

### 3.1 Contents of this Chapter

This Chapter contains the following sections:

- 3.2 Purpose
- 3.3 Receiving Information of a Breach
- 3.4 Initial investigation
- 3.5 Deciding to Take Enforcement Action
- 3.6 The Coordinated Enforcement Process
- 3.7 Role of the Legal Services Division (LSD) in Relation to the Enforcement Process
- 3.8 The Tools of Enforcement
- 3.9 Requesting the Services of a Part IIIA Investigator
- 3.10 Recording and Tracking of Enforcement Action.

### 3.2 Purpose

This Chapter deals with the initial steps in commencing enforcement action.

### 3.3 Receiving Information of a Breach

Information of suspected breaches of the legislation may be received by any officer in CASA. If you receive information of this nature either by phone, in writing or by email, you should discuss it with your team leader and/or your manager. *Where enforcement action is considered to be a possibility* the manager will initiate the Coordinated Enforcement Process (CEP).

Information also comes through CASA's hotline and through the Industry Complaints Commissioner (ICC). The ICC will not normally be involved in handling breaches of the legislation by industry. These matters are usually referred by the ICC to Legal Services Division (LSD) or to the appropriate operational area.

Matters referred directly to the Enforcement Policy and Practice Branch (EPP) will also be discussed with appropriate operational or technical areas, respecting confidentiality where that has been requested and to the extent appropriate in the circumstances.

### 3.4 Initial Investigation

Where information is received by the operational/technical area an initial investigation may be carried out by the operational/technical staff prior to the CEP being initiated. (See flowchart – Coordinated Enforcement Process A).

Managers in operational and technical areas need to consult with their team members on receipt of information and initial investigation to determine whether the matter can be addressed by using other means such as RCAs and ASRs or whether enforcement may be necessary. A record should be kept of such meetings and preliminary decisions.

There may also be a need for further investigation to be carried out by operational/technical personnel after the CEP has been initiated. As part of the CEP it may also become apparent that the specialised skills of a Part IIIA investigator should be used.

### 3.5 Deciding to Take Enforcement Action

The key factors to consider when deciding whether enforcement action should be taken, and if so what kind of enforcement action to take, are:

- The nature and sufficiency of the evidence of non-compliance that is available. This may have been obtained through information received from industry, from surveillance, an initial or further operational/technical investigation or through the use of a Part IIIA investigator.
- The kind(s) of responsive action that will effectively and efficiently address the safety issues that have arisen, or are likely to arise, in the particular circumstances
- The delegations and/or authorisations required for the options being contemplated, and who holds those delegations and/or authorisations
- The need to obtain expert assistance on any complex technical or legal issues
- The obligation to be fair, consistent, impartial and proportional in taking any enforcement action (see Chapter 2)
- The Prosecution Policy of the Commonwealth (PPC), where recommendation for referral to the Commonwealth Director of Public Prosecutions (CDPP) is contemplated
- The need to follow other applicable CASA's procedures.

In some cases, it may be that a breach of the aviation law invites and requires only a compliance-related response, such as counselling. In other cases, an aviation infringement notice (AIN) may be necessary and sufficient to deter a repetition of conduct involving a contravention of the safety regulations. In yet other cases it may be that both a prospective, safety-related response and a retrospective punitive response are called for. In other cases still, where the breaches are systemic in nature, CASA may agree to a person or organisation entering into an Enforceable Voluntary Undertaking.

As described below, this will assist officers in making initial determination about the type of response that may be appropriate and will better ensure that decision-makers are provided with more of the information and support they need.

### 3.6 The Coordinated Enforcement Process

The CEP is a mandatory process, designed to ensure that the decision-makers have the benefit of important legal and regulatory input, as well as critical operational and/or technical input, when considering the actions they may take in response to a situation involving an identified or suspected breach of the aviation laws. The CEP does not alter arrangements conferring decision-making authority on specified managers in relation to enforcement-related matters.

As a matter of policy and practice, operational decision-makers, and those who advise and make recommendations to operational decision-makers, are obliged to confer with the Manager, Enforcement Policy and Practice (Manager EPP):

- In the first instance, as soon as it becomes apparent that enforcement action of any kind *is* or *may be* appropriate in a given situation.
- From time to time thereafter, as the relevant facts and circumstances are considered (and re-considered) with a view to determining whether enforcement action of any kind is appropriate, and if so, what that action should entail.

Subject to the applicable provisions of this manual, operational officers and managers retain discretion as to whether a particular situation warrants consideration as a matter inviting or requiring potential enforcement action, and thus whether CEP consultations should be initiated. On this basis, operational officers and managers who decide that a matter does not warrant the initiation of CEP consultations will be accountable for that decision.

### Initial CEP consultation will involve:

- A review of the relevant facts and circumstances
- Identification of the legislative requirements implicated by the conduct involved
- A preliminary determination as to whether enforcement action of any kind is or may be appropriate
- Identification of the most appropriate enforcement tool or combination of tools (if any) to be employed
- Allocation of responsibility for particular actions to be taken
- Establishing and agreeing on time-frames for completing specified tasks and reporting on results and other developments.

### On-going CEP consultation will involve:

- Monitoring developments and progress on agreed actions
- Discussing implications of new information and/or changed circumstances for the agreed enforcement actions, with a view to such adjustments as may be appropriate
- Assessing overall progress against agreed milestones and anticipated developments
- Determining whether and if so when and how, enforcement actions that are in train may be concluded or terminated.

### 3.6.1 Coordinated Enforcement - Process A

**Initiating the CEP does not mean that enforcement action will necessarily be the outcome. The CEP may lead to the conclusion that the appropriate action need not involve the use of any of CASA's enforcement tools, but may involve some other approach to achieve the desired safety outcome.**

The flowchart in Appendix 1 sets out the action that should be taken in response to a suspected instance of non-compliance with a legislative requirement.

Contacting the Manager, EPP and taking part in the CEP will enable more consistent and informed decision-making without interfering with the responsibility of the decision-maker.

CASA has a number of options when dealing with breaches of legislative requirements. These include but are not limited to:

- Issuing directions (e.g., under CAR 38 or CAR 215)
- Accepting a voluntary request for variation or cancellation of a civil aviation authorisation
- Requiring an examination under CAR 5.38
- Counselling
- Imposing conditions on a civil aviation authorisation
- Varying, suspending or cancelling an authorisation
- Immediately suspending an authorisation under the Serious and Imminent Risk provisions of the Civil Aviation Act
- Immediately suspending an authorisation under CAR 265 for the purposes of requiring a person to undergo an examination
- Accepting an Enforceable Voluntary Undertaking (EVU)
- Recommending infringement notice action
- Referring a matter to the Commonwealth Director of Public Prosecutions (CDPP).

### 3.6.2 Steps in the Coordinated Enforcement Process

The operational/technical manager:

- Arranges initial investigation at the operation/ technical level where appropriate
- Arranges for appropriate entries to be made in the Enforcement Action Register in the Enforcement Action eRoom
- Contacts the Manager EPP to arrange an initial CEP discussion.

Further consultation may be necessary depending on the outcome of the initial consultation and action proposed. See flowchart - Coordinated Enforcement Process A.

### 3.7 Role of the Legal Services Division (LSD) in relation to the Enforcement Process

Although it is only part of LSD's role, the Division plays a critical part in the conduct of, and the processes leading to, any enforcement action CASA may take. Each of the Division's three branches may be involved in those processes.

1. **Enforcement Policy and Practice Branch:** This is the starting point for all matters where, in accordance with the Coordinated Enforcement Policy, it becomes apparent to the technical or operational areas that enforcement action is or may be appropriate. (See flowchart Coordinated Enforcement Process A and 3.6.2.)
2. **Legal Branch:** Once an initial Coordinated meeting has been conducted, and it has been agreed that some form of enforcement action is required, Assigned Legal Counsel (ALC) will 'case manage' the particular matter (ensuring time-limits are met) until the enforcement action is completed.
3. **Legislative Drafting Branch:** While not having a specific role in the CEP, the branch provides advice on instruments and delegations where this may be pertinent to any proposed enforcement action.

#### 3.7.1 Enforcement Policy and Practice Branch (EPP)

EPP is the focal point for linking *all enforcement action* and the Manager EPP is the contact point for the CEP.

In addition to its role in the development of CASA's enforcement policies and practices, coordinating enforcement action and the conduct of investigations by investigators appointed under Part IIIA of the Civil Aviation Act, EPP also has responsibility for:

- Issuing infringement notices
- Administering the Demerit Points Scheme
- Monitoring the Aviation Self-Reporting Scheme
- Monitoring enforcement processes including compliance-related processes such as counselling.

While some CASA Part IIIA investigators are based in field offices, they are tasked by the Manager EPP, through the Coordinator, Investigations, to investigate complex matters that could result in a variety of outcomes, including referral to the Commonwealth Director of Public Prosecutions (CDPP). Because Part IIIA investigators are tasked on a centralised basis, all requests for their investigative assistance must be made to the Manager EPP or the Coordinator Investigations using form 333. Requests for the assistance of a Part IIIA investigator or the conduct of a Part IIIA investigation should only be made on the basis of a prior CEP consultation. (See Sections 3.4, 3.6.2 and 3.8).

Any general questions relating to enforcement matters should be referred to the Manager, EPP.

### 3.7.2 Legal Branch

A crucial part of the general legal advisory role of the Legal Branch involves the provision of advice and assistance to CASA officers and managers in connection with enforcement-related matters and processes. Amongst other things, the Legal Branch may provide advice and assistance in relation to:

- Proposed actions against holders of civil aviation authorisations as part of the CEP
- The meaning and application of any provision of the Civil Aviation Act, the Regulations and the Orders, or instruments made under the civil aviation legislation
- The preparation and drafting of notices and other documents including correspondence and counselling letters.

The Legal Branch is also directly involved in:

- Federal Court litigation, including
  - Appeals to the Federal Court from the Administrative Appeals Tribunal (AAT)
  - Applications for judicial review of CASA decisions, pursuant to the Administrative Decisions (Judicial Review) Act
  - Applications by CASA for prohibition orders pursuant to section 30DE of the *Civil Aviation Act 1988*
- Applications for review in the AAT. The applications for review of decisions relate to decisions, such as refusing to issue, suspend or cancel air operator's certificates, certificates of approval, aircraft maintenance engineer licences, flight crew licences and medical certificates.
- Representation of CASA at Coronial inquests into the death of persons in aircraft accidents

- Assisting CASA's insurers in relation to civil litigation matters involving CASA
- Privacy law and freedom of information
- Insurance law issues, which also involves liaising with CASA's insurers and external solicitors appointed by insurers when claims are made against CASA, including when Court proceedings are commenced against CASA for the negligence of authorised persons or delegates
- Contract law issues, such as CASA's building lease
- Corporate governance issues, including the application of the Commonwealth Authorities and Companies Act 1997
- General legal advice on legislation which affects CASA, such as the Copyright Act, Occupational Health and Safety Act, Discrimination Act and the Trade Practices Act
- Assessing draft aviation legislation and regulatory development in general.

For queries relating to these legal matters contact the Manager, Legal Branch.

#### 3.7.3 Legislative Drafting Branch

The Legislative Drafting Branch is not generally involved in the enforcement process. The Branch has an advisory role in this process in relation to instruments and delegations.

The Legislative Drafting Branch is primarily responsible for the drafting, registration, publication and maintenance of a wide range of legislative and other statutory instruments under the Civil Aviation legislation and other legislation that CASA administers. While the Branch is responsible for ensuring that legislative instruments are registered, the registration is done by staff in the Office of Legislative Drafting and Publishing (OLDP) within the Attorney-General's Department.

The Legislative Drafting Branch also advises on, and assists in the preparation of drafting instructions for changes to the Civil Aviation legislation. Changes to the Civil Aviation Act, Regulations or other Acts and regulations administered by the Civil Aviation Authority are prepared by OLDP.

For queries relating to these matters contact the Manager, Legislative Drafting.

### 3.8 The 'Tools' of Enforcement

As seen above, the CEP will involve exploring various options for the handling of breaches of the legislation. Some of these include the use of enforcement. The enforcement tools available to CASA are set out in subsequent chapters. The CEP will generate discussion of the various options in any given case.

The tools of enforcement are:

- Suspension under CAR 265 for the purpose of an examination required to be taken under CAR 5.38
- Suspension under s.30DC of the Act because of a serious and imminent risk to safety
- The acceptance of an Enforceable Voluntary Undertaking
- Administrative action – cancellation, suspension or variation
- Infringement notice
- Referral to the CDPD after an investigation by a Part IIIA Investigation.

Other actions which may be considered *not* as enforcement but as part of the compliance function are:

- Giving directions
- Accepting a request for voluntary variation or cancellation of a civil aviation authorisation
- Counselling
- Recommendation for remedial training which would usually be done in conjunction with counselling
- Requirement to take an examination under CAR 5.38.

Flowcharts explaining the particular processes to follow when using a specific enforcement tool are set out at Appendix 1.

### 3.9 Requesting the Services of a Part IIIA Investigator

The primary purpose of a Part IIIA investigation is to establish the facts and circumstances that gave rise to the breach, by the gathering of information and evidence. This needs to be understood when requesting the assistance of a Part IIIA investigator.

Requesting the assistance of a Part IIIA investigator is NOT an initial step in relation to enforcement. While investigators undertake investigations that may result in referral of briefs to the CDPP, they also help managers in the collecting of information to support other enforcement responses such as administrative action and to support compliance-related action.

Before an investigation is requested, the operational/technical manager must first take part in the CEP to identify what the manager is trying to achieve, and to assess whether the services of an investigator are actually necessary. While investigators in the EPP Branch have specific powers under Part IIIA of the Act in relation to entry and seizure of documents and while they may also be more familiar with the gathering of evidence and the investigative process generally, operational inspectors also have the capability to undertake many of the basic tasks of gathering information and evidence. (See Chapters 12, 13, 14 and 15)

Requests for Part IIIA investigations are initiated by using form 333 after a CEP Meeting. (See also the flowcharts Coordinated Enforcement Process A and Coordinated Enforcement Process B.

### 3.10 Recording and Tracking of Enforcement Action

As noted in Section 3.6.2 above, the operational/technical manager initiating the CEP enters the matter on the Enforcement Action Register before arranging an initial consultation with the Manager EPP.

The Enforcement Action Register keeps an informal record of how matters are progressing and where they are up to at any time. The register provides a quick check as to how matters are progressing and forms a basis for collection of statistics.

It does not replace the use of formal CASA methods of recording in TRIM and AIRS.