

Interpretation of CAR Part 1 Crew Member and Commercial Transport Operation

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Background

Participants engaged in commercial transport operations ('air operations') are required by Civil Aviation Rule Part 119 to hold a current air operator certificate issued by the Director of Civil Aviation and to operate in accordance with Rule Part 135. The legal requirement to hold an air operator certificate is based on the fundamental policy that operations involving the carriage of passengers or goods for hire or reward should require a higher level of safety regulation and CAA oversight than other air activities.

Issue

The purpose of this LIB is to state the CAA's position on the interpretation of the current CAR Part 1 definitions of "crew member" and "commercial transport operation", for the purposes of determining what is a Part 119/135 air operation¹.

The Civil Aviation Rules

The relevant clauses of the CAR Part 1 definitions are as follows:

Air operation means an air transport operation or a commercial transport operation:

Air transport operation means an operation for the carriage of passengers or goods by air for hire or reward except—

¹ This LIB does not address the air transport category of air operations, which also requires Part 119 certification. This LIB also does not address the issue of whether an operation is "for hire or reward". Participants should seek legal advice if they require clarification as to whether an intended operation is "for hire or reward" or is an air transport operation.

- (1) a commercial transport operation; ...

Commercial transport operation means an operation for the carriage of passengers or goods by air for hire or reward²—

- (1) where—
 - (i) each passenger is performing, or undergoing training to perform, a task or duty on the operation; ...

Passenger in relation to an aircraft, means any person carried by the aircraft, other than a crew member:

Crew member means a person carried by an aircraft who is—

- (1) assigned by the operator—
 - (i) as a flight crew member or flight attendant to perform a duty associated with the operation of the flight; or
 - (ii) to perform a duty associated with the operation of the aircraft during flight time; or ...

Flight crew member means an appropriately qualified person *assigned by the operator for duty in an aircraft* during flight time as a pilot or flight engineer

Flight attendant means an appropriately trained person *assigned by the operator to be responsible to the pilot-in-command for passenger safety* on an aircraft

Operate, in relation to an aircraft, means to fly or use the aircraft, or to cause or permit the aircraft to fly, be used, or be in any place, whether or not the person is present with the aircraft; and "operator" has a corresponding meaning:

ICAO/international definitions

The following definitions have been adopted internationally and provide further contextual reference.

ICAO

Crew member is “a person *assigned by an operator to duty* on an aircraft during a flight duty period”; and

Flight crew member is “a licensed crew member *charged with duties essential to the operation of an aircraft* during a flight duty period”

Cabin crew member is “a crew member *who performs, in the interest of safety of passengers, duties assigned by the operator or the pilot-in-command of the aircraft, but who shall not act as a flight crew member*”

US CFRs

Crew member is “a person *assigned to perform duty* in an aircraft during flight time”

Flight crew member is “a pilot, flight engineer or flight navigator”.

² The full definition of commercial transport operation is not relevant to or included in this LIB. The full definition may be viewed on the CAA website under Rules, Part 1

The JAR definitions are identical to the US definitions.

The UK definition of “*passenger*” stipulates that it means “any person who is on a flight with the consent of the air carrier or the aircraft operator, *excluding on-duty members of both the flight crew and the cabin crew*”. UK explanatory material also provides further guidance that any person who is not licensed crew or within an exception to its Air Navigation Orders is considered to be a passenger.

CAA position on the interpretation of the CAR Part 1 definitions

The definitions must be read within the context and purpose of the Civil Aviation Rules, and with regard to the principles of statutory interpretation. It is the position of the CAA that clause (1) of the definition of ‘crew member’ must be interpreted narrowly. Clause (1) is expressly limited to flight crew or flight attendants (both defined terms), who are assigned to perform a duty associated with the “*operation of the flight*”; or other persons assigned to perform a duty associated with the “*operation of the aircraft*” during flight time.

The CAA’s position is that the emphasis in both parts of the definition must be placed on the words “operation of the flight” and “operation of the aircraft” and that the duties associated with such tasks are specific operational duties. Crew members within this part of the definition are generally subject to prescribed legal obligations under the CARs to ensure the safe operation of the flight and the aircraft during flight. These crew members must be appropriately trained and qualified, and assigned by the operator to perform such duties, in accordance with the CARs and any required operating procedures (CAR Parts 119, 121, 125 and 135). The Rules emphasise the operational responsibility of air operators and assigned crew members for the safety of the operation of the aircraft during flight, and the legal obligations on an air operator to ensure its crew are appropriately qualified, trained and equipped to execute those duties. The Rules also prescribe flight and duty time limitations and requirements for monitoring crew member fatigue. It is the position of the CAA that these are of contextual relevance in determining the intended scope and meaning of the rule definitions. The existence of an employment or contractual relationship with an operator is likely to be a relevant factor but is not determinative of whether a person is carried on a flight as a crew member³.

This is to be differentiated from other persons who may have a task or duty to perform during the flight or as part of the “operation”. Such tasks or duties may be integral to the purpose of the operation, but do not give rise to specific statutory duties associated with flying or operating the aircraft itself or require any specific civil aviation qualifications. Persons who do not fall within clause (1) of the definition may only otherwise be carried on an aircraft as crew members if they fall within clauses (2) – (4) of that definition, or are expressly designated as crew members by operation of the Civil Aviation Rules⁴.

³ The definition of crew member prior to 2004 included any person “employed, engaged, or contracted by the operator of the aircraft”. The repeal of this definition means that it is no longer sufficient that a person solely meets criteria to be legally classified as a crew member.

⁴ For example, CAR 133.73 stipulates who may be carried as a ‘supplementary crew member’ on a Part 133 external helicopter load operation.

Judicial decisions

The definitions that are the subject of this Bulletin have not been the subject of any binding judicial precedents from higher courts within New Zealand. However, the definitions have been considered in two District Court decisions. While neither interpretation is binding precedent, a brief summary of the interpretation adopted in each case, and the CAA's view, is noted below.

CAA v Helicam Aviation Ltd and Anor (D Ct Manukau, 29 October 2007)

The operator was prosecuted for allegedly conducting aerial filming flights for hire or reward without being the holder of a current Part 119 air operator certificate. The camera operator carried on those flights was employed by the operator, and the camera equipment was fitted to the airframe. The Judge considered on those facts that the camera operator was performing a duty as a 'crew member' within clause (1)(ii) of the definition. Other findings of fact were also made which resulted in a final determination that no passengers were carried for reward. The Judge therefore concluded that the aerial filming flights were not commercial transport operations requiring a Part 119 air operator certificate.

The interpretation of the crew member definition adopted in this judgment is not binding legal precedent and is not, with respect, followed or applied by the CAA. As indicated above, the existence of an employment or contractual relationship is not determinative of whether a person is a crew member. Further, the CAA does not accept that a person who operates a camera during flight is performing a duty associated with the "operation of the aircraft" within the ordinary meaning of that phrase. The CAA does not consider that the mere fact that the camera equipment was integrated into the airframe in that case rendered operation of that equipment to amount to performance of a duty associated with "operation of the aircraft". The CAA's position is that the Judge imported too wide an interpretation on the words "operation of the aircraft". The CAA considers that the Judge did not have full regard to the wider context and scheme of the CARs in interpreting the definition of crew member and failed to give meaning to the definition of commercial transport operation.

The CAA remains of the view that a camera operator is a passenger performing a task or duty on the operation. The CAA's position is that operators engaging in aerial photography or filming work for hire or reward are conducting CTOs and require Part 119/135 certification.

CAA v Brett Emeny and Ors (D Ct New Plymouth, 20 October 2008)

The defendants were prosecuted and convicted of conducting pipeline inspection work for hire or reward without holding a current Part 119/135 air operator certificate. The defendants argued that the operations were not CTOs but were private part 91 operations. The defendants relied in part on the *Helicam* decision to argue that the inspectors were crew members performing a duty associated with the operation of the aircraft. The Defendants argued in particular that one person carried was a crew member on the basis that he performed functions such as: stipulation of the route flown, the height, whether and where to land, whether to terminate the flight, safety briefing, and positioning for photography. His Honour Judge Robertson concluded that, even if it was accepted at face value that this witness indeed had authority for the stated tasks (which was disputed on the facts), "I do not consider that those matters either alone or in combination add up to a duty associated with the operation of the aircraft during flight time".

After considering the wider context of the CARs, the Judge was satisfied that the defendants had the sole operational responsibility for the operation of the aircraft and that the role of the inspectors could not properly be interpreted as a duty associated with the operation of the aircraft. The CAA respectfully agrees with this decision and suggests that participants should be guided by the wider analysis of the Civil Aviation Rules as applied in this case, when interpreting whether a person is performing a duty as a crew member or passenger.

Conclusion

It is the position of the CAA that for a person to be assigned to duty as a crew member within clause (1) of that definition, the “duty” must be one that relates to the safe operation of the flight or aircraft during flight, and which the operator has a responsibility to ensure the assigned person is appropriately qualified or approved to perform, in accordance with the prescribed requirements of the CARs. The existence of an employment or contractual relationship with an operator, while relevant, is not determinative on its own of whether a person is carried as a crew member.

It is the position of the CAA that a person carried on an aircraft who is performing a task or duty that is aligned to the purpose of the operation is properly categorised as a *passenger* who is *performing a task or duty on the operation*, within the definition of commercial transport operation.

Appendix to LIB No 4

The following table illustrates the CAA’s position on the interpretation and classification of the CAR Part 1 definitions of *crew member* and *commercial transport operation*:

Crew member	Part 119 Commercial Transport Operation for hire or reward (Note 1): <i>Passenger performing a task or duty on the operation</i>	
<p><i>Person assigned to perform a duty associated with -</i></p> <p><i>The operation of the flight(1)(i):</i></p> <ul style="list-style-type: none"> - flight crew members (as defined) - flight attendants (as defined) <p><i>The operation of the aircraft (1)(ii):</i></p> <ul style="list-style-type: none"> - persons such as licensed aircraft engineers assigned by the Operator as a crew member 	<p><i>Person (other than crew member) performing task or duty</i></p> <ul style="list-style-type: none"> - Camera Operator - Director of Photography - Shooter/Hunter - Spotter - Observer/Surveyor - inspector/observer - police/fire crew duties - search and rescue crew, medical staff 	<p style="text-align: center;"><i>Purpose of flight</i></p> <ul style="list-style-type: none"> Aerial filming/Photography Wild Animal Recovery (note 3) Guided Heli-Hunting Surveillance Electricity/Pipeline inspections Police/fire fighting operations Search and rescue / Medical flights / emergency medical flights
<p><i>Other crew members</i></p> <ul style="list-style-type: none"> - persons falling within clauses (2) – (4) of the definition of crew member - persons designated as crew members by operation of the civil aviation rules, eg, CAR 133.73 (Note 2) 		

Notes:

1: This Table is intended to provide an example of what types of operations/persons fall within the definition of commercial transport operation and may not be an exhaustive list

2: Part 133 permits helicopter external load operations to be carried out under that Rule part provided that only crew members/supplementary crew members essential to the safety of the operation are carried. If passengers are carried on the aircraft for hire or reward the flight is an air operation under Part 119/135

3: Please refer to *Draft LIB 4: Summary of Submissions and CAA Response*, pages 5-7 for further information on the certification requirements for WARO operations