

- (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.

# Enforcement Manual

## 12. Access

Approved by Executive Manager, Legal Services Version 4.0: November 2009

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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 Enforcement Policy and Practice Branch (EPP) 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 EPP.

**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. EPP 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.

CAA 32AA  
CAA 32AE  
CAA 32AF

Investigators appointed under section 32AA of the Act are empowered to seize evidence under sections 32AE and 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

- CAR 53 empowers an authorised person to investigate defects in an Australian aircraft.

CAR 53(3)

- 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

- 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.

CAR 5.51

CAR 50C



CAR 301 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 336 (immediate surrender) or form 338 (surrender within 7 days)) If the inspector wishes to issue the notice, then the inspector needs to ensure that he or she has the necessary delegation.

CAR 301 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 inspector's manager to the Coordinator Investigations in the EPP Branch. A decision will then be made as to whether to obtain a search warrant. This will be part of a Coordinated Enforcement discussion.

Alternatively, unless there is likelihood that the evidence will be destroyed, the Manager EPP or the Co-ordinator Investigations may determine, in conjunction with the CDP, 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*.

*Crimes Act 39*

CAR 301(2)

CAR 301

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 (1) • CAR 5.56(1) authorises CASA to request a person to produce his or her licence, log book or medical certificate. A person must produce the document without delay or, if the person does not have immediate access to the document at the time, within 7 days. Such a request may be made orally but should be recorded in the inspector's notes.
- CAR 302 (1) • 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.

## 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 EPP.

**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 Coordinator 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.

**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).

### 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 overlaying 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 EPP using form 333, 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 immovable 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 Coordinator Investigations, as soon as an immovable 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 EPP.

#### 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 EPP.

#### 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 in court.

### 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.

# Enforcement Manual

## 14. Note Taking

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### 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.

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## 14. Note Taking

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### 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 or a 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.



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### 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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## 14. Note Taking

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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

Any person with knowledge of a matter, who is capable and competent to give evidence at judicial proceedings.

#### 15.4.2 Suspect

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.

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## 15. Interviewing

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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 Coordinator Investigations, or the Manager EPP.

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## **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.

CAR 288 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.

CAA 32AK  
CAA 32AA 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.

CAR 288  
CAA Part IIIA 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.

# Enforcement Manual

## 16. Detaining Aircraft

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### 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.

CAR 288

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

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.

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## 16. Detaining Aircraft

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### 16.4.4 Carry Out the Necessary Investigation

CAR 288 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.

CAR 288 (2) 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.



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## 16. Detaining Aircraft

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### 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 Coordinator Investigations. The investigator will then arrange police assistance.

# Enforcement Manual

## 17. Police Assistance

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Police assistance can only be arranged with the approval of the Manager Enforcement Policy and Practice or the Coordinator 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.

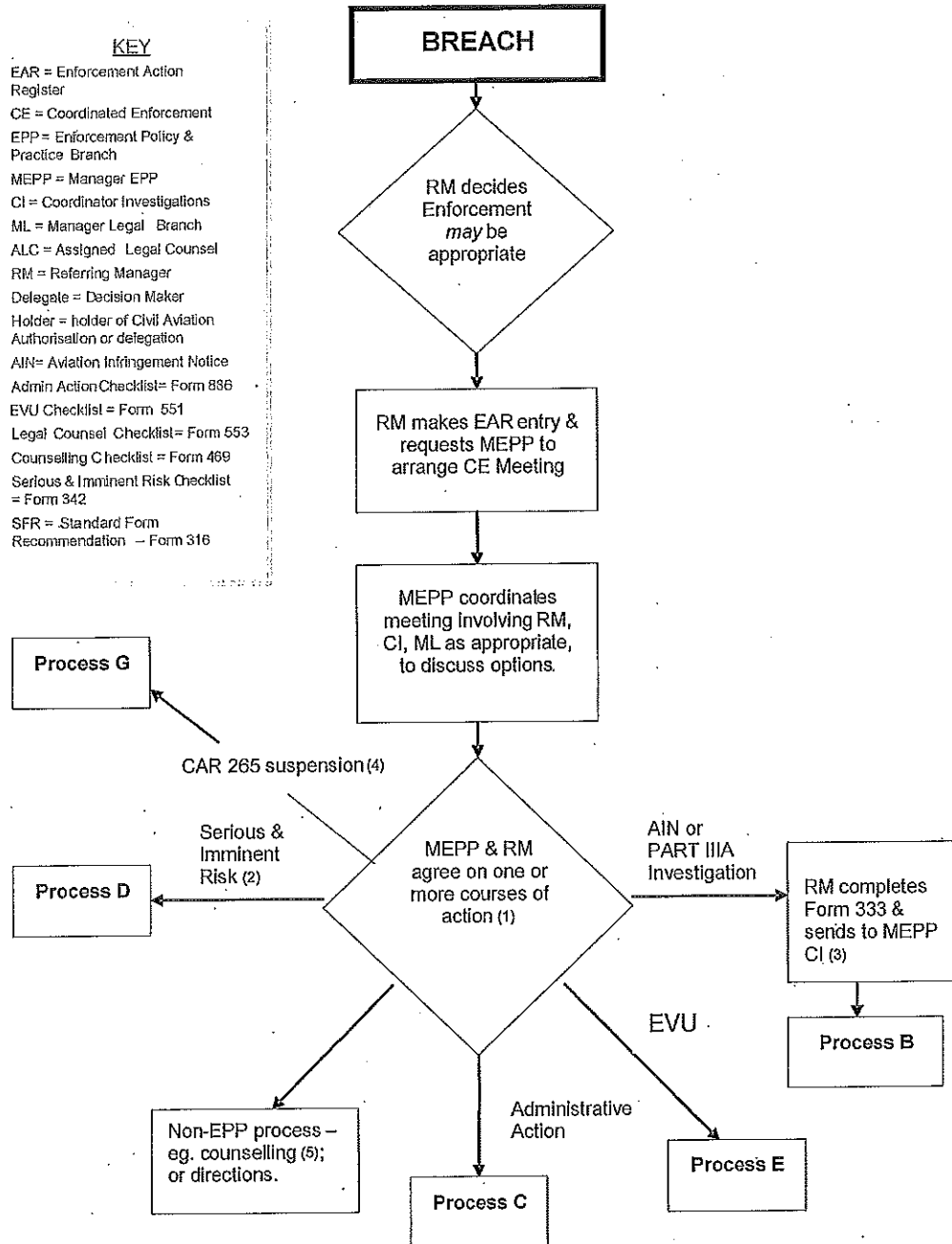


# Enforcement Manual

## Appendix 1. Flowcharts – Coordinated Enforcement Processes

Approved by Executive Manager, Legal Services Version 4.0: November 2009

### 1.1 Coordinated Enforcement Process A



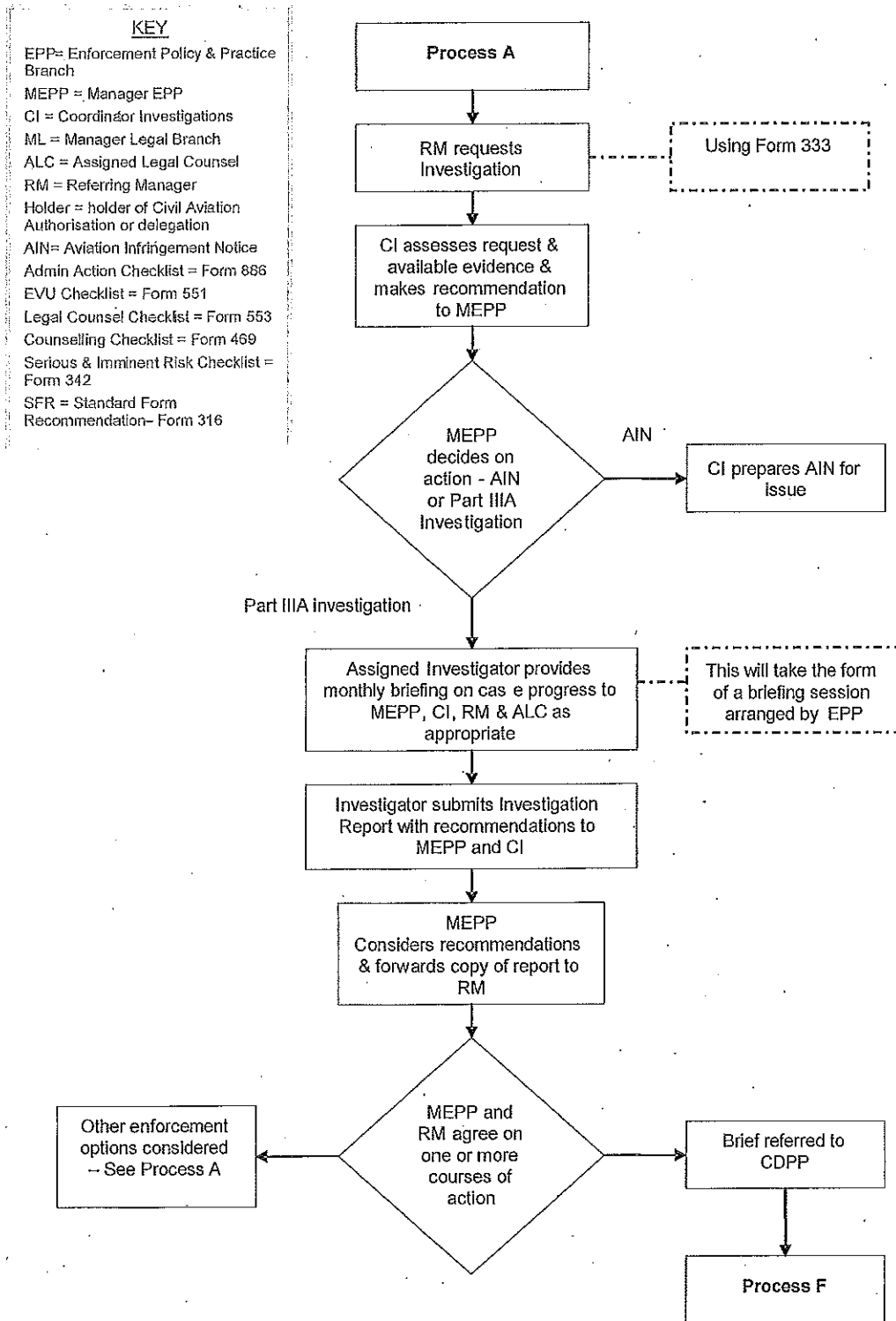
- (1) If infringement notice or Part IIIA investigation is appropriate – MEPP makes decision ; or If Serious & Imminent Risk, Administrative Action, CAR 265 Suspension, EVU or Counselling is considered appropriate – Referring Manager makes the recommendation to the delegate.
- (2) Suspension of Civil Aviation Authorisation pursuant to S30DC of the Civil Aviation act 1988
- (3) Form 333 is the Request for Investigation or Recommendation for AIN
- (4) Suspension pending successful completion of licence examination
- (5) For Counselling see Chapter 4

# Enforcement Manual

## Appendix 1. Flowcharts – Coordinated Enforcement Processes

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### 1.2 Coordinated Enforcement Process B (Part IIIA Investigation)



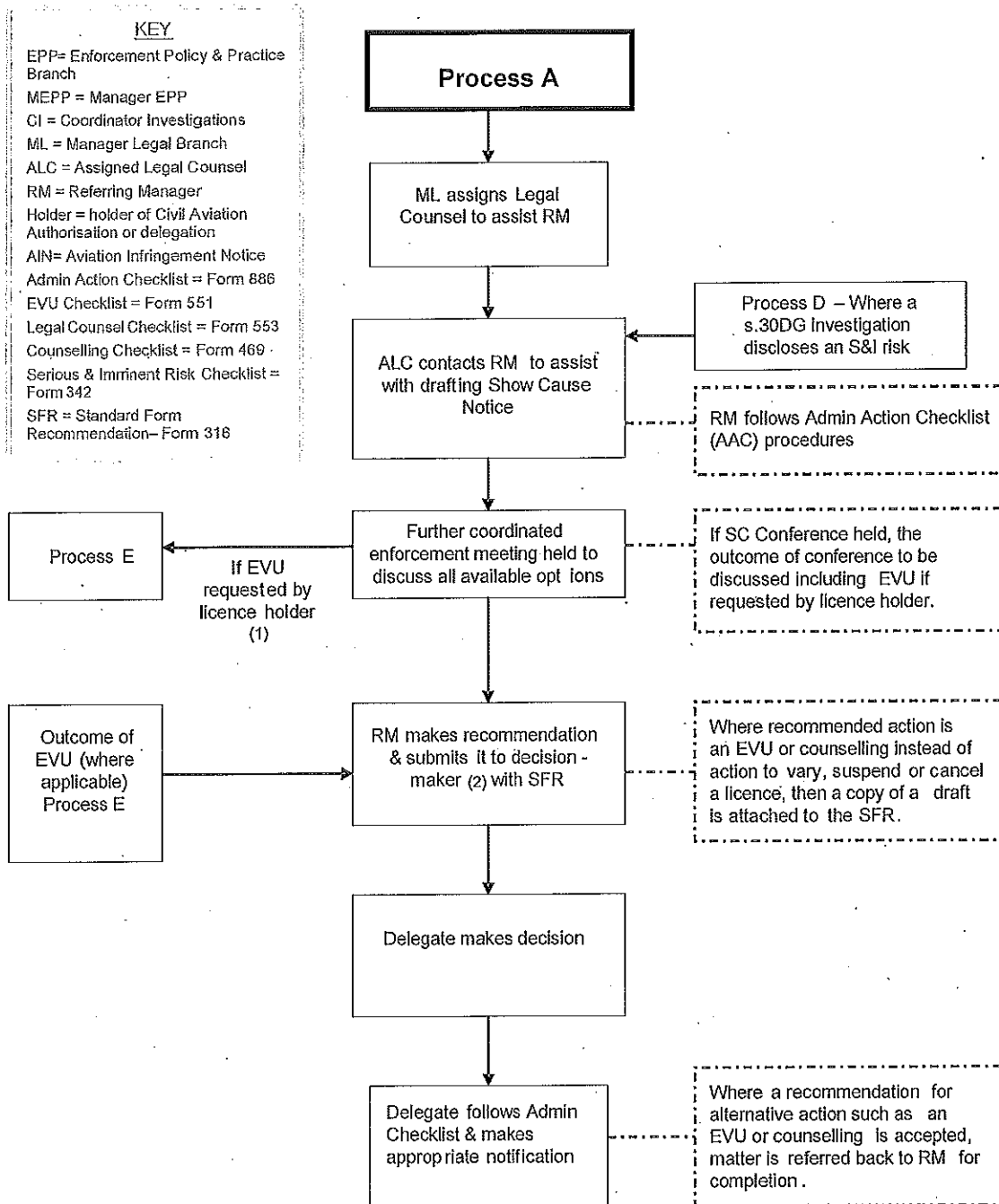


# Enforcement Manual

## Appendix 1. Flowcharts – Coordinated Enforcement Processes

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### 1.3 Coordinated Enforcement Process C (Administrative Action)



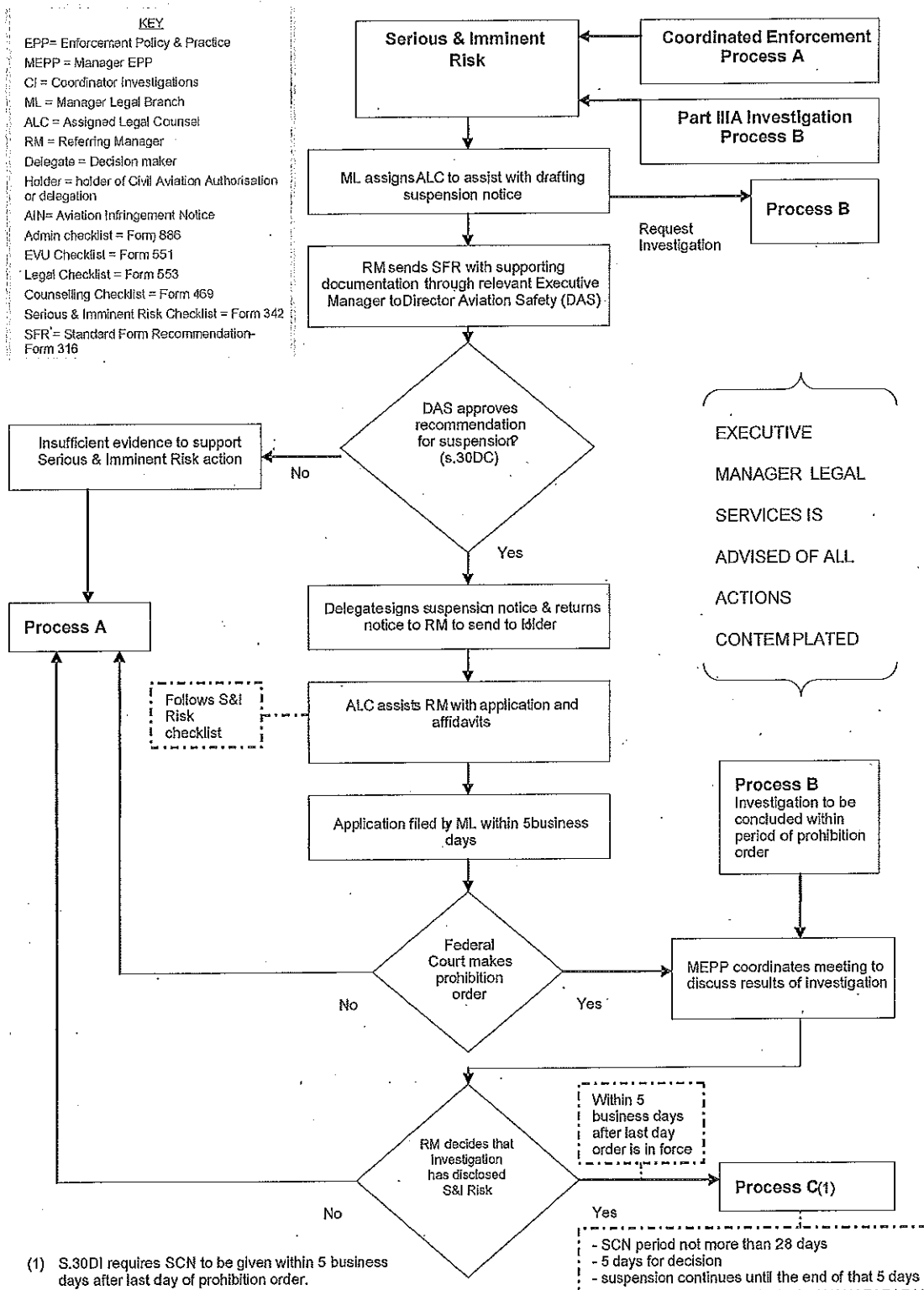
(1) Where requested by licence holder & agreed by CASA  
 (2) Delegate for 30DI decision may be different to that for general Administrative action.

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## Appendix 1. Flowcharts – Coordinated Enforcement Processes

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### 1.4 Coordinated Enforcement Process D (Serious and Imminent Risk)

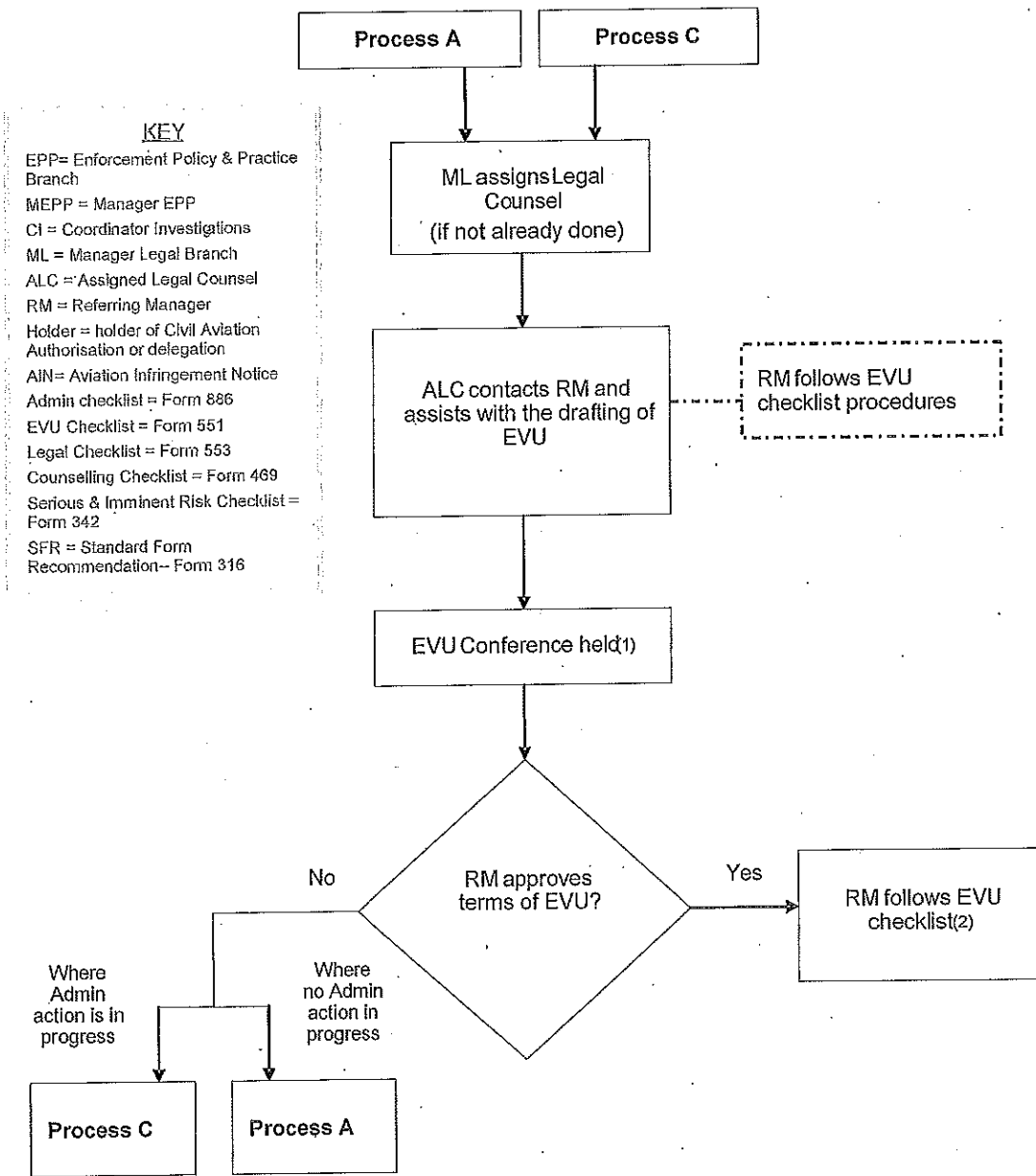


# Enforcement Manual

## Appendix 1. Flowcharts – Coordinated Enforcement Processes

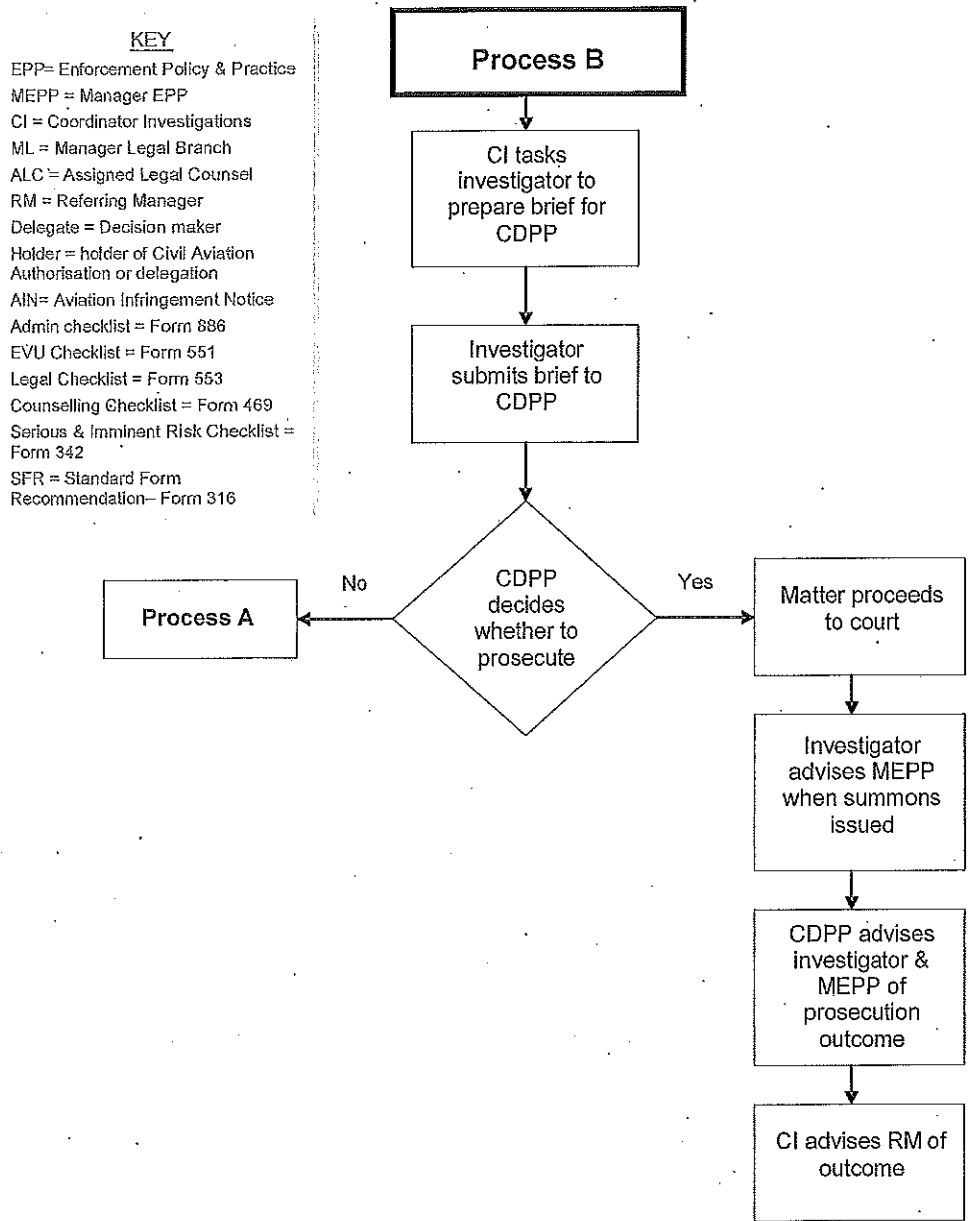
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### 1.5 Coordinated Enforcement Process E (Enforceable Voluntary Undertaking)

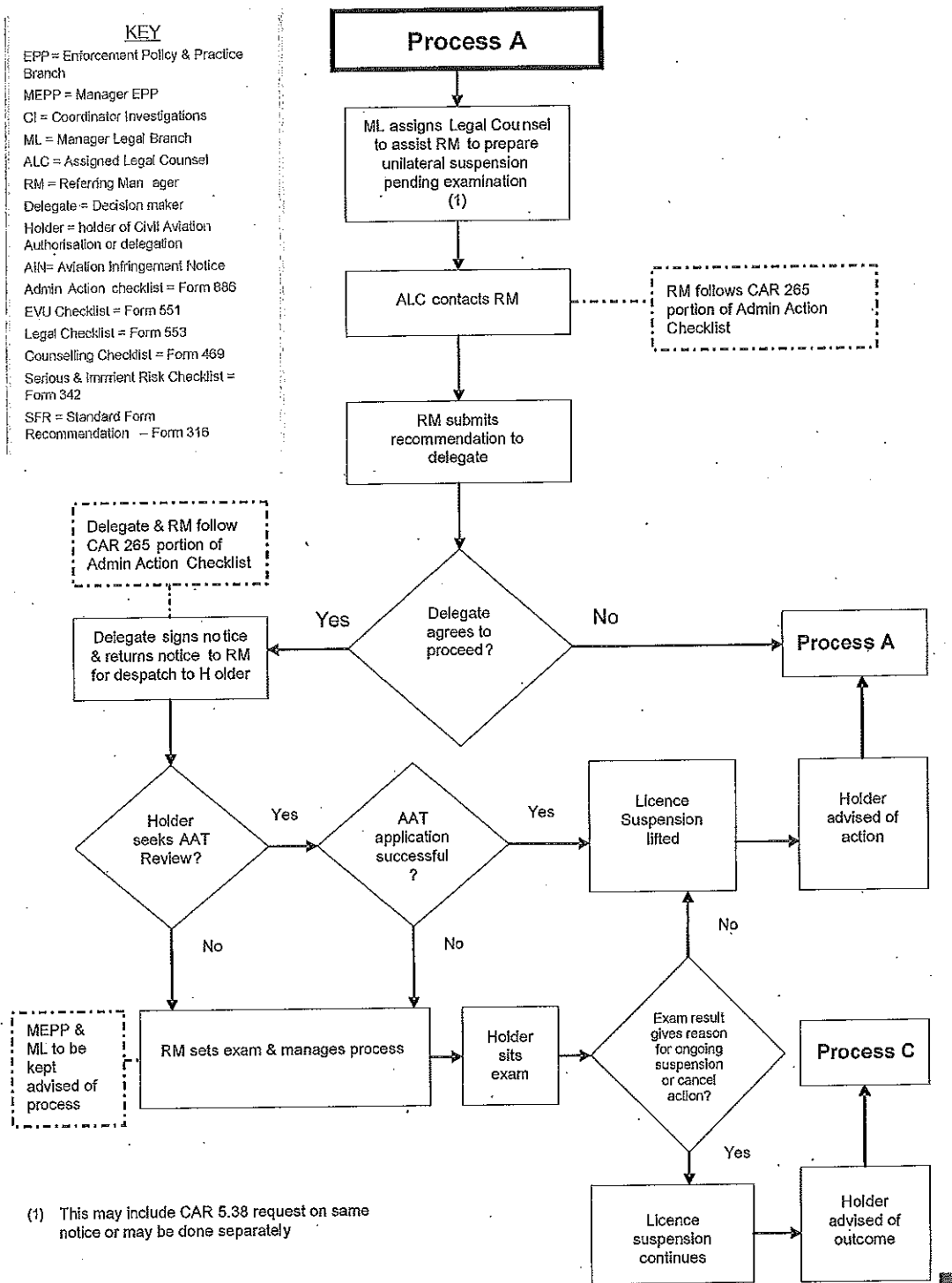


- (1) Where requested by licenceholder and agreed by CASA– this will often be in the form of a Show Cause Conference where the request for an EVU has come out of the Admin action process.
- (2) This covers the signing & publication of EVU on CASA website.

1.6 Coordinated Enforcement Process F (Referral to the Commonwealth DPP)



### 1.7 Coordinated Enforcement Process G (CAR 265 Suspension for Purpose of Examination)



# Enforcement Manual

## Appendix 1. Flowcharts – Coordinated Enforcement Processes

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# Enforcement Manual

## Appendix 2. The Legal Basis of Regulatory Enforcement

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### 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 and section 30DC (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.

# Enforcement Manual

## Appendix 2. The Legal Basis of Regulatory Enforcement

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### 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).

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 Administrative Appeals Tribunal Act 1975 or seek judicial review under the Administrative Decision (Judicial Review) Act 1977 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 at lawfully.

### 2.8 Freedom of Information

The Freedom of Information 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 Freedom of Information 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 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 FOIA 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 the CAA 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.

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### 2.9 Privacy Act

The Privacy Act 1988 establishes Information Privacy Principles which apply to the collection, storage, use and security of "personal information" by Commonwealth authorities, including CAA.

The Principles 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 Principles are expressed broadly. The main Principles which would be of relevance to the Authority are:

- Principle 4: Manner and purpose of collection of personal information
- Principle 2: Solicitation of personal information from the individual concerned
- Principle 4: Storage and security of personal information
- Principle 10: Limits on use of personal information
- Principle 11: Limits on the disclosure of personal information.

If the Authority breaches an Information Privacy Principle, the person affected can apply to the Privacy Commissioner and the Commissioner can determine what action is appropriate to redress a breach of the IPP.

If, on application, the Commissioner determines that there has been a breach of the Principles, the Commissioner can make a determination which sets out the action required to redress the breach of the Principles. The action required could be a general change in the practices of the Authority 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 Principles. Such determinations are binding on the Authority.

### 2.10 Race and Sex Discrimination

The Racial Discrimination Act 1975 and the Sex Discrimination Act 1984 may be relevant to the exercise of regulatory powers under the Civil Aviation Act 14988 and Regulations.

Both Acts prohibit discrimination of the prescribed kind by public authorities such as the Authority.

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 Racial Discrimination Act (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 Sex Discrimination Act 1984 to the exercise of powers under the Civil Aviation Act 1988 or Regulations.

The Sex Discrimination Act 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 other 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).

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### 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 7 of the Civil Aviation Regulations. 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 of 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 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 Regulations are required to be accompanied by a statement of reasons for a particular decision.

Under Regulation 264(2) there is an obligation on CASA whenever it makes a decision refusing to grant a licence or certificate (as defined in Regulation 263) to give written notice of the decision informing the applicant of the decision and of the grounds for decision.

Under regulation 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 or the Administrative Decisions (Judicial Review) 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.

# Enforcement Manual Revision History

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**Note:** The Revision History shows the most recent amendment first. Scroll down the table to view details of previous amendment information.

| Version | Date          | Chapter/<br>Section | Details  |
|---------|---------------|---------------------|--|
| 4.0     | November 2009 | All                 | Manual re-written.   |
| 3.1     | December 2005 | Chapter 11          | In para 11.4.2, inserted routing of a report or recommendation through the Coordinator Investigations.           |
|         |               | Chapter 18          | In para 18.4.1.1, inserted routing of request for a formal investigation through the Coordinator Investigations. |
|         |               | Chapter 19          | Section 19.2.21 (sample Form 333) Amended.   |
|         |               | Form 333            | Amended.   |
| 3.0     | June 2004     | All                 | Manual re-written to reflect new legislative changes.  |
| 2.0     | May 2001      | All                 | Revision of the entire manual and presentation in online format for delivery on CASA's website.                  |
| 1.0     | February 2001 | All                 | First version of the manual.   |

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