

The EVU meeting will be chaired by an ALC from LSD, whose job it will be to give all parties a fair opportunity to express their views, and to record the terms of any EVUs agreed upon at the meeting. To ensure that a transparent record is kept, the EVU meeting should be taped, or a stenographer should take minutes. The record is to be available to all parties on request².

The aim of the EVU meeting is to seek co-operative rectification and prevention of all aviation safety problems identified by CASA. It is usual at this meeting for the Chair to outline the options available to CASA for enforcement action, and for CASA officers to explain the safety issues and what it would accept in final terms to resolve the matter. However, it is a matter for the authorisation holder to set out in detail the terms of any offer which they are prepared to make and which they believe will rectify the problems identified. The EVU must have objective standards and be capable of being verified.

If an EVU is raised, as an alternative action, during the Show Cause Conference that conference will then normally stand in the place of an EVU conference although negotiation of terms may necessitate a further meeting.

Note: Whether the offer of an EVU comes from the holder as an initial action or as a proposed alternative action in the Show Cause Process this should still be discussed in the forum of a Coordinated Enforcement meeting before any final acceptance of the EVU and in the case of the Show Cause Process, while the draft EVU may be prepared, CASA will not accept the EVU until the Show Cause Process has been finalised.

In relation to EVUs generally, see the flowchart - Coordinated Enforcement Process E, the EVU checklist (form 551) and, flowchart - Coordinated Enforcement Process A and the Administrative Action Checklist (AAC) (form 886).

² However, CASA is not obliged to provide the record in a form different to its original form; eg, CASA is not required to provide a written transcript of a taped EVU meeting.



5.9 Form and Substance of EVUs

5.9.1 General Form and Content of EVUs

EVUs must:

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

See form 315.

5.9.2 General Limitations on Content of Undertakings in EVUs

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

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

5.9.3 Specific Limitations on Contents of Undertakings in EVUs

EVUs must not contain:

- Provisions in which the holder denies breaching the aviation law (although a holder need not admit to breaching the law), or which in substance set up a defence to a breach (e.g. denial of intention to breach a fault offence)
- Provisions which place obligations on CASA which are not already obligations of CASA independent of the EVU
- Provisions which purport to limit CASA's discretion, or which purport to require CASA to exercise its discretion in a particular way
- Acknowledgements by CASA that if the holder complies with the EVU, CASA will consider that the holder complies with the aviation law
- Provisions which place obligations on people other than the holder (although provisions which require the holder to be mentored, monitored, audited etc. by a third party, and provisions which affect the holder's employees or officers in their capacity as employees or officers, are acceptable)
- Confidentiality or non-disclosure provisions
- Provisions that secure the payment of an infringement notice penalty (see CAA 30DK(3)).

5.9.4 Examples of Typical Undertakings in EVUs

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

CASA may accept an undertaking that the holder:

- Develops and disseminates throughout the organisation a clear compliance policy
- Undertakes a remedial course of training
- Introduces and implements a safety management system
- Introduces and implements a compliance monitoring system verifiable by independent third party audit, with audit reports provided to CASA at set intervals
- Not employ, for a particular period of time, a particular person in a management position or position which must be approved by CASA
- Work under an arrangement or employment with an experienced aviation mentor who will supervise their activities for a set period of time and provide them with reports that the holder must make available to CASA.

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

5.10 Drafting and Acceptance of EVUs

5.10.1 Only Holders of Civil Aviation Authorisations may give EVUs

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

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

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

5.10.2 EVUS are Discretionary

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

5.10.3 Drafting of EVUs

Following an EVU meeting at which CASA has agreed to consider an EVU, the parties have agreed what remedial actions need to be undertaken by the holder if CASA is to consider accepting the EVU, and the holder has indicated a willingness that they be reduced to writing in the form of an EVU, it is CASA's responsibility to prepare the EVU.

An ALC from the Legal Branch drafts the EVU (usually the officer who chaired the EVU meeting) and the draft is cleared by that lawyer through relevant CASA officers and the holder (and their lawyers). The delegate who will be accepting the EVU on behalf of CASA should ideally attend the EVU Meeting or if that is impracticable, be given the opportunity to comment on the draft to minimise the risk that he will either request changes to the final EVU document to be executed by the authorisation holder, or that he will refuse to accept the proposed EVU.

Where the holder proposes an EVU during a Show Cause Conference, the same consideration needs to be given, but before final acceptance is given to the EVU, a copy must be attached to the Standard Form Recommendation (form 316) which is provided to the delegate of the Show Cause process (see Chapter 6) so that the delegate can consider this alternative action as part of the decision making process. On the Standard Form Recommendation the manager must also confirm that he or she has the resources to monitor the undertakings made by the holder in the EVU.

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

Once the undertakings are agreed by all parties, the ALC will forward two copies of the finalised document to the holder for execution, with instruction for execution (See form 315).

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

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

EPP Branch of the LSD maintains a register of EVUs ("EVU Register") and will make the necessary entry and arrange for the publication by the CASA webmaster.

5.10.4 Variation and Withdrawal of EVUs

CAA 30DK(6) A holder cannot unilaterally withdraw or vary an EVU – withdrawal or variation of an EVU requires CASA consent. Nor can CASA unilaterally vary or cancel an EVU – it is, after all, an undertaking by the holder, not CASA. If CASA does not think that a holder is acting in accordance with its EVU, CASA's remedy is to seek to enforce the EVU under section 30DK (6) of the Act, or take other enforcement action (see 5.11).

The considerations guiding CASA's decision whether or not to consent to any variation are the same as the considerations guiding CASA's decision to accept an EVU, as previously covered in this chapter. The process to be followed is the same as the process for the initial acceptance of an EVU including the CEP.

5.11 Enforcement of EVUs

5.11.1 Direct Enforcement of EVUs – Federal Court Orders

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

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

5.11.2 Indirect Enforcement of EVUs – Alternative Enforcement Action

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

5.11.3 Decision on How Best to Enforce an EVU

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

The decision on what action to take in response to a breach of an EVU by a holder is a matter for careful consideration, taking into account the same sorts of matters that are set out in paragraph 5.4.3, as well as the circumstances of the breach.

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

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5. Civil Action – Enforceable Voluntary Undertakings (EVUs)

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6.1 Contents of this Chapter

This Chapter contains the following sections:

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

6.2 Purpose

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

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6. Administrative Action

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6.3 Introduction

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

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

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

6.4 What is Administrative Action?

A full discussion of the administrative law and its implications on regulatory decision-making is set out at Appendix 2 and Appendix 3.

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

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



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When CASA commences a process that may lead to the making of a decision to vary, cancel or suspend a civil aviation authorisation this is known as administrative action and accordingly the process must contain all the requirements of procedural fairness, transparency and lack of bias.

This process must be carried out in accordance with the CEP set out in Chapter 3, the flowchart – Coordinated Enforcement Process C, the Administrative Action Checklist (form 886) and the Standard Form Recommendation (form 316).

6.4.1 When is Administrative Action Appropriate?

- Where there is a serious risk to safety but, at the time of the initial Coordinated Enforcement meeting, the facts and circumstances do not disclose sufficient evidence or concern to warrant action being taken under the Serious and Imminent Risk provisions (see Chapter 7 and Division 3A of the Act) and it is not appropriate to address the concerns by a suspension under CAR 265 while the person undertakes an exam.
- On the information available at the time of the initial Coordinated Enforcement meeting the behaviour cannot be appropriately addressed by Requests for Corrective Action (RCAs), Infringement Notices (AIN) or counselling. (See Chapters 4 and 8 and the Surveillance Procedures Manual).
- If the safety risk is sufficiently serious, administrative action may be initiated out of a single incident of concern. Commonly, however, it is commenced as a result of a series of breaches.

6.4.2 Administrative Action is Not Necessarily Exclusive

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

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

NOTE: when parallel actions are being taken the safety response must be paramount



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6.5 Starting the Show Cause Process

6.5.1 Purpose — Procedural Fairness

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

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

- Giving the holder notice of what actions CASA is proposing to take, i.e. that CASA intends to vary, suspend or cancel the authorisation.
- Giving the holder details of the grounds upon which CASA is proposing to take those actions. This should be done by way of a SCN which should contain sufficient detail of each individual breach or ground for concern so as to leave the holder in no doubt as to exactly what is alleged.
- Giving the holder an opportunity to submit to CASA a written response and explanation of events. Except where safety grounds require immediate action to alleviate an immediate danger, this generally involves a reasonable period of time for the holder to prepare and lodge a written response.

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

Section 6.6 below provides guidance on the procedures to be followed in relation to 'show cause' notices (SCNs). It should be remembered that the SCN is generally only one part of CASA's 'show cause' process, the other important part being the offering and holding of a 'show cause' conference (SCC). Note that there is no legislative requirement for CASA to invite the holder to take part in a SCC.

6.6 'Show Cause' Notices

6.6.1 Show Cause Notice - Definition

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

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

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

The SCN raises CASA's concerns and invites the holder to provide CASA with reasons why CASA should not suspend, vary or cancel a particular authorisation.

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

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

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

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

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6.6.2 When Are 'Show Cause' Notices Required?

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

This difference has implications on the time that any final decision to suspend, cancel or vary an authorisation takes effect and whether or not the automatic stay provisions in section 31A of the Act are invoked.

6.6.2.1 *Suspension or Cancellation of AOCs under Section 28BA(4) of The Act*

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

6.6.2.2 *Variation, Suspension or Cancellation Under CAR 269*

CAR 269(3) Under subregulation 269 (3) of the *Civil Aviation Regulations 1988* CASA is required, before taking action to vary, suspend or cancel a licence, certificate or authority of a kind defined in CAR 263, to issue a SCN to the holder of the document. Such a notice must be in writing and must set out the facts and circumstances that, in the opinion of the delegate, warrant consideration being given to the variation, suspension or cancellation of the aviation permission. The notice must allow the holder a reasonable time to show cause why the aviation permission should not be varied, suspended or cancelled. (In relation to cancellation, see the limitations placed on cancellation by subregulation 269 (1A).

6.6.2.3 *Suspension or Cancellation Action Under CAR 21.002C*

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



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6.6.2.4 Variation, Suspension or Cancellation of Chief Pilot approvals

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

6.6.2.5 Variation, Suspension or Cancellation of Other Aviation Permissions

Unless there is a serious and imminent risk to air safety, which requires immediate suspension or cancellation, consideration should be given to the issue of a SCN prior to any proposed action to vary, suspend or cancel any other aviation permission. In these situations, officers may wish to seek advice from the Legal Branch and the Manager, Enforcement Policy and Practice (Manager EPP) as part of the CEP (see Chapter 3 and 6.3) on the necessity and utility of a 'show cause' process.

6.6.3 What Time Limit should be Placed on 'Show Cause' Notices?

CAR 269(4)
CASR 21.002D
(3)

CAA 28BA
(4)(b)

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

6.6.4 Preparation and Content of 'Show Cause' Notices

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

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

The ALC drafts the SCN, with the input of the technical/operational personnel (this input is usually in the form of a basic outline). The ALC relies on this technical/operational input because the technical and operational people are best able to identify the actual breaches and the significance of those breaches from a safety perspective because they have the experience and knowledge to do so.



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SCNs must clearly identify exactly what is alleged and why it justifies the action that CASA is proposing to take. This requires no legal training — it merely requires that the expert who has identified, or has knowledge of, the circumstances spells out what those circumstances are, and the consequent breaches or other failures, in sufficient (but succinct) detail so that there can be no doubt or ambiguity as to what CASA intends to rely upon. The relevant experts, the technical and operational personnel who identified the breaches or other failures, should therefore draw up the grounds upon which they recommend CASA act. The ALC will then, from this initial input, draft the SCN. Responsibility for identifying the breach or other failures upon which CASA will be relying, resides with the operational/technical staff.

In providing the input for a SCN, officers should take into account the following guidelines:

- The notice must identify the relevant facts and circumstances in sufficient detail so that the civil aviation authorisation holder is in a position to prepare a full response. Each allegation should be stated clearly and concisely. Alleged contraventions of the *Civil Aviation Act 1988*, regulations and Civil Aviation Orders must be particularised to demonstrate the ground/s for the action.
- All facts and circumstances that the delegate might reasonably rely on in making the final decision must be included. Reliance cannot generally be placed on facts and circumstances (including previous incidents) that are not included in the SCN. The facts and circumstances should be capable of being properly substantiated by evidence admissible in the Administrative Appeals Tribunal. The grounds should be drawn in as simple terms and language as is consistent with proper identification of the matters upon which CASA intends to rely. Unless it forms part of the breach or other failure, there is no need to chronicle how the evidence was obtained or what CASA officers have done. So, for example, it can be as simple as:

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



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- Previous incidents involving the holder should be carefully considered before being included in the facts and circumstances. In deciding whether to include a previous incident, a delegate should have regard to the following factors:
 - The age of the incident. Incidents that are many years out of date will usually have little or no current relevance.
 - Whether the incident forms part of a pattern of behaviour or is an isolated incident. An incident that is part of a pattern of behaviour is more likely to have current relevance.
 - Whether the incident significantly compromised air safety. Very minor or technical incidents generally carry little weight, particularly if committed unintentionally.
 - Whether CASA took action at the time of the incident. It may be difficult to place weight on such an incident if CASA did not give it serious regard at the time.
- Generally, incidents which are not raised in the SCN cannot be relied on when making a decision. If in doubt, it may be better to include the incident to give the holder a chance to respond. The delegate may ultimately disregard it as being of little or no weight when the final decision is made.
- Unless a decision is taken not to offer a person a 'show cause' conference (see below), the SCN should include a statement offering a person the option of attending such a conference, and should attach the standard explanatory note (form 1037).

A SCN is not a 'decision'. Accordingly, there is no merits review in relation to the sending of such a notice.

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

- The evidence and information on which the delegate has relied, logically supports the facts and circumstances providing the basis of the delegate's action
- The facts and circumstances giving rise to the proposed action are effectively linked to the relevant provisions of the aviation law
- The legal grounds on which the proposed action is based adequately support that action

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- The instruments and documentation intended to give legal effect to the proposed action are clear, complete, accurate and properly formulated
- The processes leading up to, and including, the taking of a decision to vary, suspend or cancel an aviation permission are consistent with the procedural requirements of the law
- Where the breaches are particularly technical or complex, the ALC should be provided with copies of the evidence that CASA will rely on to prove the grounds alleged. In any event this is good practice.

Once the notice is settled to the satisfaction of both Legal Branch and technical and operational personnel, the latter pass the document to the Team Leader or Manager for action in accordance with the Administrative Action Checklist (form 886) and the Administrative Action flowchart at 6.3 above. Should the Team Leader or Manager wish to amend the notice they should obtain legal advice on their proposed amendments.

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

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

6.7 'Show Cause' Conferences

6.7.1 Introduction

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

6.7.2 Purposes of 'Show Cause' Conferences

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

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

6.7.2.2 *To Clarify the Nature and Import of Allegations*

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

6.7.2.3 *To Enable Reconsideration of Proposed Action*

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

6.7.2.4 *Not to Gather Evidence*

It is not the purpose of a SCC to gather evidence against a person. All evidence necessary to support the proposed action against a person should have been gathered prior to the issue of the SCN. However, a person participating in a SCC may provide new evidence that CASA may use for the purposes of its enforcement decision.

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6.7.3 When Should a Person be Offered a 'Show Cause' Conference?

6.7.3.1 *Starting Point – Whenever a 'Show Cause' Notice Has Been Issued*

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

6.7.3.2 *Circumstances where a 'Show Cause' Conference May Not Be Offered*

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

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

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

6.7.3.3 *'Show Cause' Conference to be Held Subsequent to Receipt of Written Submission*

A SCC should normally be held subsequent to the receipt by CASA of the affected authorisation holder's written response (if any) to the SCN. This is explained to authorisation holders on the standard attachment (form 1037) to the SCN. Receiving a response to the SCN prior to the SCC permits CASA to properly consider the points raised by the authorisation holder, which will enable the real matters at issue to be clarified and thereby streamline the procedure at the conference. (This is not the case where there is a serious and imminent risk – see Chapter 7.)



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6.7.4 Participants in 'Show Cause' Conferences

6.7.4.1 *Person Affected by the Proposed Action*

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

6.7.4.2 *Representatives of the Person Affected by the Proposed Action*

An authorisation holder can choose to be accompanied by a person who can assist them in the conference, either to provide advice, to assist in clarifying issues, or simply as 'moral support'. This person may be a legal adviser, a union representative, a colleague or friend etc. Where the SCN has been issued to a Chief Pilot, a representative of the relevant AOC-holder may also attend. CASA should agree to the attendance of one accompanying person. Where the authorisation holder proposes to attend with more than one other person, or turns up to a conference with more than one other person, the chair of the conference will have the discretion to permit attendance by those other people.

6.7.4.3 *CASA officers*

The following officers of CASA should attend a SCC:

- The CASA officer who will be making the recommendation for proposed enforcement action to the delegate (usually the operational/technical Manager)
- The ALC
- The CASA officer in charge of the field investigation or action which resulted in the allegations against the authorisation holder, or otherwise an officer with appropriate technical or operational expertise relevant to matters under consideration
- If the conference is not being recorded, a person able to take suitable notes of the conference.

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

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6.7.4.4 Attendance by the Delegate

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

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

6.7.5 Location of 'Show Cause' Conferences

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

SCCs are not mediations as that term is commonly understood in legal circles, and CASA officers should not feel compelled to agree to hold a conference on 'neutral territory'. Nevertheless, such a location may be preferable to the office of the authorisation holder. Requests by authorisation holders for conferences at places other than CASA offices should be dealt with on a case-by-case basis, and should be discussed with the ALC who will be attending the conference.

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

6.7.6 Procedure at 'Show Cause' Conferences

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

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

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

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

CAA 30DK This agreement should be in the form of an EVU under section 30DK of the Act. (CASA's policy in relation to EVUs, and the procedures for drafting and executing them, is set out in Chapter 5). The formal undertaking should not be signed by the authorisation holder at the conference. CASA ALC should make a note of the agreed outcome of the SCC and obtain the holder's agreement to that outcome at the end of the conference. The formal section 30DK undertaking should then be prepared on the basis of the agreed outcome promptly thereafter.

Naturally, alternative action to EVUs may be appropriate, for example, counselling or requiring the holder to undertake examinations. If counselling is agreed as a result of the Coordinated Enforcement meeting, the ALC will assist with the drafting of the letter.

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

6.8.1.3 *Proposal for No Further Action*

There may be some circumstances where the operational/technical manager may decide to recommend that no enforcement action be taken. These circumstances are unusual, and may include:

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

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

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

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

6.9 Legislative Authority for CASA to Vary, Suspend or Cancel

Section 13 of the Act empowers CASA to do all things necessary to enable the Authority to carry out its functions and section 9 sets out the general functions of conducting the safety regulation of civil air operations in Australian Territory and the operation of Australian aircraft outside Australian Territory by means that include developing effective enforcement strategies to secure compliance with aviation safety standards. The Act and Regulations also contain express powers for CASA to suspend, vary or cancel civil aviation authorisations.

6.9.1 Air Operator Certificates (AOCs) Issued Under the Act

- CAA 28BA(3) Subsection 28BA (3) of the Act empowers CASA to suspend or cancel an AOC or any specified authorisation contained in an AOC if a condition of the AOC is breached.
- CAA 28BB (2) Subsection 28BB (2) of the Act empowers CASA to vary any of the conditions of an AOC.
- CAA 28BA(4) and (5) Subsections 28BA (4) and (5) of the Act require CASA to follow a 'show cause' process and to provide written reasons for making its decision. In that notice of decision CASA must include a summary of section 31A in relation to the automatic stay process, although failure to do so will not affect the validity of the decision. See form 321 *Attachment to Decision Letters Setting out Summary of Section 31A*.
- CAA 31A

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

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

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

CAR 263(1) Licences, certificates and authorities issued under CAR 1988 may be varied, suspended or cancelled in accordance with the provisions of Part 16 of the Regulations. The terms 'authority', 'certificate' and 'licence' are defined in subregulation 263 (1).

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

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

CAR 269(1)



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6.9.4 Suspension of Licence or Authority for Purpose of Examination

CAR 265
CAR 33 or
5.38 CAR 265 gives CASA power to suspend a licence or authority, pending the holder of the licence or authority sitting an examination as directed by CASA under CAR 33 or 5.38.

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

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

6.9.5 Ratings and Endorsements On Licences

CAR 263(2),
(3) and (4). By operation of CARs 263(2), (3) and (4), CASA has the same powers to vary, suspend and cancel ratings and endorsements on licences issued under CAR 1988 as it does to vary, suspend and cancel the licences themselves.

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

6.9.6 Maintenance Controller Approvals

CAR 42ZW
CAR 42ZX CASA approves maintenance controllers for class A aircraft under regulation 42ZW of CAR 1988. Regulation 42ZX provides for the cancellation or suspension of a maintenance controller approval. Where CASA proposes to suspend or cancel a maintenance controller approval, natural justice must be accorded to the maintenance controller. Therefore, the procedures set out in this Chapter should be followed. However, there is no statutory requirement for a show cause process and so the automatic stay process will not apply to the suspension or cancellation of a maintenance controller approval.



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6.9.7 Designated Aviation Medical Examiner and Designated Aviation Ophthalmologists Appointments

- CASR 67.045
CASR 67.065
CASR 67.095
- CASA appoints designated aviation medical examiners (DAMEs) under CASR 67.045. CASA appoints designated ophthalmologists (DAOs) under CASR 67.065. CASR 67.095 provides for the cancellation of a person's DAME or DAO appointment by CASA. There is no power to suspend or vary such an appointment. Where CASA proposes to cancel a DAME or DAO appointment, natural justice must be accorded to the DAME or DAO, and the procedures set out in this Chapter should be followed. However, there is no statutory requirement for a show cause process and so the automatic stay process will not apply.
- CASR 67.100
- CASR 67.100 provides that a DAME's or DAO's appointment is automatically suspended if convicted of a criminal offence punishable by imprisonment for 12 months or longer. The appointment is then cancelled if there is no appeal against the conviction or any appeal is dismissed. If an appeal against the conviction is successful, the appointment is not taken to be suspended.
- CASR 67.105
CASR 67.110
- CASR 67.105 and 67.110 provide that a DAME's or DAO's appointment is cancelled if they cease to be registered or licensed as a medical practitioner.

6.9.8 Medical Certificates

- CASR 67.180
CASR 67.240
CAR 265
CASR 67.230
- CASA issues medical certificates under CASR 67.180. CASR 67.240 is analogous to CAR 265 (see para 6.13.2 below), permitting CASA to suspend a medical certificate pending the results of a medical examination or the disclosure of information by a medical practitioner to CASA required under CASR 67.230.
- CASR 67.255
CASR 67.180
CASR 67.230
- CASR 67.255 requires CASA to cancel a medical certificate if the holder of the certificate fails to meet the relevant medical standard (determined following a medical examination under CASR 67.180 or 67.230). Cancellation must be by notice in writing, and the notice must include the reasons for the certificate holder's failure to meet the relevant standard. CASA has no discretion under this regulation — where it considers that a person has failed to meet the relevant medical standard, it **must** cancel the certificate. There is no statutory requirement for a show cause process and so the automatic stay process will not apply to the cancellation.
- CASR 67.260
CAR 269
- CASR 67.260 provides CASA with a general power to suspend or cancel a medical certificate, on the grounds set out in the regulation. It is analogous to CAR 269, requiring that a 'show cause' process be undertaken prior to suspension or cancellation action being taken by CASA. The 'show cause' processes outlined in this Chapter should be followed. Such a decision will be subject to the automatic stay provisions.



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

There are many specific powers to suspend or cancel instruments issued under those Parts of CASR 1998 relating to aircraft and aeronautical product manufacture, other than at the request of the instrument-holder.

CASRs
(Multiple) Powers to suspend or cancel various sorts of type certificates, production certificates, airworthiness certificates, experimental certificates, and design and manufacturing approvals can be found in CASRs 21.002C, 21.051, 21.078, 21.118, 21.119, 21.159, 21.181, 21.195B, 21.201, 21.217, 21.243, 21.303 and 21.619.

CASR 21.002C
CAR Part 21
CASR 21.002C
(1)(a)
CASR 21.002D
CASR 21.002C CASR 21.002C is a general power to suspend or cancel any instrument issued by CASA under Part 21 of CAR 1998. However, it only applies to suspension or cancellation on limited grounds, set out in paragraph 21.002C (1) (a). These grounds essentially relate to fraud and false statements by the applicant for, or holder of, an instrument. Importantly, CASR 21.002D prescribes a 'show cause' procedure to be followed by CASA where it is proposing action to suspend or cancel an instrument under CASR 21.002C. Accordingly any such decision will be subject to the automatic stay process.

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

6.9.10 Chief Pilot Approvals

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



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

*Acts
Interpretation
Act 33(3)*

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

6.10 Responsibilities

6.10.1 Delegates to Exercise Powers

Only officers with valid delegations issued by the Director of Aviation Safety may exercise the power to vary, suspend or cancel civil aviation authorisations or permissions under the Act or Regulations. Only persons validly authorised by the Director of Aviation Safety may exercise powers to vary, suspend or cancel aviation permissions under the Orders. For simplicity, delegates and persons authorised to exercise variation, suspension and cancellation powers will be referred to as 'delegates'.

Before taking action to vary, suspend or cancel aviation authorisations or permission, officers must ensure that they have the necessary delegation or authorisation and that it is still current. If an officer is unsure of his or her powers they should contact the Legislative Drafting Branch of the LSD which holds originals of the instruments by which the Director has delegated or authorised the powers to vary, suspend and cancel aviation permissions. They must also follow the CEP set out in Chapter 3 and flowchart Coordinated Enforcement process C.

6.10.2 Responsibilities of the Delegate

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



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

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

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

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

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

6.10.3 Responsibilities of Technical and Operational Officers and Referring Manager

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

- Enter the matter on the Enforcement Action Register and take part in an initial and any further Coordinated Enforcement meetings
- Gather or receive the information and evidence which supports a recommendation to the delegate for action
- As necessary, seek advice and input from other officers and the ALC in relation to the conduct of the person in question
- Draft (in consultation with the ALC) the relevant notice to the person affected by the decision



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- Prepare for and attend a SCC taken up by the person affected by the decision
- Complete an SFR (form 316) and forward it to the delegate recommending a proposed course of action together with an Administrative Action Checklist (form 886)
- As necessary, assist the delegate by providing information and advice
- Serve or arrange for the service of the relevant notice to the person affected
- Request ALC to make necessary AIRs entries and alerts
- Once advised by ALC that a variation, cancellation or suspension has taken effect, prepare in consultation with ALC, 301 demand for return of authorisation
- Monitor compliance with 301 demand
- Take any follow-up action that may be necessary (including the provision of technical and operational assistance to the Legal Branch of LSD in any administrative law litigation).

6.10.4 Responsibilities of the Legal Branch of Legal Services Division

It is the responsibility of the Legal Branch to:

- Provide legal advice to officers and the delegate in relation to actual or proposed variation, suspension or cancellation action, or any part of the process
- Assist officers in the preparation of 'show cause' and decision notices, in accordance with this Chapter
- Chair 'show cause' conferences
- In relation to the ALC for any particular matter – proactively see the matter through until completion
- Conduct, or arrange for the conduct of, administrative law litigation arising out of variation, suspension and cancellation decisions
- Keep the Manager EPP, and the Coordinator Investigations (CI) advised of the progress and results of any civil court or Tribunal proceedings
- Represent CASA in any proceedings before the Administrative Appeals Tribunal or Federal Court, where CASA's decisions have been challenged
- Complete Legal Counsel Checklist (form 553), and making requisite entries and Alerts on AIRs and ensure documents are attached to AIRs where appropriate
- Advise the referring manager when the variation, suspension or cancellation takes effect and assist the referring manager, as necessary, with the preparation of the 301 demand for the return of the relevant authorisation.



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6.10.5 Responsibilities of the Enforcement Policy and Practice Branch of Legal Services Division

- Keep the referring office and the Legal Branch aware of the progress of any Part IIIA investigations or the issuing of infringement notices (AINs)
- Oversee the CEP and take part in Coordinated Enforcement meetings.

6.11 The Standard Form Recommendation and Administrative Action Checklist

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

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

6.11.1 Guidance for Referring Managers

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

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



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The SFR contains the following sections:

Background

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

Available options

- Sets out all the available enforcement and non-enforcement options

Recommended option

- Specifies the preferred choice of action

Reasons for Recommendation

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

Relevant Supporting Information

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

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

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



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Recommendation and Certification

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

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

The SFR provides the delegate with two options:

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

The Administrative Action Checklist, which is a mandatory attachment to the SFR; sets out the procedure to be followed by the delegate in either case.

There are three further boxes on the SFR, once the certification has been signed off by the referring manager, which need to be completed:

Implications of taking Recommended Action

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

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

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

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



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Where intermediary has been asked to review the recommendation

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

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

If there is no intermediary this should be noted.

If you agree with the recommendation

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

or

If you do not agree with the recommendation

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

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

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



6.11.2 Guidance for Delegates

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

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

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

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

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

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

As soon as possible the signed original of the decision notice must be sent via internal mail to the referring manager who will despatch this document to the holder by registered mail.

It is the responsibility of the referring manager to serve the decision notice on the holder (both the scanned copy and later the signed original) and to notify all the relevant parties of the decision.

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Where the delegate agrees with the recommendation he ticks the box, signs and dates the SFR where indicated and completes the AAC.

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

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

6.11.3 Post Decision Action

On receipt of the signed electronic copy of the decision notice and completed AAC the referring manager must:

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

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6.12 Variation Suspension and Cancellation of AOCs

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

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

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

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

CAA 28BA
(1)(a)

CAA (Multiple)
CAA 28BA
(1)(b)
CAA 28BD

CAO
(Multiple)

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

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

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



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6.12.3 Limits on CASA's Power to Vary, Suspend or Cancel – Section 28BC

CAA 28BC Section 28BC of the Act imposes limits on CASA's power to vary, suspend or cancel AOCs.

There are particular limits placed on varying, suspending or cancelling AOCs that authorise the operation of foreign aircraft on regulated domestic flights, and officers who are unsure of these limits should seek advice from the Legal Branch of the Legal Services Division (LSD).

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

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

6.12.4 Procedures for Variation, Suspension and Cancellation of AOCs

See generally sections 6.5-6.8.

6.13 Suspension and Cancellation of Chief Pilot Approvals

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

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

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

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



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6.13.2 Procedures for Suspension or Cancellation of Chief Pilot Approvals

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

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

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

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

6.14.1 Purpose

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

CAR 269
CAR 265

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

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6.14.2 Suspension for Purposes of Examination – CAR 265

CAR 265 (1) Before taking any action to suspend a licence or authority for the purposes of an examination under CAR 265 (1), the referring manager must ensure that they have taken part in the CEP (see Chapter 3 at 3.4). When, as a result of the CEP a decision is made to recommend this action to the delegate then the flowchart Coordinated Enforcement Process G should be followed and the SFR (form 316) with attached AAC (form 886). The manager must also ensure that the holder of the licence or authority has been, or will be, (co-incident with the suspension) validly required to undergo an examination under regulation 33 or 5.38. (This requirement may be included in the CAR 265 notice.)

CAR 33 or 5.38

It is important that the referring manager discuss with the ALC all aspects of the AOC Holder's behaviour that was/is of concern to the referring manager. Other issues, in addition to serious competency issues, may need to be included in the suspension notice, for example areas where CASA is still uncertain or unclear whether competency exists.

6.14.2.1 Duration of Suspension

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

CAR 269 If, after the results of an examination are known, the delegate decides that there are grounds for the variation, suspension or cancellation of the licence or authority, this action must be taken under CAR 269. The licence or authority remains suspended during the period allowed in the SCN to respond.

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

6.14.2.2 Preparation and Issue of Suspension Notices

CAR 265 The procedure for the preparation of suspension notices (form 311) under CAR 265 is much the same as for the preparation of SCN (see section 6.9 above). A decision to suspend a licence or authority under CAR 265 is reviewable by the AAT and the suspension notice must advise the holder of this right of review. Such a decision is not subject to the automatic stay provisions in section 31A of the Act as no show cause is required before the decision is made - see sample form 311.

CAA 31A

See generally sections 6.5-6.8 of this Chapter and the SFR and AAC.



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6.15 Variation, Suspension and Cancellation of Other Aviation Permissions

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

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

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

- CAA 27(3) and 28BB(2) • Subsections 27 (3) and 28BB (2) of the Act in relation to AOCs
- CARs 266 and 267 • CARs 266 and 267 in relation to licences, certificates, and authorities issued under CAR 1988
- CASR 21.002E • CASR 21.002E in relation to instruments issued under Part 21 of CAR 1998
- CASR 67.120 • CASR 67.120 in relation to declarations of appointments of designated aviation medical examiners
- CASR 101.370 • CASR 101.370 in relation to certified unmanned aircraft operator's certification
- CASR 139.075 • CASR 139.075 in relation to aerodrome certificates
- CASR 139.285 • CASR 139.285 in relation to the registration of a registered aerodrome
- CASR 139.1025 • CASR 139.1025 in relation to the approval of an aerodrome rescue and fire-fighting service (ARFFS)
- CASR 143.240 • CASR 143.240 in relation to ATS training providers approval
- CASR 171.240 • CASR 171.240 in relation to a aeronautical telecommunication service and radio navigation service providers approval
- CASR 172.330 • CASR 172.330 in relation to air traffic service providers
- CASR 173.385 • CASR 173.385 in relation to certified designer's procedure design certificate or authorisation.

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

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

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

CAA 30A

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

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

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

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

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

6.18 Refusal to Re-issue a Civil Aviation Authorisation

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

CAA 31

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

6.19 Service of Notices

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

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

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

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



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6.20 Follow-up Actions

6.20.1 Annotate AIRS

It is now the responsibility of the ALC in the Legal Branch to make entries and Alerts on AIRS and to attach appropriate documents.

6.20.2 Notification of Employer of Person Affected

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

6.20.3 Reporting of Decisions

The operational/technical manager must follow the SFR (form 316) and the AAC (form 886) in advising all relevant personnel. In particular see the last page of the AAC.

6.21 Automatic Stay of Certain Reviewable Decisions under Section 31A of the Act

At the point that stays come into operation, administrative control of the matter shifts to the Legal Branch, who must keep the operational/technical area advised of the progress.



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6.21.1 Application

CAA 31A Certain suspensions/cancellations are automatically stayed under section 31A of the Act.

Section 31A applies to a decision under the Act or Regulations:

- That is reviewable by the AAT
- In relation to which CASA was required by the Act or regulations to provide a SCN to the holder of the civil aviation authorisation concerned prior to the decision being made ('civil aviation authorisation' is defined in section 3 of the Act).

6.21.2 The Effect of Section 31A

CAA 31A If section 31A applies to a decision, the operation of the decision, as set out in the notice to the holder, will be stayed by the force of that section. The stay takes effect as soon as the person is notified of the decision. The stay ceases to have effect at the end of the fifth business day after the holder has been notified by CASA of the decision **unless before the end of the fifth day, the holder applies to the AAT for an order under subsection 41(2) of the *Administrative Appeals Tribunal Act 1975*.**

If the holder applies to the Tribunal as mentioned in subsection (4), the stay continues to have effect until the Tribunal makes an order under subsection 41(2) of the *Administrative Appeals Tribunal Act 1975* or decides that no order should be made.

If the holder applies to the Tribunal as mentioned in subsection (4), the holder must give a copy of the application to CASA as soon as practicable after lodging it with the Tribunal.

6.21.2.1 The Definition of 'business day', and its Implications

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

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

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

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

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

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

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

CAA 31A If the holder applies for an order under subsection 41(2) of the *Administrative Appeals Tribunal Act 1975*, the holder must give CASA a copy of the application as soon as practicable after lodging it with the AAT.



6.21.4 When does an Automatic Stay Not Apply?

CAA 31A An automatic stay under section 31A does not apply:

- To a decision that is not reviewable by the AAT
- CAA 30DI • To a decision under section 30DI of the Act which relates to a decision to vary suspend or cancel an authorisation within 5 days after the end of a show cause period specified in a SCN issued as a result of a serious and imminent risk to air safety (see Chapter 7)
- To a decision under the regulations to cancel a licence, certificate or authority on the ground that the holder of that licence, certificate or authority has contravened a provision of the Act or the regulations² (including the regulations as in force by virtue of a law of a State); or
- To a decision to vary, suspend or cancel an authorisation that does not require a SCN.

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

CAA 30DC
CAA 30DD
CAA 31(1)(d)

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

6.21.5 Stay Ends if Application is Withdrawn

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

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

6.21.6 Tribunal's Ordinary Powers Not Affected

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

CAA 31(2)

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

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6.21.7 Provision of summary of section 31A

CAA 31A
CAA 28BA (5)

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

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

6.22 Review Process

Administrative Appeals Tribunal Act
CAR 297A
CAA 31
CASR 67.141, 139.036 and 201.4
CAA 30DC
CAA 31 (1)(d) and (e)

In most circumstances, a delegate's action may be reviewed by the Administrative Appeals Tribunal (AAT) under the *Administrative Appeals Tribunal Act 1975*. This is a review of the decision on the merits of the case, or 'merits review'. What this means is that the AAT decides what the better or preferable decision in the circumstances is. The AAT's jurisdiction in relation to decisions of CASA is set out in section 31 of the Act, regulation 297A of CAR 1988, and regulations 67.141, 139.036 and 201.004 of CASR 1998. An amendment to section 31 of the Act has removed from the definition of reviewable decisions, a suspension of an authorisation in relation to serious and imminent risk (CAA 30DC) and an 'automatic' suspension or cancellation of an authorisation under the Demerit Points Scheme (see CAA 31(1)(d) and (e)).

Administrative Decisions (Judicial Review) Act
Judiciary Act 39B

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

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

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

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