

## Explanatory Statement

### Civil Aviation Regulations 1988

#### Civil Aviation Order 40.7 Amendment Instrument 2019 (No. 1)

##### Purpose

The purpose of *Civil Aviation Order 40.7 Amendment Instrument 2019 (No. 1)* (**CAO 40.7 amendment**) is to revise the requirements for hot air balloon class endorsements to better align them with the requirements of Part 5 of the *Civil Aviation Regulations 1988* and, in doing so, to modify some balloon class endorsement eligibility requirements in the interests of aviation safety.

The CAO 40.7 amendment is made in association *Civil Aviation Order 82.7 Amendment Instrument 2019 (No. 1)*. This revises the requirements for approval as a chief pilot engaged by the holder of a balloon air operator's certificate (**AOC**). In doing so, it also modifies some of the requirements in the interests of aviation safety.

##### Legislation

Section 98 (1) of the *Civil Aviation Act 1988* (the **Act**) provides that the Governor-General may make regulations for the purposes of the Act and in the interests of aviation safety. Some of these regulations are contained in the *Civil Aviation Regulations 1988* (**CAR**). In particular, Part 5 — Balloon flight crew licensing, prescribes matters for balloon flight crew licensing, rating and endorsements.

Under subregulation 5.23 (1) of CAR, CASA may give directions in Civil Aviation Orders (the **CAOs**) setting out requirements for the issue of balloon class endorsements.

Under subregulation 5.23 (2), CASA must issue a balloon class endorsement to the holder of a commercial pilot (balloon) licence, or the holder of a CAR certificate of validation for an overseas balloon authorisation that is equivalent to a commercial pilot (balloon) licence, by entering the endorsement in the holder's personal logbook provided the holder satisfies the requirements for the issue of the endorsement.

Under subregulation 5.01 (1), **class**, for a balloon class endorsement, is defined in Table 5.01as follows:

Item	Class of balloon	Description of balloon
1	Class 1	Hot air balloons that have a volume of not more than 260 000 cubic feet
2	Class 2	Hot air balloons that have a volume of more than 260 000 cubic feet
3	Class 3	Gas balloons

Subsection 12 in Civil Aviation Order 40.7 – Aircraft endorsements (balloons) and flight instructor (balloons) ratings (**CAO 40.7**) is a CASA direction about what is required to be eligible for a particular class of hot air balloon endorsement.

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 (like a CAO) that imposes a condition on a specified class of authorisations (including, by virtue of the scope of regulation 11.015 which defines an authorisation, on flight crew licences, ratings and endorsements).

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 repeal any such instrument.

### **Background**

The requirements under subsection 12 of CAO 40.7 are based on the 5 classes of endorsement that appeared in regulation 5.148 of CAR before it was repealed in 2014 and replaced by the new 3-class definition in the Table above.

It had been found practicable to consider that the cubic feet requirement of the old Class 3 exactly corresponded to the cubic feet requirement of the new Class 1 (not more than 260 000 cubic feet); and similarly, that the cubic feet requirement of the old Class 4 exactly corresponded to the cubic feet requirement of the new Class 2 (more than 260 000 cubic feet); and that the old Class 5 corresponded to the new Class 3 (gas balloons), and CASA proceeded accordingly.

However, in the interests of greater certainty, CASA now considers that it is necessary to repeal subsection 12 of CAO 40.7 and replace it with provisions which precisely reflect contemporary hot air balloon classifications.

This revision is also driven by the necessity, from a safety perspective, to clarify and improve eligibility requirements for Class 1 and Class 2 balloon endorsements. The CAO amendment creates effective stepping stones for progress to the higher level of endorsement, namely, Class 2, through new restricted Class 1 and restricted Class 2 balloon endorsements and, for this purpose, prescribes the means of graduation from restricted to unrestricted and from one class to another.

### **The CAO amendments**

Further details of the CAO 40.7 amendment are set out in Appendix 2.

### **Incorporation of documents**

In accordance with paragraph 15J (2) (c) of the *Legislation Act 2003* (the *LA*) and section 98 (5D) of the Act, the legislative instrument applies, adopts or incorporates CASA Form 214 into the CAO 40.7 amendment. Under subsection 98 (5D) of the Act, a document may be incorporated as in force or existing at a particular time or from time to time, including non-legislative instruments that may not exist when the legislative instrument was made.

For the purposes of the CAO 40.7 amendment, CASA Form 214 is applied, adopted or incorporated as the Form is in force or existence from time to time.

The Form determines the way a balloon pilot's licence is endorsed, for a particular class of balloon endorsement, by the person conducting the relevant flight test. The Form is freely available on the CASA website.

### ***Legislation Act 2003***

The CAO 40.7 amendment is a legislative instrument under different requirements, as set out in Appendix 2.

### **Consultation**

CASA published the proposed amendments contained in the CAO 40.7 amendment on the CASA Consultation Hub from 15 February 2019 to 15 March 2019 and invited industry and the public to comment. CASA used a questionnaire/survey methodology to obtain a range of views and comments on the CAO 40.7 amendment.

There were 10 respondents to the consultation, representing a balloon organisation and individuals, all of whom identified as balloon pilots. Most respondents agreed with all of the proposals without comment. Where some respondents made suggestions to refine the draft instrument somewhat, CASA agreed and modified the amendments accordingly. Overall, respondents strongly supported the proposals.

### **Statement of Compatibility with Human Rights**

The Statement in Appendix 3 is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. It indicates that, although the CAO 40.7 amendment may negatively engage, both directly and indirectly, some of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, it does so in a reasonable, necessary and proportionate way so that the CAO 40.7 amendment is compatible with those rights and freedoms. By also enhancing aviation safety through the revision of some balloon pilot qualification requirements, the CAO 40.7 amendment also positively engages the right to life in a potentially dangerous aviation activity.

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

OBPR determined that no further analysis in the form of a Regulation Impact Statement was required regarding the changes made by the CAO 40.7 amendment (OBPR ID: 25301).

### **Making and commencement**

The CAO 40.7 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 40.7 amendment commences on 1 September 2019.

## Details of Civil Aviation Order 40.7 Amendment Instrument 2019 (No. 1)

### 1 Name of instrument

This subsection names the CAO amendment.

### 2 Commencement

This subsection provides for commencement on 1 September 2019.

### 3 Amendment of Civil Aviation Order 40.7

This subsection makes Schedule 1 which contains the amendments to CAO 40.7.

## Schedule 1 Amendments

### [1] Subsection 2

Amendment No. 1 contains relevant definitions.

### [2] Subsection 12

Amendment No. 2 replaces former subsection 12 with new subsections 4, 5, 6, 7, 8 and 9, setting out the requirements that must be met for the issue of various kinds of balloon endorsements.

### Subsection 4 Class 1 balloon endorsement

New subsection 4 deals with Class 1 balloon endorsements.

s 4.1 and 4.2, the person seeking the endorsement must be qualified to hold a commercial pilot (balloon) licence in accordance with subregulation 5.138 (1) of CAR; and have a logbook that may be endorsed for a Class 1 balloon by the person conducting the flight test, using CASA Form 214 (as in force or existence from time to time).

### Restricted Class 1 endorsement — Class 1 (R)

Under paragraph 4.3, an initial Class 1 balloon endorsement is subject to the condition that it is a Class 1 (R) endorsement until the restriction is removed.

Under paragraph 4.4, the restriction is that holder of the Class 1 (R) endorsement must not, as pilot in command (**PIC**), operate a Class 1 balloon carrying more than 7 people in a balloon AOC operation.

Paragraph 4.5 explains how the examiner who conducted a successful flight test must endorse the logbook with a Class 1 (R) endorsement.

### Removal of restriction

Under paragraph 4.6, the restriction is removed only if various requirements are complied with. These include authorisation to fly the balloon type, completion of specified flight time as PIC under supervision (**PICUS**) in AOC operations carrying 7 or more people, where the PIC is the chief pilot or the holder of a flight instructor (balloon) rating; and completion of a proficiency check.

At the end of the proficiency check, the PIC (the **recommender**) must determine if the endorsement holder is competent to fly 7 or more passengers in an AOC operation; and, if so, recommend, through an entry in the applicant's logbook, that he or she be endorsed with a Class 1 (U) endorsement by an examiner.

#### **Unrestricted Class 1 endorsement — Class 1 (U)**

Paragraph 4.7 sets out the form for the recommendation. Under paragraph 4.8, the recommender must complete a proficiency check flight report. Under paragraph 4.9, a copy of the flight report must be retained in safe custody by both the logbook holder and the chief pilot of the AOC holder.

Under paragraph 4.10, within 14 days after making the recommendation, the recommender must give a copy of the proficiency check flight report and the pilot's logbook to an examiner who, if satisfied, must endorse the logbook. The endorsement is by applying the relevant Class 1 (U) sticky label from the completed CASA Form 214 and sending the top copy to CASA for its records, and recording in the logbook the name, ARN, date and signature of the examiner.

### **Subsection 5      Class 2 balloon endorsement**

New subsection 5 deals with Class 2 balloon endorsements.

Under paragraphs 5.1 and 5.2, the person seeking a Class 2 balloon endorsement must meet certain requirements. He or she must: hold an unrestricted Class 1 balloon endorsement; have specified hours as PIC of any Class 1 balloon; have specified time as PIC on balloon AOC operations; pass a proficiency check in a Class 2 balloon of the relevant type conducted by an examiner or, if an examiner is not available, an approved holder of a flight instructor (balloon) rating; and have a logbook that may be endorsed by the examiner who conducted the proficiency check flight; or by another examiner who has received the relevant written recommendation, proficiency check flight report, and the applicant's logbook.

#### **Restricted Class 2 endorsement — Class 2 (R)**

Under paragraph 5.3, a Class 2 balloon endorsement is subject to the condition that it is a Class 2 (R) endorsement until the restriction is removed.

Under paragraph 5.4, the restriction is that the holder of the Class 2 (R) endorsement must not fly a Class 2 balloon with an envelope volume that is greater than 400 000 cubic feet in an AOC operation.

Paragraph 5.5 explains how the examiner who conducted the proficiency check flight must endorse the logbook.

Paragraph 5.6 explains how the flight instructor (balloon) who conducted the proficiency check flight must recommend, through an entry in the applicant's logbook, that he or she be endorsed for a Class 2 (R) endorsement by an examiner. The examiner, if satisfied, must endorse the logbook with a Class 2 (R) endorsement.

#### **Removal of restriction**

Under paragraph 5.7, the restriction is removed only if various requirements are complied with. These include authorisation to fly the balloon type; completion of specified flight time as PICUS in the balloon type in AOC operations where the PIC is

the chief pilot or the holder of a flight instructor (balloon) rating with specified qualifications and experience; and completion of a specified proficiency check as PICUS in the balloon type in AOC operations with a relevantly qualified examiner, chief pilot or flight instructor as PIC.

At the end of the proficiency check, the PIC (the recommender) must determine if the endorsement holder is competent to fly the balloon type with an envelope volume that is greater than 400 000 cubic feet in an AOC operation; and, if so, through an entry in the endorsement holder's logbook, recommend that he or she be endorsed with the Class 2 (U) endorsement by an examiner.

#### **Unrestricted Class 2 endorsement — Class 2 (U)**

Paragraph 5.8 sets out the form for the recommendation. Under paragraph 5.9, the recommender must complete a proficiency check flight report. Under paragraph 5.10, a copy of the flight report must be retained in safe custody by the logbook holder and the chief pilot of the AOC holder.

Under paragraph 5.11, within 14 days after making the recommendation, the recommender must give a copy of the proficiency check flight report and the applicant's logbook to an examiner who, if satisfied, must endorse the logbook. The endorsement is by applying the relevant Class 2 (U) sticky label from the completed CASA Form 214 and sending the top copy to CASA for its records, and recording in the logbook the name, ARN, date and signature of the examiner.

#### **Subsection 6 Class 3 gas balloon endorsement**

Under paragraphs 6.1 and 6.2, CASA may issue a Class 3 gas balloon endorsement only after assessing that the applicant's detailed safety case, which must be submitted with the applicant's application, is satisfactory for aviation safety. No more specific criteria are specified here because gas balloons are generally small, carry no more than 2 persons, are not currently in use for charter operations in Australia and training is not available. In the event that there is a requirement for gas balloon endorsements in the future, it is likely that CAO 40.7 would be amended to specifically address that contingency.

#### **Subsection 7 Overseas balloon endorsement for Class 1 (R) or Class 1 (U) endorsement**

Paragraphs 7.1 and 7.2 set out the requirements that must be met for the issue of a Class 1 (R) endorsement or a Class 1 (U) endorsement (as the case requires) to the holder of an overseas balloon endorsement on or after 1 September 2019.

The person seeking the particular endorsement must hold an overseas equivalent of a Class 1 (R) endorsement or a Class 1 (U) endorsement (as the case requires); and be qualified to hold a commercial pilot (balloon) licence; and have an ARN, and a logbook that is capable of being endorsed.

Under paragraph 7.3, the examiner who conducted the successful flight test must endorse the logbook. This will be with a Class 1 (U) endorsement only if the logbook contains persuasive evidence that the person's relevant overseas balloon endorsement authorises the person to operate the equivalent of a Class 1 balloon carrying more than 7 people (including the person) in a balloon operation that is an AOC operation or equivalent. Otherwise, a Class 1 (R) endorsement will be issued.

Paragraph 7.4 explains how the endorsement by the examiner is made. He or she must apply the relevant Class 1 (R) or Class 1 (U) sticky label from the completed CASA Form 214 and send the top copy to CASA for its records; and then record in the logbook the name, ARN, date and signature of the examiner.

Under paragraph 7.5, a person who is issued with a Class 1 (R) endorsement may have the restriction removed only through compliance with the same procedures as apply to an Australian holder of a Class 1 (R) endorsement.

### **Subsection 8 Overseas balloon endorsement for restricted or unrestricted Class 2 balloon endorsement**

Paragraphs 8.1 and 8.2 set out the requirements for the issue of a Class 2 (R) endorsement or a Class 2 (U) endorsement (as the case requires) to the holder of an overseas balloon endorsement on or after 1 September 2019.

The person seeking the particular endorsement must hold an overseas balloon endorsement that is at least the equivalent of a Class 2 (R) endorsement or a Class 2 (U) endorsement (as the case requires). He or she must also have persuasive logbook evidence of specified time as PIC of any Class 1 balloon or equivalent; and of specified time as PIC on balloon passenger charter flights. In addition, he or she must have passed a commercial pilot (balloon) licence flight test, have passed a commercial pilot (balloon) licence theory examination, and have an ARN and a logbook that is capable of being endorsed.

Under paragraph 8.3, the examiner who conducted a successful flight test must endorse the logbook with a Class 2 (U) endorsement if the person's logbook contains persuasive evidence that the person's relevant overseas balloon endorsement authorises the person to operate a Class 2 balloon or equivalent, with an envelope volume that is greater than 400 000 cubic feet, in a balloon operation that is an AOC operation or equivalent. Otherwise, the endorsement is the Class 2 (R) endorsement. However, in either case, the person will also be endorsed with the Class 1 (U) endorsement.

Under paragraph 8.4, the endorsement by the examiner must be by applying the relevant Class 2 (R) or Class 2 (U) sticky label from the completed CASA Form 214 and sending the top copy to CASA for its records. The Class 1 (U) endorsement is also recorded on the Form. The examiner records in the logbook his or her name, ARN, date and signature.

Under paragraph 8.5, a person who is issued with a Class 2 (R) endorsement may have the restriction removed only through compliance with the same procedures as apply to an Australian holder of a Class 2 (R) endorsement.

### **Subsection 9 Transitional application of subsections 4, 5 and 6**

Under paragraph 9.1, a person, who on or after 1 September 2019 applies for the issue of an initial Class 1 balloon endorsement, is entitled to be issued with the endorsement if the endorsement would be the first balloon endorsement that the person has held and the requirements of subsection 4 are satisfied by, and for, the person.

Under paragraph 9.2, a person (a grandfathered person) who, immediately before 1 September 2019 (the *commencement*) holds a class of balloon endorsement (an *old*

*endorsement*) issued under subsection 12 of CAO 40.7 as in force immediately before the commencement, is taken to hold the balloon endorsement mentioned in Table 9.3 as if the endorsement had been issued under subsection 4, 5, 6, 7 or 8, as the case may be (a *new endorsement*).

Under paragraph 9.3, for an old endorsement mentioned in a row of column 1 of Table 9.3, the new endorsement is that mentioned in the same row in column 2.

**Table 9.3 New for old endorsements of grandfathered persons**

Old endorsement	New endorsement
Class 1 endorsement issued before 1 September 2014	Class 1 (R)
Class 2 endorsement issued before 1 September 2014	Class 1 (U)
Class 3 endorsement issued before 1 September 2014	Class 2 (R)
Class 4 endorsement issued before 1 September 2014	Class 2 (U)
Class 1 endorsement issued on or after 1 September 2014	Class 1 (U)
Class 2 endorsement issued on or after 1 September 2014	Class 2 (U)

Under paragraph 9.4, subsection 4, 5, 6, 7 or 8, as the case may be, applies to the holder of any endorsement issued or held in accordance with subsection 9 (a *transitional endorsement*) for any issue of a class of balloon endorsement for which the transitional endorsement was, at any time, a prerequisite.

**[3] Sub-subparagraph 16.2 (a) (ii)**

Amendment No. 3 decreases from 10 to 5, the number of hours of tethered flight time required to qualify for a flight instructor (balloon) rating. CASA decided that, in the context of the other requirements for the rating, the additional hours of aeronautical experience in a tethered balloon were not significantly contributing to aviation safety.

**[4] After subparagraph 16.5 (b)**

Amendment No. 4 adds a new privilege for the holder of a flight instructor (balloon) rating, namely, to conduct a proficiency check for a class of balloon endorsement, provided the holder holds the same class of balloon endorsement without restriction. This is consequential on provisions under which certain holders of a flight instructor (balloon) rating may conduct proficiency checks for the purpose of removing restrictions on a class of balloon endorsement.



**Appendix 2****Why the CAO is a legislative instrument**

Under subregulations 5 (1) and (1A) and 5.23 (1) of CAR, CASA may issue a direction in a CAO. Under subsections 98 (5) and 98 (5AAA) of the Act, where the regulations provide for certain instruments to be issued in a CAO, such a CAO is a legislative instrument. The CAO 40.7 amendment contains directions and is, therefore, a legislative instrument, subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

Subregulation 11.068 (1) of CASR expressly provides that the imposition of conditions on a class of authorisations (like flight crew licences) may be by means of a legislative instrument. The CAO 40.7 amendment imposes conditions on eligibility for endorsements. The CAO 40.7 amendment is, therefore, a legislative instrument and it is subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

The CAO 40.7 amendment is made under the respective heads of power mentioned above and is a legislative instrument.

## Statement of Compatibility with Human Rights

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

### Civil Aviation Order 40.7 Amendment Instrument 2019 (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 40.7 Amendment Instrument 2019 (No. 1)* (**CAO 40.7 amendment**) is to revise the requirements for hot air balloon class endorsements to better align them with the requirements of Part 5 of the *Civil Aviation Regulations 1988* and, in doing so, to modify some balloon class endorsement eligibility requirements in the interests of aviation safety.

The CAO 40.7 amendment is made in association *Civil Aviation Order 82.7 Amendment Instrument 2019 (No. 1)* (which revises the requirements for approval as a chief pilot for the holder of a balloon air operator's certificate (**AOC**) and, in doing so, modifies some requirements in the interests of aviation safety.

#### Human rights implications

The instrument engages some human rights protections as follows.

##### **Article 6 of the International Covenant on Civil and Political Rights (ICCPR)**

Under Article 6 of the ICCPR, persons have a right to life, an important element of which is the right to be protected from accidental death by the presence and operation of a legal framework for effective deterrence against preventable accidents.

The increased eligibility requirements to qualify for a class of balloon endorsement under the CAO 40.7 amendment are expressly designed to protect life — the lives of pilots, passengers and people on the ground. To this extent, the new Civil Aviation Order promotes the right to life and the right to safe and healthy working conditions for aviators.

##### **Article 12 of the ICCPR**

Under Article 12 of the ICCPR, persons have a right to freedom of movement within Australia, and a right to depart from Australia, at any time (with appropriate documentation). The increased eligibility requirements to qualify for a class of balloon endorsement may qualify that right for persons who fail to meet the eligibility requirements. However, these requirements are reasonable, necessary and proportionate to protect aviation safety in Australia.

***Articles 6, 7 and 8 of the ICCPR***

Under Articles 6, 7 and 8 of the ICCPR, a person has a right to work. The increased eligibility requirements to qualify for a class of balloon endorsement may qualify that right for persons engaged in balloon aerial work or charter operations who fail to meet the eligibility requirements. However, these requirements are not unduly onerous when compared to the consequences of a fatal ballooning accident caused by a lack of relevant qualifications, testing, checking and aeronautical experience. The eligibility requirements are considered to be reasonable, necessary and proportionate to protect aviation safety in Australia.

**Conclusion**

While CAO 40.7 amendment may both directly and indirectly engage some of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, it does so in a lawful, reasonable and proportionate way with the intention of promoting the right to life through aviation safety. As such, the CAO amendment is compatible with those rights and freedoms.

**Civil Aviation Safety Authority**