

Explanatory Statement

Acts Interpretation Act 1901

Civil Aviation Safety Regulations 1998

Part 91 MOS Amendment Instrument 2023 (No. 1)

Purpose

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

The **MOS**, which commenced on 2 December 2021, set 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. The **MOS** is a foundational ruleset for the safety of all aviation operations. It consolidates the existing rules of the air, contains some new rules to enhance operational flexibility and improve aviation safety, and it brings Australian requirements more in line with the Standards and Recommended Practices of the International Civil Aviation Organization (ICAO).

The **MOS** amendment 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 relate to infant or child restraints, position reports, and carriage of a survival emergency locator transmitter (a *survival ELT*).

CASA considers that all of the amendments may be classified as being of a minor or machinery nature which do not substantially alter the existing arrangements, as in place or understood. (See also under Consultation.)

The **MOS** amendment is further explained in Appendix 1.

Legislation

The *Civil Aviation Act 1988* (the **Act**) establishes the regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.

Subsection 98 (1) of the **Act** provides, in part, that the Governor-General may make regulations, not inconsistent with the **Act**, prescribing matters required or permitted by the **Act** to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the **Act**. The *Civil Aviation Safety Regulations 1998 (CASR)* were made under the **Act**.

Under regulation 91.040 of **CASR**, the Civil Aviation Safety Authority (**CASA**) may issue a Manual of Standards for Part 91 of **CASR** that prescribes matters required or permitted by that Part to be prescribed, or necessary or convenient for carrying out or giving effect to Part 91. This power is complemented by other provisions throughout Part 91 which empower **CASA** to prescribe specific matters in the **MOS**.

Under subsection 33 (3) of the *Acts Interpretation Act 1901* (in effect) where regulations empower the making of a **MOS**, the power includes a parallel power to amend the **MOS**. The **MOS** amendment is made under regulation 91.040 of **CASR**, and on the same basis as the initial **MOS** itself.

For convenience in this Explanatory Statement, unless a contrary intention appears, mention of a provision with the prefix “91.” is a reference to that provision in Part 91 of **CASR**.

Legislation Act 2003 (the LA)

Under subsection 8 (4) of the LA, an instrument is a legislative instrument if it is made under a power delegated by the Parliament, and any provision determines the law or alters the content of the law, and it 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. The MOS satisfied these requirements. Under paragraph 10 (1) (d) of the LA, for subsection 8 (5), an instrument that amends a legislative instrument is also itself a legislative instrument. Consequently, the MOS amendment is a legislative instrument.

Under paragraphs 98 (5A) (a) and (5AA) (a) of the Act, an instrument made under regulations is a legislative instrument if it is issued in relation to matters affecting the safe navigation and operation of aircraft, and is expressed to apply to classes of persons.

On each of these criteria, the MOS is a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA. Consequentially, the same provisions and conclusions apply to the MOS amendment.

Sunsetting

As the MOS amendment relates to aviation safety and is made under CASR, Part 4 of Chapter 3 of the LA (the *sunsetting provisions*) does not apply to the instrument (as per item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*). The instrument deals with aviation safety matters that, once identified, require a risk response or treatment plan. As such, the MOS amendment is, *prima facie*, intended to have enduring operation and it would not be appropriate for it to be subject to sunseting.

The exemption from the sunseting provisions affects parliamentary oversight by not requiring the MOS amendment to be remade at the end of the sunseting period (remaking would have the effect that the whole instrument must be retabled and would become subject to disallowance in the Parliament under sections 38 and 42 of the LA). However, amendment instruments are generally spent as soon as the amendments they contain take effect it. Also, it is likely that, before the end of the nominal sunseting time, the MOS will be further amended and such instruments will be subject to tabling and disallowance in the Parliament in the normal way. The sunseting exclusion, therefore, causes no practical diminution of parliamentary oversight.

Incorporations by reference

Under subsection 98 (5D) of the Act, the MOS may apply, adopt or incorporate any matter contained in any instrument or other writing. A non-legislative instrument may be incorporated into a legislative instrument made under the Act, as that non-legislative instrument exists or is in force at a particular time or from time to time (including a non-legislative instrument that does not exist when the legislative instrument is made).

Under paragraph 15J (2) (c) of the LA, the Explanatory Statement must contain a description of the incorporated documents and indicate how they may be obtained. A Table was included in the Explanatory Statement for the MOS and earlier amendments listing and explaining the various incorporated documents for the MOS. These Tables remains applicable also for this MOS amendment which introduces no new incorporated documents.

Consultation

Under regulation 11.280 in Subpart 11.J of CASR, if CASA intends to issue a MOS, CASA must, in effect, engage in public consultation on the draft MOS. Under regulation 11.267, this requirement also applies to a MOS amendment instrument.

However, under paragraph 11.275 (1) (d), CASA is not obliged to consult 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. In such circumstances, under subregulation 11.275 (2), CASA must publish the determination, and a statement of reasons for it, on the internet within 28 days after making the determination.

The purpose of the MOS amendment is to make corrections to the MOS which do not substantially alter the existing arrangements as in place or understood. They are, therefore, considered to be of a minor or machinery nature. Consequently, the Director has made a relevant determination (CASA 24/23) that consultation is not required. The determination with a statement of reasons for it are on the CASA website.

There has, nevertheless, been informal consultation with the aviation industry in the course of preparation of the amendments. 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.

Office of Impact Analysis (OIA)

A Regulation Impact Statement (*RIS*) was prepared by CASA for the new Part 91 and this RIS also covers the MOS and consequential corrective MOS amendment instruments which the regulations empowered. The RIS was assessed by the OIA's predecessor, the Office of Best Practice Regulation (*OBPR*) as compliant with the Best Practice Regulation requirements and contained a level of analysis commensurate with the likely impacts (OBPR id: 23625). A copy of the RIS was included in the Explanatory Statement for the new Part 91 regulations (<https://www.legislation.gov.au/Details/F2018L01783/Download>).

Sector risk, economic and cost impact

Economic and cost impact

Subsection 9A (1) of the Act states that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.

Subsection 9A (3) of the Act states that, subject to subsection (1), in developing and promulgating aviation safety standards under paragraph 9 (1) (c), CASA must:

- (a) consider the economic and cost impact on individuals, businesses and the community of the standards; and
- (b) take into account the differing risks associated with different industry sectors.

The cost impact of a standard refers to the direct cost (in the sense of price or expense) which a standard would cause individuals, businesses, and the community to incur.

The economic impact of a standard refers to the impact a standard would have on the production, distribution, and use of wealth across the economy, at the level of the individual, relevant businesses in the aviation sector, and the community more broadly. The economic impact of a standard could also include the general financial impact of that standard on different industry sectors.

In terms of economic and cost impacts for subsection 9A (3) of the Act, by making corrections and clarifications, the MOS amendment removes confusion and distraction, and brings the MOS more closely into alignment with its purpose and intent, and with the agreed expectations of relevant sectors of the aviation industry whose participants were consulted before it was made.

Thus, the MOS amendment will not have the effect of increasing any cost burdens and is likely to have the effect of lowering some costs for industry that might otherwise have arisen, for example,

by clarifying rules. One particular provision in the MOS amendment relieves non-air transport operators who operate single-engine aircraft *over water*, from a requirement to carry a survival ELT. This relief was available to such operators before 2 December 2021 under Civil Aviation Order (CAO) 20.11, and its inclusion in the prospective Part 91 MOS was consulted and agreed upon. However, in modifying and translating various CAOs into the MOS, the ELT relief was overlooked, and the position is now being restored to the original intent.

Sector risk

The MOS amendment does not increase any particular sector risks over or above what had been the previous, acceptable, safety standard in regard to carriage of ELTs.

Rural and regional impacts

The Minister's Statement of Expectations for the CASA Board states: "I expect that CASA will: ... (b) fully consider the impact of new regulations on general aviation, with a particular focus on regional and remote Australia. All Explanatory Statements drafted by CASA for subordinate legislation should identify the impact on the various categories of operations as well as on communities in regional and remote Australia served by those operations and how these impacts have been considered."

The MOS amendment does not give rise to any identified rural and regional impacts that differ in any material way from the general economic and cost impacts, or sector risks described above.

Environmental impact

Under subsection 9A (2) of the Act, while regarding the safety of air navigation as the most important consideration, CASA must exercise its powers and perform its functions in a manner that ensures that, as far as practicable, the environment is protected from the effects and associated effects of the operation and use of aircraft.

It is not anticipated there will be any specific negative environmental impacts as a result of the MOS amendment as compared to the baseline that existed on 1 December 2021, since the instrument is designed to correct and clarify rules in line with its original purpose, intent and expectations.

Aviation safety

In determining whether to make the MOS amendment, CASA has regard to the safety of air navigation as the most important consideration. Given the nature of the amendments, CASA is satisfied that an acceptable level of aviation safety will be preserved, and the safety of air navigation thereby maintained.

Because of an oversight prior to December 2021, a survival ELT must be carried by a single-engine aircraft if flown over water outside the one-engine-inoperative (OEI) glide to land distance. However, it was not intended that the Part 91 MOS should impose this obligation on a single-engine aircraft if:

- (a) the aircraft is a single-seat, single-engine aircraft; or
- (b) the aircraft flight is for a purpose related to any of the following:
 - (i) the aircraft's manufacture;
 - (ii) the preparation or delivery of the aircraft following its purchase or transfer of operator;
 - (iii) the positioning of an Australian aircraft from a location outside Australia to any place at which any ELTs required to be fitted to the aircraft by this Division will be registered with AMSA; or

- (b) the aircraft is:
 - (i) fitted with an operative radio capable, in the event of an emergency, of alerting an appropriate person in relation to the emergency; or
 - (ii) otherwise capable of continuous communication with a person on the ground during the aircraft's flight.

In these circumstances, even if a radio or other communications are not carried, in each case other safety factors exist in mitigation such that the removal of the inadvertent obligation to carry a survival ELT is not considered by CASA as likely to result in any unacceptable diminution in the level of aviation safety.

Thus, the position relative to single-seat aircraft over water will be restored to that essentially analogous to single-seat aircraft over land. Flights for manufacturers, delivery or positioning are invariably flights that are the subject of various other forms of safety monitoring by interested parties.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights is at Appendix 1. This concludes that the MOS amendment, as a set of minor or machinery amendments, is compatible with human rights.

Commencement and making

The MOS amendment commences on the day after it is registered.

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

Details of the Part 91 MOS Amendment Instrument 2023 (No. 1)

1 Name of instrument

This section 1 provides for the naming of the *Part 91 MOS Amendment Instrument 2023 (No. 1)* (the *MOS amendment*).

2 Commencement

This section provides for the commencement of the MOS amendment on the day after it is registered.

3 Amendment of Part 91 Manual of Standards

This section provides that Schedule 1 amends the *Part 91 (General Operating and Flight Rules) Manual of Standards 2020* (the *MOS*).

Schedule 1 Amendment

[1] Paragraph 14.04 (1) (a), the Note

This amendment corrects a formatting error.

[2] Subparagraph 20.01 (2) (c) (iv)

Under paragraph 20.01 (2) (c) (iv), an infant, or a child under 6, who is a medical patient for whom wearing the usual aircraft safety harness and a restraint strap is detrimental or is otherwise inappropriate, may be carried in the arms, or on the lap, of an adult occupying a seat. The amendment extends this potential arrangement to an adult occupying a stretcher.

[3] After subsection 20.03 (3)

This amendment corrects an omission concerning the proper restraint of an infant, or a child under the age of 6, who is a medical patient described in subparagraph 20.01 (2) (c) (iv), and is consequential on amendment 1. Thus, such an infant or child is restrained if carried in the arms or lap of an adult occupying a seat or a stretcher, provided the adult restraint is not fastened around the infant or child, and the infant or child is restrained in the relevant position in a manner determined by the operator to be appropriate for the circumstances.

[4] Paragraph 21.05 (1) (d)

This amendment is consequential on amendment 5.

[5] After subsection 21.05 (1A)

Under section 21.05, the pilot in command of an aircraft in certain prescribed airspace, must ensure that prescribed reports are made to air traffic control. One such circumstance for a report is to correct a previously reported position estimated that was more than 2 minutes in error. The amendment provides that such a report is not required if an aircraft's position is being automatically reported by an ADS-C system, unless the previous estimate was from a flight crew member and not the ADS-C, or was due to a flight crew member initiated action (for example, a manually initiated speed change).

[6] After subsection 21.06 (2)

This amendment replicates the effect of amendment 5 but in respect of IFR aircraft in Class G airspace where the requisite report is to the air traffic service.

[7] After subsection 26.48 (3)

This amendment rectifies the omission described above (under Aviation Safety, and Economic and cost impact) relating to carriage of a survival ELT. Under subsection 26.48 (2), a single-engine aircraft must carry a survival ELT when it is flown further over water than the distance from which, with the single engine inoperative, the aircraft could glide to suitable land for a forced landing.

By virtue of amendment 7, this requirement does not apply to a single-engine aircraft if:

- (a) the aircraft is a single-seat aircraft; or
- (b) the aircraft flight is for a purpose related to any of the following:
 - (i) the aircraft's manufacture;
 - (ii) the preparation or delivery of the aircraft following its purchase or transfer of operator;
 - (iii) the positioning of an Australian aircraft from a location outside Australia to any place at which any ELTs required to be fitted to the aircraft by this Division will be registered with AMSA; or
- (b) the aircraft is:
 - (i) fitted with an operative radio capable, in the event of an emergency, of alerting an appropriate person in relation to the emergency; or
 - (ii) otherwise capable of continuous communication with a person on the ground during the aircraft's flight.

However, this relief is not available for a flight where more than 1 life raft must be carried in accordance with section 26.60, in which case the flight must be fitted with an automatic ELT and carry a survival ELT, or carry at least 2 survival ELTs.

[8] Paragraph 26.65 (1) (b)

This amendment corrects a naming error.

[9] Section 26.67, Definitions

This amendment is designed to ensure that for meeting certain surveillance equipment standards references to the **UK CAP 1391** are to the Civil Aviation Authority of the United Kingdom document number CAP 1391 titled *Electronic conspicuity devices*, 2nd edition, dated April 2018, or any later edition. Previously, use of editions other than the in-force edition had been excluded.

Statement of Compatibility with Human Rights

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

Part 91 MOS Amendment Instrument 2023 (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 the Legislative Instrument

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The MOS, which commenced on 2 December 2021, set 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. The MOS is a foundational ruleset for the safety of all aviation operations. It consolidates the existing rules of the air, contains some new rules to enhance operational flexibility and improve aviation safety, and it brings Australian requirements more in line with the Standards and Recommended Practices of the International Civil Aviation Organization (ICAO).

The MOS amendment is a relatively short collection of corrections 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 relate to infant or child restraints, position reports, and carriage of a survival emergency locator transmitter.

CASA considers that all of the amendments may be classified as being of a minor or machinery nature which do not substantially alter the existing arrangements, as in place or understood. (See also under Consultation.)

Human rights implications

When it was made, the Explanatory Statement for the MOS explained that, of their very nature in addressing aviation safety issues, its provisions may engage the following human rights:

- the right to life under Article 6 and the right to privacy and reputation under Article 17 of the International Covenant on Civil and Political Rights (the **ICCPR**)
- the right to work under Article 6 (1) and the right to safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social and Cultural Rights (the **ICESCR**).

That earlier Explanatory Statement concluded that the MOS was a legislative instrument that was compatible with human rights and, to the extent that it may also limit human rights, the limitations were reasonable, necessary and proportionate to ensure the safety and the integrity of the aviation safety system upon which all aviation operations rely.

The MOS amendment is also a legislative instrument but it contains only minor or machinery amendments as explained above, and these do not, of themselves, directly engage human rights,

nor do they increase any engagement with human rights already recorded in the Explanatory Statements for the MOS as amended. The instrument is, in itself, therefore, compatible with human rights.

Conclusion

The MOS is a legislative instrument that is compatible with human rights.