

**Submission of the Civil Aviation Safety Authority
to the Senate Standing Committee
on Rural and Regional Affairs and Transport**

Inquiry into Aviation Accident Investigations (Pel-Air)

Attachment A

CASA Enforcement Manual

Version 4.0 (November 2009)





Australian Government

Civil Aviation Safety Authority

Enforcement Manual

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Enforcement Manual

This is an internal CASA policy manual. It contains guidance material intended to assist CASA officers and delegates in carrying out their regulatory responsibilities and may be made available to the public for information purposes only.

Since this is an uncontrolled version of the manual which will not be updated by CASA, it should not be relied upon for any regulatory purpose. The current manual can be viewed at any time via CASA's website at "www.casa.gov.au".

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

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1.1 Contents of this Chapter

This Chapter contains the following sections:

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

1.2 Purpose

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

1.3 Manual Objective

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

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

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1. About This Manual

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1.4 How to Propose an Amendment

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

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

1.5 Manual Amendment Process

If you wish to propose an amendment:

STAGE 1

1. Complete the Enforcement Manual Amendment Submission Form (form 314).
2. Send the completed form to your team leader or supervisor for approval.

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

3. Once the amendment is approved by your team leader or manager submit the Enforcement Manual Amendment Submission Form (form 314) to the Enforcement Policy Adviser by sending an email to the Enforcement Policy Adviser Outlook address in the Outlook directory.
4. Officers of the Legal Services Division can forward suggested amendments directly to the Enforcement Policy Adviser using the amendment submission form without seeking managerial approval.

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STAGE 2

5. Once the Enforcement Policy Adviser receives the submission he/she will arrange for the amendment request to be entered in the Enforcement Manual Issues Register and send an acknowledgment to the person who submitted the proposed amendment.
6. The Enforcement Policy Adviser then circulates the request for comment by Legal Counsel and Investigators as appropriate.
7. The Enforcement Policy Adviser then arranges for those comments to be discussed by the Enforcement Review Team, comprised of the Manager EPP, Manager Legal Branch and Enforcement Policy Adviser.

STAGE 3

8. The Review Team evaluates the proposed amendment and the additional comments.
9. The Review Team determines if the amendment should be made, then submits a recommendation to the Manual Sponsor – the Executive Manager, Legal Services Division.
10. If the Review Team considers the matter should not be processed, the Enforcement Policy Adviser arranges to advise the person who submitted the proposed amendment.

STAGE 4

11. The Executive Manager, Legal Services Division approves/disapproves the proposed amendment and advises the Enforcement Policy Adviser who arranges follow-up action.

STAGE 5

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

or

If the amendment is not accepted by the Review Team or not approved by the Manual Sponsor, the Enforcement Policy Adviser notes the refusal in the Enforcement Manual Issues Register and advises the person who submitted the proposed amendment.

Enforcement Manual

1. About This Manual

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

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Enforcement Manual

2. CASA's Enforcement Policy

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2.1 Contents of this Chapter

This Chapter contains the following sections:

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

2.2 Purpose

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

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

CAA 1988
para. 9(1)(d)

CAA 1988, s.
11; Chicago
Convention,
art 12.

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

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2.4 CASA's Enforcement Policy – High-Level Principles

In the Government's National Aviation Policy Green Paper, released for comment on 2 December 2008, the Minister stated:

'The Government is committed to working with industry and the community to develop an Aviation White Paper that sets out a plan to support the safe, dynamic and sustainable development of the aviation industry into the future.'

In particular, the Green Paper states that, among other important objectives, the Australian Government is committed to making safety the number one priority for Government aviation agencies and the industry, and ensuring safety regulation is robust, effective and efficient. To these ends, the Minister makes it clear that:

- Safety is crucial to the aviation industry and must underpin every aspect of its operation.
- Safety needs to be at the foundation of every agency, every business and every flight.
- The Government cannot and will not rest on Australia's enviable safety record. Safety is the Government's number one priority in aviation and will remain so.
- The Government will take immediate action to improve the capacity and effectiveness of its safety agencies. The agencies must be able to meet the challenges of an increasingly complicated and diverse aviation industry.
- CASA regulates the civil aviation industry to protect the travelling public, industry participants and the wider community. To do this CASA needs to have the right structure, resources and legal framework. To achieve this, the Government will appoint a Board and strengthen CASA's capacity to take appropriate safety action, particularly in relation to foreign carriers operating into Australia.

CASA's enforcement policy determines the way CASA uses its powers to regulate. With limited resources CASA must ensure it gives proper focus to the exercise of these powers in order to discharge the trust given to it by the Australian public through the Parliament.

2.4.1 Natural Justice and Accountability

Enforcement decisions must be:

- Fair and follow due process
- Transparent to those involved
- Consistent as between like circumstances
- Subject to appropriate internal and external review.

2.4.2 Impartiality

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

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

2.4.3 Proportionality

Enforcement decisions must be proportional responses to the identified breaches and the safety risk they give rise to. In particular:

- CASA's first priority is to protect the safety of passengers who are least able to control the aviation-related risks to which they are exposed.
- CASA will take strong action against those who persistently and/or deliberately operate outside the civil aviation law.
- CASA will seek to educate and promote training or supervision of those who demonstrate a lack of proficiency but show a willingness to comply with the civil aviation law.
- Where consistent with the overarching interests of safety, CASA will consider the use of infringement notices rather than administrative action when dealing with private pilots who breach the law.

2.5 Distinguishing 'Compliance-Related' Action from Enforcement Action

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

Beyond such *self-motivated* compliance (in the reinforcement of which CASA is playing a greater and more constructive role) there are four other ways in which CASA is actively and directly involved in bringing about compliance, each of which is reflected in specified CASA functions under section 9 of the Civil Aviation Act. These are:

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

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

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

CASA may also act to **compel** authorisation holders to comply with safety standards, or to **prevent** them from continuing to breach those standards, through processes involving the *variation, suspension or cancellation* of authorisations, the *imposition of conditions* on authorisations and by entering into, and where necessary, enforcing *voluntary undertakings*.

In addition, CASA has the power to initiate action with a view to **penalising** persons for contravening regulatory requirements, although the pursuit of such action is in the hands of the Commonwealth Director of Public Prosecutions (CDPP). From CASA's perspective, the implementation of such punitive action as may be necessary and appropriate is meant to **deter** those persons (specific deterrence) and others (general deterrence), from contravening the safety standards specified in the legislation in the future, by encouraging them to reflect on the consequences of their conduct.

In many cases, it may also cause them to reassess the safety-related implications of their past misconduct, and to alter their behaviour on that basis (rehabilitation). It is, of course, only a court, not CASA or the CDPP, that has the authority to impose a penalty for a breach of the Act or the Regulations.

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2.6 Classification of Compliance-Related and Enforcement Functions

Classification of Compliance-Related and Enforcement Functions

Compliance-Related Functions	Enforcement Functions		
<p>ASSISTING the industry to comply through general and more specifically targeted safety promotion and educational activities, and through the advice CASA provides on operational and technical matters to individual pilots, engineers and operators.</p>	Administrative Action	Civil Action	Criminal Action
	<p>COMPELLING authorisation holders to comply through the variation, suspension or cancellation of authorisations, the imposition of conditions on newly issued authorisations or the refusal to issue an authorisation for which a person has applied.</p>	<p>COMPELLING authorisation holders to comply by entering into and, where necessary, enforcing the terms of voluntary undertakings.</p>	<p>PENALISING AND DETERRING non-compliance by referring matters for prosecution.</p>
<p>ENCOURAGING OR EXHORTING individual authorisation holders to comply through the counselling process.</p>	<p>Infringement Notices – Administrative Fines and Demerit Points Technically, the issuance of Infringement Notices, the payment of associated administrative fines and the incurrence of demerit points do <i>not</i> constitute 'criminal' enforcement action. However, the non-payment of the penalties prescribed in relation to an Infringement Notice may result in the referral of the matter to the CDPP for prosecution, and the evidence supporting the issuance of such notices needs to be assessed in the light of a potential (criminal) prosecution.</p>		

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2.7 When is Enforcement Action Taken?

Enforcement action may only be used to:

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

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

2.8 What is 'Coordinated Enforcement'?

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

As a result of a decision taken at the Chief Operating Officer's (COO) Meeting on 10 August 2005, a process of 'Coordinated Enforcement' was introduced on a trial basis. Since February 2008, the Coordinated Enforcement Process has been a formal CASA policy, endorsed by the Director of Aviation Safety and Chief Executive Officer. The Coordinated Enforcement Process includes the following elements:

- Retention of formal decision-making responsibility for Administrative and Civil Action by the delegates at senior management level
- Retention of formal decision-making responsibility for the referral of matters to the CDPP and for the issuance of Infringement Notices with the Manager, Enforcement Policy and Practice (MEPP)
- Discussion and consultation involving (at least) the responsible operational manager(s) and the MEPP, and including, where appropriate, other operational and legal officers.



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

- To determine whether enforcement action of any kind is necessary and/or appropriate in a given situation, *and if so,*
- To identify which particular enforcement tool (or combination of tools) would be most likely to conduce to the optimal safety outcome consistent with the requirements of the law and CASA's regulatory obligations in the circumstances. The most appropriate response may ultimately involve a combination of enforcement and compliance tools.

Ultimate enforcement-related decision-making authority remains in the hands of the relevant managers and Executive Managers. The Coordinated Enforcement Process does not involve any diminution of the authority or prerogatives of these managers. Nor does it involve any unwarranted intrusion by Legal Services Division (LSD) into purely operational matters or decision-making processes.

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

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

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

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

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



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

There are and will necessarily be certain differences between the ways in which aspects of CASA's dealings with larger and smaller operators proceed, and between the approaches CASA might adopt in addressing particular safety issues in relation to different, and different kinds of operators.

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



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3. Initiating the Enforcement Process

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

3.1 Contents of this Chapter

This Chapter contains the following sections:

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

3.2 Purpose

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

3.3 Receiving Information of a Breach

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

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

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

3.4 Initial Investigation

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

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

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

3.5 Deciding to Take Enforcement Action

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

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

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

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

3.6 The Coordinated Enforcement Process

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

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

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

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

Initial CEP consultation will involve:

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

On-going CEP consultation will involve:

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

3.6.1 Coordinated Enforcement - Process A

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

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

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

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

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

3.6.2 Steps in the Coordinated Enforcement Process

The operational/technical manager:

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

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

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

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

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

3.7.1 Enforcement Policy and Practice Branch (EPP)

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

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

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

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

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

3.7.2 Legal Branch

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

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

The Legal Branch is also directly involved in:

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



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

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

3.7.3 Legislative Drafting Branch

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

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

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

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

3.8 The 'Tools' of Enforcement

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

The tools of enforcement are:

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

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

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

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

3.9 Requesting the Services of a Part IIIA Investigator

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

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

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

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

3.10 Recording and Tracking of Enforcement Action

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

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

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

4.1 Contents of this Chapter

This Chapter contains the following sections:

- 4.2 Purpose
- 4.3 What are Compliance-Related Activities?
- 4.4 Decision-Making Considerations
- 4.5 Counselling

4.2 Purpose

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

4.3 What are Compliance-related Activities?

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

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

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

4.4 Decision-making Considerations

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

- When the breach or other failure to meet the required standard was not deliberate
- When the breach or other failure to meet the required standard was not the result of a substantial disregard for safety
- Where the person has a constructive attitude to compliance
- Where the person does not have a history of similar breaches or failures
- Where it is considered that counselling/remedial action will be a sufficient deterrent.

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

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

4.5 Counselling

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

The purpose of counselling a person is to ensure that:

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

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

4.5.1 Process Overview

Although counselling is best undertaken face-to-face, sometimes this will not be practicable. Whatever form the counselling takes, it **must** be followed up by a counselling letter acknowledging that the individual has been counselled and indicating that a record will be placed on the individual's file.

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

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

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

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4.5.2 Procedure

As with all situations where enforcement action may be considered, the option of counselling will be discussed as part of the CEP set out in Chapters 2 and 3.

The procedure to be followed involves:

- The operational/technical referring manager arranging for an entry to be made on the Enforcement Action Register.
- Contacting the Manager EPP to take part in the CEP.

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

- The counselling template (form 309) is used and the assistance of Assigned Legal Counsel (ALC) requested in the drafting of the counselling letter
- The facts and circumstance and the offence must be included together with the reason for choosing this course of action
- The counselling letter is signed by the appropriate officer agreed by the manager of the initiating operational/technical area. (The officer must be a Team Leader or equivalent.)
- The signed scanned letter must be placed on the Enforcement Action Register
- The counselling letter is placed on a TRIM file. (The Enforcement Action Register is an informal manner of recording which provides a quick check on what matters are under consideration and their progress. It also provides information for statistics. It does *not* replace the formal recording processes required by CASA.)
- ALC makes appropriate AIRs entries.

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

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

4.5.3 Remedial Training

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

4.5.3.1 Purpose

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

4.5.3.2 Procedure

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

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

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5.1 Contents of this Chapter

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

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

5.2 Purpose

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

5.3 Introduction

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

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

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



5.4 What are EVUs and What is their Nature?

5.4.1 Section 30DK of the Civil Aviation Act 1988

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

"30DK Enforceable voluntary undertakings

- (1) CASA may accept a written undertaking given by the holder of a civil aviation authorisation in connection with a matter:
 - (a) arising under this Act or the regulations; and*
 - (b) in relation to which CASA has a function or power under this Act or the regulations.**
- (2) The period for which the undertaking applies must not exceed 6 months. However, CASA may accept a further undertaking from the holder.*
- (3) The undertaking must not require, or have the effect of requiring, the holder to pay money to CASA.*
- (4) CASA must publish details of the undertaking on the Internet.*
- (5) The holder may withdraw or vary the undertaking at any time, but only with the consent of CASA.*
- (6) If CASA considers that the holder has breached any of the terms of the undertaking CASA may apply to the Federal Court for an order under subsection (7).*
- (7) If the Federal Court is satisfied that the holder has breached a term of the undertaking, the Court may make all or any of the following orders:
 - (a) an order directing the holder to comply with that term of the undertaking;*
 - (b) an order directing the holder to pay the Commonwealth an amount up to the amount of any financial benefit that the holder has obtained directly or indirectly and that is reasonably attributable to the breach of the undertaking;*
 - (c) any other order that the court considers appropriate."**

A number of consequences flow from CAA 30DK:

- Only holders of civil aviation authorisations may give EVUs
- Whether CASA accepts an EVU is at CASA's discretion
- EVUs are limited in duration, although they may be used in series
- EVUs cannot have the effect of requiring payment of money to CASA
- Details of EVUs must be published (as required by section 30DK(4) of the Act)
- EVUs can only be varied or withdrawn with the consent of CASA
- EVUs are enforceable only by the Federal Court on application by CASA.

These consequences are examined more fully later in this Chapter.

5.4.2 Policy Underpinnings – EVUs are Remedial, Not Punitive

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

CAA 30DK

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

5.4.3 Policy Underpinnings – EVUs are an Alternative to Litigation

An EVU is an alternative to administrative or criminal action by CASA (although in some circumstances certain enforcement actions can be combined with EVUs, see below). Since its purpose is remedial, it should only be accepted in circumstances where there is willingness by the holder to give and abide by the undertaking.



5.4.4 Policy Underpinnings – EVUs Are Not Exclusive

An EVU is not an exclusive enforcement tool, and may be used in conjunction with other enforcement tools, only where the holder **indicates a willingness to accept an EVU in addition to the other enforcement action**. Thus, an EVU can be combined with any one or more of the following:

- Counselling
- Administrative action to vary part or all of the holder's authorisation (i.e. to legally limit the holder's scope of activity)
- Administrative action to suspend part or all of the holder's authorisation pending completion of actions set out in the EVU
- Issue of infringement notices (i.e. to mildly punish the holder for an identified breach or breaches)¹.

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

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

5.5 How do EVUs Arise?

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

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

¹ An EVU must not require a person to pay an administrative fine, as this is in breach of CAA 30DK (3).

5.6 When are EVUs Appropriate?

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

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

However, the range of circumstances in which CASA may accept an EVU is very broad: there needs only to be a connection between the EVU and a matter arising under the aviation law, and in relation to which matter CASA has a function or power under the aviation law.

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

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

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

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

5.7 Who may give EVUs?

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

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

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

5.8 Negotiation of EVUs

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

CASA should only **consider** an EVU after there is a face-to-face meeting ('EVU meeting') between the holder personally (if an individual) or its management (if a body corporate), and the CASA manager and officers involved in the relevant surveillance or investigation. As for a Show Cause Conference (see Chapter 6), a senior officer of CASA—Regional or Airline Field Office Manager or equivalent—must attend and lead the CASA delegation. The purpose of the meeting is to identify and resolve all the safety issues and negotiate the terms of the undertaking. Face-to-face meetings generally encourage alleged offenders to take breaches of the aviation law more seriously.

That is not to say that the initial negotiations of an EVU cannot be negotiated by letter or phone call between the persons concerned, their lawyers, and CASA officers or lawyers.