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# Federal Court of Australia

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## ← Civil Aviation Safety → Authority v Barrier Aviation Pty Ltd [2013] FCA 227 (22 February 2013)

Last Updated: 15 March 2013

### FEDERAL COURT OF AUSTRALIA

#### ← Civil Aviation Safety → Authority v Barrier Aviation Pty Ltd [\[2013\] FCA 227](#)



Citation:	← Civil Aviation Safety → Authority v Barrier Aviation Pty Ltd <a href="#">[2013] FCA 227</a>
Parties:	← CIVIL AVIATION SAFETY → AUTHORITY v BARRIER AVIATION PTY LTD ACN 056 643 531
File number:	NSD 2240 of 2012
Judge:	RARES J
Date of judgment:	22 February 2013
Legislation:	<a href="#">Civil Aviation Act 1988</a> (Cth) ss <a href="#">3A</a> , <a href="#">9A</a> (1), <a href="#">30DB</a> , <a href="#">30DC</a> , <a href="#">30DE</a> (2) and (3), <a href="#">30DH</a> , <a href="#">30DI</a> <a href="#">Civil Aviation Regulations 1988</a> (Cth) reg 42G
Cases cited:	← Civil Aviation Safety → Authority v Bell <a href="#">[2008] FCA 1049</a> applied <i>George v Rocket</i> <a href="#">[1990] HCA 26</a> ; <a href="#">(1990) 170 CLR 104</a> applied
Date of hearing:	22 February 2013
Place:	Sydney

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 17

Counsel for the Applicant: Mr I Harvey

Solicitor for the Applicant: Legal Branch,  Civil Aviation Safety  Authority

Counsel for the Respondent: Mr S Ferrier

Solicitor for the Respondent: Ferrier & Associates Lawyers Pty Ltd

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 2240 of 2012**

**BETWEEN:**  **CIVIL AVIATION SAFETY**  **AUTHORITY**  
Applicant

**AND:** **BARRIER AVIATION PTY LTD ACN 056 643 531**  
Respondent

**JUDGE:** RARES J

**DATE OF ORDER:** 22 FEBRUARY 2013

**WHERE MADE:** SYDNEY


**THE COURT ORDERS THAT:**

1. Pursuant to [s 30DE\(2\)](#) of the [Civil Aviation Act 1988](#) (Cth) the respondent be prohibited from doing anything that would otherwise be authorised by the Air Operator's Certificate held by the respondent for a period ending at 5 pm on Friday 22 February 2013.
2. Each party bear its own costs of the proceedings.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**



**NSD 2240 of 2012**

**BETWEEN:**  **CIVIL AVIATION SAFETY**  **AUTHORITY**  
Applicant

**AND:** **BARRIER AVIATION PTY LTD ACN 056 643 531**  
Respondent

**JUDGE:** RARES J  
**DATE:** 22 FEBRUARY 2013  
**PLACE:** SYDNEY

**REASONS FOR JUDGMENT  
(REVISED FROM THE TRANSCRIPT)**

1. This is an application by the  Civil Aviation Safety  Authority (CASA) for an order that, pursuant to [s 30DE\(2\)](#) of the *Civil Aviation Act 1988* (Cth) that Barrier Aviation Pty Limited, the respondent, be prohibited from doing anything that would otherwise be authorised by its Air Operator's Certificate for a period ending at 5 pm today. The order sought is by consent of the parties but the power to make the order requires that the Court be satisfied of the matters specified in [s 30DE\(2\)](#).
2. Following a mediation by the Registrar yesterday, the parties agreed on a subsequent procedure identify the circumstances of which CASA complains in a show cause notice that it will issue to Barrier Aviation under [s 30DH](#) of the Act no later than 28 February 2013. The notice will provide three business days in which Barrier Aviation may show cause and, if Barrier Aviation requires, CASA will grant it an extension of time to show cause. If subsequently CASA decides to make a decision under [s 30DI](#) of the Act, it will be required to notify Barrier Aviation of that decision within five business days after the end of the period specified in the show cause notice. The upshot of this regime is that, if and when, CASA decides to proceed with its substantive concerns, the issue of whether or not its concerns are well-founded will be the subject of a review in the Administrative Appeals Tribunal. In the meantime, the parties have informed me that Barrier Aviation's fleet will remain grounded.

**THE LEGISLATIVE SCHEME**

3. [Section 30DE\(2\)](#) and (3) provide:



“(2) If the Federal Court is satisfied that there are reasonable grounds to believe that the holder has engaged in, is engaging in, or is likely to engage in, conduct that contravenes [section 30DB](#), the Court must make an order that prohibits the holder from doing anything that is authorised by the authorisation but that, without the authorisation, would be unlawful.

(3) In deciding under subsection (2), the Federal Court must have regard to [section 3A](#) and [subsection 9A\(1\)](#).”

4. The main object of the Act is contained in [s 3A](#), being:

**“3A Main object of this Act**

The main object of this Act is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.”

5. In exercising its powers and performing its functions, CASA must regard the safety of air navigation as its most important consideration by force of [s 9A](#). While it is understandable that [s 30DE\(3\)](#) would perhaps draw the Court's attention to the main object of the Act, a matter that in the ordinary process of statutory construction is fundamental, the requirement in [s 9A\(1\)](#), being an obligation of CASA, is a little more problematic to apply since it is the Court that must form a satisfaction under [s 30DE\(2\)](#).
6. In  **Civil Aviation Safety**  *Authority v Bell* [2008] FCA 1049, Stone J noted that the Court is not required to arrive at its satisfaction that the holder of the licence has, actually, engaged in, or is engaging in, or likely to engage in the conduct complained of, but rather it must be satisfied that there are reasonable grounds to believe that that is so. As Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ said in *George v Rocket* [1990] HCA 26; (1990) 170 CLR 104 at 116 said that:

“The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.”

7. In this case, for present purposes, the parties have asked me to proceed on the unchallenged evidence of particular witnesses on whom CASA relies. CASA commenced these proceedings on 24 December 2012. It sought an order under [s 30DE](#). The affidavit in support of that application attached a notice dated 23 December 2012 for the immediate suspension of Barrier Aviation's Air Operator's Certificate issued pursuant to [s 30DC](#). That power was enlivened because CASA asserted it had reason to believe that Barrier Aviation had engaged in conduct that constituted, or contributed to, or resulted in, a serious and imminent risk to air safety within the meaning of [s 30DB](#). CASA relied on two substantive affidavits detailing the conduct, which it asserted Barrier Aviation had engaged in, that constituted, contributed to, or resulted in, a serious or imminent risk to air safety as being supportive of its 23 December 2012 notice.
8. *First*, Brad Cowan, an airworthiness inspector employed by CASA, with what appeared to be significant expertise, stated that CASA officers had conducted an audit of Barrier Aviation from 29 October 2012 to 12 November 2012 in which they identified a number of instances of non-compliance with the Act. *Secondly*, CASA relied on the affidavit of Craig Richardson, a pilot who, the parties agreed, was currently disaffected with his former employer, Barrier Aviation.
9. Mr Cowan conducted an investigation into the matters that ultimately led to the issue of the notice of suspension under [s 30DC](#). His investigation focused on the airworthiness of aircraft operating from one of five bases utilised by Barrier Aviation, being its base at Horn Island, at which eight aircraft were located. He concentrated on maintenance records and logbooks for three of those aircraft with registration numbers VH-BSO, VH-BWO and VH-URJ, and identified anomalies and defects for each of them. His evidence identified that pilots had reported defects in the three aircraft orally or by text message to their employer, Barrier Aviation. Mr Cowan gave examples of irregular recordings of defects in a diary maintained by Barrier Aviation's manager of the Horn Island operation in her office. These included major defects for the aircraft VH-BSO, such as instrument malfunctionings of the engine mixture level and engine tachometers, malfunctioning of one engine that were not properly recorded. Mr Cowan said that, in addition, the work done on any rectification of those matters was not properly recorded for the benefit of anyone who might be flying the aircraft or CASA inspectors.

10. Another example was of a note in the diary that the right-hand main landing gear was leaking all over the tires. That was not recorded in any book or record kept with aircraft VH-BSO for use by pilots and regulators. Mr Cowan opined that, if the record in the unofficial diary were accurate, that defect would have required assessment and rectification before the aircraft flew again, because it might compromise its safe operation. Mr Cowan noted that the permanent records of the aircraft VH-BSO failed to identify any reported defect of that nature. However, the flight records confirmed that it had been flown on at least 13 days since the entry in the unofficial diary had been made.
11. Similarly, for aircraft VH-BWO, there were entries in the unofficial diary on 24 September 2012 and 5 October 2012 concerning the way in which trim of the aircraft was moving irregularly. Mr Cowan said that there was no record of that defect in the aircraft's maintenance release or logbook. He stated that each of the two entries in the unofficial record constituted major defects due to their potential to cause an uncommanded movement of the trim system during flight. He also identified an entry on 6 October 2012 in the unofficial diary indicating that that trim assembly defect had been rectified, but he said that whatever work had been done to achieve this was not in the aircraft maintenance release and aircraft logbook. As a result, on 8 January 2013, Mr Cowan caused the aircraft to be grounded because there was no maintenance record identifying how any rectification work had been performed. In his view, reg 42G of the [Civil Aviation Regulations 1988](#) (Cth) had not been complied with because it provided that if any part of the flight control system for an Australian-registered aircraft was assembled, adjusted, repaired, modified, or replaced in the course of carrying out maintenance on the aircraft, a record of that work had to be made. He considered that it was unlikely that such a defect would have been discovered during a scheduled inspection of the aircraft, and that the critical nature of the defect and lack of detail surrounding what work had been done to rectify it, justified his decision to ground it.
12. Mr Cowan considered that, on analysis, the third aircraft had been operated in an unairworthy condition for extended periods throughout 2012. He gave, as an example, an entry in the unofficial diary of 11 April 2012 that noted that both RPM instruments (tachometers) were unserviceable, but that the aircraft had been flown on the following day without any record in official documents that indicated that this defect had been rectified. In Mr Cowan's opinion, operation of the aircraft with both its tachometers in an unserviceable state would result in the pilot not being able to test the engine ignition systems accurately before flight, or to determine if the engine was meeting its performance parameters, as listed in its flight manual.
13. Mr Cowan formed the view, based on the material to which he referred, that individually and collectively, the episodes that he instanced in his affidavit amounted to a serious risk to airworthiness because the aircraft were operated without the necessary instrumentation or documentation of defects and repair work. He considered that Barrier Aviation had circumvented regulatory requirements by failing to record defects on aircraft maintenance release documents, flying the aircraft with major defects, failing to comply with the conditions of its minimum equipment list and some parts of its own aviation operations manual, and flying with known defects, but only recording those defects on a maintenance release at a time that was convenient to the operator.
14. In Mr Cowan's opinion, the consequences of those non-compliances affected air safety. One reason for that conclusion was that a pilot would be unable to determine the airworthiness status of an aircraft because he or she would not have the information of any reported defect, or the work, if any, that had been done to attend to it so as to satisfy himself or herself that it would be safe to operate the aircraft. He also considered that the conduct of not recording defects and rectification work in the appropriate records of the aircraft would lead to a culture within Barrier Aviation that accepted as normal failures to record aircraft defects and rectification work properly.
15. Mr Richardson gave evidence that early in his employment, he formed the view that an aircraft was unfit to fly after carrying out a daily pre-flight inspection. He could not recall, he said, what the issue was or the aircraft concerned, but he had refused to take that aircraft that he had been assigned to fly, because he considered it to be unserviceable, and instead flew another one.

When he returned from the flight, he said he had been surprised to see that the aircraft which he refused to fly was missing, and apparently, according to his inquiries, had been flown by another pilot who had not identified the same defect.

## CONSIDERATION

16. Based on this evidence, I am satisfied that there are reasonable grounds to believe that Barrier Aviation has in the past engaged in conduct that contravenes s 30DB. While Mr Cowan's opinions are not conclusive, they appear to have been formed by him after an expert examination of the available records maintained by Barrier Aviation for the three aircraft he examined. The evidence that I have summarised above provides what I am satisfied is a reasonable foundation for my belief that Barrier Aviation had engaged in conduct that either constituted, or contributed to, or resulted in, a serious and imminent risk to air safety.
17. I am satisfied that it is appropriate to make the orders that the parties have consented to having arrived at that state of satisfaction based on the above evidence in accordance with s 30DE(2) of the Act.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 14 March 2013

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