



AERIAL APPLICATION ASSOCIATION OF AUSTRALIA LTD.

ABN 13 002 501 886 • ACN 002 501 886



AAAA Submission – April 2018

Part 91 - NPRM CD 15110S-2

Introduction

A basic assumption in this submission is that CASR Part 137 will be rewritten before the end of 2018 and before the operationalisation of Parts 91 and 138 – as previously discussed with CASA - to provide a range of essential variations to Part 91 and 138 for aerial application operators.

For that reason alone, AAAA has not gone into great detail in this submission, other than to bring to the attention of CASA those areas of Part 91 that either:

- need to be changed to accommodate aerial application practices
- need to be picked up in Part 137 to ensure they do not apply to aerial application operations.

For this purpose – the term ‘exemption’ is used in this submission when describing a difference to Part 91 empowered through Part 137 or another Part. This is not to be confused with the ‘exemptions’ issued under Part 11.

There is also a question of drafting simplicity as to whether a broader exemption against Part 91 contained in Part 137 would be a more useful approach, as distinct to providing individual exemptions against each Part of 91 that is either not relevant or too constrictive for aerial application operations.

Potentially, given experience with Part 137 since it was introduced in 2007, it would be worthwhile exploring a broad exemption to ensure Part 137 was largely a ‘one stop shop’ for aerial application as originally envisaged – save of course for the ‘rules of the air’ type provisions in Part 91.

In particular, attention should be paid to the difficulties created where Part 137 is silent on an issue (and consequently 137.020 is not brought into play in terms of an ‘inconsistency’ being created) and therefore regulations or orders planned to be extinguished by Part 137 and subsequent reform are still extant and applied to Part 137 operations.

Similarly, where a requirement is raised under the MOS, consideration will have to be given as to whether it is more efficient to provide an ‘exemption’ in Part 137 against the original regulation, or the relevant section of the MOS. In the comments below, AAAA has only identified the relevant regulation rather than the particular reference in the MOS.

General

RIS – why is it not available for public consultation in the same way the overall Part is? Previous CASA RIS have clearly lacked in accurate assessments of the relevant costs to industry, generally being a gross downplaying of imposts, red tape and cost.

Drafting style – far from the new CASA consultative mechanisms through ASAP delivering a more approachable, clearer and concise set of regulations, this draft is simply ‘business as usual’ from the old CASA.

This is extremely disappointing and AAAA questions the ability of CASA to deliver on the DAS commitment of completing regulatory reform without a significant change to the drafting approach to identify means of focussing on outcome-based regulations supported by Acceptable Means of Compliance, expositions and ops manuals.

The ASAP should immediately focus on the development of an overarching style of regulatory drafting and construction that complies with the government accepted principles of the ASRR Report – especially being a 3-tier system of Act/ Regs & MOS / and advisory material (especially the greater use of Acceptable Means of Compliance) with a focus on outcome-based regulations.

The **attached** Policy Paper from TAAAF deals with this issue directly at Appendix 1.

Cross Reference to other Parts – this draft makes no attempt to provide an overarching view of dependent and interrelated regulations from both the operational and licencing suites. AAAA recommends that such a tool be included so that there is a central reference point to other regulations to be read in conjunction with Part 91. This will be more important as CAR 206 is abolished/rehomed.

Specifics

- 91.045 It is not clear how this will interact with the permissions etc provided under Part 61. A cross reference or clarification might be useful.
- 91.100 2 b Use of the word ‘ensure’ is novel when compared to the 2010 draft version of Part 91 and may create an additional and unintentional liability on the part of pilots for any accident or non-compliance that may occur – even despite their best efforts. AAAA recommends a general, overarching remedy be included in the regulatory part by mention of ‘due diligence’ as a defence against any strict liability offence. The note associated with clause 91.355 confirms the creation of an evidentiary burden on a pilot in certain circumstances and AAAA is concerned at this reversal of the onus of evidence when the word ‘ensure’ is used without an accompanying overt defence of due diligence. This overt approach is used elsewhere where strict liability is imposed (see for example *NSW Pesticide Act*).
- 91.100 4 This section may inadvertently create a tension between manufacturers’ recommendations and any subsequent amending instrument such as an STC or the application of AD ENG 4 or AD ENG 5. AAAA recommends the section be removed or reviewed/amended in light of this consideration.
- 91.115 Carriage of documents – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.165/170 Formation flying – this will require an ‘exemption’ to be provided in Part 137 as is currently the case for ‘close proximity operations’
- 91.320 Fuel Requirements – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.

- 91.325 Flight planning – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.335 Matters to be checked before take-off – this will require an ‘exemption’ to be provided in Part 137 as is currently the case. Current Exemption CASA EX04/2003 applies in terms of not requiring aerial application to use approved checklists.
- 91.370 VFR Cruising levels – this will require an ‘exemption’ to be provided in Part 137.
- 91.395 Minimum Heights – VFR Flights at Night – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.400 Minimum height rules – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.403 Minimum height rules – other areas - – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.415 Specified Aircraft Performance categories – this may require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.425 Take-off and landing in low visibility - – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.427 Use of aerodromes – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.430 Aircraft may not be operated to cause a hazard – this appears to be a new requirement when compared to the 2010 locked draft of the regulation. Greater thought should be given as to what constitutes a ‘hazard’ and whose estimation of a hazard being caused is to be taken as the trigger for an offence or investigation.
- 91.450 Right of way rules for take-off and landing – this may require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.480 Take off or landing at a noncontrolled aerodrome – this will require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.490 Manoeuvring areas – this may require an ‘exemption’ to be provided in Part 137 as is currently the case.
- 91.495 Landing and taking off into wind – an ‘exemption’ is provided in this clause for aerial application, but an accompanying ‘exemption’ will need to be provided in Part 137.
- 91.500 After joining the circuit – this will require an ‘exemption’ to be provided in Part 137.
- 91.505 Maintaining track after – this will require an ‘exemption’ to be provided in Part 137.
- 91.520 Communicating at aerodromes - While it is extremely difficult to identify either the intent or the method of compliance for this regulation and it needs simplification– this will require an ‘exemption’ to be provided in Part 137.
- 91.540 Parked Aircraft not to create a hazard – this may require an ‘exemption’ to be provided in Part 137, especially for emergency fire operations.
- 91.545 Safety when aircraft operating on the ground – this may require an ‘exemption’ to be provided in Part 137 as is currently the case.

- 91.620 AAAA would like the opportunity to discuss the implications of this proposed regulation for use of other than standard aviation fuels such as diesel – which can be used in certain circumstances as approved by the manufacturer.
- 91.640 Operating electronic devices when refuelling – clarification may be required if radio contact with the refueller is required in an Operations Manual or similar.
- 91.650 AAAA would like to opportunity to discuss the implications of this requirement further given Part 137 and the AAAA Standard Operations Manual
- 91.655 Hot refuelling – general - – this will require an ‘exemption’ to be provided in Part 137.
- 91.660 This may cause significant problems for application aircraft that do not have hot refuelling in the flight manual because of an engine change to turbine via STC, for example – this will require an ‘exemption’ to be provided in Part 137.
- 91.670 Carriage of cargo – this will require an ‘exemption’ to be provided in Part 137 if cargo is broadly defined and includes a load for aerial application – which may be caught up in the ‘dropping’ definition used in this regulation.
- 91.720 Reporting of contraventions relating to emergencies - AAAA is concerned at the general nature of this provision, the difficulty with knowing which regulations if any may have been contravened, and the issue surrounding protection of the pilot from self-incrimination and potentially subsequent action from CASA – disciplinary or administrative – which has occurred in the past. While AAAA does not necessarily oppose the intent of the regulation, its wording needs refinement and greater protection for the pilot must be built into the regulation.
- 91.730 Dropping things from an aircraft- – this will require an ‘exemption’ to be provided in Part 137. Again, the use of the term ‘hazard’ can be very open to interpretation and could be misused in an attempted punitive way if the ‘hazard’ is seen as environmental or a nuisance.
- 91.735 Picking up or setting down people or things during a flight – for rotary operations, this is a constant in aerial application, for example, using a spreader on a line or firefighting bucketing. This will require an ‘exemption’ to be provided in Part 137.
- 91.770 etc Passenger provisions - The term ‘passengers’ and ‘crew’ are not particularly useful in terms of providing appropriate safety coverage for persons on an aircraft who are there for the purpose of the aerial work mission – but who are not required for the operation of the aircraft. Previous lengthy discussions with CASA around this issue have occurred with sensible resolution in the previous Part 138 and related working groups under the former SCC. The resolution was for the introduction – in Parts 138 and 137 – of an additional category of person being ‘informed participants’. This could then cover the safe carriage of people essential to the mission such as loader/mixers for aerial application operations or firefighters on firefighting missions. This would also help in clarifying the role of ‘charter’, especially around a fireground. AAAA strongly recommends an ‘exemption’ to this part be provided in Part 137 and Part 138 to create the category of ‘informed participants’.
- 91.895 Use of radio – qualifications – CASA could use this as an opportunity to clarify the role of emergency fire services personnel currently operating radios under the provision of an exemption from CASA.
- 91.900 Use of radio – this will require an ‘exemption’ to be provided in Part 137. Radio clutter is a very real safety issue that can best be managed by not requiring aerial applicators to make

- otherwise mandatory calls for the hundred or more take-offs and landings they may complete in a day, especially when their operating strips are remote from an 'aerodrome'.
- 91.910 Listening watch – fire agencies require the fitting of multiple radios to firebombing aircraft to aid communications direct from aircraft to fire agency local and remote commands. To cope with radio management and human factors around attention, fire pilots may rely on a fire attack supervisor to monitor radios while they are focused on flying the actual bombing run. This may require an 'exemption' to be provided in Part 137.
- 91.1035 Weight limitations – this will require an 'exemption' to be provided in Part 137 as is currently the case.
- 91.1090 Loading of aircraft – this may require an 'exemption' to be provided in Part 137.
- 91.1150 Instruments – this will require an 'exemption' to be provided in Part 137 as is currently the case.
- 91.1525 Restricted category – AAAA would appreciate the opportunity to consult with CASA in depth on this issue as most aerial application aircraft operate in this category of certification. For example, AAAA comments above regarding use of the term 'passenger' as distinct from the more useful term 'informed participant' should be considered in this section as well.
- 91.1530 Restricted category – kind of operations – AAAA notes that aerial application is not mentioned in this section. AAAA believes an overt mention of this significant use of the category should be included.
- 91.1690 MELs – AAAA would welcome the addition of a standard MEL for an application aircraft in both Part 137 and in the AAAA Standard Operations Manual. AAAA is keen to work with CASA to achieve this.

Further Information

If further information on or explanation of this submission is required, please do not hesitate to contact AAAA on 02 6241 2100.

Yours sincerely

Phil Hurst
CEO - AAAA

Attachments – Appendix 1 – TAAAF Policy on *Building Better Regulations – March 2018*.

TAAAF

The Australian Aviation
Associations' Forum

Building Better Aviation Regulations by December 2019

A policy paper from TAAAF – March 2018

Issue

Australia's aviation safety record is one of the best in the world. The aim of government regulation should be to provide an effective policy and regulatory safety framework to sustain that record and to adapt to a rapidly growing and changing industry.

The three key objectives in achieving these goals should be to:

- address unmitigated risks relevant to different aviation sectors in a timely manner
- provide easily understood legal requirements as minimum acceptable safety standards and
- not unduly impede the ongoing development of the industry by unnecessary regulatory complexity or associated cost.

As was highlighted by the Aviation Safety Regulation Review (ASRR) report, the development of regulations under the Regulatory Reform Program (RRP) has been hampered by:

- the absence of a strategic policy development framework that is based on an understanding of risk and capabilities relevant to different sectors of the industry, and
- regulatory outcomes that are complex and driven by a legalistic, prescriptive approach to compliance.

The rewriting of Australia's aviation regulations has, as a result, been plagued with issues and disagreements that have dragged on for almost two decades. To say the least, all those involved, both in CASA and in the industry, have acute regulatory fatigue.

The tools to address these regulatory issues are well known and are incorporated into ICAO recommendations and the practices of other leading aviation nations including the US, the EU, Canada and New Zealand. They are addressed in this paper.

Regulatory program timeframe

The aim of completing the remaining parts of the regulatory program by end 2018 was initially well received. However, as that deadline gets closer, TAAAF is questioning whether the timetable is achievable.

TAAAF offers the following recommendations for discussion in an effort to identify a new way to manage these regulatory challenges. TAAAF believes that with a clearer regulatory policy and with renewed industry support it should be possible for both the outstanding regulations and remedial action on those regulations that have already been promulgated to be completed within a two-year timeframe.

The Australian Aviation Associations' Forum (TAAAF)

02 6162 0305 | secretariat@taaf.org

11/26-28 Winchcombe Court

Mitchell ACT 2911

Background

Strategic Policy Framework

The ASRR report identified the need for CASA to establish a safety oversight and risk management hierarchy based on a classification of operations to ensure that regulations and surveillance priorities were proportionate to the safety risk.

Without a recognised system for managing risk, CASA and the Aviation Safety Advisory Panel (ASAP) will continue to find it difficult to work through and complete the regulatory program in a reasonable timeframe.

Consultation processes and Aviation Safety Advisory Panel

CASA has made positive advances in the improvement of the consultative structure through the establishment of the ASAP and industry acknowledges that this is the first critical instalment of an improved regulatory reform system.

However, more work on the 'back end' of the system is needed.

For example, the early work of the ASAP, through the technical working group which has examined the rewritten Part 91, has revealed that while the policy intent has generally been agreed, the resulting draft regulation is not consistent with that policy intent. It has been written in what is now the all-too familiar highly prescriptive and complex legal drafting style.

The establishment of the ASAP process has injected a new level of industry advisory involvement into the regulatory program. The Part 91 example has indicated that to complete the regulatory program it would be helpful for the principles upon which regulations are drafted to be re-examined.

New regulatory drafting principles

Industry has long been of the view that Australia's safety regulations need to be reduced in size and drafted in a style that is concise and easy to understand by both the regulator and the industry.

To achieve this, the ASRR report called for a change to the drafting framework for aviation safety regulations, specifically for the introduction of a consistent three-tier structure of Acts, Regulations and Standards drafted in a simplified and succinct manner. This was agreed to in principle by the Government. The primary intention of this recommendation was to remove detail out of the regulations, making them short and succinct, with guidance material included at the third tier.

TAAAF believes that the ASAP consultation process will be enhanced if the following principles form the basis of a new regulatory drafting policy:

- Three tiers of regulation being the Act, Regulations/MOS (disallowable instruments) and advisory material including Acceptable Means of Compliance;
- Outcome-based regulations that recognise that the regulator and industry are both responsible for managing risk; and the
- Removal of penalties and strict liability in outcome-based regulations.

TAAAF believes there are advantages of a nuanced three tier structure of Act, regulations/ MOS/ Instruments (disallowable instruments) and advisory material including Acceptable Means of Compliance.

This is the approach which has been broadly adopted by other leading aviation nations. This approach could significantly simplify the task of completing regulatory reform.

Recommendations

TAAAF recommends to ASAP that to establish a strategic policy framework, CASA:

1. Engage with industry through ASAP to identify and develop a policy hierarchy to guide the regulatory development process.
2. Establish a strategic policy framework that includes Board policy statements, DAS Directives and Sector Risk Profiles that will assist in keeping regulatory development and review focused to preapproved objectives.
3. In pursuing the establishment of a strategic policy framework, develop a clear classification of operations policy that will inform the development of Sector Risk Profiles and regulations based on the different risks facing each sector.
4. Establish a policy development pathway and management system within CASA that ensures decisions taken in the field or at lower levels of the organisation are more clearly visible to senior management and vice a versa.

TAAAF recommends that for the development of drafting principles, ASAP convene a Technical Working Group to:

1. Examine CASA's regulatory drafting framework and assess whether it is consistent with the objectives of ASRR recommendations 30 and 31.
2. Make recommendations back to the ASAP on the regulatory drafting framework.

The TAAAF recommends to ASAP that for the regulatory reform program, CASA:

1. Re-assess the current timeframe for completion of the regulatory reform program by the end of 2018 - which should include the work involved in producing the remaining regulations and the consultative and legal processes involved. Adequate time needs to be allocated for a review of each regulation by technical working groups commissioned by the ASAP. Allowance may need to be made for significant redrafting which could elongate the timeframe.
2. Establish key principles for regulatory drafting - these issues are discussed in this paper.
3. Consider an alternate timeframe that could involve:
 - Agreement to a new strategic framework to identify risk and required mitigation.
 - Adoption of a nuanced three tier regulatory framework.
 - Agreement to new principles for outcome-based regulatory drafting which could simplify drafting
 - over a shorter timeframe.
 - A program of remedial action to fix the major issues with the existing regulations.
 - A program to complete outstanding regulations.
 - Restatement of the specific involvement of the ASAP and its technical working groups in the review
 - process.

- A renewed commitment from industry to support the revised program and provide resources to
- complete it to an agreed timeframe.
- A two-year program and
- An on-going stakeholder communications program.

ENDS