

Explanatory Statement

Civil Aviation Safety Regulations 1998

Manual of Standards (MOS) – Part 139 Aerodromes Amendment Instrument 2020 (No. 1)

Purpose

The *Manual of Standards (MOS) – Part 139 Aerodromes Amendment Instrument 2020 (No. 1)* (the **old MOS amendment**) amends the *Manual of Standards (MOS) – Part 139 Aerodromes* (the **old MOS**) to allow for the early optional adoption, by some aerodrome operators, of new aerodrome visual aids and inset runway lights, not otherwise due to commence until 13 August 2020.

Background

The purpose of the old MOS amendment is to permit some existing aerodrome operators to adopt some of the new standards relating to aerodrome visual aids and inset runway lights, as currently contained in Chapter 8 and 4 sections of Chapter 9, respectively, of the *Part 139 (Aerodromes) Manual of Standards 2019* (the **new MOS**), earlier than would otherwise be required. Compliance would otherwise have been required only on and after 13 August 2020.

Making use of the anticipatory instrument-making powers under section 4 of the *Acts Interpretation Act 1901* (the **AIA**), the new MOS was made on 5 September 2019 under the *Civil Aviation Safety Amendment (Part 139) Regulations 2019* (the **new regulations**) which were expressed to commence on 22 August 2020.

By virtue of the *Civil Aviation Legislation Amendment (Part 139 Aerodromes — Transitional Provisions and Consequential Amendments) Regulations 2020*, the new regulations and the new MOS will commence on 13 August 2020.

However, by amending the old MOS, the new standards relating to aerodrome visual aids and inset runway lights, as currently contained in Chapter 8 and 4 sections of Chapter 9 of the new MOS, may be incorporated into the old MOS as alternative, optional, standards under the old MOS, thereby accelerating their application to those aerodrome operators who wish to voluntarily adopt them prior to 13 August 2020.

This early adoption option is likely to be of considerable benefit to some aerodrome operators who, for cyclical reasons, are currently engaged in updating or replacing their aerodrome visual aids and may wish to more readily install inset runway lights, both of which would otherwise have to comply with the old MOS standards and restrictions.

Since the old MOS standards are going to be modified by the new MOS on and from 13 August 2020, this would have resulted in aerodrome visual aids having to be upgraded or replaced again, out of cycle, on and from 13 August 2020, to comply with the new MOS, and would also have meant restrictions on the use of inset runway lights. The old MOS amendment allows relevant aerodrome operators to avoid this outcome.

Legislation

Under subsection 98 (1) of the *Civil Aviation Act 1988* (the **Act**) the Governor-General may make regulations for the purposes of the Act and in the interests of the safety of air navigation.

Some of these regulations are contained in the *Civil Aviation Safety Regulations 1998 (CASR)*. In particular, the old regulations deal, among other things, with the operation, certification and registration of aerodromes. (References below to a provision whose number begins with the number 139 are to the provision of that number in CASR Part 139.)

Under regulation 139.015, the standards for aerodromes are those set out in the old MOS. Under regulation 139.165, the operator of a certified aerodrome must ensure that the physical characteristics of the movement area comply with the standards set out in the old MOS. Under regulation 139.295, the standards applicable to registered aerodromes include standards set out in the old MOS as applicable to registered aerodromes. The old MOS contains mandatory standards for the facilities and equipment that aerodromes must have.

Chapter 8 of the old MOS deals with aerodrome visual aids. Chapter 9 deals with aerodrome lighting.

Section 4 of the AIA provides, among other things, that if an Act (including a regulation) is enacted and at a time after its enactment (the *start time*) the Act will confer power to make an instrument, that power may be exercised before the start time as if the relevant commencement had occurred. However, in general terms, the exercise of this power does not confer a power or right to impose an obligation on a person before the relevant commencement. Using section 4 of the AIA, the new MOS was made under regulation 139.005 of the new regulations.

The old MOS amendment

The old MOS amendment inserts a new subsection 8.1.1AA into Chapter 8 of the old MOS. The subsection is headed Visual aids — early compliance with alternative new Chapter 8 standards. Paragraph 8.1.1AA.1 provides some definitions. Paragraph 8.1.1AA.2 provides that despite anything else in the Chapter, but subject to paragraph 8.1.1AA.3, the new MOS Chapter 8 standards are incorporated as alternative standards. Paragraph 8.1.1AA.3 provides that paragraph 8.1.1AA.2 takes effect for an aerodrome operator only in accordance with the operator's written notice to CASA:

- (a) stating that the operator will comply with some or all of the new MOS Chapter 8 standards as if they were the standards under the old MOS Chapter 8; and
- (b) unless all of the new MOS Chapter 8 standards will be complied with:
 - (i) identifying, by relevant section number, the new MOS Chapter 8 standards that the operator will comply with; and
 - (ii) identifying the specific location on the aerodrome of anything that is the subject of a relevant section; and
 - (iii) undertaking to comply with such of the other standards in the old MOS Chapter 8 as are not inconsistent with the new MOS Chapter 8 standards specified in the notice; and
- (c) specifying the date, not earlier than the date of the notice and not later than 12 August 2020, on and from which the operator will comply with the new MOS Chapter 8 standards.

The old MOS amendment inserts a new subsection 9.1.1AA into Chapter 9 of the old MOS. The subsection is headed Inset runway lights — early compliance with alternative new Chapter 9 standards. This new subsection is in terms identical to those for the new subsection 8.1.1AA, except that it addresses only 4 selected sections of the new MOS Chapter 9 standards as being available for accelerated adoption, rather than the whole of the new Chapter. The 4 sections are:

- (a) section 9.11, Elevated and inset lights; and
- (b) section 9.51, Runway edge lights; and
- (c) section 9.52, Characteristics of runway edge lights — non-instrument and non-precision approach runway; and
- (d) section 9.53, Characteristics of runway edge lights — precision approach runway.

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 old MOS amendment satisfies these requirements and is, therefore, a legislative instrument subject to registration, and tabling and disallowance in the Parliament, under sections 15G, and 38 and 42, of the LA.

Incorporations by reference

The old MOS amendment has the effect of incorporating into the old MOS the relevant standards contained in Chapter 8 and 4 sections of Chapter 9 of the new MOS. Although they have not yet legally commenced, these standards have certain and precise legal existence within the new MOS which, like the old MOS, is a legislative instrument.

Under subsection 14 (1) of the LA, a legislative instrument may incorporate provisions from another legislative instrument as in force from time to time. However, under subsection 14 (2), a legislative instrument may incorporate provisions from a non-legislative instrument only as those provisions exist at the time of the incorporation. Since the new MOS, although made and registered, has not commenced, it may be arguable that it is not “in force” and, therefore, has the characteristics of a non-legislative instrument and its incorporation would be subject to the limitation expressed in subsection 14 (2) of the LA.

CASA has no intention to amend the existing Chapter 8 or 9 of the new MOS between now and 13 August 2020. In any case, the arguable issue is academic because under subsection 98 (5D) of the Act, 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).

In other words, the new MOS Chapters 8 and 9 standards are capable of being applied, adopted or incorporated by the old MOS amendment, as in force from time to time. The new MOS with Chapters 8 and 9 is freely available on the Federal Register of Legislation at:

<https://www.legislation.gov.au/Details/F2019L01146/Download>.

Consultation

In 2017, the proposed visual aids and aerodrome lighting standards in the new MOS Chapters 8 and 9 were publicly consulted upon as part of the post-implementation review of the old regulations and the old MOS. This ultimately led to the new regulations and new MOS being made, and registered on 6 September 2019.

A transition strategy for implementation of the new regulations and the new MOS was the subject of public and industry consultation from 3 February to 2 March 2020. One of the implementation policy proposals included in this consultation was whether to bring forward for early adoption the Chapter 8 and selected Chapter 9 MOS provisions. There were 16 responses to this consultation and in regard to this particular aspect of the proposed implementation policy, and 15 of them were favourable responses (with 1 respondent not answering the question).

Thus, public and industry consultation was conducted and it supports the early opt-in provisions for Chapters 8 and 9 of the new MOS.

When set in the overall context, to allow the early voluntary adoption of the new MOS Chapters 8 and 9 provisions is essentially a matter that could reasonably be described as of a minor and machinery nature. The Director of Aviation Safety has made a determination to that effect for the

purposes of paragraph 11.275 (1) (d) of CASR. The effect of this to relieve CASA of the obligation under Subpart 11.J of CASR to consult again, for a further 4 weeks, on the early voluntary opt-in scheme for Chapters 8 and 9. A copy of the Determination and the Reasons for it are on the CASA website.

In conclusion, CASA considers that the old MOS amendment had been the subject of reasonable and adequate public and industry consultation and that no further consultation is necessary.

Regulation Impact Statement (RIS)

A RIS was prepared by CASA for the new regulations and this RIS also covered the new MOS which the regulations empowered. The RIS was assessed by the Office of Best Practice Regulation (**OBPR**) as compliant with the OBPR requirements and contained a level of analysis commensurate with the likely impacts (OBPR id: 24678). A copy of the RIS was included in the Explanatory Statement for the new regulations (<https://www.legislation.gov.au/Details/F2019L00176/Download>).

The old MOS amendment does not alter any of the conclusions of the RIS except to the extent that, for aerodrome operators who opt to take advantage of the accelerated application of new MOS's Chapter 8 and 4 sections of Chapter 9, there will be significant cost savings arising from avoidance of what might otherwise have amounted to wasteful duplication of effort.

In addition, under OBPR Guidance Note (February 2016), and the CASA/OBPR agreement (reference OPBR ID No. 14507), amendments to MOSs that are of a minor or machinery nature do not require a RIS. Insofar as the old MOS amendment does not substantially alter existing arrangements but only allows for the early voluntary adoption of future standards, it may be said to be of a minor or machinery nature.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights is at Attachment 1. This concludes that the old MOS amendment is compatible with human rights.

Commencement and making

The old MOS amendment commences on the day after it is registered. It has been made by the Director of Aviation Safety, on behalf of CASA, in accordance with subsection 73 (2) of the Act.

Statement of Compatibility with Human Rights

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

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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 purpose of the old MOS amendment is to permit some existing aerodrome operators to voluntarily adopt, if they so notify CASA, some of the new standards relating to aerodrome visual aids and inset runway lights, as currently contained in Chapter 8 and 4 sections of Chapter 9, respectively, of the *Part 139 (Aerodromes) Manual of Standards 2019* (the **new MOS**). This would be earlier than would otherwise be required. Compliance would otherwise have been required only on and after 13 August 2020.

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Human rights implications

In the circumstances, the old MOS amendment does not give rise to any limitations on any of the relevant human rights.

The right to life under the International Covenant on Civil and Political Rights (ICCPR)

Insofar as the old MOS amendment permits, albeit on a voluntary basis, accelerated implementation of enhanced safety standards for aerodrome visual aids and inset runway lights, it might be said to promote the right to life under Article 6 of the ICCPR by legislating for safer conditions at certain aerodromes.

Conclusion

The old MOS amendment is compatible with human rights and, in a not insignificant way, promotes the right to life through the prevention of accidents in the aviation safety context.