

Regulatory Enforcement Policy

Purpose

To provide clear guidelines for the application of the Director's regulatory enforcement powers, as defined in the Civil Aviation Act 1990, the Civil Aviation (Offences) Regulations 2006, the Health and Safety at Work Act 2015, the Hazardous Substances and New Organisms Act 1996 ("the aviation legislation") and the Search and Surveillance Act 2012.

State servants – which includes everyone working at the CAA – must be vigilant about how they exercise the significant responsibilities and powers entrusted to them. This is fundamental to the integrity of the state service.

The CAA must ensure that the way it gathers information is not only lawful, but done in a way that fosters public trust in the organisation.

Summary

Enforcement of the aviation legislation forms part of a suite of regulatory tools that are available to the Director to help create and sustain a safe and secure civil aviation system.

Scope

The policy applies to the CAA regulatory workforce exercising the delegation and authorisation of the Director's functions and powers when undertaking investigations into alleged breaches of the aviation legislation.

Context

The CAA has a responsibility to clearly set out to those it regulates when, why and how it will take action to detect and respond to alleged breaches of the aviation legislation.

Enforcement activity is one component of the CAA's regulatory toolbox which is intended to encourage compliance with the aviation legislation, secure the behaviours that are encouraged, and deter and denounce non-compliance in the public interest.

Authority

This policy is approved by the Executive Leadership Team of the CAA.

The Deputy Director - Aviation Infrastructure and Personnel is the owner of this document and is responsible for its regular review and maintenance.

The Deputy Director - Aviation Infrastructure and Personnel is responsible for ensuring that this document is consistent with Development and Control of Authority Policies and Procedures.

CAA Operational Unit Managers will ensure that all staff:

- are aware of this policy;
- understand when and how to apply the policy; and
- apply the policy, as required.

References

- Civil Aviation Act 1990;
- Civil Aviation (Offences) Regulations 2006;
- Health and Safety at Work Act 2015;
- Hazardous Substances and New Organisms Act 1996;
- CAA Regulatory Operating Model;
- CAA Use of Regulatory Tools;
- Criminal Procedure Act 2011; and
- Summary Proceedings Act 1957.

Policy

Introduction

Enforcement of the aviation legislation forms part of a suite of regulatory tools that are available to the Director to help create and sustain a safe and secure civil aviation system.

Participants in the civil aviation system are expected to meet their obligations with respect to the applicable legislation. The Regulatory Operating Model and Regulatory Tools policy describe interventions that are designed to influence the behaviour of aviation participants and to reduce risk. The regulatory tools and associated interventions are set out in the CAA Use of Regulatory Tools policy and include:

- Education and Safety Promotion;
- Certification, Monitoring and Investigation;
- Administrative Actions;
- Regulatory Enforcement Action; and
- Other, including rule development.

The Director has powers to enforce the provisions of the legislation when it is in the public interest to do so. The regulatory enforcement tools referred to in this policy relate solely to (1) the issuing of a warning letter, (2) issuing an infringement notice or (3) initiating a summary prosecution.

Regulatory enforcement, as a tool, needs to be considered in the context of both:

- (1) the safety or security issue that has been identified;

- (2) the type of action that is most likely to result in the safety or security issue being addressed; and
- (3) The wider impacts of the action in the public interest.

The Director's Function

The Director's enforcement function in relation to the Civil Aviation Act 1990 is detailed in Section 72I(3)(b), as follows:

"...take such action as may be appropriate in the public interest to enforce the provisions of this Act and or regulations and rules made under this Act...."

The Civil Aviation Act 1990 places an obligation on the Director to take action, including consideration of the regulatory enforcement actions, when it is in the public interest. While 'Public Interest' has a quite specific meaning in policy and legal contexts, the CAA view of the public interest becomes a mixture of holding people or organisations to account, and the deterrence and prevention of harm. Public interest therefore includes consideration of the seriousness or criticality of a safety issue and the extent to which a person or organisation needs to be held to account for their actions that may have contributed to the safety issue under consideration.

The public arguably is increasingly intolerant of any accountability or regulatory regime that does not hold someone accountable for a failure, particularly where that failure results in serious harm. The public look to regulators to provide that accountability regime, in conjunction with initiatives to prevent or discourage failure.

In the civil aviation context it can be said that the public interest is in seeing the Civil Aviation Act 1990 and rules complied with in order to help achieve a safe and secure aviation environment which benefits the public.

Similarly the Director's function to take enforcement action in the public interest is conferred under Section 191 of the Health and Safety at Work Act 2015, and Section 97(1)(e) of the Hazardous Substances and New Organisms Act 1996.

To assist in delivering those functions the CAA's Regulatory Investigation Unit (RIU) conducts investigations and makes enforcement recommendations in relation to alleged offences under the Civil Aviation Act 1990 or the Civil Aviation (Offences) Regulations 2006.

The CAA Health and Safety Unit (HSU) conducts a similar role in relation to the offence provisions in the Health and Safety at Work Act 2015 and the Hazardous Substances and New Organisms Act 1996.

Structure of the Policy

This policy is structured in four parts, which outline:

- the principles used to determine whether an enforcement investigation should be triggered;

- how we conduct our investigations;
- approaches that should be considered when enforcement action is taken; and
- responsibilities and roles of CAA staff within the decision-making process as it applies to enforcement actions.

Triggering an Enforcement Investigation

An enforcement investigation may be considered following the review of initial facts related to a reported breach, occurrence, or concern. The initiation of an enforcement investigation should not preclude the application of other regulatory tools. In particular, it should be noted that anything presenting an on-going risk to safety should be addressed with priority and without waiting for the outcome of an enforcement investigation.

The decision to commence an enforcement investigation will be informed by the following factors:

- as a pre-requisite, prima facie information that indicates a potential breach of an obligation in the Civil Aviation Act or the Health and Safety at Work Act
- nature of the activity;
- likelihood of the safety or security failure occurring;
- consequences of a safety failure associated with the activity;
- seriousness of the alleged offence(s);
- statute of limitations;
- attitudes and behaviours of the participant(s) involved (if known); and
- compliance record of the participant under investigation.

The CAA prefers not to take enforcement action against those who fully report details of accidents and incidents pursuant to Civil Aviation Rule Part 12. However, enforcement action is more likely to result when reporting is patently incomplete, or inaccurate, or reveals reckless or repetitive at-risk behaviour.

Where it is identified that the participant is the subject of more than one intervention (e.g. audit or section 15A investigation), a coordinated approach will be undertaken to ensure consistency and transparency.

How we conduct enforcement investigations

It is critical that we conduct enforcement investigations in a way that is:

- Lawful;
- Fair to those under investigation;
- In accordance with the public's expectations of state sector agencies.

In particular, we need to ensure that we comply with our obligations under:

- the Civil Aviation Act 1990;
- the Privacy Act, in terms of what information we collect, how we collect it and how we manage the information we collect. For further guidance on this, refer to the Authority's privacy policy, which can be found here:
<http://cirrus/PolicyAndProcedures/Word Document Versions of PDF/Privacy Policy.docx>
- the Search and Surveillance Act, to the extent that enforcement investigations may involve surveillance governed by the provisions of that Act (including the seeking of warrants under the Civil Aviation Act or the Health and Safety at Work Act). This is discussed further below.
- the New Zealand Bill of Rights Act. This is discussed further below.
- The State Services Commission's Model Standards for Information Gathering Associated with Regulatory Compliance
(<https://www.ssc.govt.nz/sites/all/files/SSC%20-%20Model%20Standards%20-%20information%20gathering%20and%20public%20trust.pdf>)
- The Code of Conduct for State Servants (<http://www.ssc.govt.nz/sites/all/files/Code-of-conduct-StateServices.pdf>)

The Application of the Search and Surveillance Act

Any activity covered by the Search and Surveillance Act may be performed only with the express written consent of both the relevant Deputy Director and the Chief Legal Counsel. This activity includes:

- seeking a warrant to enter a private dwelling or marae under s24 of the Civil Aviation Act;
- the observation of private activity on private premises, and the recording of that activity using a visual surveillance device;
- observation of private activity in the land immediately adjacent to a private dwelling, and the recording of that observation using a visual surveillance device, if the surveillance is for more than 3 hours in a 24 hour period, or for more than 8 hours in total.
- seeking a warrant to enter a private dwelling under s169 of the Health and Safety at Work Act;
- taking substances, materials or things from a workplace under s172 of the Health and Safety at Work Act

- seeking a warrant to enter and search any place, vehicle or thing under s173 of the Health and Safety at Work Act

These steps should only be taken where more orthodox information gathering activities would be unlikely to be successful in gathering the necessary information.

The Application of the New Zealand Bill of Rights Act

All enforcement investigations must comply with the New Zealand Bill of Rights Act 1990 and, in particular, must comply with the following requirements:

- as a public body we must recognise and observe the principles of natural justice in relation to decisions in respect of a person's rights, obligations, or interests, which includes decisions as to whether we bring enforcement proceedings against an individual. This means, for example, that we would never make a decision to bring proceedings against a person until such time as they had been afforded an opportunity to be heard either in writing, or by way of an interview. We recognise that we may be judicially reviewed in respect of such decisions, or that we may be the subject of civil court proceedings;
- Before any person is required to attend a compulsory interview (for example under s168 of the Health and Safety at Work Act 2015) the notice of requirement must be signed off by the Chief Legal Counsel or the Crown Solicitors. Any person who is required to attend a compulsory interview must be treated fairly and with respect
- Every person who is the subject of of an enforcement investigation has the right to be free from unreasonable search and seizure.
- Every person who is the subject of an enforcement investigation (or who is appearing as a witness) has the right to legal representation
- The requirement to issue a caution (under s23 of the Bill of Rights Act) should be applied fairly and reasonably. Cautions must be issued at the point that there is sufficient information on which to charge the interview subject but, as a matter of fairness, it will usually be appropriate to issue a caution before the evidentiary threshold has been reached, at the point where it is within the reasonable contemplation of the interviewer that the subject might later face charges. This might be at the very early stages of an investigation to ensure that the information captured at interview may fairly and lawfully be used later.

Information we gather during the course of the investigation will be collected, stored and managed in accordance with our legal obligations under the Privacy Act (refer to the Privacy Policy for further guidance on those obligations) and the Information and Records Management Policy.

Any information provided to the CAA during an investigation that appears to have been obtained illegally, must be reported to the NZ Police.

Investigators must always have in mind the State Sector Standards of Integrity and Conduct, which require us to be:

- Fair
- Impartial
- Responsible.
- Trustworthy`

Following the completion of an investigation, if we receive requests for the information on the investigation file, we should always consider when assessing the request:

- The privacy interests of those involved in the investigation;
- Whether the information provided by witnesses over the course of the investigation was provided with the expectation that it would be treated in confidence

Given that information gathered during the course of an investigation is gathered for the purposes of assessing a participant's compliance with legislative or regulatory requirements, the information can lawfully and appropriately be used for subsequent compliance assessments within the CAA, eg as part of the material considered in determining the subject's fit and proper status under the Civil Aviation Act.

Training in investigations

At least annually, those conducting enforcement investigations must receive refresher training in key aspects of conducting lawful, fair investigations. This training should be provided by lawyers from within the CAA or from the Crown Solicitor network and should include issues such as:

- The application of the New Zealand Bill of Rights Act and ensuring procedurally fair investigations
- The application of the Search and Surveillance Act
- Recent developments from the courts in criminal law
- Interviewing and information gathering techniques

Sources of Information for an Investigation

An investigator may gather a wide range information from a variety of sources to support an enforcement investigation, so long as the information:

- has genuine probative value in relation to the issues at hand – rather than being simply prejudicial to the subject of the investigation
- is gathered fairly and lawfully.

Information may come via:

- reports or documents submitted about the incident by third parties
- information in the CAA business systems including, for example, from the Personnel Licensing or Medical units, depending on the nature of the investigation;
- publicly available social media posts, including from YouTube or publicly accessible Facebook accounts
- interviews of witnesses
- interviews of the subject
- expert advice from internal or external sources
- Airways data
- Covert surveillance, in accordance with the CAA's Covert Investigation Policy, found here:
<http://cirrus/PolicyAndProcedures/Policy%20and%20Procedure%20Repository/Covert%20Investigation%20Policy.pdf>

Rule protections prevent some categories of information (such as reports made under Part 12 of the Civil Aviation Rules) from being used as part of enforcement activities.

The CAA does not use external consultants or security consultants to conduct regulatory enforcement investigations.

Sometimes the CAA will receive information from anonymous sources relevant to a person who is the subject of an investigation. Such information should be treated with caution as there is no way to test the credibility or bona fides of the informant. While the anonymous information may be used to direct further lines of enquiry, the information itself should not be treated as having any evidential value unless it is able to be corroborated by independent enquiries.

Any unsolicited information received from third parties, even if they are identifiable, should be tested hard for credibility and accuracy and, wherever possible, be corroborated by further independent CAA enquiries.

Enforcement Decisions

Upon completion of the investigation, and before a decision is made to take enforcement action, an assessment of the evidence is made by the Chief Legal Counsel to ensure the evidential sufficiency test, as set out in the Solicitor General's Prosecution Guidelines, has been met:

"A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence."

In addition to the question of evidential sufficiency, the Chief Legal Counsel's review of the report must also encompass:

- the sources of information used, to ensure that they were lawful, reasonable and appropriate in the circumstances;
- the analysis, to ensure that it is supported by the available evidence;
- the recommendations, to ensure that they are proportionate, reasonable and appropriate to address the nature and extent of any aviation risk identified.

Public interest is also paramount when making enforcement decisions. Consistent with the public interest test contained in the Solicitor General's Prosecution Guidelines, the CAA applies proportionality and consistency principles to take into account the aviation safety regulatory environment.

This ensures that enforcement actions are proportionate to the risks and the potential for harm posed in any given situation. It also provides clarity to aviation participants as to how the Regulatory Enforcement Policy will be applied.

In addition and consistent with the approach outlined in the CAA Regulatory Operating Model, any enforcement actions undertaken will be conducted in a timely manner to the fullest extent practical. This recognises the importance, from a deterrence effectiveness perspective, of any actions occurring as close as practicable in time to the event(s) in question.

Proportionality

Making reasoned, risk based and informed decisions requires the CAA to consider the known facts and circumstances pertaining to the specific event. Proportionality ensures the approach taken is neither too lenient nor too excessive.

The following factors may be considered:

- seriousness of the offence(s) established – the offences and rule breaches prescribe maximum penalties for each and these will be used as a guide to establish the seriousness of the offending.
- culpability – in this context culpability relates to the degree of fault or liability. A person who commits an offence due to a genuine mistake would be deemed less culpable than a person who deliberately breaks the law or is dishonest.
- the potential or actual harm caused.
- behaviour – whether the participant demonstrates a genuine willingness to learn from the event and implement meaningful change.
- compliance history – participant’s previous warnings, infringement notices or prosecutions will be considered along with any other relevant information.

Consistency

Consistency does not mean uniformity of approach. Consistency means the systematic application of relevant policy and principles. It does not mean that a consistent or similar result will be achieved, as every case must be evaluated based on the specific facts and evidence available.

CAA Demonstrating Reasonable Judgement

Regular reviews of enforcement interventions will be made to assess whether decisions taken were reasonable, objective and evidence based. These reviews will also ensure that the legal processes and rights of the individual or entity are met and identify any internal improvement that might be required.

Enforcement Outcomes:

Warning Letter

Warning letters, where appropriate, are issued by the Deputy Director with operational oversight (DD) following a formal enforcement investigation by the RIU or HSU and held on the participant’s file. These warnings will be considered by the CAA when reviewing the participant’s compliance history for any purpose, including determining whether to commence legal proceedings.

A warning letter will only be considered when the evidential sufficiency test has been met and the offending is relatively minor. In addition, the subject needs to have cooperated with the investigation and demonstrated that he/she has learnt from the event. It is intended that the indicated and anticipated change in behaviour will provide the DD with some confidence that repeat safety or security risks from future offending is unlikely to occur.

Infringement Notice

An infringement notice provides the recipient with the following options:

- pay the prescribed fee; or
- make a written submission to the court as to the level of penalty; or
- seek a court hearing to contest the alleged breach.

An infringement notice does not result in a court conviction.

Summary Prosecution

The prosecution process is covered by the Criminal Procedure Act 2011. The maximum sanction available to the court is prescribed in the Civil Aviation Act 1990, the Civil Aviation (Offences) Regulations 2006, the Health and Safety at Work Act 2015, or the Hazardous Substances and New Organisms Act 1996, as the case may be.

Prosecution action may be taken if, after applying the proportionality factors, it is considered that a letter of warning or an infringement notice is insufficient to manage the concern and hold the person/entity to account.

The procedures in relation to the management of the prosecution process, including litigation support, disclosure responsibilities and compliance with the Criminal Procedure Act 2011, are documented in the Regulatory Investigation Unit's Prosecution Management procedure, or in the Health and Safety Unit's enforcement procedure, as applicable.

Discretion

Director to DD

The Director has granted discretion to the DD (client owner) for decisions on action to be taken following a Civil Aviation Act enforcement or Health and Safety investigation.

When new relevant and material information is presented, the DD has the discretion to reverse initial decisions and if appropriate discontinue a prosecution or an infringement notice.

If relevant the DD may also consider replacing the enforcement action with an alternative safety or security intervention.

Operational Unit Manager

An Operational Unit Manager may enforce the provisions of the Civil Aviation Act and any regulations or rules made under the Act; with the condition that this ability to do so be approved by the DD and limited to decisions regarding the issuance of formal warnings and infringement notices only. In order to do so the Operational Unit Manager must hold a delegation under s72I(3)(b) of the Civil Aviation Act 1990.

An Operational Unit Manager may not approve the initiation of summary prosecution action.

Expedited Enforcement Investigation

In some cases a regulatory investigation may disclose, at an early stage, evidence that the CAA objectively believes may justify the early issue of either a warning letter or infringement notice for a specified breach. In these cases the Operational Unit Manager and Manager Regulatory Investigations will assess the information and make a determination whether to classify the investigation as an expedited investigation. In doing so consideration will be given to the CAA Regulatory Operating Model, the CAA Regulatory Tools Policy and the Solicitor General's Prosecution Guidelines. This pathway enables the assigned Investigating Officer to exercise a discretion (in consultation with the Operational Unit Manager) to issue an infringement notice if, following an expedited investigation, they have reasonable grounds to believe this is the appropriate enforcement outcome. The action taken must be documented and saved to the investigation file.

An expedited enforcement investigation will result in a more timely result. The benefits of this approach are a more effective use of CAA resources and reduced period of uncertainty for the person(s) under investigation.

Roles of CAA staff involved in enforcement process

Regulatory Investigating Officer

The Regulatory Investigating Officer will:

- investigate alleged breaches of the Civil Aviation Act 1990, the Civil Aviation Rules, and/or other legislation as appropriate, and make recommendations as to the appropriate enforcement action to be taken;
- Exercise a discretion to issue an infringement notice if the investigation has been classified as an expedited investigation; and
- assist in the prosecution management phase.

Health and Safety Inspector

The Health and Safety Inspector will:

- investigate alleged breaches of the Health and Safety at Work Act 2015 and the Hazardous Substances New Organisms Act 1996 and make recommendations as to the appropriate enforcement action to be taken;
- also extend the scope of the investigation to examine causation. As a result, a broader suite of interventions will be considered in addition to enforcement tools. For example, the investigation may determine a need for the Inspector to issue an Improvement Notice or Prohibition Notice; these are not enforcement tools but are powers used to manage existing hazards; and
- assist in the prosecution management phase.

Manager Regulatory Investigations Unit

The Manager Regulatory Investigations Unit will:

- review all referrals in relation to alleged breaches of the Civil Aviation Act 1990 or the Civil Aviation Rules and, in consultation with the relevant Operational Unit Manager, determine whether an enforcement investigation should commence;
- manage the investigative resources; and
- recommend the enforcement action to be taken.

Manager Health and Safety Unit

The Manager Health and Safety Unit will:

- review all referrals in relation to alleged breaches of the Health and Safety at Work Act 2015 and the Hazardous Substances New Organisms Act 1996 and, in consultation with the relevant Operational Unit Manager, determine whether an investigation should commence;
- manage the investigative resources; and
- recommend the resulting actions to be taken including any enforcement action.

Operational Unit Manager

When considering a referral, the Operational Unit Manager with regulatory oversight will apply the Regulatory Tools Policy. The circumstances of the case will be examined, in consultation with the Manager Regulatory Investigations or Manager Health and Safety (as applicable), to determine the best mode or modes of investigation. This includes determining whether an investigation should be classified as “expedited”.

If multiple investigations are being considered, the Operational Unit Manager will consult with both the Manager Regulatory Investigations and Manager Health and Safety to determine the appropriate action. The Operational Unit Manager will then document the decision, trigger the referral(s) and provide technical resources when required.

The Operational Unit Manager responsible for the oversight of the concern will, on the conclusion of an investigation, review and thoroughly test the recommendations presented. If the necessary delegation has been issued by the DD, the Operational Unit Manager is authorised to make a decision on whether to issue a formal warning or Infringement Notice.

Chief Legal Counsel

When considering a prosecution recommendation, the Chief Legal Counsel will advise the DD on the application of the regulatory enforcement policy after considering:

- the evidential sufficiency test, and
- the public interest.

The Chief Legal Counsel, at his/her discretion, may consult with external legal counsel for the purpose of informing advice provided to the DD.

Deputy Director

The DD is obligated to consider enforcement action when it is in the public interest to do so. The DD will consider all relevant information before making a decision on what, if any, enforcement action should be taken.

The DD's enforcement decisions will be documented.

Appendix

Nil