

Civil Aviation Safety Regulations 1998

CASA 24/23 — Determination for Part 91 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 time frame within which such comments may be lodged (to be not less than 28 days from posting on the internet unless 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.

“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 such 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 instrument is of a minor or machinery nature

The *Part 91 MOS Amendment Instrument 2023 (No. 1)* (the **proposed MOS amendment**) amends the *Part 91 (General Operating and Flight Rules) Manual of Standards 2020* (the **principal MOS**).

The principal MOS, which commenced on 2 December 2021, sets out the standards for “the rules of the air” for all pilots, and the general operating rules for pilots who are not operating under an Air Operator’s Certificate or other certificate, and is the foundation for all aviation operations. The MOS was made under regulation 91.040 of Part 91 of CASR. It consolidates the existing rules of the air and contains some new rules to enhance operational flexibility, improve aviation safety, and bring Australian requirements more in line with the Standards and Recommended Practices of the International Civil Aviation Organization (ICAO).

The MOS amendment, which commences on the day after it is registered, is a relatively short collection of corrections to some MOS provisions either to clarify their intent or for matters that were inadvertently omitted but are causing industry to be or to become technically non-compliant. Apart from editorial corrections, these changes relate to infant or child restraints, position reports, and carriage of a survival emergency locator transmitter (**ELT**).

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 or understood.

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, and given that the Determination is not a legislative instrument, consultation on the Determination 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.

The survival ELT amendment, in particular, has arisen due to feedback from the aviation industry to CASA that the ongoing requirement was at variance with what, prior to December 2021, had been understood would be the case for the future.

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.