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-6**" produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit dated 12 September 2005.

Before me:

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

Exhibit "MAK-6"
Court's final orders, Justice Goldberg's reasons for judgment and corrigenda in the MOU Application

'MAK-6'

Re ANSETT AUSTRALIA LTD and Others and MENTHA and Another (as admin) (No V 3045 of 2001)

Re HAZELTON AIR CHARTER PTY LTD and Others and HUMPHRIS (as admin) (No V 3046 of 2001)

FEDERAL COURT OF AUSTRALIA

GOLDBERG J

5, 8–12 October 2001 — Melbourne

[2001] FCA 1439

Administrators — Application for directions by court — Approval of memorandum of understanding — Relevant factors for court to make directions — Whether administrators had taken into account interests of companies' creditors — (CTH) Corporations Act 2001 s 447.

The applicants were administrators of the Ansett group and a collection of Hazleton companies. The first Ansett airline operation commenced in 1936. By June 2000, the group had become wholly owned by Air New Zealand.

On 8 August 2001, Air New Zealand wrote a letter of comfort to the directors of three Ansett companies.

Administrators were appointed on 17 September 2001.

On 3 October 2001, the Ansett group and Air New Zealand group entered into a memorandum of understanding, which essentially provided for the New Zealand Government to pay the administrators A$150m for the Air New Zealand group to waive various claims it may have against the Ansett group, and for the administrators to release Air New Zealand from any claims in relation to the letter of credit; as well as releasing directors from certain claims made against them.

The administrators were obliged to convene meetings of the Ansett group's creditors and the Hazleton companies' creditors by 12 December 2001. They sought the approval of the court to enter into, and properly perform and give effect to the agreement.

The court had to consider certain benefits that the administrators perceived from entry into the MOU, the timing of the entry, the likely consequences for both the Ansett group and Air New Zealand for not entering into the MOU; as well as certain concerns, including the fact that the administrators had not had the opportunity to adequately investigate claims the subject of the releases.

Held, giving the direction that the court approves the MOU and that the administrators may properly perform and give effect to the MOU:

(i) Section 447 of the Corporations Act 2001 (Cth) empowers the court to direct that the court approved an agreement entered into by the administrators, which is the subject-matter of an application for directions.

Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270; 172 ALR 28; 34 ACSR 250, applied.

(ii) In giving directions under ss 447D and 479(3), the court is providing the administrator or liquidator with protection against claims that he or she acted inappropriately or unreasonably in entering into, or performing, a transaction. The court will not, however, pronounce upon the commercial prudence of the transaction.

(iii) The relevant principles apply equally to court-appointed liquidators and administrators appointed pursuant to Pt 5.3A of the Corporations Act.

(iv) On the evidence, the administrators and the Hazleton administrator sought to maximise the chances of the Ansett group continuing in existence and, second, if it was not possible for the group to continue, to provide for the business, property and affairs of the group to be administered in a way that results in a better return for the Ansett group's creditors than would result from an immediate winding up of the group. In so doing, the administrators and the Hazleton administrator acted in the interests of the Ansett group and the Hazleton companies, and their creditors.

Application

This was an application, brought pursuant to ss 447A and 447D of the Corporations Act 2001 (Cth), for approval of an agreement, in the form of a memorandum of understanding, between the Ansett group of companies and the Air New Zealand group of companies and, alternatively, an order that the administrators of the Ansett group and Hazleton companies, properly perform and give effect to the MOU. The facts are set out sufficiently in the judgment.

S P Whelan QC and *J Dodds-Streeton* instructed by *Arnold Bloch Leibler* for the applicants.

J W S Peters instructed by *Holding Redlich* for the Hazelton administrator.

C M Scerri QC and *C M Caleo* instructed by *Australian Securities and Investments Commission.*

J L Sher and *P D Crutchfield* instructed by *Freehills* for Air New Zealand Ltd, associated companies and 10 directors.

J Beach QC and *P R D Gray* instructed by *Maurice Blackburn Cashman* for the Australian Council of Trade Unions and 12 unions.

R A Brett QC instructed by the *Australian Government Solicitor* for the Commonwealth of Australia.

E Vadarlis instructed by *Vardarlis & Associates* for the E/Wise Solutions Pty Ltd.

M Power instructed by *Minter Ellison* for the Travel Compensation Fund.

[1] Goldberg J. On 12 and 14 September 2001, Messrs Peter Hedge, Greg Hall and Allan Watson (the first administrators) were appointed administrators of Ansett Australia Ltd and the other companies set out in Sch A to this judgment in accordance with the provisions of Pt 5.3A of the Corporations Act 2001 (Cth) (the Act). I will refer hereafter to these companies and to Ansett Australia and Air New Zealand Engineering Services Ltd collectively as the Ansett group. Those appointments occurred as a result of resolutions of the various companies in the Ansett group on 12 and 14 September 2001. The first administrators caused the airline operations of the Ansett group to cease at 2 am on Friday 14 September 2001.

[2] On 17 September 2001, I ordered that Mark Francis Xavier Mentha and Mark Anthony Korda (the administrators) be appointed joint and several administrators of the Ansett group other than Hazelton Air Charter Pty Ltd,

Hazelton Airlines Ltd, Hazelton Air Services Pty Ltd (the Hazelton companies), and that Michael James Humphris be appointed administrator of the Hazelton companies with effect from the time that Messrs Hedge, Hall and Watson gave notice in writing of their resignation as administrators of the Ansett group. On 17 September 2001 Messrs Hedge, Hall and Watson resigned as administrators of the Ansett group and thereupon the administrators were appointed administrators of the companies in the Ansett group and Mr Humphris (the Hazelton administrator) was appointed administrator of the Hazelton companies. On 4 October 2001, the administrators were appointed administrators of Air New Zealand Engineering Services Ltd pursuant to the provisions of Pt 5.3A of the Act.

[3] On 5 October 2001, the administrators filed an application in the court which was expressed to be made pursuant to ss 447A and 447D of the Act and the inherent jurisdiction of the court. The administrators sought the following orders:

> (2) approval of the agreement entitled memorandum of understanding between the Ansett Group and the Air New Zealand Group and others (the agreement);
> (3) further or alternatively to para (2) hereof, that the plaintiffs may properly perform and give effect to the agreement.

On 8 October, the Hazelton administrator filed an application in substantially the same terms seeking orders that the court approve the agreement, or alternatively an order that he may properly perform and give effect to the agreement.

[4] The parties to the memorandum of understanding are the Ansett group set out in Sch A to the memorandum of understanding, the Hazelton companies, the administrators, the Hazelton administrator, Air New Zealand Ltd (Air New Zealand) and its subsidiaries (other than the Ansett group and the Hazelton companies) set out in Sch B to the memorandum (the Air New Zealand group) and each party who is, or was at any time since Air New Zealand acquired full ownership of the Ansett group a director or secretary of any company in the Air New Zealand group or the Ansett group as set out in Sch C to the memorandum (the directors).

[5] I will consider the detail of the memorandum of understanding shortly but, for present purposes, it is sufficient to note that it provides for the New Zealand Government to pay the administrators A$150m for the Air New Zealand group to waive various claims it may have against the Ansett group, and for the administrators and the Hazelton administrator to release Air New Zealand from any claims in relation to a letter of comfort dated 8 August 2001 and to release the directors from certain claims which might be made against them. (Money amounts are expressed in Australian dollars unless otherwise indicated.)

[6] At the final hearing of the applications, appearances were announced and submissions were made by the administrators, the Hazelton administrator, the Australian Securities and Investments Commission (ASIC), the Commonwealth of Australia, the Australian Council of Trade Unions (the ACTU) and 12 specified unions and their members who were employees of the Ansett group, the Air New Zealand group and 10 of the directors and one creditor, E/Wise Solutions Pty Ltd. Only E/Wise Solutions Pty Ltd opposed the court making orders sought, although there were differing views as to the form of order which should be made.

[7] It is helpful to rehearse the events which have led to the making of the applications. The first Ansett airline operation commenced in February 1936 with

one aeroplane. In 1979 the Ansett group was taken over by TNT Ltd and News Ltd. By the 1990s, the Ansett group had grown into a major national airline and was one of the two principal domestic airlines operating throughout Australia. It also flew international routes. Air New Zealand acquired TNT's 50% shareholding in the Ansett group in June 1996 and News Ltd's 50% shareholding in the Ansett group in June 2000.

[8] The extent of the Ansett group's airline operations and their significance for the Australian economy and the Australian community can be seen from the following statistics and circumstances which existed prior to the appointment of the administrators:

- the Ansett group employed approximately 16,000 people;
- the total wages and salaries paid by the Ansett group annual as at February 2001 was approximately $963m;
- the Ansett group served over 130 domestic destinations and made approximately 900 flights per day across the Australian network;
- the Ansett group had approximately 130 planes in its fleet;
- in the 2000 financial year Ansett carried over 14.04 million passengers of whom 13.35 million were carried on domestic routes;
- the Ansett group contributed approximately $73.3m in tax for the financial year ending 30 June 2000;
- the Ansett group carried 111,147 tonnes of cargo per year;
- the Ansett group provided services to numerous regional and rural areas.

[9] After Air New Zealand acquired 100% ownership of the Ansett group in June 2000 a new Trans-Tasman Australasian executive structure was announced. All the directors of the holding companies in the Ansett group were, at relevant times, directors of Air New Zealand, the holding company in the Air New Zealand group.

[10] The administrators and the Hazelton administrator are obliged to convene meetings of the Ansett group's creditors and the Hazelton companies' creditors by 12 December 2001 (in accordance with my order of 1 October 2001), so that they may present a report about the various companies' business, property, affairs and financial circumstances at the meetings. The administrators and the Hazelton administrator must, at those meetings, provide the creditors with a statement setting out the administrators' opinion whether it would be in the creditors' interests (s 439A(4) of the Act):

(a) for the companies to execute a deed of company arrangement;
(b) for the administration of the companies to end;
(c) for the companies to be wound-up.

[11] The administrators and the Hazelton administrator are presently actively pursuing the possibility of selling the businesses of the Ansett group and the Hazelton companies as going concerns and are operating the businesses in a limited manner.

[12] The administrators are presently faced with difficult and significant financial constraints, having regard to the nature of the assets of the Ansett group, its pre-administration liabilities and the liabilities which have been incurred, and will continue to be incurred if the administrators continue to carry on the business of the Ansett group, albeit in a limited way. The Hazelton administrator negotiated loans with the New South Wales State Government and the Commonwealth Government and was able to recommence flights by the

Hazelton companies on 21 September 2001 on a restricted basis. The Hazelton companies has recommenced operating most of its routes.

[13] At the date on which the administrators were appointed, 17 September 2001, the major assets of the Ansett group were as follows:

(a) debtors — the debtors have a book value of $400m, but the administrators have assessed their realisable value to be between $60m and $80m because of charge backs and airline tickets not honoured;

(b) equity in leased aircraft — the administrators said that the amount of this equity is incapable of precise quantification at the present time and that following recent events in America it is difficult to obtain any precise valuations of aircraft assets;

(c) miscellaneous other fixed and aviation assets, the valuation of which cannot be precisely quantified at the present time;

(d) there was no cash available to the administrators on their appointment as the Ansett group's airline operations had ceased on 14 September 2001.

[14] The administrators have made a more precise estimate of the realisable value of the unencumbered assets and the equity in the encumbered assets of the Ansett group which has been placed before the court in a confidential exhibit. For present purposes it is not necessary to disclose that value.

[15] The administrators have identified approximately 17,000 creditors of the Ansett group. This number does not take into account frequent flier members who have accumulated unused frequent flier points, as the administrators have not yet determined whether such persons are creditors. The number also does not take into account the holders of unpresented airline tickets with a face value of between $300m and $400m as the number of those holders cannot be estimated at the present time.

[16] The administrators believe that the total unsecured liabilities of the Ansett group, after allowing a fair value for the leased aircraft assets, is approximately $2b. The principal creditors and the amounts owed to them are as follows:

(a) employee entitlements, including wages, unpaid superannuation, annual leave, long service leave, sick pay, rostered days off and redundancies — $686m;

(b) holders of unpresented airline tickets — $300–$400m;

(c) National Australia Bank — $82m;

(d) Air New Zealand group loan balance — $81m;

(e) Credit Lyonnais (an aircraft lessor) — $420m;

(f) Caltex Australia Ltd and BP Australia — $16m;

(g) Telstra — $16m.

In relation to these liabilities, the administrators note that:

- no wages are owing to employees as wages were paid in full by the first administrators from advances of $32m made by Air New Zealand to the first administrators after the commencement of the administration;
- they presently estimate that the maximum exposure of the Commonwealth Government under the proposed employee entitlement scheme may be $351m;
- the amount due to Credit Lyonnais will be reduced if its aircraft are assigned or sold.

[17] At the date on which the Hazelton administrator was appointed, 17 September 2001, the major assets of the Hazelton companies were as follows:

(a) cash of approximately $2.2m;
(b) debtors with a book value of approximately $8m which included a doubtful debt of approximately $6m to Ansett and $800,000 for charge backs and airline tickets not honoured;
(c) equity in leased aircraft which is incapable of precise quantification at the present time;
(d) equity in owned aircraft of approximately $1.6m;
(e) miscellaneous and other fixed and aviation assets, the valuation of which cannot be precisely quantified at the present time.

[18] The Hazelton administrator believes that the total unsecured liabilities of the Hazelton companies, after allowing a fair value for the leased aircraft assets, is approximately $100m. The principal creditors and the amounts owed to them are as follows:

(a) employee entitlements, including wages, unpaid superannuation, annual leave, long service and redundancy payments — $6.95m;
(b) holders of unpresented airline tickets — approximately $400,000;
(c) financiers of aircraft, lease termination costs — approximately $78.8m;
(d) Ansett — approximately $19m;
(e) G E Engines — approximately $1m;
(f) unsecured creditors — approximately $7.5m.

[19] The administrators took the view that it was imperative for the Ansett group to recommence flying operations as soon as practicable to minimise the damage which its cessation of operations had caused to the goodwill of its business. The administrators developed a strategy for recommencing Ansett operations which became known as "Ansett Kick-Start". The aim of this project was to recommence flying a limited number of aircraft on the main trunk routes so as to preserve the name, mark and goodwill of Ansett. A business plan was prepared which involved the flying of 11 A320 aircraft. The administrators reached agreement with employees to limit the employees' working conditions to the revenue which could be generated from the limited operations. Support for the project was obtained from the Commonwealth Government which agreed to provide an indemnity to the administrators to fund the repayment of the value of tickets which were issued for the resumed operations, but which could not be used if the flying operations ceased and the administrators had insufficient assets available to refund the value of the tickets issued and not used.

[20] The administrators said that Ansett Kick-Start would operate at a modest trading loss but that the losses were worth incurring for the following reasons:

(a) the value of the name, reputation and goodwill of Ansett would be preserved;
(b) if the Ansett aviation assets were sold on a liquidation basis their realisable value would be diminished significantly in an amount greater than the projected trading losses;
(c) Ansett Kick-Start met the objects of Pt 5.3A of the Act to maximise the chances of the Ansett business remaining in existence or, if that is not possible, to maximise the return to creditors on a sale of the business assets;
(d) although Ansett Kick-Start was justified as a stand alone project it was part of the larger project envisaged by the administrators to reconstitute Ansett in a new but reduced form which had been referred to as "Ansett Mark II".

The projected trading losses have been calculated by reference to additional variable costs such as payments for leased aircraft, employees and fuel and are expected not to exceed $15m. At the present time, Ansett Kick-Start is cash-flow positive.

[21] A committee of creditors has been appointed in respect of each company in the Ansett group and the Hazelton companies. The committees of creditors represent creditors with debts due of approximately $800m which, at present, is of the order of 40% of the total of unsecured creditors (after deduction of the estimated value of security held by lessors). The committees represent, directly and indirectly, approximately 15,000 creditors by number, of whom approximately 14,500 creditors are employees who are represented by 12 unions.

[22] I turn to the circumstances which led to the execution of the memorandum of understanding dated 3 October 2001 by the Ansett group, the Hazelton companies, the administrators, the Hazelton administrator, the Air New Zealand group and the directors.

[23] On 8 August 2001, Air New Zealand Ltd wrote a letter to the directors of Ansett Holdings Ltd, Ansett International Ltd and Ansett Australia Ltd in the following terms:

> Dear Sirs,
>
> *Letter of Comfort*
>
> In its capacity as the ultimate parent company and sole beneficial shareholder of the companies, Air New Zealand Ltd (ANZ) hereby confirms to you that it is its current policy to take such steps from time to time as are necessary to ensure that its wholly owned subsidiaries (including the companies) are able to meet their debts as they fall due.
>
> We will advise you promptly in the event of any change in this policy.
>
> The previous paragraphs set out our bona fide intention in respect of the matters mentioned, but shall not create any contract between us and any of you, nor a guarantee nor indemnity in respect of our obligations hereunder, enforceable at law or in equity.
>
> Notwithstanding the previous paragraph, we will make available to you on request in writing from time to time advances for the sole purpose of enabling you to pay working capital liabilities incurred by you in respect of property or services purchased or sold in the ordinary course of your business, subject to the following conditions:
>
> (a) the maximum aggregate amount of all such advances (whether or not they remain outstanding at any particular time) shall not exceed the equivalent of $A400m;
>
> (b) such advances will continue to be available to you until withdrawn and such withdrawal has been notified in writing to you by Air New Zealand (provided that such withdrawal shall not take effect earlier than 4 weeks after the date that notification is given); and
>
> (c) in making a request for an advance you will be deemed to represent, warrant and undertake to us that the advance is required, and will be applied, to pay working capital liabilities of yourself incurred in respect of property or services purchased or sold in the ordinary course of your business.
>
> This Letter of Comfort is governed by New Zealand law.

[24] Central to the issues which led to the execution of the memorandum of understanding were:

- claims under the letter of comfort;
- identification of claims which might be made against Air New Zealand Ltd and directors and officers of companies in the Air New Zealand group and the Ansett group.

[25] After the administrators were appointed, they made enquiries in relation to the general financial position of Air New Zealand and concluded that it might be counter-productive for the Ansett group to issue legal proceedings seeking hundreds of millions of dollars from Air New Zealand at a time when it was financially distressed. On 12 September 2001, Air New Zealand had written down its investment in the Ansett group by NZ$1.32b. The administrators were concerned that if they issued legal proceedings, the proceedings might lead to Air New Zealand being placed in an insolvency administration under New Zealand law which would preclude any monetary settlement from Air New Zealand. The administrators also formed the preliminary view that Air New Zealand could only survive if it could disentangle itself from the Ansett group quickly.

[26] The administrators realised that they required funds to implement Ansett Kick-Start, that is the resumption of limited operations, and to develop a longer term strategy for Ansett Mark II.

[27] The administrators concluded that if they could negotiate a speedy commercial settlement of Ansett group claims against Air New Zealand under the letter of comfort, the Ansett group had the best chance of remaining in existence, or maximising the return to creditors if it could not remain in existence.

[28] The administrators obtained legal advice as to the potential claims which the Ansett group had against the Air New Zealand group and the directors. The administrators were advised that the Ansett group had claims against Air New Zealand arising out of the letter of comfort and that theoretically there may be claims against the director of companies in the Ansett group pursuant to provisions of the Corporations Act, the Trade Practices Act 1974 (Cth) and at common law. However, the administrators were advised that until all their investigations into the business, property and financial circumstances of the Ansett group were completed, it was not possible to obtain detailed advice in relation to the theoretical claims to which I have referred. However, the administrators received specific advice about their prospects of proceeding against Air New Zealand arising out of the letter of comfort. That advice has been placed before the court in a confidential exhibit but, for present purposes, it is not necessary to consider the detail of that advice other than to note that it has been given.

[29] Shortly after their appointment, the administrators met with members of the board of Air New Zealand. At that time they were aware that Singapore Airlines Ltd (Singapore Airlines) owned 29% of the capital of Air New Zealand and Brierley Investments Ltd owned 30% of the capital. The administrators formed the view that if Ansett Mark II was to be developed, it must be managed by a leading airline operator such as Singapore Airlines. The administrators were also aware that Singapore Airlines and Brierley Investments Ltd were in the process of considering whether to inject further capital into Air New Zealand. The significance of that fact was that without a capital injection the administrators considered that there was no prospect of Air New Zealand paying money to the Ansett group pursuant to the letter of comfort.

[30] On 23 September 2001, the administrators and their legal adviser met with Mr James Farmer QC, the acting chairman of Air New Zealand, and with Air New Zealand's legal and financial advisers. During that meeting, the administrators were informed of a number of matters concerning Air New Zealand, of which the following matters are relevant for present purposes:

- the Ansett group had been losing $1.3m EBIT for each day of operation prior to the appointment of the administrators;
- the Ansett group had jeopardised the ongoing financial security and viability of Air New Zealand;
- Air New Zealand could not survive without a capital injection and it could not expect any capital injection unless it could resolve its position with the Ansett group;
- unless Air New Zealand could make significant progress to settle its disputes with the Ansett group by 3 pm that day, the directors of Air New Zealand would apply to the New Zealand Government to appoint a statutory manager that day;
- if Air New Zealand was placed in statutory management, the Ansett group would not recover any money from Air New Zealand under the letter of comfort;
- unless the Air New Zealand group honestly believed that a settlement with the administrators was likely, and that was a reasonable view to hold, they would support placing Air New Zealand into statutory management because there was a substantial risk of loss to creditors of Air New Zealand;
- Singapore Airlines would not assist in the management of the Ansett group unless and until the disputes between Air New Zealand and Ansett were resolved.

[31] The administrators and the Air New Zealand representatives discussed the commercial issues relating to these matters and other matters at length. There was discussion about the administrators' proposal for Ansett Mark II. There was also further discussion about the letter of comfort. Air New Zealand took the position that it should be treated as having paid or credited as having paid sums totalling $160m in respect of any possible liability under the letter of comfort. Air New Zealand was, therefore, of the view that the maximum amount due under the letter of comfort was $216m. The administrators disputed this proposition.

[32] Ultimately, Air New Zealand came up with an offer of a payment of $150m and said that if the administrators pushed for more money, the Air New Zealand group would collapse. The administrators considered the offer and concluded that it should be accepted. Thereafter a process of drafting the memorandum of understanding in consultation with interested parties was undertaken.

[33] One of the issues which arose for the administrators was the concern that if they received any payment from Air New Zealand, and it subsequently became insolvent, the administrators might be required to disgorge the payment as a preference. The administrators, therefore, required that either the payment be made by the New Zealand Government or that the New Zealand Government give the administrators an appropriate indemnity. On 3 October 2001, the New Zealand Government agreed to give the administrators the indemnity.

[34] On 3 October 2001, the administrators convened a meeting of committees of creditors of the companies in the Ansett group. Of the 32 different members in total of all the committee of creditors, 30 members were present and two members did not attend. The administrators explained to the meeting the background to the memorandum of understanding and its provisions were discussed clause by clause. The administrators informed the meeting that they

recommended the terms of the memorandum of understanding to creditors and that it was their belief that the memorandum of understanding was the best commercial result that could be achieved with Air New Zealand in the present circumstances. The following resolution was passed:

> That this Committee of Creditors' meeting does not oppose the orders or directions being sought in the Federal Court by the Voluntary Administrators as contemplated by clause 16 of the Memorandum of Understanding.

No creditor voted against the resolution and four creditors abstained from voting.

[35] Although the memorandum of understanding is expressed to be made on 3 October 2001, it was executed by the administrators in Melbourne at about midnight on 4 October 2001 and by the Air New Zealand group in the early hours of the morning of 5 October 2001 (New Zealand time) in New Zealand.

[36] The memorandum of understanding does not deal with the apportionment of the $150m between the various companies in the Ansett group including the Hazelton companies. The administrators and the Hazelton administrator have agreed that the determination of the manner of that apportionment will be made jointly by the administrators and the Hazelton administrator and will take account of the interests of the creditors in the Hazelton companies who are not creditors of other companies in the Ansett group. The administrators and the Hazelton administrator have agreed that if they cannot resolve the issue of apportionment, they will seek to have it determined by the court.

[37] I have annexed the memorandum of understanding as Sch B to these reasons as it is the whole of the document which is the subject of the application before the court and all its provisions should be read so as to gain an understanding of its scope and content. However, it is desirable to explain and summarise the more significant provisions in it. In summary, it provides for the payment of $150m by the New Zealand Government on behalf of the Air New Zealand group to the administrators of the Ansett group, and for the release by the administrators and the Hazelton administrator of the Air New Zealand group and the directors from all claims arising out of the letter of comfort and from certain claims arising out of, or relating to, in general terms, the management and affairs of the Ansett group (which includes the Hazelton companies).

[38] I draw attention to the following provisions in the memorandum of understanding:

(a) the memorandum is conditional upon a number of conditions precedent, the only outstanding condition being the approval by the court of the terms of the memorandum or the court making orders or directions to the same effect on or before 12 October 2001 (cl 6.1);

(b) the payment by the New Zealand Government of $150m to the administrators within one business day of the court order approving the terms of the memorandum or making orders or directions to the same effect (cl 9);

(c) the Air New Zealand group and the directors will not prove in the administration or liquidation of the Ansett group and waive all entitlements to be repaid funds advanced, outstanding trade debts or other moneys owed with certain exclusions (cl 11);

(d) the administrators, the Hazelton administrator and the Ansett group release the Air New Zealand group and the directors from all claims arising out of, or relating to, the letter of comfort (cl 12);

(e) the administrators and the Hazelton administrator release the Air New Zealand group and all the directors from all claims arising out of, or relating to:
  (i) the management or affairs of the Ansett group;
  (ii) any claims arising at common law, in equity or pursuant to statute;
  (iii) any claims arising in the administration of the Ansett group;
  (iv) any transactions or dealings between any company in the Ansett group and any company in the Air New Zealand group (cl 13);
(f) Air New Zealand and the directors release the Ansett group, the administrators and the Hazelton administrator from all claims they may have on any account whatsoever (cl 14);
(g) the parties acknowledge that the memorandum does not affect any rights or powers of, or causes of action, the ASIC may have in relation to any party (cl 20);
(h) the parties will use all reasonable endeavours to encourage and promote the participation of Singapore Airlines in the management of the new restructured Ansett business (cl 21).

[39] The administrators are of the opinion that the memorandum contains a number of substantial benefits to the Ansett group and its creditors but also have some concerns about the memorandum to which I shall refer.

[40] I summarise the benefits perceived by the administrators:

(a) the Ansett group will receive from the New Zealand Government a significant payment which it might not be able to recover from the Air New Zealand group itself;
(b) the settlement of claims, or potential claims, of the Ansett group ensures the recovery of significant funds without recourse to lengthy, costly and uncertain litigation and without the danger that those funds might subsequently be clawed back if the Air New Zealand group subsequently goes into liquidation or into a similar insolvency regime;
(c) the releases do not cover failure by the Air New Zealand group or the directors to exercise their powers and discharge their duties in good faith in the best interests of the Ansett group and for a proper purpose (within the meaning of s 181 of the Act), or reckless conduct or improper use of position;
(d) the releases do not cover insolvent trading type claims against the directors and the Air New Zealand group as holding company if the Ansett group is placed into liquidation (see ss 588M and 588V of the Act);
(e) as a result of the warranties given by the directors, if the administrators have been misled about the financial position of Air New Zealand, the releases become inoperative;
(f) the releases do not prevent the administrators from bringing actions against auditors or other advisers to the Ansett group;
(g) the memorandum does not affect any action by ASIC;
(h) a cash injection is obtained which will enable the Ansett Kick-Start process to continue and will assist in the development of the Ansett Mark II project;

(i) the Ansett Mark II project has prospects of enhancing the value of the Ansett group assets and will also have the potential of minimising claims of creditors by providing employment for 5000–8000 of the present employees.

The Hazelton administrator has relied on the information conveyed to him by the administrators that they consider it is in the interests of the creditors in the Hazelton companies, who are also creditors of the Ansett group and in the interests of the entire administration of the Ansett group that effect be given to the provisions of the memorandum.

[41] The administrators have a number of concerns. In particular they have not had the time or opportunity to conduct any adequate investigation into the claims which are the subject of the releases. They are not presently aware of any wrongdoing by the directors but they have not examined in any detail or at all whether the directors have breached their duty of care or have committed acts, the subject of the claims released. The administrators are concerned that they are giving up claims which they have not been able to quantify. The administrators have not independently satisfied themselves that Air New Zealand's representations about its financial position are true.

[42] Further, the administrators are not satisfied that Air New Zealand is entitled to claim that it has paid or ought to be credited with $160m of its liability under the letter of comfort. The administrators have not independently satisfied themselves that all of Air New Zealand representations about its financial position are true.

[43] The final concern expressed by the administrators is significant. Mr Mentha said:

> It is always safer and prudent for an insolvency practitioner not to settle claims without a thorough investigation.

[44] It can therefore be seen, and I am satisfied, that the administrators have formed a considered commercial decision that it is in the interests, and for the benefit, of the Ansett group and its creditors that they enter into the memorandum of understanding which involves, in particular, the receipt of $150m, the giving up of any further claims under the letter of comfort and the giving up of certain claims which the Ansett group might have against Air New Zealand and the directors. The administrators have set out in some detail the reasons why they have reached this conclusion. The matter of concern to the administrators is that they are giving up claims which they have not been able to quantify, although they have not presently found any evidence of wrongdoing by the Air New Zealand group or its directors. However, those claims are contested and there is no basis at the present time for assessing the likely prospects of recovery from the directors.

[45] Thus far, I have considered the material which was available to the administrators and the Hazelton administrator before they executed the memorandum of understanding and the basis upon which they executed the memorandum of understanding. Evidence was led before the court from a number of Air New Zealand witnesses which was directed to the submission made by the Air New Zealand group, and the directors for whom an appearance was announced, that the court should approve the memorandum of understanding. The Air New Zealand group evidence sets out in considerable detail the history of the relationship between the Air New Zealand group and the Ansett group, the manner in which the Ansett group has been managed and

administered in recent times and the financial difficulties which have arisen for both the Ansett group and the Air New Zealand group. It is not necessary to analyse in any detail how those financial difficulties emerged. It is sufficient that they did emerge.

[46] At the beginning of 2001, the directors on the Air New Zealand and Ansett boards were faced with deteriorating trade performances by both Air New Zealand and Ansett. It became apparent that Air New Zealand had significant capital requirements. At an Air New Zealand board meeting on 18 July 2001, the chief executive officer reported a group loss of NZ$132.6m of which the Ansett group was responsible for NZ$108m. At that meeting, one of the directors requested that a letter of comfort be provided by Air New Zealand to Ansett Holdings Ltd to a level of $200m. That proposal was left to be reviewed once the accounts of the current financial year were available. There were a number of commercial proposals which were being considered, some of which involved the participation of Qantas and Singapore Airlines. It is not necessary to consider those proposals in any detail.

[47] At an Air New Zealand board meeting on 8 August 2001, it was agreed that a letter of comfort capped at $100m be issued by Air New Zealand to the three principal Ansett companies. At that time, the directors considered that if Air New Zealand had to meet its obligations under the letter of comfort, Air New Zealand's assets would still significantly exceed its liability. Mr Farmer said that Air New Zealand at that stage was continuing to support the Ansett group because of the strategic growth objectives which had influenced the purchase of the Ansett group and which was seen by the directors to be fundamental to Air New Zealand's business plans. At that stage, equity was not an immediate problem for Air New Zealand.

[48] At an Air New Zealand board meeting on 6 September 2001, it was identified that Air New Zealand needed a capital injection of up to NZ$800m to support the continuation of Air New Zealand and the Ansett group's trading in the medium term. However, on 7 September 2001, Mr Farmer was informed that the shareholders' funding support and the possibility of government backing was dependent upon Air New Zealand achieving a clean sale of Ansett and effectively insulating itself from further Ansett losses. Mr Farmer communicated this fact to the independent Air New Zealand directors. By 10 September 2001, commercial negotiations that had been entered into with Qantas were terminated and, according to Mr Farmer, on 12 September 2001, the Air New Zealand directors had no alternative available to them other than to place the Ansett group into voluntary administration and write down Air New Zealand's investment in the Ansett group by NZ$1.32b.

[49] There was also evidence from Mr McDonald, the Treasurer of Air New Zealand, which set out in some detail the advances which Air New Zealand had made to the Ansett group prior to the commencement of the administration. Mr McDonald said that as at 3 October 2001, the amount claimed by Air New Zealand from the Ansett group was $160,389,090.02. That amount was reviewed and reconciled to an amount of $112,948,751. It was apparent from Mr McDonald's evidence that as a result of the write down of NZ$1.32b there was a breach of covenants by Air New Zealand in its banking agreements. Air New Zealand's banks accordingly have the right to demand payment of their debts which total NZ$590m. Air New Zealand has insufficient cash to satisfy those demands if they are made. Mr McDonald said that the cooperation of the

banks is vital to Air New Zealand's ability to continue trading and that the banks have made it clear that their cooperation is dependent upon no further payments being made by Air New Zealand to the Ansett group. Mr McDonald has made it clear that the continued cooperation of the banks is dependant upon the implementation of the memorandum of understanding.

[50] Air New Zealand has also presented evidence from independent financial consultants to the effect that the continuing ability of Air New Zealand to carry on business and its ability to obtain recapitalisation from the New Zealand Government is dependent upon the memorandum of understanding being implemented. Heads of agreement have been entered into between the New Zealand Government and Air New Zealand which provide for the New Zealand Government to subscribe capital in Air New Zealand and to make a loan to it. It is a condition precedent to the implementation of the heads of agreement that the memorandum of understanding becomes unconditional by 12 October 2001.

[51] Air New Zealand has also entered into a shareholders support agreement with Singapore Airlines and Brierley Investments Ltd which is intended to support the heads of agreement entered into with the New Zealand Government.

[52] The evidence of the independent financial consultants was that Air New Zealand cannot survive without an immediate and substantial injection of equity capital, that the only source of that capital is the New Zealand Government and that if the memorandum of understanding does not become unconditional, there is a high probability that Air New Zealand will be placed in statutory management.

[53] In summary, the evidence tendered by Air New Zealand supports the proposition that if the memorandum of understanding does not become unconditional by 12 October 2001, the prospects of any claims made by the administrators of the Ansett group achieving substantial payments from Air New Zealand will be problematic. Further, there is nothing in the Air New Zealand evidence which would warrant the administrators revising their statements that they have not presently found any evidence of wrongdoing by the Air New Zealand group and the directors. The Air New Zealand evidence demonstrates that there was continuing support for the Ansett group and significant attempts made to resolve the financial and commercial difficulties facing Air New Zealand and the Ansett group prior to 12 September 2001.

[54] It is not necessary for me in the present proceedings, to make any findings as to the actions taken by the Air New Zealand group and the conduct of the directors. It is sufficient, for present purposes, to note that the Air New Zealand evidence supports the reasons advanced by the administrators and the Hazelton administrator for concluding that it was appropriate to execute the memorandum of understanding and, in particular, accept the sum of $150m and give the releases.

[55] What is clear from the evidence filed on behalf of the Air New Zealand group is that if the court does not approve the memorandum of understanding or approve of the administrators entering into the memorandum of understanding, the Air New Zealand group will most likely be placed under statutory administration. The relevance of that fact to the applications is not so much the consequences for the Air New Zealand group but, rather, the result that there would be an inability of the administrators and the Hazelton administrator to receive any funds from the Air New Zealand group, certainly in the short to

medium term. They would be left with claims against a company under statutory administration. In such circumstances, a moratorium would exist in respect of the exercise of rights and claims against the company: Corporations (Investigation and Management Act) 1989 (NZ).

[56] There is also a timing issue involved. It is apparent from what the administrators have said that there is an immediate need for an injection of funds into the Ansett group in order to enhance the value of its assets for the benefit of its creditors. If funds are not received fairly immediately, then any future claims which may be made against the Air New Zealand group or the directors in relation to the subject-matter of the releases in the memorandum of understanding will be of no value to the administrators in seeking to achieve their immediate objective of enhancing the value of the assets of the Ansett group and seeking to maximise the returns for creditors.

Relevant principles

[57] There is no doubt that the administrators and the Hazelton administrator had the power to enter into the memorandum of understanding. Such power falls within the powers given to administrators pursuant to s 437A(1) of the Act which provides:

> While a company is under administration, the administrator:
> (a) has control of the company's business, property and affairs; and
> (b) may carry on that business and manage that property and those affairs; and
> (c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and
> (d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.

The administrators' power to enter into the memorandum of understanding has not been questioned.

[58] The applications are made by way of directions pursuant to s 447D of the Act which is, in substance, in similar terms to s 479(3) of the Act which allows a liquidator of a company to apply to the court for directions "in relation to any particular matter arising under the winding up". In *Editions Tom Thompson Pty Ltd v Pilley* (1997) 77 FCR 141; 148 ALR 146; 24 ACSR 617, a company subject to a deed of company arrangement applied to the court pursuant to s 447D of the Corporations Law seeking directions permitting it to sell goods the title to which were disputed between the company and another party. Lindgren J observed (at FCR 149; ALR 153; ACSR 624):

> I see no distinction in the present respect between an application by administrators under s 447D and an application by a liquidator under s 479(3) ... The procedure afforded by s 447D to administrators under a deed of company arrangement is clearly drawn from, and is in substance the same as, that afforded to liquidators by s 479(3).

[59] Accordingly, authorities relevant to the construction and application of s 479(3) are also relevant to the present applications. There are a number of authorities which consider the consequences of an order upon the rights of third parties made upon an application by a liquidator for directions under s 479(3) of the Corporations Law. In *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674; 5 ACSR 673, McLelland J considered the genesis and legislative history of s 479(3) of the Corporations Law (the predecessor of the Corporations Act) and observed (at NSWLR 679–80; ACSR 678):

> Modern Australian authority confirms the view that s 479(3) "does not enable the court to make binding orders in the nature of judgments" and that the function of a liquidator's application for directions "is to give him advice as to his proper course of action in the liquidation; it is not to determine the rights and liabilities arising from the company's transactions before the liquidation". [cases cited omitted]

This position has been adopted in a number of subsequent cases: *Re Magic Aust Pty Ltd (in liq)* (1992) 7 ACSR 742 at 745; *Re J W Murphy & P C Allen; Re B P T C (in liq)* (1996) 19 ACSR 569 at 570; *Re New Cap Reinsurance Corp (Bermuda) Ltd (prov liq apptd) v Chase Manhattan Bank* (1999) 32 ACSR 470 at 478–9; *Re Heron Abbey Pty Ltd (in liq)* (1999) 32 ACSR 490 at 492; *Bastion v Gideon Investments Pty Ltd* (2000) 35 ACSR 466; 18 ACLC 854 at 862. The same position has been expressed in relation to directions given pursuant to s 447D of the Corporations Law: *Editions Tom Thompson Pty Ltd v Pilley*, above.

[60] However, there is no issue in the present applications that the orders sought by the administrators and the Hazelton administrator bind third parties. The directions sought are effectively advisory and only have effect in relation to the administrators and the Hazelton administrator and the companies under administration: s 437B of the Act.

[61] The nature of the type of directions commonly sought under s 479(3) of the Corporations Law and its predecessors were considered by Young J in *Sanderson v Classic Car Insurances* (1985) 10 ACLR 115 at 117 as involving:

> (a) guidance to the liquidator on matters of law . . .
> (b) questions involving legal procedure . . .
> (c) whether a liquidator should act on his commercial judgment to postpone a sale because he recognises his legal duty ordinarily requires him to reduce the company's assets into cash as soon as possible and to distribute . . . or
> (d) where there are two or more competing purchasers for the company's property and the liquidator can see that it may be alleged that the liquidator has acted *mala fide* or in an absurd or unreasonable or illegal way . . .

[62] Essentially what a court is doing when giving directions under provisions such as ss 447D and 479(3) in relation to a question whether an administrator or liquidator should enter into an agreement, or whether an administrator or liquidator should give effect to an agreement, is to provide the administrator or liquidator with protection against claims that he or she acted inappropriately or unreasonably in entering into, and performing, the agreement.

[63] This consequence was identified by McLelland J in *Re G B Nathan & Co Pty Ltd (in liq)*, above, (at NSWLR 679; ACSR 678):

> The historical antecedents of s 479(3), the terms of that subsection and the provisions of s 479 as a whole combine to lead to the conclusion that the only proper subject of a liquidator's application for directions is the manner in which the liquidator should act in carrying out his functions as such, and that the only binding effect of, or arising from, a direction given in pursuance of such an application (other than rendering the liquidator liable to appropriate sanctions if a direction in mandatory or prohibitrary form is disobeyed) is that the liquidator, if he has made full and fair disclosure to the court of the material facts, will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributory or to the company in respect of anything done by him in accordance with the direction.

(See also *Burns Philp Investment Pty Ltd v Dickens (No 2)* (1993) 31 NSWLR 280; 10 ACSR 626; *Re Dallhold Investments Pty Ltd (in liq)* (1994) 53 FCR 339; 130 ALR 287; *Re Addstone Pty Ltd (in liq)* (1997) 25 ACSR 357; *Re Heron Abbey Pty Ltd (in liq)*, above.)

[64] In the present applications the administrators have agreed to accept a substantial sum in exchange for releases to Air New Zealand and the directors in respect of claims which the Ansett group (including the Hazelton companies) might have had against Air New Zealand and the directors and the waiver of certain claims. In deciding to compromise those claims and give the releases, the administrators have exercised a commercial judgment by considering and weighing the benefits and advantages to the Ansett group and its creditors in agreeing to that course as against the disadvantages of not giving the releases, not receiving immediately the sum of $150m but keeping open the opportunity to take proceedings against Air New Zealand under the letter of comfort and against the directors in respect of various causes of action.

[65] In a number of authorities, the courts have made it clear that courts should pay regard to the commercial judgment of liquidators when considering compromises of claims or causes of action made by liquidators in respect of which compromises the approval of the court is sought. The Act and its predecessors, entrust to liquidators and administrators the conduct of liquidations and administrations, albeit subject to the ultimate supervision of the court. The court will generally defer to the commercial judgment of liquidators and administrators. In *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83, Giles J said at 85–6:

> In any application pursuant to s 377(1) [equivalent to Corporations Act s 477(2A)] the court pays regard to the commercial judgment of the liquidator: *Re Chase Corp (Australia) Equities Ltd* (1990) 8 ACLC 1118. That is not to say that it rubber stamps whatever is put forward by the liquidator but, as is made clear in *Re Mineral Securities Australia Ltd* [1973] 2 NSWLR 207 at 231–2, the court is necessarily confined in attempting to second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct. The same restraint must apply when the question is whether the liquidator should be authorised to enter into a particular transaction the benefits and burdens of which require assessment on a commercial basis.

Put shortly, it is not the role of the court to make a commercial judgment for the liquidators or administrators or to substitute its judgment for their judgment. The court is not qualified to do so and it is not part of the judicial function to do so. Street CJ made this point in *Re Mineral Securities Australia Ltd (in liq)* [1973] 2 NSWLR 207 at 232:

> When the court is required to pronounce upon the commercial prudence of a transaction, it enters upon a slippery and uncertain field. Apart from the lawyer's disclaimer of expert qualifications in matters of business prudence, the very process of litigation and the necessary limitations upon the scope of admissible evidence restrict the available material to far less than is necessary for the making of a commercial decision.

[66] As I have pointed out earlier, although courts will not pronounce upon the commercial prudence of a particular transaction, they will act in an appropriate case to protect liquidators and administrators from claims that they have acted unreasonably in entering into particular transactions. That protection will remain so long as the liquidators or administrators have made a full and fair disclosure to the court of all facts material to the subject-matter under consideration: *Re G B Nathan & Co Pty Ltd (in liq)*, above, at 679; *Mentha v G E Capital Ltd* (1997) 154 ALR 565; 27 ACSR 696 at 702.

[67] In this consideration of relevant principles, I have considered the relevant principles as applying equally to court appointed liquidators and administrators appointed pursuant to Pt 5.3A of the Act.

[68] There is a difference between court appointed liquidators and administrators appointed pursuant to the provisions of Pt 5.3A of the Act. Administrators are not officers of the court in the same way as court appointed liquidators are officers of the court. Part 5.3A of the Act enables an administrator of a company to be appointed by the company (s 436A), by a liquidator of a company (s 436B), by a person entitled to enforce a charge on the whole of the company's property (s 436C) and by the court where a company is under administration but no administrator is acting (s 449C(6)). There is a suggestion in some authorities that a voluntary liquidator not appointed by the court is not an officer of the court: *Re London County Commercial Reinsurance Office* [1922] 2 Ch 67 at 84; *Re David A Hamilton & Co Ltd (in liq)* [1928] NZLR 419 at 422, but see *Re T H Knitwear (Wholesale) Ltd* [1987] 1 WLR 371 at 377.

[69] In the circumstances of these applications, I do not need to determine whether an administrator appointed by a company pursuant to s 436A of the Act is an officer of the court so as to make applicable to the administrator the principles relating to court appointed liquidators, as the administrators and the Hazelton administrator were appointed as administrators by the court on 17 September 2001: *Re Ansett Australia Ltd (admin apptd); Rappas v Ansett Australia Ltd (admin apptd)* (2001) 39 ACSR 296. In the circumstances which existed on 17 September 2001, I exercised the powers of the court pursuant to ss 447A and 449C(6) of the Act to order that the administrators and the Hazelton administrator be appointed as administrators immediately upon the resignation of Messrs Hedge, Hall and Watson. It is, therefore, appropriate that I consider this application on the basis that the administrators and the Hazelton administrator have been appointed as administrators by the court.

[70] I turn to the critical issue whether I should order that the court approves of the memorandum of understanding and order that the administrators and the Hazelton administrator may properly perform and give effect to the memorandum of understanding. I consider that I should approach this matter, bearing in mind the object of Pt 5.3A of the Act enshrined in s 435A which provides:

> The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
>
> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
>
> (b) if it is not possible for the company or its business to continue in existence — result in a better return for the company's creditors and members than would result from an immediate winding up of the company.

[71] I am satisfied on the basis of the material placed before the court that the administrators and the Hazelton administrator are seeking first to maximise the chances of the Ansett group, or as much as possible of its business, continuing in existence, and second, if it is not possible for the Ansett group or its business to continue in existence, to provide for the business, property and affairs of the Ansett group to be administered in a way that results in a better return for the Ansett group's creditors than would result from an immediate winding up of the Ansett group. The administrators and the Hazelton administrator have been presented with a window of opportunity which, on the evidence before me, will,

in all probability, not reappear if the administrators are not put in a position to perform the memorandum of understanding and carry it into effect forthwith.

[72] I am satisfied that in negotiating and entering into the memorandum of understanding, the administrators and the Hazelton administrator have acted in the interests of the Ansett group and the Hazelton companies and their creditors. By entering into the memorandum of understanding, the administrators and the Hazelton administrator have negotiated what they consider to be substantial benefits for the Ansett group and its creditors. They have procured the immediate payment of $150m with an indemnity against the repayment of that amount and have procured the avoidance of the repayment of a priority advance of $32m. The creditors are also advantaged by Air New Zealand foregoing its right to prove in the administration in any subsequent liquidation.

[73] Further, the implementation of the memorandum of understanding will enhance the possibility of the full implementation of Ansett Kick-Start and the progress of Ansett Mark II. Although both of those processes are yet to be worked out, the administrators are well advanced in relation to them and they have significant potential advantages for the Ansett group and its creditors.

[74] I should point out that the manner in which the administrators use the payment of $150m is a matter for the administrators to determine and it is no part of the function of the court to give any indication or direction as to how that amount might, or should be, applied. They have said that they intend to use the settlement proceeds to maximise the chances of the Ansett business remaining in existence and that if that is not possible, they intend to use the proceeds to maximise the return to creditors. They need to say no more at the present time.

[75] The matter which has weighed most heavily as a consideration against making an order for approval of the memorandum and that the administrators and the Hazelton administrator may properly perform and give effect to the memorandum is the release of claims under the letter of comfort and claims in respect of some causes of action against the directors. As Mr Mentha said, and it bears repeating:

> It is always safer and prudent for an insolvency practitioner not to settle claims without a thorough investigation.

Nevertheless, as appears from the evidence, the administrators do not have the luxury of the time to undertake a thorough investigation, if they wish to keep alive the opportunity to obtain an immediate cash payment of $150m without recourse and to implement their business strategies for the Ansett group and the Hazelton companies. That is a commercial decision for them and it is not for me to gainsay it in the circumstances disclosed in the evidence.

[76] Mr Mentha summarised the position of the administrators in the following terms:

> When balancing all of the advantages and disadvantages and having regard to the objects of Pt 5.3A of the Corporations Act, namely to try and keep Ansett's business in existence if it is at all possible to do so, or if not, to maximise the return to creditors, I have no doubt it is in the interests of all Ansett stakeholders for this transaction to proceed. I am concerned that I am releasing claims that I have not fully investigated. However, in all the circumstances and subject to court direction to the contrary, I have done all I can do to ameliorate the risks involved and I believe this is the best commercial outcome for all creditors.

In this context, it is important to realise that the claims which are being released are claims which, if made, will be resisted by Air New Zealand and the directors.

The proper construction of the letter of comfort is very much in issue as is the amount which the three Ansett companies, which are the beneficiaries of the letter of comfort, are entitled to claim under it. The outcome of any proceeding against the directors in respect of the causes of action which have been released is incapable of any realistic assessment at the present time. What is relevant for present purposes, is that extensive investigations would be required before any decision could be made whether any proceedings against the directors should be launched. Even if they were, the outcome would remain uncertain for a considerable period of time.

[77] I do not need to venture into a consideration of the competing claims in relation to Air New Zealand's obligations under the letter of comfort, or into the question of the extent to which there may be recoverable claims against the directors in respect of the causes of action which are released by the memorandum. It is sufficient for present purposes, that the administrators and the Hazelton administrator have considered those matters, have evaluated and weighed them against the benefits to be obtained by entering into an agreement which involves a release of those claims and have made a commercial decision, after taking legal advice, that in the circumstances, commercial considerations dictate that they should nevertheless, release those claims.

[78] As it is apparent that the administrators and the Hazelton administrator have demonstrated that they have taken into account, and considered, the interests of the Ansett group and the Hazelton companies and the interests of their creditors, and that they have not taken into account, or been influenced by, matters irrelevant in relation to, or antithetical to, the administration of the Ansett group in the manner described in s 435A of the Act ([70] above), I am satisfied that it is appropriate to order that they may properly perform and give effect to the memorandum of understanding.

[79] The administrators and the Hazelton administrator submitted that the form of order which the court should make was an order approving the memorandum of understanding and directing that the administrators and the Hazelton administrator may properly perform and give effect to the agreement. The Air New Zealand group supported this submission. ASIC, which did not oppose the applications by the administrators and the Hazelton administrator, submitted that it was not for the court to settle the terms of the memorandum of understanding but, rather, it was for the parties to enter into the memorandum of understanding and obtain a direction from the court that, having regard to the circumstances, the court approved the administrators entering into and performing the memorandum of understanding. It was submitted that the role of the court was to assist the administrators in achieving the objectives which they wished to achieve.

[80] The ACTU did not oppose the applications, but submitted that the form of order should be that the court direct that it was appropriate for the administrators to enter into, and give effect to, the transactions required to be performed by the memorandum. I consider that a form of order directed to giving effect to the transactions is too limiting and is not adequate to protect the administrators from any claim that they should not have entered into the memorandum of understanding.

[81] The only person who appeared to oppose the application was E/Wise Solutions Pty Ltd who claimed to be a creditor of the Ansett group in the sum of $264,176. In substance, the creditor submitted that if the memorandum of

understanding was approved, it would not be able to take any proceeding under s 588M of the Act against any director of the Ansett group in relation to the incurring by the relevant company of the debt owed to it. Such rights as might arise under s 588M (in conjunction with s 588R) only arise where a company has been placed in liquidation. However, the creditor disavowed any wish that the Ansett group be placed into liquidation. The solicitor who appeared for the creditor said that the creditor was puzzled why the directors had been released from certain claims. It is apparent from the evidence of the administrators that the directors have been released because the administrators have made a commercial decision that it is more advantageous for the Ansett group and its creditors, at the present time, to obtain the $150m and the other advantages and benefits provided by the memorandum of understanding. I do not consider that the concerns of that creditor are such that I should not make an order which has the effect of making the memorandum of understanding unconditional and its terms, including the releases, operative and effective. Such an order does not preclude any investigation into the affairs of the Ansett group and the conduct of the directors by ASIC.

[82] Although the court does not have express powers to "approve" an agreement entered into by administrators appointed and acting pursuant to Pt 5.3A of the Act, I am satisfied that the powers conferred upon the court by s 447A empower the court to make an order that the directions which the court may give to an administrator pursuant to s 447D of the Act include a direction that the court approves an agreement entered into by the administrators which is the subject-matter of an application for directions. The reasoning of the High Court in *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270; 172 ALR 28; 34 ACSR 250 shows that the power under s 447A(1) is sufficiently broad to cover such an order. At CLR 279–80; ACSR 256 the court said:

> Section 447A(1) speaks of orders about how "this Part" is to operate. The reference to "this Part" cannot be read as referring only to the part as a whole. That is, it cannot be read as referring, in some global way, to the total operation or effect of the part. In its context, the reference to "this Part" is to be understood as a reference to each of the provisions in it, for it is the provisions of the part which give it the operation which an order under s 447A(1) may affect. And although the examples given in s 447A(2) cannot be taken as exhaustive of the scope, or as controlling the meaning, of s 447A(1) (s 109L), it is clear from those examples that they assume that orders under s 447A(1) may alter the operation of other provisions of the part. That is, the orders contemplated in the examples go beyond a curial determination of what is the effect of existing provisions of the part on a particular company in the circumstances that may be established in a proceeding; the orders contemplated are orders that alter how the part is to operate in relation to a particular company, not how the part *does* operate in relation to that company.
>
> . . . And while full effect must be given to the provisions of s 447F (that "[n]othing in this Division *limits* the generality of anything else in it") it is clear, from the other provisions of Div 13 that we have mentioned, that s 447A was intended to permit a much wider class of orders than those which declare what is the effect of the part or which protect the interests that creditors no doubt have in the administration of a company being carried out in accordance with law.

(See also *Brash Holdings Ltd (admin apptd) v Katile Pty Ltd* [1996] 1 VR 24 at 26–7; 13 ACSR 504.)

[83] In approving the memorandum of understanding, the court is not settling its terms. Rather, the court is making it clear that it was appropriate for the

administrators to enter into the memorandum in the specific terms in which it was executed and that they have the protection of the court in having agreed to each of the terms of the memorandum and their obligation to perform and carry into effect each of its terms.

[84] In the circumstances before the court, I consider that it is appropriate to direct that the court approve the memorandum of understanding rather than direct that the court approves the administrators entering into the memorandum and performing its terms. Although a direction in the latter terms may satisfy the condition precedent in the memorandum relating to the obtaining of the approval of the court ([38](a) above), I consider it appropriate that there be no doubt that what the court is doing is rendering the memorandum of understanding unconditional and ensuring that the administrators and the Hazelton administrator are giving protection co-extensive with such issues which might arise as a result of them executing the memorandum of understanding.

[85] There is little difference between approving an agreement, into which an administrator had entered, and directing that an administrator may execute a document to be entered into with another party. Such an order was made by Finkelstein J in *Mentha v G E Capital Ltd*, above, in which his Honour directed that the administrators "may properly and justifiably execute the deed of assignment and the deed poll of novation" in the form annexed to an affidavit. It is implicit in such an order that the court was approving the deed of assignment and the deed poll of novation.

[86] Although the critical issues which were debated at the hearing were the quantum of the payment by or on behalf of Air New Zealand and the nature, extent and consequences of the releases given to Air New Zealand and the directors, it is not appropriate to limit the terms of any approval to those provisions. The administrators set out in some detail the reasons why other provisions in the memorandum of understanding were of advantage to the future viability of the Ansett group, albeit in an altered structure and to the creditors to the Ansett group. I do not consider it appropriate to do anything other than direct that the court approves the memorandum of understanding as a whole.

[87] I reserved my decision on 11 October 2001 until 4.30 pm on 12 October 2001. On the morning of 12 October 2001 may associate was informed that the Travel Compensation Fund wished to make submissions. At that time I had prepared most of these reasons. I required the submissions to be made in open court. I have considered those submissions and they do not persuade me away from the findings and conclusions I had reached.

[88] The order of the court will be that s 447D(1) of the Act operates so as to allow the court to direct that it approves the memorandum of understanding pursuant to s 447D(1) and that the administrators and the Hazelton administrator may properly perform it and give effect to it, there will be a direction that the court approves the memorandum of understanding and that the administrators may properly perform and give effect to the memorandum of understanding. The costs of all parties who have appeared in the proceeding will be costs in the administration of the Ansett group.

Order — No V 3045 of 2001

The court orders that:

(1) Pursuant to s 447A of the Corporations Act 2001 (Cth) (the Act), s 447D(1)

of the Act is to operate in relation to each of the companies set out in Sch A to the judgment so that in an application by the plaintiffs for directions pursuant to s 447D(1) in relation to a memorandum of understanding dated 3 October 2001 referred to in the application, the court may give a direction that it approves the memorandum and that the plaintiffs may properly perform and give effect to the memorandum of understanding.

(2) Pursuant to s 447D(1) of the Act, as it operates in accordance with para (1) of this order, the court directs that:

(a) the court approves the memorandum of understanding which is Sch B to the judgment;

(b) the plaintiffs may properly perform and give effect to the memorandum of understanding.

(3) The costs of all parties who have appeared in the proceeding, save for Air New Zealand Ltd and its subsidiaries and directors and Travel Compensation Fund, be costs in the administration of the companies set out in Sch A to the judgment.

Order — No V 3046 of 2001

The court orders that:

(1) Pursuant to s 447A of the Corporations Act 2001 (Cth) (the Act), s 447D(1) of the Act is to operate in relation to Hazelton Air Charter Pty Ltd, Hazelton Air Services Pty Ltd and Hazelton Airlines Ltd so that in an application by the plaintiff for directions pursuant to s 447D(1) in relation to a memorandum of understanding dated 3 October 2001 referred to in the application, the court may give a direction that it approves the memorandum and that the plaintiff may properly perform and give effect to the memorandum of understanding.

(2) Pursuant to s 447D(1) of the Act, as it operates in accordance with para (1) of this order, the court directs that:

(a) the court approves the memorandum of understanding which is Sch B to the judgment;

(b) the plaintiff may properly perform and give effect to the memorandum of understanding.

(3) The costs of the plaintiff and Australian Council of Trade Unions and its associated parties be costs in the administration of the said companies.

Schedule A

Ansett Australia Ltd (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 Ltd (ACN 000 258 113)
Ansett Aircraft Finance Ltd (ACN 008 643 276)
Ansett Australia Holdings Ltd (ACN 004 216 291)
Ansett Aviation Equipment Pty Ltd (ACN 008 559 733)
Ansett Carts Pty Ltd (ACN 055 181 215)
Ansett Equipment Finance Ltd (ACN 006 827 989)
Ansett Finance Ltd (ACN 006 555 166)
Ansett Holdings Ltd (ACN 065 117 535)
Ansett International Ltd (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 Ltd (ACN 055 259 008)

Eastwest Airlines (Operations) Ltd (ACN 000 259 469)
Eastwest Airlines Ltd (ACN 000 063 972)
Kendell Airlines (Aust) Pty Ltd (ACN 000 579 680)
Morael Pty Ltd (ACN 003 286 440)
Northern Airlines Ltd (ACN 009 607 069)
Northern Territory Aerial Work Pty Ltd (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 Ltd (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 Ltd (ACN 000 275 936)
Traveland International Pty Ltd (ACN 002 275 936)
Traveland New Staff Pty Ltd (ACN 080 739 037)
Traveland Pty Ltd (ACN 000 240 746)
Walgali Pty Ltd (ACN 005 258 921)
Westintech Ltd (ACN 009 084 039)
Westintech Nominees Pty Ltd (ACN 009 302 158)
Whitsunday Affairs Pty Ltd (ACN 009 694 553)
Whitsunday Harbour Pty Ltd (ACN 010 375 470)
Wridgway Holdings Ltd (ACN 004 449 085)
Wridgways (Vic) Pty Ltd (ACN 004 153 413)
(All Administrators Appointed)

Schedule B

Ansett Group

Mark Korda and Mark Mentha as Voluntary Administrators

Michael Humphris as Voluntary Administrator

Air New Zealand Group

The Directors

Memorandum of Understanding

Arnold Bloch Leibler
Lawyers and Advisers
Level 21
333 Collins St
Melbourne Vic 3000
Australia
Ref: Ross Paterson/Leon Zwier

Andersens
Level 13
The Tower
360 Elizabeth St
Melbourne Vic 3000
Australia

MEMORANDUM OF UNDERSTANDING

This memorandum of understanding is made the 3 October 2001 by and between:

Parties

A The Ansett Group comprising Ansett Holdings Ltd, Ansett Australia Ltd, Ansett International Ltd and all of their respective subsidiaries (including the Hazelton

companies being Hazelton Air Services Pty Ltd, Hazelton Airlines Ltd and Hazelton Air Charter Pty Ltd) to which administrators have been appointed as set out in Sch A (the Ansett Group).

B Mark Korda and Mark Mentha as the Voluntary Administrators of the Ansett Group other than the Hazelton companies (Voluntary Administrators).

C Michael Humphris as the Voluntary Administrator of the Hazelton companies (the Hazelton Voluntary Administrator).

D Air New Zealand Ltd and its subsidiaries, other than the Ansett Group, as set out in Schedule B (Air New Zealand Group).

E Each person who is, or was at any time since Air New Zealand Ltd acquired full ownership of the Ansett Group a Director or Secretary of any company in the Air New Zealand Group or the Ansett Group as set out in Schedule C (together called the Directors).

The parties to this Memorandum of Understanding have agreed as follows:

Binding agreement

1 It is the express intention of the parties that this Memorandum of Understanding records and constitutes an immediately binding agreement between the parties notwithstanding at the same time the parties contemplate that, if necessary or reasonably required by either the Voluntary Administrators or the Air New Zealand Group, the Memorandum of Understanding will be engrossed in more perfectly drafted documentation which the parties will and hereby agree to execute.

2 It is agreed that if any dispute arises between the parties regarding any suggested omission or uncertainty in the terms of this Memorandum of Understanding or if there is any dispute between the parties in the course of the preparation of the more perfectly drafted documentation regarding the form or substance of such documentation the same will be submitted to Frank Costigan QC (the mediator) for summary determination acting as an expert and not as an arbitrator.

3 The parties agree to accept such determination as final and binding and to execute such further documentation as will carry into effect such determination.

Appointment of mediator

4 The parties will enter into an agreement with the mediator in such form as the mediator may reasonably require to ensure that the mediator will be paid for professional services to be provided and protected from any claims

Further documents

5 If necessary or reasonably required by the Voluntary Administrators or the Air New Zealand Group, the parties will use their best endeavours to enter into further legally binding documentation consistent with the principles of this Memorandum of Understanding as soon as practicable (the Proposed Agreement).

Conditions Precedent

6 The Memorandum of Understanding (other than Clauses 1–8, 16, 17, 20, 27–32) will be wholly conditional upon (the Conditions Precedent):

6.1 the Federal Court of Australia approving the terms of this Memorandum of Understanding or making orders or directions to the same effect on or before 12 October 2001 or such other date as all the parties may agree in writing; and

6.2 the consent or non-opposition of the Committee of Creditors being obtained on or before 5 October 2001 in accordance with Clause 16; and

6.3 approval by end of 3 October 2001 (NZ time) by the New Zealand Government of the terms of an agreement between the New Zealand Government and Air New Zealand Ltd providing for the payment referred to in Clause 9 hereof; and

6.4 on or before 4 October 2001, the provision to the Voluntary Administrators, of an indemnity (on terms acceptable to the Voluntary Administrators) from the New Zealand Government to cover any requirement for any of the Voluntary Administrators to repay or otherwise disgorge all or any part of the payment of the AUD150M referred to in Clause 9, in the event of the insolvency or statutory management of any company in the Air New Zealand Group.

Obligation to fulfil Conditions Precedent

7 The parties will use their best endeavours to fulfil the Conditions Precedent before the dates referred to in Clause 6. If any Conditions Precedent are not satisfied, this Memorandum of Understanding will automatically terminate.

Service of Federal Court documents

8 The Voluntary Administrators will serve a copy of the Federal Court Application and non-confidential supporting Affidavits on key stakeholders, including priority creditor representatives, lessor creditor representatives, the Committee of Creditors and others.

Payment of AUD150M from New Zealand Government (on behalf of the Air New Zealand Group)

9 The Air New Zealand Group and the Directors will procure the New Zealand Government to pay (on behalf of the Air New Zealand Group) to the Voluntary Administrators AUD150M net of all New Zealand taxes (including GST) within one (1) business day of the fulfilment of the Conditions Precedent, such payment to be made in a manner reasonably required by the Voluntary Administrators so that it is not required to be disgorged on any insolvency or statutory management of any company in the Air New Zealand Group.

10 If the New Zealand Government fails to pay AUD150M in accordance with Clause 9 this Memorandum of Understanding is automatically terminated.

Air New Zealand Group waives all claims

11 In consideration of the release in Clause 12, the Air New Zealand Group and the Directors will not prove in the administration or liquidation of the Ansett Group and waive all entitlements to be repaid funds advanced, outstanding trade debts or any other money owed whatsoever arising, accruing or falling due prior to the date of fulfilment of the Conditions Precedent (but excluding any claim for unreturned aircraft assets as referred to in Clause 24). As at the date hereof, the Air New Zealand Group claim that the amount owing to the Air New Zealand Group from the Ansett Group is AUD160,389,090 as set out in Schedule D together with other amounts relating to the payment of wages and salaries.

Release of Letter of Comfort claim

12 In consideration of the payment in Clause 9 and the agreement not to prove and waiver in accordance with Clause 11, the Voluntary Administrators, the Hazelton Voluntary Administrator and the Ansett Group will accept the payment in Clause 9 and the agreement not to prove and waiver in accordance with Clause 11 in full satisfaction of any outstanding liability or rights under the Letter of Comfort dated 8 August 2001 from Air New Zealand Ltd to the Ansett Group and, subject to receipt of the payment in Clause 9, the Voluntary Administrators, the Hazelton Voluntary Administrator and the Ansett Group release the Air New Zealand Group and all of the Directors from all actions,

claims and demands arising out of and/or relating directly or indirectly to the Letter of Comfort, whether or not the Voluntary Administrators, the Hazelton Voluntary Administrator or any company in the Ansett Group are presently aware of the existence of such action, claim or demand. Nothing in Clause 22 shall apply to this Clause.

12A For the avoidance of doubt, upon payment of AUD150M in accordance with cl 9, the Ansett Group will have no claims against the Air New Zealand Group and the Directors arising out of and/or relating directly or indirectly to the Letter of Comfort.

Conditional release of Directors

13 Subject to Clause 22 and to receipt of the payment referred to in cl 9, the Ansett Group, the Voluntary Administrators and the Hazelton Voluntary Administrator release the Air New Zealand Group, and all of the Directors from all actions, claims and demands arising out of and/or relating directly or indirectly to:

13.1 the management or affairs of the Ansett Group;

13.2 any claims arising at common law, in equity or pursuant to statute including but not limited to the Corporations Act, the Corporations Law and the Trade Practices Act;

13.3 any claims arising in the administration of the Ansett Group;

13.4 any transactions or dealings between any company in the Ansett Group and any company in the Air New Zealand Group

in all cases whether or not any company in the Ansett Group or the Voluntary Administrators are presently aware of the existence of such action, claim or demand.

This release does not operate to prevent or in any way hinder the return to the owner of aircraft assets or documents as contemplated by Clause 24.

Release of Ansett Group

14 Subject to receipt of the payment referred to in Clause 0, the Air New Zealand Group and each of the Directors release the Ansett Group, the Voluntary Administrators and the Hazelton Voluntary Administrator from all actions, claims and demands whatsoever which any of them may have on any account whatsoever, including any loans which may be owing.

This release does not operate to prevent or in any way hinder the return to the owner of aircraft assets or documents as contemplated by Clause 24.

Ongoing business relationships

15 The Air New Zealand Group will enter into other agreements on reasonable commercial terms with the Ansett Group (or any new company established for the purposes of carrying on, inter alia, the former business of the Ansett Group) so as to provide preferred partner status, and access to all intellectual property reasonably required by the Voluntary Administrators or the Hazelton Voluntary Administrator to carry on the business of an airline using the Ansett brand, provided there is no detriment to the Air New Zealand Group.

Committee of Creditors to consider Memorandum of Understanding

16 The Voluntary Administrators and Hazelton Voluntary Administrator will, as soon as practicable, meet with the Committee of Creditors and seek from them (by a majority vote) their consent to the orders or directions to be sought or no opposition to the said orders or directions. If the Committee of Creditors refuses to do so on or before 5 October 2001 then this Memorandum of Understanding will be at an end and no party will have any further obligation under this Memorandum of Understanding.

Access to financial information

17 The Air New Zealand Group and the Directors will provide, on a confidential basis, to the Voluntary Administrators and the Hazelton Voluntary Administrator such information and documents as the Voluntary Administrators may reasonably require to confirm the information as to the financial position of the Air New Zealand Group as at 31 August 2001, and as projected to 31 December 2001 or on such other dates as the Voluntary Administrators may reasonably require provided that the costs of doing so will be borne by the Voluntary Administrators. All requests for information and documents must be made by the Voluntary Administrators and the Hazelton Voluntary Administrator within the period of 60 days of the date of this Memorandum of Understanding.

Deed of company arrangement

18 The Voluntary Administrators will take all reasonable steps to propose and recommend (as the case may be) that each company in the Ansett Group enters into a Deed of Company Arrangement which will:

18.1 acknowledge and incorporate the terms of the Memorandum of Understanding or if in existence the Proposed Agreement; and

18.2 seek to "pool" all of the assets and liabilities of the Ansett Group so that for the purposes of the Deed all Ansett Group companies are treated as one company.

19 If the Hazelton Voluntary Administrator recommends to creditors that the Hazelton Companies enter into a Deed of Company Arrangement, the Deed of Company Arrangement which the Hazelton Voluntary Administrator recommends will acknowledge and incorporate the terms of the Memorandum of Understanding or if in existence the Proposed Agreement.
For the avoidance of doubt, the validity and enforceability of the provisions of Clauses 12, 12A and 13 of this Memorandum of Understanding will not be affected if no Deed of Company Arrangement is executed or performed.

Memorandum of Understanding without prejudice to ASIC

20 The parties acknowledge that this Memorandum of Understanding does not affect any rights or powers of or causes of action ASIC may directly or indirectly have in relation to any party hereto. This acknowledgement by the Air New Zealand Group and the Directors is not to be taken as an admission that any of them may have engaged in conduct which would give rise to rights, powers or causes of action being available to ASIC.

SIA

21 The parties will use all reasonable endeavours to encourage and promote the participation of Singapore Airlines Ltd (SIA) in the management of a new restructured Ansett business (which may extend to equity involvement) in any way which SIA and the Voluntary Administrators deem appropriate.

Representations and warranties by the Directors

22 The Directors severally represent and warrant that:

22.1 they have not acted other than in good faith and for a proper purpose (within the meaning of s 181 of the Corporations Act 2001) or Recklessly in the management or affairs of the Ansett Group; and

22.2 they have not acted in a manner in relation to the Ansett Group which would constitute a breach of s 184 of the Corporations Act 2001; and

22.3 all statements made by any of the Directors or their or the Air New Zealand's Group's experts or advisers in any affidavits filed in support of the Federal Court Application will be true in all material respects and not misleading,

(collectively the Representations and Warranties).

The release in Clause 13 will not operate if, in any proceedings commenced by the Voluntary Administrators or the Ansett Group against the Air New Zealand Group or the Directors arising out of:

22.4 a breach of any of the Representations and Warranties; or

22.5 any action or omission by any of the Directors or the Air New Zealand Group which was not in good faith and for a proper purpose (within the meaning of Section 181 of the Corporation Act 2001) or was Reckless or which would constitute a breach of Section 184 of the Corporations Act 2001,

the court determines that any of the Representations and Warranties are materially incorrect. For the avoidance of doubt, the release in Clause 13, does not prevent the Voluntary Administrators or the Ansett Group from commencing any proceedings against the Air New Zealand Group or the Directors in respect of the matters referred to in Clause 22.4 or 22.5, nor does it prevent the Directors and the Air New Zealand Group from defending those proceedings and contending that the release in Clause 13 is effective on the ground that there has been no breach as referred to in Clause 22.4 and that there had been no action, omission, Recklessness, or breach as referred to in Clause 22.5.

For the purposes of this clause, "Recklessly" means an act or omission of the Directors or the Air New Zealand Group which was taken or omitted to be taken (as the case may be) without regard to its consequences.

Employee entitlements

23 The Voluntary Administrators will use their best endeavours to ensure that the priority creditors are paid all of their entitlements in full.

Return of aircraft parts

24 The Voluntary Administrators, the Hazelton Voluntary Administrator and the Air New Zealand Group agree to cooperate with each other in identifying and arranging for the prompt return of aircraft assets and any documents belonging to each other. The parties further agree that any assets jointly owned by two or more of the parties will be dealt with by further negotiation in good faith or, if required, mediation.

No admission of liability by Air New Zealand Group

25 Nothing herein constitutes an admission of liability by the Air New Zealand Group or the Directors in respect of the Letter of Comfort or otherwise and the payment under Clause 0 is made and procured without admission of liability.

Shares in Ansett Group

26 If the majority of companies in the Ansett Group enter into a Deed of Company Arrangement as contemplated by Clause 0, the Air New Zealand Group will within seven (7) days of being requested by the Voluntary Administrators in writing to do so execute an instrument of transfer in blank of all shares held by the Air New Zealand Group in the Ansett Group for a nominal value and deliver the share scrip so as to enable the Voluntary Administrators to give effect to the objects of Part 5.3A of the Corporations Act.

Good faith

27 The parties to this Memorandum of Understanding represent to each other that they are each entering into this Memorandum of Understanding in good faith.

Governing law

28 This Memorandum of Understanding is governed by and construed in accordance with the laws for the time being in force in Australia and the parties hereby irrevocably submit to the exclusive jurisdiction of the Australian Courts.

Certain parties may not sign

29 This Memorandum of Understanding is binding as between those parties who sign this Memorandum of Understanding notwithstanding that any one or more other intended parties do not sign this Memorandum of Understanding.

Best endeavours to execute and counterparts

30 The parties that sign this Memorandum of Understanding on the date it bears will use their best endeavours to cause all other parties associated with them to sign the Memorandum of Understanding. This Memorandum of Understanding may be executed in any number of counterparts, each of which when executed will be deemed to be an original, and all such counterparts will constitute the one instrument.

31 The Voluntary Administrators, the Ansett Group and the Air New Zealand Group agree that as and from the date upon which the Conditions Precedent are fulfilled, the costs of all Ansett employees presently being paid by the Air New Zealand Group will be borne by the Ansett Group.

32 For the avoidance of doubt, the Air New Zealand Group's payment of the costs of the Ansett employees up to the date of fulfilment of the Conditions Precedent will be forgiven by the Air New Zealand Group in accordance with Clause 14.

Signed

A Ansett Group

_____
For and on behalf of
501 Swanston Street Pty Ltd
(Administrators Appointed)

_____
For and on behalf of
Aeropelican Air Services Pty Ltd
(Administrators Appointed)

_____
For and on behalf of
Airport Terminals Pty Ltd
(Administrators Appointed)

_____
For and on behalf of
Aldong Services Pty Ltd
(Administrators Appointed)

_____
For and on behalf of
Ansett Aircraft Finance Ltd
(Administrators Appointed)

_____
For and on behalf of
Ansett Australia Holdings Ltd
(Administrators Appointed)

_____
For and on behalf of
Ansett Australia Ltd
(Administrators Appointed)

_____
For and on behalf of
Ansett Aviation Equipment Pty Ltd
(Administrators Appointed)

For and on behalf of
Ansett Carts Pty Ltd
(Administrators Appointed)

For and on behalf of
Ansett Equipment Finance Ltd
(Administrators Appointed)

For and on behalf of
Ansett Finance Ltd
(Administrators Appointed)

For and on behalf of
Ansett Holdings Ltd
(Administrators Appointed)

For and on behalf of
Ansett International Ltd
(Administrators Appointed)

For and on behalf of
Bodas Pty Ltd
(Administrators Appointed)

For and on behalf of
Brazson Pty Ltd
(Administrators Appointed)

For and on behalf of
Eastwest Airlines (Operations) Ltd
(Administrators Appointed)

For and on behalf of
Eastwest Airlines Ltd
(Administrators Appointed)

For and on behalf of
Kendell Airlines (Aust) Pty Ltd
(Administrators Appointed)

For and on behalf of
Morael Pty Ltd
(Administrators Appointed)

For and on behalf of
Northern Airlines Ltd
(Administrators Appointed)

For and on behalf of
Northern Territory Aerial Work Pty Ltd
(Administrators Appointed)

For and on behalf of
Rock-It-Cargo (Aust) Pty Ltd
(Administrators Appointed)

For and on behalf of
Show Group Pty Ltd
(Administrators Appointed)

For and on behalf of
Skywest Airlines Pty Ltd
(Administrators Appointed)

For and on behalf of
Skywest Aviation Ltd
(Administrators Appointed)

For and on behalf of
Skywest Holdings Pty Ltd
(Administrators Appointed)

For and on behalf of
Skywest Jet Charter Pty Ltd
(Administrators Appointed)

For and on behalf of
South Centre Maintenance Pty Ltd
(Administrators Appointed)

For and on behalf of
Spaca Pty Ltd
(Administrators Appointed)

For and on behalf of
Traveland International (Aust) Pty Ltd
(Administrators Appointed)

For and on behalf of
Traveland International Pty Ltd
(Administrators Appointed)

For and on behalf of
Traveland New Staff Pty Ltd
(Administrators Appointed)

For and on behalf of
Traveland Pty Ltd
(Administrators Appointed)

For and on behalf of
Walgali Pty Ltd
(Administrators Appointed)

For and on behalf of
Westintech Ltd
(Administrators Appointed)

For and on behalf of
Westintech Nominees Pty Ltd
(Administrators Appointed)

For and on behalf of
Whitsunday Affairs Pty Ltd
(Administrators Appointed)

For and on behalf of
Whitsunday Harbour Pty Ltd
(Administrators Appointed)

For and on behalf of
Wridgway Holdings Ltd
(Administrators Appointed)

For and on behalf of
Wridgways (Vic) Pty Ltd
(Administrators Appointed)

For and on behalf of
Hazelton Airlines Ltd
(Administrators Appointed)

For and on behalf of
Hazelton Air Charter Pty Ltd
(Administrators Appointed)

For and on behalf of
Hazelton Air Services Pty Ltd
(Administrators Appointed)

B The Voluntary Administrators

Mark Korda
Voluntary Administrator

Mark Mentha
Voluntary Administrator

C The Hazelton Voluntary Administrator

Michael Humphris
Voluntary Administrator

D The Air New Zealand Group

For and on behalf of
Air New Zealand Ltd

For and on behalf of
Air Nelson Ltd

For and on behalf of
Air New Zealand Associated Companies Ltd

For and on behalf of
Air New Zealand Associated Companies (Australia) Ltd

For and on behalf of
Air New Zealand Destinations Ltd

For and on behalf of
Air New Zealand International Ltd

For and on behalf of
Air New Zealand Travel Business Ltd

For and on behalf of
Anex Holdings Ltd

For and on behalf of
Ansett Technologies (NZ) Ltd

For and on behalf of
BPT (New Zealand) Ltd

For and on behalf of
CI Air Services Ltd

For and on behalf of
Eagle Airways Ltd

For and on behalf of
Eagle Air Maintenance Ltd

For and on behalf of
Eagle Aviation Ltd

For and on behalf of
Enzedair Tours Ltd

For and on behalf of
Events Marketing Ltd

For and on behalf of
First Express Ltd

For and on behalf of
Hazelwoods Travel Ltd

For and on behalf of
Hotpac Reservations (NZ) Ltd

For and on behalf of
Jetaffair Holidays Ltd

For and on behalf of
Lexington Securities Ltd

For and on behalf of
Mount Cook Airline Ltd

For and on behalf of
National Airlines Co Ltd

For and on behalf of
National Airways Corp (NAC) Ltd

For and on behalf of
New Zealand International Airlines Ltd

For and on behalf of
New Zealand Skiing Co Ltd

For and on behalf of
New Zealand Tourist Air Travel Ltd

For and on behalf of
New Zealand Tourism Incorporated Ltd

For and on behalf of
New Zealand Tourist Promotion Co Ltd

For and on behalf of
South Pacific Air Charters Ltd (t/as Freedom Air)

For and on behalf of
Tasman Empire Airways 1965 Ltd

For and on behalf of
The Mount Cook Group Ltd

For and on behalf of
Tourism New Zealand Ltd

For and on behalf of
Travelseekers International Ltd

For and on behalf of
United Travel Agencies Ltd

For and on behalf of
Variety Travel (Central) Ltd

For and on behalf of
Variety Travel Ltd

For and on behalf of
Air New Zealand (Australia) Pty Ltd

For and on behalf of
Jetset Finance Pty Ltd

For and on behalf of
Jetset International Corp Pty Ltd

For and on behalf of
Jetset Tours Pty Ltd

For and on behalf of

Jetset Tours (Operations) Pty Ltd

For and on behalf of
Jetset Travel & Technology Holdings Pty Ltd

For and on behalf of
Tasman Aviation Enterprises (NSW) Pty Ltd

For and on behalf of
Worldmaster Technology Pty Ltd

For and on behalf of
Safe Air Ltd

For and on behalf of
Air New Zealand Engines Christchurch Ltd

For and on behalf of
ANNZES Engines Christchurch Ltd

For and on behalf of
Tasman Aviation Enterprises (Queensland) Pty Ltd

E The Directors

Philip Ralph Burdon

Ronald Powell Carter

Choong Kong Cheong

Elizabeth Mary Coutts

John Simon Curtis

Selwyn John Cushing

Anthony St George Edmonds

Robert Estcourt

James Alfred Farmer

John Thomas James Kline

Ralph James Norris

Mervyn Leonard Peacock

Philip John Barnes Rose

Michael Jiak Ngee Tan

Gregory James Terry

William McLeod Wilson

Christopher Wright

Arun Amarsi

Choon Seng Chew

Syn Chung Wah

John Harvey Blair

George Frazis

Scott David Roworth

Charles Barrington Goode

Gary Kenneth Toomey

Graeme Clifford Allison

Pamela Jean Catty

John Anthony Dell

Lawrence Francis Doolan

John Laurence Gribble

William Keith Herdman

Trevor George Jensen

Donald Moreton Kendell

Bey Soo Khiang

Garry Robert Kingshott

Andrew Baxter Miller

Adam Francis Moroney

Allister Currie Paterson

Ronald Morris Rosalky

Paul van Ryn

Wayne Alan Walker

Sean Patrick Wareing

David James Irvine

Craig Alexander Wallace

Robert Harry Nazarian

James McCrea

Peter John Macourt

Kenneth Edward Cowley

Roderick Ian Eddington

Paul Craig Birth

Lyell Francis Strambi

Sean Gould Williams

Peter James Crogan

Norman William Fricker

Desmond Livingstone Nicholl

Stanley James Quinlivan

Bradford Frederick McInnes Stuart

K Turnbull

William Eric Jacobson

Huang Cheng Eng

Schedule A

Ansett Group

	Ansett Companies	*ACN*
1	501 Swanston Street Pty Ltd (Administrators Appointed)	005 477 618
2	Aeropelican Air Services Pty Ltd (Administrators Appointed)	000 653 083
3	Airport Terminals Pty Ltd (Administrators Appointed)	053 976 444
4	Aldong Services Pty Ltd (Administrators Appointed)	000 258 113
5	Ansett Aircraft Finance Ltd (Administrators Appointed)	008 643 276
6	Ansett Australia Holdings Ltd (Administrators Appointed)	004 216 291
7	Ansett Australia Ltd (Administrators Appointed)	004 209 410
8	Ansett Aviation Equipment Pty Ltd (Administrators Appointed)	008 559 733

9	Ansett Carts Pty Ltd (Administrators Appointed)	005 181 215
10	Ansett Equipment Finance Ltd (Administrators Appointed)	006 827 989
11	Ansett Finance Ltd (Administrators Appointed)	006 555 166
12	Ansett Holdings Ltd (Administrators Appointed)	065 117 535
13	Ansett International Ltd (Administrators Appointed)	060 622 460
14	Bodas Pty Ltd (Administrators Appointed)	002 158 741
15	Brazson Pty Ltd (Administrators Appointed)	055 259 008
16	Eastwest Airlines (Operations) Ltd (Administrators Appointed)	000 259 469
17	Eastwest Airlines Ltd (Administrators Appointed)	000 063 972
18	Kendell Airlines (Aust) Pty Ltd (Administrators Appointed)	000 579 680
19	Morael Pty Ltd (Administrators Appointed)	003 286 440
20	Northern Airlines Ltd (Administrators Appointed)	009 607 069
21	Northern Territory Aerial Work Pty Ltd (Administrators Appointed)	009 611 321
22	Rock-It-Cargo (Aust) Pty Ltd (Administrators Appointed)	003 004 126
23	Show Group Pty Ltd (Administrators Appointed)	002 968 989
24	Skywest Airlines Pty Ltd (Administrators Appointed)	008 997 662
25	Skywest Aviation Ltd (Administrators Appointed)	004 444 866
26	Skywest Holdings Pty Ltd (Administrators Appointed)	008 905 646
27	Skywest Jet Charter Pty Ltd (Administrators Appointed)	008 800 155
28	South Centre Maintenance Pty Ltd (Administrators Appointed)	007 286 660
29	Spaca Pty Ltd (Administrators Appointed)	006 773 593
30	Traveland International (Aust) Pty Ltd (Administrators Appointed)	000 275 936
31	Traveland International Pty Ltd (Administrators Appointed)	000 598 452
32	Traveland New Staff Pty Ltd (Administrators Appointed)	080 739 037
33	Traveland Pty Ltd (Administrators Appointed)	000 240 746
34	Walgali Pty Ltd (Administrators Appointed)	055 258 921
35	Westintech Ltd (Administrators Appointed)	009 084 039
36	Westintech Nominees Pty Ltd (Administrators Appointed)	009 302 158
37	Whitsunday Affairs Pty Ltd (Administrators Appointed)	009 694 553
38	Whitsunday Harbour Pty Ltd (Administrators Appointed)	010 375 470
39	Wridgway Holdings Ltd (Administrators Appointed)	004 449 085
40	Wridgways (Vic) Pty Ltd (Administrators Appointed)	004 153 413

	Hazelton Companies	*ACN*
41	Hazelton Airlines Ltd (Administrators Appointed)	061 965 642
42	Hazelton Air Charter Pty Ltd (Administrators Appointed)	065 221 356
43	Hazelton Air Services Pty Ltd (Administrators Appointed)	000 242 928

Schedule B

Air New Zealand Group

(as represented to the Ansett Group and the Voluntary Administrators by Air New Zealand Ltd)

New Zealand Companies

Air New Zealand Ltd
Air Nelson Ltd
Air New Zealand Associated Co Ltd
Air New Zealand Associated Co (Aust) Ltd
Air New Zealand Destinations Ltd
Air New Zealand International Ltd
Air New Zealand Travel Business Ltd
Anex Holdings Ltd
Ansett Technologies (NZ) Ltd
BPT (New Zealand) Ltd
CI Air Services Ltd (90% owned)
Eagle Airways Ltd
Eagle Air Maintenance Ltd
Eagle Aviation Ltd
Enzedair Tours Ltd Events Marketing Ltd
First Express Ltd Hazelwoods Travel Ltd
Hotpac Reservations (NZ) Ltd
Jetaffair Holidays Ltd
Lexington Securities Ltd
Mount Cook Airline Ltd
National Airlines Co Ltd
National Airways Corp (NAC) Ltd
New Zealand International Airlines Ltd
New Zealand Skiing Co Ltd
New Zealand Tourist Air Travel Ltd
New Zealand Tourism Inc Ltd
New Zealand Tourist Promotion Co Ltd
South Pacific Air Charters Ltd (t/as Freedom Air)
Tasman Empire Airways 1965 Ltd
The Mount Cook Group Ltd Tourism
New Zealand Ltd Travelseekers International Ltd
United Travel Agencies Ltd Variety Travel (Central) Ltd
Variety Travel Ltd

Australia

Air New Zealand (Aust) Pty Ltd
Jetset Finance Pty Ltd
Jetset International Corp Pty Ltd
Jetset Tours Pty Ltd

Jetset Tours (Operations) Pty Ltd
Jetset Travel & Technology Holdings Pty Ltd
Tasman Aviation Enterprises (NSW) Pty Ltd
Worldmaster Technology Pty Ltd

Engineering companies

New Zealand Safe Air Ltd
Air New Zealand Engines Christchurch Ltd (P & W joint venture)
ANNZES Engines Christchurch Ltd (P & W joint venture)

Australia

Tasman Aviation Enterprises (Qld) Pty Ltd

Schedule C

Directors

Directors of Ansett companies under administration (as set out in Sch A)

from 20 June 2000 onwards

Name

1 Philip Ralph Burdon
2 Ronald Powell Carter
3 Choong Kong Cheong
4 Elizabeth Mary Coutts
5 John Simon Curtis
6 Selwyn John Cushing
7 Anthony St George Edmonds
8 Robert Estcourt
9 James Alfred Farmer
10 John Thomas James Kline
11 Ralph James Norris
12 Mervyn Leonard Peacock
13 Philip John Barnes Rose
14 Michael Jiak Ngee Tan
15 Gregory James Terry
16 William McLeod Wilson
17 Christopher Wright
18 Arun Amarsi
19 Choon Seng Chew
20 Syn Chung Wah
21 John Harvey Blair
22 George Frazis
23 Scott David Roworth
24 Charles Barrington Goode
25 Gary Kenneth Toomey
26 Graeme Clifford Allison
27 Pamela Jean Catty
28 John Anthony Dell
29 Lawrence Francis Doolan
30 John Laurence Gribble
31 William Keith Herdman
32 Trevor George Jensen
33 Donald Moreton Kendell
34 Bey Soo Khiang
35 Garry Robert Kingshott

36 Andrew Baxter Miller
37 Adam Francis Moroney
38 Allister Currie Paterson
39 Ronald Morris Rosalky
40 Paul van Ryn
41 Wayne Alan Walker
42 Sean Patrick Wareing
43 David James Irvine
44 Craig Alexander Wallace
45 Robert Harry Nazarian
46 James McCrea
47 Peter John Macourt
48 Kenneth Edward Cowley
49 Roderick Ian Eddington
50 Paul Craig Birth
51 Lyell Francis Strambi
52 Sean Gould Williams
53 K Turnbull
54 William Eric Jacobson
55 Huang Cheng Eng

Directors of the Hazelton companies under administration (as set out in Sch A) from mid March onwards

Name

56 Peter James Crogan
57 Norman William Fricker
58 Desmond Livingstone Nicholl
59 Stanley James Quinlivan
60 Bradford Frederick McInnes Stuart

Schedule D

Schedule of Amounts Claimed By Air NZ From Ansett Group

Wages paid to VA post 12/9	A$32,000,000.00
Inter-company debt as at 12/9	A$82,809,884.25
Net trading debts owed by Ansett Group to Air NZ	A$8,613,890.00
Amount payable on behalf of Ansett to AMP/Country under put option re Ansett International	A$32,600,000.00
Guarantee of Ansett tax liability under A320 leases	A$4,365,315.77
	A$160,389,090.02

ALISTER ABADEE
BARRISTER

FEDERAL COURT OF AUSTRALIA

In the matter of Ansett Australia Limited and Mentha [2001] FCA 1439

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 3045 of 2001

IN THE MATTER OF HAZELTON AIR CHARTER PTY LIMITED (ACN 065 221 356), HAZELTON AIR SERVICES PTY LIMITED (ACN 000 242 928), HAZELTON AIRLINES LIMITED (ACN 061 965 642) (All Administrator Appointed) and MICHAEL JAMES HUMPRHIS (As Administrator)

V 3046 of 2001

GOLDBERG J
12 OCTOBER 2001
MELBOURNE

3. **Page 10, paragraph 28, fourth line**

Amend "the director of companies" to read "the directors of companies".

4. **Page 31, first line**

Amend "are giving protection" to read "are given protection".

5. **Page 31, paragraph 87, second line**

Amend "may associate" to read "my associate".

SOPHIA GRACE
Associate to Justice Goldberg

22 October 2001

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)