

## Civil Aviation Safety Regulations 1998

### CASA 20/23 — Determination for Part 138 MOS Amendment Instrument 2023 (No. 1)

#### Statement of reasons for making the Determination

##### Legislation

Subsection 9 (1) of the *Civil Aviation Act 1988* (the *Act*) provides that CASA has the function of conducting the safety regulation, in accordance with the Act and the regulations, of civil air operations in Australian territory, and of the operation of Australian aircraft outside Australian territory. Section 98 of the Act empowers the Governor-General to make regulations for the Act and the safety of air navigation.

Under regulation 11.280 in Subpart 11.J of the *Civil Aviation Safety Regulations 1998 (CASR)*, if CASA intends to issue a Manual of Standards (a *MOS*) CASA must publish a notice of its intention to do so on the internet. Under regulation 11.267, this requirement also applies to an amendment of a MOS.

The purpose of such publication is to facilitate consultation with, and seek comments from, interested parties. The notice must describe the draft MOS or MOS amendment, how a copy of it may be obtained, how comments on it may be made and lodged, and the period within which such comments may be lodged (to be not less than 28 days from posting on the internet; or not less than 14 days if subregulation 11.280 (4) of CASR applies, that is, where the MOS amendment is of a minor or machinery nature).

Under regulation 11.290 of CASR, before issuing the final MOS, CASA must consider any comments received, and may consult with any person on issues arising from those comments. Under subregulation 11.295 (1) of CASR, a failure to comply with the procedures in Subpart 11.J of CASR does not affect the validity of the MOS in question.

However, under paragraph 11.275 (1) (d) of CASR, CASA is not obliged to comply with the publication requirements of regulation 11.280 before issuing a MOS or a MOS amendment if the Director of Aviation Safety (the *Director*) determines that “the MOS is of a minor or machinery nature that does not substantially alter existing arrangements”.

Paragraph 11.275 (1) (d) refers to “the MOS” overall, that is, the MOS as a whole, not to each and every one of its individual provisions. However, the presence in the MOS of a major legislative reform or initiative would be sufficient to transform the “nature” of the MOS from one merely limited to minor or machinery matters.

“Minor or machinery” are alternative criteria, not cumulative. The content and effect of that which is of a minor nature differs from the content and effect of that which is of a machinery nature.

A “substantial alteration” is taken to be one that involves the imposition of both a new and a significant regulatory obligation of compliance with or without an associated burden of cost. Conversely, an amendment does *not alter existing arrangements* if it does not involve the imposition of both a new and significant regulatory obligation of compliance with or without an associated burden of cost.

“Existing arrangements” are not confined to those provided for by the principal MOS and can include regulatory and other arrangements under the civil aviation legislation as applied or understood, including in transitional or consequential legislation or other instruments.

Under subregulation 11.275 (2) of CASR, if the Director does make a Determination (the **Determination**), CASA must publish the Determination, and a statement of reasons for it, on the internet within 28 days after making the Determination.

Under subregulation 11.295 (1), a failure to comply with the Subpart 11.J procedures for a MOS does not affect the validity of the MOS. Under subregulation 11.295 (2), if CASA issues a MOS other than under paragraph 11.275 (1) (a) of CASR (an urgent issue in the interests of aviation safety), CASA must, within 28 days after issuing the MOS, publish a notice of consultation in relation to the MOS as if it were a notice under regulation 11.280, and regulations 11.285 and 11.290 are taken to apply (comments may be received, and must be considered). Urgent issue MOSs are dealt with in a similar way under subregulations 11.275 (3) and (4).

### **Why the proposed MOS amendment is of a minor or machinery nature**

The *Part 138 MOS Amendment Instrument 2023 (No. 1)* (the **MOS amendment**) amends the *Part 138 (Aerial Work Operations) Manual of Standards 2020* (the **Part 138 MOS**).

The Part 138 MOS, which commenced on 2 December 2021, sets out the operational, procedural and safety risk management standards for the conduct of aerial work operations in aeroplanes and rotorcraft. This MOS was made under regulation 138.020 of Part 138 of CASR. It consolidates the existing rules and contains some new rules to enhance operational flexibility and improve aviation safety.

The MOS amendment, which commences on 27 March 2023, is necessary to make a small number of related amendments whose purpose is to restore to certain aerial work operators the possibility of conducting rappelling, and to make other amendments of an editorial nature. Rappelling in aerial work operations is a form of Class D external load operation — that is, an operation in which the external load is a person. Rappelling is already defined in subsection 1.04 (6) of the Part 138 MOS as any of the following:

- (a) a person lowering themselves from an airborne rotorcraft by going down a line hanging from the rotorcraft;
- (b) a person being lowered from an airborne rotorcraft by controlled release from the rotorcraft of a line to which the person is securely attached;
- (c) a person lowering themselves down a line hanging from an airborne rotorcraft, with descent of the person controlled by a person on the ground;
- (d) a person coming down from, or going up to, an airborne rotorcraft by using a flexible ladder hanging from the rotorcraft.

The option of conducting permitted rappelling had been available before 2 December 2021 under Civil Aviation Order 29.11, but when Part 138 of CASR was made it inadvertently only allowed for emergency service operations (**ESO**) to carry out rappelling, and not for other aerial work operators with a relevant rappelling approval.

The MOS amendment remediates this by, in effect, removing the limitation under which only ESO could conduct rappelling. It makes corrections to ensure the consistent use of the defined term **rappelling**. It clarifies what is necessary in an application for CASA approval of some external load operations. It adds some explanatory Notes, in particular explaining that the initial

conduct of rappelling constitutes a significant change for which an operator must have CASA approval as required under subparagraph 138.012 (a) (vii) of CASR.

CASA considers that these amendments are of a minor or machinery nature because they are not of such significance, impact or novelty as to substantially change existing civil aviation legislation arrangements as currently applied, understood or intended.

The Explanatory Statement, which accompanies the proposed MOS amendment, can be found on the Federal Register of Legislation, and contains further information about the amendments.

### **Determination**

The Determination, therefore, is a determination, by the Director, that the proposed MOS amendment is of a minor or machinery nature that does not substantially alter existing arrangements, within the meanings of these terms as described above.

### ***Legislative Instruments Act 2003***

The Determination is not a legislative instrument.

### **Consultation**

In view of the minor or machinery nature of the proposed MOS amendment, consultation is not required.

There has, nevertheless, been some informal consultation in the sense that the amendments have arisen from feedback from the aviation industry to CASA about the discrepancy between the pre- and post-2 December 2021 positions and the need for remediation of that.

### **Commencement and making**

The Determination commences on the date of signature.

The Determination has been made by the Director in accordance with paragraph 11.275 (1) (d) of CASR.

The Determination and this Statement of Reasons for making the Determination are published on the CASA website within 28 days after the Determination is made in accordance with subregulation 11.275 (2) of CASR.