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### 7.2 Purpose

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

### 7.3 Introduction

CAA 30DB Section 30DB of the Act states that:

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

CAA 30DC Subdivision B of Division 3A of Part 2 of the Act, authorises CASA to suspend civil aviation authorisations and apply to the Federal Court for a confirmatory order where CASA has reason to believe that the holder of the authorisation **has engaged in, is engaging in, or is likely to engage in** conduct which constitutes, contributes to, or results in a serious and imminent risk to air safety—see section 30DC.

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

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



### 7.4 What is an Imminent Risk?

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

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

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

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

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

### 7.5 What is a Serious Risk to Air Safety?

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

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

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

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

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

### 7.6 Suspension Process

While this process will be initiated with urgency, being mindful of the seriousness of the action and the legislative time-frames, officers contemplating this action must still take part in the Coordinated Enforcement process set out in Chapter 3 at 3.4.

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

*Because of the urgency and importance of such action the Executive Manager Legal Services Division (LSD) must be kept advised of all steps taken as part of the Serious and Imminent Risk enforcement process.*

CAA 30DC Section 30DC of the Act gives CASA power to suspend a civil aviation authorisation (without issuing a show cause notice) where CASA has reason to believe that the civil aviation authorisation holder **has engaged in, is engaged in or is likely to engage in** conduct that contravenes section 30DB (see CAA 30DC).

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

CAA 30DE

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



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

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

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

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

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

CAA 30DE (3)  
CAA 3A  
CAA 9A (1)

**7.6.2 Preparing the Suspension Notice**

CAA 30DC The suspension notice will be prepared using form 311. The Director is currently authorised to issue a suspension under section 30DC. Delegations must be confirmed before a decision is taken and a suspension notice is signed.

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



### 7.6.3 Application and Affidavits

Because of the five-business day time limit in section 30DE and the urgency of bringing a suspension application before the Federal Court, CASA operational staff needs to give the highest priority to this enforcement obligation. To assist in collecting evidence in an appropriate form for use in the Federal Court, see draft Affidavit (form 323) and application (form 310). They are in the appropriate form for filing at the Federal Court together with a draft application.

The appropriate persons to be deponents for such affidavits are experienced Team Leaders (Flying Operations and Airworthiness) and Senior Flying Operations Inspectors.

The affidavits allow for easy attachment of the following records:

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

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

- The legislation that has been breached
- CASA, ICAO or other regulators' (FAA, JAA etc) advisory material prohibiting or commenting on the conduct, or similar conduct in terms of safety risk
- Any approved maintenance data, flight manual, operations and other manuals applicable to the conduct or perceived risk
- Searches of ATSB Oasis database or NTSB database of accidents or serious incidents in the last ten (10) years caused by the type of conduct, or unairworthy condition of the aircraft, the subject of the application
- Any photographs taken of the accident, incident scene or condition of aircraft relevant to application.

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

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

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

### 7.6.4 CASA May Suspend Despite Other Processes

CAA 30DD Section 30DD of the Act provides as follows:

- CAA 30DC
- (1) *CASA may make a decision under section 30DC in relation to a civil aviation authorisation even if CASA has given the holder of the authorisation the show cause notice required before making a decision under another provision of this Act or the regulations.*
- CAA 30DC  
CAA 31A
- (2) *A suspension of a civil aviation authorisation under section 30DC has effect despite a stay (whether or not a stay under section 31A) of an earlier decision to vary, suspend or cancel the authorisation'.*

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

### 7.7 Application to the Federal Court

CAA 30DE  
CAA 30DC

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

CAA 30DB

CAA 3A  
CAA 9A(1)

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

CAA 30DG

The Manager, Enforcement Policy and Practice (EPP) must be kept advised so that an investigator can be made available to undertake the investigation required under section 30DG of the Act, if it is thought necessary for the investigation to be conducted by a Part IIIA Investigator.

CAA 30DE

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

CAA 30DE

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

CAA 30DF  
CAA 30DE

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



### 7.8 Court May Vary Period of Order

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

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

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

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

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

See below (extract from section 30DF):

Period of order when an application to vary is made			
Item	If...	the order continues in force until...	
CAA 30DF (Extract)	1	the holder applies to shorten the period and CASA does not apply to extend it	the earlier of: (a) the last day of the original period; and (b) if the Court grants the application—the day determined by the Court in granting the application.
	2	CASA applies to extend the period of the order and the holder does not apply to shorten it	whichever of the following applies: (a) if the Court grants CASA's application—the day determined by the Court in granting the application; (b) if the Court refuses CASA's application before the end of the original period—the end of the original period; (c) if the Court refuses CASA's application after the end of the original period and before the 28th day after the end of the original period—the day of the refusal; (d) otherwise—the 28th day after the end of the original period.
	3	the Court hears applications from both parties together under subsection (5)	whichever of the following applies: (a) if the Court grants one of the applications—the day determined by the Court in granting the application; (b) if the Court refuses both applications before the end of the original period—the end of the original period; (c) if the Court refuses the extension application after the end of the original period and before the 28th day after the end of the original period—the day of the refusal; (d) Otherwise—the 28th day after the end of the original period.



### 7.9 CASA Must Investigate

CAA 30DE  
CAA 30DC

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

Because of the very tight time-frame and the fact that a Part IIIA investigator is generally required to carry out the investigation, the investigation will have generally already commenced before the Federal Court has made any order.

Communication between operational/technical staff, Legal Branch and EPP is essential to ensure that mandatory time frames are met.

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

CAA 30DH  
CAA 30DJ

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

CAA 30DH

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

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

The show cause process under these provisions should follow the same procedures as set out in sections 6.6 and 6.7. Because the holder will have already had procedural fairness through the Federal Court process and because of the limited time-frame, a show cause conference will not normally be offered and no attachment inviting the party to a show cause conference will be provided with the SCN in a serious and imminent risk situation. If the holder requests a show cause conference then form 312 should be provided. This is similar to the normal attachment but explains that the conference needs to be held within 20 days of the notice and that the holder understands that this may be before the holder has tendered a written response to the show cause. This cannot be avoided as the 28-day show cause period, provided for under the legislation, cannot be extended and the decision maker needs time to consider all the facts before making a decision.



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

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

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

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

**7.12 When Does a Suspension under Section 30DC End?**

CAA 30DC  
CAA 30DE  
CAA 30DJ

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

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

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

CAA 30DH

CAA 30DI

CAA 30DH

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

The flowchart Coordinated Enforcement Process D sets out the procedures that must be followed when a situation arises that requires a response pursuant to section 30DC of the Act. The Serious and Imminent Risk Checklist (form 342) must also be followed together with the SFR (form 316).



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### 8.1 Contents of this Chapter

This Chapter contains the following sections:

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

### 8.2 Purpose

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

### 8.3 What is an Infringement Notice?

Infringement Notices referred to as Aviation Infringement Notices (AINs) are another enforcement tool. They impose administrative fines and can be issued in relation to all offences under the Regulations. They are a cheaper and quicker alternative to prosecution but still require the same level of evidentiary proof i.e. the criminal standard of 'beyond reasonable doubt'. To maintain a consistent approach with the Demerit Points Scheme they should generally only be issued by CASA where there is a breach of a strict liability offence. A person served with an AIN can refuse to pay the fine or choose to have the matter dealt with by a court and CASA will then refer the matter to the CDPP for prosecution.

# Enforcement Manual

## 8. Infringement Notices – (Administrative Fines)

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

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

- If the maximum penalty for the offence is 5 or 10 penalty units – an administrative fine of 1 penalty unit (\$110)
- If the maximum penalty for the offence is 15, 20 or 25 penalty units – an administrative fine of 3 penalty units (\$330)
- If the maximum penalty for the offence is more than 25 penalty units – an administrative fine of 5 penalty units (\$550).

Crimes Act  
4AA

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

See the following comparative table of penalties

MAXIMUM PENALTY SET OUT IN CARs & CASRs	MAXIMUM PENALTY UNDER THE INFRINGEMENT NOTICE SCHEME	MAXIMUM FINE A COURT COULD IMPOSE	DEMERIT POINTS INCURRED AGAINST CLASS OF AUTHORISATION
5 penalty units	\$110 (1 penalty unit)	\$550 (5 penalty units)	1 demerit point
10 penalty units	\$110 (1 penalty unit)	\$1100 (10 penalty units)	1 demerit point
15 penalty units	\$330 (3 penalty units)	\$1650 (15 penalty units)	2 demerit points
20 penalty units	\$330 (3 penalty units)	\$2200 (20 penalty units)	2 demerit points
25 penalty units	\$330 (3 penalty units)	\$2750 (25 penalty units)	2 demerit points
30 penalty units	\$550 (5 penalty units)	\$3300 (30 penalty units)	3 demerit points
50 penalty units	\$550 (5 penalty units)	\$5500 (50 penalty units)	3 demerit points



### 8.4 Decision-making Considerations

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

A request for investigation or a recommendation for the issue of an AIN is **NOT** an initial step in relation to enforcement. (See the Coordinated Enforcement Process (CEP) Chapter 3 at 3.8 and 3.9 and the flowchart Coordinated Enforcement Process A.) The matter may or may not require a further investigation by a Part IIIA Investigator. The first step in relation to the decision to issue an AIN is a Coordinated Enforcement Meeting. As a consequence of this meeting it will be determined whether AINs or some other form of enforcement is appropriate. If the Manager EPP has reason to believe on the evidence provided that an AIN is appropriate then the referring manager must submit a form 333. While it is the authorised person who will make the decision on issuing the AIN there are certain general considerations that must be borne in mind when making a recommendation:

Appropriate situations for the issue of AINs:

- Where the breach does **not** cause a serious risk to safety
- When the offence has **not** been committed through misunderstanding of the legislation that could be addressed by Informal Enforcement Action
- Where the offence has **not** been committed due to lack of skill or error that could be addressed by Informal Enforcement Action
- Where the offence is a strict liability offence against the Regulations
- Where the penalty would be an adequate future deterrent given the nature of the offence.

Inappropriate situations for the issue of AINs:

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

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



### 8.5 Form of Recommendation for Infringement Notice

Any recommendation made for the issue of an AIN or Request for Investigation must be made by completing a form 333 and signed by the referring manager. (See also the CEP Chapter 3 at 3.6.2, 3.8 and 3.9)

### 8.6 Form of Infringement Notice

CAR 296E The AIN is required by CAR 296E to include certain information. The AIN document (form 313) complies with the requirements of the Regulation including the requirement to pay the penalty within 28 days.

### 8.7 Service of Infringement Notices

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

### 8.8 Register of Infringement Notices

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



### 8.9 Withdrawal of Infringement Notices

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

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

Only the Manager EPP currently has the authorisation to withdraw an AIN.

In making such a decision the authorised person must consider:

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

#### 8.9.1 Service of Withdrawal Notices

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

#### 8.9.2 Withdrawal of Infringement Notice Following Payment of Prescribed Penalty

The authorised person may withdraw an AIN after the recipient of the AIN has paid the prescribed penalty provided that the withdrawal is done within the period set out in 8.9 above. In such cases CASA is required to refund the payment that the alleged offender has made. Any demerit points incurred on payment will also be removed.

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

- Where CASA has reason to believe on the evidence available, that the person who has paid the prescribed penalty did not in fact commit the offence for which the AIN was served; or
- Where information has come to light following service of the AIN, which convinces CASA that the most appropriate enforcement action to take is to refer the matter to the CDPP for prosecution.

### 8.10 Payment of an Administrative Fine

#### 8.10.1 Time for Payment

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

#### 8.10.2 Extension of Time to Pay

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

#### 8.10.3 Part Payments and Instalments

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

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

### 8.10.4 Consequences of Payment within the Time Permitted

CAR 296F

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

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

CAA 30DW

- Demerit points will accrue (refer to section 30DW of the Act and Chapter 10.

### 8.10.5 Consequences of Payment after the Time Permitted

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

- CASA should not accept payment/part payment of the administrative fine
- The person may be prosecuted for the offence

CAA 30DW

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

### 8.11 Responsibilities

EPP will advise the Referring Manager when payment has been made. If payment has not been made, then EPP may carry out a Part 111A investigation where appropriate and may refer the matter to the CDPP.



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**8. Infringement Notices – (Administrative Fines)**

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### 9.1 Contents of this Chapter

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

### 9.2 Purpose

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

### 9.3 What is the Aviation Self Reporting Scheme?

CAA Part 2  
Div 3C

CASR 13.335  
(1)

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

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

- The holder voluntarily reports a reportable contravention of the Regulations to the prescribed person, currently being the Executive Director of Transport Safety Investigation in the ATSB, within 10 days of the contravention
- Presents CASA with a receipt evidencing that report within the time-frame set out at 9.5.3.

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



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

This protection is only available once every five years.

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

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

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

### 9.4 Administration of the Scheme

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

### 9.5 How the Scheme Works

CAA Part 2  
Div 3C  
CASR Div  
13.K.1

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

### 9.5.1 Limitation as to Type of Contravention

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

- A contravention that is deliberate
- A contravention that is fraudulent
- A contravention that causes or contributes to an accident or to a serious incident (whether before or after the contravention is reported) or
- A contravention prescribed under the regulations being currently:
  - CAR 282
  - CAR 288 (2)
  - CAR 298A
  - CAR 298B
  - CAR 298C
  - CAR 301
  - CAR 302
  - CAR 305(1A)

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

### 9.5.2 Limitation as to Timing of Report

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

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

- Has been given a show cause notice for the proposed decision; or
- Has been served with an AIN.

#### 9.5.3 Limitation as to Time of Production of Receipt

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

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

The receipt must be produced:

- If a show cause notice has been served on the holder – **before** CASA varies, suspends or cancels the authorisation; or
- If an infringement notice has been served on the holder – **before** the due date for payment specified in the infringement notice.

#### 9.5.4 Aviation Self Reporting Scheme Register

An ASRS Register is maintained by the Enforcement Policy and Practice Branch (EPP) of the Legal Services under the direction of the Manager, Enforcement Policy and Practice (Manager EPP). This will ensure that a person claiming protection under the ASRS does not receive protection more than once in five years.

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

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

Where CASA grants protection from Administrative Action or from an AIN this will be cross-referenced on the ASRS Register and where appropriate, the Infringement Notice Register, the Demerit Points Register and the Enforcement Action Register.



### 9.6 Decision-Making Considerations

If the holder produces a receipt from the Executive Director of Transport Safety Investigation to an officer of CASA, the officer should notify their regional/airline or other appropriate manager and no action should be taken in relation to any show cause or infringement notice that has been issued to the holder, before providing the Manager EPP with a copy of the receipt. The Manager EPP will then arrange a Coordinated Enforcement meeting to determine:

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

The Manager EPP shall check the ASRS Register and confirm whether the holder is entitled to the protection of the Scheme.

If the holder is **entitled to protection**, the Manager EPP will:

- In the case of a show cause, notify the referring manager in writing, that the contravention is to be disregarded and the referring manager is to arrange for the holder to be notified of this entitlement and of how it will affect the show cause process.

**Note:** There will be situations where there are sufficient alternative grounds to vary, suspend or cancel, the authorisation other than those grounds contained in the report given by the holder to the prescribed person, and as such the show cause process may continue. The notice sent to the holder, acknowledging the holder's protection under the ASRS, is therefore quite distinct from the ultimate show cause decision.

or

- In the case of an AIN, notify the holder in writing that the AIN is taken to be withdrawn. See form 324 and send a copy of this notice to the relevant referring manager.

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

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



### 9.7 Other Relevant Information about the Scheme

#### 9.7.1 Form of Reports and Processing Procedures

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

*Transport  
Safety  
Investigation  
Act*

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

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

#### 9.7.2 Use of Information in Criminal Proceedings

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

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

# Enforcement Manual

## 10. The Demerit Points Scheme

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

### 10.1 Contents of this Chapter

This Chapter contains the following sections:

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

### 10.2 Purpose

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

### 10.3 What Is the Demerit Points Scheme?

CAA Div 3  
30DS to 30EJ

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

CASR 13.370

The Civil Aviation Safety Regulations 1998 (CASR) prescribe offences to which the Scheme applies and the number of points incurred in relation to an offence. The Scheme currently applies to all strict liability offences against the CARs and CASRs—see CASR 13.370.



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## 10. The Demerit Points Scheme

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### 10.4 How Does the Scheme Work?

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

1. If CASA serves the holder with an infringement notice (AIN) in relation to a prescribed offence, **and the holder pays (in whole or part) the penalty** (the administrative fine) specified in the notice.

or

2. The holder is **convicted or found guilty** of a prescribed offence **either**:

- a. After the holder has been served with an AIN and **has not** paid all or part of the penalty within the prescribed time for payment, or any extension;

or

- b. Where the holder has **not** been served with an AIN but an investigation by CASA has disclosed a *prima facie* case against the holder, the matter has been referred to the CDPP and the holder is convicted or found guilty by a court.

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

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

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



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COLUMN 1	COLUMN 2	COLUMN 3
Item	Particular Civil Aviation Authorisations	Class of Civil Aviation Authorisation
CAA 27	1. A certificate issued under section 27 of the Act	Air operators certificate
CAR Part 3	2. A certificate issued under Part 3 of CAR	Certificate of registration
CAR 30	3. A certificate issued under CAR 30	Certificate of approval
CAR 31 CAR 33B CAR 33C	4. (a) a licence referred to in CAR 31 (b) an authority referred to in CAR 33B or 33C	Maintenance authority
CAR 5.08 (a)	5. A licence referred to in CAR 5.08 (a)	Flight radiotelephone licence
CAR 5.08 (b) to (m)	6. A licence referred to in CAR 5.08 (b) to (m)	Pilot licence
CAR 5.08 (o) or (p)	7. A licence referred to in CAR 5.08 (o) or (p)	Flight engineer licence
CAR Part 6 CASR 67	8. A certificate issued under CAR Part 6 or CASR Part 67	Medical certificate
CASR 65	9. A licence or authorisation issued under CASR Part 65	Air traffic control licence
CASR 101F	10. A certificate issued under CASR Subpart 101.F	UAV certificate
CASR 139.B	11. A certificate issued under CASR Subpart 139.B	Aerodrome certificate
CASR 139C	A registration granted under CASR Subpart 139.C	
CASR 139H	12. An approval granted under CASR Subpart 139.H	ARFFS approval
CASR 143 or 172	13. An approval granted under CASR Part 143 or 172	ATS approval
CASR 171	14. An approval granted under CASR Part 171	Aeronautical telecommunication and radionavigation provider approval
CASR 173	15. A certificate or authorisation issued under CASR Part 173	Instrument flight procedure approval

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### 10.5 Consequences of Incurring Demerit Points

As shown in the table below, if a specified number of demerit points are accumulated in relation to the same class of authorisation within a specified period of time, all authorisations of that class will be suspended or cancelled. See also Comparative Table of Penalties at 10.13.

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

Table – Showing the Method of Calculating Penalty

Accrual Period	Number of Demerit Points	Action by CASA	Penalty
3 years (ending on the date of the current prescribed offence)	At least 12	First-time Demerit Suspension Notice	<p><b>12-15 points = 90 days</b> suspension of all authorisations of the same class</p> <p><b>16-19 points = 120 days</b> suspension of all authorisations of the same class</p> <p><b>Over 19 points = 150 days</b> suspension of all authorisations of the same class and no entitlement to be granted a civil aviation authorisation of the same class from the <b>date of the notice</b> to the end of the last day of the suspension.</p>



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

### 10.6 Expiry of Demerit Points

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

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## 10. The Demerit Points Scheme

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### 10.7 Reinstatement of Authorisations

CAA 30EF

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

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

### 10.8 First-Time and Second-Time Demerit Suspension Notices

As can be seen from the table at 10.5 above, there are first-time and second-time suspension notices which CASA will be required to issue to a holder of a civil aviation authorisation based on the number of demerit points incurred in a given period in relation to that class of authorisation.

#### 10.8.1 First-Time Demerit Suspension Notice – where after-acquired authorisation

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

#### 10.8.2 Second-Time Demerit Suspension Notice - where after-acquired authorisation

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





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### 10.8.3 Form of Demerit Suspension Notices

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

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

(See form 328 and form 329.)

### 10.9 Demerit Cancellation Notice

As can be seen from the table at 10.5 above, CASA will be required to issue a Demerit Cancellation Notice to a holder of a civil aviation authorisation, where the holder has committed a prescribed offence, has been issued with a First-Time and Second-Time Suspension Notice and within a 3 year period, ending on the day of the offence, has incurred 6 demerit points in relation to that class of authorisation.

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

#### 10.9.1 Demerit Cancellation Notice - where after-acquired authorisation

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

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### 10.9.2 Form of Demerit Cancellation Notice

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

- The date of the notice
- The start date, being the date that the cancellation begins (which must not be earlier than the 28<sup>th</sup> day after the date of the notice)
- The period of disqualification (3 years from the **date of the notice** not the start date)
- The class of authorisations covered by the notice
- Any other information required by the regulations. (As at 30 June 2004, the regulations do not require any other information to be included.)

(See form 330.)

### 10.10 Demerit Points Register

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

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

The register is maintained by EPP, Legal Services Division and has been drafted to comply with the legislation. It also links with the Infringement Notice Register (see Chapter 8.)

CASA must also:

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



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## 10. The Demerit Points Scheme

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### 10.11 Responsibilities

Manager, Enforcement Policy and Practice	<ul style="list-style-type: none"><li>• Oversees the Demerit Point Scheme and reports statistics and anomalies to management.</li></ul>
Coordinator Investigations	<ul style="list-style-type: none"><li>• Records the demerit points in the demerit points register even if the person does not hold that specific authorisation at the time the points were incurred. (See section 30EG and Section 30EI of the Act)</li><li>• Corrects mistakes, errors or omissions as advised</li><li>• Removes expired points from the register (see section 30EJ of the Act)</li><li>• Produces reports for the Manager, EPP</li><li>• Advises relevant managers</li><li>• Prepares information for website for approval of Manager EPP</li><li>• Provides details of any prosecutions of offences under the regulations.</li></ul>
Investigators	<ul style="list-style-type: none"><li>• Provide notification of any prosecutions of strict liability regulatory breaches to the Coordinator Investigations.</li></ul>



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## 10. The Demerit Points Scheme

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### 10.12 Other Relevant Information

#### 10.12.1 Suspension Period Not to be Served Concurrently

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

*'Section 30EB*

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

- (a) on that day, a suspension of the authorisation has effect under another provision of this Act or the regulations; or*
- (b) the day is a day prescribed by the regulations for the purposes of this section.*

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

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### 10.12.2 Other Regulations

CAA 30DV Section 30DV of the Act set out the implications of other regulations on the Demerit Points Scheme.

*'Section 30DV*

*if:*

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

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

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

*'...the subsequent suspension or cancellation has effect, in relation to the civil aviation authorisation, on the day immediately following the day when the Administrative Appeals Tribunal set aside the earlier cancellation.'*

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## 10. The Demerit Points Scheme

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### 10.13 Comparative Table of Penalties

Maximum Penalty set out in CARs & CASRs	Maximum Penalty under the Infringement Notice Scheme	Maximum Fine a Court Could Impose	Demerit Points Incurred Against Class of Authorisation
5 penalty units	\$110 (1 penalty unit)	\$550 (5 penalty units)	1 demerit point
10 penalty units	\$110 (1 penalty unit)	\$1100 (10 penalty units)	1 demerit point
15 penalty units	\$330 (3 penalty units)	\$1650 (15 penalty units)	2 demerit points
20 penalty units	\$330 (3 penalty units)	\$2200 (20 penalty units)	2 demerit points
25 penalty units	\$330 (3 penalty units)	\$2750 (25 penalty units)	2 demerit points
30 penalty units	\$550 (5 penalty units)	\$3300 (30 penalty units)	3 demerit points
50 penalty units	\$550 (5 penalty units)	\$5500 (50 penalty units)	3 demerit points



# Enforcement Manual

## 11. Criminal Action – Prosecution

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

### 11.1 Contents of this Chapter

This Chapter contains the following sections:

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

### 11.2 Purpose

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

### 11.3 Introduction

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

It is important for all officers to recognise the role that is played by the CDPP in the criminal enforcement of all Commonwealth laws, including the Act and the regulations. While CASA is responsible for **investigating** offences against the Act and the regulations, the function of **prosecuting** offences rests with the CDPP. The CDPP is an independent body established by an Act of Parliament to ensure a separation of the investigative and prosecuting functions in the Commonwealth criminal justice system.

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

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



CASA's primary role in the prosecution process is to collect evidence for consideration by the CDPP and to monitor and provide assistance during the conduct of the prosecution. It is particularly important that this role be carried out in a thorough and impartial manner by all concerned so that the CDPP office is able to fulfil its function of bringing all relevant evidence before the court.

The Manager EPP may also discuss with the CDPP what alternative action has been considered or taken by CASA (e.g. AINs, Serious and Imminent Risk action, CAR 265 suspension or administrative action). This will usually appear in the brief but depending on timing of the actions may not be included. The CDPP need to have all this information available to them and to understand the approach which may have been taken, or which CASA proposes to take, as this may impact on the CDPP's consideration of the public interest of pursuing prosecution.

### 11.3.1 Regulation 296

CAR 296

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

Crimes Act  
15B

## 11.4 Responsibilities

### 11.4.1 The Inspector

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



# Enforcement Manual

## 11. Criminal Action – Prosecution

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### 11.4.2 The Manager

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

### 11.4.3 The Investigator

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

### 11.4.4 The Manager, EPP

The Manager EPP is, under the Executive Manager Legal Services, responsible for decisions as to what matters are referred to the CDPP. In making this decision the Manager EPP must act in accordance with the PPC and any agreement between CASA and the CDPP regarding referral of matters to the CDPP.

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

### 11.4.5 The Commonwealth Director of Public Prosecutions

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



### 11.5 Procedures Relating to Investigation and Possible Referral to the CDDP

#### 11.5.1 Procedures

##### 11.5.1.1 Initial steps

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

The officer should report the matter to the officer's manager, together with all available evidence.

If the relevant manager considers that there *may* be evidence of a breach then the first action to be taken is initiation of the CEP (see Chapters 2 and 3). **It is only after discussion in this forum that a request for investigation should be made using form 333.**

The tasked investigator will conduct an investigation to provide the Manager EPP with a report and recommendations in accordance with the procedures set out in the *Investigators Manual* which incorporates the Australian Government Investigations Standards.

Investigations may take some months to complete depending on their complexity. EPP Branch will keep the referring manager informed of the progress of any investigation requested by that manager. (See also the flowcharts Coordinated Enforcement Process B and Coordinated Enforcement Process F).

The investigator will be required by the Coordinator Investigations, where a matter is prolonged, to arrange regular briefing sessions with the referring manager and his officers together with the Coordinator Investigations and the Manager EPP.

Once the investigator's report is complete it will be forwarded to the Manager EPP for consideration. After discussion of the report and its recommendation within EPP the report will be forwarded to the referring manager and a Coordinated Enforcement Meeting will be arranged by EPP to discuss the report.

If the report does not provide evidence of a *prima facie* case or if there are circumstances disclosed by the investigation that would lead to the investigator not recommending the matter for referral to the CDDP, alternative action will be discussed at the Coordinated Enforcement Meeting.

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

# Enforcement Manual

## 11. Criminal Action – Prosecution

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### 11.5.1.2 The Public Interest

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

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

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

### 11.5.2 Reporting

The Investigators/Coordinator Investigations make entries on AIRS, on the ASIS database and on the Enforcement Action Register on the Enforcement Action eRooms.

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### 12.1 Contents of this Chapter

This Chapter contains the following sections:

- 12.2 Purpose
- 12.3 General Principles
- 12.4 Statutory Provisions Relating to Access
- 12.5 Access under CAR 305 – General Principles
- 12.6 Procedures Relating to Access Under CAR 305
- 12.7 Access under Division 173.E.5 of the CASRs – Authorised Inspectors.

### 12.2 Purpose

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

### 12.3 General Principles

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

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

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

### 12.4 Statutory Provisions Relating to Access

The relevant statutory provisions are:

- CAR 30 (4) • CAR 30(4), which, among other things, authorises access to inspect processes and systems of certificate of approval holders and inspection of aircraft to determine whether the activities to which the certificate relates are being carried out in a satisfactory manner
- CAR 33 (2) • CAR 33(2), which authorises inspection of aircraft or aircraft components to assess the competence and diligence of a LAME or airworthiness authority holder
- CAR 50D • CAR 50D, which authorises inspection of aircraft maintenance records
- CAR 53 • CAR 53, which empowers CASA to require the production of documents and other things required in the investigation of defects.
- CAR 227 (3) • CAR 227(3), which authorises entry to crew compartments.
- CAR 262 (1) • CAR 262(1), which empowers CASA to authorise CASA officers to carry out inspections or examine aircraft or related equipment and the ground organisation provided by an operator for use by aircraft.
- CAR 262 (2) • CAR 262(2), which requires operators to provide accommodation on aircraft in certain circumstances.
- CAR 288 • CAR 288, which authorises the detention of aircraft where aircraft may be flown in contravention of the regulations or in circumstances which could cause danger.
- CAR 302 • CAR 302, which empowers the Authority to require the production of licences issued under the regulations and documents relating to an aircraft.
- CAR 305 • CAR 305, which is a general access provision authorising access to aircraft, aerodromes, premises and documents for regulatory purposes.
- CASR 21.049 • CASR 21.049, which requires that the holder of a type certificate must make the certificate and the type design of the aircraft, engine or propeller available for examination by CASA.
- CASR 21.123 • CASR 21.123, which requires a manufacturer to make each aircraft, aircraft engine or propeller available to inspection by CASA.
- CASR 21.157 • CASR 21.157, which requires the holder of a production certificate to allow CASA to make inspections or tests.
- CASR 21.166 (4) • CASR 21.166(4), which requires the manufacturer of Class I, Class II, Class III or unapproved Class I product to allow CASA to examine records.

- CASR 21.181 (3) • CASR 21.181(3), which requires that the holder of a certificate of airworthiness must make it available for inspection by CASA or an authorised person on request.
- CASR 21.293 (4) • CASR 21.293(4), which requires the manufacturer of an aircraft, aircraft engine or propeller type certificated under a delegation option authorisation make current records available to CASA on request current records.
- CASR 67.275 • CASR 67.275, which requires the holder of a medical certificate to surrender it to CASA on written notice.
- CAR 6  
CASR 201.1 Inspectors should carefully read these provisions and become familiar with their content. Note also that an authorised person is defined in the CARs as being a person appointed under CAR 6 and in the CASRs as a person who is appointed under CASR 201.1.

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

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

### 12.5 Access Under CAR 305 – General Principles

CAR 305  
CAR 6

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

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

CAR 305

CAR 6

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

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

### 12.6 Procedures Relating to Access Under CAR 305

#### 12.6.1 Procedures

##### 12.6.1.1 Identification – Produce an Identity Card

CAR 305 (2)  
and (3)  
CAR 6A

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

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

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



### 12.6.1.2 Limitations on Access Time

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

CAR 305

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

CAR 305

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

### 12.6.1.3 Inspection of Aircraft

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

### 12.6.1.4 Denial of Access

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

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

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

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

CASR 173.390 Under CASR 173.390 the Director may appoint authorised inspectors. They are required to be issued with an identity card that includes a recent photograph. The powers of an authorised inspector are set out in CASR 173.400:

*(1) The powers that an authorised inspector may exercise are the powers to do any or all of the following:*

*(a) enter and inspect premises connected with, or used for the purposes of, design work that is carried on by, or for, a certified designer or authorised designer or where any documents or records relating to that work are kept;*

*(b) observe the practices and procedures of the certified designer or authorised designer (including the designer's employees) in carrying on design work under designer's procedure design certificate or procedure design authorisation;*

*(c) inspect the designer's facilities used for, or in relation to, that work;*

*(d) inspect and test any systems and equipment used for, or in relation to, that work;*

*(e) inspect any documents or records maintained, or required to be kept under this Part, by the designer in relation to that work;*

*(f) make a copy of any document or record that the authorised designer inspects.*