

Explanatory Statement

Acts Interpretation Act 1901

Civil Aviation Safety Regulations 1998

Part 91 MOS Amendment Instrument 2022 (No. 1)

Purpose

The *Part 91 MOS Amendment Instrument 2022 (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).

As is explained below, in making a number of miscellaneous minor or machinery amendments to the **MOS**, the **MOS amendment** does not substantially alter the existing regulatory arrangements as applied or understood.

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**.

The **MOS amendment** is a miscellaneous collection of corrections and updates covering over 20 distinct groups of matters. The amendments modify some provisions to clarify their intent. They also modify a number of provisions that have not correctly implemented the continued application (in effect) of certain pre-2 December 2021 rules. These matters are inadvertently causing industry to be or to become technically non-compliant (though without safety implications). The amendments also delay the start of a new equipment requirement for the relevant aviation industry sector for whom further time is needed to achieve effective implementation.

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 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 listing and explaining the various incorporated documents for the MOS. This Table remains applicable also for the MOS amendment.

In addition, however, the further documents listed below are incorporated.

Document	Description	Manner of incorporation	Source
A declaration of an area as a danger area, made under regulation 6 of the <i>Airspace Regulations 2007</i>	Danger area declarations are made or revised by CASA approximately every 6 months in the instrument known as <i>Designation of Prohibited, Restricted and Danger Areas – Declaration and Determination (Permanent PRDs) Instruments</i>	As in force from time to time	Available for free on the CASA website. Also published by Airservices Australia in the Designated Airspace Handbook which is part of the Aeronautical Information Publication (the <i>AIP</i>). The AIP is available for free on the Airservices Australia website www.airservicesaustralia.com/aip/aip.asp
<i>CASA 26/21 – Direction – Australian Aircraft and Foreign Registered Aircraft in Australian-administered Airspace Instrument 2021, including any CASA instrument that is expressed to be a successor instrument to CASA 26/21</i>	This instrument makes rules governing the use of certain airspace in Australian-administered airspace outside Australian territory. International airspace is allocated to Australia for the purposes of airspace administration.	As in force from time to time	This document is available for free on the Federal Register of Legislation website (https://www.legislation.gov.au/)

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 a range of corrections and updates 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 34/22) that consultation is not required. The determination with a statement of reasons for it are on the CASA website.

There has, nevertheless, been considerable informal consultation with the aviation industry in the course of preparation of the amendments. Many of the amendments have arisen due to extensive feedback from the aviation industry to CASA via multiple communication channels, both individual direct feedback, and collective feedback from various working groups.

Regulation Impact Statement

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 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.

Sector risk

The MOS amendment does not increase any particular sector risks.

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.

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 2022 (No. 1)

1 Name of instrument

This section 1 provides for the naming of the *Part 91 MOS Amendment Instrument 2022 (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 Amendments

[1] Subsection 1.07 (6)

This amendment adds new definitions.

[2] Section 3.08

This amendment is intended to give NVIS lighting requirements precedence if they conflict with other lighting requirements under the MOS.

[3] Section 3.08, the Note

This amendment is consequential on amendment 4.

[4] Section 3.08, after Note 1

This amendment adds a guidance Note on the location of exterior lighting requirements.

[5] Subsection 11.02 (4)

This amendment is a stylistic change. Regulation 91.255 imposes on the pilot in command the relevant obligation to meet the transition altitude, transition layer and transition level standards. Instead of repeating this, the amendment objectifies the standard.

[6] Subsection 11.02 (5)

This amendment is a stylistic change consequential on Amendment 5. It also uses the correct expression *forecast area QNH* for use in relation to altimeter setting. It adds a new explanatory Note.

[7] Subsection 11.02 (6)

This amendment is a stylistic change consequential on Amendment 5.

[8] Subsection 11.02 (7)

This amendment is a stylistic change consequential on Amendment 5.

[9] Subsection 11.02 (8)

This amendment is a stylistic change consequential on Amendment 5.

[10] Subsection 11.16 (3)

This amendment repeals subsection 11.16 (3) about notification of track deviations to ATC. Subsection 11.16 (1) already requires compliance with the authorised aeronautical information (the AIP) which includes the same notification requirement. The repeal of subsection 11.16 (3) avoids duplication of the same rules in 2 places.

[11] Section 11.22

This amendment repeals section 11.22 and replaces it in a way that first, takes account of the detailed CASA direction in instrument CASA 26/21 which regulates the use of danger areas within and outside Australian territory, for Australian and foreign aircraft; and secondly, accommodates the commencement of the *Airspace Amendment (Danger Areas) Regulations 2022*, which will have full effect on and from 15 June 2023.

[12] After paragraph 14.04 (1) (a)

This amendment adds a Note to make it clear that use of GNSS cannot substitute for use of the VOR or NDB ground-based navigation aids mandated for use during a GNSS arrival.

[13] Subsection 14.05 (1), the chapeau

This amendment makes it clearer that the section applies to 1 of the listed ground-based navigation aids.

[14] After subsection 14.05 (1)

This amendment adds new subsection (1A) and a supporting Note to make it clear that section 14.05, about substituted use of GNSS, does not apply to the use of a VOR or NDB for a GNSS arrival, or a DME or GNSS arrival.

[15] Section 15.02, definition of *qualifying multi-engine aeroplane*

This amendment corrects the definition of *qualifying multi-engine aeroplane* to include reference to aircraft with turbojet engines.

[16] Section 20.01, the heading

This amendment inserts a new section heading to more accurately reflect the contents of the section which now includes references to police special operations group (*SOG*) operations (these are defined under amendment 22).

[17] Paragraph 20.01 (2) (a)

This amendment adds a SOG operation to a medical transport operation and a rescue operation as a prescribed circumstance, that is, an operation where a seatbelt or shoulder harness is not required for a SOG member (however, a safety harness or restraint strap must be used for safety).

[18] Subparagraph 20.01 (2) (b) (iii)

This amendment adds a SOG member as a person for a prescribed circumstance, that is, an operation where a seatbelt or shoulder harness is not required (however, a safety harness or restraint strap must be used for safety).

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

This amendment corrects the omission of an “or” at the end of the subparagraph.

[20] Sub-subparagraph 20.01 (2) (c) (v) (B)

This amendment inserts an “or” at the end of the sub-subparagraph to facilitate Amendment 21.

[21] After sub-subparagraph 20.01 (2) (c) (v) (B)

This amendment provides that if use of a safety harness or restraint strap by a SOG member is considered, by the police or ADF authority responsible for the conduct of the SOG operation, to be detrimental to the conduct of the operation, the SOG member must be otherwise safely restrained in accordance with the applicable procedures in the operator’s operations manual, taking into account the nature and characteristics of the operation.

[22] Subsection 20.01 (3)

This amendment inserts definitions of SOG, SOG member and SOG operation.

[23] Subsection 24.04 (1)

This amendment modifies the application of section 24.04 dealing with the take-off performance of Category A rotorcraft within a populous area. The new application is to a Category A rotorcraft which is not being operated in accordance with its Category B supplement in the AFM; and that takes off from a place in a populous area that is a non-certified aerodrome (including an HLS), not used for the regular take-off or landing of aircraft.

[24] Subsection 24.05 (1)

This amendment is similar to that in Amendment 23, but for Category B rotorcraft.

[25] Subsection 25.04 (1)

This amendment modifies the application of section 25.04 dealing with the landing performance of Category A rotorcraft within a populous area. The new application is to a Category A rotorcraft which is not being operated in accordance with its Category B supplement in the AFM; and that lands at a place in a populous area that is a non-certified aerodrome (including an HLS), not used for the regular take-off or landing of aircraft.

[26] Subsection 25.05 (1)

This amendment is similar to that in Amendment 25, but for Category B rotorcraft.

[27] Section 26.16

The original drafting instructions for this amendment were inadvertently at variance with CASA’s policy intent which was to appropriately preserve the provisions under Civil Aviation Order 20.18 to allow the use of recognised country-approved aeroplane flight instruments and rotorcraft equipment that would deliver safety outcomes equivalent to those of the Part 91 standards. Thus, section 26.16 now provides that Division 26.3 (aeroplane flight instruments) and Division 26.4 (rotorcraft equipment requirements) do not apply to a registered aircraft if it is fitted with equipment that the type certifying authority of a recognised country determines will achieve, for the intended operation of the aircraft, a level of safety equivalent to that which would be achieved if Division 26.3 or 26.4 (as the case requires) applied.

[28] Subsection 26.22 (6)

This amendment has the effect of disapplying certain aircraft anti-collision lights to the extent that the pilot in command reasonably believes that, in the circumstances, reflection or glare from the anti-collision light system may cause a hazard to an aircraft; or if a

specific provision of another MOS expressly provides for occasions when particular lights need not be displayed. A Note references provisions where requirements for display of exterior lighting in an NVIS operation may be disappplied at the safety discretion of the pilot in command.

[29] After subsection 26.24 (2)

The amendment is consequential on Amendment 28, but for navigation lights.

[30] Paragraph 26.25 (2) (c)

This amendment makes it clear that relevant altitude alerting equipment must offer both aural and visual warnings for the flight crew.

[31] Paragraph 26.31 (b)

The original drafting instructions for this amendment were inadvertently at variance with CASA's policy intent, now implemented, which was to appropriately preserve the provisions under Civil Aviation Order 20.18 to require only an aeroplane of "a type first certificated in its country of manufacture" on, or after, 1 July 1965 (rather than "first issued with an Australian certificate of airworthiness" or after that date) to be fitted with a flight data recorder (*FDR*).

[32] Subparagraph 26.32 (a) (ii)

This amendment is consequential on Amendment 31, but for cockpit voice recorders (*CVR*).

[33] Paragraph 26.33 (a)

This amendment is consequential on Amendment 31, but for rotorcraft *FDR*s. Also, an incorrect "and" is replaced with "or".

[34] Subparagraph 26.34 (a) (i)

This amendment is consequential on Amendment 31, but for rotorcraft *CVR*s. Also, an incorrect "and" is replaced with "or".

[35] Subsections 26.43 (1) and (2)

This amendment removes a potential implication that, on a flight above FL 125 without passengers, supplemental oxygen equipment must be carried even if the aircraft never actually triggers the prescribed requirement for oxygen supply to the crew (only if at FL 125 for more than 30 minutes). Under new subsection (1), an aircraft must carry sufficient supplemental oxygen to meet the requirements set out in Table 26.43 (2). Under new subsection (2), an aircraft to which subsection (1) applies must be fitted with, or carry, supplemental oxygen equipment capable of storing and dispensing the supplemental oxygen to crew members and passengers.

[36] Paragraph 26.53 (3) (e)

This amendment relieves of the specific obligation to carry 1 hand-held fire extinguisher in the flight crew compartment if the maximum certificated passenger seating capacity is not more than 9, and the flight crew members and the passengers occupy the same compartment. There is already an obligation for 1 hand-held fire extinguisher to be readily available to the pilot in command in that shared compartment. In other words, there is no requirement for a second one in the compartment.

[37] Paragraph 26.53 (3) (f)

This amendment relieves of the specific obligation to carry 1 hand-held fire extinguisher in the flight crew compartment if the maximum certificated passenger seating capacity is more than 9, and the flight crew members and the passengers occupy the same compartment. There is already an obligation for 1 hand-held fire extinguisher to be readily available to the pilot in command in that shared compartment, and for 1 to be readily available to the passengers. In other words, there is no requirement for a third one in the compartment.

[38] Subsection 26.70 (4)

Under this amendment, transmission of aircraft flight identification by an approved Mode S transponder is optional for an aircraft that was first “certificated in its country of manufacture” before 9 February 2012. The previous reference to an aircraft that was first “issued with a certificate of airworthiness” before that date. The rationale for this amendment is similar to that for Amendments 31 to 34.

[39] Subsection 26.70 (6), the chapeau

The rationale for this amendment is similar to that for Amendments 31 to 34. This amendment is consequential on Amendment 38.

[40] Subsection 26.71 (1), the chapeau

The rationale for this amendment is similar to that for Amendments 31 to 34, and 38 and 39.

[41] Subsection 26.71 (2)

The rationale for this amendment is similar to that for Amendments 31 to 34, and 38 to 40.

[42] Subparagraph 26.79 (1) (a) (ii)

This amendment relates to the requirement for the radio altimeter to be positioned where it is instantly visible and discerning to each NVIS crew member from their station in the cockpit. This positioning requirement is made subject to subsection (2).

[43] Subsection 26.79 (2)

This amendment, related to Amendment 42, defers the application of the radio altimeter positioning requirement to 2 December 2023. This is to allow rotorcraft, which currently require modification in order to comply with the new positioning requirement, a transitional period in which to carry out the modification. This transitional period will not be extended.

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 2022 (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

The *Part 91 MOS Amendment Instrument 2022 (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).

In making a number of miscellaneous minor or machinery amendments to the MOS, *the MOS amendment* does not substantially alter the existing regulatory arrangements as applied or understood.

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 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.