

30 October 2008

Steve Douglas
Director Civil Aviation Authority
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Dear Steve

The National Organisation in New Zealand of:
Aviation Education and Research Organisations
Aircraft Repair and Maintenance Organisations
Air Rescue/Air Ambulance Organisations
Aviation Fuel and Oil Suppliers
Flight Training Organisations
Aviation Service Providers
Air Charter Operators
Helicopter Operators
Agricultural Aviation
Aircraft Constructors
Aviation Suppliers
Airport Operators
Airline Operators
Aviation Insurers

Draft Legal Information Bulletin 4

Thank you for the opportunity to participate in the consultation proposed in respect of Draft Legal information Bulletin 4. The AIA supports the purpose and approach of legal bulletins and is pleased that on this particular occasion the CAA has determined that consultation with the aviation community is appropriate, albeit we would prefer the TOR of the consultation to be widened to include a discussion on the proposed approach itself.

You have requested that we respond in relation to four specific points:

The purpose of consultation on a draft Legal Information Bulletin **is** to:

- Gauge the level of awareness and understanding within industry of the legal issues raised in the LIB
- Seek feedback on whether the legal position adopted by the CAA as expressed in the draft LIB is clear and understood
- To identify and, to the extent that it may be possible, to clarify or resolve any legal argument on the position adopted by the CAA in the draft LIB
- To identify whether, and to what extent, interested parties consider that there may be a need to consider amending the Rules to clarify the legal position adopted by the CAA

We also note

The purpose of consultation on a draft Legal Information Bulletin **is not** to:

- Engage in a substantive review of the Civil Aviation Rules or underlying policy

AIA will be responding to each of these points in turn however we would note in opening that there was very minimal confusion in Industry prior to the CAA issuing the LIB. The Industry was clear on when an operation was deemed “commercial” and required Rule Part 119/121/125 or 135 certification. It was equally clear that there were those who pushed the boundary of “commercial” operations and were in fact providing services carrying commercial passengers and goods for “hire or reward” without the correct certification. However, the effect of the LIB has been to create confusion and widespread disbelief that the CAA would overturn long standing practice in respect of

- The definition of crew member;
- The definition of passenger;
- Introducing a new term “aligned with” to define crew whereas the existing terminology is “associated with”;
- What constitutes commercial air transport operations (including aerial work).

- What constitutes purely private operations and the ability to carry passengers and goods but not for hire or reward
- The operation of restricted category aircraft

As indicated, the Industry was quite clear when an AOC was required and not required. Now it is extremely confused by the issuance of this bulletin; the change in the definition of passenger to include all persons on the flight not directly related to the safety of the flight (within the narrow confines of training required under the appropriate certificate) and the requirement to be certificated in operations which previously could be conducted pursuant to Rule Part 91, Rule Part 133 and 137.

It has not been past practice and we are informed it is not the current practice of other jurisdictions to prohibit aerial work or to certificate aerial work in the manner proposed. The LIB creates a misalignment with International practice and has the effect of turning some aspects of the New Zealand's rules into conflict with others and we are assured in LIB 4, that this was not the intended outcome.

We appreciate it is the view of CAA that the Ruling in the District Court in relation to Helicam is not considered to be a precedent but we fail to appreciate how the issues traversed in LIB4 in anyway differ from the issues traversed in the Court hearing. We also fail to appreciate how operations akin to Helicam's can now be deemed as requiring certification when Helicam's does not.

The effect of applying LIB 4 is to change operations where:

- Non revenue passengers are carried to enhance the safety of the flight eg frost protection work where a passenger might be carried to assist the pilot in identification of hazards or ensure alertness.
- Inspections of wires where safety observers are "passengers with a duty to perform" as opposed to crew.
- Carriage of non commercial passengers to provide additional risk mitigation.
- Preclude any operation of restricted category aircraft where the carriage of an additional person is integral to the mission but not integral to flight safety. Restricted category aircraft are not permitted to carry passengers.
- Part 137 Operators' normal procedure is to fly the landowner over the job to identify boundaries and hazards. Because of this LIB, this longstanding practice can no longer be performed under Part 137. Unless the Rule Part 1 definition of Commercial Transport Operations is deemed to apply Operators also get caught by the Restricted Category requirements because when role equipment is fitted, the aircraft has to revert to Restricted Category and cannot then carry passengers for the purpose of boundary and hazard identification. Neither can the loader driver be carried as he is no longer crew. It should be noted that virtually all fixed wing agricultural aircraft operate in the restricted category as do a number of other aircraft providing specialised operations such as lifting logs etc or towing equipment.

- The interpretation of the LIB that references wild animal recovery operations is questionable. In the view of AIA, the CAA is not adequately resourced at the present time and the impact of introducing another 20-30 135 Operators would not be manageable and would therefore have a detrimental effect on the safety management of this group overall. If there are safety issues with the WAR's sector, then there are likely to be more effective ways of managing their risk than certification as a 119/135 operator.
- The LIB also means that the crew of an Air Ambulance are either passengers with a duty to perform or flight attendants. Given the role these paramedics perform, AIA would submit that they are definitely crew.

Turning to the specifics of the questions asked

1. *To Gauge the level of awareness and understanding of the legal issues raised in the LIB* – the industry now has a much heightened awareness of the legal issues raised in the LIB however does not agree that the underlying interpretation of “crew member” is correct. In particular the Industry does not agree that the proposed change will bring about consistency with the International environment, in fact New Zealand's interpretation of the definition of crew member will be quite unique in jurisdictions to which we benchmark. CAA appears to be substituting the word “aligned” for the word “associated”. The two words have quite different meanings.

Most importantly the CAA's interpretation cannot be correct as it would require:

- (a) a massive number of exemptions to be issued in respect of agricultural and restricted category operations, whereas we are frequently reminded that it is not the intention of the exemption process to be used in lieu of bad law making;
 - (b) that restricted category operations would now be prohibited from all forms of operation. CAR 91.105 (a) prohibits the carriage of passengers for hire or reward, and LIB 4 prohibits the carriage of crew. What then is the classification of individuals who are on board, integral to the operation but not to the safety of the aircraft within the narrow definition now applied by CAA?
 - (c) the LIB has the effect of eliminating the concept of passengers and goods being carried for neither hire nor reward when the operation is itself commercial. Effectively the LIB is stating that if an operation is commercial then all on board are either crew (within the narrow meaning ascribed to the term) or commercial passengers. There is no recognition of the fact that passengers are often carried as a requirement of the operator but are not fare paying passengers
2. *To seek feedback on whether the legal position adopted by the CAA as expressed in the draft LIB is clear and understood*

The legal position is understood by the CAA but the Industry does not accept that position as being correct – this is for the reasons outlined above.

3 To identify and, to the extent that it may be possible to clarify or resolve any legal argument on the position adopted by the CAA in the draft LIB

We believe that the LIB is attempting to address a problem which does not exist.

4 To identify whether and to what extent, interested parties consider that there may be a need to consider amending the Rules to clarify the legal position adopted by the CAA.

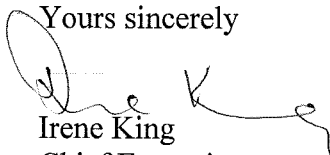
We would not support a rule change as prior to the issue of LIB 4 the Industry was clear on when an AOC was required and when it wasn't required. LIB 4 has muddied the waters unnecessarily and created confusion. We are concerned that pilots are now operating in fear that they will be prosecuted for breaching an interpretation of the law which we believe is without foundation and totally unjustified.

AIA is very familiar with the processes adopted with IRD in respect of taxation matters and finds that the CAA's processes are well short of those we have experienced with IRD. We are concerned that the effect of issuing the LIB and then applying that interpretation in law when the process of consultation is still occurring (we refer to the matter of frost protection) is confusing. In fact we find this whole process of consultation quite confusing and very inconsistent with the process of consultation generally used in respect of rule making.

AIA would support any initiative to address those operators who are deliberately flouting the law and are providing commercial operations carrying passengers or freight for hire or reward without the appropriate certification – this however is viewed as a matter quite separate from the issues being addressed by LIB4. We understand that CAA is already aware of a number of these but from the information we have, has not conducted any investigations of the complaints particularly in respect of carriage of commercial deer hunters. We are totally opposed to the application of any interpretation that is wrong in law and wrong in fact.

It is our opinion that CAA is wrong in law and in fact and for this reason we would request LIB 4 be removed and the real issues if there are in fact any be addressed. The Industry would welcome the opportunity to work with CAA to that end.

Yours sincerely


Irene King
Chief Executive