Enforcement Manual

Version 4.5: December 2018
Enforcement Manual

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You should always refer to the applicable provisions of the Civil Aviation Act, Civil Aviation Regulations and the Civil Aviation Orders, rather than this manual, to ascertain the requirements of, and the obligations imposed by or under, the civil aviation legislation.

Version 4.5 – December 2018

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PREFACE

As a Commonwealth government authority, CASA must ensure that its decision-making processes are effective, fair, timely, transparent, consistent, properly documented and otherwise in accordance with the requirements of the law. At the same time, we are committed to ensuring that all of our actions are consistent with the principles reflected in our Regulatory Philosophy.

Most of the regulatory decisions CASA makes are such that conformity with authoritative policy and established procedures will be conducive to the achievement of these outcomes. Frequently, however, decision-makers will encounter situations in which the strict application of policy may not be appropriate. In such cases, striking a proper balance between the need for consistency and a corresponding need for flexibility, the responsible exercise of discretion is required.

In conjunction with a clear understanding of the considerations mentioned above, and a thorough knowledge of the relevant provisions of the civil aviation legislation, adherence to the procedures described in this manual will help to guide and inform the decisions you make, with a view to better ensuring the achievement of optimal outcomes in the interest of safety and fairness alike.

Shane Carmody
Chief Executive Officer and
Director of Aviation Safety
Note: The Revision History shows the most recent amendment list. Scroll down the table to view details of previous amendment information.

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<td>Para. 3.5 clarifies the process for referral of matters to Coordinated Enforcement by Aviation Medicine. Para. 3.5 identifies when matters should be referred to Coordinated Enforcement from the surveillance process (as per Chapter 4 of the CASA Surveillance Manual and provides a list (not exhaustive) of the things that will be considered, in relation to a proposed Action Plan, at a Coordinated Enforcement Meeting.</td>
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## Enforceable Voluntary Undertaking (EVU) or a variation of the relevant authorisation by the imposition of conditions.

It also makes it clear that even where an Action Plan
addresses the issues raised in 3.5, CASA may still suspend, cancel or vary the authorisation depending on the circumstances.

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Para 6.14.2 Sets out that CASA’s policy is that as a normal practice where a CAR 5.38 is considered appropriate to assess competency that it is done in combination with a CAR 265 suspension. Where a CAR 265 suspension is being considered, advice and input from Flying Standards Branch is to be obtained. Para 6.23 sets out that CASA’s policy is to publish decisions to suspend or cancel authorisations normally held by a corporate entity (eg AOCs and COAs).

Para 7.6 clarifies the suspension process and the different entry points for action under s. 30DC of the Act.

Changes to flowcharts to clarify the Coordinated Enforcement process and responsibilities.

New appendix provides guidance on the term ‘fit and proper person’.

Preface added.

Manual re-written.

In para 11.4.2, inserted routing of a report or recommendation through the Coordinator Investigations.

In para 18.4.11, inserted routing of request for a formal investigation through the Coordinator Investigations.

Section 19.2.2.1 (sample Form 333) Amended.

Amended.

Manual re-written to reflect new legislation.

Revision of the entire manual and presentation in online format for delivery on CASA’s website.

First version of the manual.
1. About This Manual

1.1 Contents of this Chapter

This Chapter contains the following sections:

1.2 Purpose
1.3 Manual Objectives
1.4 How to Propose an Amendment
1.5 Manual Amendment Process

1.2 Purpose

This Chapter deals with how you go about proposing an amendment to the enforcement procedures contained in the Enforcement Manual.

1.3 Manual Objective

The objective of this manual is to provide a clear, practical guide to understanding:

- The meaning of ‘enforcement’ as the term is used for CASA’s purposes
- The ‘Coordinated Enforcement Process’ and how it operates
- What enforcement tools are available and how and when to use them
- The responsibilities of CASA officers in relation to enforcement
- How to request the services of a Part IIIA investigator
- The processes supporting CASA’s enforcement activities
- How to report and close-off enforcement action
- The forms and templates needed to carry out enforcement action.
1.4 How to Propose an Amendment

The sponsor of this manual is the Executive Manager, Legal Services Division. The manual is a reference for all CASA staff although operational staff will find it most useful.

As the aim of the Enforcement Manual is to ensure that processes and procedures in the manual are continually refined to provide optimum benefit to the users, input is welcomed from any CASA officer using the amendment process set out at 1.5.

1.5 Manual Amendment Process

If you wish to propose an amendment:

STAGE 1


2. Send the completed form to your team leader or supervisor for approval.

Note: Where the team leader or supervisor has not approved the request, the author may escalate the suggestion to their manager for re-assessment.

3. Once the amendment is approved by your team leader or manager submit the Enforcement Manual Amendment Submission Form (form 314) to the Enforcement Officer in the legal Service Division by sending an email to the Enforcement Policy and Practice Outlook address in the Outlook directory.

4. Officers of the Legal Services Division can forward suggested amendments directly to the Enforcement Policy and Practice Outlook address using the amendment submission form without seeking managerial approval.
STAGE 2

5. Once the submission is received the Enforcement Officer will arrange for the amendment request to be entered in the Enforcement Manual Issues Register and send an acknowledgment to the person who submitted the proposed amendment.

6. The Enforcement Officer will then arrange to circulate the request for comment by Legal Counsel and Investigators as appropriate.

7. The Enforcement Officer will then arrange for those comments to be discussed by the Enforcement Review Team, which consists of the Senior Adviser, EPP, Manager Legal Branch and Manager Investigations.

STAGE 3

8. The Review Team evaluates the proposed amendment and the additional comments.

9. The Review Team determines if the amendment should be made, then submits a recommendation to the Manual Sponsor – the Executive Manager, Legal Services Division.

10. If the Review Team considers the matter should not be processed, the Review Team provides reasons for rejecting the proposed amendment and the Enforcement Officer arranges to advise the person who submitted the proposed amendment.

STAGE 4

11. The Executive Manager, Legal Services Division approves/rejects the proposed amendment with reasons for the decision, and advises the Enforcement Officer who arranges follow-up action.

STAGE 5

12. If the amendment is approved, the Enforcement Officer makes arrangements to amend the manual in accordance with CASA document control procedures;

or

If the amendment is not accepted by the Review Team or not approved by the Manual Sponsor, the Enforcement Officer arranges to note the rejection in the Enforcement Manual Issues Register and advises the person who submitted the proposed amendment of the reasons for rejection.
2.1 Contents of this Chapter

This Chapter contains the following sections:

2.2 Purpose
2.3 CASA’s Legal Obligation to Enforce the Civil Aviation Laws
2.4 CASA’s Enforcement Policy – High-Level Principles
2.5 Distinguishing ‘Compliance-Related’ Action from Enforcement Action
2.6 Classification of Compliance-Related and Enforcement Functions
2.7 When is Enforcement Action Taken?
2.8 What is ‘Coordinated Enforcement’?
2.9 Recommendation(s) arising from the Coordinated Enforcement Process

2.2 Purpose

This Chapter sets out CASA’s legal obligations in relation to enforcement, the difference between compliance and enforcement functions, CASA’s enforcement policy and the processes to be followed when conducting enforcement activities.

NOTE

Aspects of the processes described in this Chapter have been adjusted to take account of the introduction of CASA’s Regulatory Philosophy. As the principles of the Regulatory Philosophy are operationalised, it is expected that further amendments will be made—in the first instance by way of CEO/DAS Directives and/or Temporary Management Instructions.

2.3 CASA’s Legal Obligation to Enforce the Civil Aviation Laws

The Civil Aviation Act 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’ (CAA 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 Chicago Convention.
2.4 CASA’s Enforcement Policy – High-Level Principles

In his Statement of Expectations for the CASA Board for the period 16 April 2015 to 30 June 2017, the Minister for Infrastructure and Regional Development re-emphasised the Government’s continuing focus on aviation safety as the highest priority, subject to a range of corollary considerations.

Further to the Minister’s Statement, in September 2015 CASA published its Regulatory Philosophy to guide and direct CASA’s approach to the performance of its regulatory functions and the exercise of its regulatory powers. The ten principles that comprise CASA’s Regulatory Philosophy are set out below.

1. CASA is committed to maintaining the trust and respect of the aviation community.

2. Mindful of the primacy of air safety, CASA takes account of all relevant considerations, including cost.

3. CASA takes risk-based approaches to regulatory action and decision-making.

4. CASA performs its functions consistently with Australia's international obligations.

5. CASA approaches its regulatory functions consultatively and collaboratively.

6. CASA communicates fully and meaningfully with all relevant stakeholders.

7. CASA fairly balances the need for consistency with the need for flexibility.

8. CASA embraces and employs rational 'just culture' principles in its regulatory and related actions.

9. CASA demonstrates proportionality and discretion in regulatory decision-making and exercises its powers in accordance with the principles of procedural fairness and natural justice.

10. 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, the Minister’s expectations and broader Government policy. 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.
2.4.1 Natural Justice and Accountability

Enforcement decisions must be:

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

2.4.2 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.

2.4.3 Impartiality

Enforcement decisions must not be influenced by:

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

2.4.4 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. An example of such mechanism is where, after discussion with CASA, the authorisation holder requests that their authorisation be varied or suspended.

Where it is necessary in the demonstrable 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, recklessness, wilful violations and 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.

2.4.5 Relevant considerations for regulatory decision-making

In determining whether and how to exercise its enforcement powers in a particular matter, CASA will have regard to:

- The seriousness of the safety-related implications of the instance of noncompliance under scrutiny
- Mitigating or aggravating circumstances impacting on the appropriateness of the responsive regulatory action(s) contemplated
- The history and background of the person whose acts or omissions are under scrutiny, in relation to that person’s demonstrated ability and willingness to comply with regulatory requirements
- The passage of time since the acts or omissions under scrutiny occurred, and when they were discovered by, or otherwise came to the attention of, CASA
- The degree of responsibility of the individual(s) whose acts or omissions are under scrutiny
The effect on the wider aviation community (including the general public) and confidence in CASA’s administration of the civil aviation legislation in the interests of safety

The obsolescence or obscurity of the law

Whether the contemplated regulatory response would be perceived as counter-productive, for example, by bringing the civil aviation legislation or CASA into disrepute

The availability and efficacy of appropriate alternatives to a particular regulatory response

Whether the consequences of the regulatory action contemplated would be unduly harsh or oppressive

Whether the matter is one of considerable public concern

The actual or potential harm occasioned to an individual or the damage to property

Whether the person whose acts or omissions are under regulatory scrutiny is (or has been) willing to co-operate with CASA in the efforts to address the particular matter to hand and/or to address relevant safety-related issues more generally.

The applicability of and weight to be given to these principles and other factors (paragraph 3.7) will depend on the particular circumstances of each case, and in appropriate cases guidance and advice in the exercise of discretion will need to be obtained.

2.5 Distinguishing ‘Compliance-Related’ 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 know or believe 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 is playing a greater and more constructive 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 Civil Aviation Act. These are:

- **Assisting** the industry to comply, generally and on an individual basis
- **Encouraging** or exhorting compliance
- **Compelling** compliance
- **Penalising** and **deterring** 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 individual pilots, engineers 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.

CASA’s safety-orientated actions of the kind described in the last paragraph may be described as compliance-related action, as opposed to enforcement action, since no enforcement of any kind is actually involved.

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, enforcing voluntary undertakings.

Consistent with the tenth principle of CASA’s Regulatory Philosophy (see 2.4 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 or 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.
## 2.6 Classification of Compliance-Related and Enforcement Functions

Classification of Compliance-Related and Enforcement Functions

<table>
<thead>
<tr>
<th>Compliance-Related Functions</th>
<th>Enforcement Functions</th>
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<tbody>
<tr>
<td><strong>ASSISTING the industry to comply</strong>, including through general and more specifically targeted safety promotion and educational activities, and through the advice CASA provides on operational and technical matters to individual pilots, engineers and operators.</td>
<td><strong>Administrative Action</strong>&lt;br&gt;COMPELLING authorisation holders to comply or removing authorization holders from the aviation system through the variation, suspension or cancellation of authorisations, the imposition of conditions on newly issued authorisations or the refusal to issue an authorisation for which a person has applied.</td>
</tr>
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</table>

**ENCOURAGING OR EXHORTING individual authorisation holders to comply** through the surveillance and counselling processes.  
Infringement Notices – Administrative Fines and Demerit Points  
Technically, the issuance of Infringement Notices, the payment of associated administrative fines and the incurrence of demerit points do not constitute ‘criminal’ enforcement action.  
However, the non-payment of the penalties prescribed in relation to an Infringement Notice may result in the referral of the matter to the CDPP for prosecution, and the evidence supporting the issuance of such notices needs to be assessed in the light of a potential (criminal) prosecution.
2.7 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 that 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.

2.8 What is ‘Coordinated Enforcement’?

Coordinated Enforcement is a policy aimed at achieving better-informed and consistent enforcement across CASA.

Since February 2008, the Coordinated Enforcement Process has been a formal CASA policy, endorsed by the Director of Aviation Safety. The Coordinated Enforcement Process includes the following elements:

- Retention of formal decision-making responsibility for Administrative and Civil Action by the delegates at senior management level;

- Retention of formal decision-making responsibility for the referral of matters to the CDPP and for the issuance of Infringement Notices with the Manager Investigations;

- Discussion and consultation via a Coordinated Enforcement Meeting (CEM) involving the responsible Controlling Office Manager, the Manager Legal Branch, the Manager Investigations and the LSD Enforcement Officer and including, where appropriate, other operational and specialist officers (e.g. Medical, human factors or Flying Standards Branch officers).

The purpose of the discussion/consultation process is two-fold:

- To determine, on the basis of risk, the most appropriate contribution CASA can make to addressing the relevant issue, including whether enforcement action of any kind is necessary and/or appropriate in a given situation and, if so,

- Identify the most appropriate response.
This may identify which particular enforcement tool (or combination of tools) would be most likely to achieve the optimal safety outcome 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.\(^1\) On request, CASA will also consider whether suggested alternative approaches to the fulfilment of a regulatory requirement will satisfy legal requirements without unacceptably compromising safety.

Ultimate decision-making authority, in relation to compliance-related, civil or administrative action, remains in the hands of the Controlling Office Managers and their Executive Managers. The Coordinated Enforcement Process does not involve any diminution of the authority or prerogatives of these managers. Nor does it involve any unwarranted intrusion by Legal Services Division (LSD) into purely operational matters or decision-making processes.

Whether or not an operational or technical matter should be addressed and dealt with entirely through ‘compliance-related’ processes remains a determination to be made at the operational/technical level, by appropriately qualified technical/operational people, informed of course, by relevant regulatory considerations. Should such a determination be made, there may be no need for any direct LSD involvement (or accountability) whatsoever.

However, once it appears that such an operational or technical matter may properly involve, invite or require consideration and assessment as a matter for possible enforcement action, it will be incumbent on the responsible Controlling Manager(s) to initiate the coordinated enforcement consultative process.

This approach recognises the sometimes subtle but critical shift of focus on a matter:

- **From** one of operational or technical safety, which should properly be assessed and managed by appropriately qualified operational or technical experts, informed as necessary by qualified regulatory experts

- **To** a matter of regulatory enforcement, which should properly be assessed and managed by appropriately qualified regulatory experts, informed as necessary by qualified operational or technical experts.

It also provides a more effective basis on which CASA’s operational managers and field-based personnel can manage sensitive and potentially problematic aspects of their day-to-day relations with the operators with whom they deal.

\(^1\) Such as an Enforceable Voluntary Undertaking or decision of the authorisation holder to voluntarily remedy a breach or to request a variation, suspension or cancellation of their authorisation.
If an extant or potential issue can effectively be addressed in a ‘compliance-related’ context that will surely be the approach preferred by CASA and the industry alike. However, where it becomes apparent that a person lacks the ability and/or the willingness to take the steps necessary to address a matter of regulatory non-compliance in an appropriately responsible way, the ‘obligation’ to raise that matter in an enforcement-related context (that is, via the Coordinated Enforcement Process), allows CASA’s operational and technical managers to take a ‘step back’ from the further consideration of the enforcement-related aspects of the matter, in a way that preserves both the reality and the appearance of objective neutrality, whilst maintaining, in so far as possible, harmonious relations at the ‘coal face’.

Consistent with the seventh principle of CASA’s Regulatory Philosophy, there are and will necessarily be certain differences between the ways in which aspects of CASA’s dealings with larger and smaller operators proceed, and between the approaches CASA might adopt in addressing particular safety issues in relation to different, and different kinds of operators.

However, there should not be any difference, real or apparent, between the fundamental processes CASA employs in deciding whether and how it will assess and respond to demonstrable or apparent contraventions of applicable regulatory requirements involving larger or smaller operators.

2.9 Recommendation(s) arising from the Coordinated Enforcement Process (CEP)

As a result of the CEP a recommendation will be made and the reasons for that recommendation will be recorded on the Coordinated Enforcement - Referral Form (Form 812) which will be placed on the electronic TRIM file for this specific enforcement matter. Where there is no consensus reached in the CEM as to a particular recommendation:

- The Controlling Office Manager will, in relation to any proposed course of action relating to the use of counselling, administrative action, an Enforceable Voluntary Undertaking or action under s.30DC of the Civil Aviation Action 1988 in relation to a Serious and Imminent Risk:
  - complete the appropriate section of the Coordinated Enforcement – Referral form
  - provide reasons for his recommendation.

- LSD, through Manager, Legal Branch will:
  - complete the appropriate section of the Coordinated Enforcement – Referral form
  - provide reasons for LSD’s different proposed course of action.
• The Controlling Office Manager will:
  o Provide both recommendations, together with the reasons for those recommendations, to their Executive Manager.

• The Executive Manager will:
  o Advise the Controlling Office Manager, the Manager, Legal Branch, the Manager, Investigations Branch and the LSD Enforcement Officer through the Enforcement Policy and Practice Mailbox of their decision and reasons for that decision.

The recommendations and the Executive Manager’s decision and reasons for decision must be provided by completing the relevant portion of the Coordinated Enforcement – Referral Form (Form 812) - see also Chapter 3 at 3.5.2.
3.1 Contents of this Chapter

This Chapter contains the following sections:

3.2 Purpose
3.3 Receiving Information of a Breach
3.4 Initial investigation by Operational or Technical Staff
3.5 The Coordinated Enforcement Process - Referrals
3.6 The Coordinated Enforcement Process – Non -Referrals
3.7 Factors in deciding to take enforcement action – to be discussed in the CEM
3.8 The Tools of Enforcement
3.9 The role of Legal Services Division
3.10 Requesting the services of a Part IIIA Investigator
3.11 Recording and tracking of Enforcement Action
3.12 Delays in Enforcement Action by CASA

3.2 Purpose

This Chapter deals with the initial steps in commencing enforcement action and the procedural steps and responsibilities of the Coordinated Enforcement process.

NOTE

Aspects of the processes described in this Chapter have been adjusted to take account to take account of the introduction of CASA’s Regulatory Philosophy. As the principles of the Regulatory Philosophy are operationalised, it is expected that further amendments will be made—in the first instance by way of CEO/DAS Directives and/or Temporary Management Instructions.

3.3 Receiving Information of a Breach

Information of suspected breaches of the legislation may be received by any officer in CASA. If you receive information of this nature either by phone, in writing or by email, you should discuss it with your team leader and/or your manager.

There are times when breaches are detected by an inspector during surveillance or an audit. In those circumstances the CASA Surveillance Manual (CSM) should be followed but read in conjunction with the Enforcement Manual. Where there is uncertainty as to what action should be taken given the nature of the breach, or the circumstances in which
it has been detected, you should discuss this firstly with your team leader and/or your manager and advice should be sought from the Manager Legal Branch as to the appropriate action that should be taken.

Where enforcement action is considered to be a possibility the Controlling Office Manager must initiate the Coordinated Enforcement Process (CEP).

Information also comes through CASA’s hotline and to the Industry Complaints Commissioner (ICC). The ICC will not normally be involved in handling breaches of the legislation by industry. These matters are usually referred to the appropriate operational or technical area and from there may be referred for coordinated enforcement.

Sometimes matters are referred directly to the Investigations Branch, Legal Services Division (LSD). These are generally queries from external sources such as other agencies, members of the public or information or queries from the aviation industry. These will normally be referred, at first instance, to Corporate Relations who will arrange to circulate this information to the appropriate operational or technical office. Where there are specific confidentiality issues raised in providing this information or the seriousness of the information requires a more immediate response or variation to this normal process then the Executive Manager (EM) Legal Services Division (LSD) and the EM of the Controlling Office will be consulted in relation to the action proposed having regard to the principles and processes of Coordinated Enforcement.

Where matters or information referred directly to the Manager Investigations relate to issues that require an immediate response (such as seizure of dangerous goods, an immediate search warrant or where the offender may not be an aviation industry participant – e.g. a consignor of dangerous goods) these will, where appropriate, be acted upon by the Investigations Branch, through the Manager Investigations, in consultation with the appropriate area of CASA or relevant external agencies such as the AFP or state police. The CEP in these instances may need to be an expedited discussion. However, these matters must still be entered on the Enforcement Action Register as with other Coordinated Enforcement matters even if this is carried out after the immediate response.

Where a serious incident prompts consideration of a suspension under s.30DC of the Act, in relation to a serious and imminent risk then, as with those matters mentioned in the preceding paragraph, the matter may need an expedited discussion because of the extreme urgency. However, these matters must still be entered on the Enforcement Action Register as with other Coordinated Enforcement matters even if this is carried out after the immediate response. It is extremely important that all steps in the Serious and Imminent checklist (Form 342) are completed.

3.4 Initial Investigation by Operational or Technical Staff

Where information is received by the operational/technical area an initial investigation may be carried out by the operational/technical staff prior to the CEP being initiated (see flowchart – Coordinated Enforcement Process A).
Controlling Office Managers need to consult with their team members on receipt of information and initial investigation to determine whether the matter can be addressed by using other means such as NCNs and ASRs or whether enforcement may be necessary. A record should be kept of such meetings and preliminary decisions.

There may also be a need for further investigation to be carried out by Controlling Office personnel after the CEP has been initiated. As part of the CEP it may also become apparent that the specialised skills of a Part IIIA investigator need to be used. This will be discussed at the initial Coordinated Enforcement Meeting (CEM).

3.5 The Coordinated Enforcement Process - Referrals

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

As a matter of policy and practice, operational/technical decision-makers, and those who advise and make recommendations to operational decision-makers, are obliged to initiate the coordinated enforcement process as set out in paragraph 3.5.2 as soon as it becomes apparent that enforcement action of any kind is or may be appropriate in a given situation\(^1\).

**When should a matter be referred?**

Controlling Office Managers must exercise judgment as to whether a particular situation warrants consideration as a matter inviting or requiring potential enforcement action, and thus whether the CEP should be initiated.

In general, the factors set out in paragraph 3.7 as to the considerations to be taken into account at a CEM are a guide as to whether the CEP should be initiated, but the matters below provide specific guidance as to the considerations to take into account when making a decision whether or not to refer a matter for a CEP.

\[\text{NOTE}\]

While there may be different entry points for Coordinated Enforcement (eg in relation to some DAMP matters) these must be agreed by Legal Service Division prior to any diversion from the normal practice.

\(^1\) While enforcement may not be an outcome, it is considered appropriate from a policy perspective, that where an applicant is applying for a civil aviation authorisation (either as an initial application or where an applicant is re-applying for that authorisation after a previous cancellation), where the applicant’s fitness and propriety is a consideration to be taken into account when assessing their application for the authorisation, such applications should be considered through the Coordinated Enforcement Process and the procedures set out in paragraph 3.5 should be followed (see also Appendix 4 for guidance on what constitutes ‘Fit and Proper’).
Minor contraventions

Generally, where a minor technical contravention of a legislative requirement is detected that has no safety implications or consequences, such a matter need not be referred for a CEP and a non-referral form is not required to be completed. However, it is preferable that, at the least, the factors set out in paragraph 3.7 are taken into account and set out on the relevant TRIM file.

Contraventions identified during the surveillance process

CEP will generally not apply to the surveillance situation unless there are deficiencies or instances of non-compliance that cannot be dealt with appropriately or exclusively by the use of surveillance tools such as NCNs or ASRs, in which case the CEP should be initiated in the normal manner.

However, referral for CEP is required in the following scenarios:

1. Where serious contraventions and threats to safety are identified during a surveillance event, such that a safety alert was required to be issued;

2. Where the holder of the authorisation is an organisation and the contraventions reveal systemic deficiencies that CASA is not satisfied that the authorisation holder is willing or able to rectify by compliance with NCNs alone;

3. If a surveillance event reveals the repetition of a number of breaches of a type detected in previous surveillance events, the matters arising in the later event should be the subject of a referral for CEP;

4. Where the authorisation holder does not respond to NCNs within the time requested or any agreed extension;

5. Where the authorisation holder seeks an extension of time to respond to NCNs and the matter is of a complex nature requiring a detailed Action plan;

6. Any other situation where an Action Plan has been proposed by an authorisation holder, or where the requirements of an Action Plan (including implementation schedule) have not been met.

NOTE: An Action Plan is defined in the CASA Surveillance Manual (CSM) as follows:

‘Means by which an authorisation holder demonstrates to CASA the actions and milestones planned to resolve a process/system deficiency that caused a breach’.

It may also be referred to, by the authorisation holder, as a Recovery Plan, Management Action Plan or some other term.

In order to satisfy CASA that the proposed Action Plan addresses the safety
concerns raised as a result of the surveillance event and that it is reasonable in the circumstances for CASA to consider such plan as a basis not to take more serious enforcement action, the Coordinated Enforcement Meeting will need to consider, among other matters

- Whether the Plan covers all the issues;
- Whether it can be carried out in a timely manner;
- Whether the milestones are realistic and provide sufficient detail to be assessable; and
- Whether in the interim period while the issues are being addressed under the Action Plan, persons are not exposed to a serious safety risk.

(Where the Action Plan is raised as part of the show cause process -see Chapter 6 at 6.8)

Where proposed Action Plans are acceptable to CASA their implementation may need to be supported by an Enforceable Voluntary Undertaking (EVU) or a variation of the relevant authorisation by the imposition of conditions.

For further information in relation to EVUs - see Chapter 5. For further information in relation to imposing conditions and administrative action generally - see Chapter 6.

For further information on when matters should be discussed with Legal Services Division or referred for Coordinated Enforcement see the CSM at Chapter 4.

When referring matters to Coordinated Enforcement from a surveillance event the normal process set out at paragraph 3.5.1 is to be followed.

**Aviation Medicine matters**

In relation to Aviation Medicine matters discretion will remain with the Principal Medical Officer (PMO) as to whether any particular matter is referred to CEP, other than (where CASA proposes to suspend or cancel a medical certificate (unless that is at the request of the holder).

In those cases where CASA is proposing to suspend or cancel a medical certificate the process will consist of an abbreviated Coordinated Enforcement Meeting (CEM) in the form of a discussion between Aviation Medicine and the Manager Legal Branch - unless the Manager Legal Branch or the PMO considers the matter needs to be discussed in the broader forum of a formal CEM.

In all other matters, where the PMO exercises discretion not to refer a matter, the factors set out in paragraph 3.7 will be taken into consideration and set out on the medical file.
Accountability for non-referral

Controlling Office Managers who decide that a matter, which based on the guidelines contained in this chapter would normally be a matter requiring referral, does not warrant the initiation of the CEP will be accountable for that decision (see paragraph 3.6 for the process to be followed in relation to non-referrals).

Initial CEP consultation will involve:

- A review of the relevant facts and circumstances;
- Identification of the legislative requirements implicated by the conduct involved;
- A preliminary determination as to whether enforcement action of any kind is or may be appropriate, having regard to the applicable provisions of CASA’s Regulatory Philosophy;
- Identification of the most appropriate enforcement tool or combination of tools (if any) to be employed;
- Allocation of responsibility for particular actions to be taken;
- Establishing and agreeing on time-frames for completing specified tasks and reporting on results and other developments;
- Where the preliminary evidence indicates that the proposed outcome may involve the necessity for an examination and/or suspension under CAR 265 then the Manager, Flying Standards should be requested to attend the CEM. If the evidence is not clear until the CEM or until after the initial CEM, then his input should be sought and where considered necessary a further CEM should be arranged to allow the Manager, Flying Standards to participate.

On-going CEP consultation will involve:

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

3.5.1 Coordinated Enforcement - Process A

Initiating the CEP does not mean that enforcement action will necessarily be the outcome. The CEP may lead to the conclusion that the appropriate action need not involve the use of any of CASA’s enforcement tools, but may involve no action being taken or some other approach to achieve the desired safety outcome.
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Contacting the LSD Enforcement Officer through the Enforcement Policy and Practice Outlook Mailbox is the first step in the CEP process, and will enable more consistent and informed decision-making without interfering with the responsibility of the decision-maker.

3.5.2 Steps in the CEP and responsibility for reporting and recording information

Prior to the Coordinated Enforcement Meeting (CEM)

The operational/technical manager of the Controlling Office:

- Arranges initial investigation at the operation/technical level where appropriate.
- Arranges for a Coordinated Enforcement – Referral form (Form 812) to be completed.
- Arranges for appropriate entries to be made in the Enforcement Action Register (EAR) in the Enforcement Action eRoom.\(^2\) This will include:
  - Initial entry of data contained in the Coordinated Enforcement – Referral form (Form 812) including:
    - the date referred,
    - the entry date (which should normally be the same date),
    - the entity/individual,
    - ARN,
    - Office,
    - Division,
    - alleged offences,
    - proposed action; and
  - a short one line summary of the issue/s. (Full details in relation to the initial information/evidence/investigation will be contained in the Coordinated Enforcement – Referral form (Form 812) which will be placed on the TRIM file);\(^3\)
    - A short cut to the TRIM file placed on the EAR entry. This should be the only attachment appearing on the EAR entry
- Arranges for an Enforcement – Coordinated Enforcement Referral TRIM file to be opened (See the Coordinated Enforcement Referral Form for details of how this is to

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\(^2\) Entry on the EAR will automatically generate an Enforcement Action Number EAN. This number will appear in the title of the TRIM file with the ARN for easy reference. Where eRooms is replaced by some other form of electronic storage system the same data is required to be entered into that new system.

\(^3\) Where the matter has been referred from an audit the electronic TRIM numbers for the NCNs, safety alerts or ASRs are to be referred to and the Coordinated Enforcement Referral TRIM file cross-referenced to the audit file.
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be done. Also see Appendix R to the TRIM titling conventions on the intranet for details on opening this type of electronic file).

- Contacts the LSD Enforcement Officer through the Enforcement Policy and Practice Outlook mailbox, if the matter is urgent or the particular Controlling Office does not have a pre-arranged regular coordinated enforcement meeting, or
- Where the Controlling Office has a pre-arranged regular coordinated enforcement meeting, places the matter on the agenda for discussion.

At the CEM

The Controlling Office Manager
- Arranges for an administrative officer to attend the meeting and record a note of the recommendations on the Coordinated Enforcement Referral Form and the action required.

The LSD Enforcement Officer
- Facilitates the meeting;
- Confirms that the recommendation is agreed by all parties; or
- Where LSD and the Controlling Office do not agree on the recommendation, and that recommendation includes action for which the Controlling Office or the Executive Manager of the Controlling Office would ultimately make a decision (ie action which is not a criminal response such as AINs or referral to the CDPP), ensures that the process set out at Paragraph 2.9 is followed.

After the CEM and on an on-going basis

The Controlling Office Manager:

Once a course of action is agreed, either at the initial coordinated enforcement meeting or a subsequent meeting, arranges their administrative officer to:

- Amend the TRIM file title to show the course of action (see 3.10 for further details) and flowchart - Coordinated Enforcement Process A.
- Record the recommendation on the Coordinated Enforcement Referral Form and on-going action required:
  - In relation to a new matter - on the Coordinated Enforcement – Referral Form;
  - In relation to on-going matters – on the agenda/summary (for regular pre-arranged CEMs) and on the EAR (for all on-going matters).
As a matter proceeds, ensure that:

- Any interim action taken by the Controlling Office is recorded on the EAR;
- Dates of service of SCNs, counselling and other notices and decision letters are recorded on the EAR calendars;
- Dates of examinations and the result of examinations are recorded on the EAR calendars;
- All documents are TRIMmed and placed on the appropriate Coordinated Enforcement – Referral file;
- Consistent with CASA’s regulatory philosophy, the relevant aviation participant is regularly informed as to CASA’s position on the relevant issue, and provides ongoing opportunities for the participant to contribute to the resolution of safety issues (but this does not enable the participant to direct CASA’s regulatory response);
- Checklists are followed for the appropriate action taken (see the relevant checklists under Enforcement Forms on the CASA Intranet).

Where the recommended action is to refer the matter to the Controlling Office for discretionary measures outside the enforcement regime:

- Ensures email notification is made to the relevant contact officer of the Controlling Office with appropriate TRIM document number, ARN and EAN reference so that CASA systems can be updated accordingly.

Where counselling is the recommended action:

- Ensures email notification is made to the Counselling Outlook Mailbox with appropriate TRIM document number, ARN and EAN reference so that CASA systems can be updated accordingly.

When SCNs, Serious and Imminent Risk suspension notices or CAR 265 suspension are served:

- Ensures email notification is made to the Enforcement Policy and Practice Outlook mailbox - so that the required alerts and other records can be placed on CASA systems.
On successful completion of examinations:

- Ensures email notification is made to the Enforcement Policy and Practice Outlook mailbox so that alerts can be removed from CASA systems (and the appropriate letter reinstating licence can be arranged through a CEM)

(Where the examination is not completed successfully the matter will be put on the agenda or a Coordinated Enforcement meeting arranged so that the matter can be discussed and a SCN can be arranged.)

On the making of a decision by a delegate:

- Ensures email notification of decisions made by the relevant delegates is made to licensing/permissions so that CASA systems can be updated to reflect this (NOTE: the Assigned Legal Counsel will be responsible for ensuring licensing/permissions are aware of stay periods and decisions of tribunals or the Federal Court).

Where the decision is to suspend or cancel an authorisation, where the authorisation is normally held by a corporate entity - such as an AOC or COA (even if the authorisation is in fact in the name of an individual) and will therefore require publication:

- Ensures email notification to the Enforcement Policy and Practice Outlook Mailbox includes a short one paragraph summary of the reason why the decision was made.

Where a decision involves the variation of an authorisation by the addition of conditions:

- Ensures that these conditions have preferably been drafted by and, in any event, cleared by the Manager Legal Branch and that the on-going monitoring, or any proposal to vary the conditions, is also carried out in consultation with the Manager Legal Branch.

Where LSD and the Controlling Office Manager do not agree on the recommendation and that recommendation includes action for which the Controlling Office Manager or their EM would ultimately make a decision (ie action which is not a criminal response such as AINs or referral to the CDPP):

- Follows the process set out at Paragraph 2.9.

**Manager, Investigations Branch**

Where the agreed recommendation is that the matter should proceed by, or include:

- Assistance of a Part IIIA Investigator;
- A full Part IIIA Investigation; or
- Issuing of an Aviation Infringement Notice (AIN).
The Manager, Investigations will use a copy of the Coordinated Enforcement – Referral Form 812 as a request for Investigation and a copy will be placed on the Investigator’s TRIM file (this file is discrete from the TRIM file which will have been opened by the Controlling Office).

The Manager will ensure that the assigned Investigator, as well as complying with the requirements of the Investigations Manual also:

- Enters their name on the EAR together with regular updates as to the progress of their investigation and the ultimate result of their recommendation;
- Ensures they make appropriate entries on CASA systems and note this on the EAR.
- Ensures they enter or amend (where necessary) the offences for which criminal enforcement is pursued;
- Ensures that they enter the result of any AIN issued; and
- Where a brief is referred to the CDPP, records the result of that action.

**Manager, Legal Branch**

Where the agreed recommendation is that the matter should proceed by, or include:

- Administrative Action;
- Serious and Imminent Risk;
- CAR 265 suspension;
- Enforceable Voluntary Undertaking (EVU);
- Counselling; or
- Any other action coming out of the CEM in which it is decided that legal assistance is appropriate,

the Manager, Legal Branch will:

- Assign legal counsel to assist;
- Ensure assigned legal counsel (ALC):
  - Place their name on the register as ALC;
  - Case-manage the matter assigned to them to its conclusion. Where the matter results in a decision that is appealed, either continues to case manage the matter or ensures that they brief any other ALC that is responsible for handling the appeal. Note: This new ALC must place their name on the EAR and is responsible in the same manner as the original ALC;
  - Continue to update the EAR with any progress in relation to action for which they have responsibility ie writing to legal representatives of the party against whom a
3. Initiating the Enforcement Process

- On receipt from the LSD Enforcement Officer, approve the wording of the paragraph summarising reasons for decision in relation to cancellations and suspensions in relation to decisions relating to authorisations normally held by an organisation for publication and advise the LSD Enforcement Officer.

**LSD Enforcement Officer**

The LSD Enforcement Officer will:

- Once notification is received through the Enforcement Policy and Practice Outlook Mailbox of any SCN, Serious and Imminent Risk suspension notice or CAR 265 suspension notice being served, or suspension, cancellation or variation of an authorisation, arrange to place alerts on CASA systems;

- Once notification is received through the Enforcement Policy and Practice Outlook Mailbox of a suspension or cancellation – (where the decision is in relation to an authorisation normally held by a corporate entity - even if the authorisation is in fact in the name of an individual) together with the paragraph summary of the reasons ensure the wording is approved by the Manager Legal Branch and request the webmaster to publish on the external CASA internet website.

- Ensure regular audits are carried out on the Enforcement Action Register and TRIM Enforcement files.
3.6 The Coordinated Enforcement Process – Non-referrals

In any case where a Controlling Office Manager determines, on the basis of information provided by a Team leader and/or inspector or equivalent, that although a breach has occurred a matter does not merit consideration under the CEP, and that he or she does not intend to refer the matter to a Coordinated Enforcement Meeting (CEM), the Controlling Office Manager must:

- Complete the Coordinated Enforcement – Non-Referral form (Form 811);
- Forward the completed form to his EM, with the reasons for non-referral, within 48 hours of making that determination;
- Forward a copy of the TRIMed form to the EM LSD, the Manager Legal Branch, and the LSD Enforcement Officer through the Enforcement Policy and Practice Outlook mailbox.
- Once the form is returned by the EM with the reasons for his decision:
  
  (i) Where the EM agrees with the Controlling Office recommendation:
  
  o TRIM the form and place on the TRIM file listed on the Coordinated Enforcement Non-Referral form; and
  
  o Forward a copy of the TRIMed form to the EM LSD, the Manager Legal Branch, the LSD Enforcement Officer through the Enforcement Policy and Practice Outlook mailbox;
  
  (ii) Where the EM disagrees with the recommendation:
  
  o TRIM the form, attach it to a new Coordinated Enforcement – Referral Form; and
  
  o Institute the CEP as set out at subparagraph 3.5.2.

NOTE

The Controlling Office Manager must not advise the affected person(s) of any determination until after he is able to confirm that the EM has accepted or rejected his recommendation or, where the matter has been referred back to the CEP, until after a course of action has been settled.

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4 See footnote to paragraph 3.5 in relation to some Medical or DG matters.
5 Usually this will involve discussion of the issues by the Manager and his EM prior to the EM making a decision.
3.7 Factors in deciding whether to take Enforcement Action –CEM and non-CEM processes

The key factors that will be considered in the CEM when deciding whether enforcement action should be taken are:

- the seriousness of the safety-related implications of the instance of noncompliance under scrutiny;
- mitigating or aggravating circumstances impacting on the appropriateness of the responsive regulatory action(s) contemplated;
- the history and background of the person whose acts or omissions are under scrutiny, in relation to that person’s demonstrated ability and willingness to: co-operate with CASA in the efforts to address the particular matter to hand, address relevant safety-related issues generally, and comply with regulatory requirements;
- the passage of time since the acts or omissions under scrutiny occurred, and when they were discovered by, or otherwise came to the attention of, CASA;
- the degree of responsibility of the individual(s) whose acts or omissions are under scrutiny;
- the kind(s) of action that will effectively and efficiently address the safety issues that have arisen, or are likely to arise, in the particular circumstances;
- the effect on the wider aviation community (including the general public) and confidence in CASA’s administration of the civil aviation legislation in the interests of safety;
- the obsolescence or obscurity of the law;
- whether the contemplated regulatory response would be perceived as counter-productive, for example, by bringing the civil aviation legislation or CASA into disrepute;
- the availability and efficacy of appropriate alternatives to a particular regulatory response;
- whether the consequences of the regulatory action contemplated would be unduly harsh or oppressive;
- whether the matter is one of considerable public concern;
- the actual or potential harm occasioned to an individual or the damage to property;
- the nature and sufficiency of the evidence of non-compliance that is available. This may have been obtained through information received from industry, from surveillance, an initial or further operational/technical investigation or through the use of a Part IIIA investigator;
the Prosecution Policy of the Commonwealth, where recommendation for referral to the Commonwealth Director of Public Prosecutions is contemplated; and

- the application of the other general enforcement-related principles in this Manual.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case. In many cases, the exercise of discretion in relation to these considerations will need to be informed by advice from appropriate supervisory officers and/or managers.

In some cases, a breach of the aviation law may not require further compliance or enforcement action, or may only require a compliance-related response, such as counselling. In other cases, an AIN may be necessary and sufficient to deter a repetition of conduct involving a contravention of the safety regulations. In other cases it may be that both a prospective, safety-related response and a retrospective punitive response are called for. In other cases still, CASA may agree to a person or organisation entering into an Enforceable Voluntary Undertaking with CASA.

### 3.8 The ‘Tools’ of Enforcement

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

The tools of enforcement are:

- Suspension under CAR 265\(^6\) for the purpose of an examination required to be taken under CAR 5.38;
- Suspension under s.30DC of the Act because of a serious and imminent risk to safety;
- The acceptance of an Enforceable Voluntary Undertaking;
- Administrative action – cancellation, suspension or variation (including the imposition of conditions);
- Infringement notice;
- Referral to the CDPP after an investigation by a Part IIIA Investigator.

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

- Giving directions;
- Accepting a request for voluntary variation, suspension or cancellation of a civil aviation authorisation;

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6 Under CASR 65.255 CASA also has the power to suspend an air traffic controller’s licence. See paragraph 6.9.4.
• Counselling;
• Recommendation for remedial training which would usually be done in conjunction with counselling;
• Requirement to take an examination under CAR 5.38.

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

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

Although it is only part of LSD’s functions, the Division plays a critical role in the conduct of, and the processes leading to, any enforcement action CASA may take. The Executive Manager, Legal Services Division and each of the Division’s two branches may be involved in those processes.

**LSD Enforcement Officer:** This officer is the starting point for all matters where, in accordance with the Coordinated Enforcement Policy, it becomes apparent to the technical or operational areas that enforcement action is or may be appropriate (see flowchart Coordinated Enforcement Process A and paragraph 3.5.2.) This officer will also arrange for the publication of decisions as set out paragraph 6.23.

1. **Legal Branch:** Once an initial Coordinated Enforcement Meeting has been conducted, and it has been agreed that some form of enforcement action (other than solely an AIN or request for a Part IIIA Investigation) is required, Assigned Legal Counsel (ALC) will ‘case manage’ the particular matter (ensuring time-limits are met) until the enforcement action is completed.

2. **Investigations Branch:** Once an initial Coordinated Enforcement Meeting has been conducted, it may be agreed that an investigation is required and/or AIN(s) issued. The decision whether AINs are issued or a brief is referred to the CDPP is then made by the Manager Investigations.

3. **Legislative Drafting Section (in Legal Branch):** While not having a specific role in the CEP, the Section provides advice on instruments and delegations where this may be pertinent to any proposed enforcement action.

3.9.1 Legal Branch

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

• Proposed actions against holders of civil aviation authorisations as part of the CEP;
• The meaning and application of any provision of the Civil Aviation Act, the Regulations and the Orders, or instruments made under the civil aviation legislation

• The preparation and drafting of notices and other documents. The Legal Branch is also directly involved in:

• Federal Court litigation, including:
  o Appeals to the Federal Court from the Administrative Appeals Tribunal (AAT);
  o Applications for judicial review of CASA decisions, pursuant to the Administrative Decisions (Judicial Review) Act 1977;
  o Applications by CASA for prohibition orders pursuant to section 30DE of the Civil Aviation Act 1988;

• Applications for review in the AAT. The applications for review of decisions relate to decisions, such as refusing to issue, suspend or cancel air operator's certificates, certificates of approval, aircraft maintenance engineer licences, flight crew licences and medical certificates;

• Representation of CASA at Coronial inquests into the death of persons in aircraft accidents;

• Assisting CASA's insurers in relation to civil litigation matters involving CASA;

• Privacy law and freedom of information;

• Insurance law issues, which also involves liaising with CASA’s insurers and external solicitors appointed by insurers when claims are made against CASA, including when Court proceedings are commenced against CASA for the negligence of authorised persons or delegates;

• Contract law issues, such as CASA’s building leases;

• Corporate governance issues, including the application of the Public Governance, Performance and Accountability Act 2013;

• General legal advice on legislation which affects CASA, such as the Copyright Act 1968, Work Health and Safety Act 2011, Disability Discrimination Act 1992 and the Fair Work Act 2009;

• Assessing draft aviation legislation and regulatory development in general.

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

The Investigations Branch is responsible for:

- The conduct of investigations by investigators appointed under Part IIIA of the Civil Aviation Act;
- Issuing infringement notices;
- Administering the Demerit Points Scheme;
- Monitoring the Aviation Self-Reporting Scheme;
- The Alcohol and Drugs (AOD) Testing program;
- Internal Fraud Investigations.

While some CASA Part IIIA investigators are based in field offices, they are tasked centrally by the Manager Investigations, to investigate complex matters that could result in a variety of outcomes, including referral to the Commonwealth Director of Public Prosecutions (CDPP).

All requests for their investigative assistance must come through the CEP (see paragraphs 3.4 and 3.5.2).

For queries relating to these matters contact the Manager Investigations. Any general questions relating to enforcement matters should be referred to the EM Legal Services Division.

3.9.3 Legislative Drafting Section

The Legislative Drafting Section is not generally involved in the enforcement process. The Section has an advisory role in this process in relation to instruments and delegations. The Legislative Drafting Section is primarily responsible for the drafting, registration, publication and maintenance of a wide range of legislative and other statutory instruments under the Civil Aviation legislation and other legislation that CASA administers. While the Branch is responsible for ensuring that legislative instruments are registered, the registration is done by staff in the Office of Parliamentary Counsel (OPC).

The Legislative Drafting Section also advises on, and assists in the preparation of drafting instructions for changes to the Civil Aviation legislation. Changes to the Civil Aviation Act, Regulations or other Acts and regulations administered by the Civil Aviation Authority are prepared by OPC. For queries relating to these matters contact the Manager, Legal Branch.
3.10 Requesting the Services of a Part IIIA Investigator

The primary purpose of a Part IIIA investigation is to establish whether a non-compliance of the aviation legislation has taken place, by the gathering of information and evidence. This needs to be understood when requesting the assistance of a Part IIIA investigator.

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

Before an investigation is requested, the Controlling Office Manager must first take part in the CEP to identify what the manager is trying to achieve, and to assess whether the services of an investigator are actually necessary. While investigators in the Investigations Branch have specific powers under Part IIIA of the Act in relation to entry and seizure of documents and while they may also be more familiar with the gathering of evidence and the investigative process generally, operational inspectors also have the capability to undertake many of the basic tasks of gathering information and evidence (see Chapters 12, 13, 14 and 15) and will need to do this on a day to day basis as part of their regulatory role.

When the recommendation made at the CEM is for the assistance of a Part IIIA Investigator, a full Part IIIA investigation or the issuing of an AIN the Coordinated Enforcement – Referral Form will be marked accordingly and a copy will be provided to the Manager Investigations, for the Investigation file (see also the flowcharts Coordinated Enforcement Process A and Coordinated Enforcement Process B).

3.11 Recording and Tracking of Enforcement Action

As noted in paragraph 3.5.2 above, the Controlling Office Manager initiating the CEP arranges for a Coordinated Enforcement – Referral form to be completed, a Coordinated Enforcement TRIM file to be opened and an entry to be made on the EAR before taking part in a CEM.

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

It does not replace the use of formal CASA methods of recording in TRIM and other CASA systems (see above and in particular paragraphs 3.5.2 and 3.6 in relation to specific Coordinated Enforcement TRIM files).
3.12 Delays in Enforcement action by CASA

Where as a result of a Coordinated Enforcement meeting it has been decided to take some form of enforcement or related action against an individual or organisation and that action is delayed during the course of a process (e.g. where CASA has issued a Show Cause Notice and no decision has been made) and the delay:

- is in relation to action that is to be taken by CASA; and
- the delay has exceeded 60 days,

a letter must be sent to the affected party (or to their legal representative if they have one) advising that the matter is still proceeding, and providing them with an estimated time-frame for completion of that action by CASA.
4.1 Contents of this Chapter

This Chapter contains the following sections:

4.2 Purpose

4.3 What are Compliance-Related Activities?

4.4 Decision-Making Considerations

4.5 Counselling

4.2 Purpose

The purpose of this Chapter is to provide understanding of the compliance-related action that may be considered as a result of the Coordinate Enforcement Process (CEP).

4.3 What are Compliance-related Activities?

The differences between compliance-related functions and enforcement functions are set out in Chapter 2 together with the action that may ensue as a result of those functions.

In practice some of these functions may be harder to distinguish. Education and safety promotion are clearly compliance-related functions aimed at assisting industry understand its obligations. It is when CASA is encouraging and exhorting authorisation holders to comply with the legislation, that the area may become less clear. Whether information in relation to an alleged breach comes from industry, the public or from the audit process, there will be times when the appropriate response, or the need for enforcement action, will not be immediately clear. This is why the CEP set out in Chapters 2 and 3 is important and will assist in the making of consistent, informed and appropriate decisions. (See in particular paragraphs 3.5 and 3.6.)

Counselling (or the recommendation for remedial training - usually as a part of the counselling process) is a response that fits into this category. It is really part of the compliance-related activities. There is no penalty associated with counselling other than a record being maintained by CASA, in the form of a counselling letter acknowledging that the person or entity has been counselled.

4.4 Decision-making Considerations

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

- 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 person has a constructive attitude to compliance
Where the person does not have a history of similar breaches or failures
Where it is considered that counselling/remedial action will be a sufficient deterrent
Where, taking into consideration both the matters raised above and the Commonwealth’s prosecution guidelines, it is not an offence that is appropriate for referral for prosecution and cannot be addressed by an infringement notice.

Inappropriate circumstances for the use of counselling include any one or more of the following:

Where the breach or failure to meet the required standard poses a serious or potentially serious risk to aviation safety
Where the breach or failure to meet the required standard seriously endangered life
Where the breach of failure to meet the required standard was deliberate, fraudulent or demonstrated a reckless disregard for safety
Where the breach of failure to meet the required standard caused or resulted in an accident or serious incident.

4.5 Counselling

Counselling is most appropriate in the case of ignorance or misinterpretation of the aviation law.

The purpose of counselling a person is to ensure that:

The person understands the nature and safety implications of the breach or failure to meet the required standard
The person understands how similar breaches or failures can be avoided in the future
The person understands that further breaches or failures will not be tolerated and will likely result in enforcement action being taken
CASA gains a reasonable degree of confidence that the person will comply in the future.

NOTE: Counselling is unilateral and does not require the formal acceptance of the counselling by the party being counselled. The formal counselling letter provides advice to the recipient that they make comment if they wish in relation to the subject matter of the counselling and in a timely manner.
Enforcement Manual
4. Compliance-Related Action

4.5.1 Process Overview

Counselling is conducted by way of a formal counselling letter advising that the individual, or a company through its CEO, has been counselled. There may also be a face to face counselling session, though this not always practicable. Each case will depend on the evidence that the Controlling Office has available to allow assessment, as part of the Coordinated Enforcement Process, that counselling is an appropriate response.

Counselling may be an initial safety response coming out of a Coordinated Enforcement Meeting or may be the appropriate response after a show cause process has been followed and a decision made not to vary, cancel or suspend (see Chapter 6). Counselling may also be the appropriate response in a situation where a formal investigation using a Part IIIA investigator has been undertaken but it is considered, at the end of that investigation, that referral for prosecution is not the right course to follow given the facts of the situation and the evidence available. It may also be the measure taken after consideration of an ESIR.

Counselling may also be carried out in conjunction with some other form of enforcement such as the issuing of an infringement notice (AIN). The appropriateness of the action or any combination of actions will be discussed in the forum of the initial Coordinated Enforcement Meeting described in Chapters 2 and 3. It should be explained in the counselling letter, why the decision-maker has chosen this particular response to the breach.

The Controlling Office will normally undertake counselling after this has been discussed as part of the CEP. However, there are situations where a formal investigation has been carried out by a Part IIIA investigator, and where the Investigations Branch has more recent and informed evidence of the facts and circumstances and the attitude of the civil aviation authorisation holder. In these circumstances counselling may be undertaken by the Manager, Investigations. This will only be done in this way after consultation with the relevant Controlling Office Manager.

4.5.2 Procedure

As with all situations where enforcement action may be considered, the option of counselling will be discussed as part of the CEP set out in Chapters 2 and 3. No counselling should be undertaken until a CEM is held.

Once it has been decided that counselling is the appropriate action the Counselling Checklist (form 469) should be followed. This involves ensuring:

- The counselling template (form 309) is used by the Operational/Technical area to draft the counselling letter
- The assistance of Assigned Legal Counsel (ALC) requested to check the draft in relation to legal content.
4. Compliance-related action

- The facts and circumstance and the offence must be included together with the reason for choosing this course of action.

- The counselling letter is signed by the appropriate officer agreed by the Controlling Office Manager. (The officer must be a Team Leader or equivalent.)

- Where it is practicable a face to face counselling session is held between the party being counselled and the relevant CASA officers from the referring office prior to the counselling letter being provided to the counselled party.

- Where the counselling takes place face to face then counselling letter will be provided to the counselled party either at the end of the session or shortly thereafter.

- A copy of the signed counselling letter is placed on the Coordinated Enforcement TRIM file. (A TRIM shortcut to that file will have already been placed on the Enforcement Action Register by the enforcement administrative officer of the Controlling Office, to provide easy access via the Enforcement Action Register. The Enforcement Action Register is to be used by CASA Officers as part of the Enforcement Policy. It is an informal manner of recording which provides a quick check on what matters are under consideration and their progress. It also provides information for statistics. It does not replace the formal recording processes required by CASA through the use of TRIM.)

- A copy of the signed and dated PDF of the counselling letter is forwarded by the Controlling Office’s enforcement administrative officer to the Counselling Outlook mailbox for entering on EAP by Legal Services Division’s Enforcement Officer.

To provide procedural fairness the counselling letter should contain words to the effect that the person being counselled may provide comments as soon as possible if they have any concerns about issues raised in the counselling letter. This provides a chance for feedback by the counselled party without any time obligation on CASA and the matter can be closed off.

If the counselled party does raise relevant issues in response to a counselling letter, CASA should consider these and a further Coordinated Enforcement Meeting should be held if that response indicates that further/alternative action may be required.

4.5.3 Counselling in combination with other action

There will be times when the breach or breaches which have been discussed at the CEM may lead to two forms of enforcement/compliance action being taken in relation to different aspects of the non-compliance (eg AIN for a particular regulatory breach but counselling in relation to a Criminal Code offence or simply to provide clarity and further technical detail in relation to a situation where the issue of an AIN is considered not to provide sufficient

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1 The reasons for the course of action will have been recorded on the Coordinated Enforcement Referral Form, by the Controlling Office Admin Enforcement Officer, after the Coordinated Enforcement Meeting.
detail). In these cases it must be made clear to the offender, in the counselling letter, that two forms of enforcement action are contemplated by CASA and explanation of why, so that there is no misunderstanding.

### 4.5.3.1 Procedure

Where counselling is carried out in combination with some other form of action the general procedure set out at 4.5.2 should be followed. However, the following additional steps must also be taken:

1. The counselling letter must refer to the additional action being taken (eg AIN) and why the different types of action are being taken;
2. The counselling letter should be served first - either by mail or at the face to face counselling session (where such a session is conducted);
3. Once the counselling letter has been served then, in addition to the normal notification requirements set out in the Counselling Checklist (form 469), the Manager Investigations must be advised that the counselling has been completed and provided with a copy of the counselling letter so that the additional action(eg AIN) can be issued.

### 4.5.4 Remedial Training

Remedial training is usually recommended where a breach appears to have occurred due to a specific deficiency in competence and it is seen to be necessary either prior to or as an alternative to an examination.

#### 4.5.4.1 Purpose

This is usually recommended as part of a counselling session and the reason for the belief that the individual lacks competence in a certain area explained.

#### 4.5.4.2 Procedure

There is no specific aviation law in relation to remedial training. Once the specific deficiency and type of remedial training has been specified and agreed, usually as part of a counselling session, an Enforceable Voluntary Undertaking (EVU) may be suggested to formalise the agreement (see Chapter 5).

If the person does not want to give an EVU, a letter should be sent to the person setting out why it is considered that the training is necessary, noting that if the remedial training is not undertaken, CASA may have to consider alternative action.
5.1 Contents of this Chapter

This Chapter describes Enforceable Voluntary Undertakings (EVUs) and contains the following sections:

5.2 Purpose
5.3 Introduction
5.4 What are EVUs and What is their Nature?
5.5 How do EVUs Arise?
5.6 When are EVUs Appropriate?
5.7 Who may give EVUs?
5.8 Negotiation of EVUs
5.9 Form and Substance of EVUs
5.10 Drafting and Acceptance of EVUs
5.11 Enforcement of EVUs

5.2 Purpose

The objective of this Chapter is to explain the purpose and use of EVUs.

5.3 Introduction

CAA 30DK

Section 30DK of the Civil Aviation Act 1988 provides for CASA to accept a written undertaking from a holder of a civil aviation authorisation in relation to aviation safety – and for the enforcement of such undertakings by the Federal Court. Such undertakings are referred to as EVUs.

People who give EVUs may subsequently withdraw them or vary them only with the consent of CASA.

CAA 30DK

CASA regards CAA 30DK as an important enforcement tool for use in situations where there is evidence of a breach or potential breach of the aviation law by a holder of a civil aviation authorisation (holder), which may justify regulatory action, but remedial action by that holder is in the best interests of civil aviation safety.
5.4 What are EVUs and what is their Nature?

5.4.1 Section 30DK of the Civil Aviation Act 1988

EVUs are written undertakings given by holders of civil aviation authorisations to CASA under section 30DK of the Act. That section provides:

“30DK Enforceable voluntary undertakings

(1) CASA may accept a written undertaking given by the holder of a civil aviation authorisation in connection with a matter:

(a) arising under this Act or the regulations; and

(b) in relation to which CASA has a function or power under this Act or the regulations.

(2) The period for which the undertaking applies must not exceed 12 months. However, CASA may accept a further undertaking from the holder.

(3) The undertaking must not require, or have the effect of requiring, the holder to pay money to CASA.

(4) CASA must publish details of the undertaking on the Internet.

(5) The holder may withdraw or vary the undertaking at any time, but only with the consent of CASA.

(6) If CASA considers that the holder has breached any of the terms of the undertaking CASA may apply to the Federal Court for an order under subsection (7).

(7) If the Federal Court is satisfied that the holder has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the holder to comply with that term of the undertaking;

(b) an order directing the holder to pay the Commonwealth an amount 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;

(c) any other order that the court considers appropriate.”
A number of consequences flow from CAA 30DK:

- Only holders of civil aviation authorisations may give EVUs
- Whether CASA accepts an EVU is at CASA’s discretion
- EVUs are limited in duration, 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 (as required by section 30DK(4) of the Act)
- EVUs can only be varied or withdrawn with the consent of CASA
- EVUs are enforceable only by the Federal Court on application by CASA.

These consequences are examined more fully later in this Chapter.

5.4.2 Policy Underpinnings – EVUs are Remedial, Not Punitive

EVUs are remedial in nature. Their purpose is to reduce risk to aviation safety by having the holder of a civil aviation authorisation voluntarily modify their practices, behaviour, attitude or skills to ensure they comply with the effect and intent of the aviation law.

Publication of the details of EVUs, as required by sub-section 30DK (4) of the Act, may provide a deterrent value but more importantly, promotes compliance with the aviation law by educating the aviation industry and the public at large about the requirements of that law and CASA’s expectations of those who must comply with it. EVUs are not intended to punish or penalise. As EVUs are an enforcement tool designed to address non-compliance through prevention and remediation, they are clearly administrative in nature, and in themselves do not give rise to criminal sanctions such as fines or imprisonment.

5.4.3 Policy Underpinnings – EVUs are an Alternative to Litigation

An EVU is an alternative to administrative or criminal action by CASA (although in some circumstances certain enforcement actions can be combined with EVUs, see below). Since its purpose is remedial, it should only be accepted in circumstances where there is willingness by the holder to give and abide by the undertaking.
5.4.4 Policy Underpinnings – EVUs Are Not Exclusive

An EVU is 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
- Issue of infringement notices (i.e. to mildly punish the holder for an identified breach or breaches)\(^1\).

An EVU should not be combined with action to cancel the holder’s authorisation, or with the submission of a brief of evidence to the DPP for prosecution.

An EVU should not be combined with other enforcement action where the holder is not willing to accept that other enforcement action, as the purpose of the EVU will be undermined.

5.5 How do EVUs Arise?

EVUs may be offered by any holder with whom CASA has discussed the possibility of needing to take some sort of action against them as a result of matters arising under the Act and Regulations that has caused CASA concern in relation to safety.

This may occur most usually during surveillance (as an initial enforcement action) or during the Show Cause process (usually at the Show Cause Conference).

5.6 When are EVUs Appropriate?

CASA may canvass the possibility of an EVU with, or consider accepting an EVU from, a holder if, for example, CASA is reasonably satisfied that:

- The holder has breached the aviation law; or
- If the holder continues to act in the manner in which it is observed acting, they will breach the aviation law.

\(^1\) An EVU must not require a person to pay an administrative fine, as this is in breach of CAA 30DK (3).
However, the range of circumstances in which CASA may accept an EVU is very broad: there needs only to be a connection between the EVU and a matter arising under the aviation law, and in relation to which matter CASA has a function or power under the aviation law.

In determining whether to canvass the possibility of an EVU with the holder, and whether to accept an EVU, and in deciding what an EVU should say and do, CASA should have regard to the following matters:

- The impact of the alleged breaches on aviation safety and the magnitude of risk created
- The compliance history of the holder
- The extent to which any meaningful undertakings can be given to remedy the breaches and mitigate the risk
- The likelihood that the EVU will be fulfilled, i.e. does the holder demonstrate a commitment to the promises made, and to comply in the future?
- The apparent good faith of the holder
- The ability of CASA to properly monitor compliance with the EVU
- The prospects of rapid resolution of the matter.

This list is not exhaustive, and other considerations may arise which reflect the particular circumstances of a matter. If in doubt, officers should consult Legal Services Division (LSD).

Assigned Legal Counsel (ALC) must clear all EVUs before being final acceptance by CASA.

### 5.7 Who may give EVUs?

Only holders of civil aviation authorisations may give EVUs under section 30DK of the Act. A civil aviation authorisation is defined in section 3 of the Act as follows:

> 'civil aviation authorisation means an authorisation under this Act or the regulations to undertake a particular activity (whether the authorisation is called an AOC, permission, authority, licence, certificate, rating or endorsement or is known by some other name)';

Thus, it is not possible for a person to offer to give an EVU where that person holds an authorisation to conduct an aviation activity which is not a civil aviation authorisation. E.g. the holder of a licence or other document issued by a sports aviation body under that body's own administrative arrangements. Nor is it possible for a person to give an EVU, who is not conducting an aviation activity per se, but is nevertheless in breach of the aviation law, e.g. a passenger on an aircraft or an individual sending dangerous goods by air.
5.8 Negotiation 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 the Show Cause process.

CASA should normally only consider an EVU as the result of a Coordinated Enforcement Meeting and after there is a face-to-face meeting between the holder personally (if an individual) or its management (if a body corporate), and the Controlling Office Manager and officers involved in the relevant surveillance or investigation.

Where the possibility of an EVU is discussed with the holder as an initial enforcement response the face to face meeting may be as part of the general oversight/audit process. It may be followed up by further meetings between the CASA delegate responsible for accepting EVUs and or the Team Leader or equivalent Technical/Operational officer and/ or via correspondence setting out the issues and assessing what might be considered as appropriate undertakings.

The CASA Surveillance Manual (CSM) sets out the various points in the surveillance/audit process when the Controlling Office Manager must contact the Legal Services Division for advice or refer a matter for Coordinated Enforcement. As can be seen from Chapter 3 of the Enforcement Manual, referral does not necessarily mean that enforcement action will be taken. Where the Controlling Manager considers that an EVU may be an acceptable means of addressing the safety issues in an organisation and brings the matter to a Coordinated Enforcement Meeting (CEM), the issues set out in paragraph 5.6 above will be considered and as a result of the CEM the organisation may be requested, as part of the audit process, to provide a plan of what they are prepared to do to address CASA’s safety concerns.

Where the possibility of an EVU is raised during the show cause process, the show cause conference may form the face to face EVU meeting. (See Chapter 6 in relation to Show Cause Conferences).

The aim in considering the possibility of an EVU, is to seek co-operative rectification and prevention of all aviation safety problems identified by CASA. While CASA may outline the options available to CASA, given the safety issues, and explain what CASA may in principle accept to resolve the matter, it is up to the authorisation holder to set out in detail the terms of any offer which they are prepared to make and which they believe will rectify the problems identified. The EVU must have objective standards and be capable of being verified and ‘milestoned’ through the term of the EVU.

Note: Whether the offer of an EVU comes from the holder as an initial action or as a proposed alternative action in the Show Cause Process this should still be discussed in the forum of a Coordinated Enforcement meeting before any final acceptance of the EVU and in the case of the Show Cause Process, while the draft EVU may be prepared, CASA will not accept the EVU until the Show Cause Process has been finalised.
In relation to EVUs generally, see the flowchart - Coordinated Enforcement Process E, the EVU checklist (form 551) and, flowchart - Coordinated Enforcement Process A and the Administrative Action Checklist (AAC) (form 886).

5.9 Form and Substance of EVUs

5.9.1 General Form and Content of EVUs

EVUs must:

- Be in writing and set out each specific undertaking in language which is unequivocal and ensures that the undertaking is assessable
- Be of substance and address the action or inaction of the holder which has given rise to the safety risk (e.g. a breach or prospective breach of the aviation law) and set out the future actions by the holder to prevent an occurrence or recurrence of the safety risk
- Ensure that the dates or time-frames for completing specific undertakings fit within the 12 month maximum duration of the EVU. Note: It is important that all milestones for completion of undertakings are clearly defined and able to be completed and assessed as satisfactory prior to the expiry of the EVU. Note: CASA may accept a further EVU from a holder.
- State the name of the holder and the date the undertakings were accepted by CASA
- Be signed by the holder and accepted by the CASA delegate.

See form 315.

5.9.2 General Limitations on Content of Undertakings in EVUs

An EVU constrains, in the interests of aviation safety, a holder’s freedom of action in carrying on an aviation activity, and has the potential to impose costs on the holder. It is not for CASA to place constraints on a person who is acting lawfully. That is why EVUs should generally not be used in circumstances where CASA does not believe that there is an actual or prospective breach of the aviation law (see 5.6). Further, because EVUs are remedial and not punitive, they must not be unduly burdensome or disproportionate to the alleged breaches. The obligations imposed under an EVU should be no more intrusive, expensive, or deleterious to a holder than those which may result from more affirmative enforcement action, such as cancellation of an authorisation or prosecution.

CASA should not accept undertakings that will have the effect of causing loss or damage to a third party, unless such loss or damage is unavoidable in order to properly address the safety risk.
5.9.3 Specific Limitations on Contents of Undertakings in EVUs

EVUs must not contain:

- Provisions in which the holder denies breaching the aviation law (although a holder need not admit to breaching the law), or which in substance set up a defence to a breach (e.g. denial of intention to breach a fault offence)
- Provisions which place obligations on CASA which are not already obligations of CASA independent of the EVU
- Provisions which purport to limit CASA’s discretion, or which purport to require CASA to exercise its discretion in a particular way
- Acknowledgements by CASA that if the holder complies with the EVU, CASA will consider that the holder complies with the aviation law
- Provisions which 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)
- Confidentiality or non-disclosure provisions
- Provisions that secure the payment of an infringement notice penalty (see CAA 30DK(3)).

5.9.4 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.

5.10 Drafting and Acceptance of EVUs

5.10.1 Only Holders of Civil Aviation Authorisations may give EVUs

CASA must not accept an undertaking from a person who does not hold a civil aviation authorisation. Such an undertaking has no legislative basis and is not enforceable. In circumstances where an EVU is appropriate but the person does not hold a civil aviation authorisation, alternative action should be discussed as part of the Coordinated Enforcement Process (CEP).

As with other enforcement options they will be considered, where appropriate during the CEP. (See the flowchart – Coordinated Enforcement Process A, and the flowchart – Coordinated Enforcement Process E.)

Also see the EVU checklist (form 551), and where the matter derives from administrative action – the Administrative Action Checklist (AAC) (form 886).

5.10.2 EVUS are Discretionary

CASA does not have the power to compel holders of civil aviation authorisations to give EVUs, nor is CASA obliged to accept an EVU when requested by an authorisation holder.

5.10.3 Drafting of EVUs

An Assigned Legal Counsel from the Legal Branch drafts the EVU in conjunction with operational/technical staff to reflect the undertakings that CASA would be prepared to accept after negotiation of the terms of undertakings proposed by the holder. The delegate who will be accepting the EVU on behalf of CASA should be given the opportunity to comment on the draft to minimise the risk that he will either request changes to the final EVU document to be executed by the authorisation holder, or that he will refuse to accept the proposed EVU.
Where the holder proposes an EVU during a Show Cause Conference, the same consideration needs to be given, but before final acceptance is given to the EVU, a copy must be attached to the Standard Form Recommendation (form 316) which is provided to the delegate of the Show Cause process (see Chapter 6) so that the delegate can consider this alternative action as part of the decision making process. On the Standard Form Recommendation the manager must also confirm that he or she has the resources to monitor the undertakings made by the holder in the EVU.

NOTE
This must be read in conjunction with Chapter 6, and the EVU Checklist (form 551) and the Administrative Action Checklist (form 886) should be followed. See also the flowcharts – Coordinated Enforcement Process C and Coordinated Enforcement Process E.

Once the undertakings are agreed by all parties, and cleared by the Assigned Legal Counsel the referring office will forward two copies of the finalised document to the holder for execution, with instruction for execution (See form 315 EVU template following the EVU Checklist).

Once the two copies of the draft EVU are executed by the holder, the relevant delegate shall provide CASA’s acceptance of the EVU by executing the documents.

One copy of the signed EVU will be returned to the holder by the Controlling Office and the other copy is required to be forwarded to the Senior Adviser EPP (See EVU Checklist Form 551)

CAA 30DK(4) Once an EVU is accepted by CASA, CAA 30DK (4) of the Act requires that CASA publish details of the EVU on the internet.

Enforcement Policy and Practice in LSD maintains a register of EVUs and will make the necessary entry and arrange for the publication by the CASA webmaster. The EVU will be displayed on the website in the current year of publication and thereafter it will be archived, on the website, by calendar year.

5.10.4 Responsibilities for the EVU process

To ensure all details are captured and the process is handled in a clear and timely manner, including the timely publication of the EVU, it is important that the normal Coordinated Enforcement Process is followed irrespective of whether the EVU has been raised as the result of an audit or as an alternative outcome to administrative action. The EVU Checklist – Form 551 sets out the process and makes it clear what action should be taken and the person responsible.
In the case where administrative action has already been commenced as a result of the Coordinated Enforcement Process the matter will already be listed on the Enforcement Action Register and a TRIM file already opened but where the option of an EVU comes as a result of an audit this will involve the normal commencement procedures of preparing a Coordinated Enforcement Referral Form, opening a Coordinated Enforcement TRIM file and entering the matter on the Enforcement Action Register.

5.10.5 Variation and Withdrawal of EVUs

CAA 30DK(6) 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 Act, or take other enforcement action (see 5.11).

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 chapter. The process to be followed is the same as the process for the initial acceptance of an EVU including the CEP.

5.11 Enforcement of EVUs

5.11.1 Direct Enforcement of EVUs – Federal Court Orders

CAA 30DK(7) EVUs may not be enforced directly by CASA. If CASA considers that a holder is not acting in accordance with its EVU, then CASA may, at its discretion, seek orders from the Federal Court under subsection 30DK (7) of the Act. The Manager Legal Branch will manage any such litigation.

CAA 30DK(7) The sorts of orders that CASA may seek from the Court are as varied as the circumstances of breaching EVUs. 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). 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.
5.11.2 Indirect Enforcement of EVUs – Alternative Enforcement Action

CASA is not required to seek orders from the Federal Court where it considers that a holder is not acting in accordance with its 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. Refer to flowcharts – Coordinated Enforcement Process A and Coordinated Enforcement Process E. Thus, for example, CASA may choose to take administrative action against a holder’s authorisation, or issue an infringement notice, or refer a matter to the DPP for prosecution, where the holder has breached the terms of its EVU. But such administrative action or prosecution action will be based on an alleged breach of the aviation law, not on a failure to comply with an EVU. While this will be a new administrative action process with a new show cause notice - if this option is considered the appropriate one, after a further Coordinated Enforcement meeting – it will necessarily be based upon the facts and circumstances from any previous Show Cause action.

5.11.3 Decision on How Best to Enforce an EVU

CAA 30DK(7) It should be borne in mind that seeking orders from the Federal Court under CAA 30DK(7) of the Act 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 same sorts of matters that are set out in paragraph 5.4.3, 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 manager to the holder, reminding the holder of his or her 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 DPP for prosecution. In either case the manager will need to arrange a Coordinated Enforcement Meeting to discuss these options.
6.1 Contents of this Chapter

This Chapter contains the following sections:

6.2 Purpose
6.3 Introduction
6.4 What is Administrative Action?
6.5 Starting the Show Cause Process
6.6 ‘Show Cause’ Notices
6.7 ‘Show Cause’ Conferences
6.8 Further Coordinated Enforcement Meeting and Outcomes of Show Cause Conferences
6.9 Legislative Authority for CASA to Vary, Suspend or Cancel
6.10 Responsibilities
6.11 The Standard Form Recommendation and Administrative Action Checklist
6.12 Variation, Suspension and Cancellation of AOCs
6.13 Suspension and Cancellation of Chief Pilot Approvals
6.14 Variation, Suspension and Cancellation of Licences, Certificates and Authorities Issued Under the Civil Aviation Regulations 1988
6.15 Variation, Suspension and Cancellation of Other Aviation Permissions
6.16 Variation and Cancellation of an Authorisation on Holder’s Request
6.17 Variation, Suspension and Cancellation of Civil Aviation Authorisation by a Criminal Court
6.18 Refusal to Re-Issue a Civil Aviation Authorisation
6.19 Service of Notices
6.20 Follow-up Actions
6.21 Automatic Stay of Certain Reviewable Decisions under Section 31A of the Act.
6.22 The Review Process
6.23 Publication

6.2 Purpose

The purpose of this Chapter is to set out the process to be followed when CASA initiates administrative action.
6.3 Introduction

The Civil Aviation Act 1988 (CAA) gives CASA the statutory power to address safety issues. One of the ways of addressing these issues is by the use of administrative action to suspend, vary or cancel licences, certificates, permissions, approvals, and authorisations that it has issued. These extensive powers may only be exercised where an appropriate delegate is satisfied that the necessary statutory grounds for the action exist and following the Coordinated Enforcement Process (CEP) set out in Chapter 3 and the flowchart Coordinated Enforcement Process C. These administrative decisions are generally reviewable by the Administrative Appeal Tribunal and in relation to questions of law, the Federal Court. Accordingly, it is very important that delegates adhere to proper procedures and that natural justice is provided to the affected person. Officers should ensure that they comply strictly with their statutory powers. (See particularly the issue of who has responsibility for various actions throughout this process, at 6.10.)

Administrative action, as with any enforcement action commenced by CASA, is not an initial response. When it becomes apparent that enforcement action may be appropriate in a given situation, the first step that is required is for the relevant operational/technical manager to take part in the CEP. (See Chapter 3)

If a decision is made by the operational/technical manager, as a result of the CEP, to initiate administrative action then the flowchart – Coordinated Enforcement Process C should be followed and the Administrative Action Checklist (form 886) completed.

6.4 What is Administrative Action?

A full discussion of the administrative law and its implications on regulatory decision-making is set out at Appendix 2 and Appendix 3. Guidance material in relation to fitness and propriety is set out at Appendix 4.

Administrative law provides that when government, through agencies such as CASA, make administrative decisions, the affected party must be given procedural fairness. This term refers to ensuring that the affected party is given the reasons why the action is being taken against them, has the opportunity to be heard and has the opportunity to provide a response to any allegations against them. The administrative law requires that the decision-maker must be unbiased and must take into account only those considerations that are relevant to making the decision.

If the affected person is dissatisfied with the decision he may appeal the decision on the merits to the Administrative Appeals Tribunal or, on questions of law, to the Federal Court.

When CASA commences a process that may lead to the making of a decision to vary, cancel or suspend a civil aviation authorisation this is known as administrative action and accordingly the process must contain all the requirements of procedural fairness, transparency and lack of bias.
This process must be carried out in accordance with the CEP set out in Chapter 3, the flowchart – Coordinated Enforcement Process C, the Administrative Action Checklist (form 886) and the Standard Form Recommendation (form 316).

6.4.1 When is Administrative Action Appropriate?

- Where there is a serious risk to safety but, at the time of the initial Coordinated Enforcement meeting, the facts and circumstances do not disclose sufficient evidence or concern to warrant action being taken under the Serious and Imminent Risk provisions (see Chapter 7 and Division 3A of the Act) and it is not appropriate to address the concerns by a suspension under regulation 265 of the Civil Aviation Regulations 1988 (CAR) while the person undertakes an exam.

- On the information available at the time of the initial Coordinated Enforcement meeting the behaviour cannot be appropriately addressed by Non Compliance Notices (NCNs), Infringement Notices (AINs) or counselling. (See Chapters 4 and 8 and the CASA Surveillance Manual).

- If the safety risk is sufficiently serious, administrative action may be initiated out of a single incident of concern. Commonly, however, it is commenced as a result of a series of breaches.

6.4.2 Administrative Action is Not Necessarily Exclusive

Administrative action is not necessarily exclusive and may run in parallel with a Part IIIA investigation and possible referral of a matter to the Commonwealth Director of Public prosecutions (CDPP).

Because of this it is important that the CEP is followed. Ensuring regular communication between Legal Branch, the LSD Enforcement Officer and the referring operational/technical area avoids compromising any other action being taken by CASA.

NOTE

When parallel actions are being taken the safety response must be paramount.

There are also occasions where Aviation Infringement Notices (AINS) are issued at the same time as administrative action is being taken against the same individual or entity. In these situations the AINs are issued for specific regulatory breaches while the administrative action is generally in relation to broader issues encompassing not only breaches of the regulations or the CAA but also issues of fitness and propriety.

It is important that the offender is aware that more than one type of action is contemplated by CASA so that there is no misunderstanding.
6.5 Starting the Show Cause Process

6.5.1 Purpose — Procedural Fairness

When CASA perceives that the actions of the holder of a civil aviation authorisation breach the aviation law or are otherwise a threat to aviation safety, it must consider what action it should take. If it is clear that if there are likely to be continuing safety implications, CASA is obligated to take action to remove the threat or potential threat to safety. This can be done by varying, suspending or cancelling the permission by way of administrative action.

When CASA suspends, cancels or varies a civil aviation authorisation it must ensure that the holder is given the benefit of natural justice and due process, which involves:

- Giving the holder notice of what actions CASA is proposing to take, i.e. that CASA intends to vary, suspend or cancel the authorisation.
- Giving the holder details of the grounds upon which CASA is proposing to take those actions. This should be done by way of a SCN which 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.
- Giving 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.

However, where CASA has reason to believe that the holder has engaged in, is engaging in, or is likely to engage in, conduct which constitutes, contributes to, or results in a serious and imminent risk to air safety, CASA may immediately suspend the authorisation and the holder must be given full details in writing of the grounds upon which CASA relies (see Chapter 7).

Section 6.6 below provides guidance on the procedures to be followed in relation to 'show cause' notices (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). Note that there is no legislative requirement for CASA to invite the holder to take part in a SCC.
6.6 ‘Show Cause’ Notices

6.6.1 Show Cause Notice - Definition

‘Show cause notice’ is defined under CAA 3 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 holder to provide CASA with reasons why CASA should not suspend, vary or cancel a particular authorisation.

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 or an 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.

The delegate’s decision may be to proceed to some other form of enforcement action, to some action that does not require enforcement or to some alternative action such as accepting an Enforceable Voluntary Undertaking (EVU).

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

6.6.2 When Are ‘Show Cause’ Notices Required?

What do we mean by required? The following sub-paragraphs set out the situations where the legislation expressly states that CASA must issue a SCN and where, in the interests of procedural fairness, CASA chooses to issue a SCN.

This difference has implications on the time that any final decision to suspend, cancel or vary an authorisation takes effect and whether or not the automatic stay provisions in CAA 31A are invoked.
6.6.2.1 Suspension or Cancellation of AOCs under CAA 28BA(4)

CAA 28BA(4) requires CASA to issue a SCN before suspending or cancelling an AOC for a breach of a condition of the AOC. A SCN issued for the purposes of CAA 28BA (4) must be in writing and must set out the facts and circumstances that, in the opinion of the delegate, justify the suspension or cancellation of the AOC. The SCN must allow the holder a reasonable time to show cause why the AOC should not be suspended or cancelled.

6.6.2.2 Variation, Suspension or Cancellation Under CAR 269

Under CAR 269 (3) CASA is required, before taking action to vary, suspend or cancel a licence, certificate or authority of a kind defined in CAR 263, to issue a SCN to the holder of the document. Such a notice must be in writing and must set out the facts and circumstances that, in the opinion of the delegate, warrant consideration being given to the variation, suspension or cancellation of the aviation permission. The notice must allow the holder a reasonable time to show cause why the aviation permission should not be varied, suspended or cancelled. (In relation to cancellation, see the limitations placed on cancellation by CAR 269 (1A).

6.6.2.3 Suspension or Cancellation Action Under CASR 21.002C

Paragraph 21.002C (1) (b) of the Civil Aviation Safety Regulations 1998 (CASR) requires CASA to issue a SCN before suspending or cancelling an instrument issued under CASR Part 21 on a ground set out in the regulation. Under CASR 21.002D, a SCN issued for the purposes of CASR 21.002C must be in writing and must set out the facts and circumstances that, in the opinion of the delegate, justify the suspension or cancellation of the instrument. The SCN must allow the holder a reasonable time to show cause why the instrument should not be suspended or cancelled.

6.6.2.4 Variation, Suspension or Cancellation of Chief Pilot approvals

The aviation law for variation, suspension and cancellation of Chief Pilot approvals does not statutorily require SCNs. However, unless there is a serious and imminent risk to air safety (see Chapter 7), which requires immediate suspension or cancellation, a SCN should always be issued where CASA proposes to vary, suspend or cancel a Chief Pilot approval.

6.6.2.5 Variation, Suspension or Cancellation of Other Aviation Permissions

Unless there is a serious and imminent risk to air safety, which requires immediate suspension or cancellation, consideration should be given to the issue of a SCN prior to any proposed action to vary, suspend or cancel any other aviation permission. In these situations, officers may wish to seek advice from the Legal Branch as part of the CEP (see Chapter 3 and 6.3) on the necessity and utility of a ‘show cause’ process.
6.6.3 **What Time Limit should be Placed on ‘Show Cause’ Notices?**

In accordance with CAR 269 (4) and CASR 21.002D (3), the time allowed for a person to respond to a SCN must be a time that is reasonable in all the circumstances of the particular case. Generally CASA allows a period of **21 days** unless there is good reason to specify a shorter period. A similar requirement is imposed in relation to AOC SCNs – see CAA 28BA (4) (b).

It is important when giving consideration to the time that is allowed for a recipient to respond to a show cause that consideration is also given to the timeliness of any decision made by CASA in this process. (See Chapter 3 at paragraph 3.12 in relation to delays in process.)

6.6.4 **Preparation and Content of ‘Show Cause’ Notices**

The preparation of a SCN requires measured input from both technical staff and the Legal Branch through the Assigned Legal Counsel (ALC).

Prior to the commencement of this process the referring manager must follow the CEP set out in Chapter 3, the flowchart – Coordinated Enforcement Process C, and the Administrative Action Checklist (form 886).

The referring office assists in drafting the SCN by setting out the correct format and providing precise technical information. The ALC relies on this technical/operational input because the technical and operational people are best able to identify the actual breaches and 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 Controlling Office and the legal content is the responsibility of the Legal Branch.

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 ALC, the grounds upon which they recommend CASA act. The ALC will then, using the basic format draft the SCN for legal correctness. Responsibility for identifying the breach or other failures upon which CASA will be relying, resides with the operational/technical staff.
In providing the input and framework for the SCN, officers should take into account the following guidelines:

- The notice must identify the relevant facts and circumstances in sufficient detail so that the civil aviation authorisation holder is in a position to prepare a full response. Each allegation should be stated clearly and concisely. Alleged contraventions of the Civil Aviation Act 1988, regulations and Civil Aviation Orders must be particularised to demonstrate the ground/s for the action.

- All facts and circumstances that the delegate might reasonably rely on in making the final decision must be included. Reliance cannot generally be placed on facts and circumstances (including previous incidents) that are not included in the SCN. The facts and circumstances should be capable of being properly substantiated by evidence admissible in the Administrative Appeals Tribunal. The grounds should be drawn in as simple terms and language as is consistent with proper identification of the matters upon which CASA intends to rely. Unless it forms part of the breach or other failure, there is no need to chronicle how the evidence was obtained or what CASA officers have done. So, for example, it can be as simple as:

  ‘A Ramp Check of (Brand name/model) helicopter VH-XXX at Woolloomooloo Airport on 22nd April 1999 revealed that time in service for 12, 20, and 22 April 1999 was not entered on to the aircraft (VH-XXX) maintenance release. CAR 43B requires the owner, operator or pilot in command to record on the Maintenance Release the total time in service of the aircraft on the completion of flying operations on each day that the aircraft is flown. The pilot’s logbook for pilot Bloggs indicated that VH-XXX was flown on 12, 20 and 22 April 1999.’

- Previous incidents involving the holder should be carefully considered before being included in the facts and circumstances. In deciding whether to include a previous incident, a delegate should have regard to the following factors:
  - The age of the incident. Incidents that are many years out of date will usually have little or no current relevance
  - Whether the incident forms part of a pattern of behaviour or is an isolated incident. An incident that is part of a pattern of behaviour is more likely to have current relevance
  - Whether the incident significantly compromised air safety. Very minor or technical incidents generally carry little weight, particularly if committed unintentionally
  - Whether CASA took action at the time of the incident. It may be difficult to place weight on such an incident if CASA did not give it serious regard at the time.

- Generally, incidents which are not raised in the SCN cannot be relied on when making a decision. If in doubt, it may be better to include the incident to give the holder a chance to respond. The delegate may ultimately disregard it as being of little or no weight when the final decision is made.

- Unless a decision is taken not to offer a person a ‘show cause’ conference (see below), the SCN should include a statement offering a person the option of attending such a conference, and should attach the standard explanatory note (form 1037).
A SCN is not a ‘decision’. Accordingly, there is no merits review in relation to the sending of such a notice.

The ALC takes the input provided by the Controlling Office usually in the form of a rough draft and checks the SCN to ensure that the grounds are properly particularised (in a form which meets the legal requirements and which will, withstand the scrutiny of any review tribunal) and to settle the formal parts of the notice. Operational/technical staff should consult with the ALC. Following review by Legal Branch, the draft notice is returned to the technical and operational personnel with suggested amendments. These may be substantial or minor, but there is a requirement to examine the draft closely. Further refining takes place between Legal Branch and the technical and operational personnel. This may be one step or it may involve several messages backwards and forwards. The purpose of this consultation is intended to ensure that, in relation to any proposed action:

- The evidence and information on which the delegate has relied, logically supports the facts and circumstances providing the basis of the delegate’s action
- The facts and circumstances giving rise to the proposed action are effectively linked to the relevant provisions of the aviation law
- The legal grounds on which the proposed action is based adequately support that action
- The instruments and documentation intended to give legal effect to the proposed action are clear, complete, accurate and properly formulated
- The processes leading up to, and including, the taking of a decision to vary, suspend or cancel an aviation permission are consistent with the procedural requirements of the law
- Where the breaches are particularly technical or complex, the ALC should be provided with copies of the evidence that CASA will rely on to prove the grounds alleged. In any event this is good practice.

Once the notice is settled to the satisfaction of both Legal Branch and technical and operational personnel, the latter pass the document to the Team Leader or Controlling Office Manager for action in accordance with the Administrative Action Checklist (form 886) and the Administrative Action flowchart – Coordinated Enforcement Process C. Should the Team Leader or Manager wish to amend the notice they should obtain legal advice on their proposed amendments.

It is essential the Legal Branch have a copy of each SCN in its final form. Notification of all relevant officers should be made following the Administrative Action Checklist (form 886).

It is important that the ALC takes a pro-active role in following the matter through until a final decision is made and any appeal to the AAT or Federal Court is concluded.
6.7 ‘Show Cause’ Conferences

6.7.1 Introduction

‘Show cause’ conferences (SCCs) are the face-to-face discussions held between officers of CASA and persons affected by CASA decisions, which are offered to those persons as part of the ‘show cause’ process.

6.7.2 Purposes of ‘Show Cause’ Conferences

6.7.2.1 To Give an Authorisation Holder an Opportunity to Respond to Allegations

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 his or her 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.

6.7.2.2 To Clarify the Nature and Import of Allegations

A SCC enables CASA to clarify and amplify the contents of a SCN. This is particularly important where either the written response (if any) 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.

6.7.2.3 To Enable Reconsideration of Proposed Action

A SCC enables CASA to review the reasons for its proposed action against a person’s aviation authorisation in light of information provided by that person, and decide not to proceed with the action (although some other corrective or remedial action is often appropriate).

6.7.2.4 Not to Gather Evidence

It is not the purpose of a SCC 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.
6.7.3 When Should a Person be Offered a ‘Show Cause’ Conference?

6.7.3.1 Starting Point – Whenever a ‘Show Cause’ Notice Has Been Issued

CASA is not required to provide the authorisation holder with the opportunity to attend a SCC. However, as a starting point, the opportunity to attend a SCC should normally be offered to persons in all situations where a SCN has been issued. Even where a SCN has not provided much time to respond, e.g. in the case of a serious threat to safety, a SCC should normally still be offered, as face-to-face discussions are often of greater utility than written communications where time is of the essence.

6.7.3.2 Circumstances where a ‘Show Cause’ Conference May 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 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 second 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 ALC to discuss appropriate risk minimisation strategies.

6.7.3.3 ‘Show Cause’ Conference to be Held Subsequent to Receipt of Written Submission

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. (This is not the case where there is a serious and imminent risk – see Chapter 7.)
6.7.4 Participants in ‘Show Cause’ Conferences

6.7.4.1 Person Affected by the Proposed Action

Obviously, the person affected by CASA’s proposed action 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, Chief Pilot, Maintenance Controller, 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 with little authority to speak on behalf of the organisation, or little capability of addressing the concerns raised by CASA.

6.7.4.2 Representatives of the Person Affected by the Proposed Action

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 a Chief Pilot, a representative of the relevant AOC-holder 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.

6.7.4.3 CASA officers

The following officers of CASA should attend a SCC:

- The CASA officer who will be making the recommendation for proposed enforcement action to the delegate (usually the Controlling Office Manager)
- The ALC
- The CASA officer in charge of the field investigation or action which resulted in the allegations against the authorisation holder, or otherwise an officer with appropriate technical or operational expertise relevant to matters under consideration
- 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.
6.7.4.4 *Attendance by the Delegate*

The delegate may attend the SCC either in person or by video-link where that option is available within CASA.

If a request is made, by the holder, that the delegate attends the SCC, CASA will consider this request. There is no requirement for the delegate to attend and no guarantee of the delegate’s attendance should be made to the holder. However, when such a request is made and the delegate is not able or does not choose to attend the conference, the holder should be assured that the delegate’s attendance is not part of the normal procedures and that he or she will not be disadvantaged by the delegate’s absence from the conference.

6.7.5 *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 his or her 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 ALC 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.

6.7.6 *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 CASA ALC even if this has to be done by phone or video-link. Matters of procedure during a conference should be determined by the ALC 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 along the lines of the following sequence of events:

- 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.
CASA’s ALC 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, the ALC should make it 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 be used against the holder in criminal proceedings.

Following the introduction, the ALC should turn the conference over to the Controlling Office Manager (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 Controlling Office 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 operational/technical manager or CASA ALC may terminate the conference.

### 6.7.6.1 Recording of 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 may be recorded. The attachment to the SCN informs authorisation holders that conferences may be recorded, and CASA’s ALC should further inform them of the recording during the preamble to the conference. Recording should commence after personal introductions but before the ALC preamble. It is preferable to obtain the use of a triple-deck digital recorder for the recording of conferences, rather than using a dicta-
6.7.7 Use of Information Disclosed 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. CASA cannot compel a person to attend a SCC, and (subject to a few exceptions) cannot require a person to provide particular information or to answer particular questions during a SCC.

1 See, in particular, CARs 43A, 5.56, 301 and 302. It seems highly unlikely that these powers would be used in the context of a ‘show cause’ conference, but rather may be used prior to the ‘show cause’ process in the gathering of evidence.
6.7.7.1 **Administrative Action**

A SCC is an integral part of the procedure undertaken by CASA when deciding whether to take administrative action.

A copy of the transcript of any recorded conference or the conference notes (where no recording exists) should be made available to the delegate.

6.7.7.2 **Criminal Action**

A SCC is not conducted on a ‘without prejudice’ basis. Its purpose is not to obtain evidence for a criminal prosecution of the individual or organisation involved. No warnings against self-incrimination are given by CASA. Any admissions given by a person at a SCC are likely to be inadmissible in any criminal proceedings against that person, and furthermore, it is CASA policy that any admissions made during a SCC will not be relied upon as evidence of an offence in a brief of evidence submitted to the CDPP. Should a person involved in a SCC admit that he or she has committed an offence, CASA investigators may use that admission to direct a line of inquiry in order to obtain independent evidence of the commission of that offence, but may not use the admission itself as evidence of the commission of the offence.

6.8 **Further Coordinated Enforcement Meeting and Outcomes of Show Cause Conferences**

The Coordinated Enforcement Policy envisages not simply the initial Coordinated Enforcement meeting at the point where enforcement may be considered by the operational/technical areas but also at important stages throughout the process.

It may be that additional information comes to hand at various points in the administrative action process that may impact on the final decision of the delegate or on enforcement options generally. These points include:

- After the service of the SCN but before the SCC (if one is held)
- At the SCC (if one is held)
- After the SCC (if one is held) but before a recommendation is made to the delegate
- After the SCC and the recommendation is made but before the decision is made
- After the decision is made but before any appeal or application for review
- After an appeal/application for review but before a decision of the court or tribunal.

Because this additional information/evidence could have an impact on CASA’s enforcement decisions it is important that a further Coordinated Enforcement meeting be held so that any decisions can be fully informed. This is particularly relevant where other action such as a Part IIIA investigation is in progress or a brief is being prepared or has been referred to the CDPP. It is also relevant where infringement notices may have been issued for strict liability offences and these offences relate to fitness and propriety aspects encompassed by the administrative action.
6.8.1 Outcomes of ‘Show Cause’ Conferences

It is not at all uncommon for additional information to be provided within the forum of the SCC which may substantially affect the recommendation that may be proposed. (e.g. an Action Plan (as defined in the CASA Surveillance Manual (CSM)). This is why a further Coordinated Enforcement meeting may be necessary to provide the appropriate input to any recommendation.

There are three possible outcomes from a SCC:

- The operational/technical manager does not change his view about the need for the proposed administrative action to be taken against the holder of an aviation authorisation

- The manager changes his or her view about the need for the proposed administrative action to be taken against the authorisation holder, and proposes/notionally agrees to a proposal for alternative action (e.g. EVUs or some compliance-related action such as issuing directions or counselling); or

- The manager changes his or her view about the need for the proposed administrative action to be taken against the authorisation holder, and proposes no further action.

In many cases, this outcome will not be known by the referring manager at the conclusion of the conference, as he or she may need time to consider what action to take in light of all the evidence now before him or her (including that disclosed during the conference). In any event, the manager should not indicate his or her views to the authorisation holder at the end of the conference.

A further Coordinated Enforcement meeting is particularly important if there is additional evidence that supports taking some other action than that proposed initially by the SCN (e.g. A proposed Action Plan).

NOTE: Where the proposed decision is that conditions be placed on the authorisation then those conditions must be drafted by, or in any event with the guidance and clearance of, the Manager Legal Branch. The monitoring of those conditions and any proposal for variation of those conditions must be with the guidance and clearance of the Manager Legal Branch.

Where an Action Plan is proposed which meets the conditions set out in the note to paragraph 3.5, CASA may nonetheless make a decision to suspend, cancel or vary the authorisation such as in cases where the SCN dealt with intentional contraventions or matters which extend beyond the ambit of the proposed Action Plan.
6.8.1.1 Proposed Administrative Action Maintained

A SCC may not provide any information that causes the Controlling Office Manager to change his or her mind about the action he or she proposes recommending the delegate take. However, the manager should have some time to consider this, and should not inform the authorisation holder of any recommendation/decision at the conclusion of the conference.

6.8.1.2 Change to Proposed Administrative Action

Alternatively, the SCC may provide new information, indicating to the referring manager that his understanding of the relevant facts and circumstances was inaccurate or incomplete. In this event, the referring manager may decide to reconsider the action he has proposed to recommend.

If, on the basis of the information available both before, and as a consequence of, a SCC:

- The operational/technical manager determines that there are particular actions an authorisation holder might take to remedy or correct such theoretical and/or practical deficiencies as the Controlling Office Manager believes to have been the cause of the circumstances giving rise to the SCN;
- The authorisation holder agrees to undertake those remedial or corrective actions (e.g. specified practical training, theoretical study, examinations, etc.) or proposes an EVU;

the Controlling Office Manager will arrange a Coordinated Enforcement meeting to discuss these options and if agreed as a result of that meeting that an EVU is appropriate, CASA’s ALC will draw up the EVU for consideration by the parties and specifying:

- The particular remedial or corrective action(s) the person has agreed to undertake
- The manner in which the person will discharge his or her obligations under the agreement
- The time-frame within which the person will complete the action(s) he or she has agreed to undertake
- The specific basis on which the delegate will decide whether or not the person has successfully discharged his or her obligations under the agreement.

CA 30DK

This agreement should be in the form of an EVU under CAA 30DK. (CASA’s policy in relation to EVUs, and the procedures for drafting and executing them, is set out in Chapter 5). The formal undertaking should not be signed by the authorisation holder at the conference. CASA ALC should make a note of the agreed outcome of the SCC and obtain the holder’s agreement to that outcome at the end of the conference. The formal CAA 30DK undertaking should then be prepared on the basis of the agreed outcome promptly thereafter.
Naturally, alternative action to EVUs may be appropriate, for example, counselling or requiring the holder to undertake examinations. If counselling is agreed as a result of the Coordinated Enforcement meeting, the ALC will assist with checking the draft in relation to its legal content and effect.

There may also be a proposal that although no further enforcement action will be taken the Controlling Office may propose taking some compliance-related action such as issuing directions.

6.8.1.3 Proposal for No Further Action

There may be some circumstances where the Controlling Office Manager may decide to recommend that no enforcement action be taken. These circumstances are unusual, and may include:

- Circumstances where there is no breach, for example, the authorisation holder has answered every allegation made against him or her in such a way as to convince the Controlling Office Manager that there were no breaches of the aviation law and no substantial adverse impact on aviation safety from the holder’s actions.

- Circumstances where the allegations are made against the wrong person, for example, the Controlling Office Manager becomes convinced that, although there were breaches of the aviation law or an adverse impact on aviation safety by the conduct described in the SCN, that conduct was engaged in by someone other than the authorisation holder, and the authorisation holder was not required to and had no reasonable method of controlling the conduct.

In such a case it is essential to make a record of the circumstances that justify that no action is necessary, and place this record on the Coordinated Enforcement Referral file. A copy should be provided to the LSD Enforcement Officer and the ALC.

NOTE: Such alternative decisions should be made after a further Coordinated Enforcement meeting.

6.9 Legislative Authority for CASA to Vary, Suspend or Cancel

CAA 13 empowers CASA to do all things necessary to enable the Authority to carry out its functions and CAA 9 sets out the general functions of conducting 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. The CAA and Regulations also contain express powers for CASA to suspend, vary or cancel civil aviation authorisations.
6.9.1 Air Operator Certificates (AOCs) Issued Under the Act

CAA 28BA(3) empowers CASA to suspend or cancel an AOC or any specified authorisation contained in an AOC if a condition of the AOC is breached. CAA 28BB (2) empowers CASA to vary any of the conditions of an AOC.

CAA 28BA(4) and (5) require CASA to follow a ‘show cause’ process and to provide written reasons for making its decision. In that notice of decision CASA must include a summary of CAA 31A in relation to the automatic stay process, although failure to do so will not affect the validity of the decision. See form 321 Attachment to Decision Letters Setting out Summary of Section 31A.

6.9.2 Suspension under the CAA for Serious and Imminent Risk to Air Safety

Subdivision B of Division 3A of the CAA gives CASA power to suspend a civil aviation authorisation where it has reason to believe that the holder of the authorisation has engaged in, is engaging in, or is likely to engage in conduct which constitutes, contributes to, or results in a serious and imminent risk to air safety. (See Chapter 7 for details and procedures in relation to serious and imminent risk.) In this situation it is not necessary to follow the ‘show cause’ process.

6.9.3 Licences, Certificates and Authorities Issued Under the Civil Aviation Regulations 1988 – General

CAR 263(1) Licences, certificates and authorities issued under CAR may be varied, suspended or cancelled in accordance with the provisions of Part 16 of CAR. The terms ‘authority’, ‘certificate’ and ‘licence’ are defined in CAR 263 (1).

CAR 269 CAR 269 provides CASA with a general power to vary, suspend or cancel a licence, certificate or authority of the kind defined in CAR 263(1), following a ‘show cause’ procedure. As a result any such decision will be automatically stayed in accordance with CAA 31A.

CAR 269(1) Note that CASA cannot cancel a licence, certificate or authority under CAR 269(1) solely on the ground that the holder of the document has contravened a provision of the CAA or regulations, unless prior to the cancellation a court has either convicted the holder of an offence for breaching the provision, or has found the holder committed the contravention but has not convicted them of an offence. Nevertheless, a contravention or series of contraventions of the CAA or regulations can go to establishing another ground to take action set out in CAR 269(1).
6.9.4 Suspension of Licence or Authority for Purpose of Examination

CAR 265 gives CASA power to suspend a licence or authority, pending the holder of the licence or authority sitting an examination as directed by CASA under CAR 33 or 299.

CASR 65.255 permits CASA to suspend an air traffic controller’s licence if CASA has directed the controller to undergo an examination, performance or medical assessment.

Where CASA proposes to suspend a licence or authority pending examination of the holder, natural justice must be accorded to the holder. Therefore the procedures set out in this Chapter should be followed. However, there is no statutory requirement for a show cause process before a decision to suspend is made under CAR 265 or CASR 65.255. Consequently, the automatic stay process will not apply to the decision.

6.9.5 Ratings and Endorsements On Licences

By operation of CARs 263(2), (3) and (4), CASA has the same powers to vary, suspend and cancel ratings and endorsements on licences issued under CAR as it does to vary, suspend and cancel the licences themselves.

CASR 65.270 gives CASA power to suspend a licence, rating or endorsement issued to an air traffic controller.

6.9.6 Maintenance Controller Approvals

CASA approves maintenance controllers for class A aircraft under CAR 42ZW. CAR 42ZX provides for the cancellation or suspension of a maintenance controller approval. Where CASA proposes to suspend or cancel a maintenance controller approval, natural justice must be accorded to the maintenance controller. Therefore, the procedures set out in this Chapter should be followed. However, there is no statutory requirement for a show cause process and so the automatic stay process will not apply to the suspension or cancellation of a maintenance controller approval.

6.9.7 Designated Aviation Medical Examiner and Designated Aviation Ophthalmologists Appointments

CASA appoints designated aviation medical examiners (DAMEs) under CASR 67.045. CASA appoints designated ophthalmologists (DAOs) under CASR 67.065. CASR 67.095 provides for the cancellation of a person’s DAME or DAO appointment by CASA. There is no power to suspend or vary such an appointment. Where CASA proposes to cancel a DAME or DAO appointment, natural justice must be accorded to the DAME or DAO, and the procedures set out in this Chapter should be followed. However, there is no statutory requirement for a show cause process and so the automatic stay process will not apply.
CASR 67.100 provides that a DAME’s or DAO’s appointment is automatically suspended if convicted of a criminal offence punishable by imprisonment for 12 months or longer. The appointment is then cancelled if there is no appeal against the conviction or any appeal is dismissed. If an appeal against the conviction is successful, the appointment is not taken to be suspended.

CASR 67.105 and 67.110 provide that a DAME's or DAO's appointment is cancelled if they cease to be registered or licensed as a medical practitioner.

### 6.9.8 Medical Certificates

CASR 67.180 CASAR 67.240 CAR 265 CASAR 67.230

CASAR 67.240 is analogous to CAR 265 (see para 6.13.2 below), permitting CASA to suspend a medical certificate pending the results of a medical examination or the disclosure of information by a medical practitioner to CASA required under CASAR 67.230.

CASAR 67.255 CASAR 67.180 CASAR 67.230

CASAR 67.255 requires CASA to cancel a medical certificate if the holder of the certificate fails to meet the relevant medical standard (determined following a medical examination under CASAR 67.180 or 67.230). Cancellation must be by notice in writing, and the notice must include the reasons for the certificate holder’s failure to meet the relevant standard. CASA has no discretion under this regulation — where it considers that a person has failed to meet the relevant medical standard, it must cancel the certificate. There is no statutory requirement for a show cause process and so the automatic stay process will not apply to the cancellation.

CASAR 67.260 CAR 269

CASAR 67.260 provides CASA with a general power to suspend or cancel a medical certificate, on the grounds set out in the regulation. It is analogous to CAR 269, requiring that a ‘show cause’ process be undertaken prior to suspension or cancellation action being taken by CASA. The ‘show cause’ processes outlined in this Chapter should be followed. Such a decision will be subject to the automatic stay provisions.

### 6.9.9 Certificates, Approvals and Authorisations in Relation to Aircraft and Aeronautical Product Manufacture – CASAR Part 21 et. seq.

There are many specific powers to suspend or cancel instruments issued under those Parts of CASAR relating to aircraft and aeronautical product manufacture, other than at the request of the instrument-holder.

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CASR 21.002C is a general power to suspend or cancel any instrument issued by CASA under CASR Part 21. However, it only applies to suspension or cancellation on limited grounds, set out in CASR 21.002C (1)(a). These grounds essentially relate to fraud and false statements by the applicant for, or holder of, an instrument. Importantly, CASR 21.002D prescribes a ‘show cause’ procedure to be followed by CASA where it is proposing action to suspend or cancel an instrument under CASR 21.002C. Accordingly any such decision will be subject to the automatic stay process.

Powers to suspend or cancel approvals of airworthiness standards can be found in CASRs 22.6, 22.7, 22.8, 22.9, 23.6, 23.7, 23.8, 25.5, 25.6, 27.4, 29.4, 32.4, 33.4, and 35.4.

6.9.10 Chief Pilot Approvals

CASA approves the appointment of Chief Pilots by AOC-holders, under Appendix 1 of CAO 82.0. Section 6 of Appendix 1 provides for the cancellation or suspension of a Chief Pilot approval by CASA. Where CASA proposes to suspend or cancel a Chief Pilot approval, natural justice must be accorded to both the Chief Pilot and the affected AOC-holder, and while the show cause process is not required by the aviation law (and hence is not subject to automatic stay under CAA 31A), the procedures set out in this Chapter should be followed.

6.9.11 Other Approvals, Authorities and Exemptions Under The Civil Aviation Orders

CASA may issue a large number of approvals, authorities and exemptions under the Civil Aviation Orders. In some cases there are specific provisions relating to variation, suspension and cancellation of these instruments, and in other cases the power to vary, suspend or cancel may be implied by operation of subsection 33 (3) of the Acts Interpretation Act 1901. Where an officer is proposing to vary, suspend or cancel an approval, authority or exemption under the Orders, he or she should seek advice from the Legal Branch of LSD regarding the power to do so and the manner in which it should be exercised.

6.10 Responsibilities

6.10.1 Delegates to Exercise Powers

Only officers with valid delegations issued by the Director of Aviation Safety may exercise the power to vary, suspend or cancel civil aviation authorisations or permissions under the CAA or Regulations. Only persons validly authorised by the Director of Aviation Safety may exercise powers to vary, suspend or cancel aviation permissions under the Orders. For simplicity, delegates and persons authorised to exercise variation, suspension and cancellation powers will be referred to as ‘delegates’.
Before taking action to vary, suspend or cancel aviation authorisations or permission, officers must ensure that they have the necessary delegation or authorisation and that it is still current. If an officer is unsure of his or her powers they should contact the Legislative Drafting Branch of the LSD which holds originals of the instruments by which the Director has delegated or authorised the powers to vary, suspend and cancel aviation permissions. They must also follow the CEP set out in Chapter 3 and flowchart Coordinated Enforcement process C.

6.10.2 Responsibilities of the Delegate

The delegate is the decision-maker, and takes prime responsibility for the enforcement decision, whatever it may be. Although a delegate may be subject to general written directions regarding the manner in which he will exercise a power, he is not subject to specific direction in relation to any particular decision. For example, a delegate cannot be directed to issue, or not to issue, a licence or certificate to a particular person.

It is the delegate’s personal opinion and belief which is relevant to the question of whether the grounds for the proposed variation, suspension or cancellation action are made out. This means that the delegate has to be provided with sufficient information and evidence to establish to his or her reasonable satisfaction the grounds for the proposed action. It is quite proper for a delegate to request further information from other officers, and to question information and evidence presented. Furthermore, it is proper for a delegate to make a different decision to that which has been recommended, or to refuse to take any action at all.

Nevertheless, where the delegate makes a decision different to that which has been recommended, the reasons for coming to that different decision need to be recorded.

It is not necessary for a delegate to personally attend a SCC, although he or she may choose to do so.

The delegate is responsible for completing the decision maker’s portion of the Standard Form Recommendation (SFR) (form 316) and the Administrative Action Checklist (form 886) which includes ensuring that the signed notice of decision is TRIMed and returned on the same day, electronically, to the referring office, so that the referring office can arrange service, and sending the original signed decision notice in the internal mail to the referring office.

This must be done whether or not the delegate agrees with the recommendation. However, where the delegate disagrees with the recommendation he or she is responsible for setting out reasons for the decision on the SFR and must still provide a decision letter to the holder and complete the Administrative Action Checklist and SFR.
6.10.3 Responsibilities of Technical and Operational Officers and Controlling Office Manager

Without limiting the sorts of tasks which technical and operational personnel may be asked to perform in relation to variation, suspension or cancellation action, it is the responsibility of technical and operational officers (usually those in the field) to:

- Enter the matter on the Enforcement Action Register, open a TRIM Coordinated Enforcement File and take part in an initial and any further Coordinated Enforcement meetings (ensure that all parts of the Administrative Action Checklist are followed)
- Gather or receive the information and evidence which supports a recommendation to the delegate for action
- As necessary, seek advice and input from other officers and the ALC in relation to the conduct of the person in question
- Provide assistance to the ALC in drafting the relevant notice of recommended action for the delegate
- Prepare for and attend a SCC taken up by the person affected by the decision
- Complete an SFR (form 316) and forward it to the delegate recommending a proposed course of action together with an Administrative Action Checklist (form 886)
- As necessary, assist the delegate by providing information and advice
- Serve or arrange for the service of the relevant notice to the person affected
- Request EPP through the Enforcement Policy and Practice Outlook mailbox to make necessary EAP alerts
- Request Industry permissions/licencing to make the appropriate entries on EAP and cancel, vary etc the particular licence or permission
- Once advised by ALC that a variation, cancellation or suspension has taken effect, prepare in consultation with ALC, 301 demand for return of authorisation
- Monitor compliance with 301 demand
- Take any follow-up action that may be necessary (including the provision of technical and operational assistance to the Legal Branch in any administrative law litigation)
- Update the Enforcement Action Register with regular status reports.

Refer also to Chapter 3 in relation to the Coordinated Enforcement Process.

NOTE

Where the proposed decision is that conditions be placed on the authorisation then those conditions must be drafted by, or in any event with the guidance and clearance of, the Manager Legal Branch. The monitoring of those conditions and any proposal for variation of those conditions must be with the guidance and clearance of the Manager Legal Branch.
6.10.4 Responsibilities of the LSD Enforcement Officer

- Chair and facilitate Coordinated Enforcement meetings
- Make the requisite Alerts on EAP
- Ensure that Suspensions and Cancellations are published on the website.

6.10.5 Responsibilities of the Legal Branch of Legal Services Division

It is the responsibility of the Legal Branch to:

- Provide legal advice to officers and the delegate in relation to actual or proposed variation, suspension or cancellation action, or any part of the process
- Assist officers in preparation of ‘show cause’ and decision notices, in accordance with this Chapter
- Assist and arrange clearance of any conditions which are to be drafted by way of varying an authorisation
- Chair ‘show cause’ conferences
- In relation to the ALC for any particular matter – proactively see the matter through until completion
- Conduct, or arrange for the conduct of, administrative law litigation arising out of variation, suspension and cancellation decisions
- Keep the LSD Enforcement Officer, and the Manager, Investigations advised of the progress and results of any civil court or Tribunal proceedings. Represent CASA in any proceedings before the Administrative Appeals Tribunal or Federal Court, where CASA’s decisions have been challenged
- Advise the Controlling Office Manager, the LSD Enforcement Officer (through the Enforcement Policy and Practice mailbox) when the variation, suspension or cancellation takes effect and assist the referring manager, as necessary, with the preparation of the 301 demand for the return of the relevant authorisation
- Update the Enforcement Action Register with regular status reports including the name of the assigned legal counsel and the progress of any tribunal or Federal Court proceedings
- Notify Industry Permissions in relation to decisions made by a Tribunal or Court so that they can update EAP accordingly
- Approve the wording of the paragraph summarising the decision taken in cases where the decision involves a suspension or cancellation of an authorisation normally held by a company (such as an AOC or COA) and advise the LSD Enforcement Officer.
6.10.6 Responsibilities of the Investigations Branch

- Keep the Controlling Office Manager, the LSD Enforcement Officer and the Legal Branch aware of the progress of any Part IIIA investigations or the issuing and disposition of infringement notices (AINs).
- Update the Enforcement Action Register with regular status reports including the name of the assigned Investigator and the offences which the CDPP take to prosecution.

6.11 The Standard Form Recommendation and Administrative Action Checklist

Both the SFR (form 316) and the Administrative Action Checklist (AAC) (form 886) must be used by all parties taking part in the administrative action process.

Now that CASA has an electronic filing system there is no need for documents to be sent to the delegate in hard copy. The SFR and AAC should be sent by email to the delegate referring to the appropriate TRIM files and specific TRIM documents which should be considered by the delegate in making his decision.

6.11.1 Guidance for Referring Managers

In order to maintain both the perception and reality of procedural fairness the referring manager is required to prepare the SFR together with supporting documentation for consideration by an independent delegate.

The SFR is structured in such a manner that all the relevant information that the delegate needs can be clearly set out including the recommendation that flows from the CEP. The use of the SFR and AAC is compulsory. (Note that further assistance in relation to making recommendations is contained in Appendix 2 - The Legal Basis for Regulatory Enforcement and Appendix 3 – Delegations and Exercise of Powers by Delegates.)

The SFR contains the following sections:

Background
- The individual or entity
- The authorisation
- A condensed version of the facts and circumstances contained in the SCN
- The alleged breaches

Available options
- Sets out all the available enforcement and non-enforcement options
**Recommended option**

- Specifies the preferred choice of action

**Reasons for Recommendation**

- Need to set out reasons why other options are not appropriate
- Need to set out comprehensive reasons in support of preferred option
- Need to show that on the facts provided that this is consistent with previous decisions.

**Relevant Supporting Information**

It is important that the decision-maker/delegate has access to all material associated with the decision. In this section the Controlling Office Manager lists all files associated with the authorisation holder to which the decision maker might wish to refer. For example the holder may have both an AOC and a COA but the administrative action is solely in relation to one certificate. In this case only the files pertaining to that certificate need be mentioned.

Within the files, particular documents may have been referred to as being relevant to framing the recommended decision. These should be identified. Electronic files should be attached and hard copy files should be scanned and sent.

Finally, the electronic copies of the SCN, the written response, the minutes or transcript of the SCC (where applicable), the draft decision notice and the draft notification to interested parties are to be listed by electronic document number.

**Recommendation and Certification**

The recommendation and certification section of the SFR present to the delegate formally:

- The recommendation that has flowed from the CEP; and
- Certification that the information contained in the SFR and associated documents is correct and that the required procedure has been followed.

The SFR provides the delegate with two options:

- To agree with the recommended decision; or
- To reject the recommendation and make another decision.

The Administrative Action Checklist, which is a mandatory attachment to the SFR, sets out the procedure to be followed by the delegate in either case.
There are three further boxes on the SFR, once the certification has been signed off by the referring manager, which need to be completed:

**Implications of taking Recommended Action**

Care should be taken in completing this section. This is not a part of the actual recommendation and should not influence the decision. This section is placed on the form after the certification and is intended to provide information to CASA generally, alerting the authority to potential actions that may be taken by the individual, the company or associated organisations and individuals as a consequence of agreeing with the recommended decision. This may include such actions as complaints to senior CASA officers, approaches to the Minister and or other politicians (both Federal and State), or the press.

Alerting CASA to these possibilities allows the Authority to brief those concerned about the facts and circumstances that led CASA to making that decision.

It must be stressed that this section of the SFR is not intended to influence the decision-maker/delegate in the making of the decision and the Controlling Office Manager must take care to ensure that this section does not contain material that should be contained in earlier sections as considerations that are relevant to the making of the decision.

If there are no implications flowing from the decision this should be noted.

**Where intermediary has been asked to review the recommendation**

Normally the SFR will be forwarded directly from the Controlling Office Manager to the delegate. In some areas the delegate may wish to have the recommendation reviewed by an intermediary person prior to it being referred for his decision. In this case the section in the template for intermediary comments should be completed by the reviewer.

[This will be particularly relevant in relation to the Serious and Imminent Risk process (See Chapter 7) as the referring manager will forward the SFR to the relevant Executive Manager, as intermediary, who will forward it onto the Director of Aviation Safety as the appropriate delegate for that process.]

If there is no intermediary this should be noted.

**If you agree with the recommendation**

The box will be ticked by the delegate and signed and dated.

or
If you do not agree with the recommendation

This box is to be completed and signed by the delegate when he or she disagrees with the recommendation. (Naturally when the delegate agrees with the recommendation the draft decision letter will already set out the reasons for the decision).

If the delegate disagrees with the recommendation a decision letter is still required to be prepared by the delegate in relation to whether CASA should suspend, vary or cancel the authorisation and, where some other action is proposed by the delegate, the alternative disposition and reasons for the decision.

The AAC (form 886), is a compulsory attachment to the SFR (form 316), and sets out in detail each step that must be completed in the process and by whom.

6.11.2 Guidance for Delegates

Delegates should make themselves familiar with the detailed information contained in the Appendices to this manual (Appendix 2 - The Legal Basis for Regulatory Enforcement, Appendix 3 – Delegations and Exercise of Powers by Delegates and Appendix 4 – Fit and Proper person.) CASA’s processes and procedures are structured around these.

As mentioned in the preceding section, the key documents in terms of administrative action are the SFR and the AAC which must be attached to the SFR.

After considering the material referred to in the SFR the delegate will make his or her decision. Throughout the decision-making process the delegate is not constrained by the materials provided. If he or she feels there is insufficient information or requires clarification or expansion on some aspect of the matter he or she may:

- Request further information from the referring manager; and/or
- Discuss any particular point with the referring manager or with ALC.

Having made the decision the delegate will follow the process set out in the AAC.

Whether the delegate agrees or disagrees with the Controlling Office Manager’s recommendation it is crucial that the delegate follows the steps in the AAC so that the process can be concluded in a timely and efficient manner. It is particularly important that the signed, scanned and freshly TRIMed decision notice is electronically sent to the referring manager on the day of dating together with a scanned copy of the annotated SFR and AAC showing the delegate’s acceptance of the recommendation.

It is this scanned and TRIMed copy that will be served by the Controlling Office Manager on the affected party, by ordinary post.

As soon as possible the signed original of the decision notice must be sent via internal mail to the referring manager who will despatch this document to the holder by registered mail.
Where the delegate agrees with the recommendation he ticks the box, signs and dates the SFR where indicated and completes the AAC.

Where the delegate does not agree with the recommendation from the Controlling Office Manager, he or she must, in addition to completing the AAC:

- Annotate the SFR to setting out the reasons why he or she does not accept the recommendation and follow the administrative action checklist.

### 6.11.3 Post Decision Action

On receipt of the signed electronic copy of the decision notice and completed AAC the Controlling Office Manager must:

- Immediately send a copy of the signed, scanned decision notice, together with a completed Service of Documents form (see form 552) to the holder by ordinary mail. If the holder agrees to accept service by fax, the notice may be served in this manner, in addition to postal service
- Once the Controlling Office Manager has received the original notice in the internal mail, this is to be sent to the holder by registered mail (with Australian Post Delivery/Receipt Slip)
- Notify all the relevant areas electronically – as per the AAC, using the notification form at the back of the AAC
- Where the recommendation is not to vary suspend or cancel but to counsel or accept an EVU then the appropriate check list must be followed.

**NOTE**

Any variations of AOCs or other authorisations where conditions are to be monitored (or there is consideration given to the variation of those conditions) must be carried out with the guidance of LSD.
6.12 Variation Suspension and Cancellation of AOCs

6.12.1 Suspension and Cancellation of AOCs – Has a Condition of the AOC Been Breached?

Except for the serious and imminent risk suspension, CAA 28BA (3) provides the exclusive power for CASA to suspend or cancel an AOC or any specific authorisation contained in an AOC. Before taking any action to suspend or cancel an AOC under the CAA, the subsection requires CASA to satisfy itself that a condition of the AOC has been breached. It is not necessary for the breach to be continuing.

As set out in section 6.7.1 above, CASA is required, under CAA 28BA(4) to follow the show cause process (set out in this chapter) before making a decision under CAA 28BA(3).

If CASA makes a decision under CAA 28BA(3), CAA 28BA(5) then requires CASA to include in the notice of its decision a summary of CAA 31A, which relates to the automatic stay of certain reviewable decisions.

NOTE

Delegates should note that the conditions to which an AOC is subject are not necessarily all contained in the AOC itself. In particular, CAA 28BA (1) (a) provides that an AOC has effect subject to the condition that sections 28BD, 28BE, 28BF, 28BG, 28BH and 28BI are complied with. For example, CAA 28BD, makes it a condition of all AOCs that the holder of the AOC must comply with all requirements of the CAA, regulations and Orders applicable to the holder. CAA 28BA (1) (b) provides that an AOC also has effect subject to any conditions specified in the regulations or Civil Aviation Orders. Sections 82.0, 82.1, 82.3 and 82.5 of the Civil Aviation Orders contain such conditions. Delegates should carefully consider these conditions in addition to any specific conditions contained in the AOC itself.

6.12.2 Variation of Conditions of AOCs – No Breach of Condition Required

CAA 28BB (2) provides the exclusive power for CASA to vary conditions on an AOC (other than conditions imposed by the CAA, regulations and Civil Aviation Orders). Conditions on AOCs may be varied in the absence of a breach of a condition of the AOC, although there are limits on what variations may be made (see section 6.12.3 below).

NOTE

At any time when it is proposed to place conditions on an AOC these conditions and any monitoring of those conditions must be carried out in conjunction with LSD.
6.12.3 Limits on CASA’s Power to Vary, Suspend or Cancel – CAA 28BC

CAA 28BC

CAA 28BC imposes limits on CASA’s power to vary, suspend or cancel AOCs. There are particular limits placed on varying, suspending or cancelling AOCs that authorise the operation of foreign aircraft on regulated domestic flights, and officers who are unsure of these limits should seek advice from the Legal Branch of the Legal Services Division (LSD).

Civil Aviation (Carriers' Liability) Act 41E(1)

In relation to AOC permissions not relating to the operation of foreign aircraft on regulated domestic flights, CASA may not **vary** an AOC except to ensure compliance with the CAA, regulations and Civil Aviation Orders relating to safety. CASA may not **suspend** or **cancel** an AOC except to ensure compliance with the CAA, Regulations and Civil Aviation Orders relating to safety, or to prevent a breach of subsection 41E(1) of the *Civil Aviation (Carriers’ Liability) Act 1959* (flight without suitable passenger liability insurance).

6.12.4 Procedures for Variation, Suspension and Cancellation of AOCs

See generally paragraphs 6.5-6.8.

6.13 Suspension and Cancellation of Chief Pilot Approvals

6.13.1 Chief Pilot a Condition of Certain AOCs – Suspension or Cancellation of Approval of Chief Pilot Grounds the Operator

CAO 82.0

Certain operators are required by the AOC conditions set out in Part 82 of the Civil Aviation Orders to establish and appoint a person to the position of Chief Pilot. The details regarding Chief Pilots are set out in Appendix 1 to CAO 82.0.

CAO 82.0

An operator cannot appoint a person as a Chief Pilot until the appointment has been approved in writing by CASA. Under Section 6 of Appendix 1 of CAO 82.0, a Chief Pilot’s approval may only be suspended or cancelled by CASA if, in CASA’s opinion, the performance of the Chief Pilot is no longer of an acceptable standard.

CAA 28BA(2A)

If the Civil Aviation Orders require an operator to have a Chief Pilot, then a suspension or cancellation of a Chief Pilot approval will result in the operator breaching a condition of its AOC if the operator continues to operate. By operation of CAA 28BA (2A), the suspension or cancellation of the Chief Pilot approval will effectively ground the operator until the suspension lapses or is lifted or another Chief Pilot is approved.
6.13.2 Procedures for Suspension or Cancellation of Chief Pilot Approvals

See generally paragraphs 6.5-6.8 of this Chapter and the SFR (form 316) and AAC (form 886).

Authorised persons should remember that when exercising powers under the Orders they are doing so not in a delegated capacity but because they have been authorised to do so. Accordingly, decisions to suspend or cancel Chief Pilot Approvals should be signed for and on behalf of the authority.

Because of the nature of the relationship between the AOC Holder and the Chief Pilot, it is important that any submissions made by the AOC Holder are considered by the decision maker.

6.14 Variation, Suspension and Cancellation of Licences, Certificates and Authorities Issued Under the Civil Aviation Regulations 1988

6.14.1 Purpose

This section provides guidelines for the variation, suspension or cancellation of licences, certificates and authorities (as defined in CAR 263 (1)). As noted above, licences, certificates and authorities may be varied, suspended or cancelled under CAR 269, or may be suspended for the purposes of examination under CAR 265.

See generally, paragraphs 6.5-6.8, the SFR and AAC and the flowchart Coordinated Enforcement Process C.

NOTE: If conditions are proposed as an enforcement measure then those conditions and the monitoring of those conditions must be considered in conjunction with guidance from LSD.

6.14.2 Suspension for Purposes of Examination – CAR 265

Before taking any action to suspend a licence or authority for the purposes of an examination under CAR 265 (1), the Controlling Office Manager must ensure that they have taken part in the CEP (see Chapter 3 at 3.4). When, as a result of the CEP a decision is made to recommend this action to the delegate then the flowchart Coordinated Enforcement Process G should be followed and the SFR (form 316) with attached AAC (form 886). The manager must also ensure that the holder of the licence or authority has been, or will be, (co- incidental with the suspension) validly required to undergo an examination under CAR 33 or 299. (This requirement may be included in the CAR 265 notice.)
It is important that the Controlling Office Manager discuss with the ALC all aspects of the AOC Holder’s behaviour that was/is of concern to the Controlling Office Manager. Other issues, in addition to serious competency issues, may need to be included in the suspension notice, for example areas where CASA is still uncertain or unclear whether competency exists.

It is CASA’s policy that, as questions of competency go to the heart of aviation safety, as a normal practice that where a CAR 299 notice is proposed as part of the CEP, it will be served in conjunction with a CAR 265 suspension notice. Both the request to undertake and examination and the CAR 265 suspension are appealable matters.

It is also important that, as part of the Coordinated Enforcement process, when a suspension under CAR 265 is being considered that the advice and input of the Manager Flying Standards Branch is obtained prior to action being taken.

### 6.14.2.1 Duration of Suspension

**CAR 265 (1)**

Any suspension under CAR 265 (1) remains in force until such time as the examination is completed and the results are known. Where the result of an examination does not show any ground on which licence or authority may be varied, suspended or cancelled, then the delegate must immediately terminate the suspension of the aviation permission and notify the holder of the document in writing that the suspension has been terminated.

**CAR 269**

If, after the results of an examination are known, the delegate decides that there are grounds for the variation, suspension or cancellation of the licence or authority, this action must be taken under CAR 269. The licence or authority remains suspended during the period allowed in the SCN to respond. It is not, as a normal practice, acceptable to allow the holder to make further attempts at an examination.

It is not intended that CAR 265 suspensions should continue for indefinite periods. If the holder does not agree to sit for an examination on the specified date, or a further date agreed with the holder, then the matter should be treated as a refusal to sit the examination under CAR 299 and the process set out in CAR 269 should be followed to show cause why the licence should not be cancelled.

See generally paragraphs 6.5-6.8 of this Chapter and the SFR (form 316) and AAC (form 886).
6.14.2.2 Preparation and Issue of Suspension Notices

CAR 265 The procedure for the preparation of suspension notices under CAR 265 is much the same as for the preparation of SCN (see section 6.9 above). A decision to suspend a licence or authority under CAR 265 is reviewable by the AAT and the suspension notice must advise the holder of this right of review. Such a decision is not subject to the automatic stay provisions in CAA 31A as no show cause is required before the decision is made.

See generally paragraphs 6.5-6.8 of this Chapter and the SFR (form 316) and AAC (form 886).

6.15 Variation, Suspension and Cancellation of Other Aviation Permissions

The process for varying, suspending or cancelling aviation permissions, other than those already mentioned, is the same as the process for varying, suspending or cancelling an AOC under CAA 28BA(3) or a licence, certificate or authority under CAR 269. (See also flowchart Coordinated Enforcement Process A, the SFR (form 316) and AAC (form 886).)

NOTE

If conditions are considered as an enforcement measure then the drafting of those conditions and the monitoring of those conditions must be carried out with the guidance of LSD.

6.16 Variation and Cancellation of an Authorisation on Holder’s Request

Various provisions of the aviation law empower CASA to vary or cancel civil aviation authorisations at the request of the holder. For example:

- CAA 27 (3) and 28BB (2) in relation to AOCs
- CAR 267 in relation to licences, certificates, and authorities issued under CAR
- CASR 21.002E in relation to instruments issued under Part 21 of CASR
- CASR 67.120 in relation to declarations of appointments of designated aviation medical examiners
- CASR 101.370 in relation to certified unmanned aircraft operator’s certification
- CASR 139.075 in relation to aerodrome certificates
- CASR 139.285 in relation to the registration of a registered aerodrome
- CASR 139.1025 in relation to the approval of an aerodrome rescue and fire-fighting service (ARFFS)
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CASR 143.240
- CASR 143.240 in relation to ATS training providers approval

CASR 171.240
- CASR 171.240 in relation to an aeronautical telecommunication service and radio navigation service providers approval

CASR 172.330
- CASR 172.330 in relation to air traffic service providers

CASR 173.385
- CASR 173.385 in relation to certified designer’s procedure design certificate or authorisation.

Since cancellation on request is at the discretion of the holder of the relevant document, and is not an enforcement action, it is not dealt with in this manual. Questions in relation to cancellation on request should be referred to the Legal Branch of LSD for advice whenever necessary.

Natural justice must be accorded an applicant for a variation to its authorisation. In many circumstances, a variation of an authorisation is in substance a cancellation of the old authorisation and re-issue of a new authorisation on different terms to the old. The procedures set out in this Chapter relating to variation, suspension or cancellation ‘for cause’ generally apply to a refusal to vary an authorisation.

6.17 Variation, Suspension and Cancellation of Civil Aviation Authorisation by a Criminal Court

CAA 30A
CAA 30A empowers a court to exclude a person from undertaking a particular activity authorised by a civil aviation authorisation if that person is convicted of an offence against the CAA or Regulations. Such an ‘exclusion order’ effectively operates as a variation, suspension or cancellation of the authorisation. Where an exclusion order is in effect, CASA cannot issue any authority to the person to undertake the activity subject to the order (refer Chapter 10).

6.17.1 Suspension and Cancellation of Civil Aviation Authorisation Due to Incurring Demerit Points

The suspension or cancellation of a civil aviation authorisation due to its holder accruing demerit points does not involve any decision-making process on the part of CASA—it is automatic by operation of law (refer Chapter 10).

6.17.2 Suspension of Civil Aviation Authorisation for Serious and Imminent Risk to Air Safety

Subdivision B of Division 3A of the CAA authorises CASA to temporarily suspend a civil aviation authorisation where CASA has reason to believe that the holder of the authorisation has engaged in, is engaging in, or is likely to engage in conduct that constitutes, contributes to, or results in a serious and imminent risk to air safety. The process for doing so is set out in Chapter 7.
6.18 Refusal to Re-Issue a Civil Aviation Authorisation

A refusal to grant or issue a civil aviation authorisation is generally not an enforcement action (i.e. it is 'entry control' rather than 'exit control'), and hence is not dealt with in this Manual. However, a person who already holds an authorisation which requires re-issue, and who has not been notified by CASA of any grounds for the variation, suspension or cancellation of that permission, will generally have a legitimate expectation that the authorisation will be re-issued on application (at least if the person is applying for a new authorisation on the same terms as the old).

Where a person has a legitimate expectation that an authorisation will be re-issued, a refusal to re-issue, or a re-issue on different terms, can be likened to a cancellation or variation. In that case, it is generally appropriate for a 'show cause' process to be undertaken (albeit 'show cause why CASA should issue' rather than 'show cause why CASA should not vary, suspend or cancel'). Officers considering refusal to re-issue an authorisation should seek advice from the Legal Branch of LSD. A decision to refuse to issue an authorisation is a 'reviewable decision' under CAA 31 and can, therefore, be reviewed by the AAT.

6.19 Service of Notices

A SCN or a variation, suspension or cancellation notice may be served on a person in one or more of the following ways:

- By handing the notice personally to the person (if the person does not accept the offered notice, it is sufficient to leave the notice on the ground, desk, aircraft wing etc. next to the person)
- By leaving the notice at the person’s place of residence or business last known to CASA with a person who appears to be an occupant of the residence or an employee of the business and who appears to be at least 16 years old
- By mailing the notice by ordinary pre-paid post to the person’s place of residence or business last known to CASA
- By mailing the notice by registered post to the person’s place of residence or business last known to CASA.

However, the SFR (form 316) and the AAC (form 886) set out the preferred procedure for service. Service will be carried out by the Controlling Office Manager. If the procedure set out in the SFR and AAC cannot be followed, the Manager Legal Branch should be contacted.

Officers should avoid serving notices by fax only, although an advance copy of a notice may be sent by fax with the original being served by the methods set out in the SFR and AAC. Where an advance copy of a notice is sent by fax, the transmission report for the fax should be retained on file with a copy of the notice. No notice should be faxed unless a phone call has been made requesting (and receiving) the approval of the person to whom the notice is addressed. Service of notices can become a difficult matter when there is urgency involved. In these instances a process server may be required.
6.20 Follow-up Actions

6.20.1 Annotate EAP

It is the responsibility of the Controlling Office to advise the LSD Enforcement Officer through the Legal mailbox (legal@casa.gov.au) when notices are served so that Alerts can be placed on EAP.

It is also the responsibility of the Controlling Office to advise Industry Permissions/Licensing when a decision has been made so that they can make the necessary entries and vary or cancel permissions/licenses.

It is the responsibility of ALC to advise Industry Permissions of changes to the status of decisions so that they can update EAP.

6.20.2 Preparation for Publication of certain decisions

Where a decision is of a type referred to in paragraph 6.23 it will be the responsibility of the Controlling Office to prepare a short paragraph summarising the reasons for decision and to advise the LSD Enforcement Officer.

It will be the responsibility of the LSD Enforcement Officer to have the wording of the paragraph approved by the Manager Legal Branch prior to arranging for the Webmaster to publish the details of the decision. (See also paragraph 6.23 and Chapter 3 at 3.52 and 3.9).

6.20.3 Notification of Employer of Person Affected

It is often the case that an individual is employed because he or she holds a particular licence, certificate or authority. Where CASA takes action to vary, suspend or cancel that licence, certificate or authority, the person’s employer may be affected. In the normal course of events, it is expected that the individual affected will notify his or her employer as part of the employer-employee relationship. However, there may be cases where the individual does not notify his or her employer, and the employer is likely to continue to use the services of the individual as if no action had been taken by CASA. In circumstances where this would result in unlawful action by the employer or could create a risk to aviation safety, CASA may choose to alert the individual’s employer to its action. This is particularly relevant in circumstances where action is taken against a Chief Pilot or Chief Flying Instructor. Prior to CASA notifying an employer of action taken against an individual’s licence, certificate or authority, the relevant officer should consult with the ALC on the necessity, utility and risks of taking such action.
6.20.4 Reporting of Decisions

The Controlling Office Manager must follow the SFR (form 316) and the AAC (form 886) in advising all relevant personnel. In particular see the last page of the AAC. This notification can be by email advising the parties set out on the last page of the AAC and providing to the LSD Enforcement Officer, through the legal@casa.gov.au mailbox, a short paragraph of the reasons for decision - where applicable - for publication in accordance with paragraph 6.23.

6.21 Automatic Stay of Certain Reviewable Decisions under CAA 31A

At the point that stays come into operation, administrative control of the matter shifts to the Legal Branch, who must keep the Controlling Office advised of the progress of the proceedings.

6.21.1 Application

CAA 31A Certain suspensions/cancellations are automatically stayed under CAA 31A.

CAA 31A applies to a decision under the CAA or Regulations:

- That is reviewable by the AAT

CAA 3 CAA 31A
- In relation to which CASA was required by the Act or regulations to provide a SCN to the holder of the civil aviation authorisation concerned prior to the decision being made (‘civil aviation authorisation’ is defined in CAA 3).

6.21.2 The Effect of CAA 31A

CAA 31A If CAA 31A applies to a decision, the operation of the decision, as set out in the notice to the holder, will be stayed by the force of that section. The stay takes effect as soon as the person is notified of the decision. The stay ceases to have effect at the end of the fifth business day after the holder has been notified by CASA of the decision unless before the end of the fifth day, the holder applies to the AAT for an order under subsection41(2) of the Administrative Appeals Tribunal Act 1975.

If the holder applies to the Tribunal as mentioned in CAA 31A (4), the stay continues to have effect until the Tribunal makes an order under subsection41(2) of the Administrative Appeals Tribunal Act 1975 or decides that no order should be made.

If the holder applies to the Tribunal as mentioned in CAA 31A (4), the holder must give a copy of the application to CASA as soon as practicable after lodging it with the Tribunal.
6.21.2.1 The Definition of ‘business day’, and its Implications

CAA 31A

‘Business day’ for the purposes of CAA 31A means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory.

CAA 31A

Each State and Territory has its own public holiday calendar, and some public holidays in the ACT (e.g. Canberra Day) are not holidays elsewhere. Conversely, some public holidays outside the ACT (e.g. Foundation Day in WA) are not public holidays in the ACT. The outcome in these examples is that the Canberra Day holiday would not count as a business day, but the Foundation Day would still count as a business day, for the purposes of CAA 31A.

CAA 31A

CASA is not obliged by the legislation to explain the content and effect of the definition of ‘business day’ to the holders of authorisations the subject of decisions to which CAA 31A applies. However, given the gravity of a failure to apply within five business days and the relative shortness of that period, the potential effect of impending public holidays should be reviewed and, if applicable, explained to the holder. For example, the letter notifying the holder of the decision could include a statement that:

… The automatic stay of this decision ceases to have effect at the end of the fifth business day after you were notified of the decision, unless in that time you apply to the AAT for an order under subsection 41(2) of the Administrative Appeals Tribunal Act 1975. CASA understands that [specify date] is a public holiday in [specify state/territory in which the holder is situated]. Please note that, on CASA’s understanding of the effect of the definition of ‘business day’ in the Civil Aviation Act, the public holiday on [specify date] in [specify state/territory] will still count as a business day for the purposes of calculating the time in which you can make an application to the AAT staying the decision. …

6.21.3 Process where Holder Applies to the AAT within Five Business Days of Decision

If the holder applies to the AAT for an order under subsection 41(2) of the Administrative Appeals Tribunal Act 1975 within five business days after receipt of notification of the decision, the stay continues to have effect until:

- the Tribunal makes an order under subsection 41(2) of the Administrative Appeals Tribunal Act 1975 or decides that no order should be made.

CAA 31A

If the holder applies for an order under subsection 41(2) of the Administrative Appeals Tribunal Act 1975, the holder must give CASA a copy of the application as soon as practicable after lodging it with the AAT.
6.21.4 When does an Automatic Stay Not Apply?

CAA 31A

An automatic stay under CAA 31A does not apply:

- To a decision that is not reviewable by the AAT

CAA 30DI

- To a decision under CAA 30DI, which relates to a decision to vary suspend or cancel an authorisation within 5 days after the end of a show cause period specified in a SCN issued as a result of a serious and imminent risk to air safety (see Chapter 7).

- To a decision under the regulations to cancel a licence, certificate or authority on the ground that the holder of that licence, certificate or authority has contravened a provision of the CAA or the regulations\(^2\) (including the regulations as in force by virtue of a law of a State); or

- To a decision to vary, suspend or cancel an authorisation that does not require a SCN.

CAA 31A

CAA 31D states that nothing in CAA 31A prevents CASA from suspending a civil aviation authorisation under the serious and imminent risk provisions (see Chapter 7 and sections 30DC and 30DD of the CAA) and CAA 31(1)(d) expressly precludes a suspension under CAA 30DC from those decisions which are reviewable.

CAA 31(1)(e)

CAA 31(1)(e) expressly precludes a suspension or cancellation of a civil aviation authorisation under the Demerit Points Scheme (see Chapter 10).

6.21.5 Stay Ends if Application is Withdrawn

CAA 31B

If the holder withdraws the application to the AAT under CAA 31B, the stay ceases to have effect from the time of the withdrawal.

CAA 31B requires the holder to advise CASA of the withdrawal as soon as practicable.

6.21.6 Tribunal’s Ordinary Powers Not Affected

CAA 31C

CAA 31C expressly states that CAA 31A does not affect the operation of CAA 31(2).

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\(^2\) Note that under CAR 269 (1A), CASA may only vary, suspend or cancel a licence, certificate or authority subject to that regulation on the grounds of breach of law if the holder of the licence etc. has been convicted by a court of, or found by a court to have committed, the offence.
6.21.7  Provision of summary of CAA 31A

The delegate making an administrative decision which is reviewable by the AAT, where prior to the making of a decision CASA was required by the CAA or regulations to give a SCN to the holder, must ensure that a summary of CAA 31A is set out with details of the holder's appeal rights attached to his decision - see Form 321. This is a statutory requirement in relation to CAA 28BA (5).

Note that it is the referring manager who will serve the decision – see SFR (form 316) and AAC (form 886).

6.22  Review Process

In most circumstances, a delegate’s action may be reviewed by the Administrative Appeals Tribunal (AAT) under the Administrative Appeals Tribunal Act 1975. This is a review of the decision on the merits of the case, or ‘merits review’. What this means is that the AAT decides what the better or preferable decision in the circumstances is. The AAT’s jurisdiction in relation to decisions of CASA is set out in CAA 31, CAR 297A, and CASRs 67.141, 139.036 and 201.004. An amendment to CAA 31 has removed from the definition of reviewable decisions, a suspension of an authorisation in relation to serious and imminent risk (CAA 30DC) and an ‘automatic’ suspension or cancellation of an authorisation under the Demerit Points Scheme (see CAA 31(1)(d) and (e)).

Additionally, a person may institute proceedings in the Federal Court for review of the legality of a delegate’s decision under the Administrative Decisions (Judicial Review) Act 1977 or section 39B of the Judiciary Act 1903. Under this process the court only looks at whether the decision was made in accordance with the law—generally, whether there were any legal defects in the process for making the decision—without considering whether the decision was the better or preferable decision in the circumstances. Review by the Federal Court is called ‘judicial review’. All administrative decisions by CASA under the aviation law are subject to judicial review.

Further, the Federal Court will hear any application by CASA to extend the period of suspension of a civil aviation authorisation for serious and imminent risk to safety beyond five business days.

A person may also complain to the Commonwealth Ombudsman about a delegate’s actions.

For further information on this see Appendix 2 to the Manual 'The Legal Basis of Regulatory Enforcement'.
6.23 Publication

CASA will publish, on its external website, its decisions to suspend or cancel authorisations where the authorisation is normally held by a corporate entity (even if the authorisation is in fact in the name of an individual) - such as an AOC or Certificate of Approval.

The publication will be made as soon as practicable, but no later than 5 working days, after the date that the decision is made. The ‘date of the decision’ for these purposes, is the date appearing on the notice of decision.

Publication will include:

- The name of the authorisation holder only
- The date of the decision
- The type of authorisation against which action has been taken
- The type of action taken
- A summary of the decision with the reasons for that decision
- Whether the decision is subject to an automatic stay

The entry will be displayed on the website for the current financial year in which the decision is made. Thereafter, it will be archived on the website by financial year.

As decisions may be reviewed by the Administrative Appeals Tribunal or the Federal Court the website will only reflect the action taken by CASA not the ultimate outcome.
7.1 Contents of this Chapter

This Chapter contains the following sections:

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

7.2 Purpose

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

7.3 Introduction

Section 30DB of the Act states that:

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

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

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

The flowchart – Coordinated Enforcement Process D, should be followed and the Serious and Imminent Risk Checklist (form 342) used.
7.4 What is an Imminent Risk?

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

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

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

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

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

7.5 What is a Serious Risk to Air Safety?

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

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

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

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

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

7.6 Suspension Process

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

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

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

Because of the urgency and importance of such action the Executive Manager Legal Services Division (LSD) must be kept advised of all steps taken as part of the Serious and Imminent Risk enforcement process.
Section 30DC of the Act gives CASA power to suspend a civil aviation authorisation (without issuing a show cause notice) where CASA has reason to believe that the civil aviation authorisation holder has engaged in, is engaged in or is likely to engage in conduct that contravenes section 30DB (see CAA 30DC).

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

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

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

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

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

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

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

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

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

7.6.3 Application and Affidavits

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

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

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

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

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

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

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

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

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

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

### 7.6.4 CASA May Suspend Despite Other Processes

CASA 30DD

Section 30DD of the Act provides as follows:

CAA 30DC

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

CAA 30DC

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

CAA 30DC

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

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

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

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

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

It is also important to understand and be ready to deal with the implications of the definition of “business day” for the purposes of section 30DE: “business day” means a day that is not a Saturday, a Sunday or a public holiday in the Australian Capital Territory—see section 3(1) of the Act. Thus a public holiday in the State or Territory in which the holder is located may still be a “business day” for the purposes of section30DE.

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

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

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

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

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

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

See below (extract from section 30DF):

<table>
<thead>
<tr>
<th>Item</th>
<th>If...</th>
<th>the order continues in force until...</th>
</tr>
</thead>
</table>
| 1    | the holder applies to shorten the period and CASA does not apply to extend it | the earlier of:  
|      |       | (a) the last day of the original period; and  
|      |       | (b) if the Court grants the application—the day determined by the Court in granting the application. |
| 2    | CASA applies to extend the period of the order and the holder does not apply to shorten it | whichever of the following applies:  
|      |       | (a) if the Court grants CASA’s application—the day determined by the Court in granting the application;  
|      |       | (b) if the Court refuses CASA’s application before the end of the original period—the end of the original period;  
|      |       | (c) if the Court refuses CASA’s application after the end of the original period and before the 28th day after the end of the original period—the day of the refusal;  
|      |       | (d) otherwise—the 28th day after the end of the original period. |
| 3    | the Court hears applications from both parties together under subsection (5) | whichever of the following applies:  
|      |       | (a) if the Court grants one of the applications—the day determined by the Court in granting the application;  
|      |       | (b) if the Court refuses both applications before the end of the original period—the end of the original period;  
|      |       | (c) if the Court refuses the extension application after the end of the original period and before the 28th day after the end of the original period—the day of the refusal;  
|      |       | (d) Otherwise—the 28th day after the end of the original period. |
7.9 CASA Must Investigate

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

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

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

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

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

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

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

The show cause process under these provisions should follow the same procedures as set out in paragraphs 6.6 and 6.7. Because the holder will have already had procedural fairness through the Federal Court process and because of the limited time-frame, a show cause conference will not normally be offered and no attachment inviting the party to a show cause conference will be provided with the SCN in a serious and imminent risk situation. If the holder requests a show cause conference then form 312 should be provided. This is similar to the normal attachment but explains that the conference needs to be held within 20 days of the notice and that the holder understands that this may be before the holder has tendered a written response to the show cause. This cannot be avoided as the 28-day show cause period, provided for under the legislation, cannot be extended and the decision- maker needs time to consider all the facts before making a decision.
While at the time of publication of version 4.2 of the Enforcement Manual the Director, has delegated the power to issue a show cause notice, under section 30DH of the Act, to the Deputy Director of Aviation Safety and the Associate Director of Aviation Safety and to relevant Executive Managers\(^1\), delegations must always be confirmed before a show cause notice is issued under this provision of the Act.

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

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

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

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

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

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\(^1\) Executive Manager, Airspace and Aerodrome Regulation Division, Executive Manager, Operations Division, Executive Manager, Industry Permissions Division and Executive Manager, Standards Division
7.12 When Does a Suspension under Section 30DC End?

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

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

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

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

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

This Chapter contains the following sections:

8.2 Purpose
8.3 What is an Infringement Notice?
8.4 Decision-making Considerations
8.5 Form of Recommendation for Infringement Notice
8.6 Form of Infringement Notice
8.7 Service of Infringement Notices
8.8 Register of Infringement Notices
8.9 Withdrawal of Infringement Notices
8.10 Payment of an Administrative Fine
8.11 Responsibilities.

8.2 Purpose

The purpose of this Chapter is to explain the meaning of Infringement Notices, when they are issued and the procedures involved.

8.3 What is an Infringement Notice?

Infringement Notices referred to as Aviation Infringement Notices (AINs) are another enforcement tool. They impose administrative fines and can be issued in relation to all offences under the Regulations. They are a cheaper and quicker alternative to prosecution but still require the same level of evidentiary proof i.e. the criminal standard of ‘beyond reasonable doubt’. To maintain a consistent approach with the Demerit Points Scheme they should generally only be issued by CASA where there is a breach of a strict liability offence. 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 CDPP for prosecution.

CAR 296A

The level of the administrative fine depends upon the gravity of the offence as determined by the maximum penalty that a court may impose. Regulation 296A of the Civil Aviation Regulations 1988 (CAR) lays down penalties as follows:

- If the maximum penalty for the offence is 5 or 10 penalty units – an administrative fine of 1 penalty unit ($170)
8. Infringement Notices – (Administrative Fines)

- If the maximum penalty for the offence is 15, 20 or 25 penalty units – an administrative fine of 3 penalty units ($510)
- If the maximum penalty for the offence is more than 25 penalty units – an administrative fine of 5 penalty units ($850).

The value of penalty units is set out in section 4AA of the Crimes Act 1914.

See the following comparative table of penalties:

<table>
<thead>
<tr>
<th>MAXIMUM PENALTY SET OUT IN CARs &amp; CASRs</th>
<th>MAXIMUM PENALTY UNDER THE INFRINGEMENT NOTICE SCHEME</th>
<th>MAXIMUM FINE A COURT COULD IMPOSE</th>
<th>DEMERIT POINTS INCURRED AGAINST CLASS OF AUTHORISATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 penalty units</td>
<td>$170 (1 penalty unit)</td>
<td>$850 (5 penalty units)</td>
<td>1 demerit point</td>
</tr>
<tr>
<td>10 penalty units</td>
<td>$170 (1 penalty unit)</td>
<td>$1700 (10 penalty units)</td>
<td>1 demerit point</td>
</tr>
<tr>
<td>15 penalty units</td>
<td>$510 (3 penalty units)</td>
<td>$2550 (15 penalty units)</td>
<td>2 demerit points</td>
</tr>
<tr>
<td>20 penalty units</td>
<td>$510 (3 penalty units)</td>
<td>$3400 (20 penalty units)</td>
<td>2 demerit points</td>
</tr>
<tr>
<td>25 penalty units</td>
<td>$510 (3 penalty units)</td>
<td>$4250 (25 penalty units)</td>
<td>2 demerit points</td>
</tr>
<tr>
<td>30 penalty units</td>
<td>$850 (5 penalty units)</td>
<td>$5100 (30 penalty units)</td>
<td>3 demerit points</td>
</tr>
<tr>
<td>50 penalty units</td>
<td>$850 (5 penalty units)</td>
<td>$8500 (50 penalty units)</td>
<td>3 demerit points</td>
</tr>
</tbody>
</table>

8.4 Decision-making Considerations

CAR 296B

An AIN may be issued where an authorised person has reason to believe that a person has committed an offence under the regulations (see CAR 296B). The Manager, Investigations is currently the only person authorised to issue such notices.

The first step in relation to the decision to issue an AIN is a Coordinated Enforcement Meeting. As a consequence of this meeting it will be determined whether AINs or some other form of enforcement is appropriate. If the Manager, Investigations has reason to believe on the evidence provided that an AIN is appropriate then the information contained in the completed Coordinated Enforcement Referral Form (Form 812) will provide the factual basis for the issuing of the AIN. While it is the authorised person who will make the decision on issuing the AIN there are certain general considerations that must be borne in mind when making a recommendation.
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 Informal Enforcement Action
- Where the offence has **not** been committed due to lack of skill or error 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 of the offence.

**Inappropriate** situations for the issue of AINs:

- Where the offence is against the Act
- Where there was a serious risk to safety
- Where the offence was intentional or formed a pattern of breaches
- Where penalty would be inadequate in relation to the nature and or gravity of the offence
- Where it would not provide sufficient deterrent.

It may also be considered that the breach/breaches which have led to the decision to issue an AIN need to be addressed in some additional manner. The AIN will usually address some specific regulatory breach/breaches but there will be times when counselling or administrative action will address other parts of the non-compliance. It is essential that where this is to happen that the offender is made aware that this is CASA’s intention so that there can be no misunderstanding.

Ultimately the authorised person will need to consider whether a Part IIIA Investigator should be tasked to investigate the matter further and whether a prima facie case exists.

### 8.5 Form of Infringement Notice

**CAR 296E**

The AIN is required by CAR 296E to include certain information. The AIN document must comply with the requirements of the Regulation including the requirement to pay the penalty within 28 days.
8.6 Service of Infringement Notices

CAR 296D
Service must be accomplished properly, as ineffective service can lead to difficulty in pursuing the matter in court. CAR 296D sets out the procedures for service. AINs are served by an authorised person, currently the Manager, Investigations.

8.7 Register of Infringement Notices

CAA 30EG to CAA 30EJ
The Investigations Branch maintains a Register of Infringement Notices. It is cross-referenced to the Demerit Points Register (see Chapter 10), which CASA is required to maintain along with other relevant information under sections 30EG to 30EJ of the Act.

8.8 Withdrawal of Infringement Notices

CAR 296C
CAR 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.

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

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

8.8.1 Service of Withdrawal Notices

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

8.8.2 Withdrawal of Infringement Notice Following Payment of Prescribed Penalty

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 8.9 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 a Notice 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; or

- 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.

### 8.9 Payment of an Administrative Fine

#### 8.9.1 Time for Payment

A person served with an AIN, unless they elect to have the matter heard before a court, must pay to CASA the prescribed penalty within 28 days of being served with the AIN. Where a cheque is offered to CASA to pay the prescribed penalty, payment is taken not to have been made unless and until the cheque is honoured— CAR 296I.

#### 8.9.2 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).

#### 8.9.3 Part Payments and Instalments

CASA is not expressly empowered by the regulations to accept part-payments or payments by instalments of a prescribed penalty. A person cannot take advantage of the provisions of paragraphs 296F(d), (e) and (f) (refer to section 8.10.4), unless and until the prescribed penalty has been paid in full within the time permitted for full payment. However, even if a person only makes a part-payment, this will still incur demerit points as if the full payment had been made (refer Chapter 10 and section 30DW of the Act).

Where a person served with an AIN requests permission to make payment by instalments, that request should normally be denied, although consideration can be given to extending the period in which the person has time to pay.
8.9.4 Consequences of Payment within the Time Permitted

CAR 296F  If payment is made within the time permitted or any extension of that time and the notice has not been withdrawn (refer to CAR 296F):

- Criminal liability for the offence is discharged
- Further criminal proceedings cannot be taken in relation to that offence
- There is no conviction

CAA 30DW  Demerit points will accrue against the appropriate class of authorisation (refer to section 30DW of the Act and Chapter 10).

8.9.5 Consequences of Payment after the 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

CAA 30DW  Demerit points will accrue (refer to section 30DW of the Act and Chapter 10 only if the person is convicted or found guilty of the offence.

8.10 Responsibilities

The Manager, Investigations will advise the Controlling Office Manager and the LSD Enforcement Officer through the Enforcement Policy and Practice Outlook mailbox when payment has been made. This may properly be done by the Investigations Branch officer responsible for preparing the AIN noting this payment on the Enforcement Action Register. If payment has not been made, then Investigations Branch may carry out a Part IIIA investigation where appropriate and may refer the matter to the CDPP This non-payment and further action must be noted on the Enforcement Action Register.
9.1 Contents of this Chapter

This Chapter contains the following sections:

9.2 Purpose
9.3 What is the Aviation Self Reporting Scheme?
9.4 Administration of the Scheme
9.5 How the Scheme Works
9.6 Decision-Making Considerations
9.7 Other Relevant Information on the Scheme.

9.2 Purpose

The purpose of this Chapter is to explain the Aviation Self Reporting Scheme (ASRS) and the responsibilities of CASA in relation to that scheme.

9.3 What is the Aviation Self Reporting Scheme?

Division 3C of Part 2 of the Act 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 Civil Aviation Safety Regulations 1998 (CASR).

The ASRS provides the holder of an authorisation (the holder) with protection from administrative action, or from paying an Infringement Notice (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 time-frame set out at 9.5.3.

It is important to note that the ultimate decision as to whether a matter reported under the ASRS is, on the facts available to CASA, a reportable contravention, will be a decision to be made by 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 form part of that administrative action.

This protection is only available once every five years.

The protection of the ASRS is available to the holder of an authorisation subject to the limitations set out in paragraph 9.5 below.

CASR 13.335
The other purposes of the ASRS are set out in CASR 13.335. They are:

- To strengthen the foundation of aviation human factors safety research
- To identify deficiencies and problems in the Australian aviation safety system
- To provide data for planning and improvements to the Australian aviation safety system.

9.4 Administration of the Scheme

The Executive Director of Transport Safety Investigation in the Australian Transport Safety Bureau (ATSB) administers the ASRS.

9.5 How the Scheme Works

The holder can claim the protection of the ASRS only once every five years; subject to the limitations contained in the Act and CASR (refer to Division 3C of Part 2 of the Act and Division 13.K.1 of the CASR).
9.5.1 Limitation as to Type of Contravention

CAA 30DL

The contravention must be a reportable contravention, which is defined in section 30DL of the Act as a contravention of the CARs or CASRs but must not be:

- A contravention that is deliberate
- A contravention that is fraudulent
- A contravention that causes or contributes to an accident or to a serious incident (whether before or after the contravention is reported) or
- A contravention prescribed under the regulations being currently:
  
  - CAR 282
  - CAR 298A
  - CAR 298B
  - CAR 298C
  - CAR 301
  - CAR 302
  - CAR 305(1A).

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.

9.5.2 Limitation as to Timing of Report

CASR 13.345

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 CASR 13.345.

CAA 30DO

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

- Has been given a show cause notice for the proposed decision; or
- Has been served with an AIN.
9. Voluntary Reporting – Aviation Self Reporting Scheme

9.5.3 Limitation as to Time of Production of Receipt

Pursuant to section 30DP of the Act, the holder of an authorisation, seeking the protection of the ASRS, must produce to CASA a receipt from the prescribed person that 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 show cause notice has been served on the holder – before CASA varies, suspends or cancels the authorisation; or
- If an infringement notice has been served on the holder – before the due date for payment specified in the infringement notice.

9.5.4 Aviation Self Reporting Scheme Register

An ASRS Register is maintained by the Investigations Branch of the Legal Services Division under the direction of the Manager, Investigations (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 Administrative Action or from an AIN this will be cross-referenced on the Infringement Notice Register, the Demerit Points Register and noted on the Enforcement Action Register.
9.6 Decision-Making Considerations

If the holder produces a receipt from the Executive Director of Transport Safety Investigation to an officer of CASA, the officer should notify their regional/airline or other appropriate manager and no action should be taken in relation to any show cause 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 Coordinated Enforcement meeting 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 Demerit Points, Infringement Notice and Enforcement Action Registers 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 show cause, 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.

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.

or

- 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.

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 Coordinated Enforcement Meeting 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 letter to the referring manager.
9.7 Other Relevant Information about the Scheme

9.7.1 Form of Reports and Processing Procedures

CASR 13.345 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 Transport Safety Investigation Act 2003; or
- Any other provision of the Regulations relating to the reporting of defects or service difficulties on aircraft or aeronautical products.

CASR 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 CASR 13.355.

9.7.2 Use of Information in Criminal Proceedings

CAA 30DR 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.
10.1 Contents of this Chapter

This Chapter contains the following sections:

10.2 Purpose
10.3 What Is the Demerit Points Scheme?
10.4 How Does the Scheme work?
10.5 Consequences of Incurring Demerit Points
10.6 Expiry of Demerit Points
10.7 Reinstatement of Authorisations
10.8 First-Time and Second-Time Demerit Suspension Notices
10.9 Demerit Cancellation Notice
10.10 Demerit Points Register
10.11 Responsibilities
10.12 Other Relevant Information
10.13 Comparative Table of Penalties.

10.2 Purpose

The purpose of this Chapter is to explain the Demerit Points Scheme and how it operates.

10.3 What Is the Demerit Points Scheme?

The Demerit Points Scheme (the Scheme) is a system set up under Division 3 of the Civil Aviation Act 1988 (CAA) and provides a staged approach for dealing with a civil aviation authorisation holder (holder) who has multiple, 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 Civil Aviation Safety Regulations 1998 (CASR) 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 and the Civil Aviation Regulations 1988 (CAR) —see CASR 13.370.
10.4 How Does the Scheme Work?

CAA 30DW

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

1. If CASA serves the holder with an infringement notice (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 CDPP 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 CAA 30DX).

Demerit points are also 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 CAA 30DX (2) and (3).

Table 13.375 of the CASRs, reproduced below, sets out the classes of civil aviation authorisations. For the purposes of CAA 30DU 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:
## 10. The Demerit Points Scheme

<table>
<thead>
<tr>
<th>COLUMN 1</th>
<th>COLUMN 2</th>
<th>COLUMN 3</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Item</strong></td>
<td><strong>Particular Civil Aviation Authorisations</strong></td>
<td><strong>Class of Civil Aviation Authorisation</strong></td>
</tr>
<tr>
<td>CAA 27</td>
<td>1 a certificate issued under section 27 of the Act</td>
<td>Air operator certificate</td>
</tr>
<tr>
<td>CASR Part 47</td>
<td>2 a certificate issued under Part 47 of CASR</td>
<td>Certificate of registration</td>
</tr>
<tr>
<td>CAR 30</td>
<td>3 a certificate issued under regulation 30 of CAR</td>
<td>Certificate of approval</td>
</tr>
<tr>
<td>CASR Part 66</td>
<td>4 an aircraft engineer licence</td>
<td>Authorisation to perform maintenance certification and issue certificate of release to service</td>
</tr>
<tr>
<td>CAR 21, CAR 33B, CAR 33C</td>
<td>4A an authority mentioned in regulation 33B or 33C of CAR</td>
<td>Maintenance authority</td>
</tr>
<tr>
<td>CAR 5.08 (b)</td>
<td>5 a licence referred to in paragraph 5.08(b) of CAR</td>
<td>Flight radiotelephone licence</td>
</tr>
<tr>
<td>CAR 5.08 (a), CASR Part 61</td>
<td>6 a licence referred to in paragraph 5.08(a) of CAR or a pilot licence</td>
<td>Pilot licence</td>
</tr>
<tr>
<td>CASR Subpart 61.V</td>
<td>7 a flight engineer licence</td>
<td>Flight engineer licence</td>
</tr>
<tr>
<td>CAR Part 6, CASR Part 67</td>
<td>8 a certificate issued under Part 6 of CAR or Part 67 of CASR</td>
<td>Medical certificate</td>
</tr>
<tr>
<td>CASR Part 65</td>
<td>9 A licence or authorisation issued under Part 65 of CASR</td>
<td>Air traffic control licence</td>
</tr>
<tr>
<td>CASR Subpart 101.F</td>
<td>10 A certificate issued under Subpart 101.F of CASR</td>
<td>UAV certificate</td>
</tr>
<tr>
<td>CASR Subpart 139.B</td>
<td>11 (a) a certificate issued under Subpart 139.B of CASR (b) a registration granted under Subpart 139.C of CASR</td>
<td>Aerodrome certificate</td>
</tr>
<tr>
<td>CASR Subpart 139.H</td>
<td>12 an approval granted under Subpart 139.H of CASR</td>
<td>ARFFS approval</td>
</tr>
<tr>
<td>CASR 141.035, CASR 142.040</td>
<td>12A An approval granted under regulation 141.035 or 142.040</td>
<td>Flying training authorisation</td>
</tr>
<tr>
<td>CASR 141.060, CASR 142.110</td>
<td>12B a certificate issued under regulation 141.060 or 142.110</td>
<td>Flying training authorisation</td>
</tr>
<tr>
<td>CASR Part 143, CASR Part 172</td>
<td>13 An approval granted under Part 143 or 172 of CASR</td>
<td>ATS approval</td>
</tr>
</tbody>
</table>
10. The Demerit Points Scheme

10.5 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 10.13.

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.

*Table – Showing the Method of Calculating Penalty*

<table>
<thead>
<tr>
<th>Accrual Period</th>
<th>Number of Demerit Points</th>
<th>Action by CASA</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 years (ending on the date of the current prescribed offence)</td>
<td>At least 12</td>
<td>First-time Demerit Suspension Notice</td>
<td>12-15 points = 90 days suspension of all authorisations of the same class</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>16-19 points = 120 days suspension of all authorisations of the same class</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Over 19 points = 150 days suspension of all authorisations of the same class and 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.</td>
</tr>
</tbody>
</table>
10.6 Expiry of Demerit Points

All demerit points, which accrued and were 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 CAA 30EE).
10.7 Reinstatement of Authorisations

Under CAA 30EF, 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 be 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 Legal Services.

10.8 First-Time and Second-Time Demerit Suspension Notices

As can be seen from the table at 10.5 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.

10.8.1 First-Time Demerit Suspension Notice – where 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 CAA 30DY).

10.8.2 Second-Time Demerit Suspension Notice - where 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 CAA 30DZ).
10.8.3 Form of Demerit Suspension Notices

CAA 30EA requires the notice to have the following details:

- The 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.

(See form 328 and form 329.)

10.9 Demerit Cancellation Notice

As can be seen from the table at paragraph 10.5 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.

10.9.1 Demerit Cancellation Notice - where 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 CAA 30EC).
10.9.2 Form of Demerit Cancellation Notice

CAA 30ED 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. (As at 30 June 2004, the regulations do not require any other information to be included.)

(See form 330.)

10.10 Demerit Points Register

In administering the Demerit Points 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 by the Investigations Branch, Legal Services Division and has been drafted to comply with the legislation. It also links with the Infringement Notice Register (see Chapter 8.)

CASA must also:

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

| Manager, Investigations | • Oversees the Demerit Point Scheme and reports statistics and anomalies to management.  
| | • Records the demerit points in the demerit points register even if the person does not hold that specific authorisation at the time the points were incurred. (See CAA 30EG and CAA 30EI)  
| | • Corrects mistakes, errors or omissions as advised  
| | • Removes expired points from the register (see CAA 30EJ)  
| | • Produces reports for the Executive Manager, Legal Services Division  
| | • Advises relevant managers when required  
| | • Provides details of any prosecutions of offences under the regulations.  
| Investigators | • Provide notification of any prosecutions of strict liability regulatory breaches to the Manager, Investigations.  

10.12 Other Relevant Information

10.12.1 Suspension Period Not 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. CAA 30EB does not allow the suspension to be served concurrently. Any days which are the subject of the Notice will be added to the period being served under those other provisions.

‘Section 30EB

A day is not counted for the purposes of a suspension period that applies to a holder’s civil aviation authorisation under this Division if:

(a) on that day, a suspension of the authorisation has effect under another provision of this Act or the regulations; or

(b) the day is a day prescribed by the regulations for the purposes of this section.

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.’
10.12.2 Other Regulations

CAA 30DV sets out the implications of other regulations on the Demerit Points Scheme.

‘Section 30DV
If:

(a) a civil aviation authorisation is cancelled; and
(b) if the authorisation had not been cancelled, a subsequent suspension or cancellation under this Division would have had effect in relation to the authorisation; and
(c) the cancellation mentioned in paragraph (a) is later set aside by the Administrative Appeals Tribunal;

the regulations may provide that the subsequent suspension or cancellation under this Division has effect in accordance with the regulations.’

CASR 13.380 For the purpose of CAA 30DV, the regulation is CASR 13.380, which relevantly provides that:

‘…the subsequent suspension or cancellation has effect, in relation to the civil aviation authorisation, on the day immediately following the day when the Administrative Appeals Tribunal set aside the earlier cancellation.’
### 10.13 Comparative Table of Penalties

<table>
<thead>
<tr>
<th>Maximum Penalty set out in CARs &amp; CASRs</th>
<th>Maximum Penalty under the Infringement Notice Scheme</th>
<th>Maximum Fine a Court Could Impose</th>
<th>Demerit Points Incurred Against Class of Authorisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 penalty units</td>
<td>$170 (1 penalty unit)</td>
<td>$850 (5 penalty units)</td>
<td>1 demerit point</td>
</tr>
<tr>
<td>10 penalty units</td>
<td>$170 (1 penalty unit)</td>
<td>$1700 (10 penalty units)</td>
<td>1 demerit point</td>
</tr>
<tr>
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</tr>
<tr>
<td>50 penalty units</td>
<td>$850 (5 penalty units)</td>
<td>$8500 (50 penalty units)</td>
<td>3 demerit points</td>
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</table>
11.1 Contents of this Chapter

This Chapter contains the following sections:

11.2 Purpose
11.3 Introduction
11.4 Responsibilities
11.5 Procedures Relating to Prosecution and possible referral to the CDPP.

11.2 Purpose

The purpose of this Chapter is to explain the process of referral of matters to the Commonwealth Director of Public Prosecutions (CDPP), the use of prosecution as an enforcement tool, the responsibilities of CASA and its officers in relation to such referrals and the procedures to be taken when such action is being considered.

11.3 Introduction

The Act and the regulations are Commonwealth laws. The responsibility for initiating, continuing or discontinuing prosecution of such laws rests with the CDPP.

It is important for all officers to recognise the role that is played by the CDPP in the criminal enforcement of all Commonwealth laws, including the Act and the regulations. While CASA is responsible for investigating offences against the Act and the regulations, the function of prosecuting offences rests with 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.

While the Prosecution Policy of the Commonwealth (PPC) provides discretion as to what matters an agency investigates, the PPC requires that where an investigation discloses sufficient evidence of a serious offence, that the CDPP must be consulted.

Where CASA considers that the public interest does not warrant prosecution or that some other action is appropriate, the CDPP has advised that it must still be consulted in relation to matters of real gravity. In deciding whether a prosecution should be instituted or continued the CDPP will consider carefully any views of CASA. However, the final decision on whether to prosecute or not rests with the CDPP. (See the flowchart Coordinated Enforcement Process F.)

CASA’s primary role in the prosecution process is to collect evidence for consideration by the CDPP and to monitor and provide assistance during the conduct of the prosecution. It is particularly important that this role be carried out in a thorough and impartial manner by all concerned so that the CDPP office is able to fulfil its function of bringing all relevant evidence before the court.
The Manager, Investigations may also discuss with the CDPP what alternative action has been considered or taken by CASA (e.g. AINs, Serious and Imminent Risk action, CAR 265 suspension or administrative action). This will usually appear in the brief but depending on timing of the actions may not be included. The CDPP needs to have all this information available to understand the approach which CASA may have taken, or which CASA proposes to take, as this may impact on the CDPP’s consideration of the public interest of pursuing prosecution.

11.3.1 Regulation 296

In accordance with CAR 296, a prosecution in respect of an offence against the Civil Aviation 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.

11.4 Responsibilities

11.4.1 The Inspector

The Inspector is usually responsible for the initial discovery of a possible breach. The evidence collected during the early stages of an investigation can be vitally important in determining whether a prosecution action will be successful. Inspectors must be aware of the correct procedures and methods to be observed when gathering evidence. (See Chapter 13).

11.4.2 The Controlling Office Manager

Where the Controlling Office Manager considers that an initial investigation by his or her officers (usually inspectors in the field), may involve enforcement action, that manager is responsible for initiating the Coordinated Enforcement Process (CEP). (See particularly Chapter 2 and 3 in relation to this process and the flowchart Coordinated Enforcement Process A.)
11.4.3 The Investigator

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.)

11.4.4 The Manager, Investigations

The Manager, Investigations is, under the Executive Manager Legal Services, responsible for decisions as to what matters are referred to the CDPP. In making this decision the Manager, Investigations must act in accordance with the Prosecution Policy of the Commonwealth and any agreement between CASA and the CDPP regarding referral of matters 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 Legal Services Division are proposing to make contact with the CDPP, or have been approached by the CDPP, they should do so through the Manager, Investigations.

11.4.5 The Commonwealth Director of Public Prosecutions

The CDPP is responsible for conducting all prosecutions for alleged offences against Commonwealth laws. It will decide, in accordance with the Prosecution Policy of the Commonwealth, whether a prosecution will proceed, what charges will be laid and the appropriate court in which to proceed. All contact with, and from, the CDPP will generally be through the investigator. However, as necessary, the Executive Manager Legal Services, the Senior Adviser Enforcement Policy and Practice (Senior Adviser EPP) and the Manager Investigations may contact the CDPP in relation to any particular prosecution matter or matters of prosecution generally.

11.5 Procedures Relating to Investigation and Possible Referral to the CDPP

11.5.1 Procedures

11.5.1.1 Initial steps

When an officer detects a possible breach of the Act or regulations, which may constitute an offence, the officer should record all of the appropriate details, in writing, as soon as possible after detection of the breach.

The officer should report the matter to the officer’s manager, together with all available evidence.
If the relevant manager considers that there may be evidence of a breach then the first action to be taken is initiation of the CEP (see Chapters 2 and 3). Once it is decided at a Coordinated Enforcement Meeting (CEM) that investigation by a Part IIIA Investigator is appropriate, the tasked Investigator will conduct an investigation to provide the Manager, Investigations with a report and recommendations in accordance with the procedures set out in the *Investigators Manual* which incorporates the Australian Government Investigations Standards.

Investigations may take some months to complete depending on their complexity. Investigations Branch will keep the Manager, Investigations, the Controlling Office Manager and the LSD Enforcement Officer, through the Enforcement Policy and Practice Outlook mailbox, informed of the progress of any investigation by making regular updates on the Enforcement Action Register. This is important as extreme delays in an investigation may necessitate a further CEM to consider the safety aspects of the matter and whether some further/alternative action is also required. (See also the flowcharts Coordinated Enforcement Process B and Coordinated Enforcement Process F).

Once the Investigator’s report is complete it will be forwarded to the Manager, Investigations for consideration. After discussion of the report and its recommendation within the Investigations Branch, the report will be forwarded to the Controlling Office Manager, Manager Legal Branch and the LSD Enforcement Officer through the Enforcement Policy and Practice Mailbox. The matter will be added to the agenda for discussion at a CEM (where regular meetings have been pre-arranged). Where the Controlling Office does not have a regular meeting pre-arranged, the Controlling Office will contact the LSD Enforcement Officer, through the Enforcement Policy and Practice Outlook mailbox, to arrange a meeting to discuss the report. If the report does not provide evidence of a *prima facie* case or if there are circumstances disclosed by the investigation that would lead to the Investigator not recommending the matter for referral to the CDPP, alternative action will be discussed at the CEM.

If a *prima facie* case exists and prosecution is considered, a Brief of Evidence will be compiled and submitted in accordance with the procedures set down in the *Investigators Manual*. Alternatively, on consideration of the Investigator’s report, the Manager, Investigations may decide that the issue of an AIN is a more appropriate penalty. This will also be discussed as part of the CEP.

11.5.1.2 *The Public Interest*

Even when a *prima facie* case can be mounted, the CDPP may decide not to prosecute because to do so would be contrary to the public interest. CASA officers should, therefore, be mindful of the following factors which, among others, the CDPP will consider when deciding whether to prosecute:

- 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.

While the Prosecution Policy of the Commonwealth sets out in broad terms what matters should be referred to the CDPP, the CDPP will also consider any input by CASA as the referring agency, in relation to other action taken by CASA in relation to the breach and any other matter that goes to the issue of public interest in pursuing the matter by way of prosecution.

11.5.2 Reporting

The Manager, Investigations makes entries on EAP, on the ASIS database and on the Enforcement Action Register on the Enforcement Action eRooms.
12.1 Contents of this Chapter

This Chapter contains the following sections:

12.2 Purpose

12.3 General Principles

12.4 Statutory Provisions Relating to Access

12.5 Access under CAR 305 – General Principles

12.6 Procedures Relating to Access Under CAR 305

12.7 Access under Division 173.E.5 of the CASRs – Authorised Inspectors.

12.2 Purpose

The purpose of this Chapter is to explain when access is available to CASA, the statutory support for that access and procedures for inspectors when seeking access.

12.3 General Principles

In conducting safety regulation of civil aviation, inspectors may, from time to time, be required to have access to aircraft, aerodromes, premises or documents. However, Inspectors have no general right of access under common law simply because they happen to be Commonwealth officials. Any right of access must be conferred by legislation.

The Act and the regulations contain some provisions that confer statutory power on officers enabling them to have access to aircraft, aerodromes, premises and documents.

Whenever officers wish to gain access under these provisions, they must ensure that they comply with any statutory restrictions or limitations that are imposed by the relevant provision.
12.4 Statutory Provisions Relating to Access

The relevant statutory provisions are:

- **CAR 30(4)**, which, among other things, authorises access to inspect processes and systems of certificate of approval holders and inspection of aircraft to determine whether the activities to which the certificate relates are being carried out in a satisfactory manner.

- **CAR 33(2)**, which authorises inspection of aircraft or aircraft components to assess the competence and diligence of a LAME or airworthiness authority holder.

- **CAR 50D**, which authorises inspection of aircraft maintenance records.

- **CAR 53**, which empowers CASA to require the production of documents and other things required in the investigation of defects.

- **CAR 227(3)**, which authorises entry to crew compartments.

- **CAR 262(1)**, which empowers CASA to authorise CASA officers to carry out inspections or examine aircraft or related equipment and the ground organisation provided by an operator for use by aircraft.

- **CAR 262(2)**, which requires operators to provide accommodation on aircraft in certain circumstances.

- **CAR 288**, which authorises the detention of aircraft where aircraft may be flown in contravention of the regulations or in circumstances which could cause danger.

- **CAR 302**, which empowers the Authority to require the production of licences issued under the regulations and documents relating to an aircraft.

- **CAR 305**, which is a general access provision authorising access to aircraft, aerodromes, premises and documents for regulatory purposes.

- **CASR 21.049**, which requires that the holder of a type certificate must make the certificate and the type design of the aircraft, engine or propeller available for examination by CASA.

- **CASR 21.123**, which requires a manufacturer to make each aircraft, aircraft engine or propeller available to inspection by CASA.

- **CASR 21.157**, which requires the holder of a production certificate to allow CASA to make inspections or tests.

- **CASR 21.166(4)**, which requires the manufacturer of Class I, Class II, Class III or unapproved Class I product to allow CASA to examine records.
12. Access

- CASR 21.181(3), which requires that the holder of a certificate of airworthiness must make it available for inspection by CASA or an authorised person on request.

- CASR 21.293(4), which requires the manufacturer of an aircraft, aircraft engine or propeller type certificated under a delegation option authorisation make current records available to CASA on request current records.

- CASR 67.275, which requires the holder of a medical certificate to surrender it to CASA on written notice.

Inspectors should carefully read these provisions and become familiar with their content. Note also that an authorised person is defined in the CARs as being a person appointed under CAR 6 and in the CASRs as a person who is appointed under CASR 201.1.

12.4.1.1 Sections 32AA, 32AC, 32AD, 32AE, 32AF of the Civil Aviation Act 1988

In addition to these provisions, sections 32AC and 32AE of the Civil Aviation Act 1988 allow officers who have been appointed as Investigators under the Act to enter premises with the consent of the occupier of the premises. Additionally, investigators may also obtain a warrant under sections 32AD and 32AF authorising them to enter and search premises. These powers, however, are not available to officers generally — they are only available to officers who hold valid appointments as investigators under section 32AA of the Act.
12.5 Access Under CAR 305 – General Principles

CAR 305 provides a general right of access to officers who have been appointed as "authorised persons" under CAR 6 in order to enable them to carry out their authorised person functions. However, there are a number of limitations on that power of which inspectors should be aware.

Firstly, the power is subject to any aviation security requirements. Accordingly, if inspectors need to have access to aerodromes or aircraft or premises on aerodromes, they need to ensure that they comply with any aviation security requirements that may be in place — for example, are security passes required? These are matters that are dealt with by the Department of Infrastructure and Transport and aerodrome operators.

Secondly, the access power under CAR 305 is only available to “authorised persons” appointed under CAR 6 and only for the purposes of CAR 305. Accordingly, inspectors need to ensure that they have been appointed as “authorised persons” under CAR 6 and that appointment is still current.

Where doubt exists or further advice is required, please consult the Legislative Drafting Branch, Legal Services Division.

12.6 Procedures Relating to Access Under CAR 305

12.6.1 Procedures

12.6.1.1 Identification – Produce an Identity Card

Subregulations 305 (2) and (3) require that an authorised person produce his or her identity card (which is issued under regulation 6A) for inspection while acting as an authorised person when asked to do so by the occupier or person in charge of the place or thing to which access is sought.

If the authorised person (the inspector) fails to produce his or her identify card when asked to do so, then he or she is not authorised to have access. Additionally, even if access has been given to the inspector and the inspector fails to produce his or her identity card, then that access is terminated by operation of the law and the inspector must leave.

Even if an inspector is not required to produce his or her ID card, all CASA officers should produce their identification cards at all times when seeking right of access under the legislation, as a matter of prudent practice.
12.6.1.2 Limitations on Access Time

CAR 305  The times when access powers under CAR 305 are available are not unlimited. However, the Regulations provide different access times depending upon the purpose for which the access is sought.

CAR 305  • Firstly, CAR 305 authorises access to any place to which access is necessary for the purpose of carrying out any powers or functions vested in the authorised person under the Regulations. The reference to “any place” would include an office, a hangar, an aircraft or some part of an aircraft to which access is necessary in order to enable the inspector to exercise any power conferred on him or her under the Regulations. In these cases, access is available “at all reasonable times”. What is reasonable will depend upon the circumstances of each particular case. Access during normal working hours would generally be regarded as reasonable whereas access late at night would probably not be reasonable, absent some special circumstances.

CAR 305  • Secondly, CAR 305 sets out different access times depending upon the place or thing to which access is required. These specific times override the general requirement above. The specific times are as follows:
  • An authorised person has access “at all times” to an aerodrome for the purpose of inspecting the aerodrome
  • An authorised person has access at all times “during working hours” to premises where an aircraft is being constructed, assembled or maintained by the holder of a certificate of approval or an AME licence covering the construction, assembly or maintenance. In these circumstances the authorised person also has access to the drawings of the aircraft or any aircraft component that is, or is to be, installed in the aircraft and all documents associated with the construction, assembly or maintenance of the aircraft
  • An authorised person has access “at all reasonable times” to any aircraft for the purpose of inspecting the aircraft.

12.6.1.3 Inspection of Aircraft

If an inspector needs to inspect an aircraft in the field, the inspector should, where possible, carry out the inspection without requiring the opening of panels, dismantling or jacking. If a further internal inspection is required, then the inspector should obtain the consent of the owner, maintenance engineer in charge, or pilot-in-command of the aircraft. The person providing the consent should remove and replace any access panels. The inspector should generally not do this.
12.6.1.4 Denial of Access

Under CAR 305 (1A) it is an offence for a person to prevent, or hinder, access by an authorised person to any place to which the authorised person needs access to enable him or her to carry out any of his or her powers or functions under the Regulations.

The following guidelines should assist inspectors in attempting to conduct their duties:

- Insisting on access under regulation 305 will require tact, circumspection and perhaps some diplomacy, since an authorised person most certainly may not obtain access under CAR 305 by force or threat of force.
- If a person continues to deny access the inspector should withdraw.
- Inspectors should make careful notes of the circumstances in which the access was denied or hindered (refer to Chapter 14). If access is still required, the matter should then be referred in the first instance to the inspector’s manager. If the matter still cannot be resolved the matter should be referred to the Legal Services Division to determine the most appropriate way to proceed.

12.7 Access under Division 173.E.5 of the CASRs – Authorised Inspectors

Under CASR 173.390 the Director may appoint authorised inspectors. They are required to be issued with an identity card that includes a recent photograph. The powers of an authorised inspector are set out in CASR 173.400:

‘(1) The powers that an authorised inspector may exercise are the powers to do any or all of the following:

(a) enter and inspect premises connected with, or used for the purposes of, design work that is carried on by, or for, a certified designer or authorised designer or where any documents or records relating to that work are kept;

(b) observe the practices and procedures of the certified designer or authorised designer (including the designer’s employees) in carrying on design work under designer’s procedure design certificate or procedure design authorisation;

(c) inspect the designer’s facilities used for, or in relation to, that work;

(d) inspect and test any systems and equipment used for, or in relation to, that work;

(e) inspect any documents or records maintained, or required to be kept under this Part, by the designer in relation to that work;

(f) make a copy of any document or record that the authorised designer inspects.'
(2) However, an authorised inspector may exercise his or her powers only:

(a) at premises connected with, or used for the purposes of, design work that is carried on by, or for, a certified designer or authorised designer or where any documents or records relating to that work are kept; and

(b) with the permission of the certified designer or authorised designer; and

(c) if the designer, or a person on behalf of the designer, so requests—after the designer or person has been shown the inspector’s identity card; and

(d) during normal business hours; and

(e) to ensure that design work is being carried on in accordance with these Regulations’

CASA officers purporting to exercise powers under these provisions must ensure that they have been appointed under an instrument of appointment signed by the Director for this purpose.
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13.1 Contents of this Chapter

This Chapter contains the following sections:

13.2 Purpose
13.3 Definitions
13.4 Importance of Maintaining Integrity of Evidence
13.5 Procedures in Relation to Obtaining Evidence
13.6 Procedures in Relation to Handling Exhibits.

13.2 Purpose

The purpose of this Chapter is to set out, in general terms, the different types of evidence, the rules relating to evidence, and to provide guidance for inspectors who are required to gather and handle evidence and preserve the integrity of exhibits (evidence that may be required in proceedings).

The matter of evidence is extremely complex and cannot be adequately covered in a single chapter. This chapter should provide sufficient information to assist inspectors in their routine tasks. Inevitably, situations will arise which require additional explanation. If inspectors are confronted with a situation that they feel is not encompassed by the information provided here, they should seek further advice from the Investigations Branch of the Legal Services Division (LSD).

13.3 Definitions

13.3.1 Evidence

Evidence consists of facts, testimony, hearsay and exhibits which a court or tribunal will receive to prove or disprove a matter under inquiry.

13.3.2 Law of Evidence

The law of evidence governs the means and manner in which a person may substantiate his case, or refute his opponent's case.
13.3.3 Rules of Evidence

The rules of evidence are the rules that regulate the manner in which questions of fact may be determined in judicial proceedings. The aim of most court proceedings is to determine two different types of issues:

- Firstly, a court has to determine whether the facts on which a charge is laid did actually happen. These are questions of fact.
- Secondly, the court has to determine, if they did happen, what their legal consequence is. These are questions of law.

The rules of evidence are generally divided into three parts:

1. What facts may or may not be proved?
2. What sort of evidence must be given by which a fact may be proved?
3. By whom, and in what manner, must the evidence be produced by which a fact is to be proved?

13.3.4 Types of Evidence

There are different types of evidence:

- Direct evidence
- Real evidence
- Documentary evidence
- Expert evidence
- Circumstantial evidence
- Hearsay evidence.

13.3.4.1 Direct Evidence

Evidence of something that has been directly perceived by a witness through one or more of his five senses—for example, has been seen, heard, smelled, felt or tasted. Direct evidence is given by the witness in oral testimony in court.

13.3.4.2 Real Evidence

Material objects, other than documents, which are produced for inspection by a court, are commonly called real evidence. This, when available, is probably the most satisfactory kind of evidence because it generally does not require testimony or inference. Unless its genuineness is in dispute, the thing speaks for itself.
13.3.4.3 **Documentary Evidence**

There are two types of documentary evidence:

- **Primary documentary evidence** is the production of the original document itself
- **Secondary documentary evidence** is the production of a copy of the original document—for example, photocopy or certified copy, etc. It can generally only be produced after it has been shown to the court that the original is either lost or destroyed, or that it is impracticable to produce the original document.

13.3.4.4 **Expert Evidence**

Evidence of someone’s opinion is generally inadmissible. An exception to that rule is the opinion of an expert. Such evidence is only accepted when it is in the witness’s field of expertise. The witness must first prove to the satisfaction of the court that he is qualified in that field—for example, a doctor giving evidence of a medical matter or a pilot giving evidence of the ramifications of low flying.

13.3.4.5 **Circumstantial Evidence**

This is evidence from which a fact may be inferred as a natural or probable conclusion. It is usually made up of a series of items that point to the same conclusion.

13.3.4.6 **Hearsay Evidence**

This is evidence of something of which the witness does not have direct knowledge but has been told about it by some other person. Under normal circumstances, hearsay evidence is not admissible in a court as evidence of the truth of what was said. (It may be admissible in the Coroner’s Court or the AAT.)

There are numerous exceptions to the inadmissibility of hearsay evidence. Some of the exceptions include:

- Business records and tags and labels
- Representations made about employment or authority
- Admissions.

For further explanation and assistance in any dealings relating to evidence, inspectors should seek advice from the Investigations Branch.
13.4 Importance of Maintaining Integrity of Evidence

Inspectors involved at any stage of surveillance, audit or investigation may be required to gather evidence in order to provide proof of a contravention of a safety rule. In the process of gathering evidence, they will handle various articles that may be required as evidence (in the form of exhibits) in various proceedings. (These articles may consist of documents or aircraft components or material.) It is important that the integrity of these potential exhibits be preserved.

NOTE

During a routine surveillance, audit or investigation, inspectors may not be aware of any future developments that may lead to prosecution or other actions where evidence may be required. The failure to be aware of the correct procedures when gathering evidence may seriously jeopardise any future enforcement action. Where an inspector suspects that a breach of relevant legislation may have occurred, any evidence identified should be collected in accordance with proper evidence gathering procedures. Investigations Branch or Legal Branch can assist with this advice.

13.5 Procedures in Relation to Obtaining Evidence

13.5.1 Purpose

These procedures provide assistance for inspectors gathering evidence.

13.5.2 Staff Responsible

- Inspectors

NOTE

Investigators are also responsible for evidence/exhibits and should refer to the Investigators’ Manual which sets out the requirements of the Australian Government Investigations Standards.
13.5.3 Procedures

13.5.3.1 Seizing Evidence

Inspectors generally have no power to seize evidence. That is, inspectors have no general statutory powers to obtain and retain documents or physical evidence simply on the basis that the documents or physical evidence may or will be required for court proceedings.

Investigators appointed under section 32AA of the Act are empowered to seize evidence under sections 32AH and, if they are issued with a warrant to do so, 32AF of the Act. Such seizure must be undertaken strictly in accordance with these sections.

13.5.3.2 Statutory Powers for Obtaining Real or Documentary Evidence

How then does an inspector obtain real or documentary evidence? There are some statutory powers in the Civil Aviation Regulations that may help.

- CAR 53 empowers an authorised person to investigate defects in an Australian aircraft.
- CAR 53(3) further empowers the authorised person to require in writing the production of documents, aircraft components or other physical evidence and to retain these for the duration of the investigation. (Once the investigation is complete the material must be returned to its owner unless alternative legal steps are taken to secure it as evidence).
- CAR 301 requires a person to surrender any licence, certificate or other document issued or required to be kept under the Regulations if required to do so by CASA. This provision covers most documents that may be required in relation to a contravention. It includes pilot logbooks (even though they are the personal property of the pilot) because they are required to be kept by CAR 5.51. Likewise it includes aircraft log books, engine log books, propeller log books and maintenance releases because these documents are required to be kept pursuant to directions given under CAR 50C.
- If an inspector wishes to obtain a document under CAR 301 then it is important to note that the notice requiring a person to surrender the document must be in writing (see form 338). If the inspector wishes to issue the notice, then the inspector needs to ensure that he or she has the necessary delegation.
There is no provision equivalent to CAR 301 in relation to real evidence or documentation not issued or required to be kept under the Regulations. If an inspector believes that such an article may be required as evidence in possible future proceedings, he or she should ask the person concerned if he or she can take possession of the article. If this request is refused the inspector should not pursue the matter. A report should be prepared immediately identifying the evidence, its location, who has custody of it and why it is required. This report should be submitted via the Controlling Office Manager to the Manager Investigations. A decision will then be made as to whether to obtain a search warrant. This will be part of a Coordinated Enforcement Meeting and will necessitate following those procedures (See Chapters 3 and 11). However, where urgency requires securing of that evidence the process may need to be expedited (see 3.3) or the Coordinate Enforcement procedures may need to follow the initial and urgent evidence gathering action.

Alternatively, unless there is likelihood that the evidence will be destroyed, the Manager, Investigations may determine, in conjunction with the CDPP, that the person may be summoned to produce that evidence in court.

If an inspector is denied possession of documentary evidence, he or she should attempt to obtain a photocopy or photograph of it.

If an inspector cannot make a photocopy for any reason, he or she should examine the document carefully and describe it precisely in his or her notes. The description should be sufficiently detailed to allow any changes to the document to be readily identified. The inspector should then tell that person that the document may be required as evidence and must not therefore be destroyed or rendered illegible or indecipherable. It is vital that the inspector include in his or her notes the fact that the inspector informed the person to this effect. If the person disregards this advice he or she may be guilty of an offence under section 39 of the *Crimes Act 1914*. Additionally, CAR 301(2) makes it an offence for a person to destroy, mutilate or deface any document that he or she is required to surrender under CAR 301 with the intention of evading the requirement to surrender the document.

If an inspector suspects something may afford evidence of the commission of an offence, they may also consider photographing the items as a means of recording the existence of such evidence, either documented or real. The photograph should be recorded and labelled in the same way that the actual article would be if it were retained as evidence.

See also CASR provisions in Chapter 12.
13.5.3.3 Requesting Licences

Inspectors should also be aware that there are a number of other provisions in the regulations under which persons may be required to produce licences, log books and medical certificates. In particular, inspectors should note the following:

- CAR 5.56 and CASRs 61.340 and 61.365 confer powers on CASA to request a person to produce his or her licence, log book or medical certificate. Each regulation states the timeframe within which a requested document must be produced. Such a request may be made orally but should be recorded in the inspector's notes.

- CAR 302(1) authorises CASA to require a person to produce his or her licence (which is not a flight crew licence) for inspection. This would cover, for example, AME licences and ATC licences.

- CAR 302(2) authorises CASA to require the owner or pilot in command of an aircraft to produce any certificates, licences or other documents related to the aircraft and any passengers or cargo.

13.6 Procedures in Relation to Handling Exhibits

13.6.1 Purpose

These procedures provide assistance for inspectors handling exhibits.

13.6.2 Staff Responsible

- Inspectors.

At any time, where inspectors may be unsure of exhibit-handling procedures, advice should be sought from the Investigations Branch.

Note: Investigators are also responsible for evidence/exhibits and should refer to the Investigators’ Manual.

13.6.3 Procedures

From time to time inspectors will be required to handle various articles that may be required as evidence (in the form of exhibits) in various proceedings. These articles may consist of documents or aircraft components or material. It is important that the integrity of these potential exhibits be preserved.
13.6.3.1 Preservation of Exhibits

The general rule in handling any exhibit is to handle it as little as possible. It is important to retain the item in its original condition. This is especially true in the case of documents.

The overriding rule is that if an inspector takes possession of an original article which the inspector believes has potential value as an exhibit, the inspector should notify the Manager, Investigations, immediately to seek advice and assistance on its treatment and the appropriate safe storage. The inspector, on taking possession of the article, should issue a receipt to the person from whom the article is taken, using the CASA ‘Property Receipt and Disposal Form’ (form 1059).

The inspector should record details on the seizure and storage of such items in their notebook or diary, store the item securely and restrict access to the item, and retain the item until it is required for investigation or of no further value.

13.6.4 Continuity

The expression “continuity of evidence” is used to describe the handling and whereabouts of an exhibit from the time it comes into the possession of CASA until the time it is produced in court. Continuity is also referred to as the “chain of evidence”. Bearing in mind that a chain is only as strong as its weakest link, any weakness, such as not being able to confirm the retention of evidence for a period, leaves it open to suggestion that the evidence presented in court is not the same as the evidence originally obtained.

Inspectors need to be aware that they may be required to account, in court, for their involvement with an exhibit. Therefore, inspectors should record the following information about any exhibit that comes into their possession:

- A description of the exhibit and any identification details
- The date, time and place that the exhibit came into their possession
- From whom they obtained it
- How they obtained it
- When they relinquished possession
- To whom they relinquished possession.

The fewer persons who handle any exhibit, the safer the evidence will be.

NOTE

The inspector who initially takes possession of the exhibit is usually the person who will be required to produce it in court.
13.6.4.1 Receipts for Exhibits Handed to Other Parties

If, for any reason, an inspector relinquishes an exhibit to a party outside CASA it is essential to obtain a receipt for that exhibit. The exhibit movement should be documented on the CASA ‘Property Receipt and Disposal Form’ (form 1059 - This a hard copy book with pages in triplicate. It is not an electronic form).

13.6.4.2 Handling of Documentary Exhibits

Inspectors should ensure that documents such as log books, flight plans, maintenance releases or other documents that may be required as exhibits in court are handled carefully so as to ensure that they are not changed in any way. In particular:

- Inspectors should ensure that such documentary exhibits are not written on, stapled, torn, folded, pinned or mutilated in any way.

- Inspectors should also ensure that such documentary exhibits are not placed in a position where impressions from writing on overlying paper, will be left on the documentary exhibit—e.g. writing on an envelope after the document has been placed inside. The impressions on a document can be an important part of forensic document examination.

- When an inspector becomes aware that a document may be required in some later court proceeding, the inspector should arrange for it to be placed in an envelope as soon as possible. There are two reasons for this:
  - It prevents damage to the document itself
  - In the unlikely event that it may be necessary, it preserves any fingerprints that may be on the document.

- As soon as an inspector obtains a documentary exhibit he or she should collect it in accordance with exhibit handling procedures, and notify the Manager, Investigations if the document may be an exhibit relating to a Part IIIA investigation.

- If an inspector needs to work from a document he or she should take a photocopy of it and work from the copy.

- Inspectors should make every effort to retain possession of original documents. If it is not possible to take possession of original documents it is important that inspectors arrange for them to be photocopied. If a document is photocopied:
  - Sign and date the photocopy, preferably on the back of the photocopy;
  - Wherever possible, try to arrange for the person retaining the original document to sign the photocopy as being a true copy of the original; and
  - Treat the photocopy as an original—see the first two points in this section.

- Inspectors should identify in their notes or file notes, who has possession of the original. This will enable an investigator to obtain the originals if required.
13.6.4.3 **Handling Physical Exhibits**

Physical exhibits can be either moveable or immovable. Moveable exhibits include items such as small aircraft parts, non-hazardous cargo etc. Immovable exhibits include large items such as large aircraft parts, for example, wings and rotor blades, and hazardous material such as fuel samples.

The main difficulty with immoveable items is the ability of CASA to take possession of the original article. In this situation secondary evidence, such as a photograph, copy, drawing, sketch or video footage may need to be obtained to assist in proving the existence of the article or thing.

Inspectors should notify the Manager Investigations, as soon as an immoveable exhibit is identified to enable appropriate evidence collection measures to be arranged, if the exhibit is required as part of an investigation.

13.6.4.4 **Collection and Handling of Fluid Samples for Evidence**

Fuel and other fluid samples may require special consideration. If inspectors are required to obtain fluid samples they should only do so with the consent of the aircraft owner or pilot-in-command or, if the aircraft is undergoing maintenance, the approval of the person carrying out the maintenance.

If there is any likelihood of the fluid samples being required as evidence, they should be obtained in accordance with exhibit handling procedures. Advice and assistance on obtaining evidence should always be sought from the Investigations Branch.

13.6.4.5 **Access to Exhibits**

CASA officers must not provide access to any exhibit, except to those authorised and required to access such exhibits. In the event that access is provided, officers must maintain comprehensive records and maintain strict continuity requirements, in line with rules governing exhibits. Further advice may be obtained from Investigations Branch.

**Return of Exhibits**

Exhibits should be returned to their source as soon as possible after it is determined that there is no longer any need for their retention. This should not occur until after the relevant investigator has confirmed that the exhibit is no longer required for an investigation or for court proceedings, or has notified that the court proceedings have been finalised. It is the responsibility of the relevant investigator to return exhibits used incourt.
14.1 Contents of this Chapter

This Chapter contains the following sections:

14.2 Purpose
14.3 Introduction
14.4 Terminology
14.5 Procedures for Note Taking.

14.2 Purpose

The purpose of this Chapter is to set out the reasons for, and importance of, note taking and the procedures that should be followed. This Chapter should be read in conjunction with Chapter 13.

14.3 Introduction

When an event occurs, inspectors may often think it is unnecessary to make a written note of the event. After an event occurs, when an inspector may have other work to do, preparing a file note may seem to be unnecessary paperwork. However, experience has shown the value of such records in subsequent proceedings or deliberations. When an inspector is called to account for his or her actions, possibly a year or more after the event, the value of such notes becomes self-evident.

The purpose of making notes, either in an official notebook or as a file note, is to enable inspectors to refresh their memory at some later date or justify their actions when called upon to relate a set of circumstances. CASA’s record management procedures require all CASA staff to document CASA activities by making full and accurate records. CASA officers are required to make records of conversations or discussions where these are part of an information-gathering process.

Note: If it’s worth remembering, it’s worth making a note.
14.4 Terminology

14.4.1 Notes

Notes are used to make a contemporaneous record of a conversation or an event. In the case of a conversation, notes are used to record a conversation between an inspector and at least one other person. That is, they are an inspector’s notes made during the course of the discussion. Notes may be cryptic or “key-word” in format but should be legible in case they are required as evidence. Often inspectors will be required to decipher their notes months after having recorded them. Notes may also be made immediately after a meeting or discussion. If the notes are to be accepted as a valid record of what occurred, then they should be made as soon as possible after the meeting or discussion while everything is fresh in the memory of the inspector. Notes may also be used to record details of an event.

14.4.2 File Notes

A file note is a record of some action undertaken by an inspector - for example, it may be a note of a meeting with someone, a note of a conversation; or a note of a physical activity such as inspecting a document. A file note is usually more narrative in nature than “notes”, and may be made up from contemporaneous notes. While file notes are usually made after the event, their validity depends on their being made while events are still fresh in the memory of the inspectors.

14.5 Procedures for Note Taking

14.5.1 Purpose

These procedures provide assistance for inspectors making notes in the course of their investigation.

14.5.2 Staff Responsible

- Inspectors.
14.5.3 **When to Make Notes or File Notes**

It is not possible to provide an exhaustive list of circumstances of when inspectors should make notes or file notes. However, it is important for inspectors to consider the overall context in which an investigation is being made.

The best rule of thumb is to ask:

“Is further action possible in connection with what I am doing?”

If the answer is “Yes”, then an inspector should make some record of what he or she has done. Some examples of situations in which inspectors should make notes or file notes as a matter or course are set out below:

- Where a prosecution or the issue of an infringement notice may be a possibility
- Where licence variation, suspension or cancellation may be considered
- As a record of counselling (which must be followed up with a letter—see 4.5.1)
- Where the matter may need to be recalled in the future—for example, to compile an individual's history of compliance or non-compliance
- When the matter relates to a complaint to CASA about some activity
- Where it is possible that an investigation could precipitate a complaint to, for example, the Minister or Ombudsman, the Industry Complaints Commissioner or other senior CASA officer, etc.
- Whenever confrontation, controversy or ill feeling is involved
- If an inspector considers it important to keep a record of his or her actions.

14.5.4 **General Guidelines for Note Making**

**14.5.4.1 When**

Inspectors should make notebook or file notes at the time an event occurs or as soon as practicable after the event.

**14.5.4.2 Legible Notes**

All notes, however brief and however hastily made, should be legible.
14.5.4.3 **Signature, Date and Time**

Inspectors should sign their notes and should record the date and the time of day at which the notes were made. Noting the time is naturally important in establishing precisely when the notes were made relative to the matters that they cover.

14.5.4.4 **Record Conversations Verbatim**

Inspectors should record conversations or statements as close to verbatim as possible and in the first person—for example:

He said, “It's a fair cop, mate. I done it”.

Avoid using the third person when recording notes. The above example should not be recorded as follows:

“He told me that I had made a correct assumption and that he had committed the said misdemeanor.”

Inspectors should be careful not to imply that something is a direct quote by a person—for example, by putting it in inverted commas—unless the person actually spoke the words.

14.5.4.5 **Accuracy**

Inspectors should ensure that their notes or file notes are accurate and that they are confident of their accuracy. This is particularly important given that it is possible that inspectors may have to rely on their accuracy well into the future when their independent recollection of the matter may be extremely cloudy.

If two inspectors conduct an interview, or are present when something occurs, there is generally no objection to one inspector making the notes or file notes and for the other to read them and agree to their accuracy. However, both inspectors should sign the note or file note. Equally, there is generally no objection to the two inspectors conferring to ensure that the record is accurate.

14.5.4.6 **Retain the Original Notes**

If an inspector makes contemporaneous notes and subsequently prepares a more detailed typed account he or she **must** retain the original handwritten notes. If the matter becomes the subject of evidence in a court, tribunal or inquest, it is the original notes that will validate the subsequent account.
14.5.4.7 Official Notebooks and Diaries

Inspectors should observe the following guidelines when using official notebooks and diaries:

- All entries must be legible
- Continue items immediately below the preceding one
- There must be no erasure of entries
- Any corrections must be crossed out with a single line and re-written so that the original error can still be read
- Correction fluid must not be used
- Pages must not be defaced.

14.5.4.8 Assumptions and Opinions

Assumptions and opinions are often important and should not be omitted. However, inspectors should not include assumptions or opinions unless they also include their reasons for them. They must be justified. It is unlikely that an inspector will be able to recall why he or she thought of something unless it is recorded.
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15.1 Contents of this Chapter

This Chapter contains the following sections:

15.2 Purpose
15.3 Introduction
15.4 Definitions
15.5 Power to Interview
15.6 Procedures when Interviewing.

15.2 Purpose

The purpose of this Chapter is to set out procedures and provide guidance for inspectors interviewing people in the course of their investigations.

15.3 Introduction

This Chapter covers the methods that should be used by inspectors when interviewing people. It is written to help the inspector obtain useful and useable information.

Inspectors are not required or expected to formally interview persons who are suspected of contravening the aviation law with a view to the institution of legal proceedings. However, given the nature of an inspector's duties, it is possible that an inspector will hold initial discussions about possible offences with people who subsequently will be involved in further investigation or judicial proceedings.

15.4 Definitions

15.4.1 Witness

A witness is any person with knowledge of a matter, who is capable and competent to give evidence at judicial proceedings.

15.4.2 Suspect

A suspect is an individual or organisation suspected of contravening a regulatory requirement.
15.5 Power to Interview

CAA 32AJ

Generally, a person cannot be compelled to talk to an Inspector or to answer any questions put to the person by an inspector. (There are some exceptions to this rule under section 32AJ of the Civil Aviation Act 1988, but such exceptions only apply in relation to investigators who are exercising powers under Part IIIA of the Act in accordance with a judicial warrant). Therefore, while every reasonable attempt should be made to conduct an interview in appropriate circumstances, inspectors should not press the matter if a person indicates that he or she does not want to be interviewed.

15.6 Procedures when Interviewing

15.6.1 Staff Responsible

- Inspectors.

15.6.2 Important Points when Interviewing

During an interview, an inspector should keep any allegations direct and straightforward and should avoid any tendency to ‘beat around the bush’ when discussing something unpleasant.

Inspectors should not conduct an interview with any preconceived beliefs about the facts. They should not prejudge the situation. The purpose of any investigation and interview is to establish the facts, not to create a scenario to fit an inspector’s idea of what happened. Inspectors should be fair and reasonable at all times when conducting interviews. Remember, a professionally conducted interview can just as easily clear someone of an allegation as indicate his or her guilt.

Inspectors should avoid becoming visibly angry and must not use threatening or intimidating words or actions. As professional regulators, inspectors should remain calm, cool and in control of an interview.

If an inspector knows in advance that he or she is going to be speaking to a person with knowledge of a particular matter, the inspector should ensure that he or she has as full an appreciation as possible of the issues involved.

Inspectors should ensure that they understand what a person is telling them. If an inspector is unsure, he or she should not hesitate to ask for clarification.

Additional points that an inspector should consider when talking to a person include:

- Inspectors should ensure that they get the person’s story. Inspectors must not put words into the mouth of the person being interviewed and must not give their version of what they think the person said.
Inspectors must distinguish between facts and innuendo, especially when assessing whether there is sufficient information to refer the matter for further investigation.

If inspectors are acting on the basis of a complaint made by a third party, they should try to be conscious of any possible motive for the making of the complaint.

During an interview, inspectors should tell the person being interviewed that other officers of CASA may need to speak to them about the matter at a later date.

**Note:** If a person declines to be interviewed, make a file note of the discussion.

### 15.6.3 Questioning

As far as it is possible to do so, inspectors should prepare their questions in advance. This will enable them to keep control of the interview and will assist them to cover all the necessary points. Some guidelines to consider when questioning include the following:

- **At the very start of the questioning process ask questions which establish how, when, where and why an event occurred, and who was involved.**
- **Do not ask long, complicated questions. Frame questions so that they are direct and as short as possible. This may require asking a few more questions, but in the end the result is clearer.**
- **Do not ask two-part questions—for example:**
  - “Did you write that in your log book and is it true?”
  This sort of question can lead to a single ambiguous answer of “yes”. Ask the question in two parts requiring an answer to each part.
- **Avoid the use of double negatives in your questions.**
- **Try to ensure that the person being questioned answers the question. If he or she does not answer, ask again. Remember that the person does not have to answer any questions, so an inspector cannot insist that the person answer.**
- **Do not ask leading questions—that is, questions that suggest their own answers. For example:**
  - “You saw that the magneto was hot wired didn’t you?”
  The correct form of questioning should be:
    - “Did you notice anything about the magneto?”
- **Avoid the risk of the interviewee starting to interview you by responding to your questions with questions of their own.**
- **As corroboration may be required at some later date, endeavour to have another officer present at the interview.**
15.6.4 Follow-up Action

If an interviewee asks what action will be taken as a result of the interview, inspectors should tell the person that the matter will be reported and that he or she will be notified of any future action.

Even in minor matters where inspectors are not conducting an interview of any substance themselves, they should not give any indication that could suggest that a matter is closed. From an inspector’s point of view a matter might be closed, but they may not be responsible for making the final decision. The decision-maker may view things differently. If in doubt, inspectors should assume that further action would follow and act accordingly.

15.6.5 How Far to Go with an Interview

Where a matter is of sufficient gravity as to be likely to lead to a formal investigation, inspectors are only required to take matters to the point where they have enough information to identify an apparent breach. They should gather sufficient information to provide the investigators with the basic facts such as:

- How, when, where and why an event occurred and who was involved
- The identity of the witness or suspect
- How those persons may be contacted in the future.

Inspectors should be aware that at some time during an interview that they may conduct, a point might be reached beyond which they should not attempt to proceed themselves. At this point the matter should be left for an investigator to follow up.

The stage at which this point is reached will vary with individual inspectors and the circumstances of each case. It is, therefore, not possible to define this point. Identifying this point is not a matter of right and wrong. However, the most important consideration is not to go too far. That which is not covered can be picked up in a later formal interview.

Inspectors should seek specialist investigative assistance in the following circumstances:

- When a person admits to an offence
- When an inspector has obtained the information he or she wanted in the first place—do not attempt to continue for the sake of doing so
- If an inspector senses a risk of confrontation
- Any time an inspector feels unsure of his or her position, or is out of his or her depth.

Note: Inspectors should always remember that they are only conducting INITIAL INQUIRIES.
15.6.6 Further Information

If inspectors are in doubt about any particular procedure they need to follow, or need additional information, they should contact an investigator, through the Manager Investigations.
16.1 Contents of this Chapter

This Chapter contains the following sections:

16.2 Purpose
16.3 Introduction
16.4 Procedures under Regulation 288.

16.2 Purpose

The purpose of this Chapter is to set out the legislative powers and the procedures for detaining an aircraft.

16.3 Introduction

The Act and the regulations contain provisions authorising CASA to detain aircraft in certain circumstances.

Under CAR 288, 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.

Section 32AK of the Act 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.

Before exercising these powers, officers need to ensure that they have the appropriate delegation under CAR 288 or have been appointed for the purpose of Part IIIA of the Act.

16.4 Procedures under Regulation 288

16.4.1 Staff Responsible

- Delegates.
16.4.2 Issuing a Detention Notice

**Note:** Sound judgement must be exercised, and detention action should not be taken unless the regulatory contravention is serious, or the safety hazard is obvious or serious. For guidance in relation to detention action, contact the Legal Services Division.

To detain an aircraft under CAR 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. (See form 339)

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.

Wherever possible, service of the notice should be witnessed.

A copy of the notice should be kept for CASA records.

16.4.3 Taking Action to Disable an Aircraft

CAR 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.
16.4.4 Carry Out the Necessary Investigation

The purpose of issuing a detention notice or taking such other action as is necessary to detain an aircraft is set out in CAR 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 CAR 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.

16.4.5 Lifting of Detention Notice

Where an aircraft has been detained and CASA is satisfied after conducting the 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.
17.1 Contents of this Chapter

This Chapter contains the following sections:

17.2 Purpose
17.3 Introduction
17.4 Arranging Police Assistance.

17.2 Purpose

The purpose of this Chapter is to set out the situations and the procedures for seeking police assistance.

17.3 Introduction

There are some occasions during which inspectors may require the assistance of police. These may include situations that involve an imminent threat to aviation safety or where it is necessary to obtain factual evidence in remote areas. They may also include situations where an inspector has legitimate concerns for his or her personal safety.

17.4 Arranging Police Assistance

17.4.1 Staff Responsible

- Inspectors
- Investigators
- Relevant manager.

17.4.2 Procedures

Police are usually willing to co-operate with CASA. However, they are not obliged to do so. Inspectors should also remember that police officers might not have the same powers over aviation operations as officers of CASA. However, police do possess certain other powers that need to be considered.

If police assistance is required, it is recommended that an inspector should, where possible, initially seek the assistance of an investigator through the inspector’s manager and the Manager, Investigations. The investigator will then arrange police assistance.
Police assistance can only be arranged with the approval of the Manager, Investigations. An inspector may approach local police directly (after obtaining the necessary CASA approval), preferably speaking to the senior officer on duty. This officer should be informed of the reason for the request in simple, non-technical language and the nature of the resources required, to comply with the request. If the inspector is aware of any special power the police may have to assist in this request, he or she should advise the police accordingly.

Conversely, if an inspector is aware of any limitations that may be encountered by the police, the inspector should inform the police of these limitations.
Appendix 1

1.1 Coordinated Enforcement Process A

Key
AAC: Admin Action checklist
AIN: Aviation Infringement Notice
ALC: Assigned Legal Counsel
CDPP: Cwlth Director of Public Prosecutions
C-E: Coordinated Enforcement
CEM: Coordinated Enforcement Meeting
CO: Controlling Office
COM: Controlling Office Manager
EAR: Enforcement Action Register
EO: Enforcement Officer - LSD
EPP: Enforcement Policy and Practice
EVU: Enforceable Voluntary Undertaking
MI: Manager Investigations
ML: Manager Legal Branch
S&I Risk: Serious and Imminent Risk

BREACH

The COM decides Enforcement may be appropriate

The CO follows the process set out at Paragraph 3.5.2 of Chapter 3

EO facilitates meeting with COM, MI, ML and other officers as appropriate (e.g. Manager Flying Standards, Team Leaders, doctors from Avmed)

CAR 265 suspension (3)

Process G

Process D

Serious & Imminent Risk (SIR)

COM, MI and ML agree on one or more courses of action. (The process where there is no agreement is set out at para. 3.5 of Chapter 3)

AIN or PART IIIA Investigation

Process B

Process C

Non-EPP process – e.g. counseling or directions.

Process E

Administrative Action

EVU
1.2 Coordinated Enforcement Process B (Part IIIA Investigation)

Key

AAC: Admin Action checklist
AIN: Aviation Infringement Notice
ALC: Assigned Legal Counsel
CDPP: Cwlth Director of Public Prosecutions
C-E: Coordinated Enforcement
CEM: Coordinated Enforcement Meeting
CO: Controlling Office
COM: Controlling Office Manager
EAR: Enforcement Action Register
EO: Enforcement Officer - LSD
EPP: Enforcement Policy and Practice
EVU: Enforceable Voluntary Undertaking
MI: Manager Investigations
ML: Manager Legal Branch
S&I Risk: Serious and Imminent Risk

Process A

MI assesses recommendation from CEM on the evidence using the C-E Referral Form and requests more information where necessary

- MI Decides if Part IIIA Investigation or AIN

- MI prepares AIN for issue

Part IIIA investigation

Assigned Investigator provides regular briefings to MI, EO, COM and ML at On-going CEMs

Investigator submits Investigation Report with recommendations to MI

MI provides copies of report to EO, COM and ML and any other parties involved in the initial CEM.

Criminal Enforcement Action

Other enforcement options considered – See Process A

Recommendations considered at CEM. Decision made as to most appropriate action/s

AIN Not Paid

Brief referred CDPP

NFA

Process F
1.3 Coordinated Enforcement Process C (Administrative Action)

Key

AAC: Admin Action checklist
AIN: Aviation Infringement Notice
ALC: Assigned Legal Counsel
CDPP: Cwlth Director of Public Prosecutions
C-E: Coordinated Enforcement
CEM: Coordinated Enforcement Meeting
CO: Controlling Office
COM: Controlling Office Manager
EAR: Enforcement Action Register
EO: Enforcement Officer - LSD
EPP: Enforcement Policy and Practice
EVU: Enforceable Voluntary Undertaking
MI: Manager Investigations
ML: Manager Legal Branch
S&I Risk: Serious and Imminent Risk

Process A

ML assigns Legal Counsel to assist COM

ALC contact COM and assists with drafting Show Cause Notice

CO follows Admin Action Checklist – Form 886

Further CEM held to discuss options as a result of authorisation holder response and show cause conference

If Show Cause Conference held, the outcome of conference to be discussed including EVU if requested by licence holder.

COM makes recommendation to delegate using standard form recommendation Form 316

Where recommendation is an EVU or counselling instead of action to vary, suspend or cancel a licence, then a copy of a draft is attached to the SFR.

Delegate makes a decision

Delegate follows admin action checklist - form 886 and returns decision notice to CO for service

CO follows Admin Action checklist – Form 886 and completes service and notification of internal CASA parties

Appendix 1-3
### 1.4 Coordinated Enforcement Process D (Serious and Imminent Risk)

**Key**
- AAC: Admin Action checklist
- AIN: Aviation Infringement Notice
- ALC: Assigned Legal Counsel
- CDPP: Cwlth Director of Public Prosecutions
- C-E: Coordinated Enforcement
- CEM: Coordinated Enforcement Meeting
- CO: Controlling Office
- COM: Controlling Office Manager
- EAR: Enforcement Action Register
- EO: Enforcement Officer - LSD
- EPP: Enforcement Policy and Practice
- EVU: Enforceable Voluntary Undertaking
- MI: Manager Investigations
- ML: Manager Legal Branch
- S&I Risk: Serious and Imminent Risk

#### Process A
- **Insufficient evidence to support Serious & Imminent Risk action (SIR)**
  - No
  - Yes

#### Process B
- **ML assigns ALC to assist with drafting suspension notice**
- **COM sends SFR with supporting documentation through to Delegate.**
  - **Delegate approves recommendation for suspension? (s.30DC)**
    - Yes
    - **Delegate suspension notice and returns notice to COM to send to Holder**
      - ALC assists COM with application and affidavits.
      - Application filed by ML within 5 business days
        - **Federal court makes prohibition order**
          - No
          - Yes
        - **COM decides that investigation has disclosed S&I Risk.**
          - No
          - Yes

#### Process C1
- **Within 5 business days after last day order is in force**
- **SCN period not more than 28 days**
- **5 days for decision**
- **Suspension continues until the end of those 5 days**

(1) S.30Di requires SCN to be given within 5 business days after last day of prohibition order.
1.5 Coordinated Enforcement Process E (Enforceable Voluntary Undertaking)

**Key**

AAC: Admin Action checklist  
AIN: Aviation Infringement Notice  
ALC: Assigned Legal Counsel  
CDPP: Cwlth Director of Public Prosecutions  
C-E: Coordinated Enforcement  
CEM: Coordinated Enforcement Meeting  
CO: Controlling Office  
COM: Controlling Office Manager  
EAR: Enforcement Action Register  
EO: Enforcement Officer - LSD  
PFP: Enforcement Policy and Practice  
EVU: Enforceable Voluntary Undertaking  
MI: Manager Investigations  
ML: Manager Legal Branch  
S&I Risk: Serious and Imminent Risk

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**Process A**

ML assigns Legal Counsel (if not already done)

**Process C**

ALC contacts COM and assists with the drafting of EVUs

**EVU Conference held (1)**

Complies with EVU checklist procedures

**COM approves terms of EVU**

No

Where admin action is in progress

→ Process C

Yes

→ Process A

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(1) Where requested by licenceholder and agreed by CASA—this will often be in the form of a Show Cause Conference where the request for an EVU has come out of the Admin action process.

(2) This covers the signing & publication of EVU on CASA website.
1.6 Coordinated Enforcement Process F (Referral to the Commonwealth DPP)

**Key**

AAC: Admin Action checklist  
AIN: Aviation Infringement Notice  
ALC: Assigned Legal Counsel  
CDPP: Cwlth Director of Public Prosecutions  
C-E: Coordinated Enforcement  
CEM: Coordinated Enforcement Meeting  
CO: Controlling Office  
COM: Controlling Office Manager  
EAR: Enforcement Action Register  
EO: Enforcement Officer - LSD  
EPP: Enforcement Policy and Practice  
EVU: Enforceable Voluntary Undertaking  
MI: Manager Investigations  
ML: Manager Legal Branch  
S&I Risk: Serious and Imminent Risk

**Process B**

MI tasks investigator to prepare brief for CDPP

Investigator submits brief to CDPP

CDPP decides whether to prosecute

Yes: Matter proceeds to court

No: CDPP advises MI when summons issued

CDPP advises Investigator and MI of prosecution outcome

MI advises COM & EO of outcome
1.7 Coordinated Enforcement Process G (CAR 265 Suspension for Purpose of Examination)

Key
AAC: Admin Action checklist  
AIN: Aviation Infringement Notice  
ALC: Assigned Legal Counsel  
CDPP: Cwlth Director of Public Prosecutions  
C-E: Coordinated Enforcement  
CEM: Coordinated Enforcement Meeting  
CO: Controlling Office  
COM: Controlling Office Manager  
EAR: Enforcement Action Register  
EO: Enforcement Officer - LSD  
EPP: Enforcement Policy and Practice  
EVU: Enforceable Voluntary Undertaking  
MI: Manager Investigations  
ML: Manager Legal Branch  
S&I Risk: Serious and Imminent Risk

Process A
ML assigns Legal Counsel to assist COM to prepare unilateral suspension pending examination (1)

ALC contacts COM

COM follows 265 portion of AAC

COM submits recommendation to delegate

Delegate & COM follow CAR 265 portion of AAC

Delegate agrees to proceed?

Yes

Auth. Holder sits exam  
Exam result gives reason for ongoing suspension or cancels action?

No

EO & ML to be kept advised of process

COM sets exam and manages process  
Auth. Holder sits exam

EO & ML to be kept advised of process

No

No

AAT application successful?

Yes

AAT application successful?

No

No

Licence suspension continues

No

No

Licence suspension terminated

Auth. Holder advised of action

Auth. Holder advised of outcome

(1) This may include CAR 5.38 request on same notice or may be done separately
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Appendix 2

2.1 Introduction

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 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.

2.2 The Exercise of Governmental 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.
2.3 Constitutional Government and the Constraint of 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.
2.4 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.

2.4.1 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.
2.4.2 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.

2.4.3 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 the Authority as any provision of the Act, Regulations or Orders are on the people whose aviation-related activities you are responsible for regulating.

2.5 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 the Authority. 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.

2.5.1 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 Regulations – for example, regulation 265 of the Civil Aviation Regulations 1988 (CAR) and section 30DC of the Civil Aviation Act 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 the Authority 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. 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.

**2.5.2 Other Important Rules and Principles of Administrative Law**

**A Decision Maker Must Not Act for Improper Purposes**

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.

**A Decision Maker Must Take All Relevant Considerations into Account**

All those factors which are relevant to the decision being made must be considered. This includes technical, operational and individual factors. Policy is always a relevant consideration, and the failure of a decision-maker to consider the application of an applicable policy may render the decision invalid.
A Decision Maker Must Not 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 Maker Must Not Make a Decision that is Vague or Uncertain in its Implications

If a person is required to comply with the terms of an officer’s decision, or if the person’s failure to comply with a requirement of the law is based on certain conduct the specific requirements imposed on the person, or the specific nature of his or her conduct which is said to be inconsistent with the law, must be sent out clearly and unambiguously by the decision maker. This is especially important in respect of the reasons underlying a decision.

Thus, where a person is reasonably unable to understand what it was he or she is said to have done (or failed to do), why he or she must do (or refrain from doing) something or what the particular requirements of the applicable law are in a particular case, the decision may be regarded as unacceptably vague or uncertain, and may be found to be invalid on that basis.

A Decision-Maker Must Not Act without Evidence

Enforcement related decision-making must be based on clear and plausible facts that are able to be articulated, not mere conjecture or speculation. These facts need not always be clear “beyond a reasonable doubt”, nor need they necessarily be facts within the personal knowledge of the decision-maker. However, they must be sufficient to justify, on reasonable grounds the action being taken, and they must be articulated to the person in relation to whom that action is being taken.

The evidence (facts and circumstances) on which a decision rests must be stated, or at least be capable of being stated, with a fair measure of specificity and particularity.

A Decision-Maker Must Not Apply Policy Inflexibly

As noted above, where the exercise of discretion is involved in decision-making, the decision-maker is required to take any relevant policy of the Authority 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, 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.

**A Decision-Maker Must Not Act 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.

**A Decision-Maker Must Act within a Reasonable Time**

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 the 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 provide its own decision in the absence of one having been made by the Authority.

### 2.5.3 Consequences of Defective Decision-Making

**Administrative and Judicial Review**

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 his or her 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 the power of government which have 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.
2.5.4 Administrative Appeals Tribunal Review

Most, if not all of the enforcement-related decisions made by officers and delegates of the Authority are subject to review by the Administrative Appeals Tribunal (AAT). The AAT has the power not only to find that a decision was inconsistent with the legislation, but can determine whether the procedures followed in the course of arriving at and making that decision were consistent with the rules of natural justice and any other applicable principles of administrative law. In either case, the AAT has the power to declare the decision to be invalid, and to make an entirely new decision. In imposing its own decision, the AAT may exercise all of their powers of the original decision-maker under the applicable legislation.

Section 31 of the Civil Aviation Act 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 CAR 297A 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.

Both section 31 of the Act and CAR 297A provide that, where the Authority 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.
2.6 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).

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 powers in relation to a decision being reviewed under the ADJR Act are limited to:

- Affirming the original decision
  
- Or
  
- Declaring the original decision to be invalid, and directing the Authority to make a new decision consistent with the requirements of the legislation
  
- Or
  
- Requiring the Authority to reconsider the decision in accordance with the applicable rules of administrative law and any other directions given by the court.

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.

2.7 Review of Decisions by the Commonwealth Ombudsman

The Ombudsman’s powers are confined to investigation, recommending and reporting.

Under the *Ombudsman Act 1976* the Ombudsman has power to enquire into whether action taken by Commonwealth Departments and agencies, such as the Authority, 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.
If the Department or agency refuses or fails to comply with the recommendations of the Ombudsman, the Ombudsman can report the matter to the Prime Minister and, if still dissatisfied, can make a report to the Parliament. The Ombudsman has no power to set aside decisions or to issue orders to persons administering legislation, but can express an opinion about whether or not any decision under consideration has been arrived a lawfully.

2.8 Freedom of Information

The Freedom of Information Act 1982 (FOI Act) applies to the Authority. However, there are grounds on which the delivery up of documents can be refused.

The grounds on which delivery up of documents can be refused include grounds such as:

- Whether disclosure would or could reasonably be expected to disclose the identity of a confidential source of information in relation to the enforcement of the law (which could be relevant where an employee of a participant in the industry has reported to the Authority aspects of the employer’s operations which are of concern)
- Whether disclosure would reveal business secrets (which could be relevant to documents provided in support of applications for certification of equipment or systems).

The FOI Act does not provide directly for any remedies or orders to be made to review administrative actions. However, by providing rights of access to information, the FOI Act can provide material which can then be used to base a claim for review under another Act such as the ADJR Act, or at common law.

It should be borne in mind that, just because FOI procedures are available, this does not mean that every request for information must be submitted to these procedures. In many cases where there is no particular sensitivity about information, then it is simpler both for CASA and for the person concerned to provide access to documents on an informal basis. However the requirements of the Privacy Act 1988 also need to be taken into account.

2.9 Privacy Act

The Privacy Act 1988 (Privacy Act) establishes Australian Privacy Principles (APPs) which apply to the collection, storage, use and security of “personal information” by Commonwealth authorities, including CASA.

The APPs are likely to be of most significance in relation to the processing of applications by individuals for licences, ratings and certificates under the Civil Aviation Act 1988 or Regulations where the decision maker will need to have information about characteristics of the applicant so as to be able to determine the ability of the applicant to carry out the activities under consideration.
The term “personal information” is not used in any narrow sense. Instead the term is defined broadly by the section 6(1) of the Privacy Act to mean “information… about” an individual.

The information could be, for example, information about any medical condition affecting the individual or information about the results which an individual obtained in a written test undertaken as part of the process of being assessed for a licence or rating.

The APPs are expressed broadly. The main APPs of relevance to CASA are:

- APP 1: open and transparent management of personal information
- APP 3: collection of solicited personal information
- APP 6: use or disclosure of personal information
- APP 11: security of personal information
- APP 12: access to personal information.

If CASA breaches an APP, a person affected can apply to the Information Commissioner, who can determine what action is appropriate to redress a breach of the APP.

If, on application, the Commissioner determines that there has been a breach of the APPs, the Commissioner can make a determination which sets out the action required to redress the breach. The action required could be a general change to CASA practices, or could be adapted to the circumstances of the individual involved or could deal with both kinds of matters. The determination can even include a determination that compensation be paid to the individual who has suffered loss through breach of the APPs. Such determinations are binding on CASA.

There are also a range of criminal offence provisions in the Act, and a civil penalty scheme administered by the Information Commissioner.

### 2.10 Race and Sex Discrimination

The *Racial Discrimination Act 1975* (RDA) and the *Sex Discrimination Act 1984* (SDA) may be relevant to the exercise of regulatory powers under the *Civil Aviation Act 1988* and Regulations. Both Acts prohibit discrimination of the prescribed kind by public authorities such as CASA.

If a person exercising regulatory powers under the *Civil Aviation Act 1988* or Regulations were to discriminate against a person subject to the power – for example, by refusing to license an applicant as a commercial pilot because the applicant was of Asian descent or because the applicant was a woman – then that would expose the action to judicial review under the *Administrative Decision (Judicial Review) Act 1977*, because such matters are “irrelevant considerations” in administrative law terms and should not be taken into account by decision-makers anyway because it is not relevant to the safety purpose of the legislation.
However, if a decision-maker did take into account such considerations, this could also attract the provisions of the Commonwealth’s racial or sex discrimination legislation.

The RDA (section 13) makes it “unlawful” for a person (supplying goods and services to the public or to any section of the public), who by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person:

a. Refuses or fails on demand to supply those goods or services to another person.

b. Refuses or fails on demand to supply those goods or services to another person except on less favourable terms or conditions than those upon which he would otherwise supply those goods or services.

While there might be some room for dispute as to whether the carrying out of some of the regulatory functions under the Civil Aviation Act 1988 or Regulations would amount to the supply of services within the meaning of this provision, there is no doubt about the relevance of the SDA to the exercise of powers under the Civil Aviation Act 1988 or Regulations.

The SDA in section 26(1) includes the provision:

It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the others person’s sex, marital status or pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

Under either Act, a complaint alleging “unlawful” conduct under the Act may be lodged with the Human Rights and Equal Opportunity Commission for determination (including compensation for loss or damage suffered) and any determination of that Commission may be enforced by action in the Federal Court.

2.11 Civil Liability for Damages Resulting from Defective Decision-Making

This is not the place to discuss the law relating to negligence or the circumstances under which the Authority (and in some cases, an individual officer or delegate) may be found liable for damages as a result of a failure to observe the rules and principles of administrative law.

It is important to keep in mind, however, that when it can be shown that, in the process of exercising decision-making powers under our legislation, an officer or delegate has acted negligently, the Authority may be held liable to pay the costs associated with any harm or injury a person may have suffered as a direct and proximate result of that action (or, as the case may be, a failure to act).
3.1 Delegations and Delegates

3.1.1 What Is a Delegation?

Under the Civil Aviation Regulations the Civil Aviation Safety Authority (CASA) is given various discretionary powers relating to the safety regulation of civil air operations in Australia. A discretionary power must, in general, be exercised only by the person or body to which it has been given unless there is an express power to delegate it to another.

Delegation, strictly used, refers to the act by which an individual or body possessing legal authority transfers the right to exercise any or all of those powers to a subordinate individual or body.

3.1.2 Becoming a Delegate

To become a delegate of the Authority with power to exercise various statutory discretions a person must be validly appointed under section 94 of the Civil Aviation Act 1998 or regulation 11.260 of the Civil Aviation Safety Regulations 1998 (CASR). Only the Director of Aviation Safety is empowered to delegate the Authority’s powers under the Act and the Regulations.

3.1.3 What Powers can a Delegate Exercise?

A delegate is only empowered to exercise the powers that have been expressly delegated to him or her by the Director of Aviation Safety under a valid instrument of delegation. Delegates exercise the powers delegated to them in their own name – they do not act on behalf of the Authority as agents of the Authority.

3.1.4 The Authority may still Exercise a Power that has been Delegated

The fact that a power of the Authority has been delegated does not deprive the Authority of the power and it is possible for the Authority to exercise the power through persons with authority to act on its behalf while one or more persons have concurrent power to exercise the power under the delegation.

3.2 Limitations Imposed on Delegates’ Discretions

While words such as “may” or “as the Authority considers necessary” give the appearance that a decision-maker has an unfettered discretion, such discretionary power must be exercised according to law to promote the policy and objects of the legislation. The decision-maker must not exercise the power for an improper purpose; nor may he or she be guided by irrelevant considerations or fail to be guided by relevant considerations; nor
may the decision be manifestly unreasonable, uncertain or made without any supporting evidence having regard to the scope and purpose of the legislation. These matters have been dealt with in more details in Appendix 2, The Legal Basis of Regulatory Enforcement.

3.3 Exercising Powers under the Act and Regulations

To what matters must a decision-maker have regard and what kinds of purposes can be pursued when exercising the powers under the Civil Aviation Act 1988 and Regulations?

The long title of the Civil Aviation Act is “An Act to establish a Civil Aviation Safety Authority with functions relating to civil aviation, in particular the safety of civil aviation, and for related purposes.” Safety is the primary focus of the Act.

The safety focus of the legislation is also reflected in the power to make regulations contained in section 98 of the Act. The regulation-making power is restricted to the power to make regulations relating to the safety of air navigation.

Generally, a decision maker exercising regulatory powers under the Civil Aviation Act 1988 or Regulations must have regard to aviation safety considerations and to no other considerations, and must pursue aviation safety purposes and no other purposes.

This implied limitation on the scope of the powers under the legislation flows from the constitutional and statutory background to the legislation.

If in any case the decision maker considers that there is some non-safety consideration which should be taken into account, then Legal Services should be consulted.

3.4 The Use of Policy Guidelines

A delegate who is entrusted with a discretion must determine the matter for himself or herself and not merely adopt or rubber stamp a decision made by someone else.

The most difficult application of this principle has concerned the extent to which a delegate is entitled to follow a previously laid down policy, either of his or her own making, or as is more frequently the case, a policy laid down by the relevant department, the Authority or even the Minister, and issued to persons involved in decision making in the form of manuals, circulars, instructions and guidelines.

In most cases a relevant policy or rule will be a relevant consideration which a decision-maker is entitled to consider so long as the policy itself was validly formulated (see Green v. Daniels (1977) 51 ALJR 463). In fact, a decision maker would be entitled to adopt a general policy that will govern the exercise or his or her discretion in most cases, provided that he or she is prepared to depart from that policy having regard to the circumstances of the case before him.
The general rule in this area is set out by Lord Denning in the UK case of *Sagnarta Investments v. Norwich Corporation* (1971) 2 QB 614 at 626:

> I take it to be perfectly clear now that an administrative body, including a licensing body, which may have to consider numerous applications of a similar kind, is entitled to lay down a general policy which it proposes to follow in coming to its individual decisions, provided always that it is a reasonable policy which it is fair and just to apply. Once laid down, the administrative body is entitled to apply the policy in the individual cases which come before it. The only qualification is that the administrative body must not apply the policy so rigidly as to reject an applicant without hearing what he has to say. It must not 'shut its ears to an application': see (1971) AC 610, 625, per Lord Reid. The applicant is entitled to put forward reasons urging that the policy should be changed, or saying that in any case it should not be applied to him. But, so long as the administrative body is ready to hear him and consider what he has to say, it is entitled to apply its general policy to him as to others.

### 3.5 Exercising Statutory Discretion

A delegate cannot be compelled not to exercise a statutory discretion by his or her superior.

While a superior may give a direction to a delegate the effect of which is to guide the exercise of the power, the superior cannot give a direction the effect of which is to prevent the exercise of the power absolutely or to dictate how the discretion is to be exercised. Such a direction is unlawful as is a decision made in such circumstances. See in particular *Perder Investments v. Lightowler* (101 ALR 151 at 160).

### 3.6 The Requirement to give Reasons for Decisions

Many of the provisions of the *Civil Aviation Act 1988* and Regulations contain express obligations requiring decision-makers to give reasons for decisions to the person affected by the decision.

For example, most of the decisions in relation to approved systems of maintenance under Part 4A of the *Civil Aviation Regulations 1988* (CAR) are required to be accompanied by a statement of reasons for a particular decision.

Under CAR 264(2) there is an obligation on CASA whenever it makes a decision refusing to grant a licence or certificate (as defined in CAR 263) to give written notice of the decision informing the applicant of the decision and of the grounds for decision.

Under CAR 269 there is an obligation on CASA to give the holder of a licence or certificate notice of any decision to vary, suspend or cancel the licence or certificate and to include in the notice a statement of the grounds for decision.
3.7 Other Commonwealth Legislation and Delegates’ Decisions

Other Commonwealth legislation may also require Authority delegates to give reasons for their decisions.

As well as any obligation to give a statement of reasons which may apply under the Civil Aviation Act 1988 and Regulations themselves, there are obligations under the Administrative Appeals Tribunal Act 1975 (AAT Act) or the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) to give a statement of reasons.

Where a decision is subject to review under the AAT Act, then a person entitled to apply for a review is also entitled to a statement of reasons under section 28 of the Act. Where a decision is subject to review under the ADJR Act but there is no right to a statement of reasons under the AAT Act, then section 13 of the ADJR Act gives a right to apply for a statement of reasons.

3.8 Matters to be Included in a Statement of Reasons

The approach to a preparation of a statement of reasons needs to be governed by the purpose of the requirement – that is, to inform persons affected by decisions so that they can understand the reason for the decision and can consider whether they wish to pursue the rights of review.

The provisions in the Civil Aviation Act 1988 and Regulations which require the giving of a statement of reasons do not specify what should go into such a statement. It is clear that the purpose of the obligation to provide reasons is to enable persons who, or whose interests, are affected by an administrative decision, to be fully informed of the basis on which the decision was made and the reasons for it (Ansett Transport Industries Limited v. Taylor (1987) 18 FCR 498). Having obtained the reasons for the decision, the recipient is then in a position to determine whether the making of the decision was an improper exercise of the power conferred, whether it involved an error of law or whether the decision maker took into account relevant considerations (see Doulton v. FCT (1985) 7 FCR 382).

Since that is the underlying purpose to the obligation to give reasons, any such statement of reasons should set out the decision-maker’s understanding of the relevant law, any findings of fact on which his or her conclusions depend and the reasoning process which led him or her to those conclusions. This must be done in clear and unambiguous language, not in vague generalities or the formal language of legislation. In particular, the decision-maker is under a clear obligation to explain his/her decisions in terms which can be understood by the persons affected by the decision (see Ansett Transport Industries (Operations) Pty Ltd v. Wraith (1983) 48 ALR 500 at 507; Commonwealth of Australia v. Pharmacy Guild of Australia (1989) 91 ALR 65 at 67).

Given the potential for any statement of reasons to be used in litigation, a statement of reasons should generally not be issued without first discussing it with Legal Services.
Of course, once a decision has been made the reasons for it cannot be altered. Accordingly it is imperative that when a decision maker has any doubts about what limits there are on what may be done in the exercise of power, then Legal Services should be consulted before the decision is made.
4.1 Introduction

CASA delegates are frequently required to consider whether an applicant for an authorisation is a ‘fit and proper person’ for the purpose of that application or whether the holder of an authorisation is a fit and proper person to continue to hold it.

4.2 Fit and Proper person

References to the ‘fitness’ of a person to hold an authorization is used in a number of regulations\(^1\) as a factor which the regulator should take into consideration in assessing whether an applicant should be issued, or should retain, an authorisation.

4.2.2 Guidance from the Legislation

There is no definition of the term ‘fit and proper person’ in the Civil Aviation Act 1988 (the Act), the Civil Aviation Regulations 1988 (CAR) or the Civil Aviation Safety Regulations 1998 (CASR).

Subsection 9A(1) of the Act 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 Act 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 and Orders 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.

\(^{1}\) For examples see regulation 269(1)(d) of the Civil Aviation Regulations 1988 and regulation 11.055(4)(i) of the Civil Aviation Safety Regulations 1998.
4.2.2.1 Context

While there is no express definition in the legislation it gives us the starting point; the context for our consideration of this phrase in the aviation environment.

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

- 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.

4.2.3 High Court decisions and other case law

The term ‘fit and proper person’ is employed in a number of Commonwealth regulatory frameworks governing the issue of licences, permits and the like. As such, there is a significant body of case law considering the meaning that should be accorded to the phrase.

4.2.3.1 Confidence

The High Court refers to the ‘context’ as a starting point for understanding the term ‘fit and proper person’. While it is a separate consideration from the actual activities undertaken under the authorisation it encompasses the need for CASA to have confidence that the conduct of those activities will be carried out properly and lawfully.

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*. 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.

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2. (1990) 94 ALR 11

3. Ibid per Toohey and Gaudron JJ at ALR 56
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, 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 the Administrative Appeals Tribunal determined that, in considering the meaning of the term ‘fit and proper person’ in sr.269(1)(d) of the CAR, 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 in which it was said in the substantially similar context of the then r.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* 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.

### 4.2.3.2 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)* cited below, to give the widest scope for judgment and rejection.

In *Re Broadbent and Civil Aviation Safety Authority* 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 duty 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]”

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8. [1999] AATA 972
9. [1999] AATA 972
10. (1955) 93 CLR 127 at 156-7
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):

- 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;

are all relevant considerations.

**4.2.3.3 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**,\(^\text{11}\) 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**,\(^\text{12}\) the Federal Magistrate’s Court considered the expression “fit and proper person” in CAR 5.09 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]

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\(^{11}\)AATA 573 (18 June 2003)

\(^{12}\)[2003] FMCA 83 (14 March 2003)
In *Brazier and Civil Aviation Safety Authority*,\(^{13}\) 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*\(^{14}\) in relation to CAR 269(1)(d), 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. \([emphasis added]\)


\(^{14}\)[2006] AATA 652 (26 July 2006)
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):

- 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.

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

A further consideration raised in the matter of Re Griffiths and Civil Aviation Authority 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 and Civil Aviation Safety Authority\(^{16}\) in relation to CAR 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. ...

\(^{16}\) [2006] AATA 652 (26 July 2006)
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 Legal Services Division 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 legislation17, 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 consideration18) 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.

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17 See for example CAR 5.09(3) which expressly states that ‘…CASA must only take into account those things set out in paras (a) which is prescriptive and (b) ‘any other matter that relates to the safety of air navigation’ which would allow CASA delegates to take into consideration the matters which are encompassed in this Appendix.

18 See also specific reference in CASR 11.055 (4)(i) to ‘any other matter relating to the fitness of the applicant to hold the authorisation.’