

Explanatory Statement

Civil Aviation Act 1988

Civil Aviation Safety Regulations 1998

CASA EX112/21 — Implementation of DAMPs (Provision of Safety-Sensitive Aviation Activities by Non-DAMP Organisations) Instrument 2021

Purpose

The purpose of *CASA EX112/21 — Implementation of DAMPs (Provision of Safety-Sensitive Aviation Activities by Non-DAMP Organisations) Instrument 2021* (the **instrument**) is to enable a person who is 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 or contractors of the non-DAMP organisation. These employees or contractors are those who provide safety-sensitive aviation activities (**SSAAs**) for the DAMP organisation.

The instrument achieves this purpose by exempting a DAMP organisation from compliance with 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 a contractual arrangement with a non-DAMP organisation that the DAMP-like program is to apply in relation to the employee or contractor of the non-DAMP organisation.

Under such a contract, the DAMP organisation must still apply its own DAMP in specified circumstances such as where an employee or contractor of the non-DAMP organisation is suspected of being under the influence of drugs or alcohol, and in such circumstances, the exemptions will not apply.

The instrument issues directions on related matters to DAMP organisations and non-DAMP organisations.

The rationale behind the instrument is 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 persons.

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.

Subpart 11.F of CASR provides for the granting of exemptions from 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 11.225 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 CASR provides for CASA to issue directions in relation to matters affecting the safety of air navigation. Under paragraph 11.245 (1) (a), 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 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). This is relevant to the definition in the instrument of *DAMP-like program* which requires, at paragraph (b), CASA's approval.

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

DAMPs

Part 99 of CASR (Drug and alcohol management plans and testing), made under section 34 of the Act, prescribes a scheme for the regulation of alcohol and certain drug use by persons who perform, or who are available to perform, 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 relating to the content of a DAMP.

Under subregulation 99.030 (1) of CASR, an organisation must develop a DAMP if it has employees who perform applicable SSAAs (*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.

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 an SSAA employee to perform, or be available to perform, an SSAA if:

- a DAMP supervisor suspects the employee's faculties of being impaired due to the employee being under the influence of prescribed drugs or alcohol
- the SSAA employee is involved in an accident or serious incident while performing the SSAA and either a test has not been conducted or the results of such a test have not been notified to the DAMP organisation.

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 audits of DAMP organisations. Regulation 99.095 provides for compliance by providing for CASA to be able to direct that changes be made to a DAMP or that a new DAMP be prepared.

Background

The instrument effectively reissues exemptions granted in instrument number CASA EX70/19 (the *previous instrument*), the exemptions in which expire at the end of 30 September 2021. The previous instrument was based on a similar scheme operating in the United States established by the U.S. Federal Aviation Administration and contains directions relating to record-keeping requirements that will cease to be in force on 31 March 2027.

CASA recognises that DAMP organisations may have difficulty in devising effective DAMPs for employees and contractors of non-DAMP organisations who provide SSAAs for DAMP organisations under contract, for example, a ground handling agent contracted to an AOC holder.

Many industry stakeholders such as ground handling agents, other ground service providers and regional aerodromes now have their own DAMP-like programs in place for their employees and contractors. The instrument would mean that these employees or contractors who provide SSAAs to multiple DAMP organisations would not be subject to multiple DAMPs.

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

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 or contractor who performs, or is available to perform, an applicable SSAA for the DAMP organisation
- 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 or contractor who performs, or is available to perform, an applicable SSAA for the DAMP organisation.

The exemptions only apply if the non-DAMP organisation has its own CASA-approved DAMP-like program that the DAMP organisation has agreed, by contractual arrangement, is to apply to these employees or contractors instead of its own DAMP. A ***DAMP-like program*** is defined as a plan of a non-DAMP organisation that complies with regulation 99.045 of CASR (as applied with necessary modifications) and is approved in writing by CASA.

Safeguards are included in the instrument in the form of directions made under regulation 11.245 of CASR. The directions require DAMP organisations to comply with notification and record-keeping requirements. The directions applying to non-DAMP organisations mirror certain provisions of Part 99 of CASR that would normally only apply to DAMP organisations.

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 applying under the instrument.

Content of instrument

Section 1 gives the instrument its name.

Section 2 sets out the duration of the instrument. It provides that it commences on the day after it is registered. There are two different repeal dates: one repeals section 5, subsection 6 (1) and section 7 at the end of 30 September 2023. The remainder of the instrument is repealed at the end of 31 March 2029. This later repeal date is fixed for the record-keeping provisions of the instrument under subsection 6 (2) to enable the records to be able to be kept for their full term which could potentially extend to 8 years after the commencement of the instrument.

Section 3 contains definitions of terms used in the instrument. A ***non-DAMP organisation*** is defined as a person other than a DAMP organisation. A ***DAMP-like program*** is defined as a plan of a non-DAMP organisation that complies with regulation 99.045 of CASR (as applied under section 4 of the instrument), as if the organisation were a DAMP organisation, and that is approved in writing by CASA.

Given that such an approval by CASA constitutes a civil aviation authorisation under the Act, a decision by CASA to refuse to approve a plan of a non-DAMP organisation as a

DAMP-like program would be subject to a 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.

Section 4 sets out how certain provisions of Part 99 of CASR are to apply (and are essentially modified) if the instrument requires or specifies compliance by a non-DAMP organisation with those provisions in relation to its DAMP-like program.

Section 5 sets out the exemptions under the instrument. Subsection 5 (1) provides that the section applies in relation to a DAMP organisation if:

- (a) a written contract exists between the DAMP organisation and a non-DAMP organisation under which the non-DAMP organisation provides an applicable SSAA to the DAMP organisation, an employee or contractor of the non-DAMP organisation performs, or is available to perform, the applicable SSAA under a DAMP-like program and the DAMP-like program (instead of the DAMP of the DAMP organisation) is to apply in relation to the SSAA; and
- (b) the DAMP organisation reasonably believes that the non-DAMP organisation is implementing its DAMP-like program in relation to the employee or contractor.

The obligation on the non-DAMP organisation to have a DAMP-like program that covers the employee or contractor is ongoing in nature, so that the DAMP organisation cannot rely on the exemption at a particular point in time in relation to an employee or contractor 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 or contractor.

Under subsection 5 (2), a DAMP organisation to which the section applies is exempt from the following provisions:

- 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 or contractor who performs, or is available to perform, an applicable SSAA for the DAMP organisation
- 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 or contractor who performs, or is available to perform, an applicable SSAA for the DAMP organisation.

Subsection 5 (3) disapplies the exemptions insofar as a DAMP organisation implements its DAMP regarding the employee or contractor of the non-DAMP organisation to give effect to the matters mentioned in subregulation 99.065 (2) of CASR. A note explains that these requirements relate to not allowing an 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 directions applying in relation to DAMP organisations. Under subsection 6 (1), if such an organisation implements its DAMP regarding an employee or contractor of the non-DAMP organisation (that is, in circumstances where the exemption

does not apply), the DAMP organisation must notify the non-DAMP organisation of that fact and notify CASA if it prevents the employee or contractor from performing the applicable SSAA. These notifications must be given as soon as practicable.

Subsection 6 (2) sets out record-keeping obligations applying to a DAMP organisation. Such an organisation must keep records of the grounds for its reasonable belief, under paragraph 5 (1) (b), that the non-DAMP organisation is implementing its DAMP-like program in relation to the employee or contractor. Such records 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 relate to the results of drug or alcohol testing, must be deleted within the 6 months following that 5-year period.

Section 7 imposes obligations on a non-DAMP organisation in relation to its DAMP-like program that are equivalent to those imposed on a DAMP organisation under Part 99 of CASR in relation to the implementation and review of DAMP-like programs, audit of a non-DAMP organisation and the powers of CASA to ensure the suitability of DAMP-like programs.

Subsection 7 (1) provides 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 as applied under section 4 of the instrument.

Subsection 7 (2) provides, however, that if a DAMP organisation implements its DAMP regarding an employee or contractor of a non-DAMP organisation as mentioned in subsection 5 (3), the non-DAMP organisation is not required to meet the requirements of regulation 99.080 of CASR to the extent that the DAMP gives effect to the matters mentioned. This avoids duplication of the requirements that would apply to the employee or contractor if the DAMP organisation decides, for example, to action the DAMP supervisor process under subregulation 99.065 (2) of CASR.

Subsection 7 (3) requires a non-DAMP organisation that has a DAMP-like program to make it available to each of its employees or contractors who perform, or are available to perform, applicable SSAA for the DAMP organisation. This requirement is similar to the requirement under regulation 99.040 of CASR for DAMP organisations to make their DAMPs available to their employees.

Subsection 7 (4) requires a non-DAMP organisation that has a DAMP-like program to comply with certain requests by CASA, including requests to provide it with a copy of the DAMP-like program and related documents, and to make changes to or prepare a new DAMP-like program. These provisions are similar to the requirements under regulations 99.090 (audits of the organisation) and 99.095 (CASA powers to ensure compliance), but for non-DAMP organisations and their DAMP-like programs.

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 DAMP organisations, and to non-DAMP organisations in relation to their DAMP-like programs. The instrument 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 is, therefore, a legislative instrument that is subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Consultation

The instrument is being issued to replace the exemptions in the previous instrument, which expire at the end of 30 September 2021. Extensive consultation occurred before the making of the previous instrument. This instrument contains substantially the same content as the previous instrument with the only changes being minor or machinery in nature. It is essential to issue the instrument to provide continued relief to DAMP and non-DAMP organisations from compliance with provisions of CASR that would otherwise impose significant regulatory and financial burdens. It is anticipated that changes will be made to Part 99 of CASR in the near future to cover the subject matter of the instrument and at that stage the instrument will no longer be needed. In the meantime, relief to industry is provided in the form of the instrument. Accordingly, CASA is satisfied that no further consultation is appropriate or 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 a delegate of CASA relying on the power of delegation under subregulation 11.260 (1) of CASR.

The instrument commences on the day after it is registered and is repealed at the end of 31 March 2029, subject to the qualification that the exemptions under section 5, and the directions under subsection 6 (1) and section 7, are repealed at the end of 30 September 2023.

Statement of Compatibility with Human Rights

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

CASA EX112/21 — Implementation of DAMPs (Provision of Safety-Sensitive Aviation Activities by Non-DAMP Organisations) Instrument 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 purpose of this legislative instrument is to grant exemptions under Division 11.F.1 of the *Civil Aviation Safety Regulations 1998 (CASR)*.

Subpart 99.B of CASR deals with drug and alcohol management plans (**DAMPs**), being plans that comply, or purport to comply, with the requirements of regulation 99.045 of CASR. Subpart 99.B requires a person who, under subregulation 99.030 (1) of CASR, is required to have a DAMP (a **DAMP organisation**) to implement its DAMP in relation to 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 an 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 and air traffic services training providers. An example of a non-DAMP organisation is a ground handling agent.

The legislative instrument exempts a DAMP organisation that, under a contract with an organisation other than a DAMP organisation (a **non-DAMP organisation**), receives an applicable SSAA provided by an employee or contractor of the non-DAMP organisation, from compliance with:

- subregulation 99.030 (4) of CASR, to the extent that the provision requires the DAMP organisation to comply with paragraph 99.045 (d) of CASR in relation to the non-DAMP organisation's employee or contractor
- 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 or contractor

The exemptions enable 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 or contractor of a non-DAMP organisation that performs applicable SSAA for a DAMP organisation must comply.

The instrument also includes related directions.

Many non-DAMP organisations have plans in place for the management of drugs and alcohol for their employees and contractors. The instrument would also assist those employees or contractors 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 the employee or contractor is suspected of being under the influence of drugs or alcohol.

The legislative instrument includes directions, issued under regulation 11.245 of CASR, in relation to a DAMP organisation, including notification requirements and requirements for record-keeping, and in relation to a non-DAMP organisation, including in relation to its implementation and review of its DAMP-like program, audits of the organisation and CASA's powers of ensuring the suitability of the 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 provisions 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 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.

Civil Aviation Safety Authority