becomes a COA holder at any time from 1 October 2013 to 30 September 2014, subsection 8 takes effect for the person as soon as the person becomes a COA holder. Paragraph 8AA.2 is designed to ensure immediate implementation of the direction for new COA holders who do not obtain the grandfathering protection of paragraph 8AA.1 for existing COA holders.

Under paragraph 8AA.3, if, immediately before 1 October 2013, a person was a COA holder, subsection 8 takes effect on and from 1 October 2014; or on and from an earlier date agreed to in writing by CASA. CASA will only agree to an earlier date if CASA appoints the holder to be a relevant CASA delegate, and approves the holder's quality control manual for relevant training and assessment, and reassessment of competency. (The agreed earlier date would not be before 1 October 2013.)

Under paragraph 8AA.4, the applicable provisions of subsection 8 take effect for each of a COA holder's employed authority or type rating holders and WHR employees immediately after subsection 8 takes effect for the COA holder itself.

Appendix 1

Consultation under the Civil Aviation Act and the Legislative Instruments Act

CASA's statutory consultation obligations are set out in the Act and the LIA.

Legislative provisions

Under section 16 of the Act, in the performance of its functions and the exercise of its powers, CASA must, where appropriate, consult with government, commercial, industrial, consumer and other relevant bodies and organisations (including ICAO and bodies representing the aviation industry).

Under subsection 17 (1) of the LIA, before making a legislative instrument, particularly where the proposed instrument is likely to have a direct, or a substantial indirect, effect on business; or to restrict competition, a rule-maker (like CASA) must be satisfied that any consultation that is considered by CASA to be appropriate and that is reasonably practicable to undertake, has been undertaken.

Under subsection 17 (2) of the LIA, in determining whether any consultation that was undertaken is appropriate, CASA may have regard to any relevant matter, including the extent to which the consultation:

- (a) drew on the knowledge of persons having expertise in fields relevant to the proposed instrument; and
- (b) ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

Under subsection 17 (3) of the LIA, consultation could involve notification, either directly or by advertisement, of those who are likely to be affected by the proposed instrument. Such notification could invite submissions by a specified date or participation in public hearings.

Under subsection 18 (1) of the LIA, despite section 17, the nature of an instrument may be such that consultation may be unnecessary or inappropriate.

Under subsection 18 (2) of the LIA, examples of when CASA may be satisfied that consultation is unnecessary or inappropriate include instruments that: are minor or machinery in nature and do not substantially alter existing arrangement; are urgent; concern Budget decisions; are for national security; have already been consulted upon; relate to employment; or relate to management and service in the ADF.

Under section 19 of the LIA, the fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument.

Under paragraph 26 (1A) (d) of the LIA, if consultation was undertaken under section 17 of the LIA, the explanatory statement must contain a description of the nature of that consultation.

Under paragraph 26 (1A) (e) of the LIA, if no such consultation was undertaken, the explanatory statement must explain why not.

How consultation was carried out

CASA considered that its normal public and industry consultation process should be followed for this instrument, that is publication of proposals on its website, involvement of the joint CASA/industry Standards Consultative Committee (*SCC*) and its specialist aircraft maintenance and certification subcommittees, receipt and analysis of comments received, and adjustment of its proposals, as appropriate for aviation safety, after taking all of the comments into account. CASA considers that written comments actually received represent an important source of evaluation and feedback from interested parties who may be affected by the proposals.

Consultation on a proposed CAO amendment instrument commenced on 8 December 2011 with the public announcement, via the frequently and widely accessed CASA website, of a proposal for a regulatory project. The principal target audience was the interested public accessing the site, the aviation sector generally, and, more specifically, the membership of the SCC and its committees.

Specific consultation drafts of the direction instrument and the CAO amendment (the *proposed legislative instruments*) were developed and made publicly available for comment on 23 October 2012 through the same website and forum mechanisms. The comment period closed on 6 November 2012.

Who responded?

The following organisations responded directly in writing to the request for comments on the proposal:

- the Old Aeroplane Company Pty Ltd and the National Air Museum;
- the Australian Warbirds Association Limited.

Those responding were considered to have particular interest in, and knowledge of, WHR operations and also significantly represented persons, at least in the aviation community, likely to be affected by the proposals.

The nature of the issues raised in consultation

The main issue raised during consultation concerned CASA's proposed use of aircraft weight as the delineating factor to decide upon the WHR whose maintainers within a COA holder's organisation would require specific certification authorisation, and prescribed maintenance training additional to the standard training of CASR 1998 Part 66 licence holders.

An additional issue concerned the extent to which the CASA proposal adequately dealt with all airworthiness authority or type rating holders involved in carrying out WHR maintenance.

CASA response to the issues raised during consultation

CASA revised the legislative instruments and made them available for further comment in the period 22 January 2013 to 1 March 2013, using the same consultation mechanisms previously described. In response to comments received, the proposals were expanded to cover, not only warbirds, but also historic and replica aircraft. The legislative instruments were revised to specifically list relevant applicable and non-applicable aircraft/engine combinations of WHR covered by the proposals.

These new listings took into account that, although an aircraft may be large, it is not always necessarily so complex to maintain that additional maintenance training (over and above standard CASR 1998 Part 66 licence training) must be mandated for safety.

The industry responses to this second round of consultation assisted in finalising the drafts. They clarified the role of independent licensed aircraft maintenance engineers, ensuring that independent inspection providers were not affected by the legislative instruments. The Part 1 and Part 2 aircraft listings were also revised in light of comments received.

Decision to provide an opportunity for further consultation

After consultation closed, CASA produced a Civil Aviation Advisory Publication (*CAAP*) titled *Maintenance of Warbird, Historic and Replica Aircraft* to provide guidance on the operation and effect of the CAO amendment (and the related Direction, CASA 197/13, *Maintenance of warbird and historic and replica aircraft (WHR)* — *directions and licence condition*).

Between 25 July 2013 and 8 August 2013, the draft CAO amendment, the draft Direction instrument and the draft CAAP were published on the CASA website to provide to industry with a further opportunity for consultation.

CASA received comments on the CAAP and as a result a special briefing was included in a CASA refresher course for Authorised Persons responsible for issuing Certificates of Airworthiness on WHR aircraft on behalf of the Australian Warbirds Association Limited.

In response to the further feedback, CASA revised the tables of WHR aircraft, including the addition of WHR aircraft not previously dealt with by the CAO amendment.

Appendix 2

Statement of Compatibility with Human Rights

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

Civil Aviation Regulations 1988

Civil Aviation Order 104.0 Amendment Instrument 2013 (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 purpose of *Civil Aviation Order 104.0 Amendment Instrument 2013 (No. 1)* (the **CAO amendment**) is to establish the conditions under which a person or organisation holding a certificate of approval under regulation 30 of the *Civil Aviation Regulations 1988* for maintenance of aircraft (a **COA holder**), may carry out maintenance on warbirds, and historic and replica aircraft (**WHR**). The effect will be to place such a COA holder in a similar position to that of an approved maintenance organisation (an **AMO**) under the more recent Part 145 of the *Civil Aviation Safety Regulations 1998* (**CASR 1998**).

Under Part 145 of CASR 1998, AMOs already have the facility to train and authorise specialist maintainers of WHR. However, existing COA holders who are not AMOs have not been able, under Part 145 to have access to similar training, authorising and maintenance opportunities. This will change provided the COA holder meets a generally similar range of safety conditions and requirements with respect to the training, qualifications, experience and authorisation of persons who carry out the maintenance on the aircraft.

The CAO amendment complements the contemporaneous instrument, CASA 197/13, *Maintenance on warbird and historic and replica aircraft (WHR) — directions and licence condition*, which sets out directions which must be observed in carrying out maintenance on WHR.

Warbirds, and historic and replica aircraft, are aircraft which give rise to particular maintenance and safety issues for which standard aircraft maintenance engineer licence training does not cater. Additional special training, the acquisition of special skills, and the conduct of relevant maintenance in a structured organisational environment, are considered by CASA to be essential to the safety of operations in these aircraft. As such, the requirements of the CAO amendment ensure that relevant maintenance personnel are provided with additional training and authorisation by the relevant COA holders carrying out maintenance on WHR.

Human rights implications

The direction 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. The instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Civil Aviation Safety Authority