

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.6 Amendment Instrument 2019 (No. 1)

Purpose

The purpose of *Civil Aviation Order 82.6 Amendment Instrument 2019 (No. 1)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to add to the list of prescribed operations that are a night vision imaging system (**NVIS**) operation, Department of Defence (**DoD**) support operations associated with aerial surveillance, aerial photography and retrieval.

Only a visual flight rules (**V.F.R.**) operation that falls within the definition of an NVIS operation may use NVIS as the primary means of terrain avoidance for safe air navigation by means of visual surface reference external to the aircraft. The addition of the new category of DoD support enables such operations to be conducted under formal arrangements with the DoD.

Legislation

A wide range of statutory powers was required to make CAO 82.6 and the same powers are used to make the CAO amendment. Given their detail, they are set out in Appendix 1.

Background

CAO 82.6 established operational and airworthiness standards and approval requirements for the use of night vision goggles (**NVG**) in specialised helicopter aerial work operations. The CAO operates as a set of conditions on air operator certificates (**AOCs**). It has the effect of rendering an AOC holder in breach of their AOC conditions if they make any unapproved use of NVG as a primary means of terrain avoidance for safe air navigation by means of visual surface reference external to an aircraft. (The use of NVIS in private operations is prohibited by CASA under instrument CASA 288/07, *Direction — use of night vision devices prohibited in private operations.*)

Prescribed NVIS operations include, for example, search and rescue, law enforcement, aerial firefighting, aerial firefighting support, emergency medical services, marine pilot transfers and NVIS training or demonstration operations.

Because of the nature and scope of its functions, the DoD requires various kinds of helicopter support operations, some of which are conducted at night, for example, associated with aerial surveillance, aerial photography, and retrieval of objects on the ground. These are civilian operations that are not appropriate for the deployment of Australian Defence Force assets.

In many respects, the operational characteristics of these flights are not dissimilar from some of the existing NVIS operations mentioned above. Hence, the CASA-approved use of NVIS in such a DoD support operation is considered to carry no more aviation safety risk than is involved in the existing prescribed operations for which CAO 82.6 provides the aviation safety framework. However, since DoD

support operations cannot be considered to fall within the list of already prescribed NVIS operations, they are not permitted to use NVIS as a primary means of terrain avoidance under the V.F.R. at night.

The DoD seeks to deploy a small number of civilian operators for DoD support operations, and some operators seek the opportunity to conduct such operations. To accommodate these respective needs, CASA has amended CAO 82.6 to add DoD support as a prescribed NVIS operation.

The same safety and operational rules that apply generally under CAO 82.6 to the other existing prescribed NVIS operations, also apply to a DoD support operation.

The CAO amendment

Section 1 of the CAO amendment names the instrument as the *Civil Aviation Order 82.6 Amendment Instrument 2019 (No. 1)*.

Under section 2, instrument commences on the day after it is registered.

Under section 3, it is provided that Schedule 1 amends *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007*.

Under amendment item 1 in Schedule 1, a DoD support operation is defined as an operation, carried out by a civilian NVIS operator, which is approved in writing by the DoD as being in support of the functions of the DoD, is provided at their request and carried out under a written agreement with the DoD. The operations must be for aerial surveillance, or assisting with aerial surveillance; aerial photography, or assisting with aerial photography; or retrieval, or assisting in the retrieval, of inanimate objects.

Under amendment item 2, DoD support is added to the list of prescribed NVIS operations in the definition of **NVIS operations** in subsection 1 of CAO 82.6.

Under amendment item 3, DoD support is added to the list of prescribed NVIS operations in subclause 14.4 of Appendix 1 of CAO 82.6, thus ensuring that an NVIS aircrew member qualification may be awarded by a relevant NVIS operator. Some DoD support operations will require the presence of NVIS aircrew members in order to successfully carry out the operation.

Legislation Act 2003 (the LA 2003)

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

Consultation

The opportunities for DoD support operations are limited by the Department's requirements. CASA has been in consultation with the DoD and with a small number of operators who are interested in conducting such operations. Some opportunities to do so are imminently available to these operators.

The CAO amendment is beneficially expansive of the range of operations that may lawfully use NVIS in accordance with the requirements of CAO 82.6. Once made and

registered, the CAO amendment will be promulgated on the CASA website and through CASA industry communications.

It is anticipated that, within the next 12 to 18 months, CAO 82.6 will be repealed and incorporated, in appropriately modified form, into the new Part 91 Manual of Standards under Part 91 of CASR. These proposals will be the subject of broader public and industry consultation under CASA's usual arrangements when developing such Manuals.

In these circumstances, CASA considers that no further consultation on the CAO amendment is required or appropriate.

Office of Best Practice Regulation (OBPR)

The CAO amendment is beneficially expansive of the range of operations that may lawfully use NVIS in accordance with the requirements of CAO 82.6. DoD support operations will, in many respects, be similar to comparable NVIS operations that are already prescribed NVIS operations.

In this context, the CAO amendment may be considered to be of a minor or machinery nature. A Regulation Impact Statement (*RIS*) is not, therefore, required because of the standing agreement between CASA and OBPR under which a RIS is not required for minor or machinery directions, approvals, permissions or exemptions (OBPR id: 14507).

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*. To the extent that the legislative instrument may directly engage any of the applicable rights or freedoms, for example, the right to freedom of movement or the right to work, the limitation to human rights is reasonable, necessary and proportionate to protect aviation safety.

Commencement and making

The CAO amendment comes into effect on the day after it is registered. It has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the *Civil Aviation Act 1988* (the *Act*).

Appendix 1

Legislation

A wide range of statutory powers was required to make CAO 82.6 and these are invoked for the CAO amendment as follows.

Under section 27 of the Act, CASA may issue AOCs for its functions. Under subsections 27 (2) and (9) of the Act, an aircraft operator must hold an AOC in order to operate for certain prescribed purposes. Paragraph 206 (1) (a) of the *Civil Aviation Regulations 1988 (CAR)* prescribes aerial work purposes of various kinds, including aerial spotting, flying training, ambulance functions, and purposes that are *substantially similar* to these. Substantially similar purposes are generally taken to include search and rescue, law enforcement, aerial firefighting, aerial firefighting support, marine pilot transfers and DoD support operations.

Under paragraph 28BA (1) (b) of the Act, an AOC has effect subject to any conditions specified in the regulations or the CAOs.

Under subsection 98 (4A) of the Act, CASA may issue CAOs, not inconsistent with the Act, in respect to any matter in relation to which regulations may be made for the purposes of section 28BA of the Act (conditions on AOCs).

Under subregulation 5 (1) of CAR, where CASA is empowered to issue certain instruments, it may do so in a CAO.

Under subregulation 157 (1) of CAR, the pilot in command of an aircraft must not fly over a city, town or populous area at a height lower than 1 000 feet, or over any area at a height lower than 500 feet.

Under subregulation 174B (1) of CAR, except for take-off and landing, the pilot in command of an aircraft must not fly it at night under the V.F.R. at a height of less than 1 000 feet above the highest obstacle within 10 miles.

Under subregulation 195 (1) of CAR, at night and in conditions of poor visibility, the operator and pilot in command of an aircraft must comply with the rules in Part 13 of CAR about the lights to be displayed for the aircraft.

Under subregulation 207 (2) of CAR, a person must not use an Australian aircraft in a class of operation if the aircraft is not fitted with the instruments and equipment approved and directed by CASA. In approving or directing, CASA may have regard only to the safety of air navigation.

Under subregulation 215 (3) of CAR, CASA may give directions requiring an operator to include, revise or vary information, procedures or instructions in the operations manual (operating procedures).

Under subregulations 217 (1) and (3) of CAR, CASA may specify operators who must provide an approved training and checking organisation to ensure that members of the operator's operating crews maintain their competency.

Under subregulation 249 (1) of CAR, the pilot in command of an aircraft must not practice emergency procedures or fly low when carrying a passenger.

Under subregulation 11.160 (1) of CAR, CASA may grant an exemption from compliance with provisions of CAR and CASR.

In essence, CAO 82.6 operates as a set of conditions imposed on relevant AOC holders who wish to use NVIS. As part of this scheme, completion of various forms of NVIS pilot training or NVIS aircrew member training were required under CAO 82.6 in order to obtain NVIS qualifications. Operators approved for NVIS operations could use only qualified NVG pilots or NVG aircrew.

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.

Appendix 2

Why the CAO is a legislative instrument

Paragraph 28BA (1) (b) of the Act provides that an AOC has effect subject to any conditions “specified in the [regulations or] Civil Aviation Orders”. By so providing, paragraph 28BA (1) (b) of the Act is considered to be a separate head of power for the making of relevant CAOs. The CAO imposes conditions on AOCs to which it applies.

Under subsection 8 (4) of the LA 2003, an instrument is a legislative instrument if it is made under a power delegated by the Parliament, and any provision determines the law or alters the content of the law, and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

The CAO amendment is of a legislative, “law determining” character 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 2003.

Under paragraph 28BA (1) (b) of the Act, an AOC has effect subject to any conditions “specified in the regulations [or Civil Aviation Orders]”. Subsection 98 (4A) of the Act provides that CASA may issue CAOs with respect to any matter in relation to which regulations may be made for the purposes of section 28BA. The CAO imposes conditions on AOCs to which it applies. Under subsection 98 (4B) of the Act, a CAO issued under subsection 98 (4A) is stated to be a legislative instrument and is, therefore, subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA 2003.

Appendix 3

Statement of Compatibility with Human Rights

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

Civil Aviation Order 82.6 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 82.6 Amendment Instrument 2019 (No. 1)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to add to the list of prescribed operations that are a night vision imaging system (**NVIS**) operation, Department of Defence (**DoD**) support operations. These are certain limited operations that must be conducted under formal arrangements with the DoD. Only a V.F.R. operation that falls within the definition of an NVIS operation may use NVIS as the primary means of terrain avoidance for safe air navigation by means of visual surface reference external to the aircraft.

Human rights implications

CAO 82.6 is a legislative instrument that, when made, may have indirectly engaged the right to freedom of movement under the *International Covenant on Civil and Political Rights*, and the right to work under the *International Covenant on Economic, Social and Cultural Rights* by placing restrictions on NVIS use and NVIS operations unless particular approvals, aviation qualifications and safety requirements were met.

However, these rights were more directly engaged by the primary requirements of the *Civil Aviation Act 1988*, the *Civil Aviation Safety Regulations 1998*, and the *Civil Aviation Regulations 1988* with respect to which the CAO amendment is made and which are designed for aviation safety and conformity with the standards of the *International Civil Aviation Organization* under the *Convention on International Civil Aviation* (the Chicago Convention).

Thus, the right to freedom of movement and employment was engaged in a way that was balanced by the objectives of achieving and improving aviation safety.

The CAO amendment does not alter any of these conclusions. It adds a new category of NVIS operations, namely, DoD support operations, which previously would have been prohibited by CAO 82.6.

The instrument is otherwise 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 otherwise engage any of the applicable rights or freedoms.

Conclusion

The legislative instrument is compatible with human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate to protect aviation safety in the operation of aircraft.

Civil Aviation Safety Authority