

Explanatory Statement

Civil Aviation Safety Regulations 1998

CASA 69/24 — CASA 39/20 (Drug and Alcohol Testing by CASA under Subpart 99.C of CASR) Amendment Instrument 2024

Purpose

The purpose of *CASA 69/24 — CASA 39/20 (Drug and Alcohol Testing by CASA under Subpart 99.C of CASR) Amendment Instrument 2024* (the **instrument**) is to amend instrument *CASA 39/20 – Drug and Alcohol Testing by CASA under Subpart 99.C of CASR Instrument 2020 (CASA 39/20)*, which sets out procedures for CASA when conducting drug and alcohol testing of people who perform safety-sensitive aviation activities (**SSAAs**). The amendment is a minor amendment in relation to the approved procedures for use of the drug-testing device known as the DrugWipe® 5S, which has recently been redesigned, such that it now has 2 control strips instead of 3.

Legislation

Under subsection 9 (1) of the *Civil Aviation Act 1988* (the **Act**), CASA has the function of conducting the safety regulation of civil air operations by means that include administering Part IV of the Act.

Part IV of the Act includes section 34. Under section 34, regulations may make provision for drug and alcohol management plans (**DAMPs**) for people who perform SSAAs, and for CASA to conduct drug and alcohol testing of such people.

Subsection 98 (1) of the Act additionally provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of Part 99, *Drug and alcohol management plans and testing (CASR 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 a drug and alcohol testing regime for all persons involved in SSAAs.

Subsection 98 (5D) of the Act provides that 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.

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. Under subsection 13 (1) of the *Legislation Act 2003* (the **LA**), subsection 33 (3) applies to legislative instruments as if each provision of the instrument were a section of an Act.

Legislative instrument under Part 99 of CASR

Under certain provisions of Part 99 of the *Civil Aviation Safety Regulations 1998 (CASR)*, CASA may make a legislative instrument for the purposes of conducting drug and alcohol testing. Under regulation 99.130 of CASR, for drug and alcohol testing under Subpart 99.C, CASA may, by legislative instrument, approve breathalysers for use in alcohol testing, and drug testing devices for use in initial drug testing.

Under regulation 99.140 of CASR, an approved tester must take and prepare a body sample for drug testing in accordance with the procedures set out in a legislative instrument made by CASA for the purposes of the regulation.

Under subregulation 99.145 (2) of CASR, an approved tester must ensure that the approved drug testing device is stored, tested, maintained and operated in accordance with the legislative instrument made by CASA for the purposes of the subregulation.

Under regulation 99.150 of CASR, CASA must, by legislative instrument, specify a method for determining sample identifiers that are to be allocated to body samples that approved testers take under Subpart 99.C and send for confirmatory drug tests.

Under regulation 99.245 of CASR, an approved tester must take body samples for alcohol testing in accordance with the procedures set out in a legislative instrument made by CASA for the purposes of the regulation.

Under subregulation 99.250 (3) of CASR, an approved tester must ensure that the breathalyser is stored, tested, maintained and operated in accordance with a legislative instrument made for the purposes of the subregulation.

Under paragraph 99.445 (3) (b) of CASR, CASA may approve a person to conduct confirmatory drug tests for the purposes of Part IV of the Act if the National Association of Testing Authorities accredits the person to AS 4760, *Procedures for specimen collection and the detection and quantitation of drugs in oral fluid*, or to another Standard that is declared by CASA in a legislative instrument made for the purposes of the paragraph.

CASA 39/20 is made for the purposes of regulation 99.140 of CASR and provides various approvals, procedures, methods and standards required for CASA to conduct drug and alcohol testing of people who perform SSAAs.

Schedule 2 of CASA 39/20 approves the use of the drug-testing device known as “DrugWipe® 5S” for use in initial drug testing.

Schedule 3 of CASA 39/20 sets out the detailed procedures for an approved tester to take and prepare a body sample for the conduct of an initial drug test. Item 1(a) of Schedule 3 sets out the procedures to be followed when using a DrugWipe® 5S. This includes a requirement that if, after taking a sample, a red control line does not appear on all 3 control line strips of the DrugWipe® 5S, the test result is not valid and device must be discarded.

Background

CASA 39/20 commenced on 4 August 2020. Among other things, it approved the drug testing device known as DrugWipe® 5S to be used for the conduct of an initial drug test under CASA 39/20.

The DrugWipe® 5S is operated by collecting saliva on a sampling pad on the device, and some minutes later a result is shown on 3 control strips within a display window. The procedures set out in CASA 39/20 state that “if a red control line does not appear on all 3 [control line] strips, the test result is not valid and device must be discarded”.

CASA was recently made aware that the manufacturer of the DrugWipe® 5S, German company Securetec Detektions-Systeme AG, has redesigned the DrugWipe® 5S such that the display window now displays 2 control strips, rather than 3. It is, therefore, necessary to amend the approved procedures for the DrugWipe® 5S, as set out in CASA 39/20, to remove the reference to 3 control strips.

Overview of instrument

The instrument amends CASA 39/20 to remove a reference to 3 control strips in the approved procedures for use of a DrugWipe® 5S drug testing device.

Details of instrument

Section 1 sets out the title of the instrument.

Section 2 states that the instrument commences on the day after it is registered.

Section 3 provides that CASA 39/20 is amended as set out in Schedule 1.

Schedule 1 amends item 1(a) of Schedule 3 of CASA 39/20, which sets out the approved procedures in respect of the DrugWipe® 5S. The part of the procedure that requires a red control line to appear on “all 3” control line strips has been amended to require the red line to “appear on all control strips”.

Legislation Act 2003

The various provisions mentioned above expressly indicate that certain matters are to be provided for by legislative instrument. The instrument is, therefore, a legislative instrument, 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 or CASA 39/20, because they both relate to aviation safety and are made under CASR (item 15 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

The instrument amends CASA 39/20 and is almost immediately spent and repealed in accordance with the automatic repeal provisions in section 48A of the LA.

CASA 39/20 deals with aviation safety matters and is intended to have enduring operation and it therefore would not be appropriate for it to be subject to sunseting. The

exemption from the sunset provisions affects parliamentary oversight by not requiring the instrument to be remade and subject to further tabling and disallowance in the Parliament under sections 38 and 42 of the LA.

Consultation

Consultation under section 17 of the LA has not been considered necessary for this instrument. The equipment approvals and testing procedures in CASA 39/20 are based on existing national drug and alcohol testing protocols and procedures and apply only to the procedures to be followed by CASA. They also largely replicate matters that have been in operation since 2009 in instrument CASA 125/09, *Drug and alcohol testing by CASA under Subpart 99.C of CASR 1998* and now CASA 39/20.

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.

The instrument makes minor or machinery changes to an existing instrument and there will be no change to the 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 CASA's drug-testing operations by keeping the approved procedures up-to-date with the design of the approved drug testing devices. As the instrument concerns CASA's own regulatory functions and procedures, it is unlikely to have any effect on operations by private operators.

Impact on regional and remote communities

The instrument is unlikely to have any specific effect on regional and remote communities, as it applies to CASA's procedures regarding SSAAs, which apply in respect of all communities.

Office of Impact Analysis

A preliminary assessment of business compliance costs indicates that the legislative instrument, as such, will have no cost impact on business. A Regulatory Impact Statement was required for the *Civil Aviation Safety Amendment Regulations 2008 (No. 1)* (the initial making of Part 99 of CASR) and, accordingly, CASA prepared

Regulation Impact Statement ORR ID: 8301A which was accepted by the Office of Best Practice Regulation. As this amendment is of a minor or machinery nature, no further assessment has been conducted in respect of the instrument.

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*. The instrument is compatible with the relevant human rights because, the extent that it may limit human rights, those limits are reasonable, necessary and proportionate.

Commencement and making

The instrument commences on the day after it is registered. It 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 automatically repealed in accordance with section 48A of the LA.

Statement of Compatibility with Human Rights

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

CASA 69/24 — CASA 39/20 (Drug and Alcohol Testing by CASA under Subpart 99.C of CASR) Amendment Instrument 2024

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

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Among other things, CASA 39/20 approved the drug testing device known as DrugWipe® 5S to be used for the conduct of an initial drug test under CASA 39/20.

The DrugWipe® 5S is operated by collecting saliva on a sampling pad on the device, and some minutes later a result is shown on 3 control strips within a display window. The procedures set out in CASA 39/20 state that “if a red control line does not appear on all 3 [control line] strips, the test result is not valid and device must be discarded.”

CASA was recently made aware that the manufacturer of the DrugWipe® 5S, German company Securetec Detektions-Systeme AG, has redesigned the DrugWipe® 5S such that the display window now displays 2 control strips, rather than 3. It is, therefore, necessary to amend the approved procedures for the DrugWipe® 5S, as set out in CASA 39/20, to remove the reference to 3 control strips.

Human rights implications

CASA 39/20 potentially engages with the right to privacy, including the right to protection of one’s reputation, as it relates to the taking of body samples for the conduct of alcohol and drug tests on persons who perform, or are available to perform, SSAAs. The instrument also potentially engages with the right to work and rights at work, as a person may be required to undergo body sampling at work in accordance with the procedures for the taking of body samples for alcohol and drug testing and may be prevented, under Part 99 of CASR, from working if confirmatory alcohol or drug testing of a sample taken using these procedures shows a positive result.

However, any limits on these human rights are reasonable, necessary and proportionate because they promote aviation safety. Part 99 of CASR sets out a scheme for the drug and alcohol testing of persons who perform SSAAs. The scheme is administered by CASA and is designed to ensure persons do not perform aviation-related duties while adversely affected by drugs or alcohol. The instrument assists in ensuring that persons who perform SSAAs are fit to perform those activities, thereby promoting the safety of aviation activities. Further, the limitations promote the right of other persons to have a safe workplace and the obligations imposed by the *Privacy Act 1988* continue to apply.

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.

Civil Aviation Safety Authority