

Summary of Submissions on Draft LIB No 4



Interpretation of CAR Part 1 Crew Member and Commercial Transport Operation

1.0 Background

Draft LIB No 4 was released together with an explanatory guide, for industry comment on 8 August 2008. The Draft LIB was published on the CAA website and notified to all participants and interested parties through the “What’s New” CAA website alert and CARRIL, and emails and hard copies were sent to all certificated operators of air services.

Written comments and submissions were invited and the deadline for submissions was extended to 31 October 2008.

2.0 Submissions & Consultation

Six written submissions were received from industry participants, and the Aviation Industry Association (the AIA submission may be viewed in full by clicking [here](#)).

Informal feedback and verbal comments were also received from a number of participants during the consultation period.

The CAA facilitated two regional meetings during the consultation period. This was intended to provide an opportunity for interested participants to discuss issues arising from the Draft LIB No 4 with CAA Legal and Operations personnel. The first meeting in Rotorua was not attended by any participants. The second meeting in Christchurch was attended by two participants. This facilitated some useful discussion of a range of issues. The key points raised in written submissions, industry consultation and informal feedback, and the CAA’s response, are outlined below.

Following consideration of all submissions received up to November 2008 the CAA decided to engage in further consultation on the issue of the application of LIB 4 and the requirement for Part 119/135 certification to Wild Animal Recovery Operations (WARO). Relevant industry groups and stakeholders were consulted on this issue between May and July 2009 and the outcome of the further consultation and decisions made by the CAA on that matter are also included below.

3.0 Amendments to draft LIB No 4

Paragraph 6.0 outlines the key changes to the draft LIB No 4 and Explanatory Guide. The final LIB No 4 may be viewed by clicking [here](#).

4.0 Summary of Submissions and CAA Response

Issues identified from submissions and consultation with industry are discussed under subject headings at paragraphs 4.1 - 4.8 inclusive.

While this overlaps with and incorporates the response to many of the issues raised in the AIA submission, further specific comments in response to the AIA submission are discussed at paragraph 5.0.

Changes made to the final LIB No 4 and Explanatory Guide are summarised at paragraph 6.0.

4.1 Legal status and enforceability of Legal Information Bulletins

One submitter complained to the Solicitor General that:

- The CAA's practice of publishing legal information bulletins was an unacceptable means of "de-facto law making"; and
- LIB No 4 in particular was illegal or unconstitutional and in breach of the rule of law in explicitly stating that it did not accept the legal interpretation adopted by a District Court in a prosecution decision as binding judicial precedent and would not follow or apply it to future cases.

The submitter asked the Solicitor General to advise the CAA that LIB 3 and LIB 4 should be withdrawn for those reasons. The Helicopter Division of the AIA also expressed concern as to the legality of the CAA's actions in not following a District Court decision as binding precedent in LIB 4.

The Office of the Solicitor General did not uphold the complaint. A full copy of their response may be viewed by clicking [here](#).

In summary, the Solicitor General confirmed that:

- The CAA bears a public duty to administer its Rules and Regulations for the purposes of making decisions on whether and how to enforce those Rules and Regulations;
- This may legitimately include publishing statements setting out the CAA's position on the correct interpretation of the law;
- The CAA is not obligated to follow a District Court decision as binding precedent and may state a contrary position in its Legal Bulletins. The Solicitor General's office did not consider that the particular District Court decision in question was criticised immoderately in the draft LIB No 4;
- Other government agencies such as Inland Revenue routinely issue such Bulletins;
- Courts at the highest level have recognised the right of government agencies to issue Interpretation Bulletins in the execution of its duty to apply and enforce the law; but have also ruled that such Bulletins in no way affect the Courts jurisdiction to give authoritative judgments on those issues at a later stage;
- The CAA may continue to enforce the law (including by prosecuting a subsequent case) based on a contrary position to that expressed in a prior District Court decision, subject to the risk that the Courts may subsequently disagree.

Publication of LIBs are for the guidance of industry and serve to inform industry of the CAA's position on a legal interpretation issue in the Rules. Participants can accordingly make an informed decision as to the position that they wish to take, and with full knowledge of the risk of adverse action and/or potential legal and cost implications in pursuing a contrary view of the law to that held by the CAA. With respect to the status and enforceability of Legal Information Bulletins, the CAA acknowledges that it represents the CAA's position on the law and that this may be subject to challenge in the Courts. However, participants who rely on and conduct their activities in compliance with an LIB in good faith will not be subject to adverse action for the period when the interpretation or determination in the Bulletin is in force.

4.2 Scope and application of LIB No 4

The intended scope and application of this LIB relates to operations conducted primarily in the GA sector by helicopters and smaller fixed wing aircraft, which the CAA considers are properly interpreted as "Commercial Transport Operations" (CTOs). The effect of the LIB is to clarify that those operations which are interpreted as CTOs must be carried out by Part 119 certificated operators and conducted pursuant to the requirements of Part 135.

Some submissions and feedback have raised concerns as to whether some types of operations are, or should be, included within the scope of the LIB and the requirements for 119/135 certification. The CAA's response to those issues is discussed below.

As there appears to be some confusion, LIB 4 has also been amended to clarify that it only applies to operations conducted "for hire or reward". Operations not conducted for hire or reward are not defined as CTOs and therefore fall outside the scope of the LIB. However, the LIB does not address what amounts to "hire or reward". Operators who are uncertain whether an intended operation is for hire or reward should seek independent legal advice.

4.3 Whether the LIB and/or rule amendments are "needed" to clarify the meaning of the existing definitions

Some submitters question the need for the LIB and express the view that the industry already understood the definitions. However, submissions and informal feedback to CAA personnel from a number of industry participants indicates that there is support for the need for the CAA to provide clarity to industry on its views on the current definitions, and which operations require part 119/135 certification.

Some submitters suggest that the appropriate mechanism to deal with any divergence of views on the current definitions is through legislative amendment to the Rules following the rules development (NPRM) process. The CAA accepts that amendment to the rules may be pursued if necessary.

However, while the CAA remains open to considering the possibility of future rule changes, having considered all matters raised in this consultation process, is not considered necessary to amend the definitions that are the subject of LIB 4 at this time.

The CAA remains of the view that it is appropriate and prudent that it provide clear guidance to industry of its interpretation on the existing law and that the LIB is the best mechanism to achieve this.

4.4 Agricultural Operations

Some submitters expressed concern as to whether some flights carried out by Part 137 agricultural operators could be interpreted as falling into either category of ‘air operations’ (for example, carriage of loader drivers on ferry flights or carriage of farm owners for pre agricultural operation flight survey and therefore be considered by the CAA to be subject to the requirements of CAR Parts 119/135.

The definitions of ATO and CTO specifically exclude operations which fall within the definition of Agricultural Operations. Carriage of the persons such as loader drivers on ferry flights have generally been treated by the CAA and industry as either being private flights (where not remunerated) or agricultural flights. However, the CAA accepts that if such flights are conducted for hire or reward, they could be interpreted as CTOs or ATOs, rather than Agricultural Operations. These concerns have now been addressed as part of the Part 137 rule rewrite and will be explicitly included as part of Agricultural Operations.

4.5 Frost protection

Frost protection operations may presently be conducted for hire or reward under Part 91, on the basis that they are single pilot helicopter operations. Provided no passengers are carried, such operations would not fall within the definition of commercial transport operation.

Questions have been raised as to whether such operations may be conducted under part 91 where persons other than the pilot are carried, for example, vineyard owners/growers.

The AIA and another submitter assert that passengers may legitimately be carried during Part 91 frost protection operations and that the draft LIB is now “reclassifying” those flights as Part 119/135; this position is not accepted as correct for two reasons:

First, where a passenger is carried to assist the pilot during frost protection operations, this would clearly fall within the definition of commercial transport operation and the operation would be required to be certificated under Part 119/135. The CAA does not therefore accept the submission that such operations, if permitted under the Rules, may be conducted with passengers on board as Part 91 operations.

Second, the CAA has concerns as to whether the practice of carrying a passenger during frost protection operations is necessary and permissible under the CARs. While the CAA does not wish to make a definitive statement as part of its response to the consultation on the LIB, the CAA generally does not anticipate that carriage of passengers during frost protection operations would be essential or compliant with CAR 91.311. Operators carrying passengers during frost protection flights would bear the onus of satisfying the CAA if challenged, that this practice was necessary.

Thus, the CAA’s position and response to the concerns raised is that:

Carriage of passengers during frost protection operations must be necessary and permissible under CAR 91.311, and is a CTO which must be conducted pursuant to the requirements of CAR Part 119 and 135.

4.6 Wild Animal Recovery Operations

Most feedback and concern was expressed about the application of LIB 4 to Wild Animal Recover Operations (WARO). WARO operations typically involve the carriage of a shooter, who is considered by the CAA to be a passenger. Those operations therefore fall within the definition of a CTO. As a result of the feedback received on this subject, the CAA decided to engage in further consultation with industry representative organisations and stakeholders, to gauge the concerns in more detail and determine whether the CAA should enforce the requirement for Part 119/135 certification and/or consider other possible options for safety regulation and oversight of this activity.

The CAA consulted with the AIA, New Zealand Helicopters Association, South Island Aerial Game Hunting Association, and the Department of Conservation (which will be issuing new 5 year DOC concessions for WARO operations conducted over DOC land from September 2009).

Some feedback supported the view that these operations fall within the scope of commercial transport operations and should be certificated. Others disagreed with or expressed no view on whether such operations fall within the current definition of CTO. The general feedback from industry representatives was that while such activities should not be completely unregulated and should be subject to some kind of safety standards and regulatory oversight, they do not necessarily require full Part 119/135 certification and should be regulated in a different or less prescriptive manner. One submitter suggested that this activity is most closely aligned with CAR Parts 133 and/or 137 and suggested that a similar level of regulation to those operations is more appropriate. Others did not support that approach but raised concern as to whether certain aspects of 119/135 certification are unnecessary or superfluous for operators solely engaged in WARO operations.

Some submitters including the AIA have also raised the fact that CAA has not historically mandated the requirement for 119/135 certification and compliance for these activities, and that to do so now may require significant increase in CAA resource and auditing activity over this sector.

Despite the level of concern raised by submitters, the CAA established during the consultation that the majority of operators currently engaging in commercial WARO activities are already Part 119/135 certificated. While it is acknowledged that some of those operators may not presently consider that their WARO operations are conducted under the authority of their certificate, the CAA's experience from its monitoring and oversight of Part 119/135 operators is that they generally apply the same safety and operating standards across all air activities that they engage in. It is therefore considered that there would be minimal change required for those operators to formally bring WARO operations under their 135 certificate. Further, the number of uncertificated operators currently engaged in commercial WARO operations is presently believed to be less than ten. The CAA does not therefore consider that it would require any significant change to current resource allocations to formally bring existing WARO operators into the 119/135 operating regime.

The greater concern to the CAA is that the latter group of operators are currently performing WARO operations to minimal regulatory and safety standards and are subject to no CAA safety regulatory oversight of these activities, despite the inherently high risk nature of this activity. There is also some concern within industry that more new operators may choose to enter into this activity due to the current economic climate and the pending

issuance of new 5 year DOC concessions for WARO activities on public lands, and that this may significantly increase the safety risk posed by operators engaging in this activity outside of the mandatory safety standards and oversight that applies to operators who are certificated under Part 119/135. This is not a regulatory or safety outcome that the CAA considers is acceptable. However, the CAA acknowledges the validity of some of the practical concerns raised by submitters, and accepts that it has not historically adopted a firm stance on the requirement for certification of these activities. The CAA has taken those matters into account in reaching the decision outlined below.

Decision on WARO operations

1. Requirement to obtain Part 119 AOC

The CAA's position is that Part 119 certification and compliance with any applicable requirements in Part 135 is mandatory for operators engaging in WARO operations.

WARO operators will therefore be required (subject to the requirements and transitional arrangement outlined below) to obtain Part 119/1135 certification. Certificated operators will be required to formally bring WARO operations under their Part 119/135 certificate.

2. Option of AOC limited to WARO operations

Operators who perform WARO operations but do not otherwise engage or intend to engage in any other Part 119 air operations will be given the option of applying for a Part 119 AOC which will limit the authorised air operations solely to WARO operations, pursuant to CAR 119.13(1).

The entry requirements for applicants who choose the option of an AOC limited to WARO operations will be appropriately assessed against the limited nature of the operations that will be authorised. While it is considered that most or all of the entry requirements can and will be expected to be complied with, the CAA will consider applications for exemptions from requirements that are not considered to be applicable or necessary, subject to an applicant satisfying the Director that requirements of section 37 of the Act are met.

3. CAA/industry joint guidelines on WARO (and other low level) operations

The consultations highlighted concern about a lack of published guidance material on WARO and other low level operations. The CAA, AIA and NZHA have agreed in principle to develop, together with relevant stakeholders, guidelines covering best safety practices for WARO and other low level operations.

WARO Operators will be expected to adopt and follow any guidelines published and to incorporate this into their Part 135 operating procedures.

4. Transition arrangements

As indicated above, the CAA will provide a transition period to allow existing WARO operators who are currently uncertificated to apply and obtain an AOC and come into full compliance with any applicable requirements subject to the following conditions:

- 1) Existing WARO operators who do not hold a Part 119 AOC must advise the CAA by 30 September 2009 that they are engaged in WARO operations and intend to certificate under the transitional arrangement offered by the CAA*.

2) Operators must submit a plan acceptable to the Director as to how they will be certificated in accordance with (the applicable provisions within) Part 119/135 in writing no later than 30 June 2010

3) Those operators must have obtained certification to Part 119/135 by 31 October 2010 (or such later date as may be determined by the CAA)

4) No WARO operations may be conducted by transitional operators after the transition period ends (31 October 2010, or such later date as advised by the CAA) unless the operator holds a Part 119/135 Air Operator Certificate.

*Operators who do not advise the CAA by the due date of 30 September 2009 that they are currently engaged in WARO operations will be treated as “new” operators and will not be entitled to take advantage of the transitional arrangement. New operators will be required to obtain Part 119/135 certification before they will be permitted to carry out WARO operations.

During the transition period, the CAA will:

- Work with industry organisations/stakeholders to produce and publish the safety guidelines material for WARO and other low level operations; and
- Undertake an assessment of how the entry requirements will be assessed for applicants for an AOC conducting WARO operations only. Participants will be advised before the required date for submitting a certification plan.

4.7 Whether the definition of “crew member” or “supplementary crew member” should be extended

Some participants have suggested that the definition of crew member or supplementary crew member should be extended to cover persons not presently accepted by the CAA as crew members, for example, air ambulance staff carried on emergency medical services. The CAA recognise that it is common to refer to such personnel as crew, for example “air ambulance crew”, or “police crew” or “rescue crew” etc, and that such persons perform an important task that is integral to the purpose of the operation itself. However, for *aviation law* purposes, they are not included within the definition of crew member.

The effect of categorising such persons as crew members under the CARs would exclude operations where only those persons are carried from the definition of CTOs, and accordingly remove those operations from the safety regulatory regime imposed by Parts 119/135. The purpose of the introduction of the CTO definition and the requirement for Part 119/135 safety regulation was to ensure that persons involved in carrying out a specific task or duty that is integral to the operation itself, are afforded the same level of safety regulatory protection as “fare paying” passengers by designating such persons as passengers with a duty or task to perform on the operation.

Even if those persons were to be re-designated as supplementary crew members for aviation law purposes, this would only be acceptable to the CAA on the basis that those operations would still be included within the Part 119/135 safety regulatory regime. This would require a substantial rewrite of the rules without any practical change to the current application and effect of the rules. It is not considered necessary or desirable to amend the definitions of crew member/supplementary crew member solely for this purpose.

4.8 Restricted category aircraft

The AIA have submitted that the draft LIB changes what operations may be permitted in restricted category aircraft, as such operations are not permitted to carry passengers. This is the intent and operation of the current rules and the CAA does not accept that the LIB results in any change to that position.

5.0 AIA submission

The CAA acknowledges the AIA's general endorsement of the CAA's publication of LIBs and in particular its decision to consult on this LIB. The CAA acknowledges its efforts to engage its members in consultation and in preparing a collective submission on the issues raised in response to the draft LIB No 4. The CAA also acknowledges the input of the AIA and NZHA during the CAA's further consultation on the WARO operations issues.

The AIA's written submission (to view click [here](#)) covered a broad range of issues, which overlap to a great extent with specific issues raised by individual participants. The CAA has identified and responded to the specific issues under the subject headings above.

For the sake of completeness, the CAA records that its response to the AIA submissions are addressed under the above paragraphs, and/or makes the following comments as follows:

Page 1-2 AIA submission:

In response to the general issues raised in pages 1-2 of the AIA submission, refer to CAA paragraphs 4.1 – 4.3 above

In respect of issues concerning hire or reward, and many of the comments raised in the AIA submissions about carriage of "non revenue" and "non commercial" passengers, refer to CAA paragraph 4.2.

With respect to comments raised about the general scope of activities included within the CTO definition refer in particular to paragraphs 4.2 and 4.7.

With respect to frost protection operations refer to CAA paragraph 4.5

Agricultural Operations, refer to CAA paragraph 4.4.

With respect to restricted category aircraft, refer to CAA paragraph 4.8.

Pages 3-4 AIA submission

With respect to comments and concerns raised about wild animal recovery operations refer to CAA paragraph 4.6.

With respect to comments about air ambulance personnel and paramedics refer to CAA paragraph 4.7. The CAA also notes that flight attendants are explicitly recognised as crew members under the CARs in New Zealand (and internationally) as this is required under international convention agreements on air travel.

Other comments raised in page 3 are addressed above.

In response to the concluding comments of the AIA at page 4 refer to all of the above. The CAA acknowledges the AIA's further input into the issues that have been the subject of ongoing consultation.

6.0 Changes to final LIB No 4 & Explanatory Guide

Based on the submissions and CAA response outlined above, the following specific amendments or clarifications are made to the final LIB No 4:

- That the LIB applies only to operations conducted for “hire or reward”
- Carriage of passengers during frost protection operations must be necessary and permissible under CAR 91.311, and is a CTO which must be conducted pursuant to the requirements of CAR Part 119 and 135
- Another recent District Court decision, *CAA v Brett Emeny (and Ors)*, D Ct New Plymouth, 20 October 2008, has been incorporated into the LIB under Judicial Decisions
- Other minor textual changes have been made to improve the readability of the LIB

For completeness, it is also noted that rule amendments to CAR Part 137 will clarify the when carriage of passengers by Agricultural Operators is permitted under CAR Part 137.