

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)

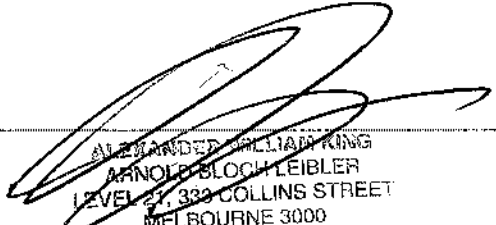
and

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

CERTIFICATE IDENTIFYING EXHIBIT

This is the exhibit marked "MAK-51" 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, 332 COLLINS STREET
MELBOURNE 3000
A NATURAL PERSON WHO IS A CURRENT
PRACTITIONER WITHIN THE MEANING OF
THE LEGAL PRACTICE ACT 1996

Exhibit "MAK-51"
**Final orders of the Court and Justice
Goldberg's reasons for judgment in the
Abbreviated Notice Application**



FEDERAL COURT OF AUSTRALIA

In the matter of Ansett Australia Limited and Mentha [2002] FCA 2

CORPORATIONS LAW – external administration – application under ss 447A and 447D of the *Corporations Act* 2001 (Cth) – directions and orders sought in respect of notice to creditors of meeting convened under s 439A of the *Corporations Act* 2001 (Cth) – meaning of giving written notice – whether notice of meeting in newspaper advertisements and on websites satisfies s 439A(3) of the *Corporations Act* 2001 (Cth) – whether reasonably practicable to send written notice to each creditor known to administrators – whether cost disproportionate to end and object to be achieved – importance of giving notice of meeting to creditors.

WORDS & PHRASES – “notice”, “reasonably practicable”

Corporations Act 2001 (Cth): Pt 5.3A, ss 439A(3), 439A(4), 447A
Corporations Regulations 2001 (Cth): reg 5.6.12

Slivak v Lurgi (Aust) Pty Ltd (2001) 177 ALR 585 applied
Marshall v Gotham Co Ltd [1954] AC 360 referred to

IN THE MATTER OF ANSETT AUSTRALIA LIMITED (ACN 004 209 410) & ORS (All Administrators Appointed) and MARK FRANCIS XAVIER MENTHA and MARK ANTHONY KORDA (As Administrators)

V 3106 of 2001

GOLDBERG J
7 JANUARY 2002
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY

V 3106 of 2002

IN THE MATTER OF:

ANSETT AUSTRALIA LIMITED
(ACN 004 209 410) & ORS
(All Administrators Appointed)
(see attached Schedule)

AND:

MARK FRANCIS XAVIER MENTHA and
MARK ANTHONY KORDA
(As Administrators)

Plaintiffs

JUDGE: **GOLDBERG J**
DATE OF ORDER: **7 JANUARY 2002**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. Pursuant to s 447A of the *Corporations Act* 2001 (Cth) ("the Act"), Pt 5.3A of the Act is to operate in relation to each company set out in the Schedule to the reasons for judgment accompanying this order ("the said companies") as if:
 - (a) s 439A(3) provided that the administrators must convene the meeting required to be convened in accordance with s 439A(1) by:
 - (i) giving written notice of the meeting by post to as many of the creditors of the company as is reasonably practicable at least ten days before the meeting;
 - (ii) causing notice of the meeting to be published in *The Australian*, *The Australian Financial Review*, *The Age*, *The Herald Sun*, *The Sydney Morning Herald*, *The Sydney Daily Telegraph*, *The Brisbane Courier Mail*, *The Adelaide Advertiser*, *The Perth West Australian*, *The Canberra Times*, *The Northern Territory News*, *The Hobart Mercury* newspapers at least ten days before the meeting.
 - (b) s 439A(4) provided that:
 - (i) the notice given to a creditor under s 439A(3)(a), as it operates pursuant to par 1(a) of this order, need not be accompanied by copies of the report and the statements referred to in s 439A(4);
 - (ii) the form of proxy required by reg 5.6.31 of the *Corporations Regulations* 2001 (Cth) to be sent with the notice of meeting need not be sent with the notice;

- (iii) copies of the notice, such report, such statements and such form of proxy be posted on the websites <http://www.ansett.com.au/administrator> and <http://www.abl.com.au/administrator> in such form that they may be down-loaded by any person obtaining access to either of those websites;
 - (iv) the administrators maintain a telephone hotline and deliver to any creditor, at his, her or its request, by post, facsimile transmission or e-mail, a copy of such notice, report, such statements and such form of proxy.
2. Pursuant to s 447A of the Act, Pt 5.3A of the Act is to operate in relation to each of the said companies as if s 439B(2) provided that creditors do not have to be notified by post of the date, time and place of the adjourned meeting if:
- (a) there is included in the notices referred to in par 1(a)(i) and (ii) of this order a statement that creditors will not be notified by post of any adjournment of the meeting, but they will be able to ascertain the date, time and place of the adjourned meeting from the websites <http://www.ansett.com.au/administrator> and <http://www.abl.com.au/administrator> within forty-eight hours of the adjournment of the meeting, and that those details will be published in the said newspapers on a specified date which is to be no later than 5 February 2002;
 - (b) those details are so placed on the two websites and so published in the said newspapers.
3. The costs of this application of the plaintiffs and the Australian Council of Trade Unions and relevant unions be costs in the administration of the said companies.
4. Liberty is reserved to any party to apply for such further or other orders and directions as may be necessary to implement the terms of this order.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

V 3106 of 2002

IN THE MATTER OF:

**ANSETT AUSTRALIA LIMITED
(ACN 004 209 410) & ORS
(All Administrators Appointed)
(see attached schedule)**

AND:

**MARK FRANCIS XAVIER MENTHA and
MARK ANTHONY KORDA
(As Administrators)**

Plaintiffs

JUDGE: GOLDBERG J

DATE: 7 JANUARY 2002

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 The plaintiffs, the administrators of Ansett Australia Limited and the other companies set out in Schedule A to these reasons ("the Ansett group"), have applied to the Court for orders and directions as to the manner in which creditors of the Ansett group are to be given notice of the meeting which must be held in respect of each company in the Ansett group pursuant to s 439A of the *Corporations Act 2001* (Cth) ("the Act"). The directions are sought pursuant to s 447D(1) of the Act and the administrators draw in aid s 447A which enables the Court to make such orders as it thinks appropriate about how Pt 5.3A is to operate in relation to the Ansett group.

2 There are forty-one companies in the Ansett group in respect of which the administrators have been appointed voluntary administrators pursuant to Pt 5.3A of the Act. Meetings of creditors of each of the companies in the Ansett group have been held pursuant to s 436E of the Act and a Committee of Creditors has been appointed in respect of each company.

3 Section 439A of the Act requires the administrators to convene a further meeting of the creditors of each company in the Ansett group ("the second meeting"), within twenty-one

days of the commencement of the administration, at which the creditors are to decide on the future of each company. I will return to the provisions of this section.

4 Pursuant to orders made on 1 and 23 October and 5 December 2001, the convening period for the second meeting of creditors of each company in the Ansett group was initially extended to 12 December 2001, and subsequently further extended to 22 January 2002. The administrators propose to hold the second meeting of creditors on 29 January 2002.

5 There are provisions in the Act and the Corporations Regulations 2001 (Cth) ("the Regulations") specifying the manner in which notice is to be given to creditors of the convening and holding of the second meeting, and specifying the information which must be given to the creditors at the time they are given notice of the second meeting.

6 Section 439A(3) sets out the notice provisions. It provides:

"The administrator must convene the meeting by:

- (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and*
- (b) causing notice of the meeting to be published:*
 - (i) in a national newspaper; or*
 - (ii) in each State or Territory in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that State or Territory;*

at least 5 business days before the meeting."

Section 439A(4) sets out the information which must accompany the notice of the meeting given to each creditor. It provides:

"The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:

- (a) a report by the administrator about the company's business, property, affairs and financial circumstances; and*
- (b) a statement setting out the administrator's opinion about each of the following matters:*
 - (i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement;*
 - (ii) whether it would be in the creditors' interests for the administration to end;*

(iii) *whether it would be in the creditors' interests for the company to be wound up;*

and his or her reasons for those opinions; and

(c) *if a deed of company arrangement is proposed – a statement setting out details of the proposed deed.”*

8 Regulation 5.6.12(1)(a) (which applies to a meeting convened under Pt 5.3A by virtue of reg 5.6.11(2)(a)) sets out the manner in which notice in writing of the meeting must be given to creditors. It provides that the administrators must give notice of the second meeting to every person appearing on the books of the Ansett group or otherwise to be a creditor of the Ansett group. Regulation 5.6.12(2) provides that:

“The notice must be given to a person:

(a) *by delivering it personally; or*

(b) *by sending it to the person by prepaid post; or*

(c) *if the person has a facsimile transmission number to which notices may be sent to the person – by faxing it to the person at that number; or*

(d) *if the person has a document exchange number to which notices may be sent to the person – by lodging it with the exchange at, or for delivery to, the person's receiving facilities identified by that number.”*

The effect of reg 5.6.11(3)(c) is that regs 5.6.12 to 5.6.36A do not apply to a meeting convened under s 439A (and other meetings) if those regulations are inconsistent with a particular requirement of the Act.

9 Compliance with these provisions poses administrative difficulties and considerable expense for the administrators, having regard to the complexity of the administration of the Ansett group and the number and categorisation of the creditors of the Ansett group. The available assets of the Ansett group are insufficient to meet its liabilities. It is not possible to give precise valuations for all assets and liabilities of the Ansett group as some of the valuations depend upon the amounts to be realised on sales which, at the present time, are unpredictable. I refer in particular to the sale of aviation assets and the extent to which financiers can re-deploy leased aircraft.

10

The principal assets of the Ansett group total in value of the order of \$850 million. Liabilities to creditors such as employees, financiers of aircraft, trade creditors and suppliers, the holders of unrepresented airline tickets who have been unable to use them, Golden Wing members and frequent flyer points holders fall within a range of the order of \$1.8 billion to over \$2 billion.

11

The administrators have sold the Ansett mainline airline business to a consortium associated with the interests of Messrs Lindsay Fox and Solomon Lew ("the Tesna consortium"). An agreement has been entered into whereby the Tesna consortium will acquire certain assets of the Ansett group and will assume responsibility for certain employee entitlements.

12

The membership of the Committees of Creditors of the companies in the Ansett group overlap and there are thirty-two different members across all the committees. Those members are drawn from representatives of employees, financiers, trade creditors and suppliers and they represent of the order of \$800 million in value of creditors.

13

The administrators have identified approximately 7,000 creditors comprising categories such as trade creditors, suppliers, other airlines and financiers. However, there are also the following categories of creditors:

- (a) Employees. There were approximately 16,000 employees as at 12 September 2001, but since that time a number of employees have either resigned or been retrenched, although many of them have not received their full entitlements to retrenchment pay;
- (b) Members of Ansett's frequent flyer scheme. Approximately 2.7 million members have accumulated unused frequent flyer points;
- (c) Members of Ansett's Golden Wing scheme. There are approximately 1.3 million members, although the administrators believe that nearly all of them are also members of Ansett's frequent flyer scheme;
- (d) The holders of unrepresented airline tickets with a face value of between \$250 million and \$300 million. The administrators cannot at the present time determine the number of such holders but believe it may be as large as 300,000. The administrators do not have addresses for most of those holders.

14 For the purpose of voting at the second meeting of creditors of the Ansett group, the administrators intend to treat as creditors:

- (a) Financiers (estimated to be 34),
- (b) Lessors of aircraft,
- (c) Landlords (estimated to be 540),
- (d) Ordinary trade suppliers (estimated to be 7,000),
- (e) Employees,
- (f) Frequent flyer points holders (estimated to be 2.7 million),
- (g) Golden Wing members (estimated to be 1.3 million), and
- (h) Holders of unrepresented airline tickets as at 12 September 2001 (estimated to be 300,000).

15 As noted earlier, s 439A(4) requires the administrators to enclose with the notice of meeting sent to creditors a report, a statement of their opinion on specified matters and a draft outline of a proposed deed of company arrangement (where such a deed is proposed). Each of the forty-one companies in the Ansett group must have its own report, statement and separate draft outline of a proposed deed of company arrangement. Regulation 5.6.31 requires the administrators to send a proxy form with the notice of meeting.

16 The administrators have obtained an estimate of \$178,000 for the cost of printing, handling and postage in respect of sending 150 pages of material to each of 25,000 persons. If four million persons were to receive the notice and accompanying documentation, the administrators estimate that the cost could be as high as \$28 million. The administrators acknowledge that this is probably an excessive estimate as it should be reduced due to the economies of such a large scale mail out, and because the estimate of four million creditors may be reduced to three million, having regard to the overlap between Golden Wing members and frequent flyer points holders.

17 The administrators have identified four alternative methods of providing notice of the second meeting to the creditors of the Ansett group:

- (a) Placing notice of the meeting, the reports to creditors, outlines of deeds of company arrangement and other relevant documents ("the documentation") on two websites on

the internet, and also placing a large advertisement in two national newspapers and in other newspapers circulating in capital cities throughout Australia. The advertisement would give notice of the meeting and notice that creditors could obtain copies of the documentation by calling the administrators' hotline telephone number. The cost of the advertisement would be of the order of \$60,000.

- (b) Placing the notice and the documentation on the two websites, posting to each of the identified creditors a one page notice informing them that a copy of the notice and the documentation can be obtained from the two websites or by calling the Ansett hotline telephone number, and placing the advertisement in the newspapers. The administrators have obtained an estimate that posting a one page, double-sided notice to four million creditors would cost \$2,480,000, comprising \$800,000 for processing and \$1,680,000 for postage. Posting the notice to three million creditors would reduce the estimate to approximately \$1,860,000.
- (c) Posting to each of the identified creditors a copy of the notice of the meeting and a copy of the documentation and placing the usual advertisement in the "Law Notices" sections of the various newspapers. This would involve posting seventy-five double-sided pages to three million creditors (allowing for the overlap of holders of frequent flyer points and members of the Golden Wing scheme), a total of 225 million sheets of paper.
- (d) Posting a copy of the notice of the meeting and the documentation to the 7,000 creditors who are trade creditors, suppliers, airlines and financiers, each of the relevant trade unions whose members include Ansett employees with outstanding and unpaid entitlements, the Australian Council of Trade Unions, credit card financiers, placing the notice of the meeting and documentation on the two websites together with a copy of the newspaper advertisement for the benefit of the remaining creditors being frequent flyer points holders, Golden Wing scheme members and persons holding unrepresented airline tickets.

18

There are advantages and disadvantages in respect of each method. I consider them seriatim:

- (a) The first method is the least expensive and the simplest from an administrative point of view. It saves the costs of posting a substantial body of material to known

creditors. It provides an opportunity for interested creditors to obtain the relevant documentation. The disadvantage of this method is that it does not comply with the provisions of s 439A or reg 5.6.12. But, more particularly, it does not deliver directly to known creditors notice of the second meeting and copies of the documentation which they are entitled to receive.

- (b) The second method has the advantage of delivering to known creditors notice that the second meeting has been convened and provides them with the opportunity to obtain copies of the notice and the documentation. This method is more costly than the first method and also does not comply with the provisions of s 439A or reg 5.6.12.
- (c) The third method complies with the provisions of s 439A and ref 5.6.12 and gives all known creditors adequate notice, but would involve a very expensive outlay in terms of printing, postage and labour running into millions of dollars.
- (d) The fourth method has the attraction of limiting the costs and expenses of notification but it discriminates between different classes of creditors. It assumes that trade creditors have a greater right to notice and information than other creditors such as frequent flyer points holders and employees who are not members of a relevant union.

19 The administrators' preference is the first method. They do not expect more than about 5,000 creditors to attend the second meeting and they propose to have the meeting broadcast or "web cast" over the internet so that creditors not present at the venue of the meeting can observe its proceedings. The administrators contend that the first method constitutes the giving of written notice to as many of the Ansett group's creditors as reasonably practicable within s 439A(3)(a) of the Act, I will return to this contention. The first method has an added attraction for the administrators as, if adopted, they say it will provide an appropriate precedent for any notice to be given of any adjourned date of the second meeting, if it is adjourned.

20 The administrators propose that the second meeting of creditors to be held on 29 January 2002 will consider principally:

- a general report;
- approval of the agreement with the Tesna consortium;
- approval of the administrators' fees.

The administrators also propose to recommend that the companies in the Ansett group enter into deeds of company arrangement, but they propose that the creditors adjourn the second meeting for about forty-five days to enable more detailed reports to be prepared and circulated. The second meeting can be adjourned for a period of up to sixty days: s 439B(2).

21

Notice of this application was published in the daily press and given to the Australian Securities and Investments Commission ("the Commission"), the solicitors for the ACTU and twelve unions, the solicitors for the Tesna consortium and the members of the various Committees of Creditors.

22

At the hearing, no objection was made to the administrators' preference for the first method of notification. The Commission did not appear at the hearing and notified the solicitors for the administrators that it considered "the Application appropriate in the circumstances". The application sought orders generally in the terms of par 17(a) above, the administrators' preference. The Australian Council of Trade Unions and twelve unions and their members who were employees of the Ansett group ("the ACTU") appeared at the hearing and supported the administrators' application and submissions.

23

The administrators submitted that publishing advertisements in newspapers, placing the notice of meeting and other required documentation on two websites and providing a telephone hotline on which creditors could ask for copies of the documentation to be sent to them was compliance with, and satisfied, the requirement in s 439A(3) that the administrators must give written notice of the meeting to as many of the Ansett group's creditors as reasonably practicable. The administrators submitted that the concept of notice involved making people aware of a matter, seeing a matter, observing a matter. The administrators contended that the meaning inherent in the giving of a notice meant that a newspaper advertisement would have the effect of a notice. It was said that this method satisfied the requirement in s 439A(3)(a) because it was not reasonably practicable to post notices of the meeting and the accompanying documents required by s 439A(4) to all creditors, having regard to the administrative work involved and the considerable cost involved. It was contended that the reference in s 449A(3)(a) to "as many of the company's creditors as reasonably practicable" should take into consideration the fact that s 439A(4) required the administrators to send the required documentation together with the notice, and that this requirement affected the practicability of this method of notice.

24 I do not accept this submission as I do not consider that this method of notice constitutes the giving of "written notice" of the meeting. Although s 9 of the Act defines "notice" as including "a circular and an advertisement", I do not consider that the requirement for the giving of written notice to creditors in s 439A(3)(a) is satisfied by the publication of an advertisement in a newspaper. A legislative provision might provide for notice to be given to a body or group of people in a number of specified ways, such as by post, or by the publication of an advertisement in a newspaper. But s 439A(3)(a) is not couched in such terms. It is couched in terms which require a document to be given, that is delivered in some manner (found in reg 5.6.12(2)) to creditors. This is made clear by the further provision in s 439A(3)(b) which requires notice of the meeting to be "published" in newspapers. Section 439A(3) makes it clear that the "giving" of written notice is something in addition to, and different from, the publication of a notice in a newspaper.

25 Further, I consider that the words "as reasonably practicable" in s 439A(3)(a) refer to the range of creditors to whom notice is to be given, rather than to the manner in which the notice is to be given. Notice is not to be given to all creditors without exception, but rather is to be given to what may turn out to be a lesser number, that is to say, as many as it is reasonably practicable to give notice. Section 439A(3)(a) does not provide that written notice is to be given to creditors in such a manner, or by such a method, as is reasonably practicable. Rather it provides that a document is to be given to creditors.

26 Insofar as reg 5.6.12(1) may require the administrators to give notice of the second meeting to more creditors than is reasonably practicable, that is to say to "every person appearing on the company books or otherwise to be [a creditor]", such requirement is inconsistent with s 439A(3)(a) and therefore, by the application of reg 5.6.11(3), does not apply.

27 Even if I were to adopt the construction of s 439A(3)(a) for which the administrators contended, I do not consider that the administrators' preferred method of giving notice of the second meeting to creditors would comply with s 439A(3)(a). If the object and purpose of s 439A(3)(a) is to ensure that as many creditors as possible are given notice of the second meeting to the extent that that result is reasonably practicable, that object and purpose is achieved in a more effective and direct way by sending by post a written notice of the second meeting addressed to each creditor whose address is known to the administrators.

28

The issue, however, arises whether it is "reasonably practicable" to give notice to creditors in this manner. The administrators submitted that giving notice by post was a wasteful process, having regard to the more economical method of advertising the holding of the second meeting. The relevant question to ask (accepting the administrators' construction of s 439A(3)(a)) is whether the expense and administrative effort involved in sending a notice of the second meeting by post to the creditors is such that it is not reasonably practicable to undertake this process.

29

I do not consider that the cost involved, of the order of \$1,860,000, is such that it is not reasonably practicable to give notice in this way and to incur this expense. Whether it is reasonably practicable involves a consideration of relative issues and the balancing of competing considerations.

30

As Gaudron J observed in *Slivak v Lurgi (Aust) Pty Ltd* (2001) 177 ALR 585 at 599:

"The words 'reasonably practicable' have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words 'reasonably practicable' are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts."

The judicial consideration to which her Honour was referring was in the context of industrial accidents and precautions to be taken to avoid industrial accidents and injuries to workers. Nevertheless, Gaudron J's observation is apposite to the construction of s 439A(3)(a) and the cases to which her Honour referred demonstrate the relative nature of the exercise to be undertaken.

31

In *Marshall v Gotham Co Ltd* [1954] AC 360, Lord Oaksey said at 370:

"... what is 'reasonably practicable' depends upon a consideration whether the time, trouble and expense of the precautions suggested are disproportionate to the risk involved."

(See also *Edwards v National Coal Board* [1949] 1 KB 704 at 710, 712 and 715.)

32

The administrators desire to avoid unnecessary costs and to maximise the return to creditors. That desire must be given great weight, but it is still necessary to ask the question whether the expense involved in posting notices to creditors is disproportionate to the end or

objective sought to be achieved. In this context, it is important to recognise that the administration of the Ansett group is a very large and complex administration, both in relation to the nature of the businesses, the assets and liabilities involved and also in relation to the value of those assets and liabilities. Although the cost of posting a notice to creditors is substantial, that cost must be weighed against a recognition of the importance of the role of creditors at the second meeting. They will decide the future of the Ansett group and, in particular, whether the airline will continue to fly. The significance of the role of the creditors at the second meeting highlights the importance of the notification to them of the date, time and place of the holding of the second meeting and the notification to them of the issues to be raised at the meeting and their right to vote on the issues, either in person or by proxy.

33 In these circumstances, I do not consider that the cost involved in sending a notice to creditors by post is disproportionate to the end and objective to be achieved by putting creditors on notice of the second meeting and their right to participate in it. Adopting the words of Gaudron J in *Slivak v Lurgi (Aust) Pty Ltd* (supra), I have made "a value judgment in the light of all the facts".

34 The administrators submitted, in the alternative, that I should invoke the power given to the Court in s 447A of the Act to provide that Pt 5.3A is to operate as if s 439A specifically allowed the administrators to give creditors of the Ansett group notice of the second meeting and the documentation required by s 439(4) in the manner proposed by the administrators' preferred method. In support of this submission they relied upon the following matters:

- Although frequent flyer points holders were to be considered as creditors for the purpose of voting at the second meeting, there was an issue as to the value to be given to their rights as creditors. As their debt was unliquidated, they could not vote unless a just estimate of the value of their debts had been made by the administrators: reg 5.6.23(2). The administrators had not yet determined the value to be given to the frequent flyer points held by holders. Factors to be taken into account were that holders of under 1,500 points could not redeem the points; points were given to holders as a bonus; points could not be converted into cash; seats allocated for holders of frequent flyer points were usually unsold seats and there was, therefore, a low cost to the airline of allocating them to the holders of frequent flyer points. Nevertheless,

the Ansett group recognised its obligations to frequent flyer points holders as contingent liabilities in its books of account;

- Advertisements in newspapers would bring notice of the meeting to the attention of creditors, particularly having regard to the massive media coverage already given to the Ansett group and its administration;
- The administrators wished to avoid wasted and unnecessary expense;
- The cost of posting notices and required documentation to all creditors would be very substantial;
- Posting notices to creditors presumed that the records kept by the Ansett group of creditors' addresses were up-to-date and accurate;
- The Commission had expressed a positive opinion that it considered the administrators' application appropriate;

35

The ACTU supported these submissions and submitted that an additional factor to be taken into account was the time of the year in which the second meeting was to be held and in which the notices of meeting would be posted. It was said that persons would be absent from their postal addresses, and that a better method of alerting them to the holding of a meeting would be by way of an advertisement in a newspaper. The ACTU also submitted that advertisements would bring notice of the meeting to the holders of unrepresented airline tickets whose addresses were unknown to the Ansett group.

36

As I have observed earlier, the guiding principle in this context is that it is for the creditors to determine the future of companies placed into voluntary administration pursuant to the provisions of Pt 5.3A of the Act. It is for the creditors to decide whether a company under voluntary administration should execute a deed of company arrangement, whether the administration should end, or whether the company should be wound up: s 439C. As s 439A(4) recognises, creditors must be given sufficient information to enable them to make an informed decision. It is to that end that reg 5.6.12 of the Regulations requires that notice of the second meeting and the information administrators are required to provide creditors be brought to their direct attention.

37 Although the expense involved in notifying creditors of a meeting and supplying them with the required information may be a relevant consideration to take into account in determining the method by which creditors are to be notified of a meeting and provided with the required information, I do not consider that that consideration should outweigh the primary consideration which is that creditors be notified of the convening of the meeting, their right to attend and participate in, and vote at, the meeting and their right to receive information required to be provided to them by the administrators.

38 I do not consider that placing advertisements in newspapers and putting the notice of the meeting and the required documentation on the two websites is sufficient notice for the purpose of ensuring that the creditors become aware of the holding of the meeting and their right to attend it, participate in it and vote on resolutions put to the meeting. This method requires creditors either to read a newspaper advertisement, or visit one of the two websites in order to become aware of the convening of the meeting and its date, time and place. I consider that there would be many creditors who would not see or read the advertisements in the newspapers or visit the websites. Although the existence of the Ansett administration is no doubt well-known to most, if not all residents in Australia, and particularly to Ansett's Golden Wing members and frequent flyer points holders, and has received much media attention, it does not follow that the creditors are up-dating daily their knowledge of the progress of the administration by reference to newspaper reports and advertisements or by visiting one of the two websites.

39 I do not consider that the administrators' preferred method is, as the administrators submitted, reasonable notice where the existence and postal address of most of the creditors is known to the administrators. Where the creditors can be given notice directed to them personally of the second meeting, they should be given that notice. That is their right. It may be expensive to give them notice of the meeting, but that is the consequence of a large and complex administration involving a substantial number of creditors.

40 Although there is an issue for the administrators to resolve in relation to the value to be given to the rights of the holders of frequent flyer points as creditors, I do not regard that as a relevant consideration to take into account in determining the manner in which notice of the second meeting should be given to creditors. Nor do I regard the manner in which the holders of frequent flyer points acquired their points, or can use them, as a relevant

consideration on this application. Once the administrators make the decision (as they have done) to treat the holders of frequent flyer points as creditors for the purpose of the second meeting, those holders are to be treated in the same way as other creditors in relation to the manner in which they are to be given notice of the second meeting.

41 It may well be that the records of addresses of the holders of frequent flyer points and other creditors kept by the Ansett group are not up-to-date or accurate, but it was not suggested that the records were so out-of-date as to be unreliable across the board. Further, a number of creditors may well be absent from their usual address and on holidays during part of January. That is no reason not to use a method of notification, posting the notices, which will come to the direct attention of a substantial majority of the body of creditors.

I have taken the Commission's opinion into account, but I am not satisfied, for the reasons to which I have referred, that it is appropriate to dispense with the requirement that the administrators give written notice of the second meeting to creditors by sending it to them by post. As I have observed earlier, I do not regard the cost of so doing as disproportionate to the end and objective to be achieved. Nor do I do not regard the cost of posting a single sheet notice to creditors as wasted or unnecessary expenditure, having regard to the importance of the second meeting and the right of creditors to participate in it and vote on the resolutions proposed at it.

43 It is then necessary to consider what form of notice should be given to the creditors and what information should accompany the notice. It is also necessary to take into account the holders of un-presented airline tickets, most of whose addresses are not known to the Ansett group or to the administrators.

44 Not all creditors will be interested in reading the information to be supplied by the administrators, although they should be given the opportunity to do so. I consider that it is appropriate and sufficient notice that creditors be told in the notice that the relevant information required to be provided to them by the administrators including reports, outlines of deeds of company arrangement and proxy forms will be given to them if they telephone the administrators and request the information, and that it is also available for perusal and down-loading at the two websites on the internet.

45 I do not consider that it is to the disadvantage of the creditors that, having been given notice of the meeting and the availability of the relevant information, they are required to make a telephone call or visit a website if they want to peruse and consider that information. That opportunity avoids the necessity for all creditors to be supplied directly with a substantial body of written information which, in all probability, many of them would not read. The cost of sending that information to all creditors by post would be prohibitive and would be disproportionate to the end and objective to be achieved.

46 The notice to be posted to creditors should be generally in the form of Form 529 in sch 2 to the Regulations, with the following additions. It should refer to the fact that the following documents are available for perusal and down-loading on the two specified websites and that copies of them can also be obtained upon calling the administrators' specified telephone hotline:

- the notice of meeting;
- a report by the administrators about the Ansett group's business, property, affairs and financial circumstances;
- a statement setting out the administrators' opinion about:
 - (i) whether it would be in the creditors' interests for the Ansett group to execute a deed of company arrangement;
 - (ii) whether it would be in the creditors' interests for the administration to end;
 - (iii) whether it would be in the creditors' interests for the Ansett group to be wound up;
- a statement setting out details of any proposed deed of company arrangement;
- a proxy form.

The notice should also refer to any adjournment of the meeting in the manner to which I shall refer.

47 It will still be necessary to publish advertisements containing notice of the second meeting in accordance with s 439A(3)(b). Those advertisements will be the principal means by which notice of the second meeting will be brought to the attention of the holders of unrepresented airline tickets. Accordingly, those advertisements should not be in the usual

form found in the "Law Notices" sections of the classified advertisements section of the newspapers but should be more prominent, as the administrators have proposed.

48 The administrators have said that it is probable that the second meeting will be adjourned to a later date. Creditors will need to be notified of the adjourned date, time and place.

49 I do not consider that it is necessary to notify creditors of the adjourned meeting by post, provided they are notified at the outset in the notice posted to them, that if the second meeting is adjourned, they will not be notified of the adjournment by post, but they will be able to ascertain the date, time and place of the adjourned meeting from the two websites and the administrators' telephone hotline within forty-eight hours of the adjournment of the meeting on 29 January 2002. A notice of the adjourned date, time and place will also need to be published prominently in the same newspapers which published the notice of the second meeting.

50 I therefore propose to order pursuant to s 447A of the Act, that Pt 5.3A of the Act is to operate in relation to each company in the Ansett group as if s 439A provided that the administrators should give notice of the meeting by posting a notice to the creditors known to the administrators, notifying them of the matters required by Form 529 of the Regulations and also notifying them that copies of the reports and statements required to be sent to them by s 439A(4) and proxy forms would be available on the two internet websites and could be down-loaded. I also propose to order that notices of the holding of the second meeting and the availability of the reports and statements and proxy forms required to be sent to creditors be published in the newspapers identified by the administrators to ensure that the holders of unrepresented airline tickets, whose addresses are not known to the administrators, might be made aware of the holding of the meeting. In order to minimise cost and expense, in the event of the second meeting being adjourned, I also propose to order that the administrators need not send notices of the adjourned date, time and place of the second meeting to creditors, by post, if the initial notice states that:

- (a) if the meeting is adjourned, creditors will not be notified by post of any adjournment of the meeting but they will be able to ascertain the date, time and place of the adjourned meeting from the two websites within forty-eight hours of the adjournment

of the second meeting and that those details will be published in the same newspapers on a specified date, which is to be no later than 5 February 2002;

- (b) those details are in fact so placed on the two websites and so published in the newspapers.

51 I will reserve liberty to apply for further orders and directions in relation to the implementation of this order in case any issue arises as to its implementation.

I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Goldberg.

Associate: 

Dated: 7 January 2002

Counsel for the plaintiffs: Mr L Zwier

Solicitor for the plaintiffs: Arnold Bloch Leibler

Counsel for the Australian Council of Trade Unions, twelve unions and relevant employees: Mr J Bornstein

Solicitor for the Australian Council of Trade Unions, twelve unions and relevant employees: Maurice Blackburn Cashman

Date of Hearing: 4 January 2002

Date of Judgment: 7 January 2002

SCHEDULE

Ansett Australia Limited (ACN 004 209 410)
501 Swanston Street Pty Ltd (ACN 005 477 618)
Aeropelican Air Services Pty Ltd (ACN 000 653 083)
Airport Terminals Pty Ltd (ACN 053 976 444)
Aldong Services Pty Limited (ACN 000 258 113)
Ansett Aircraft Finance Limited (ACN 008 643 276)
Ansett Australia Holdings Limited (ACN 004 216 291)
Ansett Aviation Equipment Pty Ltd (ACN 008 559 733)
Ansett Carts Pty Limited (ACN 055 181 215)
Ansett Equipment Finance Limited (ACN 006 827 989)
Ansett Finance Limited (ACN 006 555 166)
Ansett Holdings Limited (ACN 065 117 535)
Ansett International Limited (ACN 060 622 460)
Ansett Australia and Air New Zealand Engineering Services Ltd (ACN 089 520 696)
Bodas Pty Ltd (ACN 002 158 741)
Brazson Pty Limited (ACN 055 259 008)
Eastwest Airlines (Operations) Ltd (ACN 000 259 469)
Eastwest Airlines Limited (ACN 000 063 972)
Kendell Airlines (Aust) Pty Ltd (ACN 000 579 680)
Morael Pty Ltd (ACN 003 286 440)
Northern Airlines Limited (ACN 009 607 069)
Northern Territory Aerial Work Pty Limited (ACN 009 611 321)
Rock-it-Cargo (Aust) Pty Ltd (ACN 003 004 126)
Show Group Pty Ltd (ACN 002 968 989)
Skywest Airlines Pty Ltd (ACN 008 997 662)
Skywest Aviation Limited (ACN 004 444 866)
Skywest Holdings Pty Ltd (ACN 008 905 646)
Skywest Jet Charter Pty Ltd (ACN 008 800 155)
South Centre Maintenance Pty Ltd (ACN 007 286 660)
Spaca Pty Ltd (ACN 006 773 593)
Traveland International (Aust) Pty Limited (ACN 000 275 936)
Traveland International Pty Limited (ACN 002 275 936)

Traveland New Staff Pty Ltd (ACN 080 739 037)

Traveland Pty Limited (ACN 000 240 746)

Walgali Pty Ltd (ACN 005 258 921)

Westintech Limited (ACN 009 084 039)

Westintech Nominees Pty Ltd (ACN 009 302 158)

Whitsunday Affairs Pty Ltd (ACN 009 694 553)

Whitsunday Harbour Pty Limited (ACN 010 375 470)

Wridgway Holdings Limited (ACN 004 449 085)

Wridgways (Vic) Pty Ltd (ACN 004 153 413)

(All Administrators Appointed)