

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Order 82.6 Amendment Instrument 2021 (No. 1)

Purpose

The purpose of *Civil Aviation Order 82.6 Amendment Instrument 2021 (No. 1)* (the **CAO amendment**) is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to correct an NVIS minimum in-flight cloud requirement that was included in *Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1)* registered on 29 September 2020.

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. CAO 82.6 operates essentially 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, emergency medical services, marine pilot transfers, NVIS training or demonstration operations and aerial fire fighting and aerial fire fighting support.

The CAO amendment

Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1) provided, among other things for specific minimum NVIS in-flight cloud requirements in the following table:

Table 10.1 — In-flight cloud requirements for an NVIS flight

Item	NVIS helicopter and crew	Kind of NVIS flight	Minimum in-flight cloud requirement
1	NVFR capable	Under the VFR	No more than scattered cloud up to 2 000 ft AGL within 2 NM either side of track.
2	IFR capable	Under the VFR	No more than scattered cloud up to 1 000 ft above the highest obstacle within 2 NM either side of track
		Under the IFR below LSALT	

The reference in item 2 to “No more than scattered cloud up to 1 000 ft *above the highest obstacle* within 2 NM either side of track” was not correct and the resulting standard was not intended by CASA or noticed during industry consultation on the CAO amendment’s predecessor, *Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1)*.

The item should have read “No more than scattered cloud up to 1 000 ft **AGL** within 2 NM either side of track”, “AGL” meaning “above ground level”.

A requirement for no more than scattered cloud up to 1 000 ft *above the highest obstacle* in a place, for example in a city, could, in many circumstances, significantly and unnecessarily limit NVIS operations that could otherwise remain within the limits of safe flight with no more than scattered cloud up to 1 000 ft above the ground per se rather than above the highest obstacle on the ground (for example, a building).

For this reason, the matter having recently been drawn to CASA’s attention, CASA has made the amendment urgently to ensure that the requirement expresses what CASA had intended and what the relevant aviation industry had expected.

Legislation Act 2003 (the LA 2003)

The CAO amendment is a legislative instrument under various requirements, as set out in Appendix 3.

Consultation

Under section 16 of the *Civil Aviation Act 1988* (the **Act**), in performing its functions and exercising its powers, CASA must consult government, industrial, commercial consumer and other relevant bodies and organisations insofar as CASA considers such consultation to be appropriate.

Under section 17 of the LA 2003, before a legislative instrument is made, CASA must be satisfied that it has undertaken any consultation it considers appropriate and practicable, in order to draw on relevant expertise and involve persons likely to be affected by the proposals.

CASA did not consider that it was appropriate to engage in consultation about the CAO amendment. It corrects an incorrect NVIS minimum in-flight cloud standard to ensure that it is inline with what CASA intended, and what the aviation industry expected, during industry consultation in 2020 on the CAO amendment’s predecessor (*CAO 82.6 Amendment Instrument 2020 (No. 1)*). The incorrect standard arose from an incorrect drafting instruction and was not noticed at that time. However, urgent steps will be taken to ensure that relevant NVIS operators are made aware of the correction.

Office of Best Practice Regulation (OBPR)

Given its nature, the CAO amendment is considered to be of a 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 4 of the Explanatory Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The amendment as such does not engage any of the applicable rights or freedoms.

Commencement and making

The CAO amendment commences on the day it is registered. It has been made by the Acting Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of 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. Other provisions required CASA permission or exemption (as embodied in the CAO).

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.

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, absent appropriate permission, the pilot in command of an aircraft must not fly over a city, town or populous area at a height lower than 1 000 ft, or over any area at a height lower than 500 ft.

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

Under subregulation 195 (1) of CAR, at night and in conditions of poor visibility, absent appropriate exemption, 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, absent appropriate exemption, 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 the *Civil Aviation Safety Regulations 1998* (**CASR**), 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

Civil Aviation Order 82.6 Amendment Instrument 2021 (No. 1)

Details of the CAO amendment are as follows.

1 Name of instrument

The provision names the instrument as the *Civil Aviation Order 82.6 Amendment Instrument 2021 (No. 1)*.

2 Commencement

Under this provision, the instrument commences on the day it is registered.

3 Amendment of Civil Aviation Order 82.6

Under this provision, Schedule 1 amends *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007* (as amended).

Schedule 1 Amendments

Appendix 3, clause 10, Table 10.1

The amendment repeals Table 10.1 and substitutes a new table which modifies the minimum in-flight cloud requirement for an IFR capable NVIS helicopter and crew, so that no more than scattered cloud up to 1 000 ft above ground level (AGL) is permitted (rather than the previously incorrect “above the highest obstacle”), as shown below:

Table 10.1 — In-flight cloud requirements for an NVIS flight

Item	NVIS helicopter and crew	Kind of NVIS flight	Minimum in-flight cloud requirement
1	NVFR capable	Under the VFR	No more than scattered cloud up to 2 000 ft AGL within 2 NM either side of track.
2	IFR capable	Under the VFR	No more than scattered cloud up to 1 000 ft AGL within 2 NM either side of track

Appendix 3

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.

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 2021 (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 2021 (No. 1)* is to amend *Civil Aviation Order 82.6 (Night vision imaging system — helicopters) 2007 (CAO 82.6)* to correct an NVIS minimum in-flight cloud requirement that was included in *Civil Aviation Order 82.6 Amendment Instrument 2020 (No. 1)* registered on 29 September 2020.

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For this reason, the matter having recently been drawn to CASA's attention, CASA has made the amendment urgently to ensure that the requirement expresses what CASA had intended and what the relevant aviation industry had expected.

Human rights implications

The legislative instrument is compatible with human rights and does not engage any of the applicable rights or freedoms.

Civil Aviation Safety Authority