



Enforcement Manual

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This document contains guidance material intended to assist CASA officers, delegates and the aviation industry in understanding the operation of the aviation legislation. However, you should not rely on this document as a legal reference. Refer to the civil aviation legislation including the Civil Aviation Act 1988 (Cth), its related regulations and any other legislative instruments—to ascertain the requirements of, and the obligations imposed by or under, the law.

PREFACE

Most people follow the aviation safety rules most of the time because they know that is the responsible thing to do. Responsible people occasionally make mistakes, and when a person inadvertently breaches a regulatory requirement, if the contravention is minor and not part of a pattern of non-compliance, CASA normally takes an educative approach to the matter with a view to minimising the likelihood of a recurrence.

Where a person cannot or will not comply with the safety requirements, however, or where a breach is significant or persistent, CASA will not hesitate to take appropriate enforcement action, in the interests of safety, to compel compliance and, where necessary, to limit the exercise of a person's aviation privileges until CASA can be satisfied the offending conduct will not be repeated.

On those rare occasions where there is evidence that offending conduct is wilful or deliberate, the product of recklessness or gross negligence, or part of a pattern of knowing non-compliance, CASA may refer the case to the Commonwealth Director of Public Prosecutions, who will determine whether to progress the matter to a court.

Because enforcement action of any kind can have a significant effect on a person's rights, interests and legitimate expectations, CASA strictly adheres to the principles of fairness in performing these important functions.

Beyond our legal obligations to ensure procedural fairness, our enforcement processes are in line with CASA's Regulatory Philosophy and consistent with our principles of just culture, as set out in CASA's *Directive on Just Culture in the Exercise of CASA's Enforcement Powers and the Use of Safety Information* (for more information see <https://www.casa.gov.au/search?keys=Just+Culture>).

Chief Executive Officer and
Director of Aviation Safety

Table of contents

Table of contents	4
1 Glossary	11
2 Revision history	13
3 LEGAL AND POLICY FOUNDATIONS OF CASA'S COMPLIANCE AND ENFORCEMENT FUNCTIONS.....	14
3.1 CASA's legal obligation to enforce the Civil Aviation Laws.....	14
3.2 CASA's enforcement policy - High level principles	14
3.2.1 Natural Justice and accountability	15
3.2.2 Consistency and flexibility	15
3.2.3 Impartiality	15
3.2.4 Responsible exercise of compliance and enforcement powers	15
3.3 Distinguishing compliance action from enforcement action	16
3.4 When is enforcement action taken?	18
4 HOW DOES CASA MAKE ENFORCEMENT DECISIONS?	19
4.1 What are the purposes of the CEP?	19
4.2 What matters must be referred to the CEP?	20
4.3 Optional referrals	21
4.4 Process for referral to the CEP	21
4.4.1 Receipt of information concerning potential regulatory breaches	21
4.4.2 Initial assessment of intelligence	22
4.4.3 Procedure for determining what matters will be referred to the CEP	22
4.5 Non-referral of matters.....	22
4.6 How are matters referred to the CEP?	22
4.6.1 Entry of referrals onto EICMS	23
4.7 Discussion of referrals at CEM	23
4.7.1 Initial CEM	23
4.7.2 Ongoing discussion at future CEMs	23
4.8 Participants in CEM	24
4.9 Scheduling of CEMs	24
4.10 Discussions between meetings.....	24
4.11 Record of CEMs	24
4.12 Authority to make decisions and recommendations	25

4.13	Resolving disagreements.....	25
4.14	Special arrangements for aviation medical matters.....	25
4.14.1	Relevant considerations for compliance and enforcement related regulatory decision-making.....	26
4.15	Delays in enforcement action.....	27
4.16	Applications for new or additional authorisations while a person is subject to potential enforcement action	27
4.17	The tools of enforcement	28
4.18	Reporting on enforcement action	28
5	COMPLIANCE RELATED ACTION	29
5.1	Education	30
5.1.1	Purpose of engaging in educative activities.....	30
5.1.2	Form of education	30
5.1.3	Decision- making considerations	30
5.1.4	Process overview	31
5.2	Counselling.....	31
5.2.1	Purpose of counselling	31
5.2.2	Form of counselling.....	31
5.2.3	Decision-making considerations	32
5.2.4	Responding to counselling notices.....	32
5.2.5	Process overview	33
6	ENFORCEMENT ACTION.....	33
6.1	Administrative Action	33
6.1.1	Kinds of administrative enforcement action.....	34
6.1.2	When is administrative action appropriate?	34
6.1.3	Administrative action is not necessarily exclusive	35
6.1.4	Procedural fairness and the show cause process	35
6.1.5	Show cause notice - definition.....	35
6.1.6	Legislative requirement to issue a show cause notice	36
6.1.7	When is a show cause notice not required to be issued?	37
6.1.8	Time limit for responding to a show cause notice	38
6.1.9	Preparation and content of show cause notice	38

6.1.10	Written response to show cause notice.....	39
6.1.11	Show cause notice - process overview.....	40
6.1.12	Show cause conferences	40
6.1.13	Purpose of show cause conferences	40
6.1.14	When should a person be offered a show cause conference?.....	41
6.1.15	A show cause conference will only proceed after receipt of a written response.....	42
6.1.16	Withdrawal of offer of show cause conference	42
6.1.17	Participants in a show cause conference	42
6.1.18	Location of show cause conferences.....	43
6.1.19	Procedure at show cause conferences	44
6.1.20	Use of information obtained during show cause conferences.....	45
6.1.21	Review of discussions at a show cause conference.....	46
6.1.22	Show cause conference process overview.....	46
7	CASA'S ADMINISTRATIVE ENFORCEMENT POWERS	46
7.1	Aviation Infringement Notices	46
7.1.1	Nature and purpose of AINs.....	46
7.1.2	Setting the financial penalty	47
7.1.3	AINs – decision-making considerations	48
7.1.4	Form of an AIN	48
7.1.5	Service of AINs	49
7.1.6	Withdrawal of AINs	49
7.1.7	Service of withdrawal notices	49
7.1.8	Withdrawal of AIN following payment of fine.....	49
7.1.9	Time for payment of an AIN	50
7.1.10	Extension of time to pay	50
7.1.11	Part payments and payment plans	50
7.1.12	Consequence of payment of an AIN within time permitted	50
7.1.13	Consequence of payment of AIN after time permitted	50
7.1.14	Non-payment of AINs	50
7.1.15	AIN process overview.....	51

7.2	Enforceable Voluntary Undertakings.....	51
7.2.1	What is an EVU?	51
7.2.2	Nature and purpose of EVUs	52
7.2.3	Legal requirements for EVUs	52
7.2.4	EVUs: decision-making considerations	53
7.2.5	Examples of typical undertakings in EVUs	53
7.2.6	Examples of undertakings which are not acceptable	54
7.2.7	Acceptance of EVUs	54
7.2.8	EVUs - process overview	54
7.2.9	Variation of withdrawal of EVUs	55
7.2.10	Enforcement of EVUs	55
7.2.11	Decision on how best to enforce EVU	56
7.3	Decision to vary, suspend or cancel an authorisation or to issue a direction	56
7.3.1	Decisions which do not require a SCN.....	56
7.3.2	Decisions which do require a SCN	56
7.3.3	Legislative authority to vary, suspend or cancel an authorisation	57
7.3.4	Legislative authority to issue a direction	58
7.3.5	Draft proposed decision notice	58
7.3.6	Recommendation to a delegate	59
7.3.7	Decision-making delegate	59
7.3.8	Deliberations by the delegate	59
7.3.9	Serving a decision on the authorisation holder	59
7.3.10	No enforcement or compliance action necessary at the conclusion of a show cause process.....	60
7.4	Special requirements for serious and imminent risk suspension	61
7.4.1	What is a serious and imminent risk to air safety	61
7.4.2	Drafting a suspension notice under section 30DC of the CAA.....	62
7.4.3	Service of the suspension notice	62
7.4.4	Obligation to investigate	63
7.4.5	Application to the Federal Court.....	63
7.4.6	Federal Court hearing and decision	64

7.4.7	Variation, suspension or cancellation of an authorisation under section 30DI	64
7.5	Special arrangements for suspension or cancellation of medical certificates	65
7.5.1	Suspension or cancellation of medical certificates - process overview.....	65
8	Review of Approved Self-Administering Organisation internal review decisions by CASA	66
	To date, two organisations have been issued with ASAO certificates under Part 149:.....	66
8.1	Aviation enforcement powers of ASAOs	66
8.1.1	Internal review of enforcement decisions by ASAOs.....	66
8.2	Review of an ASAO enforcement decision by CASA	67
8.2.1	Extension of time in which to seek review by CASA.....	67
8.2.2	Requirements for making an application	67
8.2.3	CASA's powers in relation to review of ASAO enforcement decisions	68
8.2.4	Record of decision.....	68
8.3	Discussion in CEM.....	68
8.4	Drafting of decision notice and recommendation to delegate	69
8.5	Reconsideration of ASAO enforcement decisions - process overview	69
9	Refusal to issue an authorisation	70
9.1	Applications for authorisations - relevant legislative provisions	70
9.1.1	CASR 1998 Part 11.....	70
9.1.2	Fitness and propriety	71
9.1.3	CAA - section 28	71
9.2	Key considerations for decision making.....	71
9.2.1	Past conduct by applicants for individual authorisations	71
9.2.2	Individuals nominated to key personnel positions	72
9.2.3	Organisational authorisation holders with a history of poor safety performance	72
9.3	Show cause notices prior to refusal to issue an authorisation	72
9.3.1	Authorisation holder reapplying for an authorisation they currently hold	72
9.3.2	Where the applicant is not the current holder of the authorisation applied for	73
9.4	Issue of authorisation following the CEP	73
9.5	Draft decision notice	73
9.6	Decision making delegate.....	73
9.7	Refusal to issue an authorisation - process overview.....	74
10	CRIMINAL ENFORCEMENT ACTION.....	74

10.1	Safety policy underpinnings	74
10.2	CASA does not prosecute criminal offences	75
10.3	Factors taken into account when referring matters to the CDPP	75
10.3.1	Sufficient evidence to secure a conviction	75
10.3.2	The public interest.....	75
10.3.3	Referral for non-payment of AIN.....	76
10.4	Safety action takes precedence over criminal prosecution	76
10.5	Time limit for instituting prosecution	77
10.6	Business area responsibilities	77
10.6.1	Manager Investigations	77
10.6.2	Individual investigators	77
10.6.3	Individual CASA staff	78
10.6.4	Business area managers	78
10.7	Referral for prosecution - process overview	78
11	OTHER ENFORCEMENT RELATED PROCESSES, PROCEDURES AND POWERS.....	79
11.1	The Aviation Self Reporting Scheme	79
11.1.1	What is the ASRS?.....	79
11.1.2	Administration of the ASRS	79
11.1.3	How the ASRS works.....	79
11.1.4	Limitation as to type of contravention	80
11.1.5	Limitation as to timing of report	80
11.1.6	Limitation as to time of production of receipt	80
11.1.7	ASRS register.....	81
11.1.8	Determining whether a person is entitled to protection.....	81
11.1.9	Form of reports and receipts	82
11.1.10	Use of information in criminal proceedings.....	82
11.2	The Demerit Points Scheme	82
11.2.1	What is the Demerit Points Scheme?	82
11.2.2	How does the Scheme work?	83
11.2.3	Consequences of incurring demerit points	85
11.2.4	Expiry of demerit points	87

11.2.5	Reinstatement of authorisations	87
11.2.6	First time and second time demerit suspension notice	87
11.2.7	First time demerit suspension notice - after acquired authorisation	87
11.2.8	Second time demerit suspension notice - after acquired authorisation	88
11.2.9	Form of demerit suspension notice	88
11.2.10	Demerit cancellation notice	88
11.2.11	Demerit cancellation notice - after acquired authorisation.....	88
11.2.12	Form of demerit cancellation notice.....	88
11.2.13	Demerits Points Register	89
11.2.14	Suspension period notice to be served concurrently	89
11.2.15	Responsibilities for the administration of the Scheme	89
11.3	Detention of Aircraft	90
11.3.1	Procedures under regulation 288	90
11.3.2	Procedures for section 32AK of the CAA.....	91
11.4	Liaison with police and other law enforcement agencies.....	91
Appendix A. Overview of the Coordinated Enforcement Process		93
<i>The Hearing Rule</i>		98
Appendix D. Business unit procedures for determining which cases will be referred to the CEP..		121

1 Glossary

Acronyms and abbreviations

Acronym / abbreviation	Description
AIN	Aviation Infringement Notice
APF	Australian Parachuting Federation
ASAO	Aviation Self-administering Organisation
ASRS	Aviation Self Reporting Scheme
ATSB	Australian Transport Safety Bureau
BM LIE	Branch Manager, Litigation, Investigations and Enforcement
CASA	Civil Aviation Safety Authority
CAA 1988	Civil Aviation Act 1988
CAR 1988	Civil Aviation Regulations 1988
CASR 1998	Civil Aviation Safety Regulations 1998
CDPP	Commonwealth Director of Public Prosecutions
CEP	Coordinated Enforcement Process
EM LIRA	Executive Manager, Legal, International and Regulatory Affairs
EICMS	Enforcement and Investigations Case Management System
ETC	Enforcement Technical Coordinator
EVU	Enforceable Voluntary Undertaking
LIE branch	Litigation, Investigations and Enforcement branch
PPC	Prosecution Policy of the Commonwealth
RAAus	Recreational Aviation Australia Pty Ltd
SCC	Show Cause Conference
SCN	Show Cause Notice
TSI Act	Transport Safety Investigation Act 2003

Definitions

Term	Definition
Authorisation	Includes a civil aviation authorisation as defined in s.3 of the CAA 1988

Reference material

Document type	Title
Legislation	<i>Civil Aviation Act 1988</i>
	<i>Civil Aviation Regulations 1988</i>
	<i>Civil Aviation Safety Regulations 1998</i>

Forms

Form no.	Title
Form 324	Withdrawal of Aviation Infringement Notice
Form 327	Aviation Self Reporting Scheme
Form 339	Detention Notice
Form 811	Non-referral to Coordinated Enforcement Process
Form 812	Referral to Coordinated Enforcement Process
Form 1037	Show Cause Notice information
Form 1255	Review Rights notice
Form 1256	Automatic stay information form

2. Revision history

Revisions to this manual are recorded below in order of most recent first.

Version no.	Date	Parts / sections	Details
4.5	2018		

3 LEGAL AND POLICY FOUNDATIONS OF CASA'S COMPLIANCE AND ENFORCEMENT FUNCTIONS

3.1 CASA's legal obligation to enforce the Civil Aviation Laws

The CAA 1988 places responsibility on CASA to conduct the safety regulation of civil air operations in Australian territory and the operation of Australian aircraft outside Australian territory, by means that include 'developing effective enforcement strategies to secure compliance with aviation safety standards' (s.9(1)(d)). This is a core regulatory function and one to which Australia is bound to give effect in accordance with its obligations under the Chicago Convention.

This manual, in combination with the CASA Surveillance Manual and Regulatory Philosophy, sets out the enforcement strategies developed by CASA to discharge the functions imposed on it by s.9(1)(d) of the CAA 1988

3.2 CASA's enforcement policy - High level principles

Pursuant to s.9A(1) of the CAA 1988, CASA must regard the safety of air navigation as the most important consideration in the exercise of its enforcement related powers. Subject to this overriding consideration, there are a range of other matters which CASA may legitimately have regard to in determining what decision ought to be made in an individual case.

CASA's Regulatory Philosophy is intended to guide and direct CASA's approach to the performance of its regulatory functions and the exercise of its regulatory powers. The Regulatory Philosophy provides guidance on the way in which CASA will seek to balance safety against other interests which might be affected by the making of an individual enforcement decision. The ten principles that comprise CASA's Regulatory Philosophy are set out below:

- (i) CASA is committed to maintaining the trust and respect of the aviation community.
- (ii) Mindful of the primacy of air safety, CASA takes account of all relevant considerations, including cost.
- (iii) CASA takes risk-based approaches to regulatory action and decision-making.
- (iv) CASA performs its function consistently with Australia's international obligations.
- (v) CASA performs its regulatory functions consultatively and collaboratively.
- (vi) CASA communicates fully and meaningfully with all relevant stakeholders.
- (vii) CASA fairly balances the need for consistency with the need for flexibility.
- (viii) CASA embraces and employs rational 'just culture' principles in its regulatory and related actions.
- (ix) CASA demonstrates proportionality and discretion in regulatory decision-making and exercises its powers in accordance with the principles of procedural fairness and natural justice.

- (x) CASA has a legitimate, but limited, role in pursuing punitive action for breaches of the civil aviation legislation.

The policy set out in this Manual describes the way CASA uses its enforcement-related powers to regulate in a manner consistent with CASA's Regulatory Philosophy and broader Government policies applicable to the role and functions of an independent regulatory authority. While all of the principles of the Regulatory Philosophy are applicable to CASA's actions, those set out below are highlighted in the specific context of this Manual.

3.2.1 Natural Justice and accountability

Consistent with the principles of Natural Justice, enforcement decisions must be:

- Fair and follow due process
- Transparent to those involved
- Subject to appropriate internal and external review.

3.2.2 Consistency and flexibility

CASA will consistently employ the same processes, and have regard to the same criteria, in determining whether, and if so how, a regulatory requirement should be interpreted or applied in any given situation. CASA will also ensure that all relevant facts and circumstances peculiar to an individual situation have been fully and fairly considered on their merits, and will provide advice about, or decide the outcome of, a particular matter governed by a regulatory requirement on that basis.

3.2.3 Impartiality

Enforcement decisions **must not** be influenced by:

- Personal interests of CASA officials
- Any irrelevant considerations
- The personal, political or financial power or influence of those affected by such decisions.

3.2.4 Responsible exercise of compliance and enforcement powers

CASA will make responsible enforcement decisions having regard to the nature of the identified breaches and the safety risk they give rise to. In particular:

- CASA's first priority is to protect the safety of passenger transport operations, and operations in which passengers and others exposed to higher levels of risk are not in a position to make informed judgements and effective decisions about the risks to which they are exposed.
- CASA will take strong action against those who persistently and/or deliberately operate outside the civil aviation law.
- CASA will first consider education, training or supervision for those who demonstrate a lack of proficiency but show a willingness to comply with the civil aviation law. It is not proper to regard actions of this nature as punitive or disciplinary in character.

- Where the interests of safety require the variation or suspension of a person's aviation-related privileges pending the rectification of identified shortcomings or specified deficiencies, unless safety considerations dictate otherwise, CASA will first exercise discretion to pursue voluntary mechanisms to achieve those objectives.
- Where it is necessary in the interests of safety for CASA to exercise discretionary powers in order to achieve a specified safety-related outcome, CASA will employ the least intrusive and least disruptive means consistent with the achievement of that outcome.
- CASA embraces, and encourages the development throughout the aviation community of, a 'just culture'. Enforcement action will not be used to punish aviation participants for actions, omissions, or decisions that are commensurate with their experience and training but that result in a non-compliance or otherwise actionable safety deficiency. However, CASA will not tolerate gross negligence, repeated non-compliance, recklessness, wilful violations and deliberate destructive acts.
- Consistent with the overarching interests of safety, and the applicable principles of CASA's Regulatory Philosophy, CASA will consider the use of infringement notices rather than administrative action or referral to the Commonwealth Director of Public Prosecutions (CDPP) when dealing with private pilots who commit strict liability offences.

3.3 Distinguishing compliance action from enforcement action

It is common ground that compliance with aviation safety requirements is normally achieved by the entirely self-motivated conduct of participants in aviation-related activities who comply with the rules because they understand it is the 'right thing' to do, as a matter of law and in the interests of safety alike.

Beyond such self-motivated compliance (in the reinforcement of which CASA plays an important role) there are four other ways in which CASA is actively and directly involved in bringing about compliance, each of which is reflected in specified CASA functions under section 9 of the CAA 1988. These are:

- **Assisting** the industry to comply, generally and on an individual basis
- **Encouraging** or **exhorting** compliance
- **Compelling** compliance
- **Deterring and penalising** non-compliance

CASA endeavours to bring about compliance with legislative requirements and optimal safety outcomes by assisting the industry through general and more specifically targeted safety promotion and educational activities, and through the advice CASA provides on operational and technical matters to individuals and operators. CASA also acts to encourage or exhort authorisation holders to comply and to conduct their activities at a high level of safety, including through the counselling process and by recommending remedial training.

Where it is necessary to do so in the interests of safety, CASA may also act to compel authorisation holders to comply with safety standards, or to prevent them from continuing to breach those

standards, through processes involving the suspension or cancellation of authorisations, the variation of authorisations, which may include the imposition of conditions, and by entering into, and where necessary and appropriate, enforcing voluntary undertakings.

Consistent with the tenth principle of CASA's Regulatory Philosophy (see section 1.2 above), CASA has the power to initiate action with a view to penalising persons for contravening regulatory requirements, although the pursuit of such action is in the hands of the CDPP.

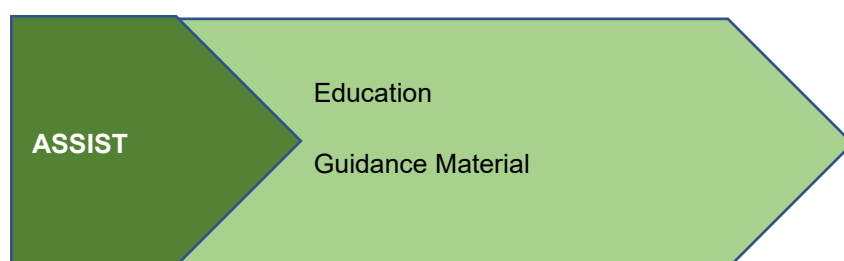
The pursuit of such punitive action may be necessary or appropriate to deter those persons (specific deterrence) and others (general deterrence) from contravening the safety standards specified in the legislation in the future, by encouraging them to reflect on the consequences of their conduct. It may also cause them to reassess the safety-related implications of their past misconduct, and to alter their behaviour on that basis (rehabilitation). It is, of course, only a court, not CASA nor the CDPP, that has the authority to impose a penalty for a breach of the Act or the Regulations.

CASA will not normally initiate action with a view to the imposition of a penalty except in cases involving gross negligence, recklessness, wilful violations, repetitive non-compliance or destructive acts that threaten safety or undermine the safety regulatory scheme. See further below at section 10.

Compliance action is generally distinguishable from enforcement action in that it does not involve the exercise of any specific regulatory power or the commencement of legal proceedings in a way designed to alter the legal rights or obligations of an industry participant. Rather, it involves CASA encouraging or exhorting industry participants to comply with their regulatory obligations in circumstances and through processes which do not alter the legal rights or obligations of the relevant participants.

Enforcement action on the other hand, involves the exercise of specific legislative powers to alter the legal rights or obligations of the effected authorisation holder.

The graphic below illustrates the kinds of actions which CASA may take to secure compliance with aviation safety standards and shows which of those actions constitute compliance action as opposed to enforcement action.



COMPLIANCE ACTIVITIES

Assisting industry to comply.
Encouraging or exhorting specific participants to comply.
Does not involve exercise by CASA of specific legislative powers or commencement of legal proceedings.

**ECOURAGE
EXHORT**

Audit Safety Findings
Counselling Notices

ENFORCEMENT ACTIVITIES

Compelling compliance.
Preventing non-compliance.
Deterring and penalising identified instances of non-compliance.
Involves exercise of specific regulatory powers and/or the commencement of legal proceedings.

**COMPEL
PREVENT
DETER****ADMINISTRATIVE ACTION**

Aviation Infringement Notice
Variation, suspension or cancellation of authorisation
Enforceable Voluntary Undertakings
Issue of directions

**DETER and
PUNISH****CRIMINAL ACTION**

Referral to CDPP for prosecution

3.4 When is enforcement action taken?

Enforcement action may only be used to:

- *Compel* a person to comply with specified legislative requirements, which in many cases may involve no more than conducting their aviation-related activities at a minimally acceptable level of safety; or
- *Limit, constrain or prevent* a person, who is demonstrably unable and/or unwilling to comply with specified legislative requirements, from continuing to conduct the aviation-related activities they would otherwise be authorised to conduct; or
- *Initiate* action whereby a court may decide whether a person deserves to be penalised for having conducted an aviation-related activity in breach of an explicit legislative requirement.

There are many things CASA can properly do to enhance the likelihood of better safety outcomes, including, in some cases, taking appropriate enforcement action. As a matter of law, however, CASA may only take enforcement action in response to instances of non-compliance with a requirement specified in the legislation.

4 HOW DOES CASA MAKE ENFORCEMENT DECISIONS?

CASA makes enforcement related regulatory decisions through the application of the Coordinated Enforcement Process (CEP). The CEP is a formal CASA policy, endorsed by the Director of Aviation Safety.

The CEP includes the following elements:

- Referral of all matters involving potential use of CASA's enforcement powers for discussion, and consultation and disposition via regular Coordinated Enforcement Meetings (CEM) involving the responsible business unit manager (or their designee), the BM LIE (or their designee), the Manager Investigations and other operational and specialist officers (e.g., medical, human factors or maintenance and flying operations specialists);
- Administration and oversight of the CEP is the responsibility of the LIE branch;
- Making a range of enforcement-related decisions, normally by consensus, within the CEP;
- Determining whether to issue AINs or refer suitable matters to the CDDP for consideration of prosecution;
- Retention of formal decision-making responsibility for more significant enforcement related decisions at senior executive level within CASA as appropriate based upon recommendations arising from the CEP;

4.1 What are the purposes of the CEP?

The purposes of the CEP include:

- To determine, on the basis of risk, the most appropriate and proportionate safety response to an identified safety risk arising from non-compliance with the requirements of the aviation legislation;
- To ensure consistency of process and of outcome, especially where similar fact situations are under consideration;
- To ensure effective and efficient deployment of necessary specialist resources at the earliest possible stages of the investigation and decision-making process;
- To ensure that decision-makers have access to specialised legal advice and support in the preparation of key enforcement related communications, including show cause notices, decisions notices and related communications with lawyers representing interested parties in the enforcement process;
- To ensure that enforcement decisions are not only lawful, but defensible based on the evidence available to sustain them;
- To ensure appropriate capture and recording of enforcement related decision-making processes
- To increase visibility within CASA of the nature and extent of CASA's enforcement related activities.

The CEP aims to identify which particular enforcement tool (or combination of tools) would be most likely to achieve the optimal safety outcome in a given case consistent with the requirements of the law, CASA's regulatory obligations in the circumstances and the applicable principles of CASA's Regulatory Philosophy. However, the most appropriate response may ultimately involve a combination of enforcement and compliance tools, compliance tools alone, or voluntary action initiated by the industry participant. CASA may also consider whether alternative approaches to the fulfilment of a regulatory requirement will satisfy legal requirements without unacceptably compromising safety.

The CEP expressly proceeds on the basis that, in appropriate cases, **no action**, or action falling short of enforcement action, may be the most appropriate response having regard to the available evidence.

The multi-disciplinary nature of the CEP expressly recognises that effective engagement of CASA's regulatory enforcement powers requires the qualified input of both:

- Operational and technical safety experts
- Other regulatory experts, including lawyers and investigators.

4.2 What matters must be referred to the CEP?

The following matters must be referred for consideration in the CEP:

- a. Any matter which appears to involve a serious or deliberate contravention of the aviation legislation with a potential to affect safety
- b. Any matter in which it is proposed to issue a formal counselling notice to an industry participant
- c. Any matter in which it is proposed to issue an AIN to an industry participant
- d. Any matter referred to CASA by a state, territory or commonwealth law enforcement agency seeking the issue of an AIN or other specified compliance or enforcement action (e.g., the issue of a counselling notice)
- e. Any matter in which serious questions arise as to the suitability of an applicant for a civil aviation authorisation or appointment, to be issued with that authorisation or appointment – including questions of whether the applicant is a fit and proper person to hold the relevant authorisation or appointment
- f. Any matter in which an authorisation holder engages lawyers to dispute surveillance findings or raise questions about the holder's compliance obligations under the aviation legislation
- g. Any matter involving the issue of a safety alert to an authorisation holder
- h. Any matter involving the alleged falsification of records required to be kept under the aviation regulatory framework
- i. Any matter in which, following surveillance or otherwise, it is proposed that the authorisation holder be the subject of a corrective/management action plan, however, so described.

- j. Any matter where, in order to determine whether non-compliance has occurred, CASA will be required to resolve complex factual issues which may require the skills of an Investigator
- k. Any other regulatory contravention in respect of which it is considered *possible* that it *may* be necessary to exercise CASA's enforcement powers.

4.3 Optional referrals

In addition to the matters in 4.2 above, which must be referred to the CEP, business unit managers should also give serious consideration to referring compliance related matters of the following kinds for consideration in the CEP:

- a. Complex matters involving long-term repeated non-compliance by an authorisation holder
- b. Surveillance reports involving safety findings of such a significant number or nature that the safety findings acquittal process may not be an adequate means of addressing the safety risks arising from the identified non-compliance
- c. Any application under regulation 149.610 of the CASR, for review of an internal review decision made by an Approved Self-administering Aviation Organisation (ASAO)
- d. Any matters in which authorisation holders have repeatedly failed to acquit safety findings within required timeframes.

4.4 Process for referral to the CEP

4.4.1 Receipt of information concerning potential regulatory breaches

Information concerning suspected breaches of the legislation is received by CASA through a variety of means including:

- From members of the public or industry through the notify and report section of CASA's public website
- From members of the public or industry through the safety reporting telephone hotline
- From the ATSB through existing occurrence reporting processes (not governed by Annex 13 principles)
- Reports to the Industry Complaints Commissioner
- Industry intelligence supplied directly to CASA staff members
- Conduct of surveillance activities
- Monitoring of social media and television broadcasts
- Direct from State, Territory and Commonwealth law enforcement bodies

4.4.2 Initial assessment of intelligence

4.4.2.1 Intelligence received from State, Territory or Commonwealth law enforcement agencies

Any referrals of information or requests for assistance received from State, Territory or Commonwealth law enforcement agencies must be referred for assessment to the Manager Investigations.

The Manager Investigations will determine whether the intelligence received should be referred for consideration in the CEP.

4.4.2.2 Other intelligence of potential non-compliance

All other intelligence alleging or potentially providing evidence of non-compliance with regulatory requirements is to be assessed in the first instance by the relevant business area. The business area is responsible for determining - taking into account the matters identified in paragraphs 3.2 and 3.3 above - whether a matter is to be referred for consideration in the CEP.

If the business unit is unsure about whether it is appropriate to refer a particular matter into the CEP, then they should contact the BM LIE or the Manager Investigations for advice.

4.4.3 Procedure for determining what matters will be referred to the CEP

Each relevant business unit must have a written procedure detailing how it will make determinations about which matters will be referred to the CEP, who will have the authority to make those referrals and how records will be kept of matters which are not referred. The written procedure for each business unit with enforcement responsibilities can be found at **Annexure D** of this manual.

4.5 Non-referral of matters

Where a relevant business unit determines that a matter identified as potentially requiring referral to the CEP should not be referred, the accountable business unit manager must complete the Co-ordinated Enforcement non-referral form (**Form 811**) setting out the reasons why the matter was not referred and provide a copy of the form to the ETC in addition to the procedures set out in paragraph 4.4.3 above.

4.6 How are matters referred to the CEP?

To refer a matter into enforcement, the relevant business area should complete the CEP referral form (**Form 812**) and send the completed form to the ETC. The ETC can be contacted through the Investigations mailbox (investigations@casa.gov.au).

In more urgent cases requiring swift resolution, matters may be referred for immediate consideration by contacting the BM LIE directly.

4.6.1 Entry of referrals onto EICMS

The ETC is responsible for entering enforcement referrals onto the EICMS and for uploading any documentary artefacts (audit reports, video footage etc) which are necessary to understand the nature of the breaches being referred.

The ETC will ensure that all matters referred by a particular business unit are added to the agenda of active enforcement matters referred by that business unit. This agenda will form the basis for the ongoing discussion at CEMs

4.7 Discussion of referrals at CEM

4.7.1 Initial CEM

Once a matter is referred to the CEP, it will be assigned to the enforcement agenda of the referring business unit and discussed at a CEM. Initial discussion of a new referral at a CEM will canvas some or all of the following issues:

- A review of the facts and circumstances relevant to the alleged breach(es);
- 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, having regard to the applicable provisions of CASA's Regulatory Philosophy;
- Conducting an initial risk assessment of the safety significance of the matter to determine how swiftly it needs to be determined and whether urgent immediate safety action is required;
- Identification of the most appropriate enforcement tool or combination of tools (if any) to be employed;
- A consideration of whether further enquiries or investigations are required in order to establish the facts of the matter;
- Where considered appropriate in the interests of safety, placing a note on CASA's EAP system, advising of the current enforcement referral and to refer further enquiries to the Manager Investigations;
- Assignment of responsibility for any actions arising out of the meeting;
- Establishing and agreeing on timeframes for completing specified tasks and reporting on results and other developments;

4.7.2 Ongoing discussion at future CEMs

Continued discussion of the referral will occur at future CEMs to effectively manage the matter to a point where the participants in the CEM are satisfied that they are in a position to make a decision regarding the disposition of the referral.

4.8 Participants in CEM

The participants in a CEM will be the:

- BM LIE (or designee)
- Special Counsel, Litigation and Enforcement
- Manager Investigations
- ETC
- Senior Manager of the referring business unit (or designee)
- Relevant surveillance and response surveillance managers
- Technical and other subject matter experts as necessary to discuss individual matters.

4.9 Scheduling of CEMs

Each business having responsibility for enforcement related decision-making must arrange with the Branch Manager, Litigation, Investigations and Enforcement to hold CEMs on a regular basis.

In determining the frequency with which meetings should be held, the following should be taken into account:

- the number of matters on the enforcement agenda;
- the relative complexity and safety sensitivity of those matters;
- the need to maintain momentum in the management of matters to ensure they are determined within appropriate timeframes.

The ETC is responsible for scheduling of CEMs in accordance with the arrangements agreed between the relevant business unit and the Branch Manager Litigation, Investigations and Enforcement. If the relevant business unit considers that no meeting is required then this should be confirmed in writing to the ETC.

4.10 Discussions between meetings

Where there is a need for urgent discussion of matters outside of the regular scheduled CEM, the ETC will arrange for an out of session meeting to be held.

Alternatively, if the matter is sufficiently urgent that it is not practical to hold a meeting, or if the matter is of a routine nature that does not require a meeting, then matters may be discussed and resolved via email communications.

4.11 Record of CEMs

The ETC is responsible for keeping records of any action items assigned, resolutions made or updates provided during CEMs. These records will be kept on the EICMS.

4.12 Authority to make decisions and recommendations

The participants in the CEM have authority to resolve matters referred to the CEP by agreeing to one or more of the following:

- a) take no action in relation to a particular referral
- b) refer the matter for a preliminary investigation or an investigation under Part IIIA of the CAA
- c) arrange for the conduct of educative activities including by face-to-face interview or in writing
- d) issue a formal counselling notice
- e) request that the Manager Investigations issue an AIN
- f) direct a person to undertake an examination or provide identified information
- g) suspend a civil aviation authorisation pending the completion of a practical or theoretical examination or the provision of identified information
- h) varying, suspending or cancelling an endorsement or rating on a licence
- i) request that the Manager Investigations refer the matter to the CDPP for consideration of prosecution.

Accountability for the outcome of the CEM rests with the BM LIE. Accountability for the decision as to the action to be taken rests with the accountable senior or executive manager.

In addition to the above, the participants in the CEM have the authority to make recommendations to the CEO/DAS, or to an appropriate Executive Manager, proposing the variation, suspension or cancellation of an authorisation, or such other action as may be appropriate in the circumstances.

4.13 Resolving disagreements

Where there is disagreement between the BM LIE, and the senior manager of the relevant business area as to the disposition of a particular referral, then the following process is to be followed:

- The matter is to be escalated for consideration between the Executive Manager LIRA, and the Executive Manager of the relevant business area. If agreement is reached between the Executive Managers, then the matter will be resolved in accordance with that agreement;
- If no agreement is reached between the Executive Managers, then the matter is to be escalated for resolution by the DAS/CEO.

4.14 Special arrangements for aviation medical matters

Aviation medical certification often involves the making of decisions at short notice to suspend, and occasionally cancel medical certificates on medical grounds. Given the regularity with which this occurs and the tight timeframes associated with the safety risks, such matters are not required to be referred to the CEP using the enforcement referral form, nor are they required to be the subject to discussion in a CEM, prior to the making of any necessary decision.

Instead, the Aviation Medicine Coordinator will upload a copy of any draft decision notice proposing the suspension or cancellation of a medical certificate onto the EICMS before the decision is made. The Special Counsel, LIE will then arrange for the draft decision notice to be reviewed to ensure that

it is legally correct and defensible before referring the draft decision notice back to the Aviation Medicine Coordinator. The Aviation Medicine Coordinator will arrange for the decision to be dispatched to the medical certificate holder once a final decision has been made by a doctor in Aviation Medicine.

A regular CEM will be held to discuss the management of active aviation medicine matters recorded on the EICMS with the schedule for the meetings to be determined between the Special Counsel LIE and the Principal Medical Officer.

4.14.1 Relevant considerations for compliance and enforcement related regulatory decision-making

Keeping in mind CASA's commitment to the promotion of rational just culture principals as set out in CASA's Regulatory Philosophy, the following core regulatory elements and associated factors will be taken into account by CEM participants in determining the appropriate use of CASA's compliance and enforcement powers in relation to any matter referred to the CEP:

Regulatory Element	Factors considered
Impact on air safety	<ul style="list-style-type: none"> • The significance of the safety risks created by the identified non-compliance including, in particular, any actual or potential harm occasioned to an individual or damage to property • Whether the non-compliance was deliberate, reckless or grossly negligent • Any other mitigating or aggravating circumstances, including whether the matter was self-reported
Attitude and antecedents of person(s) alleged to have committed the contravention(s)	<ul style="list-style-type: none"> • The degree of responsibility of the individual for the contraventions(s) under consideration • Any concerns which the circumstances of the non-compliance may raise about whether the person has sufficient theoretical and practical knowledge and skill to be the holder of an authorisation • Whether the person has a history of non-compliance with aviation regulatory requirements • Generally a review of a person's compliance history will only take into account matters which have occurred in the previous three years unless: <ul style="list-style-type: none"> o the person has a prior history of similar contraventions, and/or o the person's compliance history, taken as a whole, reveals a pattern of non-compliance with regulatory requirements o the person's compliance history taken as a whole, indicates that the person is not a fit and proper person to be the holder of an authorisation

	<ul style="list-style-type: none"> • Whether the person has acknowledged responsibility for the contravention(s) and cooperated with CASA's investigation into the matter • The degree of insight and remorse demonstrated by the person • Any steps taken by the person to address the causes and consequences of the contravention
Confidence in CASA's administration of the regulatory system	<ul style="list-style-type: none"> • The passage of time since the contravention is alleged to have occurred including how it came to CASA's attention • The reasonable availability of evidence to establish the facts of the alleged contravention(s) • Whether the proposed compliance or enforcement outcome is a proportionate response having regard to the circumstances of the alleged contravention and taking into account its impact on air safety • Mindful of principle 10 of the Regulatory Philosophy, the need for specific and general deterrence to ensure future compliance with regulatory requirements by the person concerned and other aviation industry participants

The above is not an exhaustive list of factors that CASA may take into account in making a compliance or enforcement decision. The particular facts and circumstances of an individual case may call for consideration of additional matters not specified above.

Similarly, not every factor identified above will be relevant, or equally relevant in a particular situation. The weight to be attributed to any particular factor is a matter for CASA's judgment having regard to the facts of the individual case.

4.15 Delays in enforcement action

The BM LIE and the senior manager responsible for the relevant business unit will constantly monitor matters referred for consideration in the CEP to ensure they are resolved as expeditiously as possible. Where an enforcement process has been notified to an authorisation holder (for instance by the issue of a Show Cause Notice) CASA will ensure that the authorisation holder is kept informed of the progress of the matter and of any delays. In particular, if there is a delay of more than 60 days between any steps in the process, CASA will write to the authorisation holder (or to their legal representative if they have one) advising that the matter is still under consideration and providing them with an estimated time- frame for completion of that action by CASA.

4.16 Applications for new or additional authorisations while a person is subject to potential enforcement action

Where a person is subject to potential enforcement action, any applications for a new authorisation or for additional privileges (i.e., the addition of new activities to an existing certificate or licence) (**new**

applications) should be referred to the CEM for consideration of whether the application should be assessed and determined while the person remains subject to enforcement.

As a general rule, where the matter under consideration in enforcement raises serious questions concerning the person's suitability to hold the authorisation or the further privileges, which are the subject of the new application, CASA will not proceed to process the application until the enforcement action is resolved.

Where the matters under consideration are considered less serious (for instance, as they are only likely to warrant the issue of a counselling notice or an AIN), CASA may proceed to assess and finalise the new application prior to concluding the enforcement action.

4.17 The tools of enforcement

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

The available tools of enforcement are:

Administrative Action

- Variation (including the imposition of conditions), suspension or cancellation of a civil aviation authorisation.
- The issue of an AIN;
- The acceptance of an EVU;
- The issue of a direction requiring a person to engage in, or abstain from engaging in, certain conduct
- Suspension of a civil aviation authorisation under s.30DC of the Act because of a serious and imminent risk to safety;

Criminal Action

- Referral to the CDPP for commencement of criminal prosecution

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

4.18 Reporting on enforcement action

The EM LIRA will report on enforcement action as follows.

Executive Committee

Weekly report covering the following metrics;

- (a) Number of referrals received in the current financial year
- (b) Number of active investigations
- (c) Number of active prosecutions being conducted by the CDPP
- (d) Number of prosecutions commenced by the CDPP in the current financial year
- (e) Number of active AINs
- (f) Number of AINs issued in the last 7 days
- (g) Number of AINs issued in the current financial year
- (h) Number of active AAT applications

Aviation Safety Committee

Quarterly report covering the following metrics:

- (a) Proportion of finalised prosecutions which end in conviction (or findings of guilt) as compared to acquittals or matters where charges are withdrawn is not less than 80% (3 year rolling average)
- (b) Proportion of AAT applications which proceed to hearing before the AAT which are affirmed in whole, or part as opposed to being set aside or adversely varied is not less than 80% (3 year rolling average)
- (c) Number of referrals to enforcement received in the last quarter which arose from surveillance activity

Business units with enforcement responsibilities

Six monthly reporting covering the following metrics:

- (a) Number of referrals to enforcement in past six months
- (b) Number of referrals received in same period last year
- (c) Break down of sources of intelligence which have led to referrals
- (d) Most common regulatory breach(es) identified in referrals
- (e) Number of educational activities undertaken
- (f) Number of counselling notices issued
- (g) Number of AINs
- (h) Number of show cause notices issued
- (i) Number of decisions to vary suspend or cancel an authorisation
- (j) Number of decisions to issue a direction
- (k) Number of decisions to refuse to issue an appointment or authorisation

5 COMPLIANCE RELATED ACTION

As noted above, compliance related activities are primarily distinguished from enforcement activities by the fact that they do not involve the exercise of specific legislative powers, or the commencement

of legal proceedings with the intention of altering the privileges, obligations or liabilities of an industry participant. Compliance activities generally involve:

- Educative activities undertaken by CASA to assist industry to understand how to comply
- Notices issued by CASA to identify non-compliance with a view to preventing future non-compliance - such as safety findings or counselling notices
- Action taken voluntarily by industry participants at the request of CASA to restore compliance

The compliance activities most frequently associated with the CEP are:

- Education
- Safety findings issued as a result of surveillance events
- Counselling

5.1 Education

5.1.1 Purpose of engaging in educative activities

The purpose of engaging in education is to provide guidance to an authorisation holder or person of interest sufficient to ensure that person has adequate regulatory knowledge to safely and compliantly conduct regulated activities in future. Education may be an initial safety outcome determined following the consideration of a referral at a CEM, or it may follow the completion of an investigation by a Part IIIA investigator.

5.1.2 Form of education

The educative activity may take the form of a meeting (in person or via telephone/video link) between the industry participant(s) and relevant CASA officers or a formal letter to the participant(s) providing appropriate regulatory information, or both.

5.1.3 Decision- making considerations

As a guide, the following are examples of appropriate circumstances for the use of education:

- Where there is no adverse compliance history
- When the breach or other failure to meet the required standard was not deliberate
- When the breach or other failure to meet the required standard was not the result of a substantial disregard for safety
- Where the breach or other failure is of a minor or technical nature and does not result in serious safety consequences
- Where the breach has been caused by a lack of knowledge of applicable regulatory requirements
- Where the authorisation holder or person of interest engages with CASA in a positive manner.

5.1.4 Process overview

Where it is determined in the CEP that education is the appropriate response to an established breach of the aviation legislation, then:

- a) The relevant business unit will be responsible for determining and conducting the necessary educative activities which may involve an in-person interview, or telephone discussion with the authorisation holder or identified person of interest;
- b) In every case the authorisation holder or identified person of interest will be sent a letter recording the circumstances of the breach as well as the fact that education has occurred. There may be cases where the content of the letter itself is the only education considered necessary.
- c) The letter will be:
 - (i) settled by the BM LIE (or their designee) or Special Counsel and who is responsible for ensuring that the content of the letter is legally correct; and
 - (ii) signed by the senior manager of the relevant business unit (or their designee) who is responsible for ensuring that the content of the notice is factually and technically correct;
- d) The ETC will be responsible for dispatching the signed education letter to the recipient and uploading a copy of it onto the EICMS

5.2 Counselling

5.2.1 Purpose of counselling

Counselling is an official warning to an authorisation holder or other person of interest whereby CASA formally records that a breach(es) of the aviation legislation has occurred and expresses CASA's expectation that the authorisation holder or another person will not engage in further non-compliant conduct. Counselling serves the dual purpose of ensuring the relevant industry participant has sufficient regulatory knowledge to safely and compliantly conduct regulated activities in future and of putting that person on notice of CASA's expectation that they will improve their attitude towards safety compliance in future. It is intended through this process to ensure that the person who is the subject of the counselling does not engage in similar non-compliant conduct in future.

5.2.2 Form of counselling

Counselling will result in the issue to the authorisation holder, or another person, of a formal written counselling notice identifying the particulars of the non-compliant conduct, setting out the relevant regulatory requirements and recording the fact that counselling has occurred. Depending on the nature and circumstances of the relevant breach, counselling may also involve a face-to-face discussion (or discussion via telephone or video link) to ensure that the person understands the safety significance of the regulatory requirements which are relevant to the breach. Where face-to-face discussions are to occur, this will normally happen before the counselling notice is finalised and despatched. However, there may be occasions where face to face discussions occur after the written

notice is issued, particularly if those discussion result from questions or concerns raised by the recipient.

5.2.3 Decision-making considerations

As a guide, the following are examples of appropriate circumstances for the use of counselling:

- Where the person does not have a history of similar breaches or failures
- Where the offence is of a less significant nature and has not resulted in serious safety consequences
- Where it is considered that counselling will be a sufficient deterrent to prevent recurrence of the non-compliant conduct

Counselling may also be used in cases of more serious deliberate contraventions, cases of contravention resulting in more significant adverse safety outcomes, or cases where the recipient has a past history of similar breaches where:

- It is combined with an additional compliance or enforcement response, such as the issue of an AIN, a requirement to undertake an examination or test or the giving of an EVU
- The authorisation holder or person of interest engages with CASA in a constructive manner in relation to the established non-compliance
- It is considered that the combination of the counselling notice with the additional compliance or enforcement response will be sufficient to ensure that there are no similar contraventions in future
- Having regard to the combination of the counselling notice with the additional compliance or enforcement response, it is not necessary for the matter to be referred to the Commonwealth Director of Public Prosecutions for consideration of criminal prosecution.

5.2.4 Responding to counselling notices

In order to ensure a measure of procedural fairness is afforded to persons who are subject to counselling, all counselling notices will offer the recipient the opportunity to provide a written response to the counselling.

Where the recipient decides to avail themselves of the opportunity to respond, any such response will be reviewed in a CEM.

The nature of the response received will determine the further steps which are then taken. For example, the response may simply acknowledge receipt of the counselling notice and acceptance of the matters set out therein. Alternatively, the response may challenge the factual basis for the counselling and request that it be withdrawn.

Requests for withdrawal of a counselling notice will be reviewed and determined taking into account the original basis for the decision to counsel, along with any further information or evidence supplied in the response.

In every case, the ETC will ensure that any response received to a counselling notice is uploaded to EICMS.

5.2.5 Process overview

Where it is determined in the CEP that counselling is the appropriate response to an established breach of the aviation legislation, then:

- a) The relevant business unit will be responsible for determining and conducting the necessary counselling activities, including whether in-person discussions with the authorisation holder or identified person of interest are necessary;
- b) In every case the authorisation holder or identified person of interest will be sent a formal counselling notice recording the circumstances of the breach as well as CASA's expectation that there will be no recurrence of such conduct in future.
- c) The counselling notice will be:
 - (i) settled by the BM LIE (or their designee) who is responsible for ensuring that the content of the notice is legally correct ; and
 - (ii) signed by the senior manager of the relevant business unit (or their designee) who is responsible for ensuring that the content of the notice is factually and technically correct;
- d) The ETC will be responsible for dispatching the signed counselling notice to the recipient and uploading a copy of it onto the EICMS;
- e) The ETC will be responsible for ensuring that any further correspondence relating to the counselling notice (including requests for withdrawal or clarification) is uploaded onto EICMS

6 ENFORCEMENT ACTION

6.1 Administrative Action

As explained earlier in this manual, the principal difference between compliance action and enforcement action, is that enforcement action involves the making of a decision by CASA to exercise specific legislative powers in a way which affects the rights, obligations or liabilities of an authorisation holder or other industry participant.

Such decisions are referred to as administrative decisions and the making of them is governed by the terms of the aviation legislation and by the body of legal principles known as administrative law.

In an enforcement context, the CAA as well as the regulations and other instruments made under its authority, give CASA the power to address safety concerns relating to the holder of an authorisation by exercising a number of specific enforcement related powers

These administrative decisions are generally reviewable by the Administrative Appeal Tribunal and the Federal Court, or, in the case of AINs, by the criminal courts. Accordingly, it is very important that delegates adhere strictly to legal requirements for the making of such decisions. It is equally

important that the evidentiary and safety basis for such decisions is sufficiently robust to withstand external scrutiny.

For this reason, all administrative decisions proposed to be made for an enforcement purpose must be made through the processes outlined in this chapter.

Further information on the principles of administrative law and external review of administrative decisions made by CASA can be found in **Appendix B**

6.1.1 Kinds of administrative enforcement action

CASA's specific enforcement related administrative powers include:

- a) To issue an AIN - regulation 296 of the CAR 1988
- b) To accept an EVU - section 30DK of the CAA
- c) To vary, suspend or cancel an authorisation - various powers under the CAA and regulations
- d) To issue directions to persons requiring them to take, or refrain from taking, certain actions - various powers under the CAA and regulations
- e) To refuse to grant an authorisation to a person who does not meet the statutory criteria for issue of the authorisation
- f) To review enforcement decisions made by ASAOs under Part 149 of the CASR 1998.

6.1.2 When is administrative action appropriate?

Administrative action may be necessary on safety grounds in a number of circumstances:

- To issue an AIN in order to deter an authorisation holder or industry participant from engaging in further contraventions of the safety rules
- To accept an EVU proposed by an authorisation holder as a pathway to restore compliance with legislative obligations applying to the authorisation holder
- To cancel an authorisation where the holder has demonstrated that they are no longer willing or able to comply with the requirements of the aviation legislation;
- To suspend a civil aviation authorisation for a period of time necessary in order to allow the holder to demonstrate, or re-establish compliance with applicable regulatory requirements;
- To vary a civil aviation authorisation if CASA considers that the holder cannot safely exercise all of the privileges afforded by the authorisation, or if CASA considers that additional conditions need to be imposed on the authorisation in order to ensure that the holder complies with the regulatory obligations;
- To require a person to take a particular action (ie: perform certain maintenance) or refrain from certain action (ie: operating an aircraft) on safety grounds;
- To refuse to issue a civil aviation authorisation to a person who does not meet the statutory preconditions for the holding of that authorisation.

6.1.3 Administrative action is not necessarily exclusive

Administrative action is not necessarily exclusive and may run in parallel with compliance action such as counselling, with other administrative action or with the referral of a matter to the CDPP.

For example a licence holder may have their licence suspended in order to undertake training and an examination following a breach of regulatory requirements. Once the training and examination are successfully completed, the licence holder may be counselled in respect of the original breach at the time when the suspension is lifted.

NOTE

When parallel actions are being taken the safety response must be paramount. So, for example, where CASA has taken administrative action against an authorisation holder based on identified conduct, CASA will not generally consider referring that conduct to the CDPP for consideration of a criminal prosecution until such time as the administrative action (including any appeals) has concluded.

6.1.4 Procedural fairness and the show cause process

One of the most important principles relating to the making of administrative decisions is that persons who may be affected by those decisions are entitled to procedural fairness. Although the requirements of procedural fairness vary depending on the extent of the proposed decision's impact upon a person's rights and interests, as a general rule, before CASA makes a decision which will have a substantial impact on those rights and interests (such as varying, suspending or cancelling a licence), CASA is required to give the holder notice of what actions CASA is proposing to take, e.g. that CASA intends to vary, suspend or cancel the authorisation or issue a direction. A SCN is intended to:

- a) give the authorisation holder details of the grounds upon which CASA is proposing to take those actions. The SCN should contain sufficient detail of each individual breach or ground for concern so as to leave the holder in no doubt as to exactly what is alleged.
- b) give the holder an opportunity to submit to CASA a written response and explanation of events. Except where safety grounds require immediate action to alleviate an immediate danger, this generally involves a reasonable period of time for the holder to prepare and lodge a written response.

Section 6.1.9 below provides guidance on the procedures to be followed in relation to SCNs. It should be remembered that the SCN is generally only one part of CASA's 'show cause' process, the other important part being the offering and holding of a 'show cause' conference (SCC).

6.1.5 Show cause notice - definition

'Show cause notice' is defined under section 3 of the CAA to mean:

‘...a written notice to the holder of a civil aviation authorisation:

- a) that by this Act or the regulations, is required to set out the reasons why CASA is considering making a decision under the Act or regulations; and*
- b) that is required to state a period during which the holder may show cause why CASA should not make the decision.*

The SCN raises CASA’s concerns and invites the authorisation holder to provide CASA with reasons why CASA should not suspend, vary or cancel a particular authorisation or make any other decision which might be proposed in the SCN.

The SCN does not predetermine any outcome. It is important that this is an objective procedure and starts with the facts and circumstances known to CASA at the time and on which CASA is basing its safety concerns. These facts and circumstances may be incomplete or inaccurate and therefore it is important that such facts and circumstances are put to the holder so that CASA can establish whether there are any mitigating circumstances, further evidence or acceptable explanation that would reassure CASA that there is no safety risk.

NOTE: Only once the show cause process has been concluded will the delegate formally make a decision.

Alternatively, there may be no substantial additional information provided to the delegate by the authorisation holder, or from any other source, during the show cause process and the facts and circumstances in the SCN may continue to support CASA’s initial concerns.

6.1.6 Legislative requirement to issue a show cause notice

As noted above, procedural fairness requires that, prior to making significant decisions impacting on the rights, obligations and livelihoods of participants in the aviation system, CASA must provide them with an opportunity to show cause.

However, the aviation legislation expressly codifies this requirement in relation to the making of decisions under certain provisions of the Act and the regulations. Some examples of relevant provisions include:

- Section 28BA(4) of the CAA– prior to the making of a decision to suspend or cancel an AOC;
- Regulation 269 of the CAR 1988 – prior to the variation, suspension or cancellation of an authorisation on the grounds identified in that regulation;
- Regulation 67.260 of the CASR 1998 – prior to suspending or cancelling a medical certificate on the grounds identified in that regulation

Where the legislation expressly requires the issue of a SCN prior to the making of a decision those decisions will generally be subject to the automatic stay provisions in section 31A of the CAA.

As a general rule (other than in the circumstances below) CASA will not vary, suspend or cancel an aviation authorisation, or make an enforcement related decision to issue a direction, which will have significant implications for an operator or individual, without first issuing a show cause notice identifying the facts and circumstances upon which CASA’s proposed action is based.

6.1.7 When is a show cause notice not required to be issued?

As noted above, the extent of the procedural fairness which a person is entitled to before CASA makes a decision which impacts on the person's rights or obligations, depends upon the circumstances in which that decision is made.

Where CASA is satisfied that the regulatory breaches or other safety concerns identified in a particular case do not give rise to immediate safety of flight concerns, or where it is satisfied that any safety concerns that do arise are mitigated through existing controls, CASA may be prepared to allow persons affected by a proposed decision a reasonably lengthy period of time in which to show cause.

However, the amount of procedural fairness afforded to affected persons will decrease as the seriousness and the proximity of the relevant safety concerns increases. In particularly serious and urgent cases, both the general law of procedural fairness, and the provisions of the aviation legislation, contemplate that CASA may make a decision in the interests of safety without affording persons affected by that decision the opportunity to show cause. Some examples of decisions which may be made without the need for a show cause process include;

- A decision under s.30DC of the Act to suspend an authorisation on the basis of a serious and imminent risk to air safety;
- A decision under regulation 67.230 of the CASR to suspend a medical certificate where a certificate holder has been directed (via examination or the provision of information) to verify that they continue to meet the applicable medical standard;
- A decision to issue a maintenance direction under regulation 38 of the CAR 1988 or regulation 11.245 of the CASR 1998 requiring performance of maintenance tasks prior to further flight in an aircraft;
- The suspension of an authorisation under regulation 299 of the CAR where the authorisation holder has been directed to verify their competence to hold the authorisation via a theoretical or practical examination (or both)

CASA may also not engage in a show cause process prior to making a range of operational decisions, especially where the decision does not require immediate action and the persons affected by the decision are able to clarify or challenge any aspects of it before taking the action required by the decision. Some examples of routine decisions of this nature include:

- A decision to issue a Class B aircraft survey report under regulation 38 of the CAR 1988 or regulation 11.245 of the CASR 1998 which does not require the identified maintenance actions to be accomplished prior to further flight of the aircraft;
- A direction under regulation 141.100 of the CASR 1998 to a Part 141 operator to remove content from or add content to, the operator's operations manual.

Finally, CASA may not issue a SCN before making some enforcement related decisions, especially where the impact of the decision on the affected person is relatively minor and where the person is able to clarify or challenge aspects of the decision either before or after it takes effect. Some examples of enforcement decisions of this nature include:

- A decision to issue an AIN - the recipient is able to request that CASA withdraw the AIN and, ultimately, may elect to have the matter considered independently in a criminal court;
- A decision to accept an EVU - the person offering the EVU has significant opportunity to engage with CASA about the terms of the proposed EVU before it is signed and is ultimately under no obligation to give the EVU if they do not want to.

6.1.8 Time limit for responding to a show cause notice

Subject to the consideration identified above in relation to the seriousness and proximity of the safety issues identified in a SCN, the standard timeframe allowed for a written response to be provided will be 28 days.

It is important to ensure that the time allowed for a response to be provided is reasonable having regard to the breadth and complexity of the matters raised in the SCN as well as the significance of the safety issues identified.

This may result in the time period specified for a response to a SCN being extended beyond 28 days or reduced to less than 28 days depending upon what the facts of the individual case require.

6.1.9 Preparation and content of show cause notice

The preparation of a SCN requires measured input from both technical staff, lawyers and investigators as appropriate. The draft of the SCN will be prepared by a lawyer in the LILE branch on instructions and with input from relevant subject matter experts and investigators as appropriate.

It is critical that technical staff contribute clear and complete instructions to this process so that the relevant lawyer can draft the SCN in a way which accurately describes the relevant factual circumstances and explains relevant technical concepts in ways that can be easily understood by a lay audience.

Prior to the commencement of this process the referring manager must follow the CEP as set out in **Appendix A – Overview of the Coordinated Enforcement Process**

The lawyer drafting the SCN relies on investigator/technical/operational input because the investigator or the technical and operational people are best able to identify the actual breaches involved as well as the significance of those breaches from a safety perspective because they have the experience and knowledge to do so. The drafting will be a collaborative effort, however, the form of the SCN and the administrative correctness (dates, addresses, footers, headers and format) remain the responsibility of the BM LIE and assigned lawyer.

SCNs must clearly identify exactly what is alleged and why it justifies the action that CASA is proposing to take. This requires no legal training — it merely requires that the expert who has identified, or has knowledge of, the circumstances spells out what those circumstances are, and the consequent breaches or other failures, in sufficient (but succinct) detail so that there can be no doubt or ambiguity as to what CASA intends to rely upon.

The relevant experts - the technical and operational personnel who identified the breaches or other failures - should provide to the assigned lawyer, the grounds upon which they recommend CASA act.

The lawyer will then, using these instructions, draft the SCN for legal correctness. Responsibility for identifying the breach or other failures upon which CASA will be relying, resides with the investigator/operational/technical staff.

6.1.10 Written response to show cause notice

Once a SCN is issued, the next step in the process is to await the written response from the recipient of the SCN.

6.1.10.1 Extension of timeframe for response

If the recipient of a SCN seeks an extension to the timeframe set by CASA for the response to be provided, then the BM LIE will confer with the senior manager of the relevant business unit to determine whether the extension should be granted. In making that determination, the following factors will be relevant:

- The urgency of the safety issues raised in the SCN;
- The length and complexity of the facts and circumstances set out in the SCN;
- Any reasons advanced by the recipient in support of the granting of the suspension;
- The length of the extension requested.

CASA will not generally countenance requests for extension which seek additional time equal to or in excess of the initial period specified for a response in the SCN. Final authority for determining whether an extension is to be granted and, if so, what the length of the extension will be, will rest with the senior manager of the relevant business unit.

All communications relating to a request for an extension of time in which to respond to an SCN are to be provided to the ETC for uploading onto EICMS.

6.1.10.2 Review of SCN response

Once the SCN response is received, it will be reviewed by the lawyer responsible for drafting the SCN, as well as the technical staff/investigators who contributed to it. The review will seek to establish whether the matters alleged in the SCN have been established in light of the recipient's response and canvas the range of options available for resolving the issues identified in the SCN having regard to the content of the response.

6.1.10.3 No response to SCN

Where the recipient of a SCN has not responded by the date specified in the SCN, then the senior manager of the relevant business unit will contact the recipient and give them a further period of seven days in which to make a response. This reminder will expressly put the recipient on notice that, if no response is received at the end of the seven-day period, CASA will proceed to make a decision based on the evidence presently available to it.

This correspondence is to be provided to the ETC for uploading onto EICMS

6.1.11 Show cause notice - process overview

Where it is determined in the CEP, that issue of a SCN is required as a prelude to potential administrative action, then:

- a) The SCN will be drafted by a lawyer in the LIE branch with input and instructions provided by relevant subject matter experts (including investigators as appropriate). Relevant technical staff and/or investigators will be responsible for ensuring that the draft SCN is technically and factually correct;
- b) The draft SCN will be settled by the BM LIE (or their designee) who is responsible for ensuring that the content of the SCN is legally correct, and to the extent that any content is provided by investigators, that it is factually correct;
- c) The senior manager of the relevant business unit will be responsible for determining whether the content of the SCN is technically correct, and where factual content has been supplied by technical staff in the relevant business unit, that it is factually correct;
- d) The SCN will be signed on behalf of CASA by the senior manager of the relevant business unit.
- e) The ETC will be responsible for dispatching the signed SCN to the recipient via email and registered post along with the show cause conference information form;
- f) The ETC will also be responsible for uploading the signed version of the SCN and any correspondence to the recipient onto the EICMS.

6.1.12 Show cause conferences

SCCs are the face-to-face discussions held between officers of CASA and persons who have received a SCN. A SCC will only be held once a written response to the SCN has been provided to CASA. While it is generally the case that the conference will be held in person, in appropriate cases and by agreement a conference can be held remotely by video-conference.

6.1.13 Purpose of show cause conferences

The holding of a formal face to face discussion concerning the issues raised in a SCN serves a number of specific purposes aimed at ensuring that the recipient of the SCN is afforded as much opportunity as is reasonably practicable to explain their position to CASA in relation to the matters raised in the SCN and to understand CASA's safety concerns as expressed in the SCN.

6.1.13.1 An opportunity to expand upon the written response

The primary purpose of a SCC is to provide a person affected by a proposed CASA enforcement decision with the opportunity to orally respond to the allegations set out in the SCN. The SCC provides an additional measure of procedural fairness (natural justice), in that it constitutes a vehicle whereby a person can complement or supplement their written response to a SCN with appropriate oral submissions in a controlled, but comparatively informal, context. SCCs are particularly important in situations where a person finds it difficult to respond to a SCN adequately in writing.

6.1.13.2 To clarify the nature and significance of matters raised in the SCN

A SCC enables CASA to clarify and amplify the contents of a SCN. This is particularly important where either the written response of a person to a SCN or his or her discussion in the conference indicate a misunderstanding of the allegations being made, or the nature of the action proposed by CASA, against him or her.

6.1.13.3 Not a vehicle for gathering evidence

It is not the purpose of a SCC for CASA to gather evidence against a person. All evidence necessary to support the proposed action against a person should have been gathered prior to the issue of the SCN. However, a person participating in a SCC may provide new evidence that CASA may use for the purposes of its enforcement decision. Person's participating in an SCC should also bear in mind that anything said, or any evidence provided by them at an SCC, may be taken into account by CASA in making its final decision.

6.1.14 When should a person be offered a show cause conference?

6.1.14.1 Whenever a SCN is issued

CASA is not required by legislation or by the common law, to provide the authorisation holder with the opportunity to attend a SCC. However, as a starting point, the opportunity to attend a SCC will normally be offered to persons in all situations where a SCN has been issued. This is subject to the exceptions set out below.

6.1.14.2 When will a show cause conference not be offered?

There are a number of situations where CASA may choose not to offer the holder of an aviation permission the opportunity to attend a SCC. Those situations are:

- Where the SCN raises matters which contribute to a serious risk to safety which must be resolved urgently;
- Where substantial face-to-face discussions between CASA and the person have already occurred, for example, during the course of an investigation, the issues have been fully ventilated, and there would be no purpose in having a further face-to-face discussion; and/or
- Where CASA reasonably believes that a face-to-face discussion will be confrontational and create further ill-feeling between CASA and the person, or will expose CASA officers to physical assault or unreasonable verbal assault.

In relation to the third example, it should be noted that proposed administrative action is often stressful for the authorisation holder, and CASA officers must be aware that emotions may be charged and that they must deal with those emotions in a sensible and professional manner. It is incumbent on CASA to reduce the risks of a conference being reduced to a confrontation, and only where those risks cannot be adequately mitigated should CASA not offer a permission holder the opportunity for a SCC. Where an officer is concerned that a SCC may be less than civil, he or she should contact the assigned lawyer to discuss appropriate risk minimisation strategies.

6.1.15 A show cause conference will only proceed after receipt of a written response

A SCC should normally be held subsequent to the receipt by CASA of the affected authorisation holder's written response (if any) to the SCN. This is explained to authorisation holders on the standard attachment (**Form 1037**) to the SCN. Receiving a response to the SCN prior to the SCC permits CASA to properly consider the points raised by the authorisation holder, which will enable the real matters at issue to be clarified and thereby streamline the procedure at the conference.

6.1.16 Withdrawal of offer of show cause conference

Where an authorisation holder has requested a SCC, but has:

- Failed to submit a written response (or an adequate written response) to the SCN; or
- Failed to agree to arrangements with CASA for the SCC to be held within a reasonable period of time after receipt of the authorisation holder's written response,

CASA may, at its discretion, withdraw the offer of a SCC and proceed to make its final decision on the material then available to it.

6.1.17 Participants in a show cause conference

The participants in a SCC will normally include:

- (a) The recipient of the SCN or its officers if the recipient is a company;
- (b) Representatives of recipient of the SCN
- (c) Relevant CASA officers.

6.1.17.2 Recipient of the SCN

Obviously, the person most affected by CASA's proposed action (the recipient of the SCN) should participate in a SCC. In the case of an individual, that person must attend — a SCC should not be conducted through proxies or representatives. In the case of a corporate permission holder, e.g. the holder of an AOC or Certificate of Approval, appropriate senior representatives of the organisation should attend. Depending on the allegations made against the organisation such representatives may include the Chief Executive Officer, Head of Flight Operations, Head of Aircraft Airworthiness and Maintenance Control, or the manager with primary responsibility for the area in which CASA has concerns. SCCs involving corporate permission holders must not be held with representatives of the organisation who have little authority to speak on behalf of the organisation, or little capability of addressing the concerns raised by CASA.

6.1.17.3 Representatives of the SCN recipient

An authorisation holder can choose to be accompanied by a person who can assist them in the conference, either to provide advice, to assist in clarifying issues, or simply as 'moral support'. This person may be a legal adviser, a union representative, a colleague or friend etc. Where the SCN has been issued to the holder of a key personnel position within an organisation, a representative of the relevant company may also attend. CASA should agree to the attendance of one accompanying

person. Where the authorisation holder proposes to attend with more than one other person, or turns up to a conference with more than one other person, the chair of the conference will have the discretion to permit attendance by those other people.

6.1.17.4 CASA officials

The following CASA officials should attend a SCC:

- The CASA officer who will be making the recommendation for proposed enforcement action to the delegate (usually the Senior Manager of the relevant business unit)
- The assigned lawyer who will be the Chair of the conference
- Any technical specialists necessary to facilitate discussion of the issues raised in the SCN
- If the conference is not being recorded, a person able to take suitable notes of the conference.

In all cases, the number of CASA officers attending a SCC should be kept as small as possible while still being able to adequately deal with the issues.

6.1.17.5 Attendance by the delegate

As a general rule, the delegate who will make the final decision arising from the show cause process will not attend the SCC. This is to ensure that the delegate's independence from the show cause process is preserved so that they can bring a fresh perspective to the matter if a recommendation for the making of a particular decision is subsequently made to them.

6.1.18 Location of show cause conferences

Where possible, SCCs should be held at a CASA office. Unless there are compelling reasons to do so, conferences should not be held at the home or place of business of the authorisation holder or their representative.

SCCs are not mediations as that term is commonly understood in legal circles, and CASA officers should not feel compelled to agree to hold a conference on 'neutral territory'.

Nevertheless, such a location may be preferable to the office of the authorisation holder. Requests by authorisation holders for conferences at places other than CASA offices should be dealt with on a case-by-case basis and should be discussed with the assigned lawyer who will be attending the conference.

SCCs should be conducted with a reasonable measure of confidentiality. They should be convened in a room where communications will not be overheard by persons outside, and under circumstances where the participants will not be disturbed or interrupted. A small conference room is ideal. If the conference is conducted in an office, arrangements should be made to ensure that the participants are not interrupted by telephone calls or other CASA personnel.

Where it is not possible for all necessary participants to attend a physical location, the SCC may, with the agreement of the parties, proceed via video-conferencing, or by a mixture of in-person attendance and attendance by video conference.

6.1.19 Procedure at show cause conferences

There are no strict or standardised procedures in accordance with which SCCs must necessarily proceed other than the requirement that these conferences are chaired by a CASA lawyer, even if this has to be done by phone or video-link. Matters of procedure during a conference should be determined by the lawyer chairing the conference and where necessary by agreement with the authorisation holder and operational/technical manager. However, in general a conference should proceed more or less in the following sequence:

- All participants should be introduced to one another. The role of particular CASA officers should be explained if the authorisation holder is unsure of them. Participants should also be asked to identify themselves for the purposes of transcribing the recording of the conference.
- CASA's lawyer should commence the conference by briefly explaining its purpose and reminding the participants of the voluntary, informal and non-adversarial nature of the proceedings. However, it should be made clear that a record of the conference will be kept, and that CASA is bound to act in the interests of air safety on information disclosed during the conference. The conferences are not held on a 'without prejudice' basis, however, no cautions are given which means that admissions made by a holder during a conference cannot (other than in limited circumstances) be used against the holder in criminal proceedings.
- Following the introduction, the CASA lawyer should turn the conference over to the Senior Manager of the relevant business unit (or other CASA officer making the recommendation to the delegate), who should summarise the facts and circumstances set out in the SCN and explain his or her understanding of the authorisation holder's written response. Having done so, the manager should then invite the authorisation holder to comment on, explain and otherwise respond to those facts and circumstances. This may also involve providing the authorisation holder with an opportunity to elaborate on the matters contained in any written response he or she has already lodged or may be intending to lodge. The manager should also clarify any parts of the SCN, which the holder appears to have misunderstood.
- The CASA Senior Manager should endeavour to explain to the authorisation holder why the kind of conduct giving rise to the enforcement action poses particular safety-related concerns (and thus constitutes a basis for enforcement action under the aviation law). The manager should then explain his or her specific concerns in relation to the particular conduct of the holder. This is an educative exercise, the object of which is to ensure that the person understands (or understands more clearly) the nature of, and basis for, CASA's concerns.
- At the conclusion of the conference, the manager should reiterate what he perceives to be the authorisation holder's submissions, and ensure that the permission holder understands and agrees with that statement.

If at any time it appears that a SCC will no longer usefully serve any purpose (e.g. it has become confrontational, or the authorisation holder refuses to provide any further information or answer any more questions), the Senior Manager or CASA lawyer may terminate the conference.

6.1.19.1 Recording of show cause conferences

Since CASA decisions and actions may be based to a lesser or greater extent on information disclosed during a conference, it is very important that an accurate record of a conference is kept. Accurate recording also protects the interests of the authorisation holder.

SCCs are to be recorded. The attachment to the SCN informs authorisation holders that conferences will be recorded, and CASA's lawyer should further inform them of the recording during the preamble to the conference. Recording should commence after personal introductions but before the assigned lawyer's preamble which should be captured as part of the recording.

Where a recording device is not available or is not used, accurate notes of the conference need to be taken, preferably by a skilled note-taker with no other duties in relation to the conference, for example, an administrative assistant.

Where the conference is recorded a copy of the recording will be provided to the authorisation holder within a reasonable timeframe following the conference. Where the conference is not taped/recorded and the authorisation holder requests a copy of the notes of the conference, CASA should provide a copy once it has been typed. CASA is not obliged to prepare a transcript of a recording for the permission holder.

CASA should permit an authorisation holder to record or take their own notes of the conference, although the chair of the meeting may accept this on the understanding that copies of the recording or the notes will be provided to CASA at the end of the conference (CASA should offer its own copying facilities for this purposes) or as soon as practicable thereafter. Note that CASA should always make its own records of the conference, and not rely upon the recording or notes taken by the authorisation holder.

NOTE

It is inappropriate for the attending manager or the delegate to make any indication of a likely decision at the conclusion of the conference as the delegate will need to have time to consider all relevant information and submissions presented during the course of the Show Cause process.

6.1.20 Use of information obtained during show cause conferences

Information disclosed by the holder of an aviation authorisation during a SCC may be used by CASA for its regulatory purposes including being taken into account by the delegate who makes any final decision relating to the show cause process. CASA cannot compel a person to attend a SCC, and (subject to a few exceptions¹) cannot require a person to provide particular information or to answer particular questions during a SCC.

Note: SCCs are **not** conducted on a 'without prejudice' basis.

6.1.21 Review of discussions at a show cause conference

Once a SCC is concluded the matter will be discussed at a CEM to determine what action should be taken in relation to the matters raised in the SCN. This decision will be made based on the authorisation holder's written response to the SCN as well as any representations made by or on behalf of the holder at the SCC.

6.1.22 Show cause conference process overview

- a) The ETC is responsible for liaising with the senior manager of the relevant business unit, the assigned lawyer and the SCN recipient (or their representative) to arrange a mutually convenient time and date for the SCC;
- b) The senior manager (or a suitably senior alternate) of the relevant business unit must attend the conference and ensure that sufficient technical staff are in attendance to discuss any issues that might arise;
- c) The BM LIE is responsible for assigning a lawyer to attend at the conference
- d) The assigned lawyer is the Chair of the SCC and is responsible for ensuring that the SCC is recorded and that the SCN recipient or their representative is provided with a copy of the recording at the conclusion of the conference or as soon as this can be arranged after the conclusion of the conference.
- e) The ETC is responsible for ensuring that a copy of the recording of the SCC is uploaded to EICMS along with copies of any correspondence exchanged between the parties as a result of the conference.

7 CASA'S ADMINISTRATIVE ENFORCEMENT POWERS

7.1 Aviation Infringement Notices

7.1.1 Nature and purpose of AINs

Aviation Infringement Notices, referred to as AINs, are a form of administrative enforcement tool. An AIN issued by CASA puts the recipient on notice that CASA has reasonable grounds to believe that the recipient has contravened the aviation legislation and the recipient then has the option to resolve the matter immediately by paying the financial penalty specified in the AIN.

This provides an efficient means of dealing with less serious and complex contraventions of the legislation. CASA avoids the cost and associated administrative burden of having to initiate criminal prosecution or administrative action to deal with the contravention and the recipient avoids the expense of such proceedings as well as the risk of a criminal conviction or administrative action resulting in a limitation of their relevant aviation privileges.

To maintain a consistent approach with the Demerit Points Scheme to which they are linked, AINs will generally only be issued by CASA where there is a breach of a strict liability offence contained in the regulations. More information about the Demerits Point Scheme can be found in section 11.2. A

person served with an AIN can refuse to pay the fine or choose to have the matter dealt with by a court and CASA will then refer the matter to the CDP for prosecution.

7.1.2 Setting the financial penalty

The amount of the administrative fine specified in the AIN depends upon the gravity of the offence as determined by the maximum penalty that a court may impose. Regulation 296A of the CAR sets out the maximum administrative penalties that may be specified in an AIN as follows:

- If the maximum penalty for the offence is 5 or 10 penalty units – an administrative fine of 1 penalty unit (\$275)
- If the maximum penalty for the offence is 15, 20 or 25 penalty units – an administrative fine of 3 penalty units (\$825)
- If the maximum penalty for the offence is more than 25 penalty units – an administrative fine of 5 penalty units (\$1375).

The value of a penalty unit is as set out in section 4AA of the *Crimes Act 1914* (as amended from time to time). **NB. As from 1 July 2023 one penalty unit will increase from \$275 to \$313.**

See the following comparative table of penalties.

MAXIMUM PENALTY SET OUT IN CAR 1999 AND CASR 1998	MAXIMUM PENALTY UNDER THE INFRINGEMENT NOTICE SCHEME	MAXIMUM FINE A COURT COULD IMPOSE	DEMERIT POINTS INCURRED AGAINST CLASS OF AUTHORISATION
5 penalty units	\$275 (1 penalty unit)	\$1375 (5 penalty units)	1 demerit point
10 penalty units	\$275 (1 penalty unit)	\$2750 (10 penalty units)	1 demerit point
15 penalty units	\$825 (3 penalty units)	\$4125 (15 penalty units)	2 demerit points
20 penalty units	\$825 (3 penalty units)	\$5550 (20 penalty units)	2 demerit points
25 penalty units	\$1375 (3 penalty units)	\$6875 (25 penalty units)	2 demerit points
50 penalty units	\$1375 (5 penalty units)	\$13750 (50 penalty units)	3 demerit points

7.1.3 AINs – decision-making considerations

An AIN may be issued where an authorised person has reason to believe that a person has committed an offence under the civil aviation regulations (see regulation 296B of the CAR 1988). However, given that non-payment of an AIN will generally lead to a brief of evidence being submitted to the CDPP, CASA will not usually issue an AIN unless it considers that it has sufficient evidence to prove the relevant contravention(s) to the criminal standard.

Appropriate situations for the issue of AINs:

- Where the breach does not cause a serious risk to safety
- When the offence has not been committed through misunderstanding of the legislation that could be addressed by Education
- Where the offence has not been committed due to lack of skill or genuine mistake that could be more appropriately addressed by counselling, remedial training or an examination
- Where the offence is a strict liability offence against the Regulations
- Where the penalty would be an adequate future deterrent given the nature and circumstance of the contravention

Inappropriate situations for the use of an AIN as the sole enforcement response:

- Where the contravention gave risk to a serious risk to safety
- Where the offence was intentional or formed a pattern of breaches
- Where the penalty would be inadequate in relation to the nature and or gravity of the offence
- Where it would not provide sufficient deterrence.

Notwithstanding the above, an AIN may be used as part of an enforcement response to serious and deliberate offending where the combination of enforcement measures used is considered to adequately and appropriately deal with the nature and circumstance of the relevant offending. For example, in addition to having their licence suspended pending re-training, a person may be issued with an AIN or multiple AINs as a part of ensuring that the recipient is appropriately deterred from engaging in similar conduct in future. The demerit points accrued as a result of the payment of the AIN(s) may constitute a significant part of that deterrent effect.

Similarly, a person who has committed multiple less significant contraventions of the aviation legislation might be issued with a counselling notice covering all of the relevant offending along with an AIN for a selected offence to ensure that the counselling has the intended deterrent effect.

7.1.4 Form of an AIN

An AIN is required by regulation 296E, to include certain information. The AIN document must comply with the requirements of the Regulations including the requirement to pay the penalty within 28 days. The EICMS has been configured to produce AINs in a form that complies with the requirements of regulation 296E.

7.1.5 Service of AINs

Service of an AIN must be accomplished properly, as ineffective service can lead to difficulty in pursuing the matter in court. Regulation 296D sets out the procedures for service.

Although AINs may be emailed to recipients who have provided CASA with an email address, they must in all cases also be posted via registered post to the person's place of residence or business last known to CASA.

7.1.6 Withdrawal of AINs

Regulation 296C provides that an authorised person may withdraw an AIN by serving a written notice of the withdrawal on the recipient:

- Within 28 days after the date of service of the AIN; or
- Before the end of any allowed period of extension for payment.

The Manager Investigations currently has the authorisation to withdraw an AIN. In making such a decision the authorised person must consider:

- The matters set out in paragraphs 296C(2) (a) to (c) of CAR 1988
- Any submissions made by the alleged offender in response to the AIN
- Any other relevant matter.

7.1.7 Service of withdrawal notices

Regulation 296D requires a Notice of Withdrawal of AIN to be served in the same manner as AINs.

7.1.8 Withdrawal of AIN following payment of fine

The authorised person may withdraw an AIN after the recipient of the AIN has paid the prescribed penalty provided that the withdrawal is done within the period set out in section 7.1.6 above. In such cases CASA is required to refund the payment that the alleged offender has made. Any demerit points incurred on payment will also be removed.

The withdrawal of an AIN following payment is unusual, and should generally only occur in the following situations:

- Where CASA has reason to believe on the evidence available, that the person who has paid the prescribed penalty did not in fact commit the offence for which the AIN was served;
- Significant mitigating circumstances not known to CASA at the time of issuing the AIN have come to CASA's attention relating to the health and well-being of the recipient or other aspects of their personal situation which are relevant to the appropriateness of the AIN as an enforcement response;
- Where information has come to light following service of the AIN, which convinces CASA that the most appropriate enforcement action to take is to refer the matter to the CDPP for prosecution rather than allowing the recipient to deal with the matter by way of payment of the AIN.

7.1.9 Time for payment of an AIN

A person served with an AIN must, unless they elect to have the matter heard before a court, pay to CASA the prescribed penalty within 28 days of being served with the AIN.

7.1.10 Extension of time to pay

An authorised person may allow an extension of the period for payment, on application by the recipient of AIN, but that period shall not extend beyond 28 days after the initial 28 days provided by the notice (i.e. up to 28 days extension can be given in addition to the original 28 days set out in the notice).

7.1.11 Part payments and payment plans

Generally, part payments or payment plans are not available options for attending to payment of an AIN. However, the Manager Investigations may give consideration to such arrangements if requested in writing and on such terms as determined to be appropriate.

7.1.12 Consequence of payment of an AIN within time permitted

If payment is made within the time permitted or any extension of that time and the notice has not been withdrawn then:

- Criminal liability for the offence is discharged
- Further criminal proceedings cannot be taken in relation to that offence
- There is no conviction
- Demerit points will accrue against the appropriate class of authorisation (refer to section 30DW of the CAA and section 11.2.2).

7.1.13 Consequence of payment of AIN after time permitted

If payment is made after the time permitted or any extension of that time and the notice has not been withdrawn:

- CASA should not accept payment/part payment of the administrative fine
- The person may be prosecuted for the offence
- Demerit points will accrue (refer to section 30DW of the Act and section 11.2.2 only if the person is convicted or found guilty of the offence).

7.1.14 Non-payment of AINs

Where the recipient of an AIN fails to pay the AIN within the time allowed for payment, CASA will generally refer the matter to the CDPD for consideration of prosecution. The primary basis of this policy is to ensure that there is sufficient incentive for AIN recipients to give serious consideration to paying the AIN. The strength of this incentive may be adversely affected if it were to become known that CASA routinely declined to pursue matters further in the face of a refusal to pay an AIN

The only exception to this are for AINs issued at the request of the Australian Federal Police (**AFP**) for passenger offences. If the recipient of such an AIN fails or refuses to pay it, the matter will be referred back to the AFP for them to consider whether a prosecution should be commenced.

7.1.15 AIN process overview

Where the CEM agrees to the issue of an AIN:

- a) The investigator with responsibility for the relevant investigation will draft the AIN and accompanying covering letter for consideration by the Manager, Investigations
- b) The Manager Investigations will approve the form of the AIN and covering letter
- c) The ETC will be responsible for dispatching the AIN and covering letter to the recipient via email and registered post
- d) The Manager Investigations will be responsible for determining whether a person should be granted an extension of time in which to pay an AIN
- e) The Manager Investigations will be responsible for determining any requests for the withdrawal of an AIN
- f) Accounts receivable will be responsible for notifying the Investigations Section when payment is received for an AIN
- g) The investigator with responsibility for the relevant investigation will update payment details on EICMS
- h) The Manager Investigations will be responsible for ensuring that any applicable demerit points are accrued in EICMS
- i) The ETC will be responsible for ensuring that all communications to and from the recipient of the AIN (including requests for extension and withdrawal and accompanying responses) are uploaded to EICMS.

7.2 Enforceable Voluntary Undertakings

7.2.1 What is an EVU?

EVUs are written undertakings given by holders of civil aviation authorisations to CASA under section 30DK of the CAA. These undertakings can include promises to perform, or to abstain from performing certain activities relating to the privileges conferred by the civil aviation authorisation held by the person giving the undertaking.

Failure to comply with a written undertaking given to CASA under s.30DK of the CAA enlivens CASA's power to bring an application to the Federal Court seeking (among other things) enforcement of the terms of the undertaking and the imposition of a financial penalty equal to the amount of the financial benefit directly or indirectly obtained by the authorisation holder as a result of the breach of the undertaking.

7.2.2 Nature and purpose of EVUs

EVUs are an enforcement tool designed to encourage a cooperative approach to the resolution of identified non-compliance by authorisation holders and as an alternative to more directive or adversarial options such as criminal prosecution or the variation, suspension or cancellation of a civil aviation authorisation.

The giving and acceptance of an EVU involves a valuable exchange whereby:

- The authorisation holder avoids more substantial sanctions while at the same time providing CASA with tangible evidence of its intentions to work constructively with CASA to re-establish regulatory compliance
- CASA avoids the need to expend time and resources in prosecuting more significant enforcement action while at the same time, obtaining meaningful and enforceable undertakings from the authorisation holder designed to re-establish regulatory compliance and address associated safety concerns.

Having said that, it is important to note that EVUs are not an exclusive enforcement tool and may be used in conjunction with other enforcement tools, only where the holder indicates a willingness to accept an EVU in addition to the other enforcement action. Thus, an EVU can be combined with any one or more of the following:

- Counselling
- Administrative action to vary part or all of the holder's authorisation (i.e. to legally limit the holder's scope of activity)
- Administrative action to suspend part or all of the holder's authorisation pending completion of actions set out in the EVU

7.2.3 Legal requirements for EVUs

Section 30DK of the Act imposes a number of specific legal requirements which dictate the nature, extent and content of an EVU and which impose other legal obligations on both CASA and the authorisation holder. The most significant of these include:

- Only holders of civil aviation authorisations may give EVUs
- EVUs must be in writing
- Whether CASA accepts an EVU is at CASA's discretion
- EVUs are limited in duration to 12 months, although they may be used in series
- EVUs cannot have the effect of requiring payment of money to CASA
- Details of EVUs must be published by CASA on its public website
- EVUs can only be varied or withdrawn with the consent of CASA
- EVUs are enforceable only by the Federal Court on application by CASA.

7.2.4 EVUs: decision-making considerations

As a guide only, the following are examples of appropriate circumstances for the acceptance of an EVU:

- Where the identified non-compliance does not lead to immediate safety of flight concerns;
- Where the proposed undertakings are clear and capable of enforcement
- Where the undertakings and the period proposed for their implementation is considered sufficient to address the identified non-compliance and associated safety issues
- Where CASA has confidence in the authorisation holder's willingness and ability to effectively implement the proposed undertakings
- Where CASA has the ability to adequately monitor compliance with the EVU

An EVU should only be used in cases of more serious, deliberate contraventions, or in cases of contravention resulting in more significant adverse safety outcomes, where:

- It is combined with an additional compliance or enforcement response, such as the issue of an AIN, and/or a counselling notice
- The authorisation holder engages with CASA in a constructive manner in relation to the established non-compliance
- It is considered that the combination of the EVU and the additional enforcement action will be sufficient to both restore compliance and ensure that there are no similar contraventions in future
- If the identified non-compliance gives rise to serious and/or immediate safety of flight concerns, the authorisation holder agrees to suspension or variation of the privileges of its authorisation pending the successful implementation of those elements of the EVU which are necessary to address that risk.
- Having regard to the combination of the EVU with the additional compliance or enforcement response, it is not necessary for the matter to be referred to the Commonwealth Director of Public Prosecutions for consideration of criminal prosecution.

7.2.5 Examples of typical undertakings in EVUs

The following examples are described in general terms to illustrate the types of undertakings that might be found in an EVU. It should be borne in mind, however, that each EVU must be tailored to the particular circumstances of the matter and must contain specific undertakings that clearly set out the promisor's obligations.

CASA may accept an undertaking that the holder:

- Develops and disseminates throughout the organisation a clear compliance policy
- Undertakes a remedial course of training
- Introduces and implements a safety management system
- Introduces and implements a compliance monitoring system verifiable by independent third party audit, with audit reports provided to CASA at set intervals

- Not employ, for a particular period of time, a particular person in a management position or position which must be approved by CASA
- Work under an arrangement or employment with an experienced aviation mentor who will supervise their activities for a set period of time and provide them with reports that the holder must make available to CASA.

This list is not exhaustive, and any one or more of these or other appropriate undertakings in combination may be accepted. The essential criteria are that these undertakings are sufficiently specific and unequivocal that CASA can establish that they are being met and take action if they are not.

7.2.6 Examples of undertakings which are not acceptable

EVUs must not contain undertakings by which:

- the holder denies breaching the aviation law (although a holder need not admit to breaching the law), or which in substance sets up a defence to a breach (e.g. denial of intention to breach a fault offence)
- amount to a promise not to breach the aviation legislation
- place obligations on CASA which are not already obligations of CASA independent of the EVU
- which purport to limit CASA's discretion, or which purport to require CASA to exercise its discretion in a particular way
- place obligations on people other than the holder (although provisions which require the holder to be mentored, monitored, audited etc. by a third party, and provisions which affect the holder's employees or officers in their capacity as employees or officers, are acceptable)
- require CASA and/or the holder to maintain confidentiality
- they secure the payment of an AIN or other monetary amount

7.2.7 Acceptance of EVUs

A holder may offer to give CASA an EVU at any time, although realistically such offers are only likely to be made as a consequence of CASA activities, e.g. surveillance or investigation or during a Show Cause process.

No delegate may accept an EVU offered by an authorisation holder unless the possibility of doing so has been discussed and agreed in the CEP and the terms of the proposed EVU have been settled by the BM LIE (or their designee).

7.2.8 EVUs - process overview

Where it is determined in the CEP, that acceptance of an EVU is the appropriate response to an established breach of the aviation legislation, then:

- a) The senior manager of the relevant business unit will be responsible for determining whether the terms of the proposed EVU will satisfactorily address the identified non-compliance and associated safety issues;

- b) The EVU will be drafted by a lawyer in the LIE branch and settled by the BM LIE (or their designee) who is responsible for ensuring that the content of the EVU is legally correct
- c) The EVU will be signed on behalf of CASA by an appropriate delegate agreed between senior manager of the relevant business unit and the BM LIE
- d) The ETC will be responsible for dispatching the signed EVU to the authorisation holder seeking its execution on behalf of the holder
- e) The ETC will also be responsible for uploading the final signed version of the EVU (signed by both parties) onto the EICMS and arranging for a copy of it to be published on CASA's public website.

7.2.9 Variation of withdrawal of EVUs

A holder cannot unilaterally withdraw or vary an EVU – withdrawal or variation of an EVU requires CASA consent. Nor can CASA unilaterally vary or cancel an EVU – it is, after all, an undertaking by the holder, not CASA. If CASA does not think that a holder is acting in accordance with its EVU, CASA's remedy is to seek to enforce the EVU under section 30DK (6) of the CAA or take other enforcement action.

Any proposal to vary or withdraw an EVU – whether advanced by the authorisation holder or by CASA – must be discussed in the CEP. The considerations guiding CASA's decision whether or not to consent to any variation are the same as the considerations guiding CASA's decision to accept an EVU, as previously covered in this part. The process to be followed in the event that there is agreement to a withdrawal or variation is the same as the process for the initial acceptance of an EVU as set out in section 7.2.8 above.

7.2.10 Enforcement of EVUs

There are two pathways to enforcement of the substance of the undertakings set out in an EVU.

7.2.10.1 Direct enforcement - Federal Court orders

EVUs may not be enforced directly by CASA. If CASA considers that a holder is not acting in accordance with an EVU given to CASA, then CASA may, at its discretion, seek orders from the Federal Court under subsection 30DK (7) of the CAA.

The sorts of orders that CASA may seek from the Court are as varied as the circumstances relating to the breach of an EVU. Typically, the order sought will be a variation on the general theme that the holder abides by an undertaking it has given in an EVU, that is, an order under paragraph 30DK (7) (a) of the CAA. CASA may also seek an order under paragraph 30DK (7) (b), that is, an order that the holder pay the Commonwealth an amount of money up to the amount of any financial benefit that the holder has obtained directly or indirectly and that is reasonably attributable to the breach of the undertaking.

7.2.10.2 Indirect enforcement - alternative enforcement action

CASA is not required to seek orders from the Federal Court in every, or even any case where it considers that a holder is not acting in accordance with an EVU. The fact that CASA has accepted an

EVU from a holder does not preclude CASA seeking to address any safety concerns arising from that holder's later actions through other enforcement mechanisms available to it.

Show cause action may be initiated if CASA considers that the failure of the holder to comply with the EVU demonstrates a lack of willingness or ability on the part of the holder, to diligently discharge the obligations and responsibilities imposed on it by the holding of the relevant authorisation.

Similarly, where the breach of the EVU gives rise to the commission of a breach of the aviation law, CASA may consider issuing an AIN to the holder, or referring the holder to the Commonwealth Director of Prosecutions for consideration of prosecution.

7.2.11 Decision on how best to enforce EVU

All decisions relating to the action which CASA proposes to take in response to an identified breach of an EVU must be made in the CEP.

It should be borne in mind that seeking orders from the Federal Court under subsection 30DK(7) of the CAA may be an expensive process, and there are no guarantees either that an order can be sought in a time frame necessary to alleviate a safety problem, or that the Court will grant any particular order sought by CASA. CASA should therefore be careful to examine all reasonable options available to address the safety issue that the EVU (now breached) sought to address.

The decision on what action to take in response to a breach of an EVU by a holder is a matter for careful consideration, taking into account the general decision-making considerations identified at section 5.2.3 above as well as the circumstances of the breach.

A suitable response to an inadvertent and temporary breach of a minor undertaking in an EVU may be a letter from the relevant operational manager to the holder, reminding the holder of their obligations. A suitable response to a major breach of a substantial undertaking in an EVU may be cancellation of the holder's authorisation and referral of relevant regulatory breaches to the CDPP for prosecution. In either case the manager will need to arrange a CEM to discuss these options.

7.3 Decision to vary, suspend or cancel an authorisation or to issue a direction

As noted above at section 6.1.7 some decisions to vary, suspend or cancel an authorisation, or to issue a direction are required to be preceded by a SCN while others are not.

7.3.1 Decisions which do not require a SCN

Where a decision is not required to be preceded by a SCN, it will proceed straight to the decision drafting phase outlined below at section 7.3.5.

7.3.2 Decisions which do require a SCN

In relation to decisions which do require a show cause process, these will follow the show cause process outlined at section 6.1.11 above. Once the written response to the show cause notice is

received and a SCC is held (if offered to and requested by the authorisation holder) a further CEM will be held to determine what course of action should be taken in relation to the matters raised in the SCN.

This will involve the participants in the CEP considering the authorisation holder's written response as well as any further evidence or representations made at the SCC. If the CEP remains satisfied that the appropriate action is to vary, suspend or cancel the relevant aviation authorisation or to issue a direction, then the senior manager of the relevant business unit will make a recommendation to a delegate recommending a decision in the terms agreed by the CEP. The recommendation will be accompanied by a draft proposed decision setting out the suggested terms of the decision.

If the participants in the CEP determine that variation, suspension or cancellation or the issue of a direction is not warranted, but a different enforcement action (such as counselling or the issue of an AIN) is, then the relevant provisions of this manual relating to that enforcement outcome will be followed. If the participants in the CEP determine that no action is required at the conclusion of show cause process, then the procedure set out at section 7.3.10 below is to be followed.

7.3.3 Legislative authority to vary, suspend or cancel an authorisation

CASA has a range of powers under the civil aviation legislation to vary, suspend or cancel an authorisation. As noted above, it is critical that any proposed decision notice clearly explain how the grounds for the exercise of the relevant power have been established. A non-exhaustive list of the grounds upon which CASA is entitled to vary, suspend or cancel various different kinds of authorisation include:

- a) That CASA has reason to believe that the holder of an authorisation, has engaged in, is engaging in or is likely to engage in, conduct that contravenes section 30DB of the CAA (serious and imminent risk to air safety);
- b) That an AOC holder has contravened a condition to which the AOC is subject – section 28BA(3) of the CAA;
- c) That the holder of an authorisation (including a pilot licence, aircraft engineer licence or certificate of approval) has contravened a provision of the CAA or the Regulations
- d) That the holder of an authorisation no longer meets the requirements prescribed by the regulations for the holding of the authorisation – regulation 269(1)(b) of the CAR 1988
- e) That the holder of an authorisation has failed in their duty with respect to any matter effecting the safe navigation or operation of an aircraft – regulation 269(1)(c) of the CAR 1988;
- f) That an authorisation holder is not a fit and proper person to have the responsibilities and to exercise and perform the functions and duties of such an authorisation – regulation 269(1)(d) of the CAR 1988;
- g) That an approved design organisation has does not comply, or ceases to comply with subpart 21J of the CASR 1998 – regulation 21.249

7.3.4 Legislative authority to issue a direction

CASA has a range of powers to issue directions under the civil aviation legislation subject to it being satisfied that the criteria for the issue of the direction is made out. A non-exclusive list of the grounds upon which CASA is entitled to issue a direction include:

- a) Where it is satisfied that it is in the interests of safety to do so, CASA may issue a direction in relation to a matter effecting the safe navigation or operation of aircraft, the maintenance of aircraft or the airworthiness or design standards for aircraft. Such a direction must be consistent with the Act and issued for the purposes of CASA's functions – regulation 11.245 of the CASR 1998.
- b) CASA may issue a direction to an air transport operator requiring the operator to remove one or more of its key personnel from their position if CASA is satisfied that the person is not carrying out the responsibilities of their position, or, if the person is the CEO is not properly managing the safety matters for which the person is accountable – regulation 119.105 of the CASR 1998.
- c) Where it is satisfied that it is in the interests of air safety to do so, CASA may issue a direction to a CASR Part 141 flight training operator, requiring the operator to remove particular information from the operator's operations manual, to include particular information in the operator's operations manual or to revise or vary information, procedures or information in the operations manual – regulation 141.100 of the CASR 1998.

7.3.5 Draft proposed decision notice

Where the participants in the CEP agree that a decision should be made to vary, suspend or cancel an authorisation or to issue a direction, the assigned lawyer will work with the technical staff/investigator who have the relevant technical or factual knowledge of the relevant legislative contraventions or safety issues in order to draft the proposed decision notice. The decision notice needs to:

- a) clearly set out the factual findings that the CEP considers are open to the delegate, including after taking into account the authorisation holder's response to the SCN and any other representations made at the SCC (if there was a show cause process);
- b) explain how the conduct of authorisation holder contravenes the aviation legislation;
- c) identify the safety implications arising from the relevant contraventions;
- d) if the decision is a decision to issue a direction, explain the safety issue which has led to the issue of the direction;
- e) demonstrate how CASA's power to vary, suspend or cancel the relevant authorisation or to issue the relevant direction is engaged;
- f) explain why the variation, suspension or cancellation of the authorisation or the issue of the direction is necessary in the interests of aviation safety.

7.3.6 Recommendation to a delegate

Once the participants in the CEP are satisfied with the content of the proposed decision notice, the senior manager of the relevant business unit will make a recommendation to an appropriate delegate, that a decision be made in the terms set out in the draft decision. The recommendation will be made on the standard form recommendation (SFR) template and will be forwarded to the delegate for consideration along with the proposed decision notice and all other documents relevant to the decision-maker's deliberations, including, but not limited to, the SCN and the recipient's response to the SCN (if any).

7.3.7 Decision-making delegate

The decision-making delegate in relation to any decision to vary, suspend or cancel an authorisation or to issue a direction, will generally be:

- a) a senior manager with responsibility for the relevant business unit; and
- b) who has not been involved in the CEP process related to the matter in respect of which the decision is to be made.

Where no decision-maker is available matching both of those criteria, the BM LIE will be responsible for selecting a suitable independent delegate to consider the matter in consultation with the EM LIRA and the CEO/DAS as required.

7.3.8 Deliberations by the delegate

The delegate may seek further information or clarification of the terms of the proposed decision and the evidence upon which it is based. The delegate may also seek the making of amendments to the terms of the proposed decision or the nature of the proposed decision as the delegate thinks fit.

Where the delegate seeks amendments to the proposed decision, BM LIE and the senior manager of the relevant business unit will confer about the appropriate amendments to be made to give effect to the delegate's request and then return the proposed decision notice to the delegate for further consideration.

To finalise their decision making deliberations, the delegate must sign and complete the relevant parts of the SFR indicating their agreement or disagreement with the recommendation advanced by the CEP and sign and date the decision notice after satisfying themselves that the terms of the notice give effect to the decision which ought to be made in the circumstances.

The completed SFR and signed decision notice must then be returned to the ETC for service upon the authorisation holder.

7.3.9 Serving a decision on the authorisation holder

Once the delegate has returned the signed decision notice to the ETC, the ETC will arrange to serve a copy of the decision upon the authorisation holder via email and registered post.

7.3.9.1 Notice of review rights

Decisions made under the civil aviation legislation to vary, suspend or cancel an authorisation are reviewable in the AAT. Some decisions to issue directions are also reviewable by the AAT.

Where the decision made by the delegate is a reviewable decision, the ETC will ensure that the copy of the decision notice served upon the authorisation holder is accompanied by a **Form 1255**. This form provides the authorisation holder with information about how to apply for review of the decision in the AAT.

7.3.9.2 Automatic stay provisions

Decisions to vary, suspend or cancel an aviation authorisation may also be subject to the automatic stay provisions set out in section 31A of the CAA. Section 31A applies to any decision reviewable by the AAT in respect of which CASA was required by the Act or the regulations to issue a SCN before the decision could be made.

Where the automatic stay provisions apply, CASA's decision is automatically stayed for a period of five business days after the authorisation holder is notified of the decision. If, within that five-day period, the authorisation holder applies to the AAT for review of the decision and applies to the AAT for a stay of the decision, then CASA's decision is stayed until the AAT hears and determines the stay application.

Where a decision is subject to the automatic stay provisions, the ETC will ensure that the decision notice served on the authorisation holder is accompanied by a **Form 1256**. This form explains the automatic stay provisions to the authorisation holder.

7.3.10 No enforcement or compliance action necessary at the conclusion of a show cause process

Where, after considering the response made to a SCN, including any representations made by the recipient at a SCC, the CEM determines that no action is required, then the senior manager of the relevant business unit must write to the recipient notifying them of the fact that CASA has decided that no regulatory action is required and setting out the reasons for that conclusion.

The draft of this notice will be prepared by a lawyer in LIE branch in consultation with relevant technical specialists/investigators as required. The notice will explain by reference to the allegations set out in the SCN and the recipient's response, how CASA has satisfied itself that it can close out the show cause process without the need for compliance or enforcement action. The BM LIE (or their designee) will settle the draft notice to ensure that it is legally correct. The senior manager of the relevant business area will be responsible for ensuring that the notice is technically and factually correct.

The ETC will despatch the notice to the SCN recipient via email and registered post and ensure that a copy of it is placed on the EICMS.

7.3.10.1 Decision to vary, suspend or cancel an authorisation or issue a direction - process overview

Where it is determined in the CEP, that a decision will be made to vary, suspend or cancel an authorisation, or to issue a direction:

- a) The draft decision notice will be drafted by a lawyer in LIE branch with input and instructions provide by relevant subject matter experts (including investigators as appropriate). Relevant technical staff and/or investigators will be responsible for ensuring that the draft decision is technically and factually correct;
- b) The draft decision notice will be settled by the BM LIE (or their designee) who is responsible for ensuring that the content of the decision notice is legally correct, and to the extent that any content is provided by investigators, that it is factually correct;
- c) The senior manager of the relevant business unit will be responsible for determining whether the content of the draft decision notice is technically correct, and where factual content has been supplied by technical staff in the relevant business unit, that it is factually correct;
- d) A draft SFR will be prepared by a lawyer in the LIE branch for consideration by the senior manager of the relevant business unit.
- e) The senior manager of the relevant business unit is responsible for settling the content of the SFR, signing and dating it and returning it to the ETC.
- f) The ETC is responsible for preparing the decision making package, including the SFR, draft decision notice and all other attachments referred to in the SFR, for consideration by the delegate;
- g) The BM LIE and the senior manager of the relevant business unit are responsible for addressing any queries or making any changes to the proposed decision required by the delegate.
- h) The ETC will be responsible for dispatching the signed decision to the recipient via email and registered post along with the review rights and automatic stay notification forms as applicable;
- i) The ETC will also be responsible for uploading the signed version of the SFR, the decision and any correspondence to the recipient onto the EICMS.

7.4 Special requirements for serious and imminent risk suspension

The specific legislative requirements specified under section 30DC and 30DE of the CAA for the suspension of an authorisation due to the existence of a serious and imminent risk to air safety require some modification of the decision-making process outlined above in section 7.3 above.

7.4.1 What is a serious and imminent 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 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 or reckless flying.

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

A risk can be regarded as imminent if it is likely to materialise in the short term or at any time.

7.4.2 Drafting a suspension notice under section 30DC of the CAA

Where the CEP determines that it is necessary to suspend an authorisation with immediate effect under s.30DC of the CAA, the procedure outlined above in section 7.3 for making a decision to vary, suspend or cancel an authorisation will apply. Noting the urgency with which such decisions may be required to be made, there may be situations where it is not practicable for a formal SFR to be prepared for consideration by the delegate. In such cases, the relevant senior manager may communicate their recommendation to the delegate via email along with a copy of the proposed decision notice. In such cases, the ETC will be responsible for ensuring that all such communications are uploaded onto EICMS.

Again, given the urgency of such matters, it may not be possible to complete the CEP referral form prior to the making of the suspension decision. In all cases, the ETC is responsible for ensuring that the referring business area completes the referral form, even if that occurs after the decision is made.

7.4.3 Service of the suspension notice

The ETC will be responsible for forwarding a copy of the serious and imminent risk suspension notice to the authorisation holder by email and registered post. However, given the importance of ensuring that the authorisation holder is aware of the decision as quickly as possible the BM LIE and the relevant senior manager will determine whether arrangements should be made for CASA staff to personally deliver the decision-notice to the recipient or whether a process server should be engaged for this purpose.

The senior manager of the business unit will determine whether it is appropriate to contact the authorisation holder to notify them of the decision via telephone.

7.4.4 Obligation to investigate

7.4.4.1 Cases where no further investigation is required

There may be cases in which CASA has available to it, sufficient evidence and information to sustain an application to the Federal Court under s.30DE prior to the making of a suspension decision under s.30DC. An example would include where an ongoing investigation in relation to a particular incident or allegation discovers evidence elevating the risks associated with the incident or allegation to the serious and imminent risk level. In such cases, CASA may proceed from the serious and imminent risk suspension to the filing of an application to the Federal Court under s.30DE without seeking further time from the Court in which to conduct an investigation.

7.4.4.2 Cases where further investigation is required

In cases where the evidence gives rise to a reasonable belief as to the existence of a serious and imminent risk, but further investigation is required to confirm the matters contributing to that belief, it is expected that CASA will conduct those further investigations with as much expedition as possible.

As such, the senior manager of the relevant business area must task an investigation into the circumstances which led to the suspension in order to confirm the facts and circumstances contributing to the existence of the serious and imminent risk and to determine what regulatory action CASA should take in response to it. The senior manager should liaise with the Manager Investigations if the assistance of an investigator is required in formulating an appropriate investigation plan.

Within the initial 5 business days, after the suspension under s.30DC the investigation needs to establish:

- What further enquiries need to be made and what evidence needs to be obtained; and
- If it is not possible to conclude these enquiries within 5 business days, how much further time will the necessary investigations take.

If it is determined within the initial 5 business days after the suspension, that there is no serious and imminent risk to safety requiring ongoing suspension of the relevant authorisation, then the section 30DC suspension notice can be revoked at that time, or the suspension can be allowed to cease at the end of the fifth business day after the suspension was issued.

Note – even if it is determined that there is no ongoing serious and imminent risk to safety, the matters which formed the basis of the suspension may, nonetheless, require further attention as to whether an alternative enforcement pathway is more appropriate.

If the investigation determines the existence of a serious and imminent risk, or if the investigation cannot be concluded in 5 business days, then the ongoing suspension of the relevant authorisation can only be continued if CASA makes an application to the Federal Court under s.30DE of the CAA.

7.4.5 Application to the Federal Court

If it is determined in the CEP, that an application should be made to the Federal Court for a prohibition order under s.30DE of the CAA, then,

- The BM LIE is responsible for preparing and filing CASA's application;
- The relevant senior manager is responsible for making appropriately qualified technical staff available to provide evidence in support of the application and, if CASA's investigation is incomplete at the time the application is filed, for providing evidence going to the amount of time that CASA considers it will require to complete the investigation.

Given the urgency with which any application to the Court will need to be prepared, it may be necessary to conduct CEMs out of session or via email to determine whether the application is to be lodged. In any case, the ETC is responsible for creating appropriate entries in EICMS to document the deliberations of the CEM.

Where CASA lodges an application to the Federal Court the suspension initiated by the s.30DC suspension notice remains in force until the Court hears and determines CASA's application.

7.4.6 Federal Court hearing and decision

If CASA's application for a prohibition order is successful, the Court will usually grant CASA a further period of time in which to complete its investigation of the circumstances giving rise to the serious and imminent risk.

The Court can allow CASA up to 40 days for the completion of its investigation.

If the Court accepts that CASA has established reasonable grounds for its belief in the existence of a serious and imminent risk, but considers, by the time the matter is heard before the Court, that CASA has had adequate time to complete its investigations, then the Court will normally grant the prohibition order, but provide that it remains in force only for a short period – ie: until the end of the day on which the judgement is given. If the Court grants CASA a prohibition order, then CASA is obligated under s.30DG of the Act, to investigate the matters giving rise to the serious and imminent risk suspension, by the end of the period specified in the prohibition order.

CASA may apply to the Court once for an extension of the prohibition order. Any extension is not to exceed 28 days.

If the Court dismisses CASA's application (ie: does not accept that there are reasonable grounds for CASA's belief in the existence of a serious and imminent risk), then the suspension of the relevant authorisation is ended on the day that the Court dismisses the application.

Note – where this occurs, the CEP will need to determine whether the facts and circumstances giving rise to the serious and imminent risk suspension need to be managed through a different enforcement response.

7.4.7 Variation, suspension or cancellation of an authorisation under section 30DI

If, at the conclusion of its investigation under s.30DG, CASA considers that a serious and imminent risk to safety will continue to exist if the relevant authorisation is not varied, suspended or cancelled, then it may proceed to make a decision accordingly under s.30DI of the Act. Such a decision must be proceeded by a SCN issued under s.30DH.

In order for CASA to access these decision-making powers, any SCN under s.30DH must be issued within 5 business days after the conclusion of the prohibition order issued by the Court. Any decision under s.30DI must then be made within 5 business days of the conclusion of the period allowed by CASA for the authorisation holder to respond to the SCN under s.30DH. This period cannot be longer than 28 days.

If CASA engages in a show cause and decision-making process in accordance with sections 30DH and 30DI, then the suspension of the authorisation holder's authorisation remains in force until such time as CASA makes its final decision under s.30DI.

A decision by CASA to vary, suspend or cancel an authorisation under s.30DI on the grounds of the existence of a serious and imminent risk, is not subject to an automatic stay under s.31A of the Act.

7.4.7.1 Drafting the SCN and decision notice

The drafting of a SCN under s.30DH and any subsequent decision notice under s.30DI will proceed in accordance with the process outlined above at section 6.1 for SCNs and section 7.3 for decision notices to vary, suspend or cancel an authorisation.

Noting the urgency with which such decisions may be required to be made, there may be situations where it is not practicable to hold a show cause conference. It may also not be practical for a formal SFR to be prepared for consideration by the delegate. In such cases, the relevant senior manager may communicate their recommendation to the delegate via email along with a copy of the proposed decision notice. In such cases, the ETC will be responsible for ensuring that all such communications are uploaded onto EICMS.

7.5 Special arrangements for suspension or cancellation of medical certificates

As noted above at section 4.14 special arrangements apply for consideration of aviation medical certification decisions involving the suspension or cancellation of a medical certificate.

7.5.1 Suspension or cancellation of medical certificates - process overview

The process for the issuing of such decisions is as follows:

- a) Aviation medicine is responsible for ensuring that drafts of all such decisions are uploaded to the EICMS and referred to the Special Counsel, LIE for review before the decisions are signed off by a delegate;
- b) The Special Counsel LIE (or their designee) is responsible for ensuring that all proposed decisions are lawful and defensible based on the available evidence;
- c) Aviation medicine is responsible for ensuring that all proposed decisions are technically correct and evidence based;
- d) Aviation medicine is responsible for ensuring that the signed decision issued by the delegate is despatched to the relevant medical certificate holder and that a copy of the signed decision is uploaded the EICMS

8 Review of Approved Self-Administering Organisation internal review decisions by CASA

Pursuant to Part 149 of the CASR 1998, a person may be approved to administer a recreational sport aviation activity within Australia. Such persons are called Approved Self-administering Aviation Organisations (ASAOs). As described in the Part 149 MOS, self-administering activities include:

- a) Administration functions in relation to certain aircraft – including aircraft registration, airworthiness and pilot-licensing
- b) Administration functions in relation to parachute descents
- c) Exercising enforcement powers in relation to members engaged in Part 149 activities

To date, two organisations have been issued with ASAO certificates under Part 149:

- (i) The APF
- (ii) RAAus

8.1 Aviation enforcement powers of ASAOs

Part 149 ASAOs are certificated under Part 149, to issue authorisations to their members, permitting them to participate in the aviation activities administered by the organization. As a corollary to this power, ASAOs may be authorised under Part 149, to exercise enforcement powers in relation to those of their members who exercise the privileges of their authorisations in a manner which is unsafe, and/or not in compliance with the requirements of Part 149.

8.1.1 Internal review of enforcement decisions by ASAOs

Under regulation 149.605 of CASR 1998, an ASAO must have in place a mechanism to review a range of decisions made by it in the exercise of its enforcement powers. These decisions include (amongst others):

- A decision to issue an authorisation
- A decision to attach conditions to an authorisation
- A decision to vary, suspend or cancel an authorisation

Where a member applies to the ASAO for the review of such a decision, the ASAO must review the decision within 21 days of receipt of the application and either affirm the decision, vary the decision or set aside the decision and substitute a different decision in its place.

Where the ASAO fails to make a decision on the application for review within 21 days of receipt of the application, it is deemed to have affirmed the decision under review.

8.2 Review of an ASAO enforcement decision by CASA

Where a person is dissatisfied with an internal review decision made by an ASAO, that person may apply to CASA for review of the decision under regulation 149.610 of the CASR.

Any such application must be made within 21 days of the date of the internal review decision, or within such further period as CASA allows.

8.2.1 Extension of time in which to seek review by CASA

CASA's discretion to extend the time within which an application for review may be made under r.149.610 is unconfined in its terms, but it is accepted that, as with powers afforded to other decision makers to extend time in analogous circumstances, CASA should take into account the criteria established by the *Federal Court in Hunter Valley Developments v Cohen [1984] FCA 176*. Those criteria require the decision maker to consider:

- a) Whether there is an acceptable explanation for the delay in making application noting that the prima facie rule is that applications received outside of the time limit will not be entertained
- b) Action taken by the applicant to alert the relevant ASAO to the fact that the applicant intends to seek review of the decision by CASA
- c) Any prejudice to the ASAO in allowing the extension – although the mere absence of prejudice does not mean that an application must be allowed
- d) The merits of the substantial application
- e) Consideration of fairness between the applicant and other persons in a like position

While it is important to note that each application for an extension of time must turn on its own facts, in general terms, CASA is likely to be more favourably disposed to the granting of an extension where the period of the extension is short, where the applicant is able to explain the cause of the delay, and where the extension will not cause significant unsettling of the ASAO, or lead to a situation where necessary evidence is no longer available.

On the other hand, CASA is less likely to entertain lengthy extensions where the delay is not adequately explained, where the evidence necessary for a comprehensive review of the decision is no longer available and where there would be significant unsettling of the ASAO or other persons in a similar position who may not have sought an extension of time.

8.2.2 Requirements for making an application

In addition to being made within the requisite time period, an application must be made in the approved form (as approved by CASA at the relevant time), include all of the information required in the form, must be accompanied by the applicable fee, and the applicant must notify the ASAO of the making of the application.

For the purposes of r.149.610, an application is considered to be made in the approved form, if it is in written form (including electronic written form) and it:

- a) Requests CASA to conduct a review

- b) Sets out the decision to be reviewed and the date the decision was made
- c) Sets out the decision the applicant would prefer was made by the ASAO
- d) Sets out why the applicant believes the ASAOs review decision is not the preferable decision
- e) Includes all relevant supporting information that the applicant would like CASA to consider as part of its review
- f) Is emailed to sport@casa.gov.au within 21 days of the date of the internal review decision, or within such further period as CASA allows

8.2.3 CASA's powers in relation to review of ASAO enforcement decisions

In reviewing an ASAO decision under r.149.630 of the CASR 1998, CASA may:

- g) Seek further information from the ASAO beyond the documents and information supplied by the ASAO in compliance with r.149.620
- h) Request further information or documents from the applicant – r.149.625(1)(a)
- i) Require the applicant to submit to a test or examination conducted by CASA – r.149.625(1)(b)
- j) Require the applicant to attend an interview with CASA

Where the applicant is requested to undertake action under r.149.625, CASA may refuse to make a decision on the application for review until the request is complied with.

After reviewing the available evidence and taking into account any other matters it considers relevant to the application for review, CASA must make a decision to either:

- a) Affirm the decision under review
- b) Vary the decision under review
- c) Set aside the decision under review and substitute its own decision in place of the reviewable decision
- d) Set aside the decision under review and remit the matter to the ASAO for further reconsideration in accordance with any directions or recommendations of CASA.

8.2.4 Record of decision

After making its decision on an application for review, CASA must provide the applicant and the ASAO with a written notice setting out the terms of its decisions and the reasons for the decision.

8.3 Discussion in CEM

As noted above at section 4.3, applications for review of ASAO enforcement decisions received by CASA should be given serious consideration for referral to the CEP.

Where a new application is received, the details of the application will be entered into the EICMS and the matter will be scheduled for discussion at the next available Sport Aviation CEM.

Initial discussion will cover matters such as:

- a) Whether the ASAO has supplied its statement of reasons and associated evidence as required under r.149.620
- b) Whether any further information or evidence is required from the ASAO
- c) Whether the applicant should be requested to provide further information, or to submit to an interview, a test or an examination
- d) Whether CASA should conduct an investigation of its own in order to establish the facts and circumstances upon which the decision is based. This would only normally occur if there was significant dispute as to the relevant facts, or a significant gap in the evidence which cannot be filled by the ASAO or the applicant.

The application for review will be discussed at each subsequent Sport Aviation CEM until such time as the members of the CEM consider that they have sufficient information and evidence to make a recommendation to an appropriate delegate as to the decision which CASA should make on the application. The decision-making delegate will generally be the Executive Manager Stakeholder Engagement Division, the CEO/DAS, the Branch Manager Sport & Recreation Aviation Branch or a different manager nominated by the CEO/DAS.

8.4 Drafting of decision notice and recommendation to delegate

The process for drafting of the decision notice, and the making of a recommendation to the delegate will be the same as outlined under section 7.3 above.

8.5 Reconsideration of ASAO enforcement decisions - process overview

- a) The Sport Aviation Branch is responsible for referring any applications for review received under r.149.610 into the CEP using the referral form
- b) The ETC is responsible for uploading the details of the referral onto EICMS
- c) The Sport Aviation Branch is responsible for ensuring that the relevant ASAO complies with its obligations under r.149.620 to provide CASA with information and documents relevant to the reviewable decision
- d) The BM LIE is responsible for drafting the proposed decision-notice under r.149.630 and for ensuring that it is legally correct
- e) The BM Sport Aviation is responsible for providing instructions to assist in the drafting of the proposed decision notice and for ensuring that the decision notice is factually and technically correct
- f) A draft SFR will be prepared by a lawyer in LIE branch for consideration by the BM Sport Aviation
- g) The BM Sport Aviation is responsible for settling the content of the SFR, signing and dating it and returning it to the ETC
- h) The ETC is responsible for preparing the decision-making package, including the SFR, draft decision notice and all other attachments referred to in the SFR, for consideration by the delegate;

- i) The BM LIE and the BM Sport Aviation are responsible for addressing any queries or making any changes to the proposed decision required by the delegate.
- j) The ETC will be responsible for dispatching the signed decision to the applicant and the relevant ASAO via email and registered post along with the review rights and automatic stay notification forms as applicable;
- k) The ETC will also be responsible for uploading the signed version of the SFR, the decision and any correspondence to the applicant and the ASAO onto the EICMS.

9 Refusal to issue an authorisation

In some circumstances, it may be appropriate to refer to the CEP, matters in which there is doubt about whether an applicant for an authorisation meets the legislative criteria for the issue of the authorisation. This is particularly the case where the relevant statutory criteria calls for judgement in terms of the applicant's suitability to hold the relevant authorisation as a result of previous conduct.

The previous conduct of an individual might be relevant because the individual is the applicant for an authorisation in their own right, or because the individual is nominated to occupy a key personnel position in an entity which has applied for an authorisation.

In some instances, the safety performance of a corporate entity might also be relevant to a determination of whether that entity should be issued (or re-issued) with a particular civil aviation authorisation.

9.1 Applications for authorisations - relevant legislative provisions

9.1.1 CASR 1998 Part 11

Under paragraph 11.055(1A)(e) of the CASR 1998, CASA may grant an authorisation to a person if (amongst other things), granting the authorisation would not be likely to have an adverse effect on the safety of air navigation. Similar provision is made in paragraph 11.055(1B)(b), although in that case, CASA must be satisfied that granting the authorisation will preserve a level of aviation safety that is at least acceptable.

Under paragraph 11.055(1A)(e) of the CASR 1998, CASA may grant an authorisation to a person if (amongst other things), granting the authorisation would not be likely to have an adverse effect on the safety of air navigation. Similar provision is made in paragraph 11.055(1B)(b), although in that case, CASA must be satisfied that granting the authorisation will preserve a level of aviation safety that is at least acceptable.

Subregulation 11.055(4) then sets out a range of matters which CASA can take into account in determining whether it is satisfied as to the requirements of paragraph (1A)(e) or (1B)(b). These matters are as follows:

- a) the applicant's record of compliance with regulatory requirements (in Australia or elsewhere) relating to aviation safety and other transport safety; and

- b) the applicant's demonstrated attitude towards compliance with regulatory requirements (in Australia or elsewhere) relating to aviation safety and other transport safety; and
- c) the applicant's experience (if any) in aviation; and
- d) the applicant's knowledge of the regulatory requirements applicable to civil aviation in Australia; and
- e) the applicant's history, if any, of serious behavioural problems; and
- f) any conviction (other than a spent conviction, within the meaning of Part VIIC of the Crimes Act 1914) of the applicant (in Australia or elsewhere) for a transport safety offence; and
- g) any evidence held by CASA that the applicant has contravened:
 - (i) the Act or these Regulations; or
 - (ii) a law of another country relating to aviation safety; or
 - (iii) another law (of Australia or of another country) relating to transport safety; and
- h) in the case of an authorisation referred to in subregulation 11.040(2), the applicant's financial standing and financial stability; and
- i) any other matter relating to the fitness of the applicant to hold the authorisation.

9.1.2 Fitness and propriety

In respect of appointment to certain key positions within an AOC organisation or an aerial work (Part 138) organisation, it is a requirement that nominated individuals be fit and proper persons to be appointed to the relevant key personnel position – see for example, r.119.070(1). A detailed explanation of the concept of what it means to be a fit and proper person in an aviation context is set out in **Appendix C – Guidance on the meaning of the term 'fit and proper person'**.

9.1.3 CAA - section 28

Pursuant to s.28(1) of the CAA, CASA may grant an AOC to an applicant if, and only if, the applicant has complied with, or is capable of complying with, the safety rules. This involves considerations of whether the organisation of the applicant is suitable in terms of key personnel, processes and procedures, numbers and qualifications of operational staff (amongst other things) to ensure that the organization will comply with the requirements of the civil aviation legislation which apply to its intended operations.

9.2 Key considerations for decision making

9.2.1 Past conduct by applicants for individual authorisations

Where the past conduct of an individual applicant for an authorisation is called into question having regard to the criteria in subregulation 11.055(4) of the CASR 1998, the ultimate issue for CASA to consider in determining the application, is whether, having regard to the applicant's past conduct, CASA can have confidence in the applicant to honestly and diligently exercise the privileges and discharge the obligations attaching to the holding of that authorisation. Important factors to consider in reaching a decision on this issue include:

- The nature and extent of the previous misconduct
- Whether the misconduct involved contraventions of the civil aviation legislation
- If the misconduct was not aviation related, whether the nature of the misconduct has any bearing on the willingness or ability of the applicant to comply with civil aviation legislation
- The recency of the previous misconduct
- Whether the applicant acknowledges their previous wrongdoing
- Any steps taken by the applicant to address the behaviours which led to the previous misconduct
- Any referee reports which comment favourably on the applicant's suitability to hold the authorisation.

9.2.2 Individuals nominated to key personnel positions

Where an individual, who has been nominated to hold a key personnel position by an applicant for an organizational approval such as an AOC or CASR Part 145 AMO Certificate, has an adverse history of misconduct, the ultimate issue for CASA to determine is whether, having regard to the individual's past history, CASA can be confident that the individual will diligently discharge the duties and obligations attaching to the relevant key personnel position. As noted above, this will be relevant to determining whether the individual in question is a fit and proper person to hold the relevant appointment. In making that determination, the same factors identified above in relation to individual authorisations are likely to be relevant.

9.2.3 Organisational authorisation holders with a history of poor safety performance

There may be cases where an applicant for an organisational approval has a history of poor safety performance which can't be attributed directly to misconduct by a particular individual or individuals. The deficiencies might be a result of an absence of internal controls, or under-resourcing or a lack of skill and knowledge among key personnel. In such cases, it is important for CASA to determine what is causing or contributing to the poor safety outcomes before making any decision.

9.3 Show cause notices prior to refusal to issue an authorisation

9.3.1 Authorisation holder reapplying for an authorisation they currently hold

In all cases where CASA is considering refusing an application to re-issue (renew) an authorisation to an applicant who is the current holder of that authorisation, CASA will first issue the applicant with a SCN setting out the facts and circumstances which it considers justifies a decision to refuse to re-issue the relevant authorisation.

No final decision will be made on the application until the applicant has responded to the SCN, or until the time specified in the SCN for the provision of a written response has passed.

The process for the drafting and issue of the SCN will be as per section 6.1 above.

9.3.2 Where the applicant is not the current holder of the authorisation applied for

In circumstances where the applicant has never held, or is not the current holder of, the authorisation they are applying for, CASA will not generally issue a SCN to the applicant prior to making a decision to refuse to issue the relevant authorisation.

CASA may in its discretion, choose to issue a show cause notice if it considers it appropriate to do so in a particular case. The factors that CASA may take into account in determining whether or not to issue a SCN include:

- The complexity of the facts and circumstances upon which CASA proposes to rely in refusing to issue the authorisation
- The extent to which the applicant is aware of those facts and circumstances and of CASA's concerns arising from them
- The extent to which there has been previous communication between CASA and the applicant relating to the relevant facts and circumstances
- The need to ensure timely decision making.

9.4 Issue of authorisation following the CEP

It is important to note that discussion of a matter in the CEP, and consideration of all of the available evidence (including, where applicable, an applicant's response to a show cause notice) in that forum, may lead to a conclusion that it is not necessary to refuse to issue the authorisation in question. It may be that, after discussion in CEM, it is determined that the relevant authorisation can be safely issued to the applicant with conditions attached or on an unconditional basis.

9.5 Draft decision notice

Where a proposed refusal to issue an authorisation is referred to the CEP, the process for the drafting and dispatch of any relevant decision notice will be as set out in section 7.3.

9.6 Decision making delegate

The decision making delegate will normally be the senior manager of, or a team leader within, the business area responsible for determining whether the relevant authorisation is to be issued or not. Where that is the case, it will not generally be necessary for the participants in the CEM to make a recommendation (via an SFR) to a decision-maker outside of the CEP.

However, where it is determined that the relevant decision should be made at a higher level, then the senior manager of the relevant business unit will be responsible for making a recommendation to the appropriate delegate.

9.7 Refusal to issue an authorisation - process overview

Where it is determined in the CEP, that a decision will be made to refuse to issue an authorisation:

- a) The draft SCN (if applicable) will be drafted and issued as per the process set out at section 6.1.11
- b) The draft decision notice will be drafted by a lawyer in LIE branch with input and instructions provided by relevant subject matter experts (including investigators as appropriate). Relevant technical staff and/or investigators will be responsible for ensuring that the draft decision is technically and factually correct;
- c) The draft decision notice will be settled by the BM LIE (or their designee) who is responsible for ensuring that the content of the decision notice is legally correct, and to the extent that any content is provided by investigators, that it is factually correct;
- d) The senior manager of the relevant business unit (or their designee) will be responsible for determining whether the content of the draft decision notice is technically correct, and where factual content has been supplied by technical staff in the relevant business unit, that it is factually correct. Where the senior manager (or designee) is the decision maker, they will be responsible for signing and dating the decision notice and returning it to the ETC;
- e) If an SFR is necessary, then this will be prepared as per the process in section 7.3.6;
- f) The ETC will be responsible for dispatching the signed decision to the recipient via email and registered post along with the review rights notification forms as applicable;
- g) The ETC will also be responsible for uploading the signed version of the SFR(if applicable), the decision and any correspondence to the recipient onto the EICMS.

10 CRIMINAL ENFORCEMENT ACTION

10.1 Safety policy underpinnings

As noted in CASA's Regulatory Philosophy, CASA has a limited but legitimate role in pursuing punitive action for breaches of the civil aviation legislation. Criminal prosecution is therefore reserved for those matters in which CASA considers that the conduct of an individual or a corporation is sufficiently serious and aberrant to require punishment and retribution. It is the function of the criminal justice system—more specifically, the courts—to determine the appropriate punishment for criminal offending.

With the exception of matters involving non-payment of an AIN, (in which CASA pursues prosecution action as a matter of course), matters considered to warrant criminal prosecution will generally feature some aggravating feature or features which means that the specific and general deterrent effect of CASA's administrative sanctions would not constitute an appropriate response to the identified conduct. Examples of the kinds of conduct which might fall into this category are set out further below.

10.2 CASA does not prosecute criminal offences

CASA is not empowered to commence prosecution of a criminal offence committed under the aviation legislation. Prosecution of offences arising under Commonwealth laws is the responsibility of the CDPP. The CDPP is an independent body established by an Act of Parliament to ensure a separation of the investigative and prosecuting functions in the Commonwealth criminal justice system. Therefore, where CASA considers that particular conduct by an aviation industry participant may warrant criminal prosecution, it must refer the matter for consideration by the CDPP. It is a matter for the CDPP to determine whether any prosecution will ultimately be commenced. However, in making its decision whether to commence a prosecution in any particular case, the CDPP liaises closely with CASA.

10.3 Factors taken into account when referring matters to the CDPP

The CDPP makes decisions relating to the initiation (or continuation) of criminal prosecutions in accordance with the Prosecution Policy of the Commonwealth (PPC). In determining whether a matter should be referred to the CDPP, CASA will take into account the requirements of PPC. The PPC identifies two major considerations which must be satisfied before a prosecution will be commenced in any given case:

10.3.1 Sufficient evidence to secure a conviction

CASA's brief of evidence must contain sufficient evidence to satisfy the CDPP, that all elements of the relevant offence(s) can be proved beyond reasonable doubt. The assigned investigator will work with relevant CASA inspectors to ensure that the evidence provided to the CDPP is able to meet this requirement.

10.3.2 The public interest

Even where sufficient evidence exists, the CDPP will only commence a prosecution where it is satisfied that it is in the public interest for it to do so. In determining where the public interest lies, the CDPP will take into account the following:

- The seriousness or, conversely, the triviality of the alleged offence. An offence, the alleged commission of which involved actual or threatened danger to life or property or which compromised air safety, could be regarded as serious and may require prosecution action. However, an offence that is entirely technical in nature could be regarded as not warranting prosecution.
- The presence of any mitigating or aggravating circumstances
- The age, physical health, mental health or special infirmity of the alleged offender or any witness
- The alleged offender's history of compliance
- The degree of culpability of the alleged offender in connection with the offence
- The availability and efficacy of any alternatives to prosecution

- The prevalence of the alleged offence and the need for deterrence, both particular and general
- Whether the alleged offence is of considerable public concern

Having regard to these matters CASA would generally refer matters of the following kind to the CDPP for consideration of prosecution (other than referrals for non-payment of an AIN):

- Deliberate offending creating serious risks to safety;
- Unintentional offending where that offending results in death, serious injury or damage to property
- Unintentional offending involving negligence or a serious dereliction of duty
- Matters involving a significant amount of less serious offending

In determining where a matter should be referred for consideration by the CDPP, CASA will also take into account any safety action already taken by CASA in relation to the offending. For example if CASA has already suspended an authorisation holder's pilot licence as a result of a contravention and the relevant pilot has undertaken a course of retraining and re-testing in order to have the suspension lifted, then that might demonstrate that the public interest does not require further action in the form of criminal prosecution.

On the other hand, a pilot who has their licence cancelled due to deliberate contraventions which resulted in serious risks to safety, may still be referred to the CDPP to consider whether the offending is of such a nature that specific punishment and retribution is required.

However, while the PPC gives CASA a degree of discretion in which matters it refers to the CDPP and which matters it doesn't, the PPC expresses the clear expectation that, where an investigation reveals sufficient evidence of the commission of a serious offence, the CDPP must be consulted about whether the offence is to be prosecuted.

10.3.3 Referral for non-payment of AIN

As noted above at section 7.1.14, CASA will, as a general rule, automatically refer any matters involving non-payment of an AIN to the CDPP for consideration of criminal prosecution. The primary basis of this policy is to ensure that there is sufficient incentive for AIN recipients to give serious consideration to paying those AINs. The strength of this incentive may be adversely affected if it were to become known that CASA routinely declined to pursue matters further in the face of a refusal to pay an AIN

10.4 Safety action takes precedence over criminal prosecution

CASA will only refer a matter to the CDPP once it is satisfied that all administrative action required to address risks to safety have been concluded. For example, if the regulatory breaches which might be referred to the CDPP also satisfy a delegate that an authorisation holder's authorisation should be varied, suspended or cancelled, then the administrative action necessary to affect that variation, suspension or cancellation will be completed before CASA turns its mind to the question of referral to the CDPP. This includes the conclusion of any associated external processes such as appeals to the Administrative Appeals Tribunal.

This sequencing is intended to ensure that the existence of actual or contemplated criminal proceedings does not interfere with CASA's ability to give effect to necessary administrative safety decisions in an expeditious manner. For example, the Administrative Appeals Tribunal or the Federal Court may delay the hearing of administrative proceedings relating to safety decisions made by CASA if the relevant authorisation holder is concurrently subject to criminal prosecution in relation to the same regulatory contraventions which formed the basis of the safety decision.

10.5 Time limit for instituting prosecution

In accordance with CAR 296, a prosecution in respect of an offence against the regulations must be commenced within 3 years of the commission of the offence. There is no such time limit in respect of the prosecution of individuals for those offences against the Act for which the maximum penalty which may be imposed on an individual is, or includes, a term of imprisonment of more than 6 months in the case of a first conviction. Likewise, there is no such time limit in respect of the prosecution of a body corporate for those offences against the Act for which the maximum penalty that may be imposed on a body corporate is, or includes, a fine of more than 150 penalty units in the case of a first conviction. (The maximum penalty that may be imposed on a body corporate is five times the maximum pecuniary penalty that may be imposed on an individual convicted of the same offence. Thus a penalty of 30 penalty units translates into 150 penalty units for a body corporate.) A prosecution of an individual or a body corporate for an offence against the Act, the maximum penalty for which falls under these limits, must be commenced within one year after the commission of the offence: see section 15B of the Crimes Act 1914.

10.6 Business area responsibilities

10.6.1 Manager Investigations

The Manager Investigations is, under the BM LIE and the EM LIRA, responsible for determining whether there is sufficient evidence to support the referral of a matter to the CDPP.

The Manager Investigations is the focal point for all dealings with the CDPP. On a day-to-day basis it will be the tasked investigator who will generally have this contact but where officers outside LIRA are proposing to make contact with the CDPP, or have been approached by the CDPP, they should do so through the Manager Investigations.

10.6.2 Individual investigators

The Investigator is responsible for investigating matters with which he or she has been tasked by the Manager, Investigations and when required, for the preparation of briefs of evidence for the CDPP. The brief forms the basis of a case against an alleged offender and serves as instructions to the prosecutor. (The investigator also assists, when tasked, with gathering evidence to support administrative action.)

Where the CDPP decides to initiate a prosecution, the assigned investigator will be responsible for providing ongoing assistance to the CDPP in the conduct of the prosecution. This will include being the liaison point between the CDPP and other CASA staff or will be witnesses in the proceedings as well as attending the proceedings to provide support to the prosecutor.

10.6.3 Individual CASA staff

Individual CASA staff with knowledge of matters relevant to a particular prosecution may be required to appear in the prosecution as witnesses of fact - that is, to provide evidence of things that they did, saw or heard while performing their role as a CASA staff member.

Individual CASA officers with specialist qualifications and experience may be asked to assist in the conduct of prosecution matters by providing expert opinion evidence on safety and other issues relevant to the prosecution.

10.6.4 Business area managers

Business area managers are expected to make staff with particular knowledge (witnesses of fact) or subject matter expertise (expert witnesses) available as necessary to assist CASA's Investigators in preparing briefs of evidence to the CDPP and to appear as witnesses in prosecution proceedings.

10.7 Referral for prosecution - process overview

Where it is agreed in the CEP, that a matter will be referred to the CDPP or consideration of criminal prosecution:

- a) The assigned investigator will be responsible for preparing and submitting the brief of evidence to the CDPP
- b) The Manager Investigations will be responsible for approving the brief of evidence prior to submission to the CDPP
- c) The assigned investigator, in conjunction with the Manager Investigations will be responsible for liaising with the CDPP in relation to ongoing management of the referral;
- d) The assigned investigator will liaise with individual CASA staff as necessary where their assistance is required by the CDPP for the proper conduct of the prosecution
- e) Relevant business areas must make staff available at the request of the Manager Investigations, to appear as witnesses in any prosecution matters;
- f) The Manager Investigations, in conjunction with the assigned investigator and the ETC, is responsible for ensuring that all documentation relating to the referral of the matter to the CDPP and the conduct of any subsequent prosecution, is recorded on the EICMS.

11 OTHER ENFORCEMENT RELATED PROCESSES, PROCEDURES AND POWERS

11.1 The Aviation Self Reporting Scheme

11.1.1 What is the ASRS?

Division 3C of Part 2 of the CAA provides for a voluntary reporting scheme to be set up under the Regulations. The ASRS is the name of the scheme set up under subregulation 13.335 (1) of the CASR 1998.

The ASRS provides the holder of an authorisation (the holder) with protection from administrative action, or from paying an AIN, in circumstances where:

- The holder voluntarily reports a reportable contravention of the Regulations to the prescribed person, currently being the Executive Director of Transport Safety Investigation in the ATSB, within 10 days of the contravention
- Presents CASA with a receipt evidencing that report within the specified timeframe (see further below at 9.1.6)

It is important to note that the ultimate determination of whether a matter reported to CASA under the ASRS is, on the facts available to CASA, a reportable contravention, rests with CASA.

CASA generally only initiates administrative action where a course of behaviour has led to serious doubts as to whether the holder should continue to exercise their licence or authority. Protection under the ASRS, in relation to administrative action, may in fact only mean protection from the incident reported and not from the entire series of breaches which may form part of that administrative action.

This protection is only available once every five years.

The protections of the ASRS are subject to the limitations outlined below.

11.1.2 Administration of the ASRS

The Executive Director of Transport Safety Investigation in the ATSB administers the ASRS.

11.1.3 How the ASRS works

The holder can claim the protection of the ASRS only once every five years; subject to the limitations contained in the CAA and CASR 1988 (refer to Division 3C of Part 2 of the CAA and Division 13.K.1 of the CASR 1998).

11.1.4 Limitation as to type of contravention

To be covered by the ASRS, a contravention must be a reportable contravention, which is defined in section 30DL of the CAA as a contravention of the CAR 1988 or the CASR 1998 which is not:

- A contravention which is deliberate
- A contravention that is fraudulent
- A contravention which causes or contributes to an accident or serious incident, whether before or after the contravention is reported
- A contravention of one of the following regulations
 - o Regulation 288(2) of the CAR 1988
 - o Regulation 298A of the CAR 1988
 - o Regulation 298B of the CASR 1988
 - o Regulation 298C of the CAR 1988
 - o Regulation 301 of the CAR 1988
 - o Regulation 302 of the CAR 1988
 - o Regulation 305(1A) of the CAR 1988

Note that, if after the reporting and production of receipt, it is found that a contravention has contributed to an accident or serious incident, it will be a matter for CASA to review. CASA may determine that the contravention will no longer be a reportable contravention for the purposes of the ASRS and the holder will not be able to benefit from the protection of the Scheme.

11.1.5 Limitation as to timing of report

The holder seeking the protection of the ASRS, must make a report to the Executive Director of Transport Safety Investigation, in the form prescribed in regulation 13.345 of the CASR 1998.

Pursuant to section 30DO of the CAA, it must be made not later than 10 days after the reportable contravention occurred and before the holder of an authorisation:

- Has been served with a SCN for a proposed decision, or
- Been issued with an AIN

11.1.6 Limitation as to time of production of receipt

Pursuant to section 30DP of the CAA, the holder seeking the protection of the ASRS, must produce to CASA, a receipt from the prescribed person which identifies:

- The holder
- The date the report was made to the prescribed person
- The nature of the contravention

The receipt must be produced:

- If a SCN has been served on the holder, before CASA varies, suspends or cancels the authorisation

- If an AIN has been served on the holder before the due date for payment of the AIN.

11.1.7 ASRS register

An ASRS Register is maintained by the Investigations Section of LIE Branch under the direction of the Manager, Investigations. This will ensure that a person claiming protection under the ASRS does not receive protection more than once in five years.

In respect of each reportable contravention the Register will contain at least the following:

- The holder's name
- The receipt number appearing on the receipt provided by the holder proving that the report was made
- The date the report was made
- The date when the holder proved to CASA that the holder had earlier reported the contravention to the Executive Director of Transport Safety Investigation (this is the date which is the beginning of the 5-year period.)
- The date on which CASA made a decision on the report and advised the applicant.

Where CASA grants protection from an AIN, or action to vary, suspend or cancel an authorisation, under the ASRS a note of this fact will be made on the EICMS.

11.1.8 Determining whether a person is entitled to protection

If the holder produces a receipt from the Executive Director of Transport Safety Investigation to an officer of CASA, the officer should notify their appropriate manager and no action should be taken in relation to any SCN or infringement notice that has been issued to the holder, before providing the Manager, Investigations with a copy of the receipt. The Manager, Investigations will then arrange a CEM to determine:

- If protection is available; and
- If CASA considers the contravention is a 'reportable contravention' as defined in the legislation given the facts and circumstances which are available to CASA.

The Manager, Investigations shall check the EICMS and confirm whether the holder is entitled to the protection of the Scheme.

If the holder is entitled to protection, the Manager, Investigations will:

- In the case of a SCN, notify the referring manager in writing that the contravention is to be disregarded and the referring manager is to arrange for the holder to be notified of this entitlement and of how it will affect the show cause process.
- In the case of an AIN, notify the holder in writing that the AIN is taken to be withdrawn (see **form 324**) and send a copy of this notice to the Controlling Office Manager.

Note: There will be situations where there are sufficient alternative grounds to vary, suspend or cancel, the authorisation other than those grounds contained in the report given by the holder to the prescribed person, and as such the show cause process may continue. The notice sent to the

holder, acknowledging the holder's protection under the ASRS, is therefore quite distinct from the ultimate show cause decision.

If the holder is not entitled to protection, having already received the protection of the Scheme within the previous 5 years, the Manager, Investigations will:

- In the case of a show cause or of an AIN, after a CEM with the referring manager, notify the holder in writing, of the fact that they are not entitled to the protection of the Scheme, using **form 327**
- Send a copy of this form to the referring manager.

11.1.9 Form of reports and receipts

Regulation 13.345 of the CASR 1998 sets out the form that the written report must take. It is important to note that a report made under this legislation does not satisfy the reporting obligations under:

- The TSI Act, or
- Any other provision of the Regulations relating to the reporting of defects or service difficulties on aircraft or aeronautical products.

Regulation 13.350 sets out the reporting process and the form of the receipt. It includes, in the case of acceptance or non-acceptance of a report, the return of that report to the holder subject to regulation 13.355.

11.1.10 Use of information in criminal proceedings

Section 30DR precludes the use in criminal proceedings of the following:

- A report of a reportable contravention made by the holder to the prescribed person
- A receipt given to CASA in accordance with section 30DP by the holder
- Any other evidence of the fact that a report of a reportable contravention was made by the holder to the prescribed person, if the contravention is still a reportable contravention at the time when criminal proceedings commence.

11.2 The Demerit Points Scheme

11.2.1 What is the Demerit Points Scheme?

The Demerit Points Scheme (the Scheme) is a system set up under Division 3 of the CAA which provides a staged approach for dealing with a civil aviation authorisation holder (holder) who commits one or more less serious breaches of regulatory requirements. Under the scheme, demerit points are incurred for such breaches. After a predetermined number of points have been accumulated within a specified period of time, the holder's authorisation(s) must be suspended or cancelled. As the time for this action is pre-determined by the legislation, it largely removes the scope for discretion.

The CASR 1998 prescribe offences to which the scheme applies and the number of points incurred in relation to an offence. The scheme currently applies to all strict liability offences in the CASR 1998 and the CAR 1988 —see regulation 13.370.

11.2.2 How does the Scheme work?

A person, being the holder of a civil aviation authorisation, will incur demerit points in the following ways (refer to section 30DW of the CAA):

- (1) If CASA serves the holder with an AIN in relation to a prescribed offence, and the holder pays (in whole or part) the penalty (the administrative fine) specified in the notice; or
- (2) The holder is convicted or found guilty of a prescribed offence either:
 - a) After the holder has been served with an AIN and has not paid all or part of the penalty within the prescribed time for payment, or any extension; or
 - b) Where the holder has not been served with an AIN but an investigation by CASA has disclosed a prima facie case against the holder, the matter has been referred to the CDPD and the holder is convicted or found guilty by a court.

The demerit points are incurred in relation to the class of authorisation to which the offence relates (see section 30DX of the CAA).

Demerit points may also be incurred in relation to future-acquired authorisations within the class to which the offence relates where the authorisation is acquired within 3 years of the day on which the demerit points would have been incurred had the authorisation been held at the time the offence was committed. See section 30DX (2) and (3).

Table 13.375 of the CASR 1998 reproduced below, sets out the classes of civil aviation authorisations. For the purposes of section 30DU of the CAA, a civil aviation authorisation set out in column 2 belongs to a class of civil aviation authorisation set out in column 3 based on the activities covered by the particular authorisation:

	COLUMN 1	COLUMN 2	COLUMN 3
	Item	Particular Civil Aviation Authorisations	Class of Civil Aviation Authorisation
CAA 27	1	a certificate issued under section 27 of the Act	Air operator certificate
CASR Part 47	2	a certificate issued under Part 47 of CASR	Certificate of registration

CAR 30	3	a certificate issued under regulation 30 of CAR	Certificate of approval
CASR Part 66	4	an aircraft engineer licence	Authorisation to perform maintenance certification and issue certificate of release to service
CAR 31 CAR 33B CAR 33C	4A	an authority mentioned in regulation 33B or 33C of CAR	Maintenance authority
CAR 5.08 (b)	5	a licence referred to in paragraph 5.08(b) of CAR	Flight radiotelephone licence
CAR 5.08 (a) CASR Part 61	6	a licence referred to in paragraph 5.08(a) of CAR or a pilot licence	Pilot licence
CASR Subpart 61.V	7	a flight engineer licence	Flight engineer licence
CAR Part 6 CASR Part 67	8	a certificate issued under Part 6 of CAR or Part 67 of CASR	Medical certificate
CASR Part 65	9	A licence or authorisation issued under Part 65 of CASR	Air traffic control licence
CASR Subpart 101.F	10	A certificate issued under Subpart 101.F of CASR	UAV certificate
CASR Subpart 139.B	11	(a) a certificate issued under Subpart 139.B of CASR	Aerodrome certificate
CASR Subpart 139.C		(b) a registration granted under Subpart 139.C of CASR	
CASR Subpart 139.H	12	an approval granted under Subpart 139.H of CASR	ARFFS approval
CASR 141.035 CASR	12A	An approval granted under regulation 141.035 or 142.040	Flying training authorisation

142.040			
CASR 141.060 CASR 142.110	12B	a certificate issued under regulation 141.060 or 142.110	Flying training authorisation
CASR Part 143 CASR Part 172	13	An approval granted under Part 143 or 172 of CASR	ATS approval
CASR Part 171	14	An approval granted under Part 171 of CASR	Aeronautical telecommunication and radionavigation provider approval
CASR Part 173	15	A certificate or authorisation issued under Part 173 of CASR	Instrument flight procedure approval

11.2.3 Consequences of incurring demerit points

As shown in the table below, if a specified number of demerit points are accumulated in relation to the same class of authorisation within a specified period of time, all authorisations of that class will be suspended or cancelled. See also Comparative Table of Penalties at 6.1.2.

No new civil aviation authorisations within the same class may be granted to a person, in the case of a suspension, during the period of that suspension and, in the case of a cancellation, for 3 years.

Accrual Period	Number of Demerit Points	Action by CASA	Penalty
3 years (ending on the date of the current prescribed offence)	At least 12	First-time Demerit Suspension Notice	12-15 points = 90 days Suspension of all authorisations of the same class 16-19 points = 120 days Suspension of all authorisations of the same class Over 19 points = 150 days

			<p>Suspension of all authorisations of the same class</p> <p>And</p> <p>no entitlement to be granted a civil aviation authorisation of the same class from the date of the notice to the end of the last day of the suspension.</p>
<p>3 years (ending on the date of the current prescribed offence)</p>	<p>At least 6</p>	<p>Second-time Demerit Suspension Notice</p>	<p>6-9 points = 90 days suspension of all authorisations of the same class</p> <p>10-13 points = 120 days suspension of all authorisations of the same class</p> <p>Over 14 points = 150 days suspension of all authorisations of the same class</p> <p>and</p> <p>no entitlement to be granted a civil aviation authorisation of the same class from the date of the notice to the end of the last day of the suspension</p>
<p>3 years (ending on the date of the current prescribed</p>	<p>At least 6</p>	<p>Demerit Cancellation Notice</p>	<p>cancellation of all civil aviation authorisations of the same class</p> <p>and</p> <p>no entitlement to be</p>

offence)			granted a civil aviation authorisation of the same class for 3 years from the <u>date of the notice</u> .
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11.2.4 Expiry of demerit points

All demerit points accrued and counted towards a suspension or cancellation are disregarded for the purposes of subsequent calculations of demerit points except where those points were incurred after the date of the notice but before the suspension or cancellation begins (the start date of the notice). CASA must remove all expired points from the Demerit Points Register. (See section 30EE of the CAA).

11.2.5 Reinstatement of authorisations

Under section 30EF of the CAA, a holder who has been given a Demerit Suspension Notice or Demerit Cancellation Notice can apply to CASA to have the authorisation re-instated. In such cases an authorisation may be re-instated if, and only if, CASA is satisfied, on the evidence provided by the holder, that the suspension or cancellation would cause severe financial hardship because without the authorisation the holder would not be able to earn the holder's principal or only income.

When a decision to re-instate has been taken, CASA may impose such conditions on the authorisation as CASA considers appropriate in the circumstances. Conditions to be considered would include a limitation on the type of flying to be permitted, a limitation on the hours to be flown, a limitation on the period during which flying can be conducted. Before imposing any conditions, a delegate should discuss the conditions with LIRA.

11.2.6 First time and second time demerit suspension notice

As can be seen from the table at 11.2.3 above, there are first-time and second-time suspension notices which CASA will be required to issue to a holder of a civil aviation authorisation based on the number of demerit points incurred in a given period in relation to that class of authorisation.

11.2.7 First time demerit suspension notice - after acquired authorisation

Where a person acquires an authorisation after incurring demerit points for a prescribed offence but within three years ending on the date of the offence, and those demerit points add up to a total of at least 12 demerit points, those points are taken to be incurred against that authorisation and CASA must issue a First-Time Demerit Suspension Notice (see section 30DY of the CAA).

11.2.8 Second time demerit suspension notice - after acquired authorisation

Where a person acquires an authorisation after incurring demerit points for a prescribed offence but within three years ending on the date of the offence, and those demerit points add up to a total of at least 6 demerit points, those points are taken to be incurred against that authorisation and, if CASA has once previously given the holder a demerit suspension notice, CASA must issue a Second-Time Demerit Suspension Notice (see section 30DZ of the CAA).

11.2.9 Form of demerit suspension notice

Section 30 EAA of the CAA requires the notice to include the following details:

- Date of the notice
- The start date, being the date that the suspension period begins (which must not be earlier than the 28th day after the date of the notice)
- The suspension period
- The class of authorisations covered by the notice
- Any other information required by the Regulations

11.2.10 Demerit cancellation notice

As can be seen from the table at paragraph 11.2.3 above, CASA will be required to issue a Demerit Cancellation Notice to a holder of a civil aviation authorisation, where the holder has committed a prescribed offence, has been issued with a First-Time and Second-Time Suspension Notice and within a 3 year period, ending on the day of the offence, has incurred 6 demerit points in relation to that class of authorisation.

The holder is not entitled to be granted a civil aviation authorisation of that class for 3 years from the date of the notice.

11.2.11 Demerit cancellation notice - after acquired authorisation

Where a person acquires an authorisation after incurring demerit points for a prescribed offence but within three years ending on the date of the offence, and those demerit points add up to a total of at least 6 demerit points, those points are taken to be incurred against that authorisation and, if CASA has twice previously given the holder a demerit suspension notice in relation to that class of authorisation, CASA must issue a Demerit Cancellation Notice (see section 30EC of the CAA).

11.2.12 Form of demerit cancellation notice

Section 30ED of the CAA requires the notice to have the following details:

- The date of the notice
- The start date, being the date that the cancellation begins (which must not be earlier than the 28th day after the date of the notice)
- The period of disqualification (3 years from the date of the notice not the start date)

- The class of authorisations covered by the notice
- Any other information required by the regulations. (currently the regulations do not require any other information to be included.)

11.2.13 Demerits Points Register

In administering the Scheme CASA is required to maintain a register. It must record, in relation to demerit points incurred because of a prescribed offence:

- The number of demerit points prescribed by the regulations in relation to the particular offence
- The date the offence was committed
- The class of authorisations in relation to which the demerit points are incurred
- Any other matter the regulations require from time to time

The register is maintained on the EICMS and monitored by the Investigations Section.

CASA must also:

- If it becomes aware of it, correct any mistake, error or omission in the register
- Remove expired points from the register.

11.2.14 Suspension period notice to be served concurrently

The period of a suspension may be affected if, at the start date of a Demerit Suspension Notice, the holder is already subject to a suspension of the same class of authorisation under another provision of the CAA or Regulations. Section 30EB of the CAA does not allow the suspension to be served concurrently. Any days which are the subject of the Demerit Suspension Notice will be added to the period of suspension imposed under those other provisions.

Example: At the time that a 90-day suspension under section 30DY comes into force another suspension of one of the civil aviation authorisations has been stayed under section 31A. 20 days into the 30DY suspension, the Administrative Appeals Tribunal reviews the other suspension and upholds it. The other suspension runs for 30 days. Those 30 days do not count for the purposes of the section 30DY suspension of the relevant authorisation. The section 30DY suspension of that authorisation has 70 days to run after the end of the other suspension.'

11.2.15 Responsibilities for the administration of the Scheme

Manager Investigations

The Manager Investigations is responsible for:

- Overseeing the Demerit Point Scheme and reports statistics and anomalies to management.
- Recording the demerit points in the demerit points register on the EICMS, even if the person does not hold that specific authorisation at the time the points were incurred. (See sections 30EG and 30EI of the CAA)

- Correcting mistakes, errors or omissions as advised
- Removing expired points from the register (see section 30EJ of the CAA)
- Producing reports as required
- Advising relevant managers when required
- Providing details of any prosecutions of offences under the regulations.

Individual Investigators

Individual investigators provide notification of any prosecutions of strict liability regulatory breaches to the Manager, Investigations.

11.3 Detention of Aircraft

The CAA and the Regulations both contain legislative powers to detain aircraft in certain circumstances. These powers are contained in:

- Section 32Ak of the CAA
- Regulation 288 of the CAR 1988

Section 32AK of the CAA enables an officer who is appointed as an investigator under section 32AA, to require a person in control of an aircraft to stop and detain the aircraft for the purpose of enabling the investigator to exercise his or her powers under Part IIIA of the Act.

Under regulation 288 of the CAR 1988, CASA may detain an aircraft when it appears that the aircraft is intended, or is likely, to be flown in circumstances that would involve an offence against the regulations or be a cause of danger to persons or property.

11.3.1 Procedures under regulation 288

11.3.1.1 Service of detention notice

To detain an aircraft under regulation 288, a delegate should use a formal Detention Notice (**Form 339**) under his/her signature. To exercise the power it must appear to the delegate that the aircraft is intended to be, or is likely to be, flown in such circumstances that would involve an offence against the regulations or be a cause of danger to persons in the aircraft or to persons or property on the ground.

The notice should be served without delay once the intention to conduct the flight becomes apparent. The person to whom the notice is addressed should be someone who can be identified as the Certificate of Registration holder, or, if flight is impending, the pilot in command.

Every effort should be made to serve a copy personally on the Certificate of Registration holder and/or the pilot in command at the first opportunity.

In the absence of a person on whom to serve the notice, a delegate may fix the notice to a prominent location on the aircraft. While this is not an ideal solution, it is sometimes the only way if the aircraft is unattended.

If this method is used, a record of the time, date, place and means of affixing should be made and photographs taken of the notice in-situ on the aircraft.

Wherever possible, service of the notice should be witnessed. A copy of the notice should be kept for CASA records.

11.3.1.2 Action to disable an aircraft

Regulation 288 authorises a delegate to “take such action by way of detention of the aircraft or such other action as is necessary”. While in most cases it will be sufficient for the delegate to issue a notice of detention as set out above, in extreme cases it may be necessary to take physical steps to prevent an aircraft from being flown. In such cases the delegate should only take such action as is reasonably necessary to detain the aircraft. This could include, for example, parking a car in front of the aircraft, but it would extend, in an appropriate case, to removing a component of the aircraft such as a propeller.

11.3.1.3 Conduct necessary investigation or inspection

The purpose of issuing a detention notice or taking such other action as is necessary to detain an aircraft is set out in regulation 288. It provides that an aircraft may be detained “for the purpose of causing the circumstances relating to the flight to be investigated or the aircraft to be inspected”. Accordingly, if a delegate issues a detention notice, CASA should carry out the necessary investigation or inspection as quickly as possible.

Under regulation 288(2) it is an offence for a person to use an aircraft which has been detained until CASA is satisfied that the regulations are being complied with and approves the use of the aircraft, or until such alterations or repairs as CASA considers necessary to render the aircraft fit for flight have been made.

11.3.1.4 Lifting of detention notice

Where an aircraft has been detained and CASA is satisfied, after conducting an investigation or inspection, that the reasons for the detention no longer exist, CASA should advise the Certificate of Registration holder or pilot in command in writing that the aircraft is no longer detained.

11.3.2 Procedures for section 32AK of the CAA

The procedures to be applied by investigators in the exercise of powers under section 32AK are set out in the Investigations Manual.

11.4 Liaison with police and other law enforcement agencies

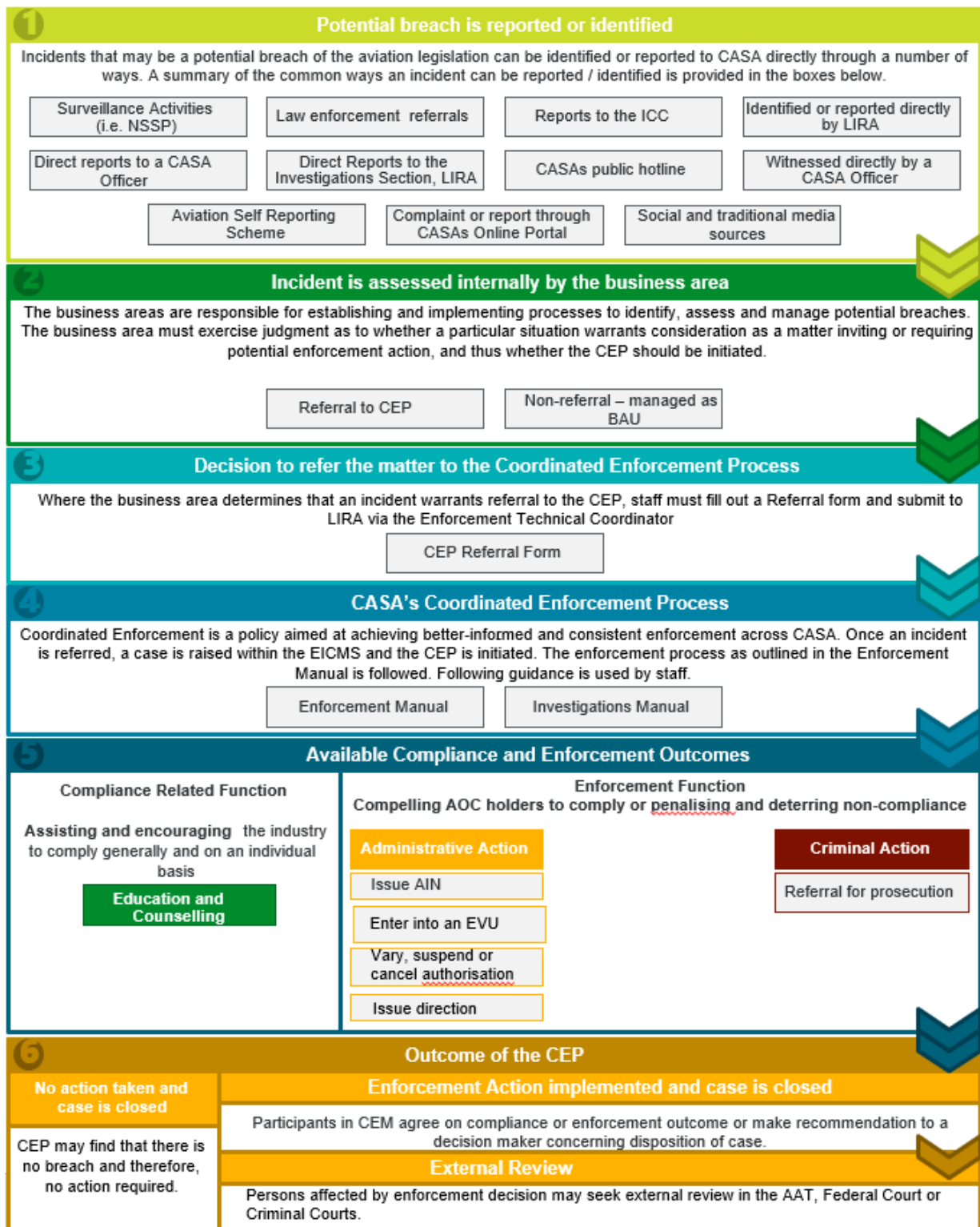
It is not uncommon for CASA staff to be approached by police for assistance, or, alternatively, to require the assistance of police in the conduct of their regulatory duties.

Similar approach may also be made by other law enforcement agencies, including other regulatory agencies with law enforcement responsibilities such as work health and safety authorities.

CASA staff should refer any request for assistance from a law enforcement agency to the Manager Investigations. The Manager Investigations will coordinate the necessary actions within CASA that are required to provide the assistance sought. This is particularly the case where the request relates to an investigation into alleged criminal offending being conducted by the law enforcement agency.

Similarly, if CASA staff consider that they may require assistance from a law enforcement agency, then they should contact the Manager Investigations who will initiate conduct with the relevant agency to determine what assistance might be made available.

Appendix A. Overview of the Coordinated Enforcement Process



Appendix B: Legal principles associated with the exercise of enforcement powers

Context

The enforcement of any law – and the enforcement of the laws dealing with civil air operations is no exception – necessarily involves the exercise of government (executive) power. By its very nature, a government tends to have a considerable measure of power at its disposal, and the application of such power can have some telling consequences for those affected by its exercise. In recognition of this fact, Australia's system of law and government has developed and inherited a range of processes, practices and principles designed expressly to protect individual citizens from improper exercise of executive power.

The exercise of executive power

Historically, governments have enjoyed something of a monopoly on the legitimate exercise of certain kinds of coercive power. That is, the power to compel to do things they would prefer not to do, and to refrain from doing things they might wish to do. It is only the government that can make enforceable rules (laws) which specify the things people must and must not do, and which provide for the imposition of penalties should a person disobey the rules.

In many respects, it is the imbalance in the distribution of the legitimate power to compel or forbid certain actions that has characterised the nature of the relationship between governments and the people they govern. Because it has the monopoly on coercive powers, a government can effectively require people, on the other hand, may only be permitted to do those things which the government decides it will let them do, when it decides they may do so. People act without government "approval" only at their peril, since they may be punished for doing something which the government has not said they may do.

Australia's constitutional and democratic form of government, however, places some very important restraints on government power and the exercise of such power by government officials.

Constitutional government and the constraint of executive power

Constitutions establish and organise the political structures and operations of government. Constitutional democracies, like Australia, are organised on the basis of the belief that:

- The unconstrained power of government almost invariably leads to injustice, if not outright oppression
- The exercise of power by government must be subject to a range of controls and checks to guard against abuse.

The Commonwealth Constitution achieves these objectives in three ways.

- Firstly, because the highest levels of government consist of elected officials, it is the people who decide who governs. If the people become dissatisfied with their actions (or failures to act) they can, and often are, voted out at the next election.
- Secondly, all of the powers the Commonwealth government may lawfully exercise are specified in the Constitution and in the laws made under the Constitution. If a power is not provided for in the Constitution, it cannot lawfully be exercised by the government. Any laws made under the Constitution which provide for the exercise of a particular power by government must be able to trace the basis of their lawful authority back to a specific provision of the Constitution. Similarly, the exercise of any power by government officials under such laws must be grounded in an identifiable authorisation provided for in those laws. This is the basis of the requirement that every regulatory action by CASA Safety Regulation must be based on a specific and identifiable “head of power”.
- Thirdly, the powers of government are vested in different, effectively separate institutions:
 - The power to make the rules of law (legislative power) is vested in the Parliament
 - The power to administer, enforce and apply the rules of law (executive power) is vested in the executive branch of government
 - The power to resolve disputes about whether the laws are consistent with terms of the Constitution, whether they have been interpreted in accordance with the meaning intended by the Parliament and whether they have been administered, applied or enforced in a fair and just manner by the relevant executive or administrative authorities (and such other courts as the Parliament may establish).

By separating three kinds of functional powers exercised by government legislative, executive and judicial – into three effectively separate institutions, the risks that can arise from a concentration of all of those powers in a single institution are substantially reduced. Potential abuses of the legislative power are “checked” by the courts, and potential abuses by the courts are “checked” by the law itself, and a person’s right to appeal improper judicial decisions to a higher court.

Delegated legislation and decision-making

As government agents exercising executive authority, officers of CASA should, strictly speaking, do nothing other than administer, apply and enforce the relevant aviation safety laws. And this is, in fact, a large part of CASA’s responsibility. In carrying out those executive functions, however officers must also interpret the meaning of the laws they apply, and make factual judgements about people’s activities in order to determine whether their conduct complies with, or contravenes, the requirements of the applicable laws.

Moreover, because it is impracticable for the Parliament itself to make all of the detailed and technically sophisticated rules of law which are appropriate for the safety regulation of civil aviation operations, Parliament has delegated this power to CASA as the relevant executive agency, whereby regulation may be made.

As a practical matter, then, while CASA properly carries out the executive function of exercising government power for the purposes of administering, applying and enforcing the law, it is also involved in aspects of the legislative function. Moreover, officers and delegates of CASA regularly engage in what amounts to a kind of judicial function. This situation – which is dictated by the demands of reality, and which is in no way peculiar to CASA – does involve a re-combination of the three kinds of powers which the Constitution seeks to separate. But this potential for abuse is effectively controlled by the imposition of various stringent legal constraints on the ways in which CASA exercises its powers.

Parliamentary scrutiny of delegated legislation

While the Parliament has delegated some of its legislative power to make regulatory rules to the Governor-General and CASA, that delegated legislation is subject to stringent parliamentary scrutiny.

Every regulation and order made by the Governor-General or the Authority must be tabled in both Houses of the Parliament (together with a detailed explanation of the legislation) and each House then has 15 sitting days to

decide whether there is anything in those rules of which it disapproves. If either House of Parliament is dissatisfied with anything appearing in such delegated legislation, it has the power to disallow the regulation or order, thereby preventing it from becoming (or remaining) an enforceable rule of law.

Administrative and judicial review of decisions and the decision-making process

To the extent that enforcement of the Regulations and Orders involves the application of the written rules to a clear factual situation, the decision-making obligations of officers of the Authority does not involve much in the way of an exercise of judicial-like powers. If a regulation requires that a person be 18 years old to obtain a licence, there is not a great deal of judgement that an officer must exercise in deciding whether or not an applicant has complied with the law.

However, much of our legislation involves the exercise of a considerable measure of judgement and discretion. That is, officers must assess and evaluate sometimes complicated factual situations, interpret the requirements of some rather complex legislation and then decide whether a person has complied, or failed to comply, with the law. Often the Regulations require the Authority to be “satisfied” that a person has demonstrated a sufficient measure of competence, or an aircraft meets certain technical standards. In other cases, the Authority must have “reason to believe” that something is or is not so, in order to determine whether or not the particular provisions of the law will apply.

This kind of decision-making – which involves the exercise of technical judgement based on an officer’s skill, experience and training, and ultimately the making of choices about the nature, import and implications of various facts and circumstances and the rules of law which appear to govern them – is called discretionary decision-making.

Because discretionary decision-making is effectively not guided by the terms of the legislation being interpreted and enforced, and because the exercise of judgement by the decision maker is quasi-judicial in nature (but is not actually the product of a formal judicial decision), such decisions are invariably subject to review by an independent tribunal or the Federal Court.

Legal Constraints on the Exercise of Discretionary Decision-Making Powers

The exercise of discretion in the enforcement of the Regulations is one of the most common, most important and, from a legal perspective, one of the most critical functions of an officer of the Authority. The consequences of

enforcement-related discretionary decision-making will often have a significant effect on the rights and interests of the people in respect of whom such decisions are made. The law, therefore, places some very severe constraints on the way in which officers go about making such decisions.

In the main, these legal constraints are not concerned with the substance of the decision (that is, with the technical or operational judgements of the officer involved). Rather, they focus on the process by which the officer comes to his or her decision, and they are designed to ensure that those processes provide the highest measure of fairness and justice possible in the circumstances. The law which governs the way in which officers exercise their powers to make decisions, and especially discretionary decisions, is called administrative law.

The rules and principles of administrative law are as binding on officers of CASA as any provision of the Act, Regulations or Orders are on the people whose aviation-related activities you are responsible for regulating.

Basic principles of Administrative Law

The rules and principles of administrative law are designed to ensure fairness in government decision-making. Of course, no rule (or set of rules) can specify what will or will not be fair in every conceivable situation. What is “fair” is very much determined by the particular, and often unique, facts and circumstances of the case to hand. What the rules of administrative law strive for, then, is fairness in a procedural sense, on the assumption that a fair procedure is most likely to produce a fair outcome in each individual situation.

Many of the requirements of administrative law appear explicitly in the provisions of the legislation administered by CASA. Even where they are not expressly mentioned in a provision of the Act, the Regulations or the Orders, officers may assume that they will apply to the exercise of discretionary decision-making power in most, if not all, cases where the results of an officer’s decision are likely to affect someone’s rights, interests or legitimate expectations.

The rule of natural justice

The fundamental principle of administrative law is the principle of natural justice, or as it is more frequently referred to today, the principle of procedural fairness (and, sometimes, due process).

The principle of natural justice consists of two rules: the **hearing rule** and the **rule against bias**.

The Hearing Rule

The Hearing Rule requires that a person be given reasonable notice of:

- What it is he or she is alleged to have done (or failed to do)
- The specific provision(s) of law which prohibit(s) or require(s) the conduct in question
- What action the Authority intends to take in response to the person's conduct
- The reasons upon which the decision to take such action are based.

Once a person has been provided with reasonable notice of the items noted above, he or she must be given a reasonable opportunity to be heard – that is, a meaningful opportunity to challenge any aspect of the Authority's claims, or the facts upon which those claims are based. Normally this kind of notice must be provided before the decision to act is taken, so that the person is actually given notice of contemplated action and an opportunity to "show cause" why that contemplated action should not be taken.

There are some exceptions to this in the aviation legislation – for example, regulation 265 of the CAR 1988 (suspension for examination) and section 30DC of the CAA 1988 (suspension where series and imminent risk to air safety) and such provisions must be used with extreme care and only where there is a serious risk to air safety.

Additionally, where urgency requires that CASA act immediately in the interests of safety, notification of the decision that has been taken must contain so much of the information specified above as can reasonably be provided in the circumstances, and an opportunity to be heard must be provided as soon afterwards as is reasonably practicable.

The rule against bias

The Rule Against Bias is in two parts:

- Firstly, the rule requires that an officer exercising discretionary decision-making power must not have a personal interest in the outcome of the decision. This means that the officer should not be related to the person in respect of whom the decision is being made, or otherwise be personally involved with that person to such an extent that the relationship may give rise to a conflict of interest. Where such a relationship exists, and there is no other officer who can practicably make the decision, there are steps that can be taken to counteract the appearance of bias of this kind – for example, through disclosure of the relationship and the person's consent to the officer's continued involvement in the decision-making process.
- Secondly, the officer must not predetermine the matter in relation to

which he or she is to make a decision. That is, the decision to take a particular action must not be made until all relevant information and evidence has been considered with an open and objective mind. This does not mean that preliminary determinations may not be made, or that the officer may not express his or her inclinations or impressions in relation to the person or the matter does mean, however, that the officer cannot effectively have decided the matter before he or she has heard and objectively assessed all of the relevant considerations.

Acting for an improper purpose

The reasons for a particular decision must be consistent with the purposes for which the rule being applied was made, as well as being consistent with the explicit requirements of that rule. Even a decision that is in strict accordance with the “letter of the law” may be improper if it can be shown that the motives behind the decision maker’s actions are different to the purposes the rule is meant to serve.

Duty to consider relevant considerations

All those factors which the relevant legislative power prescribes as being mandatory or considerations for the exercise of the particular power must be taken into account. In addition to mandatory considerations, the relevant provision may allow the decision maker to take into account a range of other considerations (permissible considerations) the relevance of which to the decision in question will be a matter for the determination of the decision maker. These permissible consideration may include technical, operational and individual factors as well as the application of any relevant policy.

Duty not to take irrelevant considerations into account

Factors which are not germane to the decision being made must not enter into the decision-maker’s consideration of the matter. For example, if the decision relates to the operational or technical competence of a person (say, in relation to the holding of a licence or a certificate), considerations of the person’s character, background or personality which are not demonstrably relevant to the specific issue of the particular kind of operational or technical competence in question are not relevant.

A decision must not be vague or uncertain in its operation

The outcome of a particular exercise of enforcement related decision-making must be sufficiently clear for the person who is the subject of the decision, to understand what it means for them and/or, what they need to do to comply with the terms of the decision.

For example, where a decision is made to impose conditions upon an authorisation, the operation of those conditions must be objectively clear so that the authorisation holder is able to easily establish what they are required by the conditions to do, or abstain from doing, as the case may be.

Inflexible application of policy

As noted above, where the exercise of discretion is involved in decision-making, the decision-maker may be required to take any relevant policy of CASA on the matter into account in the process of making his or her decision. However, where, in the judgement of the delegate, the requirements of the law can be met more effectively and the interests of fairness better served by departing from the terms of an otherwise relevant policy in a particular case, it is not only within the power of the decision-maker to depart or deviate from the terms of such a policy, he or she may be obligated to do so as a matter of law.

If there is no reason not to apply the terms of a relevant, applicable policy in a particular case, that policy should be followed. If there are sound reasons not to do so, it should not be followed. At all events, the decision-maker should expect that he or she will be required to provide reasons why the terms of a relevant policy was or was not followed in any particular case.

Acting under dictation

Where a delegate is exercising discretionary decision-making powers, the delegate must be free to exercise his or her own judgement. Of course, any decision must be consistent with the requirements of the law. It is not at all improper for colleagues and superiors to express their views about what should or should not be done in a particular case. At the end of the day, however, the decision must be that of the responsible delegate, and no one may direct or require a delegate to make a particular decision. As a matter of law, a decision based on such a direction would not be valid.

Unreasonable delay

Administrative and logistical realities often prevent decisions from being made within a time frame that is desirable or convenient to the person being affected by that decision. Where delays are unavoidable, the fact that it has taken longer than “usual”, or longer than someone would have liked, for the decision to be made, will not be regarded as an unreasonable delay.

However, where there is no good reason for the delay a failure to make a decision in a timely manner may be regarded as a decision not to decide. A delegate with discretionary decision-making power has a legal obligation to

make the decisions which are his or hers to make. In such cases, a court may insist that a decision be made within a time period specified by the court. A tribunal may do likewise or may make its own decision in the absence of one having been made by CASA.

Consequences of defective decision-making

As mentioned previously, the principles of administrative law are, in fact, rules of law and they should be regarded by decision makers as such in relation to any decision-making process. Accordingly, the rules and principles of administrative law described above should operate to structure and guide the way in which an officer goes about the process of making their enforcement-related decisions. It is in this sense that the rules and principles of administrative law operate as constraints on the decision-making process.

As a further check on the way in which decision-makers exercise executive power which has been conferred on them, the law provides those who are affected by such decisions with the right to have those decisions reviewed by an independent tribunal or the Federal Court. In reviewing a decision, the tribunal and the court will examine the processes and procedures followed by the decision-maker, in order to ensure that the rules and principles of administrative law have been complied with.

Review by the Administrative Appeals Tribunal

Most, if not all of the enforcement-related decisions made by officers and delegates of CASA are subject to review by the Administrative Appeals Tribunal (**AAT**). The AAT is not a Court but is an administrative decision-maker just like CASA. As such, it engages in what is known as merits review of administrative decisions made by CASA and a wide range of other executive decision makers.

Merits review involves the AAT in not only considering whether a decision was inconsistent with the legislation, or with the principles of administrative law, but also whether, based on all of the available evidence, the administrator, as the correct or preferable decision to be made.

If it is not so satisfied, the AAT may set the decision aside and remit it to the decision-maker for further reconsideration or substitute its own decision in place of that made by the original decision-maker.

Section 31 of the CAA1 1988 provides that any person whose interest is affected by a “reviewable decision” may apply to the AAT for a review of that decision. A “reviewable decision” means:

- A refusal to grant or issue, or the cancellation, suspension or variation of a certificate, permission, permit or licence granted or issued under the Act or the Regulations

Or

- The imposition or variation of a condition, or the cancellation, suspension or variation of an authorisation, contained in such a certificate, permission, permit or licence.

A number of decisions under the Regulations are also listed in regulation 297A of the CAR 1988 or regulation 201.004 of the CASR 1998 as decisions subject to review in the AAT. The inclusion of these decisions effectively expands the general category of “reviewable decisions” specified in section 31 of the Act.

Section 31 of the Act provides that, where CASA makes a “reviewable decision”, notice of that decision must include advice to the effect that a person whose interests are affected by the decision has a right of appeal to the AAT.

Section 28 of the *Administrative Appeals Tribunal Act 1975* provides that any person who would be entitled to appeal a decision to the AAT has a right to require that a statement of reasons for the decision be provided by the decision-maker. The only situation in which such a statement need not be provided under a section-28 demand is where such a statement has already been provided. AAT proceedings are not as formal as judicial proceedings. They are relatively inexpensive, and the parties appearing before the Tribunal need not be represented by a lawyer. That’s the general rule in court as well.

Because the right of review in the AAT is so readily available, officers should always be prepared to justify every element of their decision, and every step in the decision-making process, before the Tribunal. Properly prepared documentation will make this easier, and possibly eliminate a person’s felt need to appeal in the first instance.

Review in the Federal Court

Officers may safely assume that any decision that is not reviewable in the AAT WILL BE SUBJECT TO REVIEW IN THE Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) or under section 39B of the *Judiciary Act 1901*.

Section 5 of the ADJR Act provides judicial review of the Authority’s decisions to any person “aggrieved by” such a decision. Here too, officers may assume that this will include any person whose right, interests or legitimate expectations have been demonstrably affected by the decision (and persons so affected will not always be the particular person in respect of whom the decision has been made).

The Federal Court’s conducts what is known as judicial review of administrative decisions. This is a form of review which is concerned purely with the legality of the decision in question and not with the merits of the decision. Consistent with the limited nature of this review, where the Court determines that a decision made by CASA is unlawful, it must generally remit the matter to CASA for redetermination in accordance with the law.

It is no accident that the statutory grounds upon which a person may lodge an appeal under the AAT Act or seek judicial review under the ADJR Act essentially mirror the rule of natural justice and the principles of administrative law described above.

Review of decisions by the Commonwealth Ombudsman

The Ombudsman's powers are confined to the conduct of investigations, and the making of recommendations and reports. |

Under the *Ombudsman Act 1976* the Ombudsman has power to enquire into whether action taken by Commonwealth Departments and agencies, such as CASA, was:

- Contrary to law
- Unreasonable, unjust, oppressive or improperly discriminatory
- Based on mistake of law or of fact
- Otherwise, in all the circumstances wrong.

The Ombudsman has flexible investigatory powers, including the power to have direct access to relevant files. If, on such investigation, the Ombudsman is of the view that there has been maladministration, the Ombudsman can make recommendations to the Head of the Department or agency that a remedial course of action take place.

Appendix C. Guidance on the meaning of term 'fit and proper person'

Context

CASA's power to cancel an authorisation in the exercise of its powers under regulation 269 of the CAR 1988 is enlivened where CASA is satisfied that the holder of the authorisation is no longer a fit and proper person to have the responsibilities and to exercise and perform the functions and duties of a holder of such an authorisation.

On the other hand, regulation 119.070 of the CASR 1998 provides that an air transport AOC can only be issued to a person:

- a. if the person is an individual, if the person is a fit and proper person to hold such a AOC; or
- b. if the person is a corporation, if each of the applicant's directors are fit and proper persons to be directors of a company and if each of the applicant's proposed key personnel is a fit and proper person for appointment to that position.

Part 11 of the CASR 1998 imposes a test, similar to the test of fitness and propriety, for the issue of a range of other authorisations under the regulations. In particular, regulation 11.055(4) provides that, in determining whether the granting of an authorisation to a person will not be likely to have an adverse effect on aviation safety [r.11.055(1A)(e)] or that granting an authorisation to a person will preserve a level of safety which is at least acceptable, CASA may take into account:

- (a) *the applicant's record of compliance with regulatory requirements (in Australia or elsewhere) relating to aviation safety and other transport safety; and*
- (b) *the applicant's demonstrated attitude towards compliance with regulatory requirements (in Australia or elsewhere) relating to aviation safety and other transport safety; and*
- (c) *the applicant's experience (if any) in aviation; and*
- (d) *the applicant's knowledge of the regulatory requirements applicable to civil aviation in Australia; and*
- (e) *the applicant's history, if any, of serious behavioural problems; and*

- (f) *any conviction (other than a spent conviction, within the meaning of Part VIIC of the Crimes Act 1914) of the applicant (in Australia or elsewhere) for a transport safety offence; and*
- (g) *any evidence held by CASA that the applicant has contravened:*
 - (i) *the Act or these Regulations; or*
 - (ii) *a law of another country relating to aviation safety; or*
 - (iii) *another law (of Australia or of another country) relating to transport safety; and*
- (h) *in the case of an authorisation referred to in subregulation 11.040(2), the applicant's financial standing and financial stability; and*
- (i) *any other matter relating to the fitness of the applicant to hold the authorisation.*

Guidance from decided cases

Statutory context

There is no definition of the term 'fit and proper person' in the CAA 1988, the CAR 1988 or the CASR 1998. The decided cases make it clear that, in the absence of a statutory definition, the term 'fit and proper person' takes its meaning from the statutory context in which it is found.

Subsection 9A(1) of the CAA 1988 provides that, in exercising its powers and performing its functions CASA must regard *the safety of air navigation as the most important consideration*.

Subsection 98(1) of the CAA 1988 gives a very wide power to make Regulations relating to the safety of air navigation: see s 98(1)(c), (d), (e) and (f). Without limiting the generality of s98(1), s 98(2) sets out more specific Regulation making powers. An examination of those particular powers and the specific Regulations, Orders and Manuals of Standards made under them indicates that they cover a very broad range of matters relevant to air safety. They touch not only upon, for example, a person's ability to fly an aircraft but to the maintenance of those aircraft, the use of airspace, and the safety of those on the ground and in the air. The specific functions, duties and responsibilities of an authorisation holder apply, in at least some degree, to all of those areas. All are based on considerations of aviation safety.

As a summary of what might be expected to be taken into consideration in relation to context (although this is not exhaustive):

- the primary focus on the safety of air navigation;
- the safety of those on the ground and those in the air;
- the specific functions, duties and responsibilities associated with the particular authorisation or appointment.

Confidence in the relevant individual

The leading authority on what is encompassed by the phrase ‘fit and proper person’ is the decision of the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11(**Bond**). In relation to that phrase as used in ss.88(2) of the *Broadcasting Act 1992*, the Court said that:

The expression ‘fit and proper person’ standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concepts of ‘fit and proper person’ cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur.

As well as the confidence that an authorisation holder will carry out the functions and responsibilities of that licence, the regulator must also have confidence in the holder’s ability and temperament so as to be regarded as a person who can be relied upon to do these things properly and lawfully.

In *Sullivan v Civil Aviation Safety Authority* [2003] AATA 237 (**Sullivan**), the Administrative Appeals Tribunal considered the issue of fit and proper person in relation to the holder of a private pilot licence and said:

*“In assessing whether the Applicant is a fit and proper person to hold a pilot’s licence the Tribunal is not concerned with moral turpitude nor to impose a penalty **but regard has to be had to the safety of the public**...it would seem a fit and proper person to hold a pilot’s licence is one in whom **[CASA] has confidence as to his ability and***

temperament so as to be regarded as a person who can be relied upon to safely operate an aircraft". [emphasis added]

In *Re Griffiths and Civil Aviation Authority* (1994) 34 ALD 554 (**Griffiths**) the Administrative Appeals Tribunal determined that, in considering the meaning of the term 'fit and proper person' in ssbregulation.269(1)(d) of the CAR 1988, it should, conformably with the principles established in *Bond*, consider the fitness and propriety of an authorisation holding taking into account the responsibilities, functions and duties of the holder of such an authorisation. In taking that approach, the Tribunal in *Griffiths* was also influenced by the following passage from a previous decision of the Tribunal in *Re Taylor and Department of Transport* (1978) 1 ALD 312 in which it was said in the substantially similar context of the then regulation 258 of the *Air Navigation Regulations* that:

*... the enquiry whether the applicant is a 'fit and proper person' is directly focused upon the fitness and the propriety of the applicant **exercising the 'responsibilities' and performing the 'functions' and 'duties' of the holder of an authorisation** – in this case a commercial pilot licence. It is not simply a question of competence to fly an aircraft which the Secretary must consider for this purpose.*

*In our view, what **the regulation requires is a consideration of the applicant's conduct measured against the responsibilities, functions and duties of the holder of a commercial pilot licence** as they emerge from the provisions of the *Air Navigation Regulations*. **Whilst it would be inappropriate to endeavor to catalogue those responsibilities, functions and duties in any exhaustive fashion, it is clear that they include observing the interests of the safety of air navigation – not only the interests of pilots, passengers and the owners of aircraft, but also the interests of the public at large.*** [emphasis added]

In *Re Broadbent and Civil Aviation Safety Authority* [1999] AATA 972 the Administrative Appeals Tribunal found Mr Broadbent not to be a fit and proper person to hold a Commercial Pilot Licence. It said:

15. *In my view the applicant is not a fit and proper person to hold a flight crew licence because, as has been demonstrated in the proceedings before the Tribunal, **he could not be relied upon** to operate an aircraft in accordance with the Civil Aviation Regulations, Notices to Airmen and Air Traffic Control instructions so as to navigate the aircraft in a safe manner. He has a well-established record of breaking and bending rules and then asserting that the problem lies with someone else - often Air Services Australia or the respondent. Those are not the actions of a person who could be accepted as coming within Coke's definition of "fit". [emphasis added]*

The following is a summary of what might be expected to be taken into consideration in relation to confidence (although this is not exhaustive):

- demonstrated evidence that a person has the ability and appreciates the responsibilities of the duties and functions of the authorisation; and
- demonstrated temperament that gives CASA the confidence that the authorisation holder can be relied upon to carry out the duties and functions of the authorisation.

Honesty, Knowledge and Diligence

The expression 'fit and proper person' in its traditional application brings in those personal qualities of an upright citizen; honesty, knowledge to know what ought to be done and diligence. Their express inclusion in the aviation legislation as a consideration and a ground for action is, as the High Court said in *Hughes and Vale Pty Ltd v NSW (No 2)* (1955) 93 CLR 127 (**Hughes**) cited, to give the widest scope for judgment and rejection.

In *Re Broadbent and Civil Aviation Safety Authority*⁹ the Tribunal referred to *Hughes and Vale Pty Ltd v NSW (No 2)*¹⁰ where the High Court said:

*"The expression 'fit and proper person' is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. **But their very purpose is***

*to give the widest scope for judgment and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, **honesty, knowledge and ability**: "**honesty to execute it truly**, without malice affecting or partiality; **knowledge to know what he ought duly to do**; and **ability** as well in estate as in body, that he may intend and **execute his office**, when need is, **diligently, and not for impotency or poverty neglect it.**"*
Coke. [emphasis added]

As a summary of what might be expected to be taken into consideration in relation to honesty, knowledge to know what ought to be done and diligence to carry it out (although this is not exhaustive) the following are likely to be relevant considerations:

- demonstrated frankness in dealings with the regulator;
- demonstrated attitude to the responsibilities and duties of the authorisation; and
- demonstrated openness and contrition in relation to inadvertent breaches made by the authorisation holder;

Attitude, responsibility and respect for regulatory compliance

The issue of attitude and behaviour towards CASA officers is often raised by officers of CASA in the carrying out of their roles; auditing the aviation industry and investigating complaints or incidents.

Court and Tribunal decisions have given some guidance to when attitude may be taken into consideration, as follows.

In *Repacholi and Civil Aviation Safety Authority* [2003] AATA 573 (**Repacholi**), the Administrative Appeals Tribunal said:

89. ... In the Tribunal's opinion it is appropriate, in determining whether a person is a "fit and proper person" for the purpose of deciding whether to cancel that person's licence under reg 269(1) of the Regulations, to have regard to a wider range of considerations than is permissible when determining whether a person is a "fit and proper person" for the purpose of deciding whether to issue an authorisation to that person under reg 5.09(1) of the regulations. In the latter case it appears, from reg 5.09(3) of the Regulations, that the category of matters that may be taken into account is limited to matters that relate to the

*safety of air navigation. In the former case, however, it is appropriate that consideration be given not only to matters relating to the safety of air navigation but also, inter alia, to the licence holder's past record of compliance, or non-compliance, with the Regulations during the currency of their licence as indicative of the likelihood of their complying, or not complying, with the Regulations in the future, **and of their respect, or lack of respect, for the Regulations and civil aviation regulatory legislation generally.** The Tribunal accepts Mr Shields' submission that, in the present case, **it is appropriate for it to have regard to the applicant's conduct in his dealings with CASA officers in their professional capacities, and at least insofar as such conduct is indicative of the degree of the applicant's respect, or lack thereof, for the civil aviation laws and for those persons whose professional responsibility it is to uphold and enforce them.** [emphasis added]*

In *McBain v Civil Aviation Safety Authority* [2003] FMCA 83 (**McBain**) the Federal Magistrate's Court considered the expression "fit and proper person" in regulation 5.09 of the CAR 1988 and said the assessment of whether the applicant in that case was a fit and proper person **was directly related to his past breaches and attitude towards those breaches** which in turn relate to the issue of the safety of air navigation. [emphasis added]

In *Brazier and Civil Aviation Safety Authority* [2004] AATA 313 (**Brazier**) the Administrative Appeals Tribunal; said:

*212. In my opinion, the evidence disclosed that Mr Brazier, by his conduct, demonstrated that he is prepared to compromise air safety for the sake of business expediency. **He has also demonstrated a lack of respect for the regulations and the aviation regulatory legislation generally. He has not accepted responsibility** for breaches of the regulatory regime and has attempted to deflect responsibility to other persons. Clearly he was the person responsible for signing off on the completion of stages of maintenance, for certifying completion of maintenance on aircraft on most occasions and for the issue of maintenance releases. His denial of any knowledge of the handwritten defect list, followed by a subsequent, reluctant admission that he had made an entry on that list does put his integrity into question. Mr Brazier's handling of the right-hand fuel tank problem on aircraft VH-*

XLB also demonstrates his lack of respect for the Regulations. His inability to supervise his staff in conducting maintenance, particularly critical maintenance such as the adjustment of a turbocharger density controller, does not instil confidence that Mr Brazier, under pressure to complete maintenance by an aircraft operator, will not again succumb to the temptation to simply sign off on maintenance which had not been properly completed. Accordingly, it is my view that Mr Brazier is not a fit and proper person to have the responsibilities, and exercise and perform the functions and duties of a holder of an aircraft maintenance engineer licence or a Certificate of Approval. [emphasis added]

In *Mulligan and Civil Aviation Safety Authority* [2006] AATA 652 in relation to regulation 269(1)(d) of the CAR 1988, the Administrative Appeal's Tribunal said:

*90. On the view that I take of the evidence Mr Mulligan's flying whilst suspended on 17 March 2005 was wrong, but was explicable on the basis that he reasonably believed that being re-licensed was imminent. But the same cannot be said, in my view, for the flights on 28 March and 1 April 2005. I am of the view that in relation to these flights he took a chance that he would not be detected. In so doing he demonstrated a flagrant disregard for compliance with the regulatory scheme. It is said that Mr Mulligan was placed in a "no win situation" with his employer and that he would lose his job were he to advise the employer of the suspension. That may be accepted, but in this case when confronted with a conflict of private interest and public duty, Mr Mulligan chose his private interest over his public duty. It is not to the point that these flights of themselves were short and were not a threat to safety. **Pilots are not free to choose which regulations they will obey.** Mr Mulligan chose, on two occasions, to deliberately ignore a suspension and that leads me to conclude that he does not fully appreciate the need for compliance with the regulatory scheme. I cannot be confident that Mr Mulligan would not choose to disregard a regulation more closely attuned to safety issues or that he would not again prefer his private interest to his public duty when again placed in a similar situation. [emphasis added]*

As a summary of what might be expected to be taken into consideration in relation to honesty, knowledge to know what ought to be done and diligence to carry it out (although this is not exhaustive) the following are likely to be relevant considerations:

- Attitude to dealing with CASA and its officers in the context of that attitude reflecting on a broader lack of respect for the aviation legislation and those who uphold and enforce it;
- Attitude to demonstrated breaches and failure to take responsibility for those breaches;
- See also the *Sullivan* decision cited under the heading 'confidence', where reference is made to temperament in the context of giving CASA confidence that the licence holder would comply with the legislation; and
- Demonstration by an authorisation holder that they consider that they are 'above the law' such as where:
 - They have put commercial concerns above compliance;
 - They have chosen their interpretation of the legislation over expressed advice of CASA or that contained in CASA publications or other advisory publications; and
- Demonstrated instances of compliance with some legislative requirements and not others.

Patterns of behaviour, recency and a systematic approach to regulatory compliance

A further consideration raised in the matter of *Griffiths* referred to above was the recency of actions/behaviour to be taken into consideration when looking at fitness and propriety. The court considered that it should not limit itself to recent breaches where older breaches showed a pattern of behaviour:

15. There arose at an early stage of the proceedings the question whether we should consider only Mr Griffiths' actions as a pilot in relation to the events leading up to the variation of his licence on 9 August, 1993 or whether we

may look at his actions as a pilot in the past and as the holder of a Chief Pilot approval, which the CAA cancelled on 31 August, 1993. Furthermore, should we take account of the actions of Grif-Air Pty Ltd ("Grif-Air") of which Mr Griffiths was a director? The CAA cancelled the Air Operator's Certificate ("the AOC") of Grif-Air. Applications for the review of the cancellation of Mr Griffiths' Chief Pilot approval and of Grif-Air's AOC were both withdrawn at the commencement of the substantive part of these proceedings.

16. We do not consider that we should limit the matters, to which we may have regard, to those events occurring immediately prior to the variation of the pilot licences and related only to his actions as the holder of those licences. In assessing whether he is a fit and proper person to carry out the functions, duties and responsibilities of an authorisation holder, one of the aspects we need to assess is how he has carried out those, or similar or related, functions, duties and responsibilities in the past. Past actions in respect of those matters are one guide to how he may be expected to behave in the future. **It is not, however, simply the events immediately prior to the variation of the licences which are relevant but the pattern of his past behaviour in areas related to that under consideration.** Individual events and actions taken out of that broader context are not necessarily an accurate reflection of a person's fitness or otherwise. [emphasis added]

In *Mulligan* in relation to regulation 269(1)(d), the Administrative Appeal's Tribunal said:

69. It is not in dispute that one at least of those matters is made out. That is that Mr Mulligan has contravened a provision of the Act or the Regulations. Indeed he has contravened a provision of the Act on 3 occasions and on his own account contravened various provisions of the Regulations on numerous occasions in relation to the 2004 conduct. But, in my view, the matter is best considered by asking whether Mr Mulligan is a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of the licence, having regard to the conduct of Mr Mulligan as I have found it to be.

...

78. Mr Mulligan flew on three occasions when the tail rotor was over time before noticing that. He flew on those occasions and another three occasions without noticing that the maintenance release had expired.

...

79. The breaches do not, of themselves, represent any great risk to safety but **they point to the absence of any systematic approach** by Mr Mulligan to the task of maintenance. Here Mr Mulligan had no such system. Indeed, even when he became aware that the tail rotor had gone overtime, he did not then notice that the maintenance release was also overtime. I infer that he did not pay any attention to the maintenance release.

...

83. So far as this incident is concerned **I would consider that a pilot who was conscious of the needs of safety and the need to comply with the statutory requirements ought to have planned this trip** in such a way that the work could be undertaken and the helicopter returned to Coffs Harbour without running the risk of impermissible night flying. It may be correct to say that the safer course was to press on to Coffs Harbour, even after dark. But Mr Mulligan ought not to have put himself in the position where he had to make that choice. He ought to have planned his trip better and he ought to have given more thought to the possibility of encountering headwinds.

84. In my view a pilot ought give consideration to these matters in advance in order to avoid the potential for unsafe practices and breaches of the legislation. Once again, it may be said that this breach was, of itself, of no great moment, however **it highlights an issue of a much greater moment to me, the absence of any planning or forethought.** ...

91. These incidents collectively satisfy me that Mr Mulligan is not a fit and proper person to hold the flying licences, that is, the commercial pilot (helicopter) licence and the private pilot (aeroplane) licence. **There is a consistent pattern to his conduct characterised by a lack of foresight and planning and by a lack of appreciation of the need to comply with the scheme of regulation.** [emphasis added]

As a summary of what might be expected to be taken into consideration in relation to patterns of behaviour, recency and a systematic approach (or lack of same) to regulatory compliance (although this is not exhaustive), the following are relevant considerations:

- A pattern of behaviour even over a long period;
- A lack of a systematic approach to planning that demonstrates lack of foresight, planning and a lack of appreciation of the need to comply with the regulatory framework.

This appendix seek to provide as much assistance and guidance to CASA officers as possible. All factors mentioned should be considered as to their relevance to any assessment whether in the context of considering enforcement action or in the context of considering an application for an authorisation.

This appendix is not to be viewed as definitive in a consideration of this topic and officers should seek legal advice from LIRA if further guidance is sought as to whether an authorisation holder is a fit and proper person. Delegates, as long as they are not in clear conflict with legal authority or the legislation, have a discretion to make decisions based on their view of whether any particular authorisation holder or applicant is a 'fit and proper person' (where this term is raised for consideration) as long as they provide clear reasons for their decision and where they can demonstrate they have had regard to the key issues set out in this appendix.

Appendix D. Business unit procedures for determining which cases will be referred to the CEP

Regulatory Services and Surveillance – Regulatory Oversight Division

Any regulatory services or surveillance staff member who identifies a regulatory breach which they consider may warrant referral to the CEP must complete the CEP referral form (Form 812) and submit it to the Manager Response Surveillance. The Manager Response Surveillance will meet with National Manager Surveillance and other Surveillance Managers on a weekly basis to discuss any matters which have been raised for consideration of referral to the CEP.

Where the Manager Response Surveillance and the National Manager Surveillance agree that a matter should be referred to the CEP, the Manager Response Surveillance will send the relevant referral form to the ETC for uploading onto the EICMS.

Where the Manager Response Surveillance and the National Manager Surveillance agree that a matter should not be referred to the CEP, they will fill out the non-referral section of the Form 812 and send the form the ETC to be uploaded to the Regulatory Services and Surveillance non-referral case on EICMS.