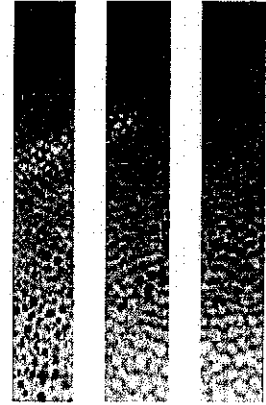


# *Dr Matthew S R Palmer*

## *Barrister*

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5 April 2013

John Sneyd  
Chief Legal Adviser  
Civil Aviation Authority  
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Dear John

### **OPINION ON AIR OPERATING CERTIFICATION**

#### **1 Summary**

- 1.1 You have asked my opinion on the circumstances in which the certification requirements in Part 119 of the Civil Aviation Rules (the Rules) apply.
- 1.2 The particular issue is whether “a person assigned by the operator to perform a duty associated with the operation of the aircraft during flight time” includes a person who is performing a duty in connection with the purpose (or a purpose) of the flight but not in connection with flying the aircraft. If so, the person is “a crew member” within the meaning of the Rules in which case the operator may not require an Air Operator Certificate (AOC). If not, the person is a “passenger” within the meaning of the Rules in which case an AOC may be required.
- 1.3 I have provided this opinion in draft and amended aspects of it in light of further information I requested from you.
- 1.4 In summary, in my opinion, a Court is likely to interpret the Rules to mean that such a person is a “passenger” within the meaning of the Rules and so an AOC would be required.

- 1.5 However, there is always doubt about the outcome of litigation in a particular case. If the Director of Civil Aviation (Director) desires legal clarity about the issue a declaratory judgment could be sought from the High Court or a clearer rule could be made. Making a new rule would also enable a more nuanced approach to the issue to be taken if the Director considers that that would advance the purposes and policy of the Civil Aviation Act 1990 (Act).

## **2 The Issue and its Significance**

- 2.1 The Act provides the framework for regulation of the civil aviation system in New Zealand. The regulatory framework includes the regulation of entry into the system, including certification requirements for certain participants. The Minister, Director and Civil Aviation Authority (CAA) have regulatory functions, powers and duties in relation to the system. The Rules provide the more detailed regulatory rules.
- 2.2 Section 46 of the Act provides that a person who operates an aircraft without holding an AOC where required commits an offence. Part 119 requires that an AOC be held by those performing air operations under Parts 121 (Large Aeroplanes), 125 (Medium Aeroplanes) and 135 (Helicopters and Small Aeroplanes) of the Rules. The certification requirements are calibrated to require a greater level of safety in connection with aircraft carrying a greater number of people. I understand that the activities which are the focus of this opinion are likely to fall in the last of these categories (Part 135).
- 2.3 The definitions in the rules mean that whether an AOC is required depends on whether passengers, or only crew members, are carried on a flight. For most flights of large or small aircraft this will be clear.
- 2.4 However, there is a category of person and flight for which it is not immediately clear whether a person is a passenger or crew member. This is where a person is on a flight, who is performing a function in connection with the purpose (or a purpose) of the flight but not in connection with flying the aircraft. Examples include: camera operators on photographic flights; shooters/hunters or spotters on Heli-hunting or wild animal recovery flights; observers on surveillance flights or inspection flights; police or fire crew on police or firefighting operations; search and rescue crew or medical staff on search and rescue or emergency medical flights.

- 2.5 In relation to these sorts of persons and flights the CAA issued Legal Information Bulletin Number 4 (LIB 4) in August 2009 to clarify its view of the law. The position reflected there is that such persons are passengers, not crew members, with the consequence that those performing such air operations are therefore required by Rule 119.5 to have an AOC, and that failure to do so constitutes an offence under section 46.
- 2.6 However, the CAA does not routinely enforce the view of the Rules endorsed in LIB 4. The issue has not been considered by the superior courts. There have been two District Court judgments that touch on the issue but they came to differing conclusions. In September 2012 the Aviation Industry Association sent to CAA an opinion by Barrister Matthew Muir that concludes that LIB 4 is wrong.
- 2.7 You have asked for my independent opinion on whether “a person assigned by the operator to perform a duty associated with the operation of the aircraft during flight time” includes a person who is performing a duty in connection with the purpose (or a purpose) of the flight but not in connection with flying the aircraft.

### **3 The Act and the Rules**

#### *The Act*

#### **3.1 The title of the Act is:**

An Act –

- (a) to establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety; and
- (b) to ensure that New Zealand’s obligations under international aviation agreements are implemented; and
- (c) to consolidate and amend the law relating to civil aviation in New Zealand.

#### **3.2 The scheme and purpose of the Act is substantially oriented to the regulation of the civil aviation system in the interests of safety - in accordance with (a) of the title.**

Further Indicators of this are:

- (a) Section 4 provides for the matters to which the Act and all regulations and rules made under it apply – persons and aviation related products and places.
- (b) Section 7 provides that Rules may require an aviation document to be required in respect of a list of participants, services, organisations, procedures, facilities and equipment in or in support of the civil aviation system.

- (c) Section 12 imposes general requirements on participants in the civil aviation system which are oriented around compliance with the Act, rules and regulations and with safety.
- (d) Section 14 provides for the objectives of the Minister to be “to undertake the Minister’s functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system” as well as implementing New Zealand’s international civil aviation obligations.
- (e) Section 14A provides that the functions of the Minister are “to promote safety in civil aviation” as well as administer New Zealand’s participation in international aviation agreements, the the Crown’s interest in aerodromes, and to make rules.

3.3 Part 3 of the Act relates to rules. Relevantly, sections 28, 29 and 30 provides for the Minister’s power to make ordinary rules for certain purposes including:

- (a) The implementation of New Zealand’s obligations under the Convention on International Civil Aviation (the Convention) (s 28(1)(a));
- (b) Assisting aviation safety and security (s 28(1)(c));
- (c) General operating rules . . . including . . . (i) the conditions under which aircraft may be used or operated (s 29(c));
- (d) the certification . . . of an air service (defined in s 2 as “an air transport service or an aerial work service, whether regular or casual”) (s 30(a)(vii)).

3.4 Section 33(1) provides that the rules must not be inconsistent with the standards of the International Civil Aviation Organisation (ICAO) and New Zealand’s international obligations relating to aviation safety and security. Section 33(2) identifies the matters to which the Minister and Director must have regard to in making and recommending rules, including the recommended practices of ICAO (which I understand do not relate to the question at issue here), the level of risk existing to aviation safety and the need to maintain and improve aviation safety and security.

*The Rules*

- 3.5 The description of Part 119 of the Rules is that it prescribes two levels of certification requirements for operators to conduct air operations: airline air operator certification in all sizes of aircraft; and general aviation air operator certification that permits air operations in helicopters and aircraft with 9 passenger seats or less. It is also stated to adopt the ICAO standards for the certification of air operators.<sup>1</sup>
- 3.6 The effect of Rule 119.5 is that
- (a) a person having operational responsibility for an air operation must hold an AOC (119.5(a)); and
  - (b) a person must not perform an air operation without an AOC (119.5(b)).
- 3.7 It is also worth noting that Rule 119.11 outlines the conditions of which the Director must be satisfied before an applicant is entitled to an AOC, including that the Director is satisfied that “the granting of the certificate is not contrary to the interests of aviation safety” (119.11(a)(3) and (b)(3)). Subparts B and C of Part 119 sets out the certification requirements for airline air operators and general aviation air operators respectively.
- 3.8 There are a series of definitions that determine who is caught by Rule 119.5. All definitions (with emphasis added, below) are subject to the qualifier “unless the context otherwise requires”:

“Air operation” is defined in Part 1 to mean “an air transport operation or a commercial transport operation”.

“Air transport operation” is defined in Part 1 to mean

- an operation for the carriage of passengers or goods by air for hire or reward except –**
- (1) **a commercial transport operation;**
  - (2) an adventure aviation operation (which is defined to be operations where the object is the passenger’s recreational experience, including flights in microlights, hot air balloons, gliders;

<sup>1</sup> ICAO, *Rules of the Air: Annex 2 to the Convention on International Civil Aviation* (10<sup>th</sup> ed, ICAO, 2005); ICAO, *Operation of Aircraft: Annex 6 to the Convention on International Civil Aviation* (9<sup>th</sup> ed, ICAO, 2010).

- (3) a helicopter external load operation under Part 133 (relating to towing, slight load, winching or rappelling operations);
- (4) an agricultural aircraft operation under Part 137 (relating to top dressing and dropping of farm supplies etc);
- (5) a trial flight.

“Commercial transport operation” is defined in Part 1 to mean:

**an operation for the carriage of passengers or goods by air for hire or reward –**

- (1) **where –**
  - (i) **each passenger is performing, or undergoing training to perform, a task or duty on the operation; or**
  - (ii) the passengers or goods are carried to or from a remote aerodrome –
- (2) **except those operations in paragraph (1) that are –**
  - (i) a helicopter external load operation conducted under Part 133; or
  - (ii) an agricultural aircraft operation conducted under Part 137:

3.9 So, an operation for the carriage of passengers for hire or reward is either a commercial transport operation (if each passenger is performing a task or duty on the operation) or an air transport operation. I note that the activities that are the focus of this opinion are likely to fall into the category of “commercial transport operation” but that the issue is also conceivably relevant to air transport operations. A series of further definitions apply to both categories:

“Operate” is defined in section 2 of the Act as “in relation to an aircraft, **means to fly or use the aircraft, or to cause or permit the 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**”.

“Passenger” is defined in Part 1 of the Rules as “in relation to an aircraft, **means any person carried by the aircraft, other than a crew member**”.

“Crew member” was amended in its definition in 2004 to be more precise. It now:

**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**
- (2) carried for the sole purpose of –
  - (i) undergoing or giving instruction in the control and navigation of the aircraft; or
  - (ii) undergoing instruction as a flight engineer or flight attendant; or
- (3) authorised by the Director to exercise a function associated with the operation of the aircraft during flight time; or
- (4) a flight examiner.

"Flight crew member" is defined in Part 1 as "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" is defined in Part 1 as "means an appropriately trained person assigned by the operator to be responsible to the pilot-in-command for passenger safety on an aircraft".

- 3.10 The definitions of "flight crew member" and "flight attendant" were clarified in 2004. They were amended from an emphasis on employment status to an emphasis, in the current versions, on function.

#### **4 Analysis**

- 4.1 It seems clear that the category of persons at issue in this opinion are not crew members under subrules (2) or (4) of the definition of crew member. Neither are they crew members under (1)(i) because of the narrow definitions of "flight crew member" and "flight attendant".
- 4.2 The question at issue in this opinion arises in subrule (1)(i) of the definition of crew member. Does "to perform a duty associated with the operation of the aircraft during flight time" include duties that are associated with the purpose (or a purpose) of the flight, such as camera operators on photographic flights or spotters on wild animal recovery flights? Or does that phrase only relate to duties relating to the aircraft itself?
- 4.3 The same issue arises in subrule (3) of the definition of crew member which includes only persons authorised by the Director "to exercise a function associated with the operation of the aircraft during flight time".
- 4.4 In my opinion the best interpretation of the phrase "the operation of the aircraft during flight time" is that it relates only to the aircraft itself rather than to the purpose (or a purpose) of the flight. This is supported by the text, purpose, context and history of the Rules and Act.

#### *Text*

- 4.5 The text of the Rules and Act supports this interpretation because:

- (a) Most importantly, in terms of text, subrule (1)(ii) must be read in the context of subrule (1)(i) which relates to flight crew members and flight attendants who “perform a duty associated with the operation of the *flight*”. If this wording has been used in subrule (1)(ii), instead of “operation of the aircraft during flight time”, there would have been a better argument that a camera operator or spotter was included as a crew member along with the flight crew and flight attendants. Such a person could be argued to be associated with the operation of a photographic or wild animal recovery flight. But use of the word “aircraft” rather than “flight” in subrule (1)(ii) suggests that the intention is that only those persons who have a function with some association with the aircraft itself are intended to be classified as crew members.
- (b) Also, the definition of “operate” in section 2 of the Act uses the phrase “to fly or use *the aircraft*”. There could be an argument that a camera operator on a photographic flight or a spotter on a wild animal recovery operation is using the aircraft. But the more natural object that a camera operator or spotter would use to perform their duties would be the camera or their eyes or binoculars, not the aircraft. A camera operator or spotter is on the aircraft but not “using” it.

#### *Purpose*

- 4.6 I consider that the scheme and purpose of the Act and the Rules reinforces this view. The scheme and purpose of the Act is oriented to the regulation of the civil aviation system in the interests of safety. The AOC requirements in the Rules are oriented to ensuring safety. An AOC is required where a passenger is on board but not when only crew members are on board. Even when all passengers on board are performing a task or duty on the operation itself, the definition of commercial transport operation applies and an AOC is required. The definition of commercial transport operation explicitly excludes helicopter external load operations or agriculture air operations which are governed by parts of the Rules that are much less onerous in terms of safety regulation regarding the required personnel and operations specifications. The higher levels of safety required when passengers are on board is consistent with how the definitions relate to each other. A person carried by an aircraft is a passenger unless they are a crew member.



- 4.7 This is because crew members are intended to be better trained and more experienced in the safe operation of a flight or aircraft than are passengers. In relation to helicopters and small aeroplanes, subparts I and J of Part 135 provide for the training and competency requirements for crew members. Subpart I, in particular, applies to crew members more generally as well as to flight crew. By contrast, rule 135.13 imposes a lighter requirement in relation to passenger training in safety and emergency procedures.
- 4.8 There are further contextual clues to purpose in subparts I and J of Part 135 that suggests they are intended to apply to crew members who operate the aircraft itself. For example:
- (a) Rule 135.553(d) provides that the holder of an air operator certificate may contract with the holder of an aviation training organisation to provide its training programme. The focus is, again, on aviation rather than the sorts of functions undertaken by the personnel at issue.
  - (b) Rule 135.557(a) provides for the syllabus for the initial training of crew members in terms which focus on the aircraft, routes and aerodromes, location of emergency equipment, oxygen and exits. Rule 135.557(a)(2)(i) also extends to "special equipment fitted for the intended operation" but in the context of the other requirements this does not suggest that a crew member is a person whose function relates only to that special equipment.
- 4.9 It would be difficult to argue that persons who are performing a function in connection with the purpose (or a purpose) of the flight, but not in connection with the aircraft itself, must be presumed to be as well trained or experienced in relation to the safety of the aircraft as crew members. It is possible that some are. But the definitions are not nuanced enough to distinguish between those who are and are not so trained or experienced. In the absence of such nuance, the scheme and purpose of the legislation and Rules suggests that the presumption should *not* be that all of them are as well trained or experienced – rather, they should be subject to the higher level of safety regulation that is implied by the requirement that the operator hold an AOC. This is consistent with CAA's accident data that shows that between 2005 and 2010, private operations (mainly under Part 91) were about four

times more likely to have an accident than non-airline commercial operations (mostly under Part 135).<sup>2</sup>

*Context and History*

4.10 A court will not necessarily take explicit recognition of the rule making history of the Rules. However, it casts an interesting light as to how we got to the current situation, and the different views of the purpose of the rules. The history is consistent with my opinion of the best interpretation of them.

4.11 The purpose of the Notice of Proposed Rulemaking (NPRM) 98-6 of 18 September 1998 was “to propose revisions and updates to the certification and operating rules relating to the air transport and commercial transport operation of aeroplanes with passenger seat numbers of less than 30 and helicopters”. This involved amendment of Parts 119 and 135 and the introduction of part 125 and consequential amendments. It appears to have stemmed from an initiative of the Air Industry Association. Relevant features of the proposal were:

(a) the flow chart illustrating the proposed concept included a category of aircraft carrying passengers for hire or reward that have a “job to do utilising aircraft abilities” being considered as commercial transport operations and subject to part 119 General Aviation Operator Certification.<sup>3</sup> The examples of operations in this category are “photography, survey, line inspection, event coverage, rescue”.

(b) The proposal characterised a commercial transport operation as being:<sup>4</sup>

“where a passenger is using the aircraft to access remote areas or perform a duty or task including surveyes, line inspection, photography. The definition of passenger has been amended to include anyone who is not a crew member, and crew member has been redefined with the intent of being a person rewarded by the operator”.

(c) The explanation of the proposal gave a further list of examples of commercial transport operations: aerial photography or filming; aerial survey; search and rescue; aerial news gathering; animal culling; sporting or other event following or

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<sup>2</sup> Civil Aviation Authority, “Rate of aircraft accidents per 100,000 flight hours” Appendix 2 to *Statement of Intent 2011-2014*.

<sup>3</sup> Civil Aviation Rules, Proposed Rules – Part 135 Review – Air Operator Certification and Operating Rules, NPRM 98-6 (18 September 1998) at 3.

<sup>4</sup> At 4.

participation; power line inspection; positioning fire or construction crews; police operations; client training exercises such as fire fighting crews, police crews, and power line crews; remote area access including flying hunters, fishermen, and trampers into the bush and flying rafting or kayaking groups into head waters, beaches, dams, or lakes; flying workers onto an oil or drilling platform; ship to shore – shore to ship transfers.

- (d) The general explanation of “passengers and crew members” in relation to part 135 is important. It stated:<sup>5</sup>

The intent of the definition changes is to clarify the relationship between operators and their clients. In determining if a person is a crew member or a passenger the relationship between the operator and their client must be established. As a service provider an operator carrying a client’s personnel is carrying passengers. If the person carried is employed by the operator as an integral part of the service provision they become a crew member.

- (e) The definition of “crew member” proposed in the 1998 NPRM referred to a person “employed, engaged, or contracted by the aircraft operator and trained and assigned for duty by that aircraft operator” and did not refer to performing a duty associated with operation of the aircraft.
- (f) Rule 135.13 was proposed to be inserted requiring that “each person performing a a commercial transport operation shall ensure that each *passenger* receives additional training in safety and emergency procedures appropriate to the characteristics of the flight operation”.<sup>6</sup> The explanation indicated that it was included “recognising the different role of passengers in commercial transport operations”.<sup>7</sup> The examples given of additional knowledge were: entering and exiting the helicopter without assistance, use of harnesses, Centre of Gravity considerations, animal handling, avoidance of tail rotor and up-hill slopes, communication, use of first aid kit and fire extinguisher, cargo hook operation, opening and closing doors.

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<sup>5</sup> At 24.

<sup>6</sup> At 120.

<sup>7</sup> At 25.

(g) Some of the other proposed draft definitions differed in minor respects from the final definitions, as promulgated.<sup>8</sup>

4.12 However, the definition of “crew member” was subsequently changed again in 2004. NPRM 02-05 of April 2002 concerned changes to a variety of definitions and changes to baggage weights.<sup>9</sup> There is a paucity of explanation of this change to the general definition of “crew member”. The general summary stated “Modification of the **crew member** definition to more clearly identify those persons involved with the operation of the aircraft during flight time . . .”<sup>10</sup> The only slightly more detailed explanation was:<sup>11</sup>

The general definition for “crew member”, “flight [sic] crew member”, “flight attendant” and “flight time” have been amended to eliminate the circulatory nature of the definitions and eliminate common misinterpretations.

4.13 My understanding is that the 2004 changes derived from a CAA view that the previous definition was expressed too broadly and could include persons not intended to be included – such as a cleaner or check-in staff. The new definition was intended to be more precise.

4.14 So, the picture of the rulemaking that emerges from the 1998 and 2004 amendments appears to be:

(a) The 1998 proposal intended that the operations of the sort under consideration would be commercial transport operations but that whether particular people involved in those operations were passengers or crew members would depend on whether they were employed by and “an integral part of the service provision” of the operator. People performing functions associated with the purpose (or a purpose) of the flight could certainly be considered passengers and would need to receive additional safety briefing (as rule 135.13 indicates). Or they could be crew members.

<sup>8</sup> The definition of “commercial transport operation” is now more comprehensive ((1) no longer starts with the word “including”) and more specific (“each” has been inserted in relation to passenger); the definition of “passenger” in the rule now refers to any person carried “on the aircraft” rather than “on the operation” in the proposed draft rule. The differences in definitions may have derived from subsequent rule changes (as did the definition of “crew member”), or from changes in the course of the 1998 rule making process.

<sup>9</sup> Parts 121, 125, 135 Air Operations, Passenger, Crew Member and Checked Baggage Weights, NPRM 02-05 (5 April 2002).

<sup>10</sup> At 4-5.

<sup>11</sup> AT 21.

Which they would be did not depend on the nature of the operation but on the relationship between the person and the operator.

- (b) The 2004 changes tightened up the general definition of "crew member" for the purposes of the whole set of Rules, in order to be more precise. This involved (probably accidentally) expunging the element of the definition of crew member which the intention of part 135 had hung off. The relationship between the operator and the person exercising functions associated with the purpose (or a purpose) of the flight no longer determined whether the person was a passenger or a crew member. Rather, the new (and current) definition turns on whether the person's duty is associated with the operation of the aircraft. Persons exercising functions associated with the purpose (or a purpose) of the flight are not so associated, in my opinion. They are, instead, considered to be "passengers" – which was one (but only one) of the possible categories envisaged by the 1998 package of rule proposals.
- (c) So a general definitional change has altered the meaning of the rules. Their meaning is different, in this respect, from what was intended in the 1998 package regarding part 135.

4.15 It is conceivable that a legal argument could be mounted on the basis of the above history of rule making that the purpose of the 1998 package of rules should guide the interpretation of the current rules. However, I would not expect such an argument to succeed. A Court will be guided primarily by the purpose evident from the scheme and text of the Act and rules which leads to the conclusion of my analysis above. The 1998 package itself clearly envisaged that persons performing a function related to the purpose (or a purpose) of the flight could be passengers. And the 2004 amendment tightened the definition of "crew member" consistent with the safety purposes of the Act as a whole. The text, purpose, context and history of the rules suggest that these persons are now intended to be passengers, not crew members.

#### *Other Factors*

4.16 I note that the definitions of air transport operation and commercial transport operation use the phrase "carriage of passengers for hire or reward". If a passenger is carried, but not for hire or reward, then neither definition applies. The meaning of "hire or reward" must be established on the facts of any particular case. Presumably

some of the persons whose carriage is at issue in this opinion will be carried for hire or reward and some will not. There will be case law available on that in other contexts. I do not understand CAA to be asking my opinion on the meaning of "hire or reward" in this context. But it may be that consideration of this, separate, interpretive issue would be influenced by the rule making history detailed above.

4.17 I have considered the relevant definitions in the ICAO Annex 6, including "crew member" but I do not consider that they materially assist the interpretation of the New Zealand law.

4.18 I should also say that, in coming to my view, I have given no weight to the content of LIB 4. LIB 4 is expressed as guidance as to what CAA's view of the law is. It was released in draft for industry comment in August 2008 and promulgated in August 2009. It does not express the law itself. You have asked me for my independent opinion on what the law is, irrespective of the content of LIB 4. I have approached the issue from first principles.

## 5 Case Law

5.1 The issue considered in this opinion has been the subject of two District Court judgments.

5.2 In a reserved oral decision in 2007, *Civil Aviation Authority v Heli Cam Aviation Ltd*, Judge Lee accepted that camera operators were within the definition of "crew member" because "'the operation of the aircraft' included not only the flying of the helicopter but also the operation of its camera equipment. Consequently they were not liable to prosecution for failure to hold an AOC."<sup>12</sup>

5.3 In a judgment in 2008 regarding surveyors of a pipeline from an aircraft, *Civil Aviation Authority v Emeny*, Judge Roberts distinguished *Heli Cam* on its facts. The Judge determined that, in any event, the "authority" of the surveyor during the flight did not "either alone or in combination add up to a duty associated with the operation of the aircraft during flight time".<sup>13</sup>

5.4 For the reasons given above, concerning the text and purpose of the Act and Rules, I do not agree with the Judge Lee's interpretation of the relevant definitions in *Heli*

<sup>12</sup> DC Manukau CRI 2007-092-4918, 2 November 2007 at [10].

<sup>13</sup> DC New Plymouth CRN 0274-285, 20 October 2008 at [15].

*Cam*. Judge Robert's determination is consistent with my view, although the reasoning is sparse. I note that, while a District Court judgment is binding on the parties, it does not constitute binding legal precedent. While it is entitled to respect, it is not law that binds future cases.

## **6 Aviation Industry Association View**

- 6.1 The Aviation Industry Association does not agree with the interpretation in LIB 4. It may be that this is, in some part, derived from the difference in the original intention of the rule making in 1998 (which tied the definition of "crew member" to whether they were employed by the operator and an integral part of the operation) and the subsequent definitional changes in 2004.
- 6.2 In September 2012 the Aviation Industry Association of New Zealand forwarded to the CAA an opinion on this issue by Barrister Mr Matthew Muir.
- 6.3 A substantial part of the opinion examines the appropriateness of CAA's LIB 4. That is not the subject of this opinion. However I note that, if Mr Muir's view is that the CAA is not lawfully able to argue that *Heli Cam* is not binding on future cases,<sup>14</sup> I disagree with it. District Court decisions are not binding precedent for future cases.
- 6.4 The Muir opinion's treatment of the issue examined in this opinion sets out some of the relevant definitions but not the statutory scheme and purpose. It considers the two District Court decisions and LIB 4 rather than starting from an interpretation of the Act and Rules. The primary analytical point seems to be that the interpretation I favour would mean that the scope of application of the definition in (1)(ii) would be relatively narrow.<sup>15</sup> That may be so, but it would include, for example, a flight test engineer. I do not consider that the Muir opinion engages with the sort of reasoning with which a superior Court would approach the issue.

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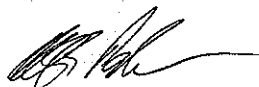
<sup>14</sup> This appears to be the implication of Mr Muir's opinion (e.g. at para 3) although there are some indications in the opinion of acceptance of the position regarding the bindingness of District Court judgments I state in the text above (e.g. at paragraphs 4, 17-18).

<sup>15</sup> At paragraph 41.

**7 Conclusion**

- 7.1 In summary, in my opinion, a superior Court is likely to interpret the Rules to mean that "a person assigned by the operator to perform a duty associated with the operation of the aircraft during flight time" does not include a person who is performing a duty in connection with the purpose (or a purpose) of the flight but not in connection with flying the aircraft. That may not have been the intention of the 1998 package in relation to part 135 but it is the effect of the general definitional changes to the rules in 2004. The consequence is that, in law, such a person is a "passenger" within the meaning of the Rules in which case an AOC may be required.
- 7.2 If the Director of Civil Aviation (Director) desires further legal clarity about the issue a declaratory judgment could be sought from the High Court or a clearer rule could be made. Making a new rule would also enable a more nuanced approach to the issue to be taken if the Director considers that that would advance the purposes and policy of the Civil Aviation Act 1990.
- 7.3 Please let me know if you require any further advice in relation to this issue.

Yours sincerely



**Dr Matthew S R Palmer**