

Explanatory Statement

Civil Aviation Regulations 1988

CASA EX70/19 — Implementation of Drug and Alcohol Management Plans (Non-DAMP Organisations) Instrument 2019

Purpose

The purpose of *CASA EX70/19 — Implementation of Drug and Alcohol Management Plans (Non-DAMP Organisations) Instrument 2019* (the **instrument**) is to enable a person required to have a drug and alcohol management plan (a **DAMP**) under the *Civil Aviation Safety Regulations 1998 (CASR)* (a **DAMP organisation**) to have a DAMP-like program of a person other than a DAMP organisation (a **non-DAMP organisation**) apply instead of the person's own DAMP in relation to particular employees of the non-DAMP organisation. These employees are those who provide, or are available to provide, the DAMP organisation with safety-sensitive aviation activities (**SSAAs**).

The instrument achieves this purpose by exempting a DAMP organisation from regulation 99.035 and subregulation 99.030 (4) of CASR to a specified extent, and only if specified circumstances apply. These circumstances include that the DAMP organisation has agreed in writing that the DAMP-like program is to apply in relation to the employee of the non-DAMP organisation.

A DAMP organisation that has agreed to this arrangement with a non-DAMP organisation must still apply its DAMP in specified circumstances such as where an employee is suspected of being under the influence of drugs or alcohol.

The instrument issues directions on related matters to DAMP organisations and non-DAMP organisations and provides for a delegation necessary for approval by the Regional Manager Eastern of the Civil Aviation Safety Authority (**CASA**) of DAMP-like programs.

The instrument aims to remove the cost and administrative burden to industry in requiring a DAMP organisation to cover contracted employees under its DAMP when the non-DAMP organisation has its own effective plan in place for the management of drugs and alcohol usage by these employees.

Legislation

Section 98 of the *Civil Aviation Act 1988* (the **Act**) empowers the Governor-General to make regulations for the Act and in the interests of the safety of air navigation. Relevantly, the Governor-General has made CASR and the *Civil Aviation Regulations 1988 (CAR)*.

Section 94 of the Act provides for delegations by the Director of all or any of CASA's powers under the Act, the regulations or an instrument made under the Act or the regulations, to an officer. Subsection 94 (2) provides for delegations to officers who hold, or perform the duties of, an office that is equivalent to a position occupied by an SES employee or acting SES employee.

Subpart 11.F of CASR provides for the granting of exemptions from particular provisions of the regulations. Subregulation 11.160 (1) of CASR provides that, for subsection 98 (5A) of the Act, CASA may grant an exemption from a provision of the regulations.

Under subregulation 11.160 (2) of CASR, an exemption may be granted to a person or a class of persons, and may specify the class by reference to membership of a specified body or any other characteristic.

Under subregulation 11.160 (3) of CASR, an exemption may be granted on application by a person or on CASA's own initiative.

Under subregulation 11.170 (3) of CASR, in deciding whether to grant an exemption on application, CASA must regard as paramount the preservation of at least an acceptable level of aviation safety. CASA has regard to the same test when deciding whether to grant an exemption on its own initiative.

Regulation 11.205 provides that CASA may impose conditions on an exemption if necessary in the interests of the safety of air navigation. Under regulation 11.210, it is a strict liability offence not to comply with the obligations imposed by a condition.

Regulation 11.225 of CASR requires an exemption to be published on the Internet. Under subregulation 11.230 (1), the maximum duration of an exemption is 3 years.

Subpart 11.G of the CASR provides for CASA to issue directions in relation to matters affecting the safety of air navigation. Under paragraph 11.245 (1) (a) of CASR, CASA may, by instrument, issue a direction about any matter affecting the safe navigation and operation of aircraft. Subregulation 11.245 (2) of CASR provides that CASA may issue such a direction if CASA is satisfied that it is necessary to do so in the interests of the safety of air navigation, if the direction is not inconsistent with the Act, and for the purposes of CASA's functions.

Under paragraph 11.250 (a) of CASR, a direction under regulation 11.245 ceases to be in force on the day specified in the direction. Under regulation 11.255 it is an offence of strict liability to contravene a direction under regulation 11.245.

Section 3 of the Act defines *civil aviation authorisation* as an authorisation under this Act or the regulations to undertake a particular activity (whether the authorisation is called an Air Operator's Certificate (*AOC*), permission, authority licence, certificate, rating or endorsement or is known by some other name).

Section 31 of the Act and regulation 201.004 of CASR provides for merits review of civil aviation authorisations.

DAMPs

Part 99 of CASR is made for section 34 of the Act and prescribes a scheme for the regulation of alcohol and certain drug use by persons conducting SSAAs.

Subpart 99.B of CASR deals with DAMPs. A DAMP is defined in regulation 99.010 of CASR as meaning a drug and alcohol management plan that complies or purports to comply, with the requirements of regulation 99.045 of CASR.

Under subregulation 99.030 (1) of CASR, a DAMP organisation must develop a DAMP if it has employees who perform applicable SSAA (*SSAA employees*) and is on a list of the kinds of organisations defined in subregulation 99.030 (2), for example, AOC holders, maintenance organisations, aerodrome operators and air traffic service providers.

Under regulation 99.035 of CASR, a person who is required to develop a DAMP must implement it by giving effect to regulation 99.080 and making the DAMP available to the person's SSAA employees as required by Subpart 99.B.

Under paragraph 99.045 (a) of CASR, a DAMP organisation's DAMP must apply to all applicable SSAA employees of the organisation. *Employee* is defined in regulation 99.010 to include *DAMP contractors*.

Applicable SSAA is defined in subregulation 99.015 (2), and includes activities performed in aerodrome testing areas (e.g. the tarmac and related areas) as well as flight crew duties, maintenance, aircraft refuelling, security, baggage handling, air traffic control etc.

Under paragraph 99.045 (b) of CASR, a DAMP must include a drug and alcohol education program, a drug and alcohol testing program and a drug and alcohol response program (for example, in relation to rehabilitation).

Subregulation 99.065 (2) requires that a DAMP include requirements to not permit a SSAA employee to perform, or be available to perform, a SSAA in specified circumstances related to: (1) the employee's faculties being suspected of being impaired due to the employee being under the influence of prescribed drugs or alcohol; or (2) the SSAA employee being involved in an accident or serious incident.

Regulation 99.080 of CASR sets out requirements for implementation of a DAMP, which include SSAA employees attending the organisation's drug and alcohol education program.

Regulation 99.090 of CASR provides for audit of DAMP organisations and regulation 99.095 provides for compliance by providing for CASA to be able to direct that changes to be made to a DAMP or that a new DAMP be prepared.

Background

CASA recognises that a DAMP organisation may have difficulty in devising effective DAMPs for employees of a non-DAMP organisation who provide SSAAs for the DAMP organisation e.g. a ground handling agent contracted to an AOC holder.

Industry stakeholders such as ground handling agents, other ground service providers and regional aerodromes have indicated to CASA that they would welcome the ability to develop and implement their own DAMP-like programs to be approved by CASA. Many of these organisations already have plans for the management of drugs and alcohol in place for their employees. The instrument would also assist their employees who provide SSAAs to multiple DAMP organisations to no longer be subject to multiple DAMPs.

In these circumstances, CASA considers it appropriate to offer these businesses a simpler avenue for compliance without sacrificing safety outcomes.

The arrangements implemented by the instrument are similar to the arrangements established by the U.S Federal Aviation Administration (the *FAA*). Under the Federal Aviation Regulations in Chapter 1 of Title 14 of the Code of Federal Regulations (CFR), Part 120 — Drug and Alcohol Testing Program, a contractor that is a non-regulated organisation may submit a drug and alcohol testing program to the FAA's Drug Abatement Division for review and approval. Once approval is obtained, the contractor implements its drug and alcohol

testing program, which may be accepted by a regulated organisation to which they are contracted to provide safety-sensitive functions.

Overview of instrument

The effect of the instrument is to exempt a DAMP organisation from the following requirements of CASR:

- subregulation 99.030 (4) of CASR, to the extent that it requires the DAMP organisation to comply with paragraph 99.045 (d) of CASR in relation to a non-DAMP organisation's employee who performs, or is available to perform, an applicable SSAA for the DAMP organisation; and
- regulation 99.035 of CASR, to the extent that it requires the DAMP organisation to implement its DAMP by giving effect to regulation 99.080 of CASR in relation to a non-DAMP organisation's employee who performs, or is available to perform, an applicable SSAA for the DAMP organisation.

This exemption only applies if the non-DAMP organisation has its own CASA-approved DAMP-like program the DAMP organisation has agreed is to apply to these employees instead of its DAMP. The instrument ensures that the content of a DAMP and a DAMP-like program are effectively the same by providing that a DAMP-like program must meet the requirements of regulation 99.045 of CASR, modified to apply to the non-DAMP organisation and its DAMP-like program.

A decision by CASA to refuse to approve a plan of a non-DAMP organisation as a DAMP-like program would be subject to merits review before the Administrative Appeals Tribunal under section 31 of the Act or regulation 201.004 (Table 201.004, item 1) of CASR. Under regulation 11.056 of CASR, an approval may be granted subject to conditions.

The exemption is subject to conditions requiring the DAMP organisation to notify CASA and the non-DAMP organisation of particular matters if it implements its DAMP regarding a non-DAMP organisation's employee in relation to the matters in subregulation 99.065 (2) of CASR. These conditions are described in more detail below.

The instrument also includes directions made under regulation 11.245 of CASR. The first set of directions is for exempted DAMP organisations. Each exempted DAMP organisation must keep records that evidence its grounds for being satisfied on reasonable grounds that the non-DAMP organisation is implementing its DAMP-like program in relation to the employees. These directions cease to be in force at the end of 1 March 2027.

The second set of directions is for non-DAMP organisations in relation to implementation and review of their DAMP-like programs. The directions ensure non-DAMP organisations are subject to the same kind of requirements that DAMP organisations are subject to in relation to implementation, review and audit of their DAMPs.

CASA has assessed the impact of the instrument on aviation safety and is satisfied that, in all the circumstances, an acceptable level of aviation safety is preserved by the directions the instrument imposes on non-DAMP organisations that have a DAMP-like program and the conditions imposed on DAMP organisations that contract with these organisations.

Content of instrument

Section 1 of the instrument sets out the name of the instrument.

Section 2 sets out the duration of the instrument and provides that it commences on the day after it is registered and is repealed at the end of 30 September 2021.

Section 3 contains definitions of terms used in the instrument. A key defined term is ***DAMP-like program***. A DAMP-like program is a plan of a non-DAMP organisation that would meet the requirements of regulation 99.045 of CASR if that regulation was applied in accordance with section 4 of the instrument and is approved in writing by CASA or by CASA's Regional Manager Eastern. The Regional Manager Eastern has responsibility within CASA for the regulatory oversight of implementation of drug and alcohol management plans. As at commencement of this instrument, other CASA officers who have been delegated CASA's power to approve in writing a DAMP-like program are those listed in both Schedule 1 of CASA instrument 02/18 and Schedule 1 of CASA instrument 114/17.

Section 4 sets out how regulation 99.045 of CASR is to be applied for the purposes of the definition of ***DAMP-like program***.

Section 5 sets out an exemption from compliance with

- subregulation 99.030 (4) of CASR, to the extent that it requires the DAMP organisation to comply with paragraph 99.045 (d) of CASR in relation to a non-DAMP organisation's employee who performs, or is available to perform, an applicable SSAA for the DAMP organisation; and
- regulation 99.035 of CASR, to the extent that it requires the DAMP organisation to implement its DAMP by giving effect to regulation 99.080 of CASR in relation to a non-DAMP organisation's employee who performs, or is available to perform, an applicable SSAA for the DAMP organisation.

The exemption only applies if:

- there is a contract between the DAMP organisation and the non-DAMP organisation for provision of applicable SSAA to the DAMP organisation
- an employee of the non-DAMP organisation performs, or is available to perform, the applicable SSAA for the DAMP organisation
- the non-DAMP organisation has a DAMP-like program that covers the employee;
- the DAMP organisation has agreed in writing that the DAMP-like program covering the employee is to apply instead of the DAMP of the DAMP organisation in relation to the employee
- the DAMP organisation is satisfied on reasonable grounds that the non-DAMP organisation is implementing its DAMP-like program in relation to the employee.

The obligation on the non-DAMP organisation to have a DAMP-like program that covers the employee is ongoing in nature, insofar as the DAMP organisation cannot rely on the exemption at a particular point in time in relation to an employee of the non-DAMP organisation who performs, or is available to perform, applicable SSAA for the DAMP organisation, unless it is satisfied at that point in time that the non-DAMP organisation's DAMP-like program is being implemented in relation to the employee.

Subsection 5 (2) provides that the exemption does not apply in relation to the DAMP organisation's implementation of its DAMP regarding the employee of the non-DAMP organisation to the extent that the DAMP gives effect to the matters mentioned in subregulation 99.065 (2). A note explains that these requirements relate to not allowing a SSAA employee to perform, or be available to perform an applicable SSAA if a DAMP

supervisor suspects an employee's faculties may be impaired due to the person being under the influence of a testable drug or of alcohol, or if there is an accident or serious incident involving such an employee.

Section 6 sets out the conditions on the exemption in section 5. The DAMP organisation must notify the non-DAMP organisation if it implements its DAMP regarding a non-DAMP organisation's employee in relation to the matters mentioned in subsection 99.065 (2) of CASR. The DAMP organisation must also notify CASA in writing if the DAMP organisation does not permit the employee to perform or be available to perform, an applicable SSAA for the DAMP organisation. These notifications must be given as soon as practicable.

Section 7 sets out directions under regulation 11.245 of CASR applying to an exempted DAMP organisation. The DAMP organisation must keep records that evidence its grounds for being satisfied that the non-DAMP organisation is implementing its DAMP-like program in relation to the employee of the non-DAMP organisation. Each record must be kept in a secure location for 5 years from the date that the record is created and either the record, or any parts of the record that relates to the results of drug or alcohol testing must be deleted within the following 6 months.

To ensure the enforceability of these directions, subsection 7 (2) provides that they cease to be in force at the end of 31 March 2027.

Section 8 sets out directions under regulation 11.245 of CASR applying to a non-DAMP organisation that has a DAMP-like program. The purpose of section 8 is to impose obligations on a non-DAMP organisation in relation to its DAMP-like program that are as similar as possible to those imposed on a DAMP organisation under Part 99 of CASR in relation to the implementation, review and audit of a DAMP.

Subsection 8 (2) sets out directions providing for implementation and review of a DAMP-like program. A non-DAMP organisation that has a DAMP-like program must meet the requirements of regulations 99.080 and 99.085 of CASR applied in accordance with subregulation (2).

Subsection 8 (3) provides, however, that the requirements in subsection 8 (2) for implementation of the DAMP-like program do not apply during any implementation by the DAMP organisation of its DAMP to give effect to the matters mentioned in subregulation 99.065 (2) of CASR regarding an employee of the non-DAMP organisation. This avoids duplication of the requirements that would apply to the employee if the DAMP organisation decides, for example, to action the "DAMP supervisor process" under subregulation 99.065 (2).

Subsection 8 (4) sets out a direction requiring a non-DAMP organisation that has a DAMP-like program to make it available to each of its employees who performs or is available to perform, applicable SSAA for the DAMP organisation. This requirement is similar to the requirement for DAMP organisations to make their DAMPs available to their employees.

Subsection 8 (5) sets out a direction that a non-DAMP organisation that has a DAMP-like program must provide CASA, on request, with specified information and records relating to the development and implementation of its DAMP-like program and a copy of the program.

A non-DAMP organisation must also comply with any direction by CASA to make a change specified by CASA to its DAMP-like program, and any other specified kinds of directions.

Legislation Act 2003 (the LA)

Paragraph 98 (5A) (a) of the Act provides that CASA may issue instruments in relation to matters affecting the safe navigation and operation or the maintenance of aircraft.

Additionally, paragraph 98 (5AA) (a) of the Act provides that an instrument issued under paragraph 98 (5A) (a) is a legislative instrument if the instrument is expressed to apply in relation to a class of persons. Subsection 8 (4) of the LA also provides that an instrument is a legislative instrument if it determines the law or alters the content of the law, rather than determining particular cases in which the law is to apply or is not to apply.

The instrument exempts DAMP organisations (a class of persons) from compliance with subregulation 99.030 (4) and regulation 99.035 of CASR to the extent specified. In addition, the instrument issues directions to exempted DAMP organisations, and also to non-DAMP organisations in relation to their DAMP-like programs. The instrument is, therefore, a legislative instrument, and is subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Consultation

Initial consultation with stakeholders on the policy implemented in the instrument was undertaken by CASA at the GOSAFE forums held in March 2018, July 2018, November 2018, April 2019 and July 2019. GOSAFE is a consultation forum hosted by CASA collaboratively with industry. GOSAFE comprises representatives of the airline industry, aerodromes, ground handling agents and relevant government agencies.

Stakeholders were generally supportive of the proposal at these forums. The consultation identified that some stakeholders considered the requirement for a DAMP organisation to implement its DAMP in relation to employees of contracted non-DAMP organisations to be burdensome and impractical, given the cost in terms of finance and resources expended for a DAMP contractor to meet DAMP requirements of multiple Air Operator's Certificate holders or aerodromes.

CASA also circulated an earlier version of this instrument in June 2019 to the GOSAFE attendees seeking their comment by 20 June 2019 but noting additional time could be provided if required. A small number of responses were received in relation to the draft and these were supportive of the proposal.

CASA is satisfied that this consultation is appropriate and reasonably practicable for this instrument for section 17 of the LA.

Office of Best Practice Regulation (OBPR)

A Regulation Impact Statement (RIS) is not required in this case, as the exemption is covered by a standing agreement between CASA and OBPR under which a RIS is not required for exemptions or directions (OBPR id: 14507).

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights at Attachment 1 has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Making and commencement

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

The instrument commences on the day after it is registered and is repealed at the end of 30 September 2021. The directions in section 7 of the instrument cease to be in force at the end of 31 March 2027.

Statement of Compatibility with Human Rights

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

CASA EX70/19 — Implementation of Drug and Alcohol Management Plans (Non-DAMP Organisations) Instrument 2019

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 purpose of this legislative instrument is to grant an exemption under Division 11.F.1 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

Subpart 99.B of CASR deals with DAMPs. A DAMP is defined in regulation 99.010 of CASR as meaning a drug and alcohol management plan that complies, or purports to comply, with the requirements of regulation 99.045 of CASR. Subpart 99.B requires a person who is required to under subregulation 99.030 (1) of CASR to have a DAMP (a **DAMP organisation**) to implement its DAMP in relation to the employees (the **SSAA employees**) of the organisation who perform, or are available to perform, specified safety-sensitive aviation activities (the **applicable SSAAs**). Under Part 99 of CASR, an employee of a DAMP contractor who performs applicable SSAAs for a DAMP organisation is a SSAA employee of the DAMP organisation.

Examples of DAMP organisations are Air Operator's Certificate holders, Certified Aerodromes, persons approved as an aerodrome rescue and firefighting service (ARFFS) and air traffic services (ATS) training providers. An example of a non-DAMP organisation is a ground handling agent.

The legislative instrument exempts a DAMP organisation, where there is a contract between the DAMP organisation and an organisation other than a DAMP organisation (a **non-DAMP organisation**) for the non-DAMP organisation to provide an applicable SSAA for the DAMP organisation, and other stated circumstances apply, from compliance with:

- regulation 99.035 of CASR, to the extent that the non-DAMP organisation must implement its DAMP in relation to an employee of a non-DAMP organisation's performance of, or availability to perform, an applicable SSAA for the DAMP organisation
- subregulation 99.030 (4) of CASR, to the extent that it requires the DAMP organisation to comply with paragraph 99.045 (d) of CASR in relation to a non-DAMP organisation's employee who performs, or is available to perform, an applicable SSAA for the DAMP organisation.

The exemption enables the DAMP organisation to rely on the implementation of a DAMP-like program by the non-DAMP organisation, so that there is no duplication in

DAMP requirements with which an employee of a non-DAMP organisation that performs applicable SSAA for a DAMP organisation must comply.

The instrument also includes related directions and a related delegation providing for approval of plans of non-DAMP organisation as DAMP-like programs.

Many non-DAMP organisations already have plans for the management of drug and alcohol in place for their employees. The instrument would also assist their employees who provide SSAAs to multiple DAMP organisations to no longer be subject to multiple DAMPs. However, the instrument does require the DAMP organisation to apply its DAMP in specified circumstances, such as where an employee is suspected of being under the influence of drugs or alcohol.

The legislative instrument includes directions under regulation 11.245 of CASR for the DAMP organisation to keep records relating to the implementation of a DAMP-like program by a non-DAMP organisation and directions for the non-DAMP organisation, including in relation to its implementation and review of its DAMP-like program.

Human rights implications

This legislative instrument engages positively with the right to privacy by reducing the range of circumstances in which some persons working in the aviation industry may be required to submit to drug and alcohol testing.

This legislative instrument engages with the right to work and rights at work by potentially reducing the range of circumstances in which a person employed by a non-DAMP organisation with as a DAMP-like program who performs SSAAs for multiple DAMP organisations may be required to submit to drug and alcohol testing. This is because, provided the DAMP organisations agree, the person may no longer be subject to multiple DAMPs.

Any risks associated with a potential reduction of the level of health and safety in relevant workplaces if an employer does not identify that a person is working under the influence of drugs or alcohol under its own DAMP are mitigated by the conditions on the exemption for DAMP organisations, and the directions in the instrument for non-DAMP organisations which ensure appropriate implementation, review and audit of, and compliance with, their DAMP-like programs. The exemption conditions and directions in the instrument aim to manage the risks associated with alcohol and other drug impacts on aviation. A DAMP organisation may also include provision in its contract with a non-DAMP organisation for additional onsite testing of all employees and contractors, for example, in the event of an accident or serious incident.

The engagement with the right to work and rights at work are reasonable and proportionate to the risks associated with the exemption give the conditions and directions in the instrument.

Conclusion

This legislative instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate. It also promotes the protection of human rights by reducing circumstances in which drug and alcohol testing is conducted.