### **Explanatory Statement**

### **Civil Aviation Safety Regulations 1998**

### **Part 91 MOS Amendment Instrument 2021 (No. 2)**

**Purpose**

The *Part 91 MOS Amendment Instrument 2021 (No. 2)* (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, 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 the *Civil Aviation Safety Regulations 1998* (***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 it is registered, is necessary to remedy an inadvertent omission in relation to requirements for the fitment of cockpit voice recorders (***CVR***) and flight data recorders (***FDR***) in certain aircraft.

It had been intended that the effect of paragraph 6.1A of Civil Aviation Order (***CAO***) 20.18 should be continued and reflected in the MOS. The CAO paragraph provided, in effect, that otherwise prescribed CVR and FDR equipment requirements would not apply to an aircraft for which there was in force an airworthiness certificate (that is, in effect, type certification) in the agricultural category or the restricted category.

It had been intended that this exclusionary provision would be included in the *Part 91 MOS Amendment Instrument 2021 (No. 1)* that was registered on 11 November 2021 to commence on 2 December 2021 (the ***previous MOS amendment***). That previous MOS amendment contained over 140 miscellaneous minor and machinery amendments provisions making a range of corrections and updates to the MOS, and this matter should also have been included there but was overlooked.

**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 Regulations 1988* and CASR are made under the Act.

The *Civil Aviation Safety Amendment (Part 91) Regulations 2018* (***Part 91 of CASR***) were registered on 18 December 2018, and amended by the *Civil Aviation Legislation Amendment (Flight Operations—Miscellaneous Amendments) Regulations 2020* registered on 6 October 2020. Part 91 of CASR commenced on 2 December 2021. 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.

The MOS was made under the foregoing power and the MOS amendment is, therefore, made under the same head of power, and on the same basis, as the 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.

More details about the MOS amendment are set out in Appendix 2 of this Explanatory Statement.

***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 and, consequentially, the MOS amendment also does so.

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.

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. This requirement also applies to a MOS amendment.

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 Director has made such a determination because the purpose of the MOS amendment is to ensure that the past requirement and intended future policy outcome for CVRs and FDRs for aircraft type certificated in the agricultural and restricted categories is achieved.

There has, nevertheless, been informal consultation with the aviation industry in the course of preparation of this amendment. Feedback was received from multiple sources identifying that the CVR and FDR provisions of the MOS had overlooked the exclusionary effect of the former paragraph 6.1A of CAO 20.18.

**Regulation Impact Statement**

A Regulation Impact Statement (***RIS***) was prepared by CASA for the new Part 91 and this RIS also covered the MOS and the previous MOS amendment which the regulations empowered. The RIS was assessed by 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>).

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 minor or machinery amendment, is compatible with human rights.

**Commencement and making**

The MOS amendment commences on the day it is registered.

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

**Appendix 1**

**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 2021 (No. 2)**

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**

The *Part 91 MOS Amendment Instrument 2021 (No. 2)* (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, 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 the *Civil Aviation Safety Regulations 1998* (***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).

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It had been intended that this exclusionary provision would be included in the *Part 91 MOS Amendment Instrument 2021 (No. 1)* that was registered on 11 November 2021 to commence on 2 December 2021 (the ***previous MOS amendment***). That previous MOS amendment contained over 140 miscellaneous minor and machinery amendments provisions making a range of corrections and updates to the MOS, and this matter should also have been included there but was overlooked.

**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 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.

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 a minor or machinery amendment as explained above, and it does not, of itself, directly or indirectly engage human rights, nor increase any engagement with human rights already recorded in the Explanatory Statement 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.

Appendix 2

Details of the **Part 91 MOS Amendment Instrument 2021 (No. 2)**

**1 Name of instrument**

This section 1 names the *Part 91 MOS Amendment Instrument 2021 (No. 2)* (the ***MOS amendment***).

**2 Commencement**

This section provides for the commencement of the MOS amendment on the day 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] After section 26.30 (new subsection 26.30A)

 Headed “Non-application — agricultural category and restricted category aircraft”, this amendment provides that in Division 26.9 of the Part 91 MOS dealing with flight recording equipment, sections 26.31 to 26.35, inclusive, prescribing FDA and CVR, do not apply to an aircraft that is type certificated in the agricultural category or the restricted category.