IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY

No. V621 of 2005

IN THE MATTER OF ANSETT AUSTRALIA LIMITED (ACN 004 209 410) & ORS (in accordance with the Schedule attached) (All Subject to a Deed of Company Arrangement)

and

MARK ANTHONY KORDA and **MARK FRANCIS XAVIER MENTHA (as Deed Administrators of the Companies)**

CERTIFICATE IDENTIFYING EXHIBIT

This is the exhibit marked "**MAK-32**" produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit dated 12 September 2005.

Before me:

ALEXANDER WILLIAM KING
ARNOLD BLOCH LEIBLER
LEVEL 21, 333 COLLINS STREET
MELBOURNE 3000
A NATURAL PERSON WHO IS A CURRENT
PRACTITIONER WITHIN THE MEANING OF
THE LEGAL PRACTICE ACT 1996

Exhibit "MAK-32"
Affidavit of Mark Anthony Korda sworn 26 September 2002 (excluding exhibits)

'MAK-32'

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY

NO. V 3051 of 2001

IN THE MATTER OF:

HAZELTON AIR CHARTER PTY LIMITED (A.C.N. 065 221 356), HAZELTON AIR SERVICES PTY LIMITED (A.C.N. 000 242 928) and HAZELTON AIRLINES LIMITED (A.C.N. 061 965 642) (All Administrators Appointed)

AND

MICHAEL JAMES HUMPHRIS in his capacity as administrator of **HAZELTON AIR CHARTER PTY LIMITED (A.C.N. 065 221 356), HAZELTON AIR SERVICES PTY LIMITED (A.C.N. 000 242 928) and HAZELTON AIRLINES LIMITED (A.C.N. 061 965 642)** (All Administrators Appointed)

Plaintiff

AND

MARK FRANCIS XAVIER MENTHA AND MARK ANTHONY MARK KORDA in their capacities as administrators of the companies listed in the Schedule attached (All Administrators Appointed)

Defendants

AFFIDAVIT OF MARK ANTHONY KORDA

DEPONENT: Mark Anthony Korda
SWORN: 26 September 2002
MK

On 26 MK September 2002, I **MARK ANTHONY KORDA**, Chartered Accountant, of Level 24, 333 Collins Street, Melbourne in the State of Victoria, say on oath :

1 I am a Chartered Accountant. I am a registered official liquidator. I am a partner of KordaMentha and former partner of Andersen. I am a member of the Insolvency Practitioners Association of Australia. I am a member of the Institute of Chartered Accountants. I have been practising in the area of

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corporate insolvency, receivership and financial reconstructions for in excess of 14 years.

2 Save where I say to the contrary, the matters deposed to in this Affidavit are deposed to from my own knowledge of the facts. Where I depose to matters from information and belief, I believe those matters to be true. I am authorised by Mark Francis Xavier Mentha ("**Mark Mentha**") to make this Affidavit on his behalf.

3 I have read the eleventh affidavit of Michael Humphris filed in these proceedings sworn 29 May 2002 and exhibits ("**Humphris' 11th affidavit**"). I have also read the affidavit of Leon Zwier sworn 20 September 2002 filed in these proceedings ("**Zwier's Affidavit**"). In so far as the matters deposed to by Leon Zwier in his affidavit relate to matters within my knowledge, I agree with those matters.

APPOINTMENT OF ANSETT & HAZELTON ADMINISTRATORS

4 There are 41 companies in the Ansett Group over which Mark Mentha and I were initially appointed as Voluntary Administrators and subsequently as Deed Administrators.

5 Mark Mentha and I were appointed the Ansett Group Voluntary Administrators on 17 September 2001 pursuant to an order of this Honourable Court following the resignation of Messrs Hall, Hedge and Watson of PricewaterhouseCoopers who had been appointed as voluntary administrators over those companies on 12 September 2001 and 14 September 2001 ("**the Initial Administrators**").

6 The Initial Administrators were also appointed voluntary Administrators of Hazelton Air Charter Pty Ltd, Hazelton Air Services Pty Ltd and Hazelton Airlines Limited ("**the Hazelton companies**") on 12 September 2001.

7 Now produced and shown to me and marked "**MAK1**" is a copy of the Notice of Appointment of the Initial Administrators to the Hazelton companies on 12 September 2001.

8 Because Andersen (the firm of which Mark Mentha and I were partners at the time of our appointment) was the auditor of the Hazelton companies, we could not act as Voluntary Administrators of the Ansett Group or the Hazelton companies without leave of the Court pursuant to section 448C(1) of the Corporations Act 2001 (Cth) ("**the Corporations Act**"). Michael Humphris of the firm Sims Lockwood was appointed Voluntary Administrator over the Hazelton companies on 17 September 2001 pursuant to an order of this Honourable Court.

9 Now produced and shown to me and marked "**MAK2**" is a copy of the consent of Michael Humphris to be appointed Voluntary Administrator over the Hazelton companies dated 17 September 2001.

HISTORY OF ANSETT

10 Ansett commenced flight operations in February 1936. Ansett operated in Australia for over sixty-five years before it was placed into voluntary administration in September 2001.

ANSETT PURCHASE OF HAZELTON COMPANIES

11 About 5 months before Ansett was placed in voluntary administration, on about 30 April 2001, Bodas Pty Ltd ("**Bodas**") a wholly owned subsidiary of Ansett Holdings Limited ("**AHL**") purchased 100% of the shares in Hazelton Airlines Limited. Hazelton Airlines Limited owned all of the shares in Hazelton Air Charter Pty Ltd and Hazelton Air Services Pty Ltd. The purchase price paid by Ansett for the Hazelton companies was about $24M. (I have been informed by Damian Templeton that the purchase price of the Hazelton shares exceeded the independent expert's valuation of those shares).

12 The Hazelton companies were purchased for strategic reasons, including to obtain control of Hazelton's 450 landing slots at Sydney Airport and as part of a proposed rationalisation of the operations of Kendell and Hazelton in regional Australia.

INITIAL ADMINISTRATORS CEASED FLIGHT OPERATIONS

13 At 2am on 14 September 2001, following their appointment as voluntary administrators of the Ansett Group and the Hazelton companies, the Initial Administrators ceased flight operations of all Ansett companies including the Hazelton companies and stood down the majority of all Ansett employees.

HAZELTON'S RECOVERY STRATEGY

14 I have read the Hazelton Second Report to Creditors dated 10 December 2001. Based on that Report, I do not believe Hazelton had any "working' capital deficiency.

15 Now produced and shown to me and marked "**MAK3**" is a copy of the Hazelton Second Report to Creditors dated 10 December 2001 ("**Hazelton Second Report to Creditors**").

16 At page 3 of the Hazelton Second Report to Creditors, Michael Humphris states:

> *"At the date of my appointment, the Hazelton Group had recoverable cash and other current assets in excess of $4 million. To assist with the recommencement of flight operations a loan was negotiated with the New South Wales Government for an amount of up to $3 million. A further loan was negotiated with the Federal Government for $3 million. I recommenced limited operations on 21 September 2001."* .

17 At pages 9 to 11 of the Hazelton Second Report to Creditors, Michael Humphris outlines his strategy to recommence flight operations in an effort to sell the Hazelton airline as a going concern. At page 10, Michael Humphris states:

> *"The impact of the decision to terminate flight operations caused substantial revenue loss. Significant damage was done to the customer base and the level of customer confidence. This has*

resulted in significant trading losses being incurred whilst revenues are being regenerated.

In addition, the grounding of the Hazelton Group (and Kendell) provided Qantas with an opportunity to dominate the regional markets of New South Wales. This was achieved by them initially providing air services in the void created.".

18 In outlining his strategy to recommence flight operations, Michael Humphris states at page 9:

"Whilst recognising that trading losses would be incurred, from the recommencement, in my opinion, these losses would be outweighed by the benefits potentially flowing from a going-concern sale, including continuity of employment and assignment of aircraft leases.

It is important to note that in adopting this strategy I have taken the decision to allocate sufficient assets in the form of freehold aircraft (four (4) Metroliners) for the purposes of ensuring that employee entitlements (including redundancy) can be met in full should the worst-case scenario of closure of operations occur."

19 At page 11 of the Hazelton Second Report to Creditors, Mr Humprhis states:

"Losses incurred for the period 21 September 2001 to 30 November 2001 total $4.8 million. These losses have been funded primarily by a Federal Government Loan of $3 million and the interim payment of $1.545 million made by the Ansett Administrators from the fund of $150 million paid to them by the New Zealand Government pursuant to the Memorandum of Understanding executed on 3 October 2001 by the Air New Zealand Group, the Ansett Group, the Ansett Administrators and me ("the MOU").

Further losses are budgeted through until February 2002 of $2.5 million. Existing current assets, cash at bank and debtors will underwrite these losses, however, requests for additional Government finance have been made to ensure the continuity of operations through to the earliest date on which a sale of business is anticipated."

20 Michael Humphris then outlined the strategy to sell the business and assets of Hazelton Airlines including the distribution of an Information Memorandum and the establishment of due diligence data rooms for interested bidders. At page 13 of the Hazelton Second Report to Creditors, Michael Humphris advises that the sale process had generated six interested parties which has since been reduced to two. A copy of the Information Memorandum for the Sale of Business and Assets of the Hazelton companies dated October 2001 formed exhibit "MAK1" to my affidavit sworn 1 November 2001 in these proceedings. It is apparent from the Information Memorandum that Michael Humphris initially intended to sell the assets of the Hazelton companies and not the shares.

HAZELTON SOLVENT AT 12 SEPTEMBER 2001

21 At page 3 of the Hazelton Second Report to Creditors, Michael Humphris states:

"From my review of the books and records and information provided by management, the Hazelton Group was placed into administration as a consequence of the failure of Ansett. It appears that the directors formed the view that without the support of Ansett, the Hazelton Group was likely to become insolvent."

Trading History

22 At pages 7 and following of the Hazelton Second Report to Creditors, Michael Humphris sets out the financial position of the Hazelton companies as at 12 September 2001. At page 9, Michael Humphris sets out a table

showing a summary of the historical trading performance of the Hazelton companies in the 3 years to 30 June 2001. That table is reproduced below:

	Year End 30 June 1999 $000's	Year End 30 June 2000 $000's	Year End 30 June 2001 $000's
Operating Revenue	63,453	69,483	63,087
Profit before tax	1,021	1,030	(6,993)
Total Assets	45,277	40,049	38,302
Total Liabilities	31,380	25,864	30,368
Net Assets	13,897	14,185	7,934

23 Michael Humphris says in relation to the fall in revenue and profitability to June 2001:

> *"I am advised that the significant fall in profitability to 30 June 2001 is due to increased competition resulting in a reduction in passenger numbers and an increase in operating expenses due to escalating fuel prices and the depreciation of the Australian dollar impacting on aircraft rentals paid in $USD."*

24 Under the heading "Investigations in Respect of Antecedent Transactions and Insolvency", at page 14 of the Hazelton Second Report to Creditors, Michael Humphris sets out a detailed analysis of the solvency of the Hazelton companies as at 12 September 2001. Following a further detailed table summarising the financial position of the Hazelton Group in the three years prior to the appointment of administrators, Michael Humphris concludes that:

> *"Although the net asset position has decreased by 44.07% in the 12 months to 30 June 2001 as a result of poor trading performance during that year, it is clear that the Hazelton Group has maintained significant net assets throughout the review period."*

Balance Sheet Test

25 Michael Humphris then sets out at page 15 of the Hazelton Second Report to Creditors a summary of the balance sheet for the Hazelton companies for each of July, August and September 2001 (as at the date of appointment of administrators). This table is reproduced below:

	31 Jul 2001 $000's	31 Aug 2001 $000's	12 Sep 2001 $000's
Current Assets	17,038	17,200	17,620
Current Liabilities	11,380	12,360	11,165
Working Capital	5,658	4,840	6,455

Total Assets	39,294	36,665	36,911
Total Liabilities	34,193	32,715	30,562
Net Assets	5,101	3,950	6,349

26 Michael Humphris concludes at page 15 of the Report that (emphasis added):

> *"The figures again reveal that although the net asset position deteriorated during August before recovering in September there is a significant surplus of assets over liabilities and the Hazelton Group continues to have positive working capital.*
>
> *Accordingly, the Hazelton Group satisfies the balance sheet test of solvency."*

27 Michael Humphris further concludes from the above table that "the Hazelton Group has maintained and increased its working capital position over the review period" and that "Accordingly, based on the liquidity test the Hazelton Group would be able to meet its current obligations from current assets.".

28 Michael Humphris then produces a table showing the position using a "quick asset test" providing a more rigorous assessment of liquidity. Michael Humphris concludes at the bottom of page 15 of the Report that:

"Based on this strict test of liquidity the Hazelton Group had a deficiency in the years ended 30 June 1999 and 2000 but significantly improved the position in 2001.".

29 Michael Humphris concludes from a review of the monthly accounts that the significant improvement in the quick asset ratio "is primarily the result of a significant reduction in trade creditors and current borrowings in the months of June 2001" which was attributable to the intercompany loans from Ansett, a significant portion of which was used "to repay outstanding finances leases ($9.9 million) which accounts for the 93.7% reduction in current borrowings.". Michael Humphris notes:

"The Hazelton Group also reduced its trade creditors by $2.6 million (24%) in the month of June, at the same time as it reduced its bank overdraft, indicating that this was also funded by the Ansett loan."

Cashflow Test

30 At pages 16 and 17 of the Hazelton Second Report to Creditors, Michael Humphris analyses trade creditor and trade debtor movements in the three months to the appointment of administrators and concludes that the Hazelton companies had a significant excess of trade creditors over trade debtors.

31 Michael Humphris notes that Ansett funded a reduction of Hazelton's overdraft facility with the Commonwealth Bank of Australia ("**CBA**") (which was requested by the bank) from $4.25M to $1.5M at 1 June 2001. Michael Humphris notes at page 18 of the Report:

"The July management report discloses that the overdraft facility was extinguished on 29 June 2001 following repayment by Ansett.".

32 Michael Humphris notes that despite a negative cash flow position at 30 June 2001, the Hazelton Group maintained a positive cash balance from

July through to the appointment of administrators. Michael Humphris concludes at page 18 of the Report that:

> *"...the Hazelton Group has enjoyed a strong liquidity position with positive working capital and access to bank finance, accordingly, I believe the Hazelton Group satisfies the cash flow test of solvency."*

CORPORATE STRUCTURE OF THE ANSETT GROUP

33 As at the date of appointment of Administrators to the Ansett companies, Bodas was the holding company for the regional airlines including Aeropelican Air Services Pty Ltd, the Show Group Companies, Kendell Airlines (Aust) Pty Ltd ("**Kendell**"), Skywest Group and the Hazelton companies. Ansett Australia Holdings Limited ("**AAHL**") was the holding company for most of the remaining Ansett companies to which Administrators had been appointed. AHL was the ultimate holding company for the Ansett Group.

34 Now produced and shown to me and marked "**MAK4**" is a copy of the Ansett Group company structure as at 12 September 2001 which my staff prepared following the appointment of Mark Mentha and me as Administrators to the Ansett companies.

35 Now produced and shown to me and marked "**MAK5**" is a copy of the ASIC company searches of the Hazelton companies as at March 2002.

36 Now produced and shown to me and marked "**MAK6**" is a copy of a chart prepared from relevant ASIC company searches showing the directors of all the Ansett Group companies as at the date of the appointment of the Initial Administrators on 12 September 2001 and 14 September 2001.

ANSETT RECOVERY STRATEGY

37 Upon our appointment as administrators of the Ansett Group, Mark Mentha and I regarded it as imperative having particular regard to the objects of Part 5.3A of the Corporations Act to recommence flying operations as soon as

possible. The aviation assets of the Ansett Group were significantly harmed by the cessation of operations. In our view, once Ansett ceased to fly, it lost the confidence of its customer base, key clients, the public and other key stakeholders. The recommencement of flight operations would be on a limited basis on main trunk routes confined initially to eleven A320 aircraft. This project was named "Ansett Kick Start".

38 Now produced and shown to me and marked "**MAK7**" is a copy of the Ansett Kick Start Business Plan. I humbly request this document to be kept confidential as it contains commercially sensitive information.

39 Ansett Kick Start was to be part of a larger project to reconstitute Ansett in a new but reduced form, to be known as "Ansett Mark II". The aim was to establish a new long term viable airline that could be sold as a going-concern. Ansett Kick Start and Ansett Mark II met the objects of Part 5.3A of the Corporations Act.

40 Mark Mentha and I required significant funding quickly for Ansett Kick-Start and Ansett Mark II. At the time of our appointment Ansett had no cash in the bank, and had pre-sold airline tickets. Possible sources of funding to pursue included:

(a) Shareholders (Air New Zealand ("**Air NZ**"), Singapore Airlines ("**SIA**"), Brierley Investments ("**Brierley**")); or

(b) Institutional investors or financiers.

BACKGROUND TO EXECUTION OF MOU

41 Mark Mentha and I knew of the existence of a letter dated 8 August 2001 from Air New Zealand Ltd ("**Air NZ**") to the directors of Ansett Holdings Limited ("**AHL**"), Ansett International Limited and Ansett Australia Limited ("**AAL**") advising that Air NZ would on request in writing from time to time make available to the three Ansett companies advances for the sole purpose of enabling them to pay "working capital liabilities" incurred by them "in respect of property or services purchased or sold in the ordinary course of

[their] business" ("**the Letter of Comfort**"). The Letter of Comfort contained certain conditions including a statement that the maximum aggregate amount of all such advances shall not exceed AUD$400M.

42 Mark Mentha and I also knew that prior to our appointment as voluntary Administrators of the Ansett Group on 17 September 2001, the Initial Administrators had made demand upon Air NZ under the Letter of Comfort failing which the Initial Administrators intended to commence legal proceedings against Air NZ (see further paragraphs 69 and 70 below).

43 Before deciding whether to pursue a litigation strategy against Air NZ, Mark Mentha and I made enquiries of other Andersen personnel in New Zealand to obtain a general financial background to Air NZ.

44 Based on those enquiries, media reports and the rapidly deteriorating share price of Air NZ shares following Air NZ's NZ write-off of its Ansett investment, Mark Mentha and I decided that it may be counter productive for us to issue legal proceedings seeking hundreds of millions of dollars from Air NZ at a time when it was financially distressed. We were concerned that to do so, may lead to Air NZ being placed into an insolvency administration under New Zealand law thereby "killing off" any prospect of a "cash" settlement from Air NZ. We also formed the preliminary view that Air NZ could only survive if it could "disentangle" itself from Ansett quickly.

45 Mark Mentha and I realised that the Ansett Group also needed to resume flying (Ansett Kick-Start) and required cash to do so, as well as develop a longer term strategy (Ansett Mark II).

46 In all the circumstances, we concluded that if we could negotiate a speedy commercial settlement of the Ansett Group claims against Air NZ under the Letter of Comfort, Ansett had the best chance of remaining in existence or if it could not, maximising the return to creditors.

NEGOTIATIONS WITH AIR NZ

47 A detailed account of the negotiations with Air NZ resulting in the execution of the Memorandum of Understanding on 3 October 2001 ("**MOU**") is set out in the affidavit of Mark Mentha sworn 8 October 2001 in Federal Court Proceedings V3045 of 2001 ("**MOU Proceedings**").

48 On Sunday 23 September 2001, following an approach by Jim Farmer QC, the Acting Chairman of Air NZ, the Mark Mentha, Leon Zwier and I had a "without prejudice" meeting at the offices of Arnold Bloch Leibler with:

(a) Jim Farmer QC, Acting Chairman, Air New Zealand;

(b) John Waller , PriceWaterhouseCoopers, Air New Zealand's advisor;

(c) Allan Galbraith Q.C., Air New Zealand legal advisor;

(d) Roger France, Air New Zealand financial advisor; and

(e) Mark Swee Wah, S.I.A observer

("**the Sunday meeting**").

49 The Sunday meeting resulted in an in-principle agreement reached at about 7.30pm that evening. The in-principle agreement reached was that:

(a) Air NZ would provide an immediate cash payment to Mark Mentha and me in our capacity as voluntary administrators of the Ansett companies of AUD$150M;

(b) Air NZ would not prove in the administration or liquidation of the Ansett Group and would waive all entitlements to be repaid funds advanced to Ansett prior to the appointment of Administrators (during the course of our negotiations, Air NZ had identified an amount of AUD$184M which was later revised to AUD$160M that was owing by Ansett to Air NZ, approximately AUD$81M of which was by way of intercompany loans);

(c) The Ansett Group and Mark Mentha and I (in our capacity as administrators of the Ansett Group) would release the Air NZ Group, the directors of Air NZ and Ansett Group from all claims:

(i) arising out of the Letter of Comfort; and

(ii) arising from the management or affairs of the Ansett Group or the administration of the Ansett Group (subject to important exceptions).

(d) The Air NZ and Ansett directors would warrant that they have not acted in bad faith, for an improper purpose or recklessly in the management of the Ansett Group.

50 It never occurred to Mark Mentha and me to invite Michael Humphris to participate in the Air NZ settlement discussions. None of the Air NZ representatives at any time during the course of the Sunday meeting or before mentioned the possibility of involving the Hazelton Administrator or the Hazelton companies in the Air NZ settlement.

DOCUMENTING THE AIR NZ SETTLEMENT

51 Mark Mentha, Leon Zwier and I remained at the offices of Arnold Bloch Leibler after the Sunday meeting for a few hours further during which time Leon Zwier set out in writing the draft terms of the Air NZ settlement agreement. The Hazelton companies were not parties to the initial handwritten draft MOU provided to Air NZ.

52 Now produced and shown to me and marked **"MAK8"** is a copy of a handwritten note from Leon Zwier to Allan Galbraith QC dated 23 September 2001 together with draft handwritten MOU.

PARTICIPATION OF THE HAZELTON ADMINISTRATOR IN THE MOU NEGOTIATIONS

53 As deposed to above, it had not occurred to Mark Mentha and me (nor presumably to Air NZ) to invite Michael Humphris to participate in the Air NZ

settlement negotiations. However, I am told by Leon Zwier that the lawyers for Air NZ, Bell Gully, in an email to Arnold Bloch Leibler on 28 September 2001, requested the Hazelton companies to be a party to the MOU. This email forms exhibit "LZ7" to the affidavit of Leon Zwier.

54 I am told by Leon Zwier that Air NZ wanted the Hazelton companies included in the MOU "for the sake of completeness". Mark Mentha and I believed the Air NZ settlement could have been concluded without the participation of the Hazelton companies or the Hazelton Administrator. However, we formed the view that it was proper for the Hazelton companies to be a party to the MOU on the basis that the Hazelton companies would probably have been a party to the MOU had Mark Mentha and I also been administrators of the Hazelton companies.

EXECUTION OF MOU

55 The MOU was executed by Mark Mentha on my behalf at about midnight on 3 October 2001. It was executed by Air NZ and the Air NZ and Ansett directors about the same time (being early the following day New Zealand time).

56 Now produced and shown to me and marked **"MAK9"** is a copy of the executed MOU.

CLAIMS RELEASED UNDER MOU

57 As part of the Air NZ settlement, and as reflected in the MOU, Mark Mentha and I unconditionally released the Air NZ Group and the directors of Air NZ and Ansett from all claims arising out of the Letter of Comfort. We also conditionally released Air NZ and the Air NZ and Ansett directors from certain claims:

(a) relating to the management or affairs of the Ansett Group;

(b) arising in the administration of the Ansett Group; and

(c) relating to any transaction or dealing between any company in the Ansett Group and any company in the Air NZ Group.

58 However, we did not release, and the MOU expressly preserved, the following claims against Air NZ and the Air NZ and Ansett directors:

(a) Claims for bad faith and improper purpose (pursuant to sections 181 and 184 of the Corporations Act);

(b) Claims for Recklessness (as defined in the MOU);

(c) Claims by the Australian Securities and Investments Commission (**"ASIC"**);

(d) Insolvent trading type claims by a liquidator or creditor under Part 5.7B of the Corporations Act if the Ansett Group was placed into liquidation; and

(e) Claims against auditors or advisors to the Ansett Group, including claims against the Initial Administrators.

59 Further, the release may become inoperative if any of the Air NZ directors statements in the MOU Proceedings are materially incorrect.

60 At the time of entering into the MOU, Mark Mentha and I were of the view that:

(a) The relevant Ansett companies had claims against Air NZ under the Letter of Comfort;

(b) There were presently no known claims the Ansett Group would have against the Air NZ/ Ansett directors for failing to exercise the requisite degree of care and diligence (Section 180 of the Corporations Act);

(c) If there were any possible claims for breach of duty by the directors, the Administrators were required to report them to ASIC and ASIC

was unfettered in its powers to pursue such claims directly (Section 438D of the Corporations Act; Section 50 of the ASIC Act);

(d) The vast majority of litigation resulting from corporate collapses in Australia has concerned either insolvent trading type claims brought by a liquidator or claims against directors for failing to act in good faith in the best interests of the company and for a proper purpose (section 181 of the Corporations Act) and that none of these claims were released under the MOU.

61 Based on the above, and our investigations to date, Mark Mentha and I came to the view that the principal, if not the only, claims likely to be given up by executing the MOU were claims under the Letter of Comfort.

ANSETT'S ENTITLEMENT UNDER LETTER OF COMFORT

62 I first became aware of the existence of the Letter of Comfort when I was advised of its existence by the Initial Administrators during the course of the changeover discussions on about 16 September 2001.

63 Now produced and shown to me and marked **"MAK10"** is a copy of the Letter of Comfort.

64 The Letter of Comfort was addressed to the directors of Ansett Holdings Limited ("**AHL**"), Ansett International Limited and Ansett Australia Limited ("**AAL**"). The Letter of Comfort was not addressed to any other Ansett Group company or to any of the Hazelton companies.

65 On 26 September 2001, Arnold Bloch Leibler provided preliminary written advice to Mark Mentha and me about our prospects of successfully prosecuting proceedings against Air NZ under the Letter of Comfort.

66 Now produced and shown to me and marked **"MAK11"** is a copy of the Arnold Bloch Leibler written advice. I humbly request that this exhibit be kept confidential as it is privileged.

67 I was told by Leon Zwier that Australian senior counsel had advised him that he agrees with the legal opinions expressed in the Arnold Bloch Leibler advice. Because the Letter of Comfort was expressed to be governed by New Zealand law, Mark Mentha and I also instructed Leon Zwier to obtain the written opinion of senior counsel from New Zealand about our prospects of successfully suing Air NZ under the Letter of Comfort.

68 Now produced and shown to me and marked **"MAK12"** is a copy of a letter of advice from New Zealand senior counsel dated 6 October 2001. I humbly request that this exhibit be kept confidential as it is privileged.

STEPS TAKEN BY INITIAL ADMINISTRATOR TO RECOVER UNDER LETTER OF COMFORT

69 On 16 September 2001, the Initial Administrators wrote to Air NZ on behalf of AHL, Ansett International Ltd and AAL demanding payment of $380M pursuant to the Letter of Comfort (Air NZ had already paid the Initial Administrators $20M on account of wages and salaries of Ansett employees without admitting any liability under the Letter of Comfort).

70 Now produced and shown to me and marked **"MAK13"** are copies of the following correspondence between the Initial Administrators and Air NZ:

(a) letter from the Initial Administrators to Air NZ dated 13 September 2001;

(b) letter from Air NZ to the Initial Administrators dated 14 September 2001;

(c) letter from the Initial Administrators to Air NZ dated 16 September 2001.

71 The Initial Administrators also briefed lawyers to draft a statement of claim seeking payment under the Letter of Comfort. On about 17 September 2001, counsel instructed by lawyers for the Initial Administrators drafted a statement of claim suing on the Letter of Comfort. The applicants to the draft Statement of Claim were AHL, Ansett International Ltd and AAL. Neither

Bodas, the Hazelton companies nor any other Ansett company was an applicant to the draft Statement of Claim.

72 Now produced and shown to me and marked "**MAK14**" is a draft statement of claim and draft application prepared by counsel briefed by the lawyers for the Initial Administrators. I humbly request that this exhibit be kept confidential as it is privileged.

73 It is apparent from the material produced at exhibit "MAK14" (and because the Initial Administrators were also administrators of the Hazelton companies) that neither the Initial Administrators nor their legal advisors contemplated that the Hazelton companies had a cause of action under the Letter of Comfort.

ANSETT V HAZELTON - WORKING CAPITAL REQUIREMENTS

74 The advances promised to AHL, Ansett International Ltd and AAL under the Letter of Comfort were expressed to be "for the sole purpose of enabling you to pay *working capital liabilities* incurred by you in respect of property or services purchased or sold in the ordinary course of your business...". (emphasis added).

75 I refer to the affidavit of Colin Egan sworn 14 November 2001 in these proceedings and exhibits. Paragraphs 9 to 13 (inclusive) of Mr Egan's affidavit sets out an analysis of the "working capital" requirements at various dates of the Ansett Group companies on the one hand and the Hazelton companies on the other. The "working capital deficiency" is derived by subtracting current liabilities from current assets of the Ansett Group. This is the generally accepted definition of "working capital".

76 Based on Mr Egan's review of the unaudited management accounts of the two groups, the Ansett companies had a working capital deficit of approximately $821M at August 2001 where as the Hazelton companies had a surplus of approximately $5M.

77 Page 15 of the Hazelton Second Report to Creditors confirms that the Hazelton companies had positive working capital for the three months prior to the appointment of the Initial Administrators on 12 September 2001 as follows:

31July 2001 $000's	31 Aug 2001 $000's	12 Sep 2001 $000's
5,658	4,840	6,455

78 Michael Humphris concludes at page 15 of the Hazelton Second Report to Creditors that:

> *"The figures again reveal that although the net asset position deteriorated during August before recovering in September, there is a significant surplus of assets over liabilities and the Hazelton Group continues to have positive working capital."*

79 Since Mr Egan's review of the unaudited management accounts of the Ansett companies in November 2001, my staff have conducted a more detailed analysis of the working capital requirements of the Ansett companies which shows that at August 2001, the Ansett companies had a working capital deficiency of approximately $428M. Set out below is a table prepared by my staff showing the working capital deficiency of the Ansett companies on a consolidated month by month basis between July 2000 and August 2001 (inclusive):

	Jul-00	Aug-00	Sep-00	Oct-00	Nov-00	Dec-00
Current Assets	973.20	1006.72	990.78	953.39	921.27	937.60
Current Liabilities	1484.06	1540.71	1488.68	1469.38	1503.49	1323.54
WC Deficiency	(510.86)	(533.99)	(497.90)	(515.99)	(582.22)	(385.94)

	Jan-01	Feb-01	Mar-01	Apr-01	May-01	Jun-01	Jul-01	Aug-01
Current Assets	1054.17	995.92	975.50	825.38	922.37	778.68	845.68	755.90
Current Liabilities	1422.55	1477.36	1377.64	1353.59	1468.30	1343.95	1047.65	1184.00
WC Deficiency	(368.38)	(481.44)	(402.14)	(528.21)	(545.93)	(565.27)	(201.71)	(428.10)

80 I am told by Mr Egan that the reason for the difference in the working capital deficiency amount for the Ansett companies identified in the later review is that the later review excludes Air NZ/ Ansett intercompany balances and that since his initial review, certain accounting errors in the management accounts have been corrected and reclassified.

VALUING ANSETT'S CLAIM UNDER THE LETTER OF COMFORT

Causes of Action

81 Had Mark Mentha and I not been able to reach a satisfactory compromise agreement with Air NZ, we would have pursued litigation against Air NZ under the Letter of Comfort. I am told by Leon Zwier that one basis for relief would be a claim for specific performance to enforce the Letter of Comfort as contemplated in the draft Statement of Claim prepared for the Initial Administrators. Mark Mentha and I would have claimed $380M under the Letter of Comfort (being $400M less the $20M then advanced to the Initial Administrators on account of wages). (Frankly, however, I am not sure that the Ansett companies could at that time have borrowed more money).

82 I am told by Leon Zwier that other primary causes of action against Air NZ would have included a claim for damages for breach of contract and possibly claims for breaches of Sections 52 and 53 of the *Trade Practices Act* as contemplated in the draft Statement of Claim. I am further told by Leon Zwier that the measure of damages in an action for breach of contract or pursuant to the *Trade Practices Act* is not the same as specific performance.

83 In our Third Report to Creditors dated 16 September 2002, Mark Mentha and I estimated a total realisation from the Ansett Administration on a consolidated Group basis of about $600M. This is the most likely outcome of the Ansett administration based on events as they in fact occurred, including the provision of $150M from Air NZ pursuant to the MOU.

84 Now produced and shown to me and marked "**MAK15**" is a copy of our Third Report to Creditors of the Ansett companies dated 16 September 2002.

85 It is extremely difficult to now speculate about the damages claim that Ansett may have had assuming that Air NZ breached the terms and conditions of the Letter of Comfort. Set out below are a number of different scenarios for claims for loss and damage that Ansett may have suffered assuming that Air NZ did not abide by the terms of the Letter of Comfort.

Option One - Ansett Not Insolvent

86 Had Air NZ continued to provide financial support to the Ansett Group pursuant to the Letter of Comfort or in accordance with some unwritten prior arrangement then Ansett may never have become insolvent, the directors may never have foreseen a need to appoint voluntary administrators to the Ansett Group and Ansett could have continued trading. Had Ansett continued trading it may have maintained a significant market share and it may have been capable of being sold as a going concern.

87 Upon the appointment of voluntary administrators to the Ansett Group, its assets diminished in value by hundreds of millions of dollars as a consequence of the appointment of voluntary administrators. It is difficult to quantify the precise impact of the loss and damage of the voluntary administration. However, there is presently a deficiency of assets over liabilities of in excess of $2B. This deficiency could have been avoided had there been a going concern sale of the airline without the stigma of the administration.

Option Two - Post Administration Breach

88 Had Air NZ advanced up to $400M of working capital after commencement of the voluntary administration process, it is possible that the Initial Administrators would not have ceased flying operations and that the mainline airline could have been sold as a going concern in administration. Whilst the assets would have eroded in value because of the insolvency administration, they may have achieved a substantially better return than the returns that we are likely to receive in the present circumstances.

89 Moreover, it may have been a more attractive proposition to other airlines that ultimately did not make a bid to purchase the Ansett mainline business if flight operations did not cease. In addition, with extra funds Ansett may have been in a position to purchase Virgin Blue and thereby package both Virgin Blue and Ansett for sale as a going concern. In this scenario, Mark Mentha and I would have realised at least $380M over our present estimated realisation.

Option Three - Assume No Sale As A Going Concern

90 Assuming that Air NZ advanced an additional $230M pursuant to the Letter of Comfort, there may have been sufficient funds to pay all of the priority creditors 100 cents in the dollar and a smaller return for some of the ordinary unsecured creditors of Ansett.

Benchmark: No Working Capital From Air NZ

91 The total realisations in the Ansett Administration would have been substantially less than our current estimate if we had not received any money from Air NZ pursuant to the Letter of Comfort. If we received no money from Air NZ, we would have been in a disastrous situation. We would not have been able to re-commence flight operations in accordance with "Ansett KickStart" or "Ansett Mark II" and we would not have been able to sell the regional and other Ansett businesses on a going-concern basis. We would have immediately terminated almost all of the Ansett employees crystallising a liability of in excess of $730M and we would have been forced to liquidate all Ansett assets and sell some of them in a "fire sale".

ASIC INVESTIGATIONS

92 Shortly after the appointment of the Initial Administrators to the Ansett Group on 12 September 2001, ASIC announced a wide-ranging investigation into the collapse of the Ansett Group (including the Hazelton companies). ASIC stated in its press releases that as part of the investigation, it conducted extensive enquiries in Australia, New Zealand and Singapore, including a

comprehensive review of company records and examinations of directors and other officers of Air NZ. On 1 March 2002, ASIC announced:

> *"ASIC has now reached the view that, based on the evidence currently available, there is no realistic prospect for successfully prosecuting the directors of Ansett for breach of their general duties of care under the Corporations Act or for insolvent trading. This view is confirmed by Senior Counsel.*
>
> *...It is considered unlikely that evidence exists which would cause these conclusions to be reconsidered but ASIC will reserve its position until all aspects of the investigation are concluded."*

93 ASIC also announced in its March 2002 Press Release that it would focus its attention from then on the adequacy of disclosures made to the market by Air NZ regarding its financial position in the period prior to 12 September 2001.

94 On 11 July 2002, ASIC announced it had closed its investigation into the collapse of the Ansett Group. ASIC stated in its press release:

> *...ASIC has given a high priority to evaluating the prospects of successfully litigating against AIZ on behalf of former shareholders or creditors.*
>
> *...after considering the evidence compiled by ASIC since March, Counsel, including Senior Counsel, have concluded that only the minority of purchasers of shareholders are likely to be in a position to prove that they relied directly on AIZ's conduct and suffered financial loss.*
>
> *Moreover, Counsel have advised that owing to the differing positions of individual creditors, it would not be possible for ASIC to pursue creditor claims by way of a single group proceeding or class action. Instead, ASIC would be required to bring each*

claim as a separate claim proceeding or, at best, as a number of proceedings on behalf of different groups of plaintiffs.

In those circumstances, the Commission has determined that the public interest would not be served by incurring the cost and risk of commencing proceedings against AIZ."

95 Now produced and shown to me and marked **"MAK16"** is a copy of ASIC's press releases dated 1 March 2002 and 11 July 2002.

OTHER CLAIMS RELEASED BY ANSETT UNDER THE MOU

96 Mark Mentha and I have conducted our own investigations into the collapse of the Ansett Group. We have been given access by Air NZ on a confidential basis to the board papers it gave to ASIC and we are currently seeking the provision of further information. At pages 34 to 42 of our Third Report, we summarise the status of our investigations to date.

97 Below is an extract from our Third Report to Creditors summarising the status of our investigations in so far as they may give rise to any causes of action against Air NZ or Air NZ/ Ansett directors. However, we have not focussed in our investigations on the potential causes of action we may have given up under the MOU but on the possible causes of action which have been preserved.

*"**4.2.1. Potential breaches of duties by directors and officers of the Ansett Group***

Sale & Leaseback of Fleet

Ansett had undertaken in the period after its acquisition by Air New Zealand to raise funds via the sale and leaseback of aircraft and the sale of owned aircraft.

There were three major transactions surrounding aircraft subject to sale and leaseback and/or refinancing arrangements during the review period:

- *Boeing B737-300s in November and December 2000;*
- *Airbus A320-200s in June 2001; and*
- *Airbus A320-200s in July 2001.*

It appears that some of the proceeds from the sale and leaseback of aircraft were used to reduce the intercompany debt owed by Ansett to Air New Zealand.

Based on information available to date, we recommend that:

- *No further action be taken regarding the November and December 2000 transaction, given it appears to be a debt raising exercise with ownership of the*

relevant aircraft remaining with AAL and there is no evidence that directors acted in breach of their duties.

- *No further action be taken regarding the June 2001 sale and leaseback transaction as, on balance, it appears the aircraft were sold at or in excess of market valuations and there is no evidence that directors acted in breach of their duties.*

Purchase of Hazelton Airline

The purchase of Hazelton was completed by Ansett in April 2001 for $25m. The acquisition was completed less than six months prior to the appointment of the Initial Administrators.

We have considered whether in undertaking the transaction the directors of Ansett exercised their duties in good faith, for a proper purpose and with due care and diligence.

In relation to the question as to whether the directors of Ansett exercised the degree of care and diligence as required by the Act in the acquisition of Hazelton, the directors must have:

- *Made the judgment in good faith for a proper purpose;*
- *No material personal interest in the subject matter of the judgment;*
- *Inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and*
- *Rationally believed that the judgment is in the best interests of the corporation.*

Whilst the purchase consideration paid for Hazelton appears high compared to the tangible assets obtained, there were other strategic benefits available to Ansett from the acquisition. These had potentially far reaching implications for Ansett.

The purchase of Hazelton was at a premium of $9m above an Independent Expert's Report high valuation commissioned by the directors of Hazelton, which excluded the strategic and synergistic benefits obtainable through the purchase. This premium, in addition to the strategic benefit of restricting Qantas' expansion, was driven by the benefits that Ansett believed it could obtain.

As a result, it appears the directors made the acquisition for a proper purpose after informing themselves of the benefits of the acquisition and believed it was in the best interest of Ansett. We have no evidence that any of the directors obtained any personal benefit from the transaction or were reckless in their considerations.

Payment of Management Bonuses

In August 2001, bonuses totalling approximately $3.3m were paid to various Ansett employees relating to the year ended 30 June 2001. Air New Zealand claims that these payments were made in good faith.

We are continuing our investigations.

4.2.2. Potential claims against Air New Zealand

Asset Stripping

Shortly after the appointment of the Initial Administrators, allegations were made that Air New Zealand had engaged in 'asset stripping' for the benefit of Air New Zealand.

In response to these claims we have sought to ascertain whether there is evidence of any asset stripping, and if so, whether the assets could be recovered.

Based on available information, there has been no evidence of asset stripping by Air New Zealand.

We have also considered whether the movement of assets between Ansett and Air New Zealand with no formal asset movement process or register was appropriate or could constitute a breach of the various directors' duties. Ansett

and Air New Zealand operated as one group with the main businesses of both Air New Zealand and Ansett being similar with similar assets being used in each business. It is therefore not unusual that there was movement of assets between the companies.

We have also been successful in retrieving Ansett's assets that we have identified. We are continuing our investigations

Derivative Policies

Following Air New Zealand's full acquisition of Ansett, the vast majority of Ansett's treasury functions were centralised at Air New Zealand's offices in Auckland. We have sought to assess the various treasury activities that related to Ansett to determine if there were any potential breaches of directors' duties. In particular, we considered Air New Zealand's policies relating to foreign exchange and interest rate risk.

Whilst some non-compliance with Air New Zealand Treasury policy may have occurred due to the largely non-prescriptive nature of the policy and unclear definition of terms, we have found no evidence to suggest that by doing so, the directors breached their duties. Accordingly, we believe no further action should to be taken against Air New Zealand and/or its directors with respect to the treasury policies for foreign exchange and interest rate risk management.

Our investigations found no evidence to suggest that the speculative activity had been engaged in or that suggests that the directors have acted in a reckless manner, nor acted without due diligence and care.

Inappropriate Payment of Expenses

Shortly after the collapse of Ansett, various parties made allegations that there had been inappropriate payment of expenses by the Ansett Group where Air New Zealand received the benefit. The major expenditure items claimed were fuel, air navigation charges and IT expenditure.

A large verification process was carried out on a large sample of invoices to determine the source of the cost incurred and which company received the benefit.

Based on the review, there is no evidence to support the allegations that Ansett was paying expenses on behalf of Air New Zealand in relation to fuel and air navigation charges. Where services have been provided jointly to Ansett and Air New Zealand, such as IT services, evidence to date indicates these expenses were recharged to Air New Zealand through the intercompany loan account. No further investigations will be made.

Movements in Intercompany Loan Account

A key part of the centralised treasury function was the daily consolidation of funds held within the combined Ansett/Air New Zealand group. We have sought to determine whether any claims exist against Air New Zealand as a result of the daily consolidation of funds.

The movements in the intercompany advance account represent the overall transactions between Air New Zealand and Ansett during each month, including the effect of the daily consolidation of funds and the provision of goods or services between the groups.

Due to Air New Zealand initiating all transactions within the AAHL bank account and controlling the information underlying each transaction in the intercompany account, we have not been able to confirm whether the transactions in the intercompany loan account were appropriately recorded.

In entering into the Air New Zealand MOU, we relied on the representations and warranties of Air New Zealand as to the balance of the intercompany loan account. However, we are yet to verify that the representations and warranties are correct.

We have requested Air New Zealand to provide documentation to support the transactions in the intercompany advance account. This information is currently being prepared by Air New Zealand. This will enable us to ascertain whether the

consolidation of funds was accurately recorded and the balance of the intercompany loan account was not materially different.

We will continue to seek information from Air New Zealand."

98 Mark Mentha and I have also prepared a more detailed investigations report following the attendance in New Zealand by Leon Zwier, Dany Merkel, Damian Templeton and Chris Da Silva to review the Air NZ board papers. This report is in the process of being completed.

99 At the conclusion of our investigations, if Mark Mentha and I form the view that the Ansett directors have been guilty of an offence in relation to the Ansett companies including negligence or default or breach of duty, we will:

(a) Lodge a report about the matter as soon as practicable; and

(b) Give ASIC such information as ASIC requires to investigate the matter

In accordance with Section 438D of the Corporations Act.

HAZELTON INVESTIGATIONS

100 Under the heading "Insolvent Trading by Directors" at pages 18 and following of the Hazelton Second Report to Creditors dated 10 December 2001 (see exhibit "MAK3"), Michael Humphris produces a table showing that following the acquisition by Ansett of the Hazelton companies in April 2001, "Ansett funded a significant reduction in the Hazelton Group's borrowing commitments.". Michael Humphris further states at page 19:

"Specifically, $10.6 million (55%) of the $19.1 million Ansett loaned to the Hazelton Group in the 2001 Financial Year, was utilised in reducing aircraft leasing commitments. The balance of the funds has been used to reduce trade creditors and fund trading losses. A further $0.9 million was funded in the period from 1 July 2001, to the appointment of Administrators.".

101 The Hazelton Report further states that Ansett provided funding to the Hazelton companies of about $20 million between 31 May 2001 and 31

August 2001 to enable the repayment of a $1.5M overdraft facility and a $9.945M commercial hire purchase facility over metro aircraft, both facilities held with the CBA. Reproduced below is a table from page 20 of the Hazelton Second Report to Creditors setting out the funds provided by Ansett and how these funds were applied by the Hazelton companies:

Date	Amount $	Purpose	Terms
31 May 2001	5,970,000	Reduction in overdraft	7 days
29 June 2001	1,034,448	Advance to US$ account	7 days
29 June 2001	588,928	US$300K Security deposit for 2 SAAB aircraft operating leases	7 days
29 June 2001	1,500,000	Repayment of overdraft	7 days
29 June 2001	10,004,985	Repayment of Commercial Hire Purchase – Metro aircraft	28 days
31 August 2001	1,235,684	Working Capital	7 days
Total Loan Balance	**20,334,045**		

102 Michael Humphris concludes at page 20 of the Hazelton Second Report to Creditors that:

> "Accordingly, Ansett has funded the reduced debt and the trading losses. It appears that without the support of the parent, it would have been necessary for the Hazelton Group to seek other means of finance."

103 Michael Humphris says at page 21 of the Report that other means of funding may have been available to the Hazelton Group to fund its operations from May 2001 to September 2001 (requiring about $9M assuming the loans to CBA could have remained on foot). Possible alternative sources of funding included:

(a) Extending trade creditors;

(b) Improved debtors collections;

(c) Sale of assets.

104 Michael Humphris concludes:

> *"Based on my assessment of the financial position of the Hazelton Group and the ability of the parent to fund its operation, it is certainly arguable that the Group was solvent leading up to the appointment of administrators and that the directors would have sufficient grounds to defend any actions that may be taken by a Liquidator for Insolvent Trading.*
>
> *However, investigations into the conduct of the directors of the Hazelton Group (which necessitates an examination of the financial position of the Group at the time the Administrators were appointed) and into the decision by the previous Administrators to cease trading have not yet concluded. Those investigations include consideration of documentation held by the Air New Zealand Group. Until those investigations are completed, I cannot reach a firm conclusion as to the solvency of the Hazelton Group.".*

105 The Hazelton Second Report to Creditors did not identify any other recovery actions that were likely against Air NZ or the directors of the Hazelton companies, although the Report noted that investigations were not yet complete.

106 I have read the Minutes of the Second Meeting of Creditors of the Hazelton companies held 18 December 2001. At page 4 of those Minutes, Michael Humphris summarises his investigations as follows:

> *"An investigation undertaken into the activities of the Company leading up to the appointment of the Administrator has checked for any potential actions that a liquidator may be able to pursue against previous officers or parties involved in the management of the Company to seek restitution from those parties for the benefit of Creditors in any liquidation scenario. A detailed analysis is contained within the report and leads the Administrator to the conclusion that at the time of the appointment of the*

Administrator the Company was solvent and the question as to whether the Company was justifiably put into Administration. This issue is still being investigated by the Administrator."

107 Now produced and shown to me and marked **"MAK17"** is a copy of the Minutes of the Second Meeting of Creditors of the Hazelton companies held 18 December 2001.

108 I am not aware of any subsequent report to Hazelton creditors which further updates the status of Michael Humphris' investigations into the collapse of the Hazelton companies.

109 I have read the Minutes of the Third Meeting of Creditors of the Hazelton companies on 29 April 2002. At page 8 of the Minutes, Michael Humphris again reiterates the possibility of an action against the Initial Administrators for closing down the Hazelton airline prematurely.

110 Now produced and shown to me and marked **"MAK18"** is a copy of the Hazelton Minutes of Third Creditors Meeting held 29 April 2002.

111 I am told by Leon Zwier that his staff have conducted a search of newspaper articles between September 2001 and August 2002 in which reference is made to the Hazelton Administration. I am further told by Leon Zwier that his staff have identified two articles, both in December 2001, in which Michael Humphris is reported as telling creditors that he is considering legal action against the Initial Administrators for closing down the airline prematurely.

112 Now produced and shown to me and marked **"MAK19"** is a copy of the newspaper articles from the Australian Financial Review dated 19 December 2001 and from the Australian dated 19 December 2001 obtained from Factiva database.

113 I am told by Leon Zwier that if Michael Humphris considers the Hazelton directors had been guilty of an offence in relation to the Hazelton companies including negligence or default or breach of duty, he must:

(a) Lodge a report about the matter as soon as practicable; and

(b) Give ASIC such information as ASIC requires to investigate the matter (Section 438D of the Corporations Act).

114 Michael Humphris has not filed in these proceedings a copy of any report lodged with ASIC alleging any Hazelton director is guilty of negligence, default or breach of duty in relation to the Hazelton companies. I am also told by Leon Zwier that his staff at Arnold Bloch Leibler have conducted a search of all documents filed by Michael Humphris with ASIC and that there is no evidence that Michael Humphris has lodged any report with ASIC alleging any Hazelton director is guilty of negligence, default or breach of duty in relation to the Hazelton companies.

OTHER ARGUMENTS MADE BY MICHAEL HUMPHRIS

115 I have not sought to verify the trading loss figures Michael Humphris attributes to the appointment of administrators to the Hazelton companies. Colin Egan and I have questioned some of these figures in previous affidavits filed in these proceedings. However, I do not believe there is any basis for the Hazelton companies making a claim under the Letter of Comfort. I also do not believe there is any basis for a claim against the Hazelton directors.

116 Michael Humphris asserts that the $20M in intercompany loans provided by Ansett to the Hazelton companies were in fact provided by Air NZ pursuant to the Letter of Comfort. Based on my investigations, no loans were made directly from Air NZ to the Hazelton companies. All intercompany advances to the Hazelton companies came from Ansett Australia Holdings Limited ("**AAHL**") a wholly owned subsidiary of Ansett Holdings Limited.

117 Further, I have not seen any evidence to suggest that AAHL ever demanded repayment of the intercompany loans.

118 In any event, all advances (with the possible exception of $12M in wages advanced after 12 September 2001) were not made pursuant to the terms of the Letter of Comfort and the majority of the money advanced was not expended on "working capital".

119 I am told by Leon Zwier that on 28 August 2002, he received from the lawyers for Air NZ, Bell Gully, an email attaching a summary of the intercompany lending between AAHL and the Hazelton companies. In the cover email, the lawyers for Air NZ noted, "I find it hard to see how Hazelton had any claim under the LOC.".

120 Now produced and shown to me and marked **"MAK20"** is a copy of the email from Bell Gully dated 28 August 2002 attaching a table from Air NZ showing intercompany lending between AAHL and the Hazelton companies.

121 I refer to paragraphs 7 and 8 of Humphris' 11th affidavit. Mr. Humphris deposes that Ansett obtained a "benefit" by entering into the MOU because Ansett did not agree to release Hazelton Airlines Limited from liability to repay the intercompany loans made by Ansett or not to prove in the administration or liquidation of the Hazelton companies.

122 The Air NZ settlement was about the disentanglement of Air NZ from Ansett. AAHL did not release any of the other Ansett companies from their obligation to repay the intercompany loans under the MOU. The Hazelton companies had the opportunity to participate in any "benefit" to the Ansett companies by participating in the proposed pooling of the Ansett companies. The Hazelton Administrator declined to do so.

123 In any event, there could be no "benefit" because there was no prospect of Ansett obtaining any dividend as an unsecured creditor of Hazelton. As early as April 2002, it was evident from the Minutes of the Third Meetings of Creditors of the Hazelton companies (see exhibit "MAK18") that on a liquidation scenario the Hazelton companies were "close to break even" and that there would be no return for unsecured creditors of the Hazelton Administrator.

124 Now produced and shown to me and marked **"MAK21"** is a copy of a PowerPoint presentation containing a Notional Liquidation Statement dated 20 April 2002 presented to the Third Meeting of Creditors of the Hazelton Companies held 29 April 2002.

125 In a circular to creditors dated 11 July 2002 updating creditors on the proposed sale of shares in Hazelton to Australiawide, the Hazelton Administrator noted that "there is no prospect of a return to unsecured creditors.".

126 Now produced and shown to me and marked **"MAK22"** is a copy of the Hazelton Circular to creditors dated 11 July 2002.

127 The Minutes of the Fourth Meeting of Creditors of the Hazelton companies held 19 July 2002 records Mr. Humphris' response to a question from the floor about what unsecured creditors could expect to be paid stating that:

> *"The unsecured creditors of Hazelton being pre-Administration will not receive a dividend and have never been likely to.".*

128 Now produced and shown to me and marked **"MAK23"** is a copy of the Minutes of the Fourth Meeting of Creditors of Hazelton dated 19 July 2002.

SUBSEQUENT EVENTS

129 On 26 October 2001, Leon Zwier wrote an open letter to the lawyers for Michael Humphris offering them a proposed settlement of this claim. The offer proposed an apportionment of the $150M on the basis of the then known employee entitlements, namely $6.9M to $730M. By applying such a ratio, the Ansett Administrators would pay to the Hazelton Administrator $1.44M.

130 This payment was subject to a "rise and fall" formula whereby the payment would be "topped up" depending on whether the employees of the respective administration were paid their entitlements in full. If all of the employees in the Ansett Group administration and the Hazelton administration were paid their entitlements in full (or in kind by transfer of employment) then the Hazelton Administrator would be under no obligation to repay $1.44M and may apply this sum to pay a dividend to all unsecured creditors.

131 The object was to ensure that the Hazelton employees were treated pari passu with the Ansett employees. The Hazelton companies were treated as an undifferentiated part of the Ansett Group. The offer was rejected.

132 Now produced and shown to me and marked **"MAK24"** are copies of the following correspondence between Arnold Bloch Leibler and Holding Redlich:

(a) Letter dated 26 October 2001 from Arnold Bloch Leibler to Holding Redlich;

(b) Letter dated 29 October 2001 from Arnold Bloch Leibler to Holding Redlich; and

(c) Letter dated 30 October 2001 from Holding Redlich to Arnold Bloch Leibler.

133 As it now transpires, the Ansett priority creditors will be paid about $735M where as because the Hazelton employees will be transferred to the new business, the Hazelton employee entitlements will be significantly less than $6.9M.

134 On 2 November 2001 and subsequently, Mark Mentha and I paid to Michael Humphris an amount of $1.545M and $1M (total $2.545M) on account of the entitlement of Michael Humphris (if any) to be paid a portion of the $150M received from Air NZ pursuant to the MOU. The moneys were paid pursuant to directions of this Honourable Court made 2 November 2001 and subsequently in these proceedings on the basis that it was without prejudice to the ultimate determination of the application for directions in these proceedings and that Michael Humphris would not be personally liable to repay the money unless he had assets available to do so after making provision for all priority liabilities. It is apparent from the Hazelton circulars to creditors deposed to at paragraphs 152 to 157 that Michael Humphris will not have sufficient assets to repay this sum.

135 For the reasons outlined in this affidavit, I do not believe Michael Humphris has any entitlement under the Letter of Comfort or to any of the settlement proceeds received under the MOU.

SALE OF KENDELL TO AWA

136 On 7 May 2002, Kendell announced that Australiawide Airlines Pty Ltd ("**AWA**") had been appointed as the preferred bidder for the purchase of Kendell. The background to the sale of Kendell to AWA is set out in my Affidavit sworn 23 July 2002 in proceeding no. V3125 of 2002 ("**Kendell Appointment of Receiver Application**").

137 Now produced and shown to me and marked "**MAK25**" is a copy of my Affidavit sworn 23 July 2002 in the Kendell Appointment of Receiver Application (excluding Exhibits).

HAZELTON COMPROMISE

138 For the reasons stated in Leon Zwier's affidavit, on 28 June 2002, I believed that agreement had been reached between Michael Humphris and me compromising these Court Proceedings although I knew Michael Humphris did not.

DELAY

139 I apologise to this Honourable Court and to the plaintiffs for the delay in preparing this affidavit. Unfortunately, I have been pre-occupied in finalising the Third Report to Creditors which forms exhibit MAK 15 to my affidavit and in preparing for the Third Creditors Meeting of the Ansett Group which will be held tomorrow, 25 September 2002. In addition, counsel has been otherwise occupied in the Ansett superannuation proceedings in the Supreme Court, which went longer than expected.

140 I refer to Exhibits "LZ36" to "LZ42", inclusive, of Zwier's Affidavit which contain copies of correspondence between Arnold Bloch Leibler and the solicitors for the plaintiffs, Holding Redlich in relation to delay.

SWORN by **MARK ANTHONY KORDA**)
at Melbourne in the State of Victoria on)
26 September 2002)
M

Before me:

LEON ZWIER
Arnold Bloch Leibler
Level 21 333 Collins Street
Melbourne VIC 3000

A natural person who is a current practitioner within the meaning of the Legal Practice Act 1996