

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX16/21 — CASR Subpart 99.B DAMP Requirements for Foreign Air Transport AOC Holders Exemption 2021

Purpose

The purpose of *CASA EX16/21 — CASR Subpart 99.B DAMP Requirements for Foreign Air Transport AOC Holders Exemption 2021* (the **instrument**) is to exempt foreign air transport Air Operator's Certificate (**AOC**) holders engaged in international air navigation in Australia from the requirement in Part 99 of the *Civil Aviation Safety Regulations 1998* (**CASR**) to develop and implement a drug and alcohol management plan (**DAMP**), provided that certain conditions are met. The instrument reissues a similar exemption in instrument *CASA EX37/19 — CASR Subpart 99.B DAMP Requirements for Foreign Air Transport AOC Holders Exemption 2019*, which expires at the end of 28 February 2021 (**CASA EX37/19**).

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**).

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 safety-sensitive aviation activities (**SSAA**).

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 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). Other requirements to be included in DAMPs are set out in regulations 99.055 and 99.060 of CASR.

Under subregulation 99.030 (1) of CASR, an 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), which includes AOC holders.

DAMP organisation is defined in regulation 99.010 as meaning a person that is required to have a DAMP under subregulation 99.030 (1).

Applicable SSAA are specified in subregulation 99.015 (2) of CASR, and include activities on the "airside" of an aerodrome (i.e. the tarmac and related areas), including the aerodrome testing area, as well as flight crew duties, maintenance, aircraft refuelling, security, baggage handling and air traffic control.

Subregulation 99.050 (2) of CASR sets out the circumstances in which drug and alcohol testing must be conducted on SSAA employees. Regulation 99.065 of CASR sets out the circumstances in which a DAMP organisation must not permit an employee to perform, or be available to perform, an applicable safety-sensitive aviation activity. These circumstances generally relate to when the organisation is aware that a positive result for a drug or alcohol test has been recorded for the employee.

Production of identification

Regulation 99.325 of CASR requires employees to provide, on request by an approved tester, the kinds of photographic identification specified in subregulation 99.325 (2) of CASR.

Foreign air transport AOCs

Under section 7 of the Act (extra-territorial application of the Act), and sections 27 and 27AE of the Act, the Civil Aviation Safety Authority (*CASA*) may issue a foreign air transport AOC authorising the operation of a foreign registered aircraft for flights that are not regulated domestic flights. The grant of such AOCs is now substantially regulated under Part 129 of CASR. The holder of a foreign air transport AOC is an AOC holder for subregulation 99.030 (1) and is subject to the requirements in Part 99 of CASR relating to DAMPs. (As part of the ANZA mutual recognition agreements, aircraft registered in New Zealand are not foreign registered aircraft and would not be issued with an Australian AOC — see the *Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand) Act 2006*.)

Provisions for extra-territorial application of Part 99 of CASR

Under paragraph 7 (a) of the Act dealing with its extra-territorial application, the Act extends to “matters relating to foreign registered aircraft flying into or out of Australian territory or operating in Australian territory”. “Foreign registered aircraft” are aircraft registered in a foreign country.

Under subsections 34 (1) and (2) of the Act “[t]he regulations may make provision for and in relation to...” DAMPs and SSAA testing. This regulation-making power is broad and has no express territorial limitation imposed upon it.

Regulation 2C of CAR provides that CASR is to be read with, and as if it formed part of, CAR. However, in the event of any inconsistency between the 2 sets of regulations, CASR must prevail.

Paragraph 3 (1) (a) of CAR provides that “subject to these Regulations [meaning CASR and CAR], these Regulations apply to and in relation to: (a) international air navigation within Australian territory”.

Part 99 of CASR contains no provisions, express or implied, from which it might reasonably be concluded that the Part was not to be read as one with CAR. Being read as one with CAR, Part 99 applies “to and in relation to international air navigation within Australian territory” — but “subject to these Regulations”. Confinement of the application of Part 99 to international air navigation “within Australian territory” only is, therefore, subject to the other regulations.

Part 99 expressly applies to AOC holders for foreign registered aircraft flying into, and out of, Australia.

Exemptions under CASR

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.

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 11.175 (4) of CASR, in deciding whether to reissue an exemption, 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 of CASR 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) of CASR, the maximum duration of an exemption is 3 years.

Background

This exemption has previously been issued as the following CASA instruments:

- CASA EX08/09, *Exemption — CASR Part 99 DAMP requirements for foreign aircraft AOC holders (CASA EX08/09)*
- CASA EX37/11, *Exemption — CASR Part 99 DAMP requirements for foreign aircraft AOC holders*
- CASA EX146/12, *Exemption — CASR Subpart 99.B DAMP requirements for foreign aircraft AOC holders*
- CASA EX33/13, *Exemption — CASR Subpart 99.B DAMP requirements for foreign aircraft AOC holders*
- CASA EX50/16, *Exemption — CASR Subpart 99.B DAMP requirements for foreign aircraft AOC holders*
- CASA EX37/19.

Instrument CASA EX08/09 was originally issued in 2009 following a CASA Post-Implementation Review of CASR Subpart 99.B. At that time, it was considered that it was not practicable for many foreign AOC holders, for whom Australian international operations are only a component of their broader international operations, to fully convert their existing drug and alcohol policies, as set by their home State, to meet the detailed requirements of Subpart 99.B of CASR for a DAMP.

The Convention on International Civil Aviation (the **Chicago Convention**) requires Contracting States to ensure that all licence holders who engage in any kind of problematic use of psychoactive substances are identified and removed from their safety critical functions, and returned to them only if the problematic use of substances has been successfully treated or ceased — see subclause 1.2.7, *Use of psychoactive substances*, in Annex 1 — *Personnel Licensing* and clause 2.5, *Problematic use of psychoactive substances*, in Annex 2 — *Rules of the Air*. **Psychoactive substances** are defined in Chapter 1 of Annex 1 as including alcohol. A note to subclause 1.2.7 of Annex 1 states that guidance on suitable methods of identification (which may include biochemical testing on such occasions as pre-employment, upon reasonable suspicion, after accidents/incidents, at intervals, and at random) and on other prevention topics is contained in the *Manual on Prevention of Problematic Use of Substances in the Aviation Workplace* (ICAO Doc 9654).

Although drug or alcohol testing is not mandatory under the Chicago Convention to meet these requirements, a number of Contracting States, like Australia, have policies or programs in place that include drug and alcohol testing of persons performing safety-critical functions in the aviation sector.

Overview of instrument

The effect of this instrument is to exempt a foreign air transport AOC holder that is engaged in international air navigation, but not engaged in domestic air navigation, in Australia (a **relevant organisation**) from the requirement under Part 99 of CASR to develop and implement a DAMP, subject to conditions. The exemption applies only if the relevant organisation has nominated a liaison officer with whom CASA can liaise in relation to a body sample donor.

Conditions imposed on the exemption are similar to requirements in Subpart 99.B of CASR with which DAMP organisations must comply that relate to when drug or alcohol testing must be conducted on SSAA employees and when they must be prevented from performing SSAA. Other conditions relate to the provision of information to CASA regarding persons who are unable to produce to an approved drug and alcohol tester (**approved tester**) the photographic identification required under regulation 99.325 of CASR or who have been prevented from performing, or being available to perform, an applicable safety-sensitive aviation activity by a relevant organisation.

The instrument also exempts employees of relevant organisations who perform, or are available to perform, applicable SSAA and have been asked by CASA for a body sample under Subpart 99.C of CASR (Drug and alcohol testing by CASA), from the requirement under subregulation 99.325 (1) of CASR, if they can produce the photographic identification issued by the relevant organisation in the same timeframes that apply in relation to the photographic identification specified in CASR.

CASA has assessed the impact of the instrument on aviation safety and is satisfied that, in all the circumstances, an acceptable level of safety is preserved through the conditions that the instrument imposes on the exemption for foreign air transport AOC holders.

Content of instrument

Section 1 sets out the name of the instrument.

Section 2 sets out the duration of the instrument. The instrument commences on 1 March 2021 and is repealed at the end of 28 February 2023.

Section 3 sets out definitions for the instrument. Key definitions are *relevant organisation*, *body sample donor* and *test*. They are defined as follows:

- *relevant organisation* means the holder of a foreign air transport AOC that is engaged in international air navigation and not engaged in domestic air navigation in Australia
- *body sample donor* means a donor (as defined in regulation 99.010) or a person who is asked to give, or has given, a body sample for the purposes of a test
- *test* (as defined) is a test using a commercial device that complies with the Standards for such devices in a place, or conducted by a medical practitioner registered to practice medicine in the place.

Section 4 sets out an exemption from DAMP requirements for relevant organisations. The exemption applies only if the relevant organisation has notified CASA of the name, title and contact details of a senior person with whom CASA may liaise in relation to a body sample donor. The exemption is subject to the conditions set out in section 6.

Section 5 sets out an exemption for an employee of a relevant organisation from having to comply with subregulation 99.325 (1) of CASR if the employee produces the photographic identification issued by the relevant organisation that employs the employee within specified timeframes. The exemption applies only to employees who perform, or are available to perform, an applicable safety-sensitive aviation activity and who have been asked by CASA for a body sample under Subpart 99.C of CASR.

Section 6 sets out conditions on the exemption for relevant organisations that is set out in section 4.

The condition in subsection 6 (1) requires the relevant organisation to provide to CASA, on request, identifying information about persons who have been unable to produce to an approved tester on request the photographic identification mentioned in subregulation 99.125 (3) of CASR or photographic identification of the kind mentioned in section 5 of the instrument. Subsection 6 (2) sets out timeframes within which this information must be provided. If CASA does not specify a timeframe, the information is to be produced as soon as practicable.

The first condition in subsection 6 (3) is that the relevant organisation must, if it has procedures that provide for the conduct of tests in the same circumstances as apply to DAMP organisations under paragraphs 99.050 (2) (b) and (d) of CASR, ensure a test is conducted in those circumstances. In this and the following condition, a *test* means a test for the presence in a body sample of a testable drug, as defined in section 33 of the Act, or alcohol. The relevant circumstances are after an accident or serious incident involving an SSAA employee while the employee is in that role, and if an SSAA employee is returning to that role after having been excluded because of positive drug or alcohol results.

The second condition in subsection 6 (3) is that if a relevant organisation that has these procedures considers that an SSAA employee may be adversely affected by a testable drug or by alcohol while performing, or being available to perform, an applicable safety-sensitive aviation activity, the relevant organisation must organise for a test to be conducted. This condition is based on that requirement in paragraph 99.050 (2) (c) of CASR. An example is provided as to how the relevant organisation may consider that this circumstance has arisen, which is when a person who performs equivalent duties to a **DAMP supervisor**, as defined in Part 99, reasonably considers the SSAA employee may be so adversely affected. As not all relevant organisations have a person who performs those duties, there may be other ways this can be determined, depending upon the nature of the particular drug and alcohol controls the relevant organisation has in place.

The condition in subsection 6 (4) requires a relevant organisation to prevent a person from performing, or being available to perform, an applicable safety-sensitive aviation activity in any circumstance mentioned in regulation 99.065. These include where the person has tested positive for the presence of a drug or alcohol in a body sample, or where the person has refused to take a test.

The condition in subsection 6 (5) requires a relevant organisation, if it has prevented a person under subsection (4), to ensure that the person does not perform, or is not available to perform an applicable safety-sensitive aviation activity until it has, among other things, advised CASA of action it has taken in relation to the person. CASA must be advised of action taken in specified circumstances, such as when the employee has a positive result for a test.

The condition in subsection 6 (6) requires the relevant organisation to notify CASA, in specified circumstances, of an employee's cessation with the organisation. The condition applies when, because of subsection 6 (4), the organisation has prevented the employee from performing, or being available to perform, an applicable safety-sensitive aviation activity, but the employee ceases to be an SSAA employee before completion of all applicable requirements under subsection 6 (5). This condition facilitates the tracking, by CASA, of persons who may not be fit to perform, or be available to perform, applicable SSAA after a change of employment.

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. The instrument exempts classes of persons, being relevant organisations and certain kinds of employees of relevant organisations. 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

Consultation under section 17 of the LA took place with the Board of Airline Representatives before the first instrument on this matter was issued. The policy behind that instrument has not changed since, and the previous instruments on this subject have not been the subject of adverse comment.

CASA is planning amendments to Part 99 of CASR which will remove the need for the exemption in the instrument. Drafting has not commenced on these amendments but CASA is currently aiming to have the amendments made sometime in 2022.

In these circumstances, CASA is satisfied that no further consultation on this instrument is appropriate or necessary 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 (OBPR id: 14507).

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights is at Attachment 1.

Making and commencement

The instrument has been made by a delegate of CASA relying on the power of delegation under subregulation 11.260 (1) of CASR.

The instrument commences on 23 March 2021 and is repealed at the end of 28 February 2023.

Statement of Compatibility with Human Rights

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

CASA EX16/21 — CASR Subpart 99.B DAMP Requirements for Foreign Air Transport AOC Holders Exemption 2021

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 instrument exempts foreign air transport Air Operator's Certificate (**AOC**) holders engaged in international air navigation in Australia (but not engaged in domestic air navigation in Australia) (**relevant organisations**) from the requirement in Part 99 of the *Civil Aviation Safety Regulations 1998 (CASR)* to have a drug and alcohol management plan (**DAMP**), provided that certain conditions are met. These conditions are based on key provisions of Subpart 99.B of CASR.

The conditions include requiring the relevant organisation to conduct drug and alcohol testing, if it has such testing procedures in place as part of its own internal drug and alcohol controls, on employees (**SSAA employees**) who are engaged in prescribed safety-sensitive aviation activities (**applicable SSAA**): before they return to perform such activities following an accident or a serious incident; if the organisation has reasonable grounds for considering the employee may be adversely affected by a testable drug or alcohol; or after a previous positive drug or alcohol test result.

Applicable SSAA include activities on the tarmac and related areas of an aerodrome, as well as flight crew duties, maintenance, aircraft refuelling, security, baggage handling and air traffic control. The relevant organisation must also prevent any such employee from performing, or being available to perform, an applicable safety-sensitive aviation activity in specified circumstances, including when the organisation is aware that the person has tested positive for the presence of a drug or alcohol in a body sample and has not yet passed a confirmatory drug test, or where the person has refused to take a test.

The instrument also exempts employees of these relevant organisations who perform, or are available to perform, an applicable safety-sensitive aviation activity and have been asked by CASA for a body sample for testing purposes, from the requirement that the employee produces photographic identification of the kind specified in subregulation 99.325 (1) of CASR. The exemption applies if the person instead produces the photographic identification issued to the employee by the relevant organisation within the same timeframes that would apply for the provision of the CASR required photographic identification.

This exemption is beneficial for the foreign air transport AOC holders (for whom Australian international operations are only a component of their broader international operations) because they are able to maintain their own internal drug and alcohol controls without the additional need for a specifically Australian DAMP.

Human rights implications

This instrument arguably engages the right to privacy because although it exempts relevant organisations from having to have an Australian DAMP, it still requires SSAA employees of those organisations to submit to drug or alcohol testing in specified circumstances. This is considered reasonable and proportionate given the risks associated with air travel if SSAA employees are under the influence of drugs or alcohol. Also, the testing must only be undertaken if the relevant organisation has procedures in place for the testing of SSAA employees in these circumstances as part of its arrangements for the management of the use of psychoactive substances by persons engaged in safety critical activities, as required under the Convention on International Civil Aviation (Chicago Convention).

The instrument is also considered to engage positively with the right to privacy, as it potentially reduces the range of circumstances in which a person performing, or being available to perform, SSAA may be required to submit to drug and alcohol testing. Unlike under an Australian DAMP, the instrument does not require an employee of a relevant organisation engaged in SSAA to be tested when the person first joins the organisation, or when the person's role changes within the organisation. This may, however, be part of the relevant organisation's own arrangements for the management of the use of psychoactive substances.

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 may also promote the protection of human rights by reducing circumstances in which drug and alcohol testing is conducted.

Civil Aviation Safety Authority