

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX17/23 — Pre-deployment Drug and Alcohol Testing Exemption 2023

Purpose

The purpose of *CASA EX17/23 — Pre-deployment Drug and Alcohol Testing Exemption 2023* (the **instrument**) is to permit an organisation (**DAMP organisation**) that is required to have a drug and alcohol management plan (**DAMP**) to use pre-hiring drug and alcohol tests to comply with the requirement to test newly-hired employees and, in some circumstances, employees being reassigned within a DAMP organisation. In the absence of this instrument, in order to comply with that requirement, a drug and alcohol test conducted on a person who was not yet performing, or available to perform, safety-sensitive aviation activities (**SSAA**) would have to be repeated. The instrument reissues a similar exemption in instrument *CASA EX15/21 — Pre-deployment Drug and Alcohol Testing Exemption 2021*, which expires at the end of 28 February 2023.

Legislation

The Act and regulations

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 the *Civil Aviation Safety Regulations 1998* (**CASR**).

Part 99 of CASR is entitled *Drug and alcohol management plans and testing*. The purpose of Part 99 is to give effect to Part IV of the Act by establishing a framework for the development of DAMPs similar to those already in place in other transport sectors, and by introducing random drug and alcohol testing by CASA for all persons involved in SSAA.

The regulations define several terms that are relevant to the instrument. Important terms include:

- **applicable SSAA**, which are the SSAA governed by Part 99
- **employee**, of a DAMP organisation, which is defined in a manner that includes a contractor or subcontractor of the DAMP organisation
- **positive result**, which, in relation to a drug test or an alcohol test, means the detection of alcohol or a testable drug above a prescribed level.

Drug and alcohol management plans

Under subregulation 99.030(1) of CASR, a DAMP organisation must develop a DAMP. A DAMP organisation is one that has employees or contractors who perform SSAA and is on a generic list of organisations defined in subregulation 99.030(2) of CASR, for example, air operator certificate holders.

A **DAMP** is required by regulation 99.045 of CASR to include a drug and alcohol education program, drug and alcohol testing for certain employees and a drug and alcohol response program for employees who may test positive.

Under subregulation 99.050(1) of CASR, a DAMP must require that drug and alcohol testing be performed to certain specified standards, and be performed on SSAA employees in the circumstances set out in subregulation 99.050(2).

The SSAA employees who must be tested by a DAMP organisation as part of its DAMP include persons who join the organisation to perform SSAA, and employees who change duties to commence performing SSAA. Under paragraph 99.050(2)(a) of CASR, such persons must be drug and alcohol tested unless, less than 90 days before performing or being available to perform the SSAA, the employee has been drug and alcohol tested under the organisation's DAMP and the result of the test is not a positive result. This is known in the industry as "pre-deployment testing". Under subregulation 99.050(1) and paragraph 99.050(2)(a), pre-deployment testing must be conducted on a person who is an employee or contractor, not merely a prospective employee.

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 relevantly 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 11.175(4) of CASR, in deciding whether to reissue an exemption on application by a person, 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 renew 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 of CASR, 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

CASA understands that, as in many other industries, it is common practice in the aviation industry for companies to be satisfied of the suitability of applicants for employment or contract before binding arrangements are entered into with successful applicants. This extends to various forms of pre-hiring checks and includes pre-hiring drug and alcohol testing.

However, pre-hiring drug and alcohol testing does not satisfy the obligations of a DAMP organisation under subregulation 99.050(1) and paragraph 99.050(2)(a), which require the testing only to be conducted on an existing employee.

CASA considers it unreasonable that there be, in effect, a requirement to conduct a second drug and alcohol test on an employee or contractor who has recently undergone pre-hiring drug and alcohol testing that did not produce a positive result.

Overview of instrument

The instrument grants an exemption to DAMP organisations, relieving them of the requirement in paragraph 99.050(2)(a) to drug and alcohol test an employee and contractor who is commencing SSAA as a **regular SSAA employee**, if the person has been tested less than 90 days ago and the test results were not positive. The exemption negates what otherwise would be a requirement for multiple drug and alcohol tests within a relatively short period of time.

The exemption means that, for example, a drug and alcohol test conducted on a person by a baggage-handling organisation (the **third party**) that is not a DAMP organisation could be accepted by a DAMP organisation that is employing the person.

The exemption also means that various DAMP organisations that contract with the third party can rely on the third party's test, instead of the person having to undergo drug and alcohol testing with each DAMP organisation for which he or she commences the provision of contracted services. The instrument requires that: (1) the test of the third party must have been less than 90 days before the person commences being a regular SSAA employee; (2) the test must meet the requirements of paragraph 99.050(1)(a), meaning that the test must be in accordance with **relevant Standards**, as defined in regulation 99.010 of CASR; and (3) the test must not return a positive result.

The link to paragraph 99.050(1)(a) is an essential requirement to preserve the integrity of the tests relied upon by DAMP organisations.

The exemption is also subject to a specified recordkeeping condition.

CASA has assessed the operation of the instrument and is satisfied that the exemptions will preserve a level of safety that is at least acceptable, as required under regulation 11.175 of CASR.

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 2023 and is repealed at the end of 28 February 2025.

Section 3 sets out definitions for the instrument. It defines an alcohol test to be an initial alcohol test, as defined in CASR, and to be a confirmatory alcohol test, as defined in CASR, if the result of the initial alcohol test is positive. Section 3 also defines a drug test to be an initial drug test, as defined in CASR, and to be a confirmatory drug test, as defined in CASR, if the result of the initial drug test is positive. The definitions are provided to ensure that the testing of a person includes a confirmatory test if an initial test returns a positive result.

Section 4 sets out the exemption in the instrument. The exemption is from the testing requirement for a person who is a new regular SSAA employee in paragraph 99.050(2)(a) of CASR if the person undertook an alcohol test and a drug test (as defined in section 3) less

than 90 days before they are required to begin performing, or being available to perform, applicable SSAA. The exemption applies both to new employees of a DAMP organisation who will be regular SSAA employees and to existing employees who are reassigned as regular SSAA employees. In practice, it is expected that the exemption will be required only rarely in relation to reassigned employees.

Section 5 sets out conditions on the exemption in section 4. The first condition is that the DAMP organisation must be satisfied, on reasonable grounds, that the alcohol test and the drug test met the requirements in paragraph 99.050(1)(a) and did not return a positive result. The application of the requirements of paragraph 99.050(1)(a) means that the testing must be in accordance with the applicable relevant Standard for the test. **Relevant Standard** is defined in regulation 99.010 to cover a range of objective standards that relate to alcohol breath testing, oral fluid testing and urine testing.

The second condition in section 5 is for the DAMP organisation to record details of the drug test and alcohol test of a person. The records must be kept in accordance with requirements in Subpart 99.B of CASR as if the DAMP organisation had conducted the testing under paragraph 99.050(2)(a). This requirement would apply to a DAMP organisation for testing required to be done if the exemption was not granted.

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 applies to a class of persons, being DAMP organisations, and is, therefore, a legislative instrument. The instrument is, therefore, subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Sunsetting

As the instrument relates to aviation safety and is made under CASR, Part 4 of Chapter 3 of the LA (the **sunsetting provisions**) does not apply to the instrument (as per item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*). However, this instrument will be repealed at the end of 28 February 2025, which will occur before the sunsetting provisions would have repealed the instrument if they had applied. Any renewal of the instrument will be subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LA. Therefore, the exemption from sunsetting does not affect parliamentary oversight of this instrument.

Consultation

Consultation was undertaken under section 17 of the LA with Airservices Australia, the Australian Airports Association and a number of airlines when the original exemption in instrument CASA EX25/13, *Exemption – drug and alcohol management plan information & Exemption – use of pre-hiring drug and alcohol tests*, was in preparation. That consultation checked the adequacy of the exemption in the light of organisational practices regarding applicants, employees and contractors.

The instrument reissues the exemption in similar terms to CASA EX15/21. No adverse comments on the policy of the instrument have been received since it was first made in 2013.

The exemption is also beneficial to industry, reduces duplicated regulatory requirements, and is expected not to have a negative impact on aviation safety.

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 2024.

In these circumstances, it is CASA's view that it is not necessary or appropriate to undertake any further consultation under section 17 of the LA.

Sector risk, economic and cost impact

Subsection 9A(1) of the Act states that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.

Subsection 9A(3) of the Act states that, subject to subsection (1), in developing and promulgating aviation safety standards under paragraph 9(1)(c), CASA must:

- (a) consider the economic and cost impact on individuals, businesses and the community of the standards; and
- (b) take into account the differing risks associated with different industry sectors.

The cost impact of a standard refers to the direct cost (in the sense of price or expense) which a standard would cause individuals, businesses and the community to incur. The economic impact of a standard refers to the impact a standard would have on the production, distribution and use of wealth across the economy, at the level of the individual, relevant businesses in the aviation sector, and the community more broadly. The economic impact of a standard could also include the general financial impact of that standard on different industry sectors.

As the instrument replaces an expiring instrument with the same provisions and conditions, there will be no change of economic or cost impact on individuals, businesses or the community.

Impact on categories of operations

The instrument is likely to have a beneficial effect on aircraft operations in which DAMP organisations, including air operator certificate holders, are involved to the extent that it removes an unreasonable burden on DAMP organisations that conduct those operations.

Impact on regional and remote communities

The instrument does not have any specific impact on regional and remote communities but is likely to have a beneficial effect insofar as prospective SSAA employees may be sourced from regional and remote communities.

Office of Impact Analysis (OIA)

An Impact Analysis (*IA*) is not required in this case, as the exemption is covered by a standing agreement between CASA and OIA under which an IA is not required for exemptions (OIA 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 1 March 2023 and is repealed at the end of 28 February 2025.

Statement of Compatibility with Human Rights

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

CASA EX17/23 — Pre-deployment Drug and Alcohol Testing Exemption 2023

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 reissue an exemption under Division 11.F.1 of the *Civil Aviation Safety Regulations 1998 (CASR)*. The exemption will permit organisations (**DAMP organisations**), which are required to have a drug and alcohol management plan (**DAMP**), to rely on recently conducted drug and alcohol tests of third parties instead of conducting separate tests for certain newly-hired employees, or certain employees who are reassigned.

In the absence of this instrument, in order to comply with the DAMP requirement, the drug and alcohol tests conducted on a person who was not yet performing, or available to perform, safety-sensitive aviation activities would have to be repeated.

Among other things, the operation of the exemption reduces the range of circumstances under Part 99 of CASR in which a person may be required to submit to a drug or alcohol test.

Human rights implications

This legislative instrument arguably engages with the right to work in Article 6 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) and rights in work in Article 7 of the ICESCR by reducing the range of circumstances in which a person may be required to submit to drug and alcohol testing. The change arguably engages negatively with rights in work by potentially reducing 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. However, in practical terms, it is not expected that the instrument will have any substantial impact on this right, since the person will in any case have had to have undergone a test in the recent past.

This legislative instrument also engages positively with the right to privacy by reducing the range of circumstances in which a person may be required to submit to drug and alcohol testing.

A condition on the exemption imposes requirements for a person relying on the exemption to keep records of alcohol and drug testing conducted by another person. That condition imposes requirements that mirror those applicable to testing that would be conducted by a DAMP organisation if the exemption was not available.

The collection of the records is necessary to ensure that information is available to demonstrate to CASA that a DAMP organisation is complying with the terms of the exemption by relying on appropriate testing by third parties. The potential for CASA to view such records protects the integrity of the scheme for alcohol and drug testing and the aviation safety regulatory scheme as a whole.

The condition is reasonable and proportionate to the risks associated with the exemption and conditions in the instrument, particularly having regard to the link to existing recordkeeping requirements for DAMP organisations and the continued application of the protections in the *Privacy Act 1988*.

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