

7.1 Contents of this Chapter

This Chapter contains the following sections:

- 7.2 Purpose
- 7.3 Introduction
- 7.4 What is an Imminent Risk?
- 7.5 What is a Serious Risk to Air Safety?
- 7.6 Suspension Process
- 7.7 Application to the Federal Court
- 7.8 Court May Vary Period of Order
- 7.9 CASA Must Investigate
- 7.10 CASA May Give Show Cause Notice within Five Business Days after End of Order
- 7.11 CASA May Vary Suspend or Cancel within Five Business Days after End of Show Cause Period
- 7.12 When does a Suspension under Section 30DC End?
- 7.13 Procedure -The Coordinated Enforcement Process D

7.2 Purpose

The purpose of this Chapter is to explain the procedures and responsibilities in relation to Serious and Imminent Risk.

7.3 Introduction

CAA 30DB Section 30DB of the Act states that:

'The holder of a civil aviation authorisation must not engage in conduct that constitutes, contributes to or results in a serious and imminent risk to air safety'

CAA 30DC Subdivision B of Division 3A of Part III of the Act, authorises CASA to suspend civil aviation authorisations and apply to the Federal Court for a confirmatory order where CASA has reason to believe that the holder of the authorisation **has engaged in, is engaging in, or is likely to engage in** conduct which constitutes, contributes to, or results in a serious and imminent risk to air safety—see section 30DC.

There are no definitions in the Act of the terms 'serious' or 'imminent'.

The [flowchart – Coordinated Enforcement Process D](#), should be followed and the Serious and Imminent Risk Checklist (form 342) used.

7.4 What is an Imminent Risk?

“Imminent” is defined in the Macquarie Dictionary as meaning “likely to occur at any moment, impending: war is imminent”.

The concept of imminence does not equate with the concept of immediacy. As Professor Sir John Smith QC has observed the term “imminent”, in the context of the criminal law defence of necessity, can include circumstances where a threat is “hanging over” a person even though there is no immediate danger of death or serious bodily harm: [1999] Crim LR 570 at 571.

CAA Div 3A

The risk does not have to crystallise into a life or injury-threatening event. Provided there is a perceived threat or danger to the life of some person or persons engaged in civil aviation (which need not, in fact, exist) a genuine belief based on reasonable grounds by a CASA officer of the perceived risk is sufficient to trigger the operation of Division 3A.

It is not necessary for a CASA officer to identify specifically the harm that will result from the imminent risk, or identify the person or persons who will be harmed. But there must be a close temporal connection between the risk and the harm. The risk must be a present one in the sense that it creates an obligation and immediate pressure on CASA to take urgent suspension action when the evidence on which the perception of the risk is based, comes to light.

As soon as CASA officers have sufficient evidence to be appraised of the serious and imminent risk, they are entitled to take action under Division 3A, and any delay of more than a few days after discovery, to commence the process is likely be fatal to success before the Federal Court.

7.5 What is a Serious Risk to Air Safety?

A serious risk is one where conduct has caused, or is reasonably likely to cause, an aviation accident or incident.

While it is not possible to list all the conduct that creates a serious risk, it would normally include the following:

- Conduct indicating the use of, or an intention to use, an aircraft that was unairworthy on passenger carrying operations
- The carrying out, or failure to carry out maintenance, in a manner that would result in that aircraft becoming unairworthy
- A pilot in command flying or indicating an intention to fly, when not authorised to do so due to lack of licence, rating, endorsement, medical certificate, or other necessary authorisation

- The occurrence of an accident or serious incident has occurred where evidence exists that a significant breach of CASA legislation, or a lack of competence, was a causal factor
- The carriage of passengers for hire or reward, or conduct indicating an intention to carry passengers for hire or reward, without the operator holding an AOC authorising such carriage
- A pilot in command engaging in conduct, or showing an intention to engage in conduct, that constitutes dangerous flying.

However, it should be noted that the risk must not only be serious: it must also be imminent.

7.6 Suspension Process

While this process will be initiated with urgency, being mindful of the seriousness of the action and the legislative time-frames, officers contemplating this action must still take part in the Coordinated Enforcement process set out in [Chapter 3](#) at 3.4. This means that the enforcement administration officer in the Controlling Office will, as with any matter being referred for Coordinated Enforcement, make an entry on the Enforcement Action Register, complete a Coordinated Enforcement Referral Form and open a Coordinated Enforcement TRIM file.

There will be different entry points to the process under s.30DC. At times the serious and imminent risk might come out of one very serious incident. At other times the serious and imminent risk may be discovered as a result of an audit. There may also be situations where the individual or organisation has already caused the Controlling office to have safety concerns and may already have been forwarded for Coordinated Enforcement. The escalation to action under 30DC may come out of further investigation or an incident occurring since the referral. If the matter has already been referred for enforcement, there will already have been an entry made on the Enforcement Action Register, a Coordinated Enforcement Referral form completed and a TRIM file opened. In that instance these will simply need to be updated to reflect the additional action or where the matter is complex a new entry made and a new TRIM file opened and cross-referenced.

When a decision is taken to recommend to the delegate that action be taken under these provisions the manager must ensure that the [flowchart – Coordinated Enforcement Process D](#) is followed and the Serious and Imminent Risk Checklist (form 342) is used together with the Standard Form Recommendation (form 316) for guidance as to the correct procedures to follow.

Because of the urgency and importance of such action the Executive Manager Legal Services Division (LSD) must be kept advised of all steps taken as part of the Serious and Imminent Risk enforcement process.

CAA 30DC Section 30DC of the Act gives CASA power to suspend a civil aviation authorisation (without issuing a show cause notice) where CASA has reason to believe that the civil aviation authorisation holder **has engaged in, is engaged in or is likely to engage in** conduct that contravenes section 30DB (see CAA 30DC).

CAA 30DC(3) Subsection 30DC (3) provides that the suspension ends at the end of the fifth business day after the day on which the holder was notified of the suspension, unless **before** that time CASA makes an application to the Federal Court under section 30DE.

CAA 30DE

Upon application by CASA, a Federal Court may prohibit a person suspended under section 30DC from doing anything authorised by the suspended authorisation, thus confirming CASA's suspension—see section 30DE.

7.6.1 What Standard of Proof is Required to Obtain a Federal Court Suspension Order?

CAA 30DB The court needs to be satisfied that there are reasonable grounds to believe that the holder has engaged in, is engaging in, or is likely to engage in conduct that contravenes section 30DB of the Act before the Court makes a suspension order. If that evidentiary standard is met, the court **must make an order** prohibiting the holder from doing anything:

‘...that is authorised by the authorisation but that, without the authorisation, would be unlawful.’

The evidence must be directed to **establishing the facts** upon which the objective belief can be formed.

Because the application is preliminary to an investigation, the evidence placed before the court may be rudimentary. The only issue is: Has CASA acted on reasonable grounds in perceiving a serious and imminent risk to air safety and suspending the civil aviation authorisation to protect public safety? While the application may be akin to an interlocutory injunction, CASA should not have to demonstrate a prima facie case (i.e. that its claim of serious and imminent risk has merit in fact and law) nor should the court weigh up “the balance of convenience”. In exercising CASA's discretion, the most important consideration is the safety of air navigation (subsection 30DE (3) requires that the Court in making its decision must have regard to section 3A and subsection 9A(1) of the Civil Aviation Act 1988.

CAA 30DE(3)
CAA 3A
CAA 9A (1)

7.6.2 Preparing the Suspension Notice

CAA 30DC The suspension notice will be prepared by the assigned legal counsel with input from the Controlling Office. At the time of publication of version 4.2 of the Enforcement Manual the Director, Deputy Director and Assistant Director have the power to issue a suspension notice under section 30DC of the Act. However, delegations must always be confirmed before a decision is taken and a suspension notice is signed.

CAA 30DC
CAA Div C and D Section 30DC of the Act requires that the notice of decision must include a summary of subdivisions C and D of Division 3A of Part 2 although failure to include such a summary does not affect the validity of the notice. Subdivision C deals with the Federal Court procedure, while subdivision D deals with procedure after the Federal Court makes a confirmatory order.

7.6.3 Application and Affidavits

Because of the five-business day time limit in section 30DE and the urgency of bringing a suspension application before the Federal Court, CASA operational staff need to give the highest priority to this enforcement obligation.

An application to the Federal Court will be prepared by Legal Services Division (LSD). Affidavits in support of the action being taken will be prepared with the assistance of LSD. Appropriate persons to be deponents for such affidavits are experienced Team Leaders (Flying Operations and Airworthiness) and Senior Flying Operations Inspectors.

The affidavits will require attachment of various records including the following:

- The deponent's curriculum vitae and aviation experience
- The deponent's duty statement
- The report received of an accident, incident, or otherwise serious risk creating conduct
- Correspondence with that respondent seeking urgent explanation for document(s)
- Any response received.

The affidavit should include the grounds on which the deponent, as an experienced aviation professional, considered the conduct created a serious and imminent risk, referring to:

- The legislation that has been breached
- CASA, ICAO or other regulators' (FAA, JAA etc) advisory material prohibiting or commenting on the conduct, or similar conduct in terms of safety risk
- Any approved maintenance data, flight manual, operations and other manuals applicable to the conduct or perceived risk
- Searches of ATSB Oasis database or NTSB database of accidents or serious incidents in the last ten (10) years caused by the type of conduct, or unairworthy condition of the aircraft, the subject of the application

- Any photographs taken of the accident, incident scene or condition of aircraft relevant to application.

CASA inspectors are encouraged to record evidence (scenes, aircraft defects, documents etc.) by digital photographs for attachment to affidavits.

Where the serious and imminent risk is created not by dangerous conduct per se, but by aviation operations that are risk-creating because they are not subject to CASA regulation (i.e. operating without appropriate AOC, licence, certificate, permission or other approval), the suspension of the respondent's existing civil aviation authorisations may not remove the risk, but will make it more difficult for the respondent to undertake risk creating conduct in the future.

In such cases, the appropriate deponent could be the Manager Legal Branch, and the affidavit should contain the legislative background to the systems of regulation (e.g. flight crew licensing, AOC etc.) which the respondent is avoiding, pointing out the derived safety benefit of such systems, and how such systems harmonise with ICAO models.

7.6.4 CASA May Suspend Despite Other Processes

CAA 30DD Section 30DD of the Act provides as follows:

CAA 30DC '(1) *CASA may make a decision under section 30DC in relation to a civil aviation authorisation even if CASA has given the holder of the authorisation the show cause notice required before making a decision under another provision of this Act or the regulations.*

CAA 30DC
CAA 31A '(2) *A suspension of a civil aviation authorisation under section 30DC has effect despite a stay (whether or not a stay under section 31A) of an earlier decision to vary, suspend or cancel the authorisation'.*

CAA 30DC What this means is that CASA may issue an immediate suspension under section 30DC even if it has issued a show cause notice to the authorisation holder under another provision of the legislation or even if it has already suspended an authorisation and that suspension has been automatically stayed.

7.7 Application to the Federal Court

CAA 30DE
CAA 30DC

Under section 30DE of the Act, CASA has only five business days after the holder has been notified of the decision to suspend under section 30DC, to apply to the Federal Court for an Order. If the court is satisfied that there are reasonable grounds for the belief that the holder ***has engaged, is engaging in, or is likely to engage*** in conduct that contravenes section 30DB, the court **must** make an order prohibiting the holder from doing anything that is authorised by the authorisation, but that without the authorisation would be unlawful. The court must have regard to sections 3A and 9A (1) in making that decision.

CAA 30DB

CAA 3A
CAA 9A(1)

Because the time for application is so limited it is important that the Assigned Legal Counsel (ALC) remain involved with immediate suspension action so that they can expedite action on the application.

CAA 30DG

The Manager, Investigations must also be kept advised so that a Investigator can be made available to undertake the investigation required under section 30DG of the Act, if it is thought necessary for the investigation to be conducted by a Part IIIA Investigator.

CAA 30DE

It is intended that applications will be made in the Federal Court in Canberra by the LSD. Only the Executive Manager of LSD and the Manager Legal Branch have the delegation to make application to the Federal Court under section 30DE.

CAA 30DE

It is also important to understand and be ready to deal with the implications of the definition of “business day” for the purposes of section 30DE: “business day” means a day that is not a Saturday, a Sunday or a public holiday **in the Australian Capital Territory**—see section 3(1) of the Act. Thus a public holiday in the State or Territory in which the holder is located may still be a “business day” for the purposes of section 30DE.

CAA 30DF
CAA 30DE

Subject to a variation order under section 30DF, an order made by the Federal Court under section 30DE lasts for **no more than 40 days** to allow CASA to complete its investigation. The Federal Court will determine how long an order will remain in force.

7.8 Court May Vary Period of Order

CAA 30DF Under section 30DF the court may extend (**by no more than 28 days**) or shorten the original period of the order on the application of either party.

The application must be made before the end of the original period and CASA can apply only once to extend the period of the order.

CAA 30DF(1)
CAA 30DF(4) If the court has already heard and determined an application under subsection 30DF(1), then **no further applications can be made**—see subsection 30DF(4).

If either party applies to vary the period of an order, and before a determination is made, the other party applies to the court, the court must hear the applications together.

CAA 30DF If an application is made to vary the period of an order, the order continues in force until the day worked out under the table at section 30DF.

See below (extract from section 30DF):

CAA 30DF
(Extract)

Period of order when an application to vary is made		
Item	If...	the order continues in force until...
1	the holder applies to shorten the period and CASA does not apply to extend it	the earlier of: (a) the last day of the original period; and (b) if the Court grants the application—the day determined by the Court in granting the application.
2	CASA applies to extend the period of the order and the holder does not apply to shorten it	whichever of the following applies: (a) if the Court grants CASA's application—the day determined by the Court in granting the application; (b) if the Court refuses CASA's application before the end of the original period—the end of the original period; (c) if the Court refuses CASA's application after the end of the original period and before the 28th day after the end of the original period—the day of the refusal; (d) otherwise—the 28th day after the end of the original period.
3	the Court hears applications from both parties together under subsection (5)	whichever of the following applies: (a) if the Court grants one of the applications—the day determined by the Court in granting the application; (b) if the Court refuses both applications before the end of the original period—the end of the original period; (c) if the Court refuses the extension application after the end of the original period and before the 28th day after the end of the original period—the day of the refusal; (d) Otherwise—the 28th day after the end of the original period.

7.9 CASA Must Investigate

CAA 30DE
CAA 30DC

If the Federal Court makes a prohibition order under section 30DE, CASA must, by the end of the period that the order is in force, complete an investigation into the circumstances that gave rise to CASA's decision to suspend the authorisation under section 30DC.

Because of the very tight time-frame and the fact that a Part IIIA investigator is generally (although not necessarily) required to carry out the investigation, the investigation will have generally already commenced before the Federal Court has made any order.

Communication between the Controlling Office, Legal Branch, Investigations Branch and the Senior Adviser EPP is essential to ensure that mandatory time frames are met.

7.10 CASA May Give Show Cause Notice within Five Business Days after End of Order

CAA 30DH

If after CASA has investigated the matter CASA still **has reason to believe** that a serious and imminent risk to safety would exist if the authorisation were not suspended, varied or cancelled **and the belief is based on the grounds of that original decision**, CASA may, under section 30DH, give the holder a show cause (within 5 business days **after** the last day the order is in force) and allow the holder a reasonable time to show cause. The show cause period must not be more than 28 days. The suspension continues for at least 5 days beyond the end of the order (see section 30DJ) to allow time for CASA to issue a show cause.

CAA 30DJ

CAA 30DH

It is important to understand and be ready to deal with the implications of the definition of "business day" for the purposes of section 30DH: "business day" means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

It should be noted if CASA does issue a SCN, the original suspension will continue in force for the duration of the show cause period and for five business days after the end of the show cause period.

The show cause process under these provisions should follow the same procedures as set out in paragraphs 6.6 and 6.7. Because the holder will have already had procedural fairness through the Federal Court process and because of the limited time-frame, a show cause conference will not normally be offered and no attachment inviting the party to a show cause conference will be provided with the SCN in a serious and imminent risk situation. If the holder requests a show cause conference then form 312 should be provided. This is similar to the normal attachment but explains that the conference needs to be held within 20 days of the notice and that the holder understands that this may be before the holder has tendered a written response to the show cause. This cannot be avoided as the 28-day show cause period, provided for under the legislation, cannot be extended and the decision-maker needs time to consider all the facts before making a decision.

While at the time of publication of version 4.2 of the Enforcement Manual the Director, has delegated the power to issue a show cause notice, under section 30DH of the Act, to the Deputy Director of Aviation Safety and the Associate Director of Aviation Safety and to relevant Executive Managers¹, delegations must always be confirmed before a show cause notice is issued under this provision of the Act.

7.11 CASA May Vary Suspend or Cancel within Five Business Days after End of Show Cause Period

CAA 30DI

If after the period specified in the SCN, CASA is **satisfied** that a serious and imminent risk to safety would exist if the authorisation were not suspended, varied or cancelled **and the belief is based on the grounds of that original decision**, CASA may, under section 30DI, vary, suspend or cancel the authorisation, by written notice given to the holder of the authorisation within five business days after the end of the period specified in the show cause notice.

While at the time of publication of version 4.2 of the Enforcement Manual the Director, Deputy Director and Assistant Director have the power to make a decision under section 30DI of the Act, delegations must always be confirmed before a decision is made under this provision of the Act.

CAA 30DC

As noted in paragraph 7.10 above, the suspension under section 30DC continues in force beyond the end of the period specified in the show cause notice until the end of the five days that CASA has to decide whether to vary, suspend or cancel the authorisation—see section 30DJ.

CAA 30DJ

CAA 31DI

It is important to understand and be ready to deal with the implications of the definition of “business day” for the purposes of section 31DI: “business day” means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

¹ Executive Manager, Airspace and Aerodrome Regulation Division, Executive Manager, Operations Division, Executive Manager, Industry Permissions Division and Executive Manager, Standards Division

7.12 When Does a Suspension under Section 30DC End?

CAA 30DC
CAA 30DE
CAA 30DJ

If CASA suspends a civil aviation authorisation under section 30DC and applies to the Federal Court for an order under section 30DE, the suspension continues in force until the time worked out under the table (section 30DJ) (unless earlier revoked). That table provides as follows:

(The following is a replication of the table in section 30DJ)

When a section 30DC suspension ends		
Item	If...	suspension ends at...
1	CASA’s application for an order is withdrawn or refused	the time of withdrawal or refusal.
2	in the 5 business days after the last day on which the order was in force, CASA does not give the holder a show cause notice under section 30DH in relation to the authorisation	the end of the fifth business day after the order ceased to be in force.
3	CASA varies, suspends or cancels the authorisation under section 30DI	the time the holder is notified of the variation, suspension or cancellation.
4	CASA gave the holder a show cause notice under section 30DH in relation to the authorisation, but, in the 5 business days after the last day of the period specified in the notice, CASA does not vary, suspend or cancel the authorisation	the end of the fifth business day after the last day of the period specified in the show cause notice.

CAA 30DH

CAA 30DI

CAA 30DH

7.13 Procedure - The Coordinated Enforcement Process D – Serious and Imminent Risk

The [flowchart Coordinated Enforcement Process D](#) sets out the procedures that must be followed when a situation arises that requires a response pursuant to section 30DC of the Act. The process is complex and has a precise and very tight time-frame. It is therefore important that The Serious and Imminent Risk Checklist (form 342) is followed so that all CASA officers participating in the process are fully aware of their responsibilities and the order of actions to be taken.