

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)

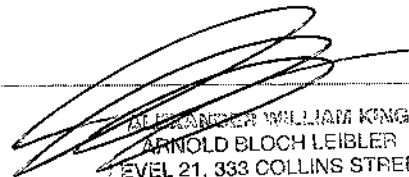
and

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

**CERTIFICATE IDENTIFYING EXHIBIT**

This is the exhibit marked "MAK-33" 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 1986

**Exhibit "MAK-33"**  
**Affidavit of Bradley Fowler sworn 13 March 2003**  
**(excluding exhibits)**

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)**

Plaintiffs

**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 BRADLEY JAMES FOWLER**

**DEPONENT:** Bradley James Fowler  
**SWORN:** 13 March 2003

On 13 March 2003, I **BRADLEY JAMES FOWLER**, Accountant, of Level 24, 56 Pitt Street, Sydney in the State of New South Wales, say on oath :

1 I am an Accountant. I am a director of KordaMentha and former director of Andersen. I am a member of the Insolvency Practitioners Association of Australia. I am an Associate Member of the Australian Society of Certified Practising Accountants. I have a Masters of Business degree (Accounting and Finance) from University of Technology Sydney and a Masters of Business Administration from the Australian Graduate School of Management Sydney. I have been practising in the area of corporate insolvency, receivership and financial reconstructions for 15 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 Mentha and Mark Korda to make this Affidavit on their behalves.

3 I have read the following Affidavits and exhibits:

- (a) Affidavit of Michael James Humphris sworn 15 November 2002 and exhibits ("**Humphris' Affidavit**"); and
- (b) Affidavit of John Richard Morrison sworn 15 November 2002 and exhibit ("**Morrison's Affidavit**").

4 Since 17 September 2001, I have been assisting Mark Mentha and Mark Korda in their capacity as Deed Administrators of Kendell Airlines (Aust) Pty Ltd (ACN 000 579 680) ("**Kendell**") (now known as Anst Lednek Airlines (Aust) Pty Ltd) ("**Kendell Administrators**") in the Kendell administration out of Sydney.

#### **BACKGROUND TO SALE OF KENDELL & HAZELTON**

5 Shortly after the commencement of the administration of the Ansett companies in September 2001, a process was established for the separate sale of Kendell, along with the other Ansett regional airline businesses of Aeropelican and Skywest as going concerns. The Kendell business was advertised for sale and expressions of interest sought by way of Information Memorandum.

6 Expressions of interest were received from several parties, including Australia Wide Airlines Limited ("**AWA**") and IMC Regional Airlines Limited consortium ("**IMC**"). In the majority of cases, potential purchasers were interested in the joint acquisition of the Kendell and Hazelton businesses. However, any sale proposal had to take into account the following factors:

- (a) Kendell had substantially more assets than Hazelton and it was the intention of the Kendell Administrators to use those assets for the benefit of Kendell's creditors;
- (b) Both businesses were incurring losses by continuing to trade in the pursuit of a sale, but the losses incurred by Hazelton were far in excess of the losses incurred by Kendell;
- (c) Any sale would require some form of Government assistance to help fund the purchaser on the one hand and each of Kendell and Hazelton to continue trading through to settlement on the other hand.

By the end of January 2002, Hazelton's trading losses exceeded Kendell's by about four-fold.

Now produced and shown to me and marked "BJF1" is a table setting out the comparative trading losses of Kendell and Hazelton between 17 September 2001 and January 2002 (actual) and between February and June 2002 (estimated).

#### **RAPID ROUTE RECOVERY LOANS**

- 7 The collapse of the regional airlines had seriously impacted rural Australian communities and it was a priority of the Commonwealth and various State Governments to maximise their chances of survival. On 18 September 2001, the Commonwealth established the Rapid Route Recovery Programme ("RRRP") to provide one-off grants to help fund operators of regional airlines to restore services to routes abandoned by the Ansett collapse in pursuit of a sale of the airlines as a going concern. The grants were available for a limited period of between 3 and 6 months.
- 8 On 24 September 2001, Martin Madden, a partner of the Andersen Corporate Recovery Services (Insolvency) practice, wrote a letter to the Honourable John Andersen for Mark Mentha requesting short term funding of \$3.5M to be repaid to the Commonwealth upon the sale of Kendell.

9 Now produced and shown to me and marked "BJF2" is a true copy of a letter from Mark Mentha to the Honourable John Andersen MP dated 24 September 2001.

10 On 25 September 2001, the Deputy Prime Minister, John Anderson issued a media release announcing the \$3.5M Kendell RRRP Loan to the Kendell Administrators.

Now produced and shown to me and marked "BJF3" is a copy of Federal Government Media Release dated 25 September 2001.

11 On about 15 October 2001, an Agreement was executed between the Commonwealth and Mark Korda and Mark Mentha pursuant to which the Commonwealth agreed to provide a \$3.5M loan facility to the Kendell Administrators ("**the Kendell RRRP Loan Agreement**").


Now produced and shown to me and marked "BJF4" is a copy of the Kendell RRRP Loan Agreement.

12 I am told by Dany Merkel that pursuant to a request made by Arnold Bloch Leibler to Holding Redlich on 20 December 2002, she obtained a copy of an agreement between the Commonwealth and Michael Humphris dated 11 October 2001 pursuant to which the Commonwealth agreed to provide a loan facility of \$3M to Hazelton ("**the Hazelton RRRP Loan Agreement**").

Now produced and shown to me and marked "BJF5" is a copy of the Hazelton RRRP Loan Agreement.

13 The Hazelton RRRP Loan Agreement is in similar terms to the Kendell RRRP Loan Agreement. Recital B of the Kendell and Hazelton RRRP Loan Agreements provides:

*"The loan facility is to be used by the Administrators to meet the expenses of carrying on [Kendell's / Hazelton's] business operations allowing the Administrators to sell the business as a going concern thereby maximising the sale price."*



- 14 Pursuant to Clause 9.1 of the Kendell and Hazelton RRRP Loan Agreements, the Administrators undertake, among other things, to apply the proceeds of each Advance "wholly for the purpose of enabling the Administrators to meet the expenses of carrying on the business of [Kendell/ Hazelton] as detailed in Schedule 1".
- 15 Schedule 1 of the Kendell and Hazelton RRRP Loan Agreements further provides:

**"A Purpose of the Loan (see clause 9.1)**

*The Administrator[s] may do those things necessary to facilitate [Kendell's/ Hazelton's] business operations and an orderly progression to the sale of Kendell as a going concern or other form of disposal consistent with the powers of the Administrators.*

*This may include:*

- (a) the purchase of inputs to enable operation of [Kendell/ Hazelton] including fuel, advertising, access to airports and like activities related to the normal operation of an airline;*
- (b) payment of salaries and wages (including payment of group tax deductions thereon) of [Kendell/ Hazelton] employees;*
- (c) rental payments for properties of which [Kendell/ Hazelton] is the tenant; and*
- (d) lease payments of aircraft which [Kendell/ Hazelton] is lessee."*

- 16 The Kendell RRRP Loan was repayable on 16 April 2002 unless settlement of a sale occurred earlier or on "such other date as the Commonwealth and the Administrators agree in writing". (Clauses 1.1 and 6.1). The Hazelton RRRP Loan Agreement was repayable on 12 April 2002 or on "such other date as the Commonwealth and the Administrator agree in writing" (Clauses 1.1 and 6.1). On about 2 April 2002, we received a letter from the Commonwealth Department of Transport and Regional Services ("DOTARS") addressed to Mark Korda referring to the Kendell RRRP Loan agreement and advising:

*"In accordance with clause 6.1 of the Agreement you must repay and discharge the loan on the Repayment Date. At this point, the Commonwealth is operating on the basis that the Repayment Date of the loan will be 16 April 2002..."*

Now produced and shown to me and marked "BJF6" is a copy of the letter from DOTARS to Mark Korda dated 2 April 2002.

- 17 I refer to paragraph 15 of Morrison's Affidavit wherein Mr. Morrison deposes that he understood that the Commonwealth Government's \$3M RRRP loan to Hazelton was:

*"only repayable if there were sufficient assets in the administration to pay out the priority creditors which were and remain in the following order:*

(a) **First Priority**

*Costs and expenses of the administration, together with the loan from the New South Wales Government, of which \$500,000 had been drawn, as at 13 June 2002...*

...

(d) **Fourth Priority**

*Accrued employee entitlements.*

(e) **Last Priority**

*Commonwealth Government Loan of \$3 million. ..."*

- 18 I always doubted this to be the case and I told Mr. Morrison on several occasions early on that if the Hazelton RRRP Loan Agreement was similar to the Kendell RRRP Loan Agreement, then the Hazelton Loan was an expense of the Administration which would rank to priority pursuant to Section 556(1)(a) of the *Corporations Act*.

- 19 Clause 11.2 of the Kendell and Hazelton RRRP Loan Agreements provides that neither the Kendell nor the Hazelton Administrators would be personally liable for repayment of the RRRP Loans in the event that having exhausted all avenues of legal recourse to be indemnified for their liabilities from the


company's assets, the Commonwealth could not be repaid. However, I do not now and never have understood the Kendell (or the Hazelton) RRRP Loan Agreement to displace the priority of repayment of the loans which would ordinarily apply under Section 556(1) of the Corporations Act.

- 20 On or about 17 October 2001, we drew down \$1M on Kendell's RRRP Loan facility. We did not fully draw down on the Kendell \$3.5M RRRP Loan facility at that time because we were cognisant that the requirement to repay would rank to priority. Hazelton, on the other hand, drew down the full amount of its \$3M RRRP Loan immediately.

### **COMMONWEALTH INVOLVEMENT IN THE SALE PROCESS**

- 21 During March and April 2002, negotiations continued between the Hazelton Administrator, the Kendell Administrators, representatives of DOTARS and various potential purchasers of the Kendell and Hazelton businesses including AWA and IMC in an effort to secure a preferred bidder. At the same time, Hazelton and Kendell had been holding discussions about a possible merger in the event that a sale could not be achieved.
- 22 DOTARS had appointed their own representatives and engaged the services of Steven Parbery of Prentice Parbery Barilla as an adviser to facilitate the sale of the Kendell and Hazelton airlines. Mr Parbery is an official liquidator. However it was clear that Mr. Parbery did not have authority to make decisions regarding Commonwealth funding. All funding decisions were made by Mr. Roger Fisher of DOTARS and the Deputy Prime Minister, Mr. John Anderson.

### **DETERIORATION OF HAZELTON'S FINANCIAL POSITION**

- 23 By mid-April 2002, the RRRP Loans had expired (Mark Mentha had written to the Commonwealth asking that the Kendell RRRP facility be rolled over) and Hazelton was continuing to incur significant trading losses. I had previously attended a Hazelton Creditors meeting at which Michael Humphris had told Hazelton's employees that he would not use money
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earmarked to pay employee entitlements to fund Hazelton's on-going trading losses.

- 24 On 19 April 2002, Mark Mentha received from Steve Parbery of Prentice Parbery Barilla a copy of a letter from Michael Humphris addressed to The Honourable John Anderson and the New South Wales Premier dated 18 April 2002 advising that without further short-term funding, Mr. Humphris would most likely recommend liquidation to the Hazelton Committee of Creditors at the forthcoming meeting.
- 25 Now produced and shown to me and marked "BJF7" is a true copy of a facsimile from Prentice Parbery Barilla enclosing letter from Michael Humphris to John Anderson and Bob Carr dated 18 April 2002.
- 26 Shortly after, Mark Mentha received by facsimile a letter dated 23 April 2002 from Peter Langhorne, Chief of Staff of the Office of the Deputy Prime Minister and Minister for Transport and Regional Services referring to the letter from Mr. Humphris and urging the Kendell Administrators to devise some strategies to assist the Hazelton Administrator to ensure a joint sale.
- 27 Now produced and shown to me and marked "BJF8" is a true copy of the letter dated 23 April 2002 from Peter Langhorne to Mark Mentha.
- 28 The letter contains handwritten notes of Mark Mentha containing the words "\$1M to 31/5". These words were written by Mark Mentha after a telephone call he had that evening with Michael Humphris which Mark Mentha later relayed to me in which Michael Humphris had said he would not continue trading the business without further funds. We knew that Hazelton was incurring between \$1M and \$1.5M per month in trading losses. In the meantime, the sale process had stalled: The bidders could not finalise their bids until they knew what level of Commonwealth assistance was proposed. However, the Commonwealth would not commit to any proposal for financial assistance until a preferred bidder was chosen. Mark Mentha proposed that Ansett pay Hazelton \$1M (on the same terms as the \$1.545M already paid to Hazelton pursuant to these proceedings) to enable Hazelton to continue



trading for an additional month and to impose a timetable for choosing a preferred bidder in the meantime to force the sale process to a head.

## KENDELL PROPOSAL OF 24 APRIL 2002

- 29 On 24 April 2002, I drafted a letter to Michael Humphris on Mark Mentha's behalf. The letter set out a proposal Mark Mentha, Leon Zwier and I had discussed the previous night. The letter proposed that the Ansett Administrators would advance Mr. Humphris \$1M on account of his entitlement to a portion of the \$150M (if any) pursuant to these Court proceedings on the same terms as the \$1.545M already advanced. The advance was made on the basis that Mr. Humphris would recommend to Hazelton's creditors at the forthcoming Hazelton Committee of Creditors meeting to continue trading for a further period of one month and a corresponding extension of the Hazelton Deed of Company Arrangement ("DOCA") in pursuit of a sale. The proposal was subject to the approval of the Commonwealth.
- 30 Now produced and shown to me and marked "BJF9" is a copy of the letter I drafted for Mark Mentha to Michael Humphris dated 24 April 2002 containing this proposal.
- 31 In the letter, I also suggested that letters should be sent to IMC and AWA giving them a period of 14 days to remedy or remove the unacceptable conditions to their previous bids (relating to additional third party finance) and that at the conclusion of the 14 day period, Hazelton and Kendell would determine whether either party was capable of being nominated as preferred bidder and if they were, a period of preferred bidder status would be granted, failing which the businesses would be wound down.
- 32 I also noted that on the appointment of a preferred bidder, further funding for Hazelton may be required to allow it to continue trading to completion and I repeated the possibilities Michael Humphris had previously raised that such funding could be sourced from:



- (a) NSW Government – by varying the terms of an existing \$3M facility (being a different facility to the Commonwealth \$3M RRRP Loan facility) of which \$500,000 had been drawn down by Hazelton to date, by for example, varying the loan to non-recourse; or
- (b) DOTARS – by re-allocating to Hazelton part or all of the then undrawn \$2.5M of the Kendell RRRP Loan facility so as to allow Hazelton to borrow a further \$2.5M from the Commonwealth.

33 I sent a similar letter on Mark Mentha's behalf to the Honourable John Anderson on the same day.

Now produced and shown to me and marked "BJF10" is a copy of a letter I drafted for Mark Mentha to The Hon. John Anderson dated 24 April 2002.

34 I always understood that it was a matter between Michael Humphris and the NSW and Commonwealth Government's as to whether and by what means they would provide such additional funding to Hazelton. I knew that Michael Humphris had already approached both the NSW and Commonwealth Governments about the possibility of obtaining further funding. I also knew that Roger Fisher had told Michael Humphris that no further funds were available in the RRRP programme other than the loans already made to Kendell and Hazelton.

35 In the meantime, I, together with Rob O'Brien and Keith Herdman of Kendell had prepared a contingency plan for Kendell involving the acquisition of certain Hazelton routes in the event that a sale could not be achieved and/or Hazelton proceeded into liquidation (given Hazelton's worsening financial position).

36 On 26 April 2002, I received a copy of a letter from Michael Humphris addressed to Mark Mentha referring to our letter of 24 April 2002 and advising that he "considers [our] proposal to be a sensible one". Mr. Humphris advised in the letter that in his circular to Hazelton creditors dated 11 April 2002, he recommended that the Hazelton DOCA be extended to 31 July 2002 but that he now intended recommending that the DOCA's be

extended to 31 May 2002 only. The letter requested that the \$1M advance be transferred to the Hazelton bank account that day.

Now produced and shown to me and marked "BJF11" is a true copy of the letter from Michael Humphris addressed to Mark Mentha dated 26 April 2002.

- 37 Later on the same day, Mark Mentha received a facsimile from the Office of the Deputy Prime Minister and Minister for Transport and Regional Services and signed by Peter Marchi, thanking him for his letter of 24 April 2002 outlining his "*commitment to finding a commercially sustainable outcome for Hazelton and Kendell airlines*" and confirming that the Commonwealth supports his efforts and would extend the time for repayment of the \$3.5M Kendell RRRP loan and the \$3M Hazelton RRRP loan. The letter stated that the "*...the Commonwealth would ask that [sic] unused portion of the Kendell loan be used to support the operations of Hazelton while a joint sales process is undertaken.*". However, the letter also provided:

*"We are prepared to consider the proposals as outlined in your letter. You will understand however that at this stage I would be unable to commit the Commonwealth to agree to any specific proposals."*

Now produced and shown to me and marked "BJF12" is a true copy of the letter from the Office of the Deputy Prime Minister and Minister for Transport and Regional Services faxed to Mark Mentha on 26 April 2002.

- 38 Also on 26 April 2002, I drafted a letter for Mark Mentha to Michael Humphris referring to our previous letter of 24 April 2002 and to Mr Humphris' reply and confirming that the sum of \$1M would be forwarded to Hazelton upon confirmation that the resolution of the Hazelton creditors has been passed.

Now produced and shown to me and marked "BJF13" is a true copy of the letter from me for Mark Mentha to Michael Humphris dated 26 April 2002.

**HAZELTON CREDITORS MEETING ON 29 APRIL 2002**

39 I attended the Hazelton creditors meeting held on 29 April 2002. At the meeting, I was presented with a memorandum prepared by the Hazelton Administrator for the creditors meeting.

Now produced and shown to me and marked "BJF14" is a true copy of the memorandum for the Hazelton creditors meeting on 29 April 2002.

40 The memorandum contained a summary of the financial performance of Hazelton from September 2001 to March 2002 and revised trading forecasts for April, May and June 2002. The summary shows total trading losses of \$12.3M for the period from 17 September 2001 to 30 March 2002 and further revised estimated trading losses of \$1.5M, \$1.7M and \$1.4M for the months of April, May and June 2002, respectively.

41 The memorandum provided at page 8 that the \$3M Hazelton RRRP Loan Facility "*has been fully drawn down and the proceeds used to operate the business to date*". The memorandum also noted at page 11 that in response to a written request to the New South Wales Government for further support to progress the sale, the New South Wales Government agreed to convert the currently drawn amount of \$500,000 of the \$3M New South Wales loan to rank equally with the loan provided by the Commonwealth Government (page 11).

42 The memorandum referred to the proposal from Mark Mentha to advance a further \$1M to Hazelton on account of these proceedings on the condition that Hazelton continues to trade for a further period to 31 May 2002 to allow bidders to further develop their bids (page 11). Mr. Humphris advised that he had accepted this proposal and that he expected a further \$1M payment shortly. At page 12 of the memorandum, Mr. Humphris recommended that the Hazelton DOCA's be extended to 31 May 2002 "so that potential purchasers may be given the opportunity to further develop their bid."

43 A notional liquidation scenario balance sheet was presented to the Hazelton creditors meeting of 29 April 2002 showing the assets and liabilities that

would be available to a liquidator of Hazelton as at 20 April 2002. The liquidation balance sheet showed a surplus of approximately \$359,000 of funds after liabilities. The liquidation balance sheet is attached to the Minutes of the Hazelton Creditors meeting.

- 44 At the meeting, a resolution was passed extending the termination date of the Hazelton DOCA to 31 May 2002 on the basis that if the Hazelton Deed Administrators determined that it was no longer practical or desirable to continue to carry on the business, they would convene a meeting of the Committee of Inspection for the purposes of considering and if thought fit passing a resolution terminating the Hazelton DOCA.

Now produced and shown to me and marked "BJF15" is a true copy of the Minutes of the third meeting of Hazelton's creditors held 29 April 2002.

- 45 Payment of the additional \$1M to Hazelton was made on or about 1 May 2002.

#### **AWA OFFER OF 30 APRIL 2002**

- 46 On 30 April 2002, the Hazelton and Kendell Administrators received by way of facsimile from Michael Jones of AWA a written offer for the joint acquisition of the Kendell and Hazelton businesses. The offer was revised from the previous offer which contained the unacceptable conditions relating to third party financial assistance.

- 47 Now produced and shown to me and marked "BJF16" is a true copy of the AWA offer to acquire Kendell and Hazelton dated 30 April 2002. I respectfully request that this document be kept confidential as it was expressed to be subject to a Confidentiality Agreement between the parties and contains the identities of proposed consortium members of AWA.

- 48 The AWA offer was subject to formal agreement which would, among other things, specify the method of acquisition, i.e. whether by way of sale of assets or shares and provide certainty as to the specific assets and liabilities to be acquired from each of Kendell and Hazelton. The letter provided that the offer would lapse if not accepted by 17 May 2002.

49 Michael Jones, the Managing Director of AWA, refused to apportion the purchase price between Kendell and Hazelton in the offer document. However, the only asset that AWA was willing to acquire from Hazelton was its rotables and spares (which AWA was then willing to acquire for \$500,000).

50 Pages 2 and 3 of the AWA offer contained a summary of the terms of the offer. A line item was included in the term sheet analysis for the Rapid Route Recovery Loan Rollover of \$6.5M. This was intended to reflect a proposal for the Commonwealth to release the RRRP Loans to assist in the sale to AWA.

51 Roger Fisher had said the Commonwealth was prepared to consider any proposal for additional funding assistance (including release of the Kendell and Hazelton RRRP Loans) provided that a joint sale of Kendell and Hazelton was concluded.

52 Page 5 of the AWA offer letter provides:

***"Rapid Route Recovery Loan Money***

*To date the Australian Federal government has provided approximately A\$6.5 million in loans to the Administrators to support the Airlines through administration under the Rapid Route Recovery Programme (RRRP). Australiawide requires the Federal Government to assist our Offer by converting the \$6.5 million RRRP Loans into a "non-recourse" facility rolled over to Australiawide. The RRRP monies are not to be repaid by Australiawide."*

53 This requirement is expressly stated to be a condition precedent of the AWA offer (Page 13 of Offer letter).

54 The AWA offer was still substantially below what would be acceptable to the Kendell Administrators and had other problems. For example,

- the cash offer for the leasehold property was substantially below Kendell's own valuation;

- the cash offer for Kendell's aircraft was substantially below Kendell's own valuation;
- the plant and equipment included some of Ansett's plant and equipment rather than Kendell's;
- the amount of the rebate on Hazelton's aircraft deposits was only an estimate (Kendell had only one aircraft security lessor where as Hazelton had 4 lessors). We worked together with Hazelton in negotiating with the security lessors to ensure AWA did not use the bonds to leverage a better deal for themselves;
- The offer letter did not include a price for Kendell's rotables and spares that were subsequently sold by Kendell to AWA.

55 Some time between 30 April 2002 and 7 May 2002 (I cannot recall the exact date), I attended a meeting at Arthur Andersen's offices in Sydney. Michael Humphris, John Morrison and another of Michael Humphris' staff members were present. Michael Jones, Michael's then lawyers from Mallesons Stephen Jacques and Simon Day from Deloitte Touche Tohmatsu ("**Deloitte**") were also in attendance representing AWA. Dominic Emmett also attended the meeting as Kendell's lawyer in the sale. The purpose of the meeting was for Michael Jones to outline in detail the offer of 30 April 2002 in an effort to be granted preferred bidder status by Kendell and Hazelton.

56 At the meeting, Michael Jones said that the proposal was for Kendell and Hazelton to get the benefit of the release of the \$6.5M RRRP loans. Michael Humphris and I were happy with this as it meant we did not have to repay the Hazelton and Kendell RRRP Loans and the release of the loans would effectively "gross up" AWA's offer to help bridge the gap between AWA's best price and the minimum amount we were prepared to sell the Hazelton and Kendell businesses for. Hazelton had sufficient cash reserves to repay the Hazelton RRRP Loan and would have benefited from a release of the obligation to repay.





## AWA GRANTED PREFERRED BIDDER STATUS

57 On 7 May 2002, agreement was reached between the Hazelton and Kendell Administrators and Michael Jones of AWA to provide AWA with preferred bidder status for a period of 14 days. A deposit of \$250,000 was made by AWA into the trust accounts for the solicitors of the Hazelton and Kendell Administrators. A copy of the preferred bidder status letter forms exhibit "MJH1" to Humphris' Affidavit. Preferred bidder status was granted to AWA in direct response to AWA's written offer of 30 April 2002.

## MISTAKE IN AWA OFFER LETTER

58 Some time after the meeting at Arthur Andersen's office, I re-read the AWA offer letter of 30 April 2002 to ensure it complied with my understanding of Michael Jones' explanation of how the proposal worked. If Michael Jones' explanation was correct, namely, that the Kendell and Hazelton Administrators would get the benefit of the release of the \$6.5M RRRP Loans, then the cash impact on the Administrators in the offer letter should have been "\$6.5M" and the cash payment from AWA should have been "zero". However, the offer letter stated that the cash impact on the Administrators was "\$6.5M" and that the cash payment from AWA was "(6.5M)" or negative \$6.5M. The benefit of the release of the \$6.5M RRRP Loans could not go to both the Kendell and Hazelton Administrators and to AWA.

59 I telephoned Simon Day from Deloitte and later Michael Jones and explained that there was a mistake in the offer letter and that the reference at page 2 of the AWA offer letter to the cash payment from AWA for the Rapid Route Recovery Loan Rollover should be "zero" as the effect of the release of the RRRP Loans on AWA was neutral. However, Michael Jones told me that the proposal was for AWA (not Kendell and Hazelton) to get the benefit of the release of the RRRP Loans (in which case the cash impact on the Administrator of the Rapid Route Recovery Loan Rollover in the AWA offer letter should be "zero" rather \$6.5M) and Kendell and Hazelton would have to pass on the benefit of the RRRP Loans to AWA. I was annoyed that



Michael Jones had changed his position. I was forced to renegotiate the terms of the sale of Kendell's rotables and spares to AWA and the terms of the leases on Kendell's aircraft to take into account AWA's intention to take the benefit of the release of the RRRP Loans.

- 60 I telephoned John Morrison the same night to tell him about the mistake in the AWA offer letter and my telephone conversation with Michael Jones. Subsequently, I also spoke with Michael Humphris and told him that Michael Jones now required that the benefit of any release by the Commonwealth of the \$6.5M RRRP Loans must go to AWA (not Kendell and Hazelton).

### COMMONWEALTH LETTER OF 21 MAY 2002

- 61 On 21 May 2002 I received from Mark Mentha a copy of a facsimile he received from the Office of the Deputy Prime Minister and Minister for Transport and Regional Services dated 21 May 2002.

Now produced and shown to me and marked "BJF17" is a true copy of the letter from the Office of the Deputy Prime Minister and Minister for Transport and Regional Services addressed to Mark Mentha dated 21 May 2002.

- 62 The letter formally proposed a level of financial assistance that the Commonwealth might be prepared to offer to facilitate the sale of Kendell and Hazelton. The letter stated that the areas where the Commonwealth might be willing to offer assistance included:-

- (a) Coming to a satisfactory agreement in relation to the \$3M and \$3.5M loans previously provided to Hazelton and Kendell Airlines;
- (b) Provision of a further amount up to \$5M under the Rapid Route Recovery Scheme to support services to communities served only by Hazelton or Kendell Airlines.

The letter stated:

*"Any assistance would of course be conditional upon a contract of sale being concluded between Australiawide and the Administrators, and the satisfactory conclusion of due diligence".*

The letter invited Mark Mentha to liaise with AWA and the Hazelton Administrator on whether the parties proposed to proceed on this basis before he put a final proposal to the Deputy Prime Minister for his consideration. The letter was copied to Michael Humphris.

### **MICHAEL HUMPHRIS NEGOTIATES DIRECTLY WITH AWA**

- 63 I refer to paragraph 14 of Humphris' Affidavit and to the Heads of Agreement executed between Michael Humphris and Michael Jones of AWA on 21 May 2002 which forms exhibit "MJH2" to Humphris' Affidavit. I knew that Hazelton was seeking to conclude a sale transaction with AWA prior to a simultaneous settlement in order to limit its ongoing trading losses.
- 64 On about 5 June 2002 Michael Jones telephoned me to advise that Michael Humphris had come to see him the previous evening and AWA had agreed to purchase the shares in Hazelton early on the basis that the Kendell sale was more complicated and would take longer to conclude.
- 65 Michael Jones walked me through the agreement and told me that AWA agreed to pay \$400,000 for the shares in Hazelton less employee entitlements for those employees transferring to AWA. I asked Michael Jones whether a deduction was made to the Hazelton purchase price for passing on the benefit of the \$3M Hazelton RRRP Loan to which he said "no". I was angry that Michael Humphris had tried to do a deal with AWA behind Kendell's back which did not pass on the benefit of the release of the \$3M Hazelton RRRP Loan when he knew that AWA was expecting a \$6.5M reduction to the overall purchase price in part for the release of this loan. I told Michael Jones that AWA would not get the benefit of the \$6.5M reduction on the purchase price without Hazelton bearing its portion of that deduction. I told him that Kendell would not subsidise Hazelton to the tune of \$3M. The conversation lasted for about 30 minutes.



66 Michael Humphris knew that the Commonwealth required the survival of both Kendell and Hazelton as part of its regional aviation solution and that further Commonwealth funding would be put at risk if a cooperative approach was not taken. He also knew that all serious bidders required both Kendell and Hazelton.

67 I understood that AWA's refusal to proceed with early settlement with Hazelton separately was because of my telephone conversation with Michael Jones and because the Hazelton share sale agreement failed to take into account the proposal to pass on the benefit to AWA of the \$3M Hazelton RRRP Loan.

68 I refer to paragraph 15 of Humphris' Affidavit and to a letter that I wrote on behalf of Mark Mentha to Michael Humphris dated 6 June 2002 which forms exhibit "MJH3" to the Humphris' affidavit. This letter crossed with Michael Humphris' letter to Mark Mentha of the previous day. In that letter I advised Mr Humphris that:

*"...we have spoken with Michael Jones of Australiawide and are concerned to discover from Australiawide that the benefit of the release of this \$3M Rapid Route Recovery Loan to Hazelton had not been dealt with in the contract between Hazelton and Australiawide".*

*We have put Australiawide on notice that the release must be dealt with in the contract and we reiterate the same point to you. For your information, we attach a copy of a letter sent yesterday by our solicitors to the solicitors acting for Australiawide in this regard.*

*The \$3 million loan was provided by the Federal Government to support Hazelton's continued operations and to facilitate the sale. The release of the \$3 million loan and the consequential benefit to Australiawide that it gives rise to is, of course, conditional upon the sale of Hazelton.*

*Failure on your part to pass on the benefit of the release would result in you being unable to meet the Federal Government's condition which failure would prevent consummation of the transaction contemplated and originally agreed between us and Australiawide. Indeed, continuing*



*failure on your part to address this issue may prejudice the Federal Government's continuing support and the solicitors acting for Australiawide have informed us that Australiawide will not contract with you until this issue is resolved...."*

69 On 5 June 2002 Mark Mentha received by way of facsimile from Michael Humphris a letter that crossed with our letter complaining of my intervention in the Hazelton sale and the requirement that a payment of \$3M needs to be made by Hazelton to Kendell prior to completion of any sale to AWA. The letter was copied to Andrew Parle of DOTARS and Steve Parbery and stated:

*"Ignoring for the moment the contractual and legal obligations of the administration of the Federal Government loan, there is simply not a sum of \$3M available to the Hazelton administration to make a payment to Kendell. Accordingly, without the consent of affected priority creditors in the Hazelton administration, there is no ability to make this payment. It is noted that the Federal Government will be required to determine the status of the loans provided to both Kendell and Hazelton and this determination will impact on any amounts capable of being paid by Hazelton to Kendell.*

*In order to facilitate the completion of the sale process to Australiawide, I have advised Australiawide that I would be prepared to acknowledge a "carve out" from the Federal Court Air New Zealand proceedings. This "carve out" would be equal to the amount that is provided from Kendell from further draw-downs from the Rapid Relief Route Recovery Loans - provided that such loans are repayable by Kendell to the Federal Government. Agreements are already in place to deal with funds advanced to date i.e. \$2.545M.*

*This is in the absence of a negotiated commercial settlement of the matter. ... regardless as to whether our proposed settlement discussions take place or are successful, the matter of progressing the sale with Australiawide is paramount to both administrations...."*

Now produced and shown to me and marked "BJF18" is a true copy of the letter from Sims Lockwood to Mark Mentha dated 5 June 2002.

70 Our letter of 6 June 2002 referred to a letter I had instructed Dominic Emmett to write to AWA's lawyers on 5 June 2002. In that letter, Dominic Emmett referred to the AWA offer of 30 April 2002 and reiterated that it was for AWA and Hazelton (not Kendell) to ensure the benefit of the release of the \$3M Hazelton RRRP Loan was passed on to AWA presumably by way of adjustment to the purchase price.

71 Now produced and shown to me and marked "BJF19" is a true copy of an e-letter from Dominic Emmett to David Selig of Coudert Brothers, lawyers for AWA dated 5 June 2002.

72 I refer to paragraph 16 of Humphris' affidavit and to Mr. Humphris letter in reply to our letter of 6 June 2002 which forms exhibit "MJH4" to Humphris' affidavit. In the letter, Michael Humphris disagrees with my contention that the benefit of the \$3M loan must be accounted for in the sale between Hazelton and AWA and invites Mark Mentha to meet with him in person to attempt to negotiate a settlement of the litigation. Both letters were copied to Roger Fisher of DOTARS.

73 By letter dated 24 June 2002 from Michael Humphris to Michael Jones, Mr Humphris purported to terminate the Heads of Agreement with AWA and thereby the preferred bidder status granted to AWA allowing Hazelton to treat with other potential purchasers.

Now produced and shown to me and marked "BJF20" is a true copy of the letter from Mr Humphris to Michael Jones dated 24 June 2002.

74 In the letter, Mr. Humphris encouraged AWA to re-submit a revised offer for the acquisition of Hazelton only. The letter states:

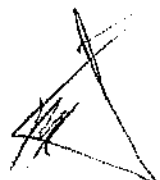
*"Australiawide is, of course, encouraged to submit any amended proposal for the acquisition of Hazelton only".*



## COMPLICATIONS IN THE SALE OF KENDELL

75 I had previously assisted in the sale of Aeropelican, another Ansett regional airline under the control of Mark Mentha and Mark Korda. The sale of Aeropelican settled on 24 April 2002. However, the sale was not as complicated as the sale of Kendell to AWA proved to be. This sale was one of the most complicated transactions that I have worked on for a number of reasons including:

- (a) Intense political pressure from the Commonwealth and State governments which required a "*regional aviation solution*" to be delivered including the offer of financial assistance contingent on a joint sale of both Kendell and Hazelton. This pressure had intensified after the failure of the Tesna Consortium to purchase the Ansett mainline airline on 26 February 2002;
- (b) The fact that most bidders required the acquisition of both Kendell and Hazelton which were under separate administrations run by separate Administrators with separate management teams, IT systems, infrastructure and the like;
- (c) the high profile nature of the Ansett collapse and the large number of stakeholders and the requirement to renegotiate all industrial agreements with the pilots and other unions before the sale was completed;
- (d) the requirement to negotiate the removal of a \$325M debt in Kendell associated with the Canadian Regional Jet ("CRJ") fleet not part of the proposed sale to AWA with the financier and Receiver of the CRJ fleet;
- (e) Kendell's on-going trading losses for continuing to trade to completion of a sale (Kendell's trading losses had increased from an average of about \$500,000 per month from September 2001 to January 2002 to between \$1M and \$1.5M per month following the



collapse of the Tesna bid and the cessation of Ansett's flying operations in about March 2002).

### 13 JUNE 2002 MEETING IN CANBERRA

76 I was in attendance at the 13 June 2002 meeting in Canberra. The substance of what occurred at that meeting is set out in paragraphs 61 to 68 inclusive of Leon Zwier's affidavit sworn 20 September 2002 ("**Leon Zwier's affidavit**").

77 At the start of the meeting, Michael Jones set out on the white board the commercial deal for the acquisition by AWA of Kendell and Hazelton.

Now produced and shown to me and marked "**BJF21**" is a print out of the whiteboard presentation of Michael Jones setting out the commercial basis upon which AWA was acquiring Kendell and Hazelton.

78 The final item on the whiteboard print-out shows an allowance for \$6.5M with the words "Fed RRRP" next to it and an allocation of \$3M to Hazelton and \$3.5M to Kendell. Michael Jones was expecting a \$6.5M deduction to the purchase price from the release of the Kendell and Hazelton RRRP Loans.

79 Kendell could fund \$3.5M of this deduction if the Commonwealth released us from the obligation to repay the Kendell RRRP Loan. Hazelton would be required to fund the remaining \$3M by the Commonwealth releasing it from its obligation to repay the Hazelton RRRP Loan. The Commonwealth was prepared to consider writing off the RRRP loans upon completion of the sale of Kendell and Hazelton to AWA. However, the value of Hazelton's assets notionally being purchased by AWA (\$400,000) was not as large as the Hazelton RRRP Loan (\$3M) to be released and passed on to AWA. AWA would not accept payment from Hazelton by way of transfer of assets (it wanted cash) so Kendell would have had to agree to bear the \$3M deduction on Hazelton's behalf. However, Kendell could not allow Kendell's assets to be used to subsidise Hazelton.

80 The compromise reached at the 13 June 2002 meeting and set out in Leon Zwier's white board presentation which forms exhibit "15A" to Leon Zwier's



affidavit provided a solution to this problem. In return for the \$3M that Kendell would deduct on Hazelton's behalf from the purchase price, Hazelton would transfer to Kendell assets to the equivalent value not being sold to AWA, being:

- |     |                           |                    |
|-----|---------------------------|--------------------|
| (a) | the airport land at cudal | \$200,000 (est.);  |
| (b) | spares & rotables         | \$500,000 (est.);  |
| (c) | plant & equipment         | \$400,000 (est.);  |
| (d) | aircraft security bonds   | \$1.450,000 (est.) |

plus an amount of \$500,000 in relation to this litigation (The \$500,000 allowance was in addition to the \$2.54M already paid to Hazelton on account of its entitlement (if any) to a portion of the \$150M Air New Zealand settlement). Ansett agreed not to seek to recover the \$2.54M already paid to Hazelton in full and final settlement of the litigation.

- 81 The compromise also ensured that Hazelton's employees would receive the same dividend as Kendell's employees which satisfied John Morrison's concern that Hazelton's employees be no worse off than under a liquidation scenario.
- 82 John Anderson was aware of the disagreements between the Kendell and Hazelton Administrators about the RRRP Loans and he wanted the matter resolved and a sale consummated. The Commonwealth was providing funding for the SEESA payments and did not want its money to be spent on major litigation between the parties.
- 83 I refer to paragraphs 16 and 17 of Morrison's Affidavit. It is not true that "the real concern of the Defendants was that AWA was only prepared to offer Kendell \$6.5 million less to purchase the Kendell aircraft it wished to buy than Kendell wanted to sell them for.". It was apparent to all present at the 13 June 2002 meeting (and had been for some time) that the \$6.5 million reduction to the purchase price was solely to pass on the benefit of the release of the RRRP Loans. Negotiations were separately conducted between Kendell and AWA about the price AWA was prepared to pay for

Kendell's aircraft, spare parts and other assets (just as Hazelton had separately negotiated the price of its rotables and spares).


84 I refer to paragraph 12 of Morrison's affidavit and paragraph 18 of Humphris' affidavit. It was never agreed at the 13 June 2002 meeting or before that Kendell would provide Hazelton with the benefit of the as then undrawn \$2.5M from the Kendell RRRP Loan facility. At the time, the Kendell RRRP Loan had expired and funds were not available to Kendell under the RRRP Loan facility. In any event, there was never any commercial or legal basis by which we could justify to Kendell's creditors the use the Kendell RRRP Loan to benefit Hazelton. Kendell would be at a severe disadvantage if we drew down \$2.5M for the benefit of Hazelton.

85 I refer to paragraph 20 of Humphris' Affidavit. It was similarly not a "requirement" of the Commonwealth that Kendell apply the unused portion of the Kendell RRRP Loan to enable Hazelton to continue trading. The Kendell RRRP Loan Agreement prohibited use of the money for any purpose other than to meet the expenses of carrying on Kendell's business operations (see paragraphs 14, 15 and 16 above). It was not in the interests of Kendell's creditors to give the money to Hazelton. It was a matter for the Commonwealth whether it would provide additional funding to Hazelton and it was not prepared to do so (It was coming to the end of the financial year and the Rapid Route Recovery Loan programme had expired).

86 Since the cessation of Ansett flights in about March 2002 following the withdrawal of the Tesna bid, Kendell was losing between \$1M and \$1.5M per month and needed the funds itself (Kendell was far more dependant on Ansett than Hazelton, which operated as a stand-alone airline. For example, Kendell shared many services with Ansett and the same flight designator and when Ansett ceased flying, many people wrongly assumed Kendell also ceased operations). Roger Fisher said that if there was an agreement at that meeting on 13 June 2002 the Commonwealth would allow us to draw down the balance of the Kendell RRRP Loan as we needed it to pass on the benefit to AWA by way of deduction in the purchase price.

- 87 Following the 13 June meeting, the Commonwealth renewed the Kendell RRRP Loan and allowed Kendell to draw down the unused portion of the Kendell RRRP Loan. We would have drawn down the unused portion of the Kendell RRRP Loan facility earlier but we had always operated on the assumption that the loan ranked to priority. In order to effect the settlement reached at the 13 June meeting, and for the Kendell Administrators to be in a cash neutral position and to pass on the benefit of the Kendell RRP Loan to AWA, we needed to draw down the balance of the Kendell RRP Loan.
- 88 I refer to paragraph 20 of Morrison's Affidavit. The compromise with Hazelton was not conditional on provision by the Kendell Administrators of a liquidation scenario for Kendell although one was requested and prepared (I do not recall whether it was ever provided).
- 89 Because the Canberra meeting went longer than expected, I missed the last flight from Canberra to Sydney and accordingly decided to stay at the hotel where John Morrison was staying in Canberra. After the meeting, I suggested to John Morrison that we meet for dinner to which he agreed. At dinner, John Morrison said he had spoken to Michael Humphris on the phone after the meeting and that Michael Humphris was pleased with the settlement because we guaranteed Hazelton employees would be paid in full.
- 90 After the 13 June 2002 meeting, Leon Zwier was to take responsibility for drafting the settlement deed and getting the deal consummated, together with Mark Korda.

#### **EXECUTION BY KENDELL AND HAZELTON OF SHARE SALE CONTRACTS WITH AWA**

- 91 On 28 June 2002, contracts for the sale of shares in Kendell and Hazelton to AWA were executed. These contracts form exhibits "LZ17" and "LZ18" to Leon Zwier's affidavit. Our experience with Tesna (as well as Aeropelican and Skywest) was that the Civil Aviation Safety Authority ("CASA") would require between 3 and 6 months to assign an Air Operators Certificate ("AOC") if there was a sale of assets. Michael Jones would not have waited
- 

this long for the sale to be consummated. It was on this basis that a decision was made early on in the sale process by all parties to proceed by way of sale of shares rather than by way of sale of assets.

- 92 For example, on 20 June 2002, Dominic Emmett of Corrs Chambers Westgarth on my instructions sent a letter to the solicitors for AWA in relation to the draft share sale agreement provided by lawyers for AWA. Page two of the letter provides:

**"AOC**

*As discussed and agreed previously, the very reason the transaction is being structured as a share sale is to avoid the need to transfer the AOC. The AOC resides in Kendell which you propose to acquire".*

- 93 Now produced and shown to me and marked "BJF22" is a true copy of the letter from Corrs Chambers Westgarth to Coudert Brothers dated 20 June 2002.

**MICHAEL HUMPHRIS ATTEMPTS TO RENEGOTIATE SETTLEMENT DEED**

- 94 I first became aware that Michael Humphris was dissatisfied with the settlement agreement he had made with Kendell in about the middle of July 2002 when he approached Mark Korda to renegotiate the deed. The Settlement Deed did not guarantee that all liabilities ranking ahead of employee entitlements, such as Administrators' fees and the costs and expenses of the Administration, would be paid in full. Further, by continuing to trade, Hazelton was using funds to cover trading losses that had been allocated to cover employee entitlements. I believed Mr Humphris had by that time traded the business to a position such that there were insufficient assets to meet the liabilities incurred by him and to honour a commitment he made to priority creditors to meet their claims in full.

- 95 I refer to paragraph 10 of Morrison's affidavit. It is not correct to say that Hazelton was incurring trading losses "for reasons entirely beyond its control but entirely within Kendell's control.". Kendell was doing all it could to ensure a speedy settlement of the transaction and was delayed only by

matters involving third parties such as negotiating an arrangement with the Receiver and secured creditors of the CRJ fleet. Kendell was not responsible for Mr Humphris' decision to continue to trade the business at the risk of eroding employee entitlements. Kendell (Rob O'Brien, Keith Herdman and myself) had prepared a contingency plan in the event that Hazelton ceased trading and proceeded into liquidation. It was always clear that settlement would not occur for some time after sale contracts were signed. For example, the AWA offer of 30 April 2002 proposed a settlement date of 30 July 2002.

### **MICHAEL HUMPHRIS PURPORTS TO TERMINATE HAZELTON SHARE SALE CONTRACT WITH AWA**

- 96 I refer to paragraph 45 of Humphris' Affidavit and to Mr Humphris' lawyers letter to AWA's lawyers purporting to terminate the Hazelton share sale contact which forms exhibit "MJH15" to Humphris' affidavit.
- 97 I refer also to paragraphs 124 to 126 (inclusive) of Leon Zwier's affidavit and to the letter from Mr Humphris to Mark Korda dated 24 July 2002 which forms exhibit "LZ34A" of Leon Zwier's affidavit. In the letter, Mr Humphris claimed that the Settlement Deed would be "non-existent" but at the same time, he made an alternative proposal for settlement of these proceedings pursuant to which Mark Korda would indemnify him for any shortfall in the Hazelton Administration after meeting liabilities of the administration and payment in full of employee entitlements.
- 98 Unbeknown to Mark Korda and me at the time, Mr Humphris' lawyers had also written to AWA's lawyers advising that depending on the decision of the Hazelton Committee of Creditors the Hazelton Administrator would be prepared to discuss a proposed deed of resurrection of the current Hazelton share sale contract. The letter forms exhibit "MJH17" of Humphris' affidavit.

### **CASA WILLING TO ASSIGN AOC TO AWA**

- 99 In the meantime, after the intervention of the Commonwealth, CASA agreed to assign Kendell's AOC to AWA within 48 hours to enable the Kendell sale



to proceed by way of asset sale (and thereby overcome the CRJ issue). These matters are set out in paragraphs 106 to 113 (inclusive) of Leon Zwier's affidavit.

100 On the afternoon of 25 July 2002, AWA's lawyers faxed to Mr Humphris and Mark Korda a letter which forms exhibit "MJH 19" to Humphris' affidavit. In the letter, AWA's lawyers referred to the "recent and significant change of circumstances surrounding the proposed acquisition by AWL of the shares in Kendell... and Hazelton" and advised that:

*"...AWL remains ... willing to acquire all the assets and business operations of Kendell and the Hazelton Companies ... at the same prices and on essentially the same terms and conditions, as have already been negotiated in the context of the abovementioned Share Sale Agreements..."*


101 On 25 July 2002, Michael Jones of AWA sent a formal letter to CASA applying for the AOC's in respect of Kendell and Hazelton.

102 Now produced and shown to me and marked "BJF23" is a true copy of a letter from AWA to Mick Toller of CASA dated 25 July 2002.

103 I am told by Mark Mentha that on 26 July 2002 he received by way of facsimile from CASA a letter enclosing a copy of a letter sent by the Director of Aviation Safety, Mick Toller, to Michael Jones of AWA advising that there would be no difficulties or delays in issuing new AOCs to AWA in respect of each of Hazelton and Kendell.

104 Now produced and shown to me and marked "BJF24" is a true copy of the letter from CASA to Mark Mentha enclosing the letter from CASA to Michael Jones dated 26 July 2002.

105 I do not believe that Mark Korda and Mark Mentha would have executed the Kendell share sale contract or the Kendell asset sale contract if they had believed that the Settlement Deed with Mr. Humphris was of no force and effect because they had effectively discounted the Kendell purchase price by an additional \$3M for and on behalf of Hazelton.




**26 JULY 2002 HAZELTON CREDITORS MEETING**

106 I refer to paragraph 55 of Humphris' affidavit and to the minutes of that meeting which form exhibit "MJH22" of Humphris' affidavit. I was in attendance at the Hazelton Committee of Creditors Meeting on 26 July 2002. The meeting was mostly taken up with discussion about whether Hazelton would proceed with a sale to AWA or with a new offer received the previous night from International Air Parts Consortium trading as "Horizon Airlines". I had sold Aeropelican to Horizon and was aware of their interest in purchasing Hazelton. However I doubted that Horizon had the funding to purchase Hazelton in the timeframe required and in any event, I knew that it would take Horizon at least a month to do due diligence. The Commonwealth would also not release Kendell and Hazelton from the requirement to repay the RRRP Loans if the joint sale to AWA did not proceed.

107 Michael Humphris also claimed that the Settlement deed was no longer in force. He said the Commonwealth and Kendell owed him \$2.5M from the Kendell RRRP funds. He said that he would not do the deal with AWA unless he could be assured he could pay the costs of the Hazelton administration and employee entitlements in full (see top of page 16 of Minutes). The meeting was adjourned to allow Michael Humphris further time to consult with Mark Korda and the Commonwealth.


**26 JULY 2002 MEETING AT PRENTICE PARBERRY BARILLA**

108 I refer to paragraph 56 of Humphris' Affidavit. At the meeting at the offices of Prentice Parberry Barilla, Michael Humphris let it be known that he was dissatisfied with the compromise reached with Kendell. He was angry and said that he would not proceed with the sale to AWA unless we could do a better deal. I told Michael that I did not know the status of the Settlement Deed or of his discussions with Mark Korda (I had not even seen the settlement deed), but that Dominic Emmett and I were prepared to listen to any proposal he might wish to make which would help him change his mind about completing the sale AWA.



- 109 However, I advised Michael Humphris that I had no authority to reach any deal with him that day and that I would need to speak to Mark Korda about his proposal. Further, neither Dominic Emmett nor I ever stated that such a proposal would be acceptable to or accepted by Mark Korda. Michael Humphris knew that Dominic Emmett was engaged by the Kendell Administrators solely to oversee the Kendell sale to AWA, that he had not been involved in the settlement discussions and that those discussions had been conducted with Mark Korda and Leon Zwier for Kendell.
- 110 Following the meeting, Dominic and I telephoned Mark Korda who was in transit to a function in the country with Mark Mentha. Mark Korda said he and Mark Mentha would consider Michael Humphris' proposal over the weekend. On the morning of Monday 29 July 2002, Dominic Emmett and I telephoned Mark Korda from Corrs' office in Sydney. Mark said that he would not be bullied into renegotiating an agreement that had already been agreed and executed.

#### **29 JULY 2002 HAZELTON CREDITORS MEETING**

- 111 Before the Hazelton Creditors Meeting was resumed on Monday 29 July 2002, Dominic Emmett and I met with Michael Humphris and John Morrison at the offices of Sims Lockwood in Sydney. Dominic Emmett politely told Michael and John that Mark Korda would not agree to his proposal to vary the settlement deed. Michael Humphris was angry and walked out of the meeting.
- 112 I refer to paragraphs 59 and 60 of Humphris' affidavit. I was in attendance at the resumed Hazelton Committee of Creditors Meeting on 29 July 2002. The purpose of the meeting was to let the Committee vote on whether to proceed with the sale to AWA. My principal concern in voting in favour of the resolution at the meeting was to get the AWA deal through. I do not recall the precise wording of the resolution. I do not recall voting and did not intend to vote in favour of a resolution to continue the litigation with Ansett. In any event, I considered that I was voting in my capacity as a representative of Kendell (not Ansett).
- 



113 I note from the minutes which form exhibit "MJH24" to Humphris' affidavit that the resolution was apparently framed so that there was no alternative in voting for the AWA sale to proceed but to also vote in favour of a resolution to continue this litigation against Ansett. I also note from the Minutes that the Commonwealth representative, Andrew Parle, also voted in favour of the resolution. It was certainly not the Commonwealth's view that this litigation should continue. The resolution was on a show of hands.

114 I note from the Minutes that Mr Humphris advised the resumed meeting that on Friday 26 July 2002 he had received a letter from the solicitors for AWA advising that AWA had that day signed a Deed with the Kendell Administrators to purchase the assets of Kendell "on essentially the same basis as its earlier agreement dated 28 June 2002" and that AWA had tendered a cheque for \$400,000 to demonstrate AWA's continuing desire to complete the sale from Hazelton. Mr Humphris explained to the meeting that he had terminated the Hazelton share sale contract because AWA could not complete by the required date but that "the Hazelton Administrators were looking to reinstate exactly that contract."

#### **REINSTATEMENT OF HAZELTON SHARE SALE CONTRACT**

115 I refer to the Deeds of Reinstatement executed by the Hazelton Administrator on 29 July 2002 and on 31 July 2002 which form exhibit "MJH25" of Humphris' affidavit and exhibit "LZ35" of Leon Zwier's affidavit, respectively. Clause 2 of the Deeds provides:

**"2 Status of Deed of Variation**

*The parties unconditionally and irrevocably acknowledge and agree that with effect from the date of this Deed of Reinstatement:*

- (a) *the Notice given by the Vendor and the Deed Administrators on 22 July 2002 is withdrawn and deemed never to have been given;*  
*and*



(b) *the Vendors' Notice of 25 July 2002 confirming that the Agreement has been terminated and is of no further force and effect on the Purchaser is deemed to have never been given."*

116 Clause 4 of the Deeds of Reinstatement provides:

*"The parties agree to reinstate the Agreement (as varied by this Deed) as though re-executed by the parties on the date of this Deed ... and accordingly the parties acknowledge and confirm the terms and conditions of the Agreement (as varied by this Deed) are in full force and effect as from the date of this Deed."*

### **COMPLETION OF SALE OF HAZELTON & KENDELL TO AWA**

117 I refer to paragraphs 65 to 67 of Humphris' Affidavit. Dominic Emmett and I were in attendance at the settlement of the Kendell and Hazelton sales to AWA at the offices of Corrs in Sydney. Completion commenced at about 4.00 pm on 31 July 2002 and we were ready to sign the Kendell Sale Contract by about 1 am in the morning. However Michael Humphris continued separate discussions with Macquarie and the other Hazelton aircraft security lessors throughout the rest of the night and morning.

118 I refer to paragraph 66 of Humphris' affidavit in which Mr Humphris deposes that neither Dominic Emmett nor I raised any concerns about Mr Humphris' ability to negotiate the final arrangement with aircraft security lessors in relation to the return of the aircraft security deposits or laid any claim to any part of the proceeds which reverted to Hazelton. Neither Dominic Emmett nor I was privy to any of the discussions Mr Humphris was having with the security lessors throughout the night of 31 July 2002. I had not at the time seen nor did I have a copy of any of the Settlement Deed, the Hazelton Share Sale Contract or the Hazelton Deed of Reinstatement (I was only aware generally of the contents of those documents from discussions with Mark Korda). I was not aware of the specific obligations in the Settlement Deed and the timing of those obligations. In any event, Mr Humphris knew that neither Dominic Emmett nor I were involved in the negotiation or drafting of the Settlement Deed.



- 119 The Hazelton Administrator was supposed to transfer to Kendell the aircraft security deposits recovered from the aircraft security lessors as part of the settlement (see paragraph 80). I do not know precisely how much money Hazelton recovered from the aircraft security lessors as Kendell was excluded from those discussions. However, I know that Hazelton negotiated directly for the release of the aircraft security deposits from each of SAAB, CBA, Tyco and Macquarie and obtained some substantial amount of money from those negotiations.
- 120 At the time of completion of the Kendell and Hazelton sale agreements on 31 July 2002, I assumed and believed that the compromise reached with Hazelton remained on foot although I knew that Mr Humphris had sought to renegotiate it. I always regarded the \$3M by which the Kendell purchase price was reduced on account of the Hazelton RRRP Loan forgiveness as Kendell's money. Further, I do not believe that Mr Humphris ever believed that Mark Korda and Mark Mentha had accepted his position that the Settlement deed was of no force and effect.

#### **COMMONWEALTH RELEASE OF RRRP LOANS**

- 121 The Commonwealth has always said that the release of Kendell and Hazelton from the requirement to repay the Kendell and Hazelton RRRP Loans was conditional on completion of the sales of Kendell and Hazelton to AWA. On 19 July 2002, we received a letter by way of facsimile from Linda Holub, Assistant Secretary, Industry Programmes Branch of DOTARS. The letter provides (omitting formal parts):

*"I refer to the Deed of Settlement for the sale of Kendell and Hazelton Airlines to Australiawide, and thank you for the opportunity to comment on it.*

*I note in particular Clause 3.1.2.1 of the Deed which states, as a condition precedent of the agreement, that the Commonwealth either assigns the right of recovery of the loans granted to the Ansett Administrators under the Rapid Route Recovery Scheme (RRRS) to Australiawide and/ or waives the debt entirely.*



*I though[sic] that it would be prudent at this point to clarify the Commonwealth's position with respect to the repayment or possible waiver of each of the debts.*

*The Commonwealth has certain responsibilities and accountabilities with regard to the proper use and management of public money, including debts owed to the Commonwealth. These responsibilities and accountabilities are outlined under the Financial Management and Accountability Act 1997 (the FMA Act), and Department of Finance guidelines. Any decision to release the Ansett Administrators from their responsibility would require the Finance Minister to waive the debt, in accordance with Section 34 of the FMA Act.*


*Any decision by the Commonwealth on how to treat the debt will, however, be conditional on the completion of the sale of Kendell and Hazelton Airlines."*

122 The letter was addressed to Mark Mentha and a letter in identical terms was sent to Michael Humphris.

123 The Commonwealth has not required the Kendell Administrators either verbally or in writing to repay the Kendell RRRP Loan. I do not believe that the Commonwealth has required the Hazelton Administrator to repay the Hazelton RRRP Loan. The Kendell Administrators have not yet requested that the Commonwealth formally release them from the requirement to repay the Kendell RRRP Loan in accordance with Section 34 of the Financial Management Act but I understand that Mark Korda and Mark Mentha presently intend to do so.

SWORN by BRADLEY JAMES )  
FOWLER at Sydney in the State of New )  
South Wales on 13 March 2003 )

Before me:

  
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*Paul Heath*  
Solicitor  
Paul Heath

