

By Joseph Wheeler

ENFORCEMENT of Australian Aviation Law

This article examines the Civil Aviation Safety Authority's (CASA) regulatory oversight functions by explaining Australia's international obligations, and describing CASA's principal mechanisms for enforcing air safety legislation on civil aviation authorisation holders. Reference is made to recent cases to illuminate particular provisions.

THE BASIS OF NATIONAL REGULATION OF AIR SAFETY

CASA is the regulatory agency with responsibility for civil aviation operations of aircraft within Australian territory, and operations with Australian-registered aircraft outside Australian territory. Other agencies in Australia have responsibility for other specific aspects of air safety regulation (for example, aircraft accident investigation is devolved to the Australian Transport Safety Bureau [ATSB], and search and rescue to the Australian Maritime Safety Authority [AMSA]).

CASA was established by the *Civil Aviation Act 1988 (Cth)* (the Act),¹ its role being required by Australia's treaty obligations under the *International Convention on Civil Aviation*² (Chicago Convention), which was incorporated into Australian law by the *Air Navigation Act 1920 (Cth)*. Australia is one of 191 parties to the Chicago Convention. This multilateral treaty codifies customary international law principles, such as airspace sovereignty, and provides the constitution for a permanent international organisation, the International Civil Aviation Organisation (ICAO).

The Chicago Convention established a basis for technical and operational aspects of civil aviation, such that technical standards and recommended practices (SARPs) – promulgated by ICAO through Annexes adopted

in accordance with the Chicago Convention – serve as a worldwide guide to civil aviation.³ There are currently 19 Annexes to the Chicago Convention, the most recent coming into force on 14 November 2013.⁴ The Annexes cover technical standards on matters such as airworthiness certification, registration of aircraft, international operating standards, and licensing.

In these areas, ICAO has broad 'quasi-legislative and executive powers'.⁵ The standards in Annexes are considered legally binding on ICAO States, in the absence of notification of a State's inability to comply.⁶ *Recommended practices* are merely desirable, in the interests of air safety, regularity or efficiency.⁷

Australia has distinct agencies with regulatory oversight functions in relation to aspects of civil aviation oversight, all falling under the umbrella of the Department of Infrastructure and Regional Development. CASA is responsible for Annexes 1, 2, 6-8, 14 and 18, and shares responsibility with Airservices Australia for Annexes 10 and 11.⁸ At the time of writing, Annex 19 was not formally allocated to a particular agency but is likely to fall within the ambit of CASA's responsibility.⁹ As a practical matter, CASA administers a significant body of legislation¹⁰ and, as a corporatised entity with other strategic and educational roles, this requires it to be responsive

to the needs of the other entities with air safety regulatory functions (the Department of Infrastructure and Regional Development, Airservices Australia, and the ATSB). This is a heavy burden, as the level of legislative implementation of SARPs is continuously measured by ICAO. ICAO broadly measures the 'safety' of an ICAO State by its adherence to and implementation of SARPs within the Universal Safety Oversight Audit Program (USOAP): results are publicly available on ICAO's website in summary form. CASA's formal policy in relation to international compliance is set out in a formal document (DAS-PN025-2010).¹¹

ENFORCEMENT ACTION BY CASA

Enforcement is one of the principal obligations incumbent on CASA as set out in ss9(1)(d) of the Act. CASA has the function of 'developing effective enforcement strategies to secure compliance with aviation safety standards'. This is a requirement on Australia as a party to the Chicago Convention, but is practically devolved to CASA. In all but exceptional circumstances, CASA officers are required to exercise their discretion in decision-making in conformity with established policy, and administrative law.

CASA has developed and publishes an Enforcement Manual (EM) for its >>

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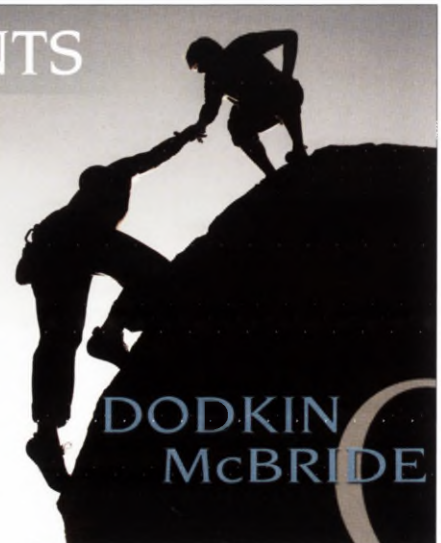
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CASA varies, suspends or cancels civil aviation authorisations when matters arise that pose so serious a risk to air safety that they preclude compliance action, but are not so serious as to require action under the serious and imminent risk provisions.

officers, which provides practitioners with an insight into the decision-making process as it is intended to apply at CASA.¹² The EM also sets out useful details about various kinds of enforcement action, including enforceable voluntary undertakings (EVUs), administrative action in relation to variation, suspension, and cancellation of civil aviation authorisations, infringement notices, the demerit points scheme, and criminal prosecution. Some of the more common of these enforcement options are described below.

Compliance-related action

CASA's compliance-related functions do not relate to enforcement as such, but include its methods for engaging with the industry to comply with and understand the rationales behind aviation laws. In terms of quasi-enforcement, CASA may counsel individuals to comply with regulations or recommend remedial training.¹³

Enforceable voluntary undertakings

An enforceable voluntary undertaking (EVU) is anticipated in s30DK of the Act. They are simply a written undertaking given by the holder of a civil aviation authorisation (for example, licence or air operator's certificate) to voluntarily modify their practices, behaviour, attitude or skills to ensure compliance with the policy behind aviation laws. They are remedial rather than punitive, and often arise when CASA has conducted some surveillance and noted matters arising under aviation laws that raise safety concerns. As an alternative to litigation,

if an authorisation-holder is likely to modify its behaviour voluntarily and not fall foul of the relevant aviation laws in the future, it would be appropriate to propose that an EVU be entered. An EVU need not be accepted by CASA as proposed by an authorisation-holder, and thus care should be taken to propose them only when past contraventions of aviation laws are unlikely to continue in future, and so warrant more serious action by CASA.

The requirements of EVUs are minimal: they must be in writing, unequivocal, and address the action or inaction of the authorisation-holder, and last for a maximum of 12 months.¹⁴ The requirements include a publication obligation on CASA, so care should be taken to ensure that pursuing an EVU will not unduly affect an authorisation-holder's commercial dealings when the EVU is mentioned on CASA's website. CASA may enforce an EVU through the Federal Court, but this option will often in practice yield to enforcement of any parallel breaches of aviation laws by the person who made the EVU, by means of the administrative enforcement mechanisms discussed below.¹⁵

Administrative action

The Act and regulations include express powers for CASA to vary, suspend or cancel civil aviation authorisations.¹⁶ Action is taken to remove actual, potential or threatened risks to safety by varying or taking away an authorisation-holder's permissions to conduct their aviation activity. This kind of action is taken when matters arise that pose so serious a risk to air safety that they preclude compliance action, but are not so serious as to

require action being taken under the serious and imminent risk provisions (see below).¹⁷ Most administrative decisions by CASA are reviewable by the Administrative Appeals Tribunal (AAT), and so CASA's processes around this kind of enforcement action are aimed at satisfying rules of procedural fairness.¹⁸

Show cause notices

The process of administrative action typically commences with the receipt of a show cause notice (SCN).¹⁹ The SCN 'raises CASA's concerns and invites the holder to provide reasons why CASA should not suspend, vary or cancel a particular authorisation'.²⁰ Some breaches require a SCN to be issued while others do not, but typically 21 days is given to respond in writing.²¹ The CASA EM is particularly useful to identify the practical considerations that inform the drafting and inclusion of matters in an SCN. The eventual decision-maker (that is, a delegate of CASA) cannot rely on matters not raised in an SCN, and so the kind of matters that are typically raised are facts or circumstances that CASA believes it can substantiate by evidence admissible to the AAT.²²

Under s31A of the Act, a stay automatically applies to reviewable CASA decisions which require the giving of an SCN to an authorisation-holder. The stay ceases to have effect at the end of the fifth business day after CASA's notification to the holder of the decision, unless the authorisation-holder applies to the AAT under ss41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth).²³ The three considerations of the Tribunal in such instances are the prospects of the substantive application for review, the hardship likely to be suffered if a stay order is not made, and public safety and the safety of air navigation.²⁴ Allegations of malice at the hands of CASA have failed to support a stay.²⁵

Show cause conferences

Show cause conferences (SCC) are not legislated but are often offered by CASA, or requested to give authorisation-holders an opportunity to respond to allegations in an SCN. They are relatively informal and are

designed, again, to accord procedural fairness to those affected by CASA decisions.²⁶ While this process is not meant to be an evidence-gathering tool (as the evidence in relation to alleged breaches should have been collected prior to the issue of an SCN), the EM recognises that 'a person participating in an SCC may provide new evidence that CASA may use for the purposes of its enforcement decision'.²⁷ Appropriate counselling of clients to stay within the bounds of the issues raised in the SCN is recommended. Legal representatives of authorisation-holders are permitted to attend an SCN with their client, as can union representatives, colleagues or friends for moral support.²⁸ Informal procedures set out in the EM dictate that CASA chairs the SCC and proceedings should be recorded if possible. A copy of recordings should be given to the authorisation-holder before they leave the meeting.²⁹

Subsequent to the SCC, CASA may then proceed to either change its recommendation to the delegate/

decision-maker (for example, that an EVU would suffice in the circumstances), maintain it, or propose that there be no further action.

Serious and imminent risk

In recent years CASA has resorted to Subdivision B, Division 3A of Part III of the Act in circumstances where it believes an authorisation-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'.³⁰ The EM sets out what these terms mean, as no definitions exist in the Act or regulations. The meaning of 'imminence' is linked to temporal connection with life or injury-threatening events, whereas 'serious' events are those where conduct has caused or is reasonably likely to cause an accident or incident. Patterns of non-compliance with aviation laws have been found to not support CASA's invocation of this provision in the Act.³¹

The most recent judicial analysis of the

term (in *Civil Aviation Safety Authority v Barrier Aviation Pty Ltd*³²) noted Stone J's comment in *Civil Aviation Safety Authority v Bell*³³ that the court must be satisfied only that there are reasonable grounds to believe that the holder of the licence has actually engaged in, or is engaging in, or is likely to engage in the conduct complained of.³⁴ The belief supporting the order requested by CASA was in this instance supported by two affidavits detailing the relevant conduct that raised CASA's concerns about several instances of non-compliance with the Act during a two-week audit of the respondent's operations. The matters deposed to included examples of major irregularities with reporting of serious aircraft maintenance issues and aircraft defects which were not properly actioned, and resulted in aircraft being operated in an unairworthy condition.

CASA, under these provisions and in the first instance, may take swift action only to *suspend* civil aviation authorisations. Once the authorisation-holder has been notified >>

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Adversarial approaches generally fail to satisfy the regulator when approaching challenges to its decisions; working creatively with the regulator in response to enforcement action to minimise risks to safety is likely to result in more measured penalties.

of the suspension, CASA then has five business days to apply to the Federal Court for an Order to make matters more permanent. If the Court is satisfied that there are grounds for the necessary belief,³⁵ it must make an Order prohibiting the performance of any activity which is permitted under the authorisation. The Order lasts for no more than 40 days.³⁶ CASA must then investigate the circumstances giving rise to the decision to suspend, and may issue an SCN within five business days after the last day on which the Order is in force.³⁷ Following the period of any SCN, if still satisfied that a serious and imminent risk exists, CASA may, within five business days, vary, suspend or cancel it.³⁸ More particular time limits apply under a table set out in s30DJ of the Act.

Infringement notices and the demerit points scheme

CASA's tools include the ability to issue administrative fines depending on the gravity of the offence. Under regulation 296A of the *Civil Aviation Regulations 1998* (Cth) (CAR), penalties for particular breaches are significantly lower than the maximum penalties a court could impose.³⁹ Aviation infringement notices (AINs) are typically issued where the breach does not cause a serious risk to air safety or the offence is one of strict liability under the regulations (not the Act), and where it would be an adequate deterrent.⁴⁰ There is limited scope to withdraw AINs under CAR 296C.⁴¹ It is important to note that once the time for payment (28 days) elapses,

prosecution could ensue unless an extension of time has been permitted.⁴²

The demerit points scheme set up under Division 3D of the Act provides a staged approach for dealing with multiple, less serious, breaches of aviation regulations.⁴³ The scheme applies to all strict liability offences against the CARs or *Civil Aviation Safety Regulations 1998* (Cth) (CASR).⁴⁴ Demerit points accrue upon payment of AINs/administrative fines, or upon conviction of guilt in relation to a prescribed offence (either after an AIN has been served and the authorisation-holder has not paid it, or whether or not an AIN has been served CASA has referred a matter to the Commonwealth Department of Public Prosecutions, and the holder is found guilty). Demerit points are accrued in relation to classes of authorisations, and future acquired authorisations such that the implications of accruing them can be significant.⁴⁵

The consequences of incurring demerit points are set out in Subdivision C, of Division 3D, Part III of the Act. The method of calculating penalties and their consequences depending on the number of demerit points accrued within the rolling three-year accrual period are set out in a convenient table in the EM.⁴⁶ In short, at least 12 points within three years results in suspension for a certain number of days depending on how many points above 12 have been accrued. Subsequent accruals and suspension notices result in longer suspensions for lower accrued numbers of points.

A summary of the demerit points

system's operation in the context of CASA's power to vary, suspend, or cancel licences under CAR 269(1) is provided in *Johanson and Civil Aviation Safety Authority*.⁴⁷ There, the Tribunal (per Deputy President Jarvis), held that CASA has discretion to consider CAR 269 type variation, suspension, or cancellation and is under no obligation to proceed under the more structured demerit points scheme.⁴⁸

CONCLUSION

An understanding of the policy behind CASA's several roles and responsibilities informs practice in this highly technical and specialised area of law. An adversarial approach generally fails to have the desired effect in the context of satisfying the regulator when approaching challenges to its decisions. A better approach is to align the ongoing enjoyment of the privileges of an authorisation-holder with the primary functions of CASA as the safety regulator. If an authorisation-holder recognises, or is advised on creative ways to work with the regulator in responding to enforcement action to minimise risks to safety, then penalties may be more measured. ■

Notes: **1** *Civil Aviation Act 1988* (Cth), s8. **2** *Convention on International Civil Aviation*, opened for signature, Dec 7, 1944, 61 Stat. 1180, 15 UNTS 295 (Chicago Convention). **3** Chicago Convention, art 37. **4** Annex 19, 'Safety Management' transplants and harmonises provisions from six other Annexes into the new one which is dedicated to safety management, and which helps to stress and reinforce to States the importance of the concept of safety risk management in all aviation domains. **5** Michael Milde, 'The Chicago Convention – After Forty Years', *IX Annals of Air and Space Law* (1984), 199, 121. **6** Chicago Convention, art 38. **7** Bin Cheng, *The Law of International Air Transport* (1962), London, Stevens & Sons Ltd, 25. **8** Annex 1 (Personnel Licensing); Annex 2 (Rules of the Air); Annex 6 (Operations of Aircraft); Annex 7 (Aircraft Nationality and Registration Marks); Annex 8 (Airworthiness of Aircraft); Annex 10 (Aeronautical Telecommunications); Annex 11 (Air Traffic Services); Annex 14 (Aerodromes); Annex 18 (The Safe Transport of Dangerous Goods by Air). **9** See <http://www.infrastructure.gov.au/aviation/international/icao/annexes/>. **10** *Civil Aviation Act 1988* (Cth), s9. The principal legislation – that is, the Act, *Civil Aviation Regulations 1988* (Cth) (CAR), and *Civil Aviation Safety Regulations 1998*

(Cth) (CASR) account for approximately 3,000 pages. This figure does not include other legislative instruments falling within CASA's responsibility, such as Civil Aviation Orders, which will progressively cease to have effect as corresponding CASRs come into force to replace them; Airworthiness Directives, Approvals, Designations, Determinations, Directorate of Aviation Safety Regulations, Directions, Exemptions, Instructions, Permissions, Permits, and Specifications. Various exemptions, approvals and delegations are published as non-legislative instruments under the CAR and CASR. **11** CASA Regulatory Policy DAS-PN025-2010, 'International Aviation Safety Developments and Obligations Policy', issued November 2013, available at http://www.casa.gov.au/wcmswv/_assets/main/corporat/policy/notices/DAS-PN025-2010.pdf, last accessed 7 January 2014. **12** The CASA Enforcement Manual (EM) (last updated January 2013) is available at http://www.casa.gov.au/scripts/nc.dli?WCMS:STANDARD::pc=PC_91181, last accessed 7 January 2014. **13** *Ibid*, 2.5. **14** *Ibid*, 5.10.1. **15** *Ibid*, 5.12.2 - 5.12.3. **16** For example, see s28BA(3) of the Act which empowers CASA to suspend or cancel an air operator's certificate (AOC) or specified authorisations contained in it if the AOC is breached. For AOCs, a show cause process is required, and also an automatic stay applies to decisions (s31A). **17** An example of a cancellation affirmed by the AAT is *GB Shaw & Co Pty Ltd t/as Dalby Air Maintenance and Civil Aviation Safety Authority* [2013] AATA 736 (11 October 2013). In this case, the authorisation-holder's certificate of approval to undertake aircraft maintenance was cancelled due to his demonstrating that he was 'either unwilling or unable to abide by the rules' (at [16] per Deputy President Hack). **18** The decisions that are not reviewable under the *Civil Aviation Act 1988* (Cth) include those which suspend an authorisation under s30DC, or suspend or cancel an authorisation under Division 3D, and to reinstate under s30EF(3) a civil aviation authorisation that has been suspended or cancelled under Division 3D.

19 Section 3 of the *Civil Aviation Act 1988* (Cth) defines SCN. **20** EM, 6.6.1. **21** The Act requires that an SCN be issued prior to suspension or cancellation of AOCs (s28BA(4)); variation, suspension or cancellation of a licence, certificate or authority under regulation 269 *Civil Aviation Regulations 1988* (Cth) (this anticipates flight crew licences and certificates of approval in relation to aircraft maintenance and engineering licenses). **22** EM, 6.6.4. **23** Section 31A(4), *Civil Aviation Act 1988* (Cth). Section 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) provides '...if the Tribunal is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review'. **24** *Repacholi and Civil Aviation Safety Authority and Transcoast Enterprises Pty Ltd (Joined Party)* [2013] AATA 598 (23 August 2013). **25** *Green and Civil Aviation Safety Authority* [2013] AATA 652 (12 September 2013). **26** EM, 6.7.2.1. **27** EM, 6.7.2.4. Further, the EM notes that SCCs are not conducted on a 'without prejudice' basis, and 'information discussed by the holder of an aviation authorisation during a SCC may be used by CASA for its regulatory purposes. CASA cannot compel a person to attend a SCC, and ... cannot require a person to provide particular information to answer particular questions during a SCC': EM, 6.7.7. Certain powers exist to compel response in CARs 43A, 5.56, 301, and 302. While CASA does not use admissions made in SCCs to base criminal prosecutions, they may 'direct a line of inquiry to obtain independent evidence of the commission of that offence': EM, 6.7.7.2. **28** *Ibid*, 6.7.4.2. **29** *Ibid*, 6.7.6.1. **30** Section 30DC, *Civil Aviation Act 1988* (Cth). **31** See *Bryant and Anor and Civil Aviation Safety Authority* [2013] AATA 641 at [34], in the context of

an application for a stay of CASA's decision to cancel an individual's aircraft engineer licence. **32** *Civil Aviation Safety Authority v Barrier Aviation Pty Ltd* [2013] FCA 227 (22 February 2013). **33** *Civil Aviation Safety Authority v Bell* [2008] FCA 1049. **34** Per Rares J, at [6]. **35** That is, that the authorisation-holder has engaged in, is engaging in, or is likely to engage in conduct that contravenes s30DB of the Act. **36** Section 30DE (4), *Civil Aviation Act 1988* (Cth). This may be varied under s30DF of the Act. **37** Section 30DG; s30DH. **38** Section 30DI. **39** Regulation 296A, *Civil Aviation Regulations 1988* (Cth). **40** EM, 8.4. **41** The CASA decision-maker must consider submissions by the alleged offender, matters set out in paras 296C(2)(a) - (c) and any other relevant matter. **42** Regulation 296J, *Civil Aviation Regulations 1988* (Cth). **43** EM, 10.3. The Explanatory Memorandum of the Bill which introduced Division 3D of Part III of the Act refers to the system as a system for minor infringements of the regulations. **44** Regulation 13.370, *Civil Aviation Safety Regulations 1998* (Cth). **45** *Ibid*, sub-regulation 13.375, (reproduced in EM, 10.4). **46** EM, 10.5. **47** *Johanson and Civil Aviation Safety Authority* [2012] AATA 239 (27 April 2012). **48** *Ibid*, at [138].

Joseph Wheeler is a Senior Solicitor in the Aviation Department of Shine Lawyers, Brisbane, and co-chairs the QLD ALA's Aviation Special Interest Group. Joseph holds qualifications from the McGill University Institute of Air and Space Law and acts solely for claimants rather than airlines and their insurers. He was formerly an airport regulator in the Aviation and Airports Division of the then Australian Government Department of Infrastructure and Transport.
PHONE (07) 3837 8500 or 0499 190 090
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