

Civil Aviation Safety Regulations 1998

CASA 38/23 — Determination for the Part 101 Manual of Standards (Miscellaneous Revisions) Amendment Instrument 2023 (No. 2)

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 actual draft MOS or MOS amendment itself, 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.

“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.

There are many categories of minor MOS amendments. For example, MOS amendments are minor if they:

- amount to no more than small or incremental changes to existing procedures, requirements or obligations
- introduce new procedures, requirements or obligations that improve aviation safety or aviation safety administration without having any relatively material impact on the pre-existing arrangements
- correct provisions which are demonstrably at variance with what had previously been agreed through consultative processes
- introduce new provisions or arrangements to implement what had previously been agreed through consultative processes and been inadvertently overlooked.

This is merely a guide and not an exhaustive list.

MOS amendments are machinery if, for example, they amount to no more than:

- corrections of typographical, spelling, citation, or other errors
- corrections of misstatements
- improvements to confused or unclear drafting
- modifications to obligations to rationalise them and avoid duplication or redundancy
- deletion of expired provisions or obligations
- updating of references or requirements that have been altered through mechanisms unrelated to the MOS amendments
- insertion or deletion of procedural steps that facilitate the application and operation of the procedural requirements as a whole.

This is merely a guide and not an exhaustive list.

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 proposed *Part 101 Manual of Standards (Miscellaneous Revisions) Amendment Instrument 2023 (No. 2)* (the **MOS amendment**) will amend the *Part 101 (Unmanned Aircraft and Rockets) Manual of Standards 2019* (the **principal MOS**).

The principal MOS prescribed a range of miscellaneous matters in relation to the safety and regulatory oversight of remotely piloted aircraft (**RPA**), including training and competency standards for remote pilot licences.

The MOS amendment is largely consequential on the *Civil Aviation Legislation Amendment (2023 Measures No. 1) Regulations 2023*, registered on 25 May 2023. The purpose of these

regulations was to amend CASR and the *Civil Aviation (Unmanned Aircraft Levy) Regulations 2021*, primarily to repeal the scheme for model aircraft registration and model aircraft operator accreditation. The amendments were not controversial as they removed an operator burden following a change in government policy from the time when the scheme was originally consulted.

The major practical and standard-setting elements of the model aircraft registration and model aircraft operator accreditation scheme were provided for in the principal MOS. Since the necessary regulatory heads of power for the scheme have been repealed, the main purpose of the MOS amendment is to remove mentions of the scheme from the MOS through deletions or repeals, as appropriate.

Thus, all but 9 of the 30 amendments in the proposed MOS amendment delete mentions of model aircraft from various contexts in the principal MOS, including Chapter 10 on record keeping, Chapter 11 on test flights, Chapter 12 on identification of aircraft, Chapter 13 on operations of foreign registered aircraft, Chapter 14 on permissible modifications to registered aircraft.

The scheme for model aircraft registration and model aircraft operator accreditation was due to take effect on and from 1 July 2023. With its repeal, the amendments to remove mentions of model aircraft from the principal MOS may commence when the instrument is registered.

All of the foregoing kind of amendments, 21 in all, being consequential on in-force regulatory amendments, are considered to be machinery in nature not requiring consultation.

When compliance with training standards is “impossible, impracticable or unreasonable”

Six amendments are considered to be minor in nature, in effect because they are largely clarifying existing arrangements rather than changing them.

The *Part 101 Manual of Standards (Modified Licensing Standards for Advancing RPA Technology, and Other Matters) Amendment Instrument 2022 (No. 1)* provided CASA with a power to approve, for individual RPA training organisations, modified training and testing competencies and standards to safely accommodate unforeseen emerging new technology in the development, manufacture and deployment of medium RPA and large RPA. These aircraft would otherwise find it impossible or impracticable to be operated in conformity with the training and flight testing requirements of the principal MOS. Without some such approval, it would otherwise be impossible to grant remote pilot licences, or upgrade existing licences, to cover these aircraft, even when it would be safe to do so.

The MOS amendment includes 4 amendments to better facilitate these interim legislative arrangements. The 4 amendments add to the mention of “impossible or impracticable” an additional criterion of “unreasonableness”. Related new Notes explain that if a feature of an RPA otherwise required an applicant for an RePL or RePL upgrade to repeat training previously successfully completed for an earlier RePL, CASA may, subject to considerations of aviation safety, consider that such repetition would be unreasonable.

It had been thought previously that the concept of impracticability would be wide enough to cover the kind of unreasonableness considered in the Notes. While this may be arguable, it is not beyond doubt and the 4 new amendments expressly clarify the matter.

The related Notes make it clear that the concept of unreasonableness will be predicated on allowing alternative substitute standards only where the other standard, although not impossible or necessarily impracticable to meet, would nevertheless contribute nothing to aviation safety and the alternative standard would contribute, or at least preserve, aviation safety.

CASA is working to develop new, generic, outcome-based training standards for technologically advanced medium RPA and large RPA, with a view to eventually amending the principal MOS accordingly, making the approval process redundant.

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

Corrections

There are 2 other amendments which correct 2 unrelated drafting errors that arose in *Part 101 Manual of Standards (Miscellaneous Revisions) Amendment Instrument 2023 (No. 1)*. The errors were technical rather than substantive — failure to repeal an old provision which would have duplicated what a new provision was designed to do. These amendments are, therefore, clearly minor in nature.

Finally, 3 amendments are considered to be minor in nature, in effect because they also are largely clarifying existing arrangements rather than changing them.

The 3 amendments update the definition of *documented practices and procedures*. Previously, this had referred to documents approved in writing by CASA. An operator's initial documented practices and procedures must be approved by CASA. However, thereafter only significant changes to the documented practices and procedures must be approved by CASA. The 3 amendments clarify this.

Explanatory Statement

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

Determination

The Determination, therefore, is a determination, by the Director, that the amendments in the proposed MOS amendment are 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 on the actual MOS amendment instrument is not required.

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.