

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA EX56/23 — Implementation of Drug and Alcohol Management Plans (Micro-businesses and DAMP Organisations) Exemption 2023

Purpose

The purpose of *CASA EX56/23 — Implementation of Drug and Alcohol Management Plans (Micro-businesses and DAMP Organisations) Exemption 2023* (the **instrument**) is to renew the exemptions in instrument *CASA EX81/20 — Implementation of Drug and Alcohol Management Plans (Micro-businesses and DAMP Organisations) Exemption 2020* (**CASA EX81/20**). The instrument:

- exempts certain small organisations (**micro-businesses**) from the *Civil Aviation Safety Regulations 1998* (**CASR**) requirement to develop and implement a drug and alcohol management plan (**DAMP**) under Subpart 99.B of CASR if they instead adopt a DAMP in the form of a DAMP, called the *CASA Micro-business Drug and Alcohol Management Plan (DAMP)* (**CASA Micro-business DAMP**), that has been specially prepared and simplified by the Civil Aviation Safety Authority (**CASA**)
- exempts a DAMP organisation, as defined in regulation 99.010 of CASR, in stated circumstances relating to emergencies or services received under contract, from compliance with regulations 99.035 and 99.040, and paragraph 99.045(d), of CASR, to the extent that these provisions require the organisation to implement a DAMP in relation to a safety-sensitive aviation activity (**SSAA**) employee's performance of, or availability to perform, an applicable SSAA for the organisation.

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.

Drug and alcohol management plans

Key terms, used in the instrument, are defined in subregulation 99.010(1) of CASR as follows:

- **applicable SSAA** is defined to mean a SSAA to which Part 99 of CASR applies under regulation 99.015 of CASR. Applicable SSAA are specified in subregulation 99.015(2), and include activities on the "airside" of an aerodrome (that is, the tarmac and related areas) as well as flight crew duties, maintenance, aircraft refuelling, security, baggage handling and air traffic control.
- **DAMP** or **drug and alcohol management plan** is defined to mean a drug and alcohol management plan that complies, or purports to comply, with the requirements of regulation 99.045 of CASR.
- **DAMP organisation** is defined to mean a person that is required to have a DAMP under subregulation 99.030(1) of CASR.
- **employee**, in relation to a DAMP organisation, is defined to include a DAMP contractor of the DAMP organisation. The term **DAMP contractor** is also defined.
- **SSAA employee** is defined, in relation to a DAMP organisation, to mean an employee of the DAMP organisation who performs, or is available to perform, an applicable SSAA.

Under subregulation 99.030(1) of CASR, a DAMP organisation must develop a DAMP if it has SSAA employees and is on a list of kinds of organisations defined in subregulation 99.030(2), for example, air operator's certificate holders, maintenance organisations, aerodrome operators and air traffic service providers.

Under subregulation 99.035(1) of CASR, a person who is required to develop a DAMP must implement a DAMP by:

- (a) giving effect to regulation 99.080 of CASR; and
- (b) making the DAMP available to the person's SSAA employees, as required by Subpart 99.B of CASR.

Regulation 99.040 of CASR deals with the requirement for a DAMP organisation to make its DAMP available to its SSAA employees.

Under paragraph 99.045(a) of CASR, a DAMP organisation's DAMP must apply to all applicable SSAA employees of the organisation. Generally, DAMP organisations must assume drug and alcohol responsibility for their contractors (and sub-contractors) who are to be treated as employees for this purpose (*employee* is defined in regulation 99.010 to include DAMP contractors).

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).

Under paragraph 99.045(d) of CASR, a DAMP organisation's DAMP must be implemented as required by regulation 99.080 and set out details of those requirements.

Regulations 99.035 and 99.040, and paragraph 99.045(d), of CASR are referred to in the instrument as the *exempted provisions*.

Under regulation 99.055 of CASR, a DAMP organisation's DAMP must include a requirement to consult a DAMP medical review officer (*MRO*) in relation to a positive drug test. In addition, the DAMP must have a requirement to consult a DAMP MRO to review medical information concerning a person's failure to give a body sample for drug or alcohol testing because of a medical condition.

Under subregulation 99.065(1) of CASR, a DAMP organisation's DAMP must include a requirement that the organisation not permit an employee to perform SSAA if the employee has returned a positive result for a drug or alcohol test that has not been discounted through confirmatory testing. Under subregulation 99.065(2), the DAMP must also include requirements to not permit a SSAA employee to perform, or be available to perform, a SSAA in specified circumstances related to: (a) the employee's faculties being suspected of being impaired due to the employee being under the influence of testable drugs or alcohol; or (b) 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. Division 99.B.4 of CASR provides for review and audit of DAMPs.

Exemptions

Subpart 11.F of the 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 compliance with 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, 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 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.

Under subsection 14(1) of the *Legislation Act 2003* (the **LA**), a legislative instrument may make provision in relation to matters by applying, adopting or incorporating provisions of an Act or disallowable legislative instrument as in force at a particular time or as in force from time to time. A legislative instrument may also make provision in relation to matters by applying, adopting or incorporating any matter contained in any other instrument or writing as in force at, or before, the time the legislative instrument commences. Under subsection 14(2) of the LA, unless the contrary intention appears, the legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. However, subsection 98(5D) of the Act provides that, despite section 14 of the LA, a legislative instrument made under the Act or the regulations may apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing from time to time, even if the other instrument or writing does not yet exist when the legislative instrument is made.

Background

Micro-businesses

Because of the usually unvarying size and often remote locality of aviation-related businesses that are micro-businesses, CASA has issued a series of exemptions since 2012 on its own initiative to relieve such organisations of the obligation to develop and implement a "full-scale" DAMP, provided they adopted a DAMP in the form of the CASA Micro-business DAMP. The CASA Micro-business DAMP retains many of the key features of a statutory DAMP but with simplifications and modifications which make implementation within a small organisation easier and more effective. The most recent exemption instrument is CASA EX81/20, which is repealed at the end of 31 May 2023.

The CASA Micro-business DAMP recognises the difficulties that micro-businesses in remote localities face, for example, in devising effective drug and alcohol management training for their employees and in having to have DAMP MROs. Other difficulties include carrying out drug and alcohol testing in specified circumstances, for example, on each SSAA employee when the person first joins the organisation, and meeting the mandated relevant Australian and New Zealand Standards for testing, particularly drug testing. In these circumstances, CASA considers it appropriate to offer these businesses a simpler avenue for compliance without sacrificing safety outcomes.

Contractors and emergencies

Since 2018, CASA has issued exemptions to relieve a DAMP organisation, in stated circumstances, from the administrative and cost burden of implementing its DAMP in relation to a SSAA employee (as broadly defined in subregulation 99.010(1) of CASR) where another DAMP has been implemented by another DAMP organisation in relation to the employee. The most recent instrument containing these exemptions is CASA EX81/20, which is repealed at the end of 31 May 2023.

Content of instrument

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

Section 2 sets out the duration of the instrument by providing that it commences on 1 June 2023 and is to be repealed at the end of 31 May 2026.

Section 3 provides some definitions for the instrument. The definitions of *micro-business* and *micro-business employee* work together to define which DAMP organisations are micro-businesses to which the exemption in section 4 applies.

Section 4 exempts a micro-business from compliance with each provision of Subpart 99.B of CASR subject to the conditions set out in section 5.

Section 5 sets out the conditions imposed on the exemption in section 4. The conditions include time frames, depending upon when the micro-business came into existence, for the micro-business to adopt as its DAMP a DAMP in the form of the CASA Micro-business DAMP and to give CASA a copy of the adopted DAMP and specified other information. The micro-business must comply with the terms of its DAMP and cooperate with CASA in any audit of its DAMP. The adoption of a DAMP by a micro-business must be done in writing and by its most senior executive manager.

Section 6 is a transitional provision to the effect that micro-businesses that have already adopted the CASA Micro-business DAMP under *CASA EX66/18 — Implementation of Drug and Alcohol Management Plans (Micro-businesses) Exemption 2018* or *CASA EX81/20* are not required to adopt the CASA Micro-business DAMP under subsection 5(1).

Section 7 of the instrument applies if:

- (a) there is a contract between a DAMP organisation or a micro-business DAMP organisation (the **first organisation**) and another DAMP organisation (the **second organisation**) in relation to the performance of an applicable SSAA for the second organisation; and
- (b) a SSAA employee of the first organisation performs, or is available to perform, the applicable SSAA for the second organisation; and

- (c) the second organisation is satisfied on reasonable grounds that the first organisation is implementing the first organisation's DAMP, or its micro-business DAMP, in relation to the employee.

For paragraph (c), the implementation must be in accordance with the requirements of CASR. The obligation in paragraph (c) is ongoing in nature, insofar as the second organisation cannot rely on the exemption at a particular point in time in relation to an employee unless it is satisfied at that point in time that the first organisation's DAMP is being implemented in relation to the SSAA employee. However, the condition does not require the second organisation to check for implementation of the first organisation's DAMP each time the employee performs, or is available to perform, an applicable SSAA. If it is reasonable to do so, a check that the first organisation's DAMP has been implemented at a point in time may enable the second organisation to have reasonable grounds to be satisfied that implementation will continue for a period of time.

If section 7 applies, the second organisation is exempted from compliance with the exempted provisions to the extent that the compliance requires implementation of the organisation's DAMP in relation to the employee's performance, or availability to perform, the applicable SSAA.

The exemption is subject to conditions for the second organisation to keep, and eventually destroy, records evidencing the satisfaction. This condition reflects similar obligations of DAMP organisations under Part 99 of CASR.

The exemption is also subject to a condition that ensures that the second organisation implements its DAMP, in relation to a SSAA employee from the first organisation, with respect to the matters mentioned in subregulation 99.065(2) of CASR. That subregulation requires that a DAMP include requirements relating to the exclusion of SSAA employees from applicable SSAA if the employee is suspected of being under the influence of testable drugs or alcohol, or if the employee is involved in an accident or serious incident. The instrument also requires the second organisation to notify the first organisation of any such implementation of the second organisation's DAMP in relation to the SSAA employee.

The policy intent of this exemption is to relieve a DAMP organisation, in stated circumstances, from the administrative and cost burden of implementing its DAMP in relation to a SSAA employee (as broadly defined in subregulation 99.010(1) of CASR) where another DAMP has been implemented by another DAMP organisation in relation to the employee.

An example of where the exemption will be relevant is where a Part 145 approved maintenance organisation (the first organisation), which will be a DAMP organisation, is contracted by a commercial aircraft operator (the second organisation), which will also be a DAMP organisation, for the performance of maintenance on the second organisation's aircraft. Employees of the first organisation will be DAMP contractors under Part 99 of CASR in relation to the second organisation. The exemption will permit the second organisation to not implement its DAMP in relation to employees of the first organisation, as long as the second organisation is satisfied on reasonable grounds that the first organisation is implementing its DAMP in relation to the employees (and if other requirements of the instrument are met).

Section 8 of the instrument applies if:

- (a) there is a contract between an emergency services organisation and a DAMP organisation in relation to the performance of an applicable SSAA for the DAMP organisation; and
- (b) the emergency services organisation is a non-DAMP organisation; and
- (c) an employee of the emergency services organisation performs, or is available to perform, the applicable SSAA for the DAMP organisation in response to an emergency; and
- (d) it is not reasonably practicable for the DAMP organisation to implement its DAMP in relation to the employee's performance of, or availability to perform, the applicable SSAA in response to the emergency.

The DAMP organisation is exempted from compliance with the exempted provisions to the extent that the compliance requires implementation of the organisation's DAMP in relation to the employee's performance of, or availability to perform, the applicable SSAA in response to the emergency.

The exemption in section 8 is subject to the following conditions:

- (a) the DAMP organisation must give the employee a drug and alcohol risk mitigation notice not more than 24 hours before the employee performs, or is available to perform, the applicable SSAA for the DAMP organisation in response to the emergency;
- (b) the DAMP organisation must make a contemporaneous record of the following information:
 - (i) the name and address of the employee to whom the notice is given;
 - (ii) the date and time the employee is given the notice;
 - (iii) details of the emergency in relation to which the notice is given;
- (c) if the DAMP organisation has reasonable grounds to believe the employee is adversely affected by a drug or alcohol while performing, or available to perform, the applicable SSAA in response to the emergency, the DAMP organisation must not allow the employee to perform, or be available to perform, the SSAA in response to the emergency whilst the reasonable grounds continue to exist;
- (d) if an accident or serious incident happens, involving the employee, while the employee is performing, or available to perform, the applicable SSAA in response to the emergency, the DAMP organisation must not allow the employee to perform, or be available to perform, the SSAA in response to the emergency during the period of 32 hours after the time the accident or incident happened.

The term ***drug and alcohol risk mitigation notice*** is defined in subsection 8(4) of the instrument.

The policy intent of this exemption is to exempt a DAMP organisation from its obligation to implement its DAMP in relation to a SSAA employee where it is not reasonably practicable for the organisation to implement its DAMP in relation to the employee's performance of, or availability to perform, an applicable SSAA in response to an emergency.

An example of where the exemption will be relevant is where a commercial aircraft operator (a DAMP organisation) with expertise in bush firefighting support activities is contracted by an emergency services organisation such as a State or Territory police force. The DAMP organisation may carry suitably trained police officers for purposes such as winching and obstacle clearance, which are SSAA. The police officers, by virtue of the contract, will be DAMP contractors of the DAMP organisation. The exemption will permit the performance of the SSAA by the police officers, without implementation of the DAMP organisation's DAMP in relation to the police officers, if it is not practicable to do so before performance of the SSAA.

In renewing the exemptions under the instrument, CASA has regarded as paramount the preservation of at least an acceptable level of aviation safety.

Documents incorporated by reference

This legislative instrument incorporates by reference the CASA Micro-business DAMP, which provides a simplified template drug and alcohol management plan that can be readily adopted by micro-businesses. In accordance with subsection 98(5D) of the Act, the plan is incorporated as existing from time to time. The CASA Micro-business DAMP is published by CASA on its website, and is available for download from the CASA website at <https://www.casa.gov.au> free of charge.

Legislation Act 2003

Paragraph 98(5A)(a) of the Act provides that the regulations may empower CASA to 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 from complying with specified provisions in Part 99 of CASR in specified circumstances. 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.

Sunsetting

Part 4 of Chapter 3 of the LA (the *sunsetting provisions*) does not apply to the instrument, because the instrument relates to aviation safety and is made under CASR (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 31 May 2026, 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

Extensive consultation preceded the making of the original exemptions whose duration this instrument extends.

No adverse feedback on the operation of the original exemptions or their successors has been received by CASA from any industry stakeholder. Most organisations that fit the eligibility criteria for the exemptions have adopted them as a cost saving for their business. CASA's surveillance oversight indicates that most organisations are complying with the conditions on the exemptions without issue.

CASA is progressing amendments to Part 99 of CASR so that this exemption will no longer be required.

In these circumstances, CASA is satisfied that no further consultation is appropriate or reasonably practicable for this instrument for 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 (or largely 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 the organisations to which the exemptions apply, including any operations involving SSAA. In particular, it reduces the regulatory requirements for micro-businesses and DAMP organisations that receive services under contract from another DAMP organisation.

Impact on regional and remote communities

The instrument is likely to have a beneficial effect on any regional or remote community in which a DAMP organisation that meets the criteria for the exemptions in the instrument are located. In particular, the exemptions in the instrument are expected to have a beneficial impact on aviation-related micro-businesses located in regional and remote communities by allowing use of a DAMP that is simpler and easier to implement.

Office of Impact Analysis (OIA)

An Impact Analysis (*IA*) is not required in this case, as the instrument 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 June 2023 and is repealed at the end of 31 May 2026.

Statement of Compatibility with Human Rights

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

CASA EX56/23 — Implementation of Drug and Alcohol Management Plans (Micro-businesses and DAMP Organisations) 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 legislative instrument renews an exemption for aviation-related micro-businesses from the requirements to have a “full-scale” drug and alcohol management plan (**DAMP**) under Subpart 99.B of the *Civil Aviation Safety Regulations 1998 (CASR)* provided they adopt a DAMP based on the more flexible and simplified CASA micro-business DAMP (**CASA Micro-business DAMP**). The exemption is beneficial for the micro-businesses concerned who, because of their size, resources and location, would otherwise have to fully comply with the requirements of Subpart 99.B of CASR for a “full-scale” DAMP. Among other things, adoption of the CASA Micro-business DAMP 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.

The legislative instrument also renews 2 other exemptions. Subpart 99.B of CASR requires a DAMP organisation to implement its DAMP in relation to the safety-sensitive aviation activity (**SSAA**) employees of the organisation who perform, or are available to perform, specified SSAAs. These 2 exemptions in the legislative instrument exempt a DAMP organisation, in stated circumstances, from compliance with regulations 99.035 and 99.040, and paragraph 99.045(d), of CASR, to the extent that this relates to the implementation of its DAMP in relation to a SSAA employee’s performance of, or availability to perform, an applicable SSAA for the organisation.

The first circumstance is where a DAMP organisation contracts another organisation, which implements a DAMP or DAMP-like scheme, for the provision of personnel. In this circumstance, the instrument will permit the first organisation to rely on the implementation of the DAMP or DAMP-like scheme of the second organisation, so that there is no duplication.

The second circumstance is where it is impracticable to implement a DAMP for a person in relation to the response to an emergency situation, for example, a bushfire emergency.

Among other things, the operation of the exemptions 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

The instrument engages:

- the right to protection against arbitrary and unlawful interferences with privacy (Article 17 of the International Covenant on Civil and Political Rights (the *ICCPR*)); and
- 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.

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

The instrument arguably engages positively with the right to work by reducing the circumstances in which a person may be prevented from working due to being under the influence of alcohol or drugs. The instrument arguably engages negatively with rights at 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. The risks are mitigated by the conditions on the instrument, which are intended to ensure the appropriate management of risks associated with alcohol and other drug impacts on aviation in the circumstances in which the exemptions apply.

The engagement with the right to work and rights at work promote the general welfare of Australian society by reducing the drug and alcohol testing burden on small aviation-related businesses, which are often in remote locations, thereby assisting these business to continue to provide employment. Overall, the provisions of the instrument are reasonable and proportionate to the risks associated with the exemptions 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