



Australian Government

Civil Aviation Safety Authority

CASA Ref: M20/101

Inquiry into the exemption of delegated legislation from parliamentary oversight

Civil Aviation Order 48.1 Instrument 2019 (the CAO)

The CAO was registered on 20 November 2019. AusALPA's chief complaint about the CAO appears to be that it enables the CASA to approve a Fatigue Risk Management System (FRMS) under Appendix 7 of the CAO in the absence of '*statutory benchmarks*'. This is not correct.

An FRMS approval under Appendix 7 of the CAO may be a trial approval or a full implementation approval. However, a full implementation approval cannot be given until the relevant operator has held a trial approval for at least 12 consecutive months (see clause 9.1 of Appendix 7). In either case, Appendix 7 of the CAO sets out an extensive range of criteria which must be met by the operator seeking the approval (these criteria are explained further below). For this reason, CASA does not accept that FRMS approvals lack relevant statutory benchmarks or that, for the purposes of *Senate Standing Order 23* or otherwise, the drafting of the CAO is defective or unclear.

Trial FRMS implementation approval

As noted above, the scheme for the issue of an FRMS approval requires there to be a trial before a full implementation approval can be given. In applying for a trial or full FRMS implementation approval, an applicant must submit the following:

- (a) policy and objectives, and related documentation;
- (b) practical operating procedures;
- (c) hazard identification, risk assessment and mitigation procedures;
- (d) safety assurance procedures;
- (e) safety promotion procedures;
- (f) change management procedures.

Appendix 7 of the CAO sets out in detail the scope and content of the above documentation and procedures. Paragraph 1.4 of Appendix 7 provides that, before CASA issues a trial FRMS implementation approval, it must be satisfied that the air operator's certificate (AOC) holder's FRMS:

- (a) comprises all of the above elements; and
- (b) is a safe, integrated, data-driven, system which appears to be reasonably capable of continuously and effectively monitoring and managing fatigue-related safety risks using scientific principles and knowledge, and operational experience; and
- (c) will enable the AOC holder to assess the extent to which FCMs [flight crew members] and other relevant personnel perform at levels of alertness sufficient to ensure the safety of operations.

Further, paragraph 8.1 of Appendix 7 provides CASA may issue a trial FRMS implementation approval for up to 24 months, if it is satisfied that each element of the AOC holder's FRMS:

- (a) complies with and meets the requirements, attributes and characteristics of an FRMS under the Appendix; and
- (b) is capable of delivering:
 - (i) identified safety outcomes; and
 - (ii) fatigue-risk data and reports; and
 - (iii) continuous improvement in the delivery of safety outcomes.

Full FRMS implementation approval

Paragraph 9.1 of Appendix 7 also provides that CASA may issue a full FRMS implementation approval, if the AOC holder:

- (a) has held a trial FRMS implementation approval for at least 12 consecutive months; and
- (b) satisfies CASA, through relevant data and reports, that the FRMS:
 - (i) is demonstrably delivering the safety outcomes expected when the trial FRMS implementation approval was given; and
 - (ii) is capable of delivering continuous improvement in the delivery of safety outcomes.

On the above basis, CASA does not have an unfettered discretion to issue a trial or full FRMS implementation approval. Rather, CASA is required to satisfy itself that the FRMS proposed to be implemented by the relevant AOC holder meets the clear and identifiable criteria relevant to safety which are specified in Appendix 7 of the CAO.

For a full implementation approval, CASA must also take into account the data and reports produced under the trial over at least a 12 month period to form a view whether the FRMS is safe and can deliver continuous improvement of safety outcomes. The power of CASA to issue a trial or full approval is therefore not, as asserted by AusALPA, “*undefined*.”

An approval is also not, as asserted by AusALPA, the subject of a “private agreement” or “private arrangement”, with the AOC holder, nor is it “privately negotiated” or “privately settled” between CASA and the AOC holder. CASA is required to assess any FRMS approval application made to it in accordance with the criteria prescribed in Appendix 7 to the CAO and may only issue such an approval if positively satisfied that the legislative criteria are met.

FRMS approvals made under CAO 48.1

Page 4 of AusALPA’s submission contends an FRMS approval issued under Appendix 7 of the CAO is a legislative instrument because it alters the content of the law. Section 8(4) of the *Legislation Act 2003* states:

- (4) An instrument is a **legislative instrument** if:
 - (a) the instrument is made under a power delegated by the Parliament; and
 - (b) any provision of the instrument:
 - (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
 - (ii) 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.

An FRMS approval is not a legislative instrument. It does not generally determine the law or alter the content of the law. Instead, it determines “*particular cases or particular circumstances*” as set out in Appendix 7 of the CAO, in relation to the one applicant aircraft operator for specified aircraft types.

Further, subregulation 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015* also provides that:

- Each of the following [is not a legislative instrument]:
 - (a) an instrument that has the effect of authorising or approving a particular person to take a particular action or act in a particular way.

An FRMS approval has the effect of authorising a particular person, namely an AOC holder, to take particular action (that is, manage flight crew fatigue) or act in a particular way.

Procedural fairness

Pages 7-8 of AusALPA's submission also contends that an operator's flight crew have been denied procedural fairness when an FRMS approval is issued by CASA under Appendix 7. As already noted above, CASA considers that an FRMS approval is not a legislative instrument. The CAO does not require CASA to consult flight crew about an FRMS approval. The applicant for the approval is the AOC holder, not a flight crew member, and it is the AOC holder who has the primary responsibility for ensuring that its flight operations are conducted safely.

AusALPA also asserts that by failing to consult it or FCMs before giving the trial approval, CASA denied it procedural fairness. For procedural fairness obligations to third parties to arise, CASA's decision must be one that will affect a third party in a direct and immediate way. For the reasons already outlined in an earlier letter from CASA to AusALPA referenced in their submission, CASA does not consider flight crew are affected in a direct or immediate way by the giving of the approval, as once there is an FRMS approved, flight crew generally must comply with requirements in the operator's operations manual.

This is emphasised by the nature of the relevant regulatory regime, which provides for the granting of authorisations by CASA (including AOCs) to operators to facilitate the conduct of commercial air operations in circumstances where, in granting the relevant approval, CASA's most important consideration is to ensure air safety (see subs 9A(1) of the *Civil Aviation Act 1988*) and where the operator is primarily responsible for ensuring that the activities conducted under the approval are conducted safely (see s 28BE of the *Civil Aviation Act 1988*). A right of individual employees of the operator (including but not limited to pilots) to be heard in relation to the granting of every such approval on the basis of the potential of the approval to impact on the manner in which they are required to work, would have obvious adverse consequences for the efficient administration of the regulatory regime as well as the potential to substantially interfere with CASA's safety prerogatives and the safety and commercial prerogatives of operators.

CASA observes that no feedback was received from AusALPA in respect of the public consultation processes for the CAO made in 2019.

Notwithstanding the above, if either AusALPA or a flight crew member of an AOC holder consider they have been denied procedural fairness in relation to an FRMS approval issued by CASA, they can apply to the Federal Court or Federal Circuit Court for judicial review of the decision to issue the approval pursuant to the *Administrative Decisions (Judicial Review Act) 1977*, assuming they have standing to do so.

It is noted that on 4 September 2020, on AIPA's application, the Administrative Appeals Tribunal determined it had jurisdiction to review the full FRMS implementation approval instrument dated 25 February 2020 issued to Qantas Airways Limited: *Australian and International Pilots Association and Civil Aviation Safety Authority* [2020] AATA 3444 (4 September 2020) - <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/3444.html>. CASA has sought judicial review of this decision in the Federal Court of Australia.