**Explanatory Statement**

**Civil Aviation Safety Regulations 1998**

**Exemption — CASR Subpart 99.B DAMP requirements for foreign aircraft AOC holders**

**Purpose**

The purpose of this exemption is to exempt foreign aircraft AOC holders engaged in international air navigation in Australia, but not engaged in domestic air navigation in Australia, from the requirement in Part 99 of the *Civil Aviation Safety Regulations 1998* (***CASR 1998***) to have a drug and alcohol management plan (***DAMP***), provided that certain conditions are met.

**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 safety-sensitive aviation activities (***SSAA***), 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 *Civil Aviation Safety Amendment Regulations 2008 (No. 1)* commenced on 23 September 2008. It amended CASR 1998 by inserting a new Part 99, Drug and alcohol management plans and testing (***CASR Part 99***).

The purpose of CASR Part 99 was 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.

**DAMPs**

Under subregulation 99.030 (1) of CASR 1998, an organisation must develop a DAMP if the organisation is a DAMP organisation. 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 1998, for example, AOC holders.

Under the definitions in subregulation 99.010 (1) of CASR 1998, a DAMP means a plan that complies, or purports to comply, with the requirements of regulation 99.045 of CASR 1998.

**Foreign aircraft AOCs**

Under section 7 of the Act (extra-territorial application of the Act), and sections 27 and 27AE of the Act (AOCs), CASA may issue a foreign aircraft AOC authorising the operations of a foreign registered aircraft on flights that are not regulated domestic flights. These AOCs include all of those issued to foreign registered aircraft. (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.) Therefore, the holder of a foreign aircraft AOC is an AOC holder for subregulation 99.030 (1) of CASR 1998, and subject to the requirements in CASR Part 99 to implement a DAMP.

**Testing SSAA personnel**

The regulations also establish a regime for random drug and alcohol tests to be conducted by, or on behalf of, CASA. This regime will potentially affect up to 120 000 personnel in Australia who undertake SSAA, from relevant employees to contractors and whether or not they are employed by a domestic AOC holder or a foreign aircraft AOC holder.

**Provisions for extra-territorial application of CASR Part 99**

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, generally, 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 the *Civil Aviation Regulations 1988* (***CAR 1988***) provides that CASR 1998 is to be read with, and as if it formed part of, CAR 1988. However, in the event of any inconsistency between the 2 sets of regulations, CASR 1998 must prevail.

Paragraph 3 (1) (a) of CAR 1988, provides that “subject to these regulations, these regulations apply to and in relation to international air navigation within Australian territory”.

Subregulation 3 (2) of CAR 1988 provides that “[e]xcept where otherwise prescribed, the provisions of these Regulations shall apply to and in relation to Australian aircraft engaged in air navigation outside Australian territory”.

CASR Part 99 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 1988.

Being read as one with CAR 1988, CASR Part 99 applies “to and in relation to international air navigation within Australian territory” — but “subject to these Regulations”. Confinement of the application of CASR Part 99 to international air navigation “within Australian territory” only, is, therefore, subject to the other regulations.

**Reasons for extra-territorial application of CASR Part 99**

The Act extends to “matters relating to” foreign registered aircraft flying into or out of Australian territory within the meaning of paragraph 7 (a). This portends to a broad extra-territorial reach consistent with the objective expressed in section 3A where the “particular emphasis” is on “preventing aviation accidents and incidents”.

The prevention of accidents to Australian aircraft anywhere, and to foreign registered aircraft when flying inside Australia is the central objective of DAMPs and SSAA testing.

For all in-bound Australian and foreign registered aircraft in Australian airspace, a large measure of their safety will have been determined by the nature, quality and extent of SSAA conducted outside Australia.

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

Subregulation 99.015 (3) of CASR 1998 expressly states that CASR Part 99 applies outside Australian certified and registered aerodromes for certain SSAA.

CASA Part 99 is not limited in its extra-territoriality consequent on paragraph 7 (a) of the Act, by its head of power in section 34 of the Act.

By virtue of subregulation 3 (2) of CAR 1988, CASA Part 99 applies to, and in relation to, Australian aircraft engaged in international air navigation outside Australian territory.

The terms of CASR 1998 and its rationale take it beyond the reach of any possible domestic limitation expressed in paragraph 3 (1) (a) of CAR 1988. In any event, that limitation is more notional than real because it provides that the Regulations apply to “and in relation to” “international air navigation within Australian territory”. Because of the nature of international passenger aviation, regulations for DAMPs and SSAA testing *outside* Australia is, *prima facie*, “in relation to international air navigation *within* Australian territory”.

**Exemption**

Under subregulation 11.160 (1) of CASR 1998, CASA may grant an exemption from compliance with a provision of CASR 1998. Under regulation 11.160, CASA may grant an exemption of its own initiative. Under subregulation 11.170 (3), in deciding whether to grant an exemption, CASA must regard as paramount the preservation of an acceptable level of safety. Under subregulation 11.205 (1), CASA may impose conditions on an exemption if this is necessary in the interests of the safety of air navigation. Under regulation 11.210, it is an offence to fail to comply with a condition of an exemption.

Under regulation 11.225 of CASR 1998, an exemption must be published on the Internet. Under subregulation 11.230 (1), an exemption ceases on the day specified within it (but no longer than 3 years after its commencement), or if no day is specified, 3 years after commencement.

**Requirement for exemption**

CASR Part 99 effectively came into operation with the implementation of DAMPs and preliminary testing.

At that time, CASA considered that it was not realistically possible for many of the foreign AOC holders, for whom Australian international operations are only a component of their broader international operations, to make a full conversion of their existing drug and alcohol control policies to CASR Part 99 DAMP requirements.

CASA, therefore, decided to issue holders of foreign aircraft AOCs with an exemption from CASR Part 99 in relation to the development and implementation of a DAMP. (Liability to random CASA testing of SSAA employees remained unaffected.)

In deciding whether to grant an exemption, CASA had regarded as paramount the preservation of an acceptable level of safety. CASA was satisfied that, in all the circumstances, an acceptable level of safety was preserved through imposition of the conditions mentioned in the instrument.

The exemption does not in any way limit the application of CASR Part 99 to any relevant organisation or person based in Australia.

The instrument imposes conditions on foreign AOC holders to ensure that (although not having a DAMP) they comply with the spirit and intent of subregulation 99.050 (2) of CASR 1998 which is to prevent an untested (and therefore uncleared) SSAA employee from performing SSAA following an accident, a serious incident, an occurrence of reasonable suspicion of improper drug or alcohol use, or a return to work following an earlier positive result from drug or alcohol testing.

**Legislative Instruments Act**

Under subparagraph 6 (d) (i) of the *Legislative Instruments Act 2003* (the ***LIA***), an instrument is a legislative instrument for section 5 of the LIA if it is declared to be a disallowable instrument under legislation in force before the commencement of the LIA. Regulation 11.215 of CASR 1998 declares an exemption to be a disallowable instrument. The exemption is, therefore, a legislative instrument and it is subject to tabling and disallowance in the Parliament under sections 38 and 42 of the LIA.

**Consultation**

Consultation under section 17 of the LIA took place with the board of Airline Representatives before the previous instrument was issued. The policy behind that instrument has not changed since the issue. The operation of the previous instrument has been satisfactory. The instrument was renewed on that basis without further consultation taking place.

**Statement of Compatibility with Human Rights**

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

**Office of Best Practice Regulation (*OBPR*)**

The exemption would be of beneficial effect to those who voluntarily wish to adopt it and comply with its conditions. OBPR does not require preparation of a Regulation Impact Statement in this case because a preliminary assessment of business compliance costs in the context of the nature of the instrument indicates that it will have only a nil to low impact on business.

**Making and commencement**

The exemption has been made by a delegate of CASA relying on the power of delegation in subregulation 11.260 (1) of CASR 1998.

The exemption commences on 23 March 2013 and stops having effect at the end of 22 March 2016 as if it had been repealed by another instrument.

[Instrument number CASA EX33/13]

**Attachment 1**

**Statement of Compatibility with Human Rights**

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

**Exemption — CASR Subpart 99.B DAMP requirements for
foreign aircraft AOC holders**

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 aircraft AOC holders engaged in international air navigation in Australia, but not engaged in domestic air navigation in Australia, from the requirement in CASR Part 99 to have a DAMP, provided that certain conditions are met. These conditions require compliance with the spirit and intent of the provisions in Subpart 99.B of CASR 1998 which make a person’s return to safety-sensitive aviation activities following an accident, a serious incident, a reasonable suspicion of improper drug or alcohol use, or a previous positive finding of improper drug or alcohol use, conditional on assessment and testing to ensure safety clearance.

The exemption is beneficial for the foreign aircraft 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.

Since its effects are limited to these beneficial consequences, the 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*.

**Human rights implications**

This legislative instrument does not engage any of the applicable rights or freedom

**Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

**Civil Aviation Safety Authority**