

Explanatory Statement

Civil Aviation Regulations 1988

Civil Aviation Order 20.16.3 Amendment Instrument 2021 (No. 1)

Purpose

The purpose of the *Civil Aviation Order 20.16.3 Amendment Instrument 2021 (No.1)* (the **instrument**) is to amend *Civil Aviation Order 20.16.3* (the **CAO**) by relieving operators and pilots in command of rotorcraft and smaller aeroplanes of the obligation under paragraph 14.2 of the CAO not to seat a person who requires assistance due to sickness, injury or disability where they could obstruct or hinder access to an emergency exit. This is done by disapplying paragraph 14.2 of the CAO, provided that a “suitable person” who meets certain criteria is seated next to the emergency exit instead.

The amendments are made in order to bring operators and pilots in command of smaller aircraft into compliance with the CAO and to bring forward equivalent relief measures that will, from 2 December 2021, apply to such persons under Parts 133 and 135 (*Civil Aviation Safety Amendment (Part 133) Regulations 2018* and *Civil Aviation Safety Amendment (Part 135) Regulations 2018*) (**Parts 133 and 135 of CASR**). At that time, it is anticipated that the entire CAO will be repealed.

Legislation

Section 98 of the *Civil Aviation Act 1988* (the **Act**) empowers the Governor-General to make regulations for the Act and in the interests of the safety of air navigation. Relevantly, the Governor-General has made the *Civil Aviation Regulations 1988* (**CAR**) and the *Civil Aviation Safety Regulations 1998* (**CASR**).

Under regulation 5 of CAR, if the Civil Aviation Safety Authority (**CASA**) is empowered or required under the regulations to issue a direction, instruction or notification, or give a permission, approval or authority, it may, unless the contrary intention appears in the regulation conferring the power or function or imposing the obligation or duty, issue the direction, instruction or notification, or give the permission, approval or authority, in a Civil Aviation Order.

Under subregulation 235 (7) of CAR, CASA may, for the purpose of ensuring the safety of air navigation, give directions with respect to the method of loading of persons and goods (including fuel) on aircraft. This provision is authority for the subject matter of subsection 14 of the CAO. Subregulation 235 (7A) makes it an offence for the operator or pilot in command to fail to comply with such a direction.

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, the power to make an instrument of a legislative character (for example, the CAO) includes the power to amend the instrument.

The CAO deals with the carriage of persons in Australian-registered aircraft. Subsection 14 of the CAO constitutes a direction given by CASA to the operator and pilot in command of an aircraft under subregulation 235 (7) of CAR with respect to the method of loading of persons on aircraft. Paragraph 14.2 requires the operator and pilot in command of an aircraft to ensure that any person who requires assistance due to sickness, injury or disability is not seated where he or she could obstruct or hinder access to any emergency exits.

Background

During the development of Parts 133 and 135 of CASR, it was identified by CASA that the nature of smaller aircraft cabin design (that is, cabins with either restricted numbers of emergency exits, or where every exit is an emergency exit) was such that requiring persons to be seated in the way directed by paragraph 14.2 of the CAO was a significant impediment for operators and pilots in command of such aircraft. The concept of a “suitable person” accompanying or assisting such a person was developed for inclusion in Parts 133 and 135. It is considered appropriate to include this alleviatory measure in the CAO so that operators and pilots in command of smaller aircraft can obtain the benefit of the measure without waiting for the commencement of Parts 133 and 135 on 2 December 2021.

Instrument

Section 1 gives the instrument its name: *Civil Aviation Order 20.16.3 Amendment Instrument 2021 (No. 1)*.

Section 2 provides that the instrument commences on the day after it is registered.

Section 3 provides that the CAO is amended as stated in Schedule 1 of the instrument.

Item 1 makes a minor amendment to paragraph 3.3. The amendment is consequential on the key measure in the instrument under item 3. Its effect is to acknowledge that a person in an exit row is no longer required, because of new paragraph 14.5, to be fully able to assist with access to the emergency exits in the event of an emergency.

Item 2 inserts words in paragraph 14.2 indicating that the paragraph is subject to new paragraph 14.5.

Item 3 contains two new paragraphs, namely, paragraphs 14.5 and 14.6.

Paragraph 14.5 disapplies paragraph 14.2 in relation to a rotorcraft or a smaller aeroplane if:

- the person is accompanied or assisted by a suitable person who is seated adjacent to the emergency exit
- the suitable person is accompanying or assisting only that person for the flight
- the suitable person has agreed to assist the crew with the evacuation of the aircraft in an emergency.

The language used in this alleviatory provision is consistent with provisions in Parts 133 and 135 of CASR due to on 2 December 2021

Paragraph 14.6 defines **rotorcraft**, **smaller aeroplane** and **suitable person** for the purposes of paragraph 14.5. The definitions are also consistent with those definitions under new Parts 133 and 135 of CASR. The only exception is subparagraph (a) of **smaller aeroplane** which, in the instrument, picks up the expression “maximum passenger seating capacity” as currently defined in the CASR Dictionary rather than the expression “maximum operational passenger seat configuration” which will be part of the definition of **smaller aeroplane** commencing on 2 December 2021 but which is not yet ready to be used in this context.

Legislation Act 2003 (the LA)

Paragraph 10 (1) (d) of the LA provides that an instrument is a legislative instrument if it includes a provision that amends or repeals another legislative instrument. The instrument amends the CAO, which was registered as a legislative instrument. The instrument is,

therefore, a legislative instrument, and is subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Consultation

The amendments of the CAO will relieve operators and pilots in command of a requirement in the same way as will be achieved following the commencement of Parts 133 and 135 of CASR on 2 December 2021. The amendments under the instrument merely bring forward measures contained in those Parts which have already undergone extensive consultation. Accordingly, CASA is satisfied that no consultation is appropriate or necessary for the instrument under section 17 of the LA.

Office of Best Practice Regulation (OBPR)

A Regulation Impact Statement is not required in this instance, as the instrument makes a minor adjustment to the CAO to clarify a practice that has been widespread in industry and constitutes a relief that would commence for those industry participants on 2 December 2021. The measure will have no negative impact and impose no cost on industry.

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights at **Attachment 1** has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Making and commencement

The instrument has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the Act.

The instrument commences on the day after it is registered.

Statement of Compatibility with Human Rights

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

Civil Aviation Order 20.16.3 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 legislative instrument

The purpose of the *Civil Aviation Order 20.16.3 Amendment Instrument 2021 (No. 1)* (the **instrument**) is to amend *Civil Aviation Order 20.16.3* (the **CAO**) by relieving operators and pilots in command of rotorcraft and smaller aeroplanes of the obligation under paragraph 14.2 of the CAO not to seat a person who requires assistance due to sickness, injury or disability where they could obstruct or hinder access to an emergency exit. This is done by disapplying paragraph 14.2, provided that a “suitable person” who meets certain criteria is placed next to the emergency exit instead.

The instrument brings operators and pilots in command of such aircraft into compliance with the CAO and brings forward equivalent relief measures that will, from 2 December 2021, apply to such persons under newly commencing Parts 133 and 135 of the *Civil Aviation Safety Regulations 1998*.

Human rights implications

The instrument engages the right to a fair trial and fair hearing in article 14 of the *International Covenant on Civil and Political Rights (ICCPR)*.

Presumption of innocence

Subsection 14 of the CAO constitutes a direction given by the Civil Aviation Safety Authority (**CASA**) to the operator and pilot in command of an aircraft under subregulation 235 (7) of the *Civil Aviation Regulations 1988 (CAR)* with respect to the method of loading of persons on aircraft. Subregulation 235 (7A) of CAR makes it an offence for the operator or pilot in command to fail to comply with the direction.

Article 14 of the ICCPR provides that in the determination of a criminal charge, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Further, in criminal proceedings, people are entitled to a range of protections, including minimum guarantees as set out in article 14, paragraph 3 and following of the ICCPR.

The presumption of innocence in article 14, paragraph 2 imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proven beyond reasonable doubt. For the charge to be proven beyond reasonable doubt, the legal and evidential burden is on the prosecution.

Reversal of burden of proof

The measure in this instrument imposes a reversed burden of evidential proof on the accused.

The burden of proof has been reversed to establish a defence to an offence provision, once the prosecution discharges the legal and evidential burden of proof in establishing the offence. The burden of adducing or pointing to evidence must only suggest a reasonable possibility that the matter exists or does not exist. This is in accordance with subsection 13.3 (6) of the Criminal Code.

Aim

The aim of this measure, is to uphold aviation safety by directing the conduct of individuals involved in civil aviation operations.

The provision reversing the burden of proof pursues this aim as it is attached to a defence to a strict liability provision in circumstances where the defence relates to a safe aviation practice.

Reasonableness, necessity and proportionality

A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011, states that provisions imposing a reversal of the evidential burden of proof are permissible for either or both of the following justifications:

- the relevant information or evidence to be established is peculiarly within the knowledge of the defendant
- it is significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish the matter.

The reversal of onus in this measure affords a defendant the opportunity to adduce evidence of specific aviation practices, of a kind contemplated by the offence, that are safe despite contravening the general rule in the offence provision. For the reasons set out below, the reversal of onus of proof in this situation is considered reasonable, necessary and proportionate.

The factual matters may not be the subject of documentary evidence because they relate to matters of judgement by the defendant, for example, whether a person is a suitable person or not (see item 3 of the instrument, inserted paragraph 14.6, definition of ***suitable person***) or whether the suitable person has agreed to assist the crew with the evacuation of the aircraft in an emergency (see item 3 of the instrument, inserted subparagraph 14.5 (c)). In each case, the matter is of a nature that is significantly easier for the defendant to raise, for example, because it relates to information within the control of the defendant, or is a matter peculiarly within the knowledge or control of the defendant.

In addition:

- the proscribed conduct relates to the safe operation of aircraft or the integrity of the regulatory scheme for the safety of air navigation and, therefore, relates to matters that potentially pose a danger to public safety
- CASA expects that in this case the facts in relation to a defence can be readily and cheaply provided by the defendant.

Due to the nature of the matter and the knowledge of the defendant, it would be difficult and costly for the prosecution to disprove, and significantly cheaper for the defendant to establish.

Conclusion

This legislative instrument is compatible with human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to ensure the safety of aviation operations and to promote the integrity of the aviation safety system.

Civil Aviation Safety Authority