

TRANSCRIPT OF PROCEEDINGS

O/N 12650

FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION

GOLDBERG J

No VID621 of 2005

IN THE MATTER OF ANSETT AUSTRALIA LIMITED

MELBOURNE

10.21 AM, TUESDAY, 30 AUGUST 2005

DAY TWO

Continued from 16.8.05

MR S. SHARPLEY appears for the Applicants

**MR T. LUXTON appears for Australian Securities and Investments
Commission**

MR M. TROIANI appears for National Australia Bank Ltd

**MR B. WATKINS and MR ELLISON appear for the Respondent CBA and
BNP Paribas**

MR T. GINNANE SC appears for the Commonwealth of Australia

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MR S. SHARPLEY: Your Honour, I appear on behalf of the Applicants.

HIS HONOUR: Thank you, Mr Sharpley.

5 MR M. TROIANI: Your Honour, I appear on behalf of National Australia Bank Limited.

HIS HONOUR: Thank you, Mr Troiani.

10 MR B. WATKINS: Your Honour, I appear on behalf of the Commonwealth Bank of Australia and BNP Paribas.

HIS HONOUR: Thank you very much.

15 MR T. LUXTON: Your Honour, I appear on behalf of the Australian Securities and Investments Commission.

HIS HONOUR: Thank you, gentlemen.

20 MR T. GINNANE, SC: If your Honour pleases, I appear on behalf of the Commonwealth of Australia

HIS HONOUR: Yes. Thank you, Mr Ginnane. Where are we at, Mr Sharpley?

25 MR SHARPLEY: Your Honour, the good news is that the administrators and the bank creditors of AAE have executed an agreement which will result in the bank creditors supporting the pooling of AAE. It also resolves the outstanding issue between AAL and the National Australia Bank in relation to the sweeping of accounts.

30

HIS HONOUR: Yes.

MR SHARPLEY: And that compromise is subject to Court approval - - -

35 HIS HONOUR: Yes.

MR SHARPLEY: - - - by section 447A and D, which is the form of relief we will seek in this application.

40 HIS HONOUR: Yes.

MR SHARPLEY: And it is also subject to the eventual - to the pooling of AAE actually being approved of at a creditors meeting. So, subject to those two conditions, the administrators and the bank creditors have resolved the issues between them and - - -

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HIS HONOUR: Well, that takes out of contention a potential form of friction of tension in relation to issues of pooling.

MR SHARPLEY: Yes, because the bank - as your Honour is aware, the bank creditors had evidenced an intention to oppose pooling. But as a result of this compromise, a term of that compromise is that they will support pooling of AAE into the general pool now. So that matter has been resolved as a result of the recent negotiations since the last directions hearing.

HIS HONOUR: Yes. Well, that is useful.

MR SHARPLEY: Yes. I might just outline the course of action the administrators intend to take generally with respect to pooling. The course they are intending to take is to hold - to call further creditors meetings of each of the 41 companies under section 445F and put a motion to the creditors that the DOCAs for each company be varied so as to allow the pooling of all group assets and liabilities into AAL. If that pooling does occur the administrators anticipate that they would then be in a position to make a further distribution to the priority creditors of AAL, being the Commonwealth and the employees, of some 80 to \$100 million before Christmas.

The administrators then contemplate that all of the Ansett group companies, with the exception of AAL, will be de-registered via applications to ASIC under section 601AA, which would then leave AAL as the rump, the residual part of the Ansett group to continue. There is some ongoing litigation, so AAL can't be de-registered in the immediate future, but this course of action will put all the assets and liabilities into AAL, allow a substantial further distribution, and leave only one Ansett group company ongoing for some time into the future until all the final issues in relation to the administration can be resolved.

HIS HONOUR: Well, once that is done the bank creditors will presumably receive some form of payment.

MR SHARPLEY: Yes.

HIS HONOUR: And that distribution at that stage to the Commonwealth and the priority creditors, up to what level will that give them a return on their dollar debts? Of what order, do you know?

MR SHARPLEY: I couldn't tell you, your Honour. It is - yes. I am told 80 to \$100 million will be distributed from the pooled assets of the group, assuming pooling occurs, and that would leave about \$50 million still in the accounts of AAL pending the final resolution of all the various litigation and other issues that will still be ongoing as at Christmas.

HIS HONOUR: Is there much litigation around?

MR SHARPLEY: There is, your Honour, but I am not - I couldn't give you details of it at the moment. I would have to get some instructions as to exactly what is still ongoing and - - -

HIS HONOUR: I am just - I would be interested in due course, just as part of the background, to know at what stage it has reached.

5 MR SHARPLEY: Yes. I am told we can't give a timeline for the actual complete termination of the administration of this at this stage. But that pooling, followed by the distribution, would be distributing about two thirds of the assets that are currently still in the administrator's hands and - - -

10 HIS HONOUR: So at the end of - - -

MR SHARPLEY: - - - that is the best they can do at the moment.

15 HIS HONOUR: So at the end of the day the Commonwealth will receive a measure of return of what it advanced, the priority creditors won't get back everything in respect of which they have lodged proofs of debt or have as entitlements, and the unsecured creditors won't receive anything, I suppose.

MR SHARPLEY: That is almost certainly the case, your Honour.

20 HIS HONOUR: Yes.

MR SHARPLEY: Yes. the compromise between the administrators and the bank creditors does provide for the banks to receive payments pursuant to that - - -

25 HIS HONOUR: Yes, I understand.

30 MR SHARPLEY: - - - which stand aside of the usual distributions. So that is the course we anticipate it following; that pooling be via the holding of section 445F meetings at which the creditors would either vote for or against pooling.

HIS HONOUR: When do you anticipate those meetings will be held?

35 MR SHARPLEY: In November, your Honour. So what we are going to ask the Court to do in this application is three things. Firstly, the administrators, aside from their obligation under the SISA deed and the MOU to propose and support pooling, the administrators have formed the view that pooling is a good thing and should occur, and have reached that determination. They are going to ask your Honour to give a direction under section 447A and/or D allowing them in the 445F meetings to vote their - they are inter-company debts, so they have votes as inter-company
40 creditors - to vote those inter-company debts in favour of pooling and to exercise their casting vote, if necessary, in favour of pooling in each of the 41 445F meetings where there is inter-company debt.

45 HIS HONOUR: Yes.

MR SHARPLEY: So that is the first thing. The second thing is a direction under section 447A or D approving the compromise with the bank creditors and the NAB pursuant to the agreement that has recently been reached.

HIS HONOUR: Subject to conditions.

5 MR SHARPLEY: Well, the two conditions of the compromise are that the Court approve it, and secondly that at the 445F meeting for AAE pooling actually passes, which is with the bank's support our anticipation of a highly likely outcome.

HIS HONOUR: Yes, I understand.

10 MR SHARPLEY: The third order we would seek in this application relates to the method of notification of creditors of the section 445F meetings, and as your Honour has previously done in relation - - -

HIS HONOUR: Well, we have some precedents for that, I think.

15 MR SHARPLEY: We do. We would be seeking relief from the obligation to serve written material on every creditor.

HIS HONOUR: But you could provide the same opportunities for availability - - -

20 MR SHARPLEY: Yes.

HIS HONOUR: - - - of material in publication on websites.

25 MR SHARPLEY: Yes, your Honour.

HIS HONOUR: Publication of advertisements in papers and so on.

MR SHARPLEY: Yes, your Honour.

30 HIS HONOUR: Yes.

MR SHARPLEY: So that is the third order. So we basically seek a direction relating to the administrators being allowed to vote inter-company debts in favour of pooling, because there is a potential conflict of interest for the administrators wearing their various hats. The second thing is approval of compromise with the banks and the NAB, and the third thing is directions under 447A in relation to the method of notification of the 445F meetings.

40 HIS HONOUR: Tell me, who can you identify whose interests might require a vote against pooling?

MR SHARPLEY: At the moment, your Honour - this will all be set out in detail in our substantive affidavit which we are intending to serve in about a week.

45 HIS HONOUR: Yes.

MR SHARPLEY: It identifies which companies, according to our best calculation, have a positive asset balance, and who the creditors are and what the likely cents in the dollar return is. But it would seem that there are about six to eight companies that are likely, if they were not pooled, and subject to a large number of assumptions, to have a positive asset balance, and the creditors would therefore be advantaged - the unsecured creditors of those companies would be advantaged if pooling did not occur and would be disadvantaged if it did occur. However, I think with one or two exceptions the returns that would be made to those creditors if those companies were separately administered are very small. Less than 1 to 2 cents in the dollar.

So there are a number of people who stand to lose if pooling goes ahead, but the vast majority of those people, the amount that is at stake is very small. The second complication is, your Honour, is that under the DOCA persons who had claims, very small claims which would result in a distribution of less than \$25, those claims were released. So they wouldn't get a vote. So there is a threshold which eliminates a large number of very small creditors from those - - -

HIS HONOUR: Nevertheless, will you be able to identify a company or a creditor who could represent the interests of those who might be thought to oppose pooling?

MR SHARPLEY: Well, the people we propose, or the entities we are proposing to notify of this application, as opposed to the 445F meetings, the committee of creditors, ASIC, the Commonwealth, the AAE creditors - - -

HIS HONOUR: Yes.

MR SHARPLEY: We are also planning to advertise in newspapers and we are also proposing to make the material available via the website for download. In terms of identifying every creditor who, theoretically at least stands to lose if pooling does not go forward, subject once again - I should go back and say, your Honour, all our calculations are based - our calculations of who stands to lose or gain are based on a large number of assumptions, and one of the bases for the administrators believing that pooling is desirable is that it is very hard to disentangle group debts and liabilities and attribute them across the various companies.

HIS HONOUR: I understand that, but what I am concerned about is I would want there to be someone who could represent the interests of those who it would might be thought would be advantaged if poolings had not occurred, to at least put or argue that - from that position. How they would put or argue it is a matter of course for them, but I would want at least one party of that characterisation to be able to appear. Of course the costs would come out of the administration, of course. Yes?

MR SHARPLEY: I actually had a discussion before the hearing with Mr Luxton. I mean, the - ASIC has a similar concern regarding identification of persons who stand to lose. And of course there is - in each company there are different interests at stake - - -

HIS HONOUR: Well, of course there are - - -

MR SHARPLEY: - - - because of the agreement.

5 HIS HONOUR: Well, of course there are different interests, but I would want - I would, I was going to say, expect, certainly at this stage, and anticipate it would be desirable if not necessary for there to be someone at the bar table to say "I represent X company who is a creditor of the Y company in the group who, if pooling were not to go ahead might get a better return, and I want to tell you what my attitude is towards pooling," at least.

10 MR SHARPLEY: Yes, your Honour.

15 HIS HONOUR: It is very important in a case like this, and the situation has arisen the past, that you get the opportunity to have both sides of the argument advanced through independent counsel.

20 MR SHARPLEY: Yes, your Honour. What we are proposing to do is serve our material next, in a week, and our affidavit identifies as best as we can those companies which have a positive asset balance in their own right, and the sorts of returns, and we were planning to have some discussions concerning perhaps identifying particular creditors who may have a greater financial interest against pooling than others. But between those discussions with us and ASIC and what your Honour has said, we appreciate that there does need to be someone here at the hearing to put the contrary position.

25 HIS HONOUR: Indeed. Thank you for that. So what do you want to today? Just simply adjourn the matter for another period of two and a half?

30 MR SHARPLEY: Well, we have some draft orders, your Honour. We were hoping your Honour would give us a trial date. The timing in terms of getting a distribution before Christmas requires us to have the mediate in November, and we were therefore hoping that a trial could be - hearing of the application could be around - in early October, perhaps, around 10 October, and we have produced a timetable on that basis. Step one, that we provide our further affidavit, which is voluminous.

35 HIS HONOUR: But do - the next step is for the administrators to get a direction as to the voting at the meeting, is that right?

40 MR SHARPLEY: The next step is for the administrators to get - to come before your Honour and ask for three directions or orders. That is what we are asking for in this proceeding. And that is a direction re how they can vote at the meetings - - -

HIS HONOUR: Yes.

45 MR SHARPLEY: - - - a direction approving our compromise with the banks - - -

HIS HONOUR: Yes.

MR SHARPLEY: - - - because that is - - -

HIS HONOUR: Yes, I understand that.

5 MR SHARPLEY: And the third direction is a direction as to how we notify people of the 445F meetings, the actual creditors' meetings.

10 HIS HONOUR: I understand that. Well, the administrators would want directions as to how they should vote. Again, is there going to be a contradictive?

MR SHARPLEY: Well, to an extent is an overlap of interests with the people who are against pooling, because in at least some of the group companies - - -

15 HIS HONOUR: Well, that may - of course, because the administrators want to vote so that they can support the pooling proposal.

MR SHARPLEY: Exactly.

20 HIS HONOUR: Well, I would want someone to be present on the hearing of that application to argue the contrary view as to the administrators - - -

MR SHARPLEY: Yes.

25 HIS HONOUR: - - - being allowed to pool. Now, you will have to identify some such person - - -

MR SHARPLEY: Well - - -

30 HIS HONOUR: - - - and there is not much point in fixing a hearing date, is there, until that person has been identified? What I don't want to happen is to fix the hearing date, come along on 10 October, and find that there is someone who is not yet ready to argue it.

35 MR SHARPLEY: Well, your Honour, the interests of the people who are against pooling would be highly - a high degree of pooling with those who would be against the administrators exercising their inter-company votes.

40 HIS HONOUR: That is fine. In that case, identify them now and have them come along for the next hearing.

45 MR SHARPLEY: Yes. Well - yes - it is - we are looking for a trial date in about six weeks, your Honour. We are going to serve all our material in one week. We would be moving to establish the identity of the contradictor quickly after service of our material, with a view to them appearing at the trial around 10 October.

HIS HONOUR: You will be serving the material by - what, the week - by 9 September?

MR SHARPLEY: By the second. Next - this Friday. We are anticipating our affidavit ready, and we will be - it will be a mixture of service of the affidavit on some parties, and in respect of the committee of creditors, we will simply be notifying them that the material is available if they are interested in it - anticipate quite a few will not be interested, but we will either be notifying or serving the committee of creditors - ASIC, Commonwealth, the AE creditors - by this Friday with our material.

HIS HONOUR: Well, what I want to do is to not give you a trial date yet, but to intimate that a trial date around 10, 11, or 12 October is a probability, but have a further directions hearing on, say, 20 or 21 September to make sure that we - that everything is ready for a final hearing on that date.

MR SHARPLEY: Yes. Do you - my instructing solicitor is expressing a concern that - can we be - perhaps a more - an inking-in of those dates rather than a pencilling in, your Honour, because we want to come back on the 20th being confident that we can go ahead on the 10th or 12th, appreciating that the onus is on us to identify a contradictor and make sure they are - making sure they are across the material. We would be looking to have a directions hearing, I think, before 20 September. We would be serving our material by this Friday, and we would - if there is any material in opposition, we were hoping to have that served by 23 September, and then allowing some time for the parties to digest that material and produce outlines of written submissions perhaps a week before the trial.

HIS HONOUR: Well, I am happy to do that, but I would want to, in that case - a day should be a sufficient amount of time for the matter, should it not?

MR SHARPLEY: I think so, your Honour. With written submissions and profferings of affidavit, we wouldn't anticipate our submissions taking more than a couple of hours, so it would depend on the extent, if any, of - well, there will be opposition, because we will be identifying a contradictor, but a day should be sufficient.

HIS HONOUR: What day do you want to have your meetings? You want to have your meetings in November?

MR SHARPLEY: Excuse me, your Honour. The answer is as early as possible in November, your Honour, but certainly before mid-November, because we are desiring to make the next substantial distribution before Christmas, and that forces a constraint as to when the meeting can be held. So we are aiming for early November.

HIS HONOUR: So if the affidavits are in by 23 September - - -

MR SHARPLEY: I thought your Honour was anticipating that we would come back and have a directions hearing in the near future, at which - by which time we would have identified a contradictor, and they could be - represent - - -

HIS HONOUR: The only trouble is, I am away from 9 to 19 September.

MR SHARPLEY: Right.

HIS HONOUR: So that is why I was contemplating a directions hearing on the 20th.
5

MR SHARPLEY: That would be suitable then, your Honour.

HIS HONOUR: Pardon?

10 MR SHARPLEY: That would be suitable then.

HIS HONOUR: Have a further directions hearing on the 20th, and how about Friday
7 October to be inked in?

15 MR SHARPLEY: Yes, your Honour.

HIS HONOUR: Or perhaps Monday the 10th.

MR SHARPLEY: Yes, your Honour. The 10th.

20 HIS HONOUR: Probably after the weekend might be better. Okay, well, at the
moment I will ink in October 10 with erasable ink. The probability is it won't be
erased. That is the best I can do at the moment. Provide for orders 1 and 2 and 3, the
date in 3 to be - - -

25 MR SHARPLEY: 3 October?

HIS HONOUR: 3 October is - yes, 3 October. The application be fixed for hearing
on 10 October, but there be a - directions hearing otherwise be adjourned to 10.15 on
30 20 September.

MR SHARPLEY: Thank you, your Honour.

HIS HONOUR: Now, that is subject to me hearing from all the other parties, of
35 course, at the bar table. Mr Troiani?

MR TROIANI: We consent to those directions, your Honour.

HIS HONOUR: Mr Watkins:

40 MR WATKINS: Your Honour, we consent to those orders.

HIS HONOUR: Mr Luxton?

45 MR LUXTON: Your Honour, the Commission doesn't oppose those orders. Just to
note that it is difficult for us to express a view in the absence of the substantive
affidavit which is on the way this week.

HIS HONOUR: Well, I - well, that is why I think it is desirable to have this directions hearing, and that is why I have referred to - my reference to erasable ink. I am very concerned in a matter of this nature to ensure that there be a proper contradictor to the proposal which is being put, because the administrators' seeking to
5 vote in a particular way is a matter that - I think is a matter which ought to attract the particular attention of the Commission, which may be alleviated by the arguments coming from someone else.

MR LUXTON: It may well be, your Honour. But a key question seems to be - who
10 should we notify of the hearing, and what it means?

HIS HONOUR: Well, I have been - are you saying whether that the whole body of creditors should be notified about the administrators' proposal to those?

MR LUXTON: Not necessarily the whole body of creditors, but perhaps the
15 creditors who would be worse off under the proposal.

HIS HONOUR: Well, Mr Sharpley has indicated that they can be identified. What I would be concerned to find out by the time of the directions hearing would be to have
20 an affidavit as to who exactly - who has been notified, and whether the PP major players whose interests might be affected by the administrators voting and the pooling arrangement have been notified. And in that respect I would appreciate assistance from the Commission. What I don't want to do is to lengthen this proceeding by going step by step one step at a time and incurring substantial costs
25 each time we come back to Court.

I am prepared to give the directions at the moment, so long as I am satisfied on 20 September that all those major players whose interests would be affected by the pooling arrangement, and at least someone - like, at least one person, if not more -
30 are either going to come along or be represented to argue against the proposition. Do I need to say anything more about that? Is that the matter that concerns you?

MR LUXTON: Yes, yes, your Honour, but - - -

HIS HONOUR: Well, we can only take it step by step. I am happy to give the
35 directions, subject to - this may be a moveable feast, depending upon what I am told on 20 September. That is all I can do at the moment.

MR LUXTON: Well, certainly ASIC doesn't want to stultify the process.
40

HIS HONOUR: The only other alternative would be to give a direction for today to serve all these people, and then to come back and see what they have to say. But what I have said today would be sufficient to communicate to them that we want - we want, I want - someone to come along, and if they can be identified between now and
45 then and pick up the roll and announce an appearance, that is fine. If on the 20th no-one announces an appearance for someone who wants to argue against pooling and against the voting, I might have take a different course.

MR LUXTON: If your Honour pleases.

HIS HONOUR: Thank you. Mr Ginnane, what is the attitude of the Commonwealth towards - - -

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MR T. GINNANE: Your Honour, the Commonwealth would agree with these directions. The Commonwealth will need every day of the period from the 2nd, this Friday, to the 23rd to consider the material, because the Commonwealth hasn't been involved in the negotiations leading up to the compromise that has been mentioned to the Court. They have provided the affidavits as served this Friday. The Commonwealth would endeavour to consider them, and if it does wish to file affidavit in response do so by the 23rd.

10

HIS HONOUR: Well, the question is whether - I said I would have the directions hearing on the 20th. The question is whether it is better to have it on the 26th, after time for the affidavits is passed.

15

MR GINNANE: Yes. Well, our position was to seek three weeks, which this direction provides, to consider the material and consider Commonwealth's interests and formulate a response. On that timetable there is something to be said for putting the directions on the 26th, your Honour.

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HIS HONOUR: Yes. I think on reflection, Mr - yes, I am sorry, anything else you wanted to say to me?

25

MR SHARPLEY: No, your Honour.

HIS HONOUR: I think I will make the directions 26 September.

30

MR SHARPLEY: Yes, your Honour.

HIS HONOUR: And then we will have a much better idea of how the land lies.

MR SHARPLEY: Thank you, your Honour.

35

HIS HONOUR: Otherwise I will reserve the costs. Is there anything further from the bar table?

MR SHARPLEY: No, your Honour.

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HIS HONOUR: Thank the parties for their presence. Adjourn the Court.

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MATTER ADJOURNED at 10.52 am UNTIL MONDAY, 26 SEPTEMBER 2005