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-7**" 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-7"
Court's final orders and Justice Goldberg's reasons for judgment in the SEESA Application

'MAK-7'

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **V 3083 of 2001**

IN THE MATTER OF:

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

AND

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

Plaintiffs

ORDER

JUDGE: **GOLDBERG J**
DATE: **14 DECEMBER 2001**
PLACE: **MELBOURNE**

THE COURT ORDERS THAT:

1. Pursuant to s 447A of the *Corporations Act* 2001 (Cth) ("the Act"), Pt 5.3A of the Act is to operate in relation to each of the companies set out in the schedule to this order as if s 443A(1)(a) provided that:

   (a) entitlement payments made to the plaintiff administrators ("the administrators") pursuant to a Determination dated 4 December 2001 by the Minister for Employment and Workplace Relations under s 22(1) of the *Air Passenger Ticket Levy (Collection) Act* 2001 (Cth), which is Exhibit "LZ-2" to the Affidavit of Leon Zwier sworn 10 December 2001, are debts incurred by the administrators in the performance and exercise of their functions and powers as administrators of each of the said companies for services rendered;

   (b) Notwithstanding sub-par (a):

      (i) if the administrators' indemnity under s 443D of the Act is insufficient to meet any such debt, the administrators will not be personally liable to repay such debt to the extent of that insufficiency;

      (ii) as to the repayment of such debts to the Commonwealth of Australia as the entity making the entitlement payments, the debts are given the same priority in the payment of any debts of the applicable company during the administration of the applicable company as if the applicable company had been in liquidation and the debts had the priority governed and provided for under ss 556 and 560 of the Act.

FEDERAL COURT OF AUSTRALIA AUSTRALIA VICTORIA DISTRICT REGISTRY

2. Pursuant to s 447A of the Act, s 447D(1) of the Act is to operate in relation to the said companies so that in an application by the administrators for directions pursuant to s 447D(1) in relation to a deed proposed to be executed by the administrators and the Commonwealth of Australia ("the Deed"), the Court may give a direction that the administrators may properly and justifiably execute and give effect to the Deed insofar as it includes provisions substantially in the form of the provisions set out in par 3 hereof.

3. Pursuant to s 447D(1) of the Act, as it operates in accordance with par 2 of this order, the Court directs that the administrators may properly and justifiably execute and give effect to the Deed insofar as it includes provisions substantially in the form of the following provisions:

(a) entitlement payments made pursuant to the Determination dated 4 December 2001 under s 22(1) of the *Air Passenger Ticket Levy (Collection) Act* 2001 (Cth), which is Exhibit "LZ-2" to the Affidavit of Leon Zwier sworn 10 December 2001, are debts incurred by the administrators in the performance and exercise of their functions and powers as administrators of each of the said companies for services rendered;

(b) Notwithstanding sub-par (a):

(i) if the administrators' indemnity under s 443D of the Act is insufficient to meet any such debt, the administrators will not be personally liable to repay such debt to the extent of that insufficiency;

(ii) as to the repayment of such debts to the Commonwealth of Australia or the entity making the entitlement payments, the debts are given the same priority in the payment of any debts of the applicable company during the administration of the applicable company as if the applicable company had been in liquidation and the priority had been governed and provided for under ss 556 and 560 of the Act.

(c) If the administrators decide to recommend that each of the said companies enter into a deed of company arrangement, the deed of company arrangement which the administrators recommend will be consistent with the incorporation of the priority regime provided for under ss 556 and 560 of the Act;

(d) If any of the said companies enters into a deed of company arrangement which incorporates a priority regime other than as provided by sub-par (c), then entitlement payments received by the administrators will constitute an expense properly incurred by the administrators in the administration of such company for services rendered and will be afforded nonetheless by force of the order of the Federal Court of Australia on 14 December 2001 a priority equal to the priority the Commonwealth of Australia or the entity making the entitlement payments would have received under s 560 of the Act in any winding up of the company had it advanced a payment of the kind contemplated by s 560 of the Act;

(e) The administrators will not express the opinion to the creditors of the said companies pursuant to s 439A(4) of the Act or recommend to them that it would be in the creditors' interests for the company to execute a deed of company arrangement other than one which provides for repayment to the Commonwealth of Australia or the said entity consistently with sub-pars (a)-(d).

4. The costs of the administrators, the Commonwealth of Australia, the ACTU and other relevant Unions and the Trustees of the Ansett Australia Ground Staff Superannuation Plan Pty Ltd, Ansett Australia Pilots/Management Superannuation Plan Pty Ltd, Ansett Australia Accumulation Payment Pty Ltd and Ansett Flight Attendants Superannuation Plan Pty Ltd be costs in the administration of the said companies.

Date entered: 14 December 2001

FEDERAL COURT OF AUSTRALIA
VICTORIA
DISTRICT REGISTRY

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DISTRICT REGISTRAR

SCHEDULE

Ansett Australia Limited (ACN 004 209 410)

501 Swanston Street Pty Ltd (ACN 005 477 618)

Aeropelican Air Services Pty Ltd (ACN 000 653 083)

Airport Terminals Pty Ltd (ACN 053 976 444)

Aldong Services Pty Limited (ACN 000 258 113)

Ansett Aircraft Finance Limited (ACN 008 643 276)

Ansett Australia Holdings Limited (ACN 004 216 291)

Ansett Aviation Equipment Pty Ltd (ACN 008 559 733)

Ansett Carts Pty Limited (ACN 055 181 215)

Ansett Equipment Finance Limited (ACN 006 827 989)

Ansett Finance Limited (ACN 006 555 166)

Ansett Holdings Limited (ACN 065 117 535)

Ansett International Limited (ACN 060 622 460)

Ansett Australia and Air New Zealand Engineering Services Ltd (ACN 089 520 696)

Bodas Pty Ltd (ACN 002 158 741)

Brazson Pty Limited (ACN 055 259 008)

Eastwest Airlines (Operations) Ltd (ACN 000 259 469)

Eastwest Airlines Limited (ACN 000 063 972)

Kendell Airlines (Aust) Pty Ltd (ACN 000 579 680)

Morael Pty Ltd (ACN 003 286 440)

Northern Airlines Limited (ACN 009 607 069)

Northern Territory Aerial Work Pty Limited (ACN 009 611 321)

Rock-it-Cargo (Aust) Pty Ltd (ACN 003 004 126)

Show Group Pty Ltd (ACN 002 968 989)

Skywest Airlines Pty Ltd (ACN 008 997 662)

Skywest Aviation Limited (ACN 004 444 866)

Skywest Holdings Pty Ltd (ACN 008 905 646)

Skywest Jet Charter Pty Ltd (ACN 008 800 155)

South Centre Maintenance Pty Ltd (ACN 007 286 660)

Spaca Pty Ltd (ACN 006 773 593)

Traveland International (Aust) Pty Limited (ACN 000 275 936)

Traveland International Pty Limited (ACN 002 275 936)

Traveland New Staff Pty Ltd (ACN 080 739 037)
Traveland Pty Limited (ACN 000 240 746)
Walgali Pty Ltd (ACN 005 258 921)
Westintech Limited (ACN 009 084 039)
Westintech Nominees Pty Ltd (ACN 009 302 158)
Whitsunday Affairs Pty Ltd (ACN 009 694 553)
Whitsunday Harbour Pty Limited (ACN 010 375 470)
Wridgway Holdings Limited (ACN 004 449 085)
Wridgways (Vic) Pty Ltd (ACN 004 153 413)
(All Administrators Appointed)

Re ANSETT AUSTRALIA LTD and Others (all administrators appointed) and MENTHA and Another (as administrator)

FEDERAL COURT OF AUSTRALIA

GOLDBERG J

5, 11, 13, 14 December 2001, 4 January 2002 — Melbourne

[2001] FCA 1806

Corporations — Administrators — Proposed deed between administrators and Commonwealth of Australia relating to priority of repayments of advances by Commonwealth in respect of employee entitlements — Orders sought approving deed and according Commonwealth priority — Prejudice to unsecured creditors — Court's powers under s 447A — (CTH) Corporations Act 2001 ss 443A(1), 447A, 447D, 556(1), 560, Pt 5.3A — (CTH) Air Passenger Ticket Levy (Collection) Act 2001 ss 22, 23(1).

Following the collapse of the airline operations of the Ansett Group in September 2001, the Commonwealth Government proposed to advance money to the administrators of the group for the specific purpose of paying employee entitlements to the extent that the Ansett Group was unable to do so. The administrators applied for orders approving the terms of the proposed deed between the administrators and the Commonwealth, and setting out the basis on which Pt 5.3A of the Corporations Act 2001 would apply. Specifically, it was proposed that the administrators would not be liable for repayment of the advances except to the extent that assets were available, and that the Commonwealth would enjoy a priority over unsecured creditors. The Commonwealth proposed that the amounts to be funded by it would rank for repayment pari passu with all other employee entitlements in the administration of the Ansett Group, and expected that any deed of company arrangement under Pt 5.3A of the Corporations Act would also preserve priority for repayment of the amounts advanced.

The effect of the deed was to preclude the creditors, at a meeting convened under s 439A to determine the future of the group, from approving a deed of company arrangement that did not preserve the Commonwealth's priority. The court was concerned that by approving the proposed deed the court would pre-empt the opportunity of unsecured creditors, who were not employees, subsequently to have a say on the issue whether the right of the Commonwealth to repayment should be subordinated to the rights of priority creditors. The administrators submitted that the opportunity of the unsecured creditors who were not employees to adopt this approach was theoretical only. The statutory presumption until displaced by the creditors was that the Commonwealth would enjoy priority, and the application was not opposed by any member of the committee of creditors. Further, the likelihood of creditors successfully overturning the Commonwealth's priority at a meeting under s 439A was so minimal or remote that the orders should be made as sought.

Held, granting the application:

(i) Although the Act does not expressly authorise the court to approve a proposed or concluded agreement by administrators appointed under Pt 5.3A, nonetheless under s 447A the court does have such a power. The courts will not pronounce upon the commercial prudence of an agreement entered into by administrators, but will act in an appropriate case to protect administrators from claims that they have acted unreasonably in entering into particular agreements: at [42].

(ii) The payments to be made by the Commonwealth for the benefit of employees did not amount to "services rendered" for the purposes of s 443A(1)(a) of the Act. Consequently, without a further order the administrators were not personally liable under s 443A for the repayment of those advances and there was no right of indemnity under s 443D: at [45], [46].

Employers' Mutual Indemnity Association Ltd v FCT (1943) 68 CLR 165, considered.

(iii) It would only be appropriate to make an order under s 447A that s 443A(1) applied to the advance of funds by the Commonwealth for the benefit of employees if it was also appropriate to make the order confirming the priority sought by the Commonwealth: at [48].

(iv) Any exercise of the power conferred by s 447A must be consistent with the object of Pt 5.3A: at [52]. However, the court may make orders under s 447A(1) that alter the application of other provisions of Pt 5.3A, and there is no limitation that such orders must not impinge upon or affect the rights of unsecured creditors found in Pt 5.3A: at [53].

Australasian Memory Pty Ltd v O'Brien (2000) 200 CLR 270; 172 ALR 28, applied.

(v) It was appropriate to make the orders. The advances were intended to assist a substantial body of creditors, the administrators considered that it was in the interests of the group and its creditors that the advances be made, it did not appear that the administrators had taken into account any irrelevant considerations, and the aims of the administrators fell within the object of Pt 5.3A. There was no prejudice to unsecured creditors in granting the Commonwealth priority in respect of its advances, because the creditors would be in no better position in the absence of that priority. To the extent that the administrators were liable for repayment of the advances they enjoyed an indemnity against the assets of the group in priority to the claims of the unsecured creditors in any event. The possibility that a meeting of creditors would vote to dislodge the priority given by the act to the repayment of advances to meet employee entitlements was remote. If a deed of company arrangement did relegate priority, it was likely that a court would terminate the deed under s 445C, on grounds that it was oppressive, unfairly prejudicial or unfairly discriminatory: at [56]–[61].

Application

Mark Mentha and Mark Korda applied as administrators of the Ansett Group of companies for orders under ss 447A and 447D of the Corporations Act 2001 (Cth) approving the terms of a deed to be entered into with the Commonwealth and applying Pt 5.3A.

S P Whelan QC, J Dodds-Streeton and *L Zwier* instructed by *Arnold Bloch Leibler* for the plaintiffs.

J B R Beach QC and *B F Quinn* instructed by *Maurice Blackburn Cashman* for the Australian Council of Trade Unions, twelve unions and relevant employees.

C M Maxwell QC and *P D Nicholas* instructed by *Australian Government Solicitor* for the Commonwealth of Australia.

J G Santamaria QC and *D M Maclean* instructed by *Deacons* for Ansett Australia Ground Staff Superannuation Plan Pty Ltd, Ansett Australia Pilots/Management Superannuation Plan Pty Ltd, Ansett Australia Accumulation

Plan Pty Ltd and Ansett Flight Attendants Superannuation Plan Pty Ltd.

[1] Goldberg J. On 14 December 2001, I pronounced orders in this proceeding. I now publish my reasons for making those orders.

[2] The plaintiffs, who are the administrators of Ansett Australia Ltd and the other companies set out in Sch A to these reasons (the Ansett Group), have applied to the court for directions and orders that the court approve the terms of a deed into which the administrators propose to enter with the Commonwealth of Australia and that the administrators may properly perform and give effect to the deed. The directions are sought pursuant to ss 447A(1) and 447D(1) of the Corporations Act 2001 (Cth) (the Act).

[3] The administrators also seek orders pursuant to s 447A(1) of the Act that Pt 5.3A of the Act is to operate in relation to the Ansett Group as if it provided that:

> 4.1 the Entitlement Payments referred to in Part 4 of the Schedule to the Determination under Subsection 22(1) of the Air Passenger Ticket Levy (Collection) Act 2001 are debts incurred by the Administrators in the performance and exercise of their functions and powers as Administrators and which the Administrators will not be personally liable to repay unless and to the extent that the Administrators have assets available to them to do so; and
>
> 4.2 on the basis that such repayments are to have the priority equal to the priority the Commonwealth would have received, under Section 560 of the Act in any winding up of a company had it advanced a payment of the kind contemplated by Section 560 of the Act.

[4] The circumstances giving rise to the application are as follows. On 12 and 14 September 2001, administrators (the first administrators) were appointed to all but one of the companies in the Ansett Group and Hazelton Air Charter Pty Ltd, Hazelton Airlines Ltd and Hazelton Air Services Pty Ltd (the Hazelton companies) in accordance with the provisions of Pt 5.3A of the Act. 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. The first administrators resigned as administrators on 17 September 2001.

[5] On 17 September 2001, the plaintiffs (the administrators) were appointed joint and several administrators of the Ansett Group, other than the Hazelton companies (in respect of which a separate administrator was appointed), in place of the first administrators. On 4 October 2001, the administrators were appointed administrators of Ansett Australia and Air New Zealand Engineering Services Ltd, one of the companies in the Ansett Group.

[6] Subsequent to the cessation of the Ansett Group's airline operations, the Prime Minister announced on 14 September 2001 that the Commonwealth Government intended to protect employees of the Ansett Group who were denied their monetary entitlements as employees. The Prime Minister made a commitment that the pay entitlements of employees of the Ansett Group for wages, leave and payment in lieu of leave, as well as for redundancies up to the community standard of 8 weeks, would be met by the Commonwealth to the extent that those entitlements were not able to be met from the assets of the Ansett Group. This commitment was confirmed and explained in a letter from the Deputy Prime Minister to Mr Korda, one of the administrators, on 7 October 2001. The Deputy Prime Minister said that the Commonwealth had decided to take this course under the special employee entitlement scheme for Ansett Group

employees (the scheme) provided for under the Air Passenger Ticket Levy (Collection) Act 2001 (Cth) (the Ticket Levy Collection Act). The Deputy Prime Minister told Mr Korda in the letter that the scheme would provide for:

- the payment of wages;
- payments in lieu of annual and long service leave;
- payments in lieu of notice;
- redundancy payments up to the community standard of 8 weeks.

It was made clear by the Deputy Prime Minister that the money to be advanced under the scheme would be by way of a loan made specifically for the purpose of paying employee entitlements to the extent that there were not sufficient assets of the Ansett Group to pay them.

[7] The Ticket Levy Collection Act was assented to on 27 September 2001 and it commenced on 1 October 2001. It provides for the payment of a levy on air passenger tickets purchased on or after 1 October 2001. The purpose of the levy is to meet the cost of payments of employee entitlements by the Commonwealth of Australia under the scheme. Section 22 of the Ticket Levy Collection Act provides for the establishment of the scheme in the following terms:

> (1) The Workplace Relations Minister may determine, in writing, the terms of a scheme for the payment of certain entitlements to former employees of companies in the Ansett Group whose employment has been terminated as a result of the insolvency of those companies.
>
> (2) Without limiting subsection (1), the determination may specify:
>
> (a) the companies that are to be covered by the Scheme; and
>
> (b) the entitlements to be covered by the Scheme; and
>
> (c) the terms on which payments under the Scheme are to be made.
>
> (3) . . .
>
> (4) No more than $500 million in total may be authorised under this section.
>
> (5) . . .

Section 23(1) of the Ticket Levy Collection Act provides:

> (1) If the Minister is satisfied that more levy has been received by the Commonwealth than is needed for the purpose for which the levy was imposed, the Minister may determine that the surplus is to be distributed in accordance with a scheme prescribed by the regulations for the purpose of this section.

[8] On 9 October 2001, the Minister for Employment and Workplace Relations and Small Business made a determination pursuant to s 22(1) of the Ticket Levy Collection Act. That determination provided that amounts payable under the scheme by the Commonwealth were to be made by way of loan and that the terms of repayment by the administrators would be on terms prescribed by the secretary of the department. On 4 December 2001, the minister repealed that determination and made a further determination pursuant to s 22(1) of the Ticket Levy Collection Act that the terms of the scheme were as set out in the schedule to the determination. Those terms contain provisions identifying the employees that are covered by the scheme, the entitlements that are covered by the scheme and the manner in which entitlement payments under the scheme are to be made. I will return, in particular, to Pt 4 of the determination.

[9] As was made clear in the letter from the Deputy Prime Minister to Mr Korda of 7 October 2001, payments were to be made under the scheme only where there were entitlements outstanding after the assets of the Ansett Group had been used to make payments to employees. The administrators believed that the realisation of the assets of the Ansett Group may take up to 2 years to

complete and that the delay in the realisation of those assets, as a precondition to payments under the scheme, would create hardship for employees. A substantial number of the employees of the Ansett Group have been stood down since 14 September 2001.

[10] The administrators held discussions with the Commonwealth to discuss an arrangement for the employees to receive their entitlements as soon as possible. On 12 October 2001, the administrators sent a draft proposal to the Commonwealth based on an assumption that 8600 employees would be made redundant by the administrators. After further discussion, the administrators and the Commonwealth agreed to the following proposal:

- the administrators would write to employees, giving them an opportunity to apply for redundancy;
- the employees made redundant would be paid 4 weeks pay in lieu of notice. The payments were expected to amount to approximately $35m;
- the Commonwealth would pay the balance of the entitlements of the retrenched employees on the basis of the scheme which was expected to involve payments in the vicinity of $195m.

This agreement was made public on 15 October 2001.

[11] Thereafter, the administrators and the Commonwealth and their respective advisers entered into discussions to finalise documentation of the agreement and the scheme. The Commonwealth's proposal was that the amounts to be funded by it would rank for repayment pari passu with all other employee entitlements in the administration of the Ansett Group. The Commonwealth expected any deed of company arrangement executed pursuant to the provisions of Pt 5.3A of the Act to include a provision for the priority payments found in s 556(1) of the Act, in relation to the entitlements to be paid by the Commonwealth for the employees, and that any such deed would contain a provision for the same priority that the Commonwealth would receive under s 560 of the Act in relation to such an advance in a winding up.

[12] The effect of the Commonwealth's proposal was to give it priority for the repayments of any advances made by it to the administrators for employee entitlements as if it stood in the shoes of the employees to whom, and for whom, the payments were made. In particular, this proposal would give the Commonwealth priority for repayment over non-employee unsecured creditors and would enable the Commonwealth to rank equally with those employees who had entitlements, such as retrenchment payments in excess of 8 weeks, which had not been paid to them under the scheme.

[13] On 31 October 2001, the administrators asked the Commonwealth to consider other options for repayment. One option involved the Commonwealth limiting the amount to be repaid to the difference between the amounts it received under the Ticket Levy Collection Act and amounts paid pursuant to the scheme, with that difference ranking pari passu with all other employee entitlements. Another option involved the Commonwealth limiting the amount to be repaid to the difference between the amounts received pursuant to the Ticket Levy Collection Act and the amounts paid under the scheme, with such amount being subordinated to the priority payments due to employees and ranking pari passu with all other ordinary unsecured debts. However, the Commonwealth maintained its position that it expected repayments of advances made under the scheme to be given priority equal to the priority given to other employee entitlements.

[14] In the course of the discussions with the Commonwealth, the administrators informed the Commonwealth that the issue of the amount to be repaid to the Commonwealth being subordinated under a deed of company arrangement approved by the creditors had been raised with the administrators by ordinary unsecured creditors.

[15] The Commonwealth maintained its position as to the terms upon which any advances under the scheme were to be repaid and as at 14 November 2001, after further negotiations and discussions, the Commonwealth informed the administrators:

- that the scheme had been established for the benefit of employees and not ordinary unsecured creditors;
- the scheme was to be viewed as a safety net for employees;
- as a matter of policy, the Commonwealth had never made payments for the benefit of ordinary unsecured creditors as requested by the administrators.

The Commonwealth maintained its position that it expected to be repaid the amounts advanced under the scheme with a priority equal to the priority given in respect of other employee entitlements.

[16] On 8 November 2001, the administrators had agreed to accept an offer from a consortium of interests associated with Messrs Lindsay Fox and Solomon Lew to acquire certain of the assets of the Ansett Group and to assume certain of its liabilities. The offer made by the consortium was subject to a number of conditions precedent, one of which was that the Commonwealth agree by 24 November 2001 to subordinate the repayment of the amounts made under the scheme which were estimated to be $195m.

[17] On 15 November 2001, the committee of creditors of the Ansett Group approved the administrators' agreeing to accept the offer from the consortium, including the condition precedent to which I have referred. Thereafter, the Commonwealth reiterated its position that it would not accept a subordinated position in respect of the amounts advanced under the scheme and that it required the repayment of those amounts to rank in priority with all other employee entitlements.

[18] A further meeting of the committee of creditors of the Ansett Group was held on 28 November 2001, at which the administrators informed the committee that the Commonwealth was not prepared to subordinate the repayment of the amounts paid under the scheme, and they recommended to the committee that they waive compliance with the condition precedent. The committee did not oppose the administrators doing so.

[19] On or about 17 October 2001, the administrators had sent letters to all employees of the Ansett Group inviting them to apply for voluntary redundancies. Some employees were not given the option and were made redundant. From 30 October 2001, approximately 4000 employees have been made redundant. The administrators have paid these employees, or were, at the date of the hearing, in the process of paying them, the payments to which they were entitled. However, those employees had not, at the date of the hearing, received any payments under the scheme. In an affidavit sworn on 3 December 2001, Mr Korda said that these employees would not receive payments under the scheme unless the court made directions and orders to ensure that the Commonwealth's priority to repayment was enshrined and the administrators were protected appropriately.

[20] The deed into which the administrators and the Commonwealth proposed to enter set out the basis on which the Commonwealth, or any party contracted by the Commonwealth for the purpose of making payments under the scheme, would make payments under the scheme to the administrators. The deed was expressed to be conditional upon the court making an order or direction to the effect that:

> 2.1.1 the Administrators may properly and justifiably execute this Deed or the terms of this Deed are approved; and
>
> 2.1.2 Part 5.3A of the Act is to operate as if it provided that the Entitlement Payments are debts incurred by the Administrators in the performance or exercise of their functions and powers as Administrators and for which the Administrators will not be personally liable to repay unless and to the extent that the Administrators have assets available to them to do so and on the basis that such repayments are to have the priority equal to the priority the Commonwealth would have received, under s 560 of the Act, in any winding up of a company, had it advanced a payment of the kind contemplated by s 560 of the Act.

[21] Clause 2.4 of the deed provided that if the administrators made a payment to an eligible employee of money provided under the scheme, the Commonwealth would have a priority for repayment equal to the priority the Commonwealth would have received under s 560 of the Act in any winding up, had it advanced the payment of the kind contemplated by s 560.

[22] Clause 2.5 of the deed provided that if the administrators decided to recommend that the companies in the Ansett Group enter into a deed of company arrangement, the deed which they would recommend would:

> 2.5.1 seek to "pool" all of the assets and liabilities of the eligible companies, so that for the purposes of the Deed all eligible companies are treated as one company; and
>
> 2.5.2 otherwise be consistent with the provisions of this Deed (and in particular the incorporation of the priority regime contemplated under sections 556 and 560 of the Corporations Act in the manner provided for in this Deed).

[23] Clauses 2.6, 2.7 and 2.8 of the deed were in the following terms:

> 2.6 If any eligible companies enters [sic] into a Deed of Company Arrangement which incorporates a priority regime other than as contemplated by Clause 2.5.2, then the parties agree that Entitlement payments received by the Administrators will constitute an expense properly incurred by the Administrators in the administration of the eligible company, and will be afforded a priority equal to the priority the Commonwealth would have received, under s 560 of the Act, in any winding up of a company, had it advanced a payment of the kind contemplated by s 560 of the Act.
>
> 2.7 The Administrators undertake that they will not recommend to eligible company creditors pursuant to Section 439A(4) of the Corporations Act that it be in the creditors' interests for the company to execute a Deed of Company Arrangement other than one which contains a payment for the Commonwealth consistent with the terms of this Deed.
>
> 2.8 The Administrators acknowledge that if a Deed of Company Arrangement is approved that subordinates the Commonwealth's priority to repayment other than in accordance with the terms of this Deed that the Commonwealth will have suffered substantial injustice.

[24] The overall effect of the deed was, in effect, to preclude the creditors, at a meeting convened pursuant to s 439A of the Act to determine the future of the Ansett Group, from resolving that the Ansett Group execute a deed of company arrangement with a provision that the Commonwealth did not have the priority

in respect of the repayment of the amounts advanced by it under the scheme equal to the priority received under s 560 of the Act in any winding up.

[25] The application came on for hearing on 5 December 2001. Appearances were announced on behalf of the administrators, the Australian Council of Trade Unions and 12 unions and their members who were employees of the Ansett Group (the ACTU) and the Commonwealth. The Commonwealth supported, and the ACTU did not oppose, the orders and directions sought by the administrators. No person appeared to oppose the application.

[26] I raised with the parties whether approval of the proposed deed might be to the disadvantage or detriment of the unsecured creditors, other than employees. I was concerned that the unsecured creditors, other than employees, would be precluded from propounding or participating in a resolution which provided that in any deed of company arrangement the Commonwealth would not have priority in respect of the repayment of the amounts advanced by it under the scheme, but would rank equally with unsecured creditors who were not entitled to receive any employee entitlements contemplated by s 556(1) of the Act.

[27] The provisions of s 556(1) of the Act would be incorporated into any deed of company arrangement by virtue of the provisions of s 444A(5) of the Act, reg 5.3A.06 of the Corporations Regulations 2001 (Cth) and para 4 of Sch 8A to those regulations, unless otherwise provided in the deed and so resolved by the creditors. Section 444A(5) provides that where creditors at a meeting convened under s 439A resolve that the company execute a deed of company arrangement, the deed is taken to include the prescribed provisions, except so far as the deed provides otherwise. The prescribed provisions are set out in Sch 8A to the Corporations Regulations and cl 4 of that schedule provides:

> The administrator must apply the property of the company coming under his or her control under this deed in the order of priority specified in section 556 of the Act.

[28] I was concerned that by approving the deed I would be pre-empting the opportunity of the unsecured creditors, who were not employees, to have a say on the issue whether the Commonwealth's right to repayment of the amounts advanced under the scheme should be subordinated to the rights of priority creditors and not entitled to rank pari passu with them.

[29] The administrators submitted that the opportunity of the unsecured creditors, who were not employees, to adopt this approach was theoretical because as a matter of principle:

- payments to employees were entitled to priority under the winding-up provisions of the Act and under the provisions of a deed of company arrangement prescribed by s 444A(5) of the Act;
- the committee of creditors was aware of the application and none of its members was concerned to oppose it.

[30] The administrators submitted that the opportunity which the unsecured creditors, other than employees, might have was only foreclosed to them if the Commonwealth advanced the moneys under the scheme to pay the employee entitlements. If the court did not make the orders sought confirming the Commonwealth's priority, then the Commonwealth would not advance any money under the scheme to pay the employee entitlements so that the position of the unsecured creditors, other than employees, being disadvantaged would never arise.

[31] Counsel for the Commonwealth said that if the Commonwealth could not obtain an appropriate guarantee of priority for repayment in respect of the funds proposed to be advanced, then it would consider dealing with employees individually. Counsel said that if the orders sought under s 447A of the Act were not made, then the funds proposed to be advanced under the scheme would not be advanced to the administrators. He contended that I was assuming a possibility which did not exist.

[32] I was not satisfied at the hearing on 5 December 2001 that sufficient notice had been given to the creditors of the Ansett Group of the nature of the application made by the administrators, and that if the orders sought were made they would preclude unsecured creditors of the Ansett Group, at the meeting convened under s 439A of the Act, from resolving that, in any deed of company arrangement, the Commonwealth's priority to repayment of advances made under the scheme be subordinated and not rank in priority to the claims of the employees to whom the advances had been made. I therefore required the administrators to publish notices in the daily press notifying Ansett Group creditors of the nature and consequences of the application which had been made. This occurred on 8 December 2001.

[33] The further hearing of the application was adjourned to 11 December 2001, and on that date, in addition to the earlier appearances, counsel appeared on behalf of the trustee of four superannuation funds in respect of which employees of the Ansett Group are members. No other creditor appeared to be heard on the application. The court received letters from two persons who claimed to be frequent flyer member creditors and who objected to any class of unsecured creditor being given preference over any other class of unsecured creditor.

[34] It is necessary to summarise briefly the submissions which were made at the adjourned hearing, having regard to a change which occurred in the position of the Commonwealth. The administrators submitted that the borrowing from the Commonwealth should be treated as a financial service rendered to the Ansett Group and should therefore be treated as if it was a s 443A(1) liability of the administrators. The administrators reiterated that their intention was to treat the borrowing from the Commonwealth pursuant to the scheme as a debt incurred by the administrators in the performance or exercise of their functions and powers as administrators of the Ansett Group and then, with the consent of the Commonwealth, to limit their personal liability and to fix the priority of repayment to that which would have been applicable had each company in the Ansett Group been in liquidation and the priority of repayment had been governed by ss 556 and 560 of the Act.

[35] At that stage of the proceeding, the position of the Commonwealth was, as stated on the first day of the hearing, that the Commonwealth would not advance funds to the administrators under the scheme, unless it could stand in the shoes of the employees in respect of its priority for repayment.

[36] The administrators submitted that the only disadvantage which might be suffered by the unsecured creditors was that they would not be able to alter the priority for repayment which would be given to the Commonwealth in respect of its advances under the scheme. However, as the administrators pointed out, that disadvantage, although theoretical, would never arise if the position was, as it was at that stage of the proceeding, that the Commonwealth would not advance the money if there was a risk of its right of repayment being subordinated after

the priority given to employees in respect of their outstanding entitlements. Put another way, the creditors would never have the opportunity to subordinate the right of payment of the Commonwealth because the advances would never be made by the Commonwealth if that opportunity was to be available.

[37] On the second day of the hearing, the Commonwealth modified its position that in the absence of any guarantee of priority for repayment of advances made under the scheme no advances under the scheme would be made to the administrators. The Commonwealth submitted that if the order sought in respect of priority was made, it was the outcome best calculated to promote the objective of prompt and orderly payment of money to the employees. Nevertheless, counsel for the Commonwealth made the Commonwealth's position clear that it was not to be thought that the Commonwealth was saying "unless the order is made this absolutely won't happen". I took this statement to mean that the Commonwealth was not saying that unless the order in respect of priority was made by the court, advances would not be made under the scheme to the administrators. Counsel made it clear that it was now not the case that if there was any possibility of creditors having an opportunity to disrupt the priority sought by the Commonwealth, the payments would not be made to the administrators under the scheme.

[38] The Commonwealth submitted that, notwithstanding the concession it had made, I should still make the order sought. It was submitted that the scheme was to ensure that retrenched Ansett employees received their statutory entitlements on a timely basis, rather than waiting until assets were realised by the administrators, which assets might in any event, be insufficient. It was said that the scheme was to provide a safety net for Ansett employees and was never intended to meet the Ansett Group's liabilities to unsecured creditors. The priority position sought by the Commonwealth was to ensure that the public funds advanced for the sole purpose of assisting Ansett employees were used for that purpose only. If the Commonwealth ranked with other unsecured creditors, other than employees, for repayment, then the effect would be that the funds advanced by the Commonwealth would provide a benefit for unsecured creditors, as they would receive a greater return than if the Commonwealth was given the priority for repayment by standing in the shoes of the employees.

[39] The issue which arose was whether, in the unusual circumstances of this case, it could be said that the creditors might be denied the opportunity to consider their attitude to the priority for the repayment of any advances sought by the Commonwealth. The change in the Commonwealth's position meant that I was not faced with the proposition of "no priority, no advance", that is to say, I was not faced with the proposition that there was no disadvantage, either theoretical or actual, in making the order which precluded the unsecured creditors at the second meeting of creditors considering their attitude to the priority sought by the Commonwealth. The Commonwealth submitted that there was only a remote possibility of a creditor successfully moving for the Commonwealth not to be given the priority for repayment of its advances under the scheme which it has sought. It was said that I should only be concerned with a real and substantial possibility and not take into account a purely theoretical possibility. It was submitted that the likelihood of a creditor or creditors successfully overturning the priority sought by the Commonwealth at the meeting convened pursuant to s 439A was so minimal or remote a possibility that I should make the orders sought.

[40] Having heard further argument, I was satisfied that from a practical point of view no real opportunity would be foreclosed if I made the orders sought. For the reasons to which I refer, I was satisfied that I had the power to do so under ss 447A and 447D of the Act and that I should exercise that power in favour of making the orders sought.

[41] There were two issues that arose for determination:

- whether the court should approve the proposed deed or some of the provisions in it, and direct that the administrators may properly and justifiably execute the proposed deed, or a deed containing some of the provisions in it, and give effect to the deed or those provisions;
- whether the court should make orders pursuant to s 447A(1) of the Act that Pt 5.3A of the Act is to operate in relation to each of the companies of the Ansett Group as if it provided that:

  4.1 the Entitlement Payments referred to in Part 4 of the Schedule to the Determination under Subsection 22(1) of the Air Passenger Ticket Levy (Collection) Act 2001 are debts incurred by the Administrators in the performance and exercise of their functions and powers as Administrators and which the Administrators will not be personally liable to repay unless and to the extent that the Administrators have assets available to them to do so; and

  4.2 on the basis that such repayments are to have the priority equal to the priority the Commonwealth would have received, under Section 560 of the Act in any winding up of a company had it advanced a payment of the kind contemplated by Section 560 of the Act.

[42] The court does not have express powers to "approve" an agreement entered into or proposed to be entered into by administrators appointed and acting pursuant to Pt 5.3A of the Act, or to direct that the administrators may properly and justifiably enter into an agreement and perform it. For the reasons which I set out in *Re Ansett Australia Ltd and Mentha* (2001) 39 ACSR 355, I am satisfied that s 447A of the Act empowers the court to make such an order. Although courts will not pronounce upon the commercial prudence of an agreement entered into by administrators, they will act in an appropriate case to protect administrators from claims that they have acted unreasonably in entering into particular agreements.

[43] The issue of the court approving of the deed, or directing that the administrators may properly and justifiably enter into it and perform it is tied in with the issue of the order or direction sought that the debt due to the Commonwealth be accorded a priority for repayment in accordance with ss 556 and 560 of the Act. There should be clarification and certainty that payments made to the administrators under the scheme by the Commonwealth constitute, and result in, debts being incurred by the administrators, and that the administrators are entitled to be indemnified out of the property of the Ansett Group in respect of the repayment of those debts. But the court should not provide that clarity and certainty unless it is satisfied that there will be no significant disadvantage to the unsecured creditors who are not employees.

[44] The right of an administrator to incur debts and the administrator's liability for such debts he or she incurs is not unlimited. Section 443A of the Act provides:

(1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:

(a) services rendered; or
(b) goods bought; or
(c) property hired, leased, used or occupied.

(2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the company or anyone else.

An administrator is entitled to be indemnified out of the company's property for those debts in accordance with s 443D of the Act. That right of indemnity is subject to the order of priority found in s 556 which applies in the case of winding up but, otherwise, the indemnity has priority over all the company's unsecured debts: s 443E(1)(a). The indemnity also has priority over debts secured by a floating charge, subject to the exceptions contained in subss (2) and (3) of s 443E. The indemnity is secured by a lien on the company's property: s 443F.

[45] The issue was not fully argued but my view is that an advance by the Commonwealth under the scheme of funds to pay employee entitlements would not fall within the definition of "services rendered" in s 443A(1)(a). In *Employers' Mutual Indemnity Associated Ltd v FCT* (1943) 68 CLR 165 the High Court considered whether an insurance company was carrying on the business of "rendering services" to its members, who held policies of insurance with it, when it processed claims made under policies. The majority of the court (Latham CJ, Starke and Williams JJ) held that it was not. Latham CJ said (at 174):

> But the rendering of services, in the ordinary sense of that expression, does not convey any and every kind of dealing between persons. It would not be in accordance with the ordinary use of language to say that every company which deals with another person in some way or other upon terms acceptable to that person, and therefore regarded by him as being beneficial to him, was engaged in rendering services to him. The object of the companies in the cases mentioned is to carry on business profitably and it cannot be said, even if in a very general sense they are rendering services to, among others, their shareholders, that the primary object of the company is to render such services.
>
> In my opinion the words "rendering of services to" persons mean doing work of some kind for those persons. When it is the primary object of a company to do work for other persons, then it may be said that the primary object of the company is the rendering of services to such persons. But the issuing of an insurance policy to a person cannot be described as doing work for that person. It is making a contract with him. Work may be done for a person in pursuance of a contract with him, but the making of a contract with him does not amount to doing work for him.

Starke J considered that the rendering of services for shareholders involved the carrying out of acts for shareholders and Williams J considered that services which were to be rendered must be of a type which could result from a contract of service or for services: see also *Revesby Credit Union Co-op Ltd v FCT* (1965) 112 CLR 564 at 577–8; [1965] ALR 752 at 759; *Polla-Mounter v FCT* (1996) 71 FCR 570 at 583; 43 ALD 773. Consistently with this approach, the lending of money would not be considered to be the rendering of services.

[46] If an advance was made to the Ansett Group, which was not for services rendered, the companies would remain liable for repayment but the administrators would have no personal liability and, in any event, the advances would not be covered by the indemnity given to the administrators in s 443D of the Act.

[47] By virtue of s 443C of the Act, an administrator of the company under administration is not liable for the company's debts except under subdiv A of Pt 5.3A of the Act which includes s 443A. Thus, if the Commonwealth wishes there to be no doubt that the administrators are personally liable for the repayment of any advances made by the Commonwealth under the scheme, and that the administrators have a right of indemnity out of the property of the Ansett Group in respect of the repayment to the Commonwealth of any such advances, it is necessary for an order to be made pursuant to s 447A of the Act that s 443A(1) of the Act applies to any agreement whereby such advances are made. (Such an order was made by Finkelstein J on an application by the administrators of Pasminco Ltd (administrators appointed) on 10 October 2001 (V3044 of 2001).)

[48] For the reasons to which I shall refer, I am satisfied that it is appropriate to make such an order after taking into account the interests of unsecured creditors who are not employees. I consider that I should only make an order providing that by the Commonwealth advancing funds to the administrators under the scheme, the administrators are incurring a liability to repay the advances under subdiv A of Pt 5.3A of the Act, if it is also appropriate to make the order confirming the priority for repayment required by the Commonwealth. I am satisfied that, subject to that consideration, it is an appropriate exercise of power under s 447A to order that s 443(1)(a) operates so that advances made by the Commonwealth under the scheme to the administrators create debts for which the administrators are personally liable to the extent of their indemnity out of the property of the Ansett Group.

[49] The purpose of the advances is to assist a substantial body of the creditors of the Ansett Group who would otherwise suffer great hardship if the advances were not made as soon as is practicable. The administrators consider that it is in the interests of the Ansett Group and its creditors that the transaction under the scheme be entered into, and it does not appear that they have taken into account matters irrelevant in relation to the administration of the Ansett Group. I am satisfied that the aims which the administrators are seeking to achieve fall within the object of Pt 5.3A, expressed in s 435A of the Act, 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 — results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

[50] I turn to the issue whether the orders sought are within the power and jurisdiction of the court. Put shortly, does the power given to the court by s 447A extend to making orders which may take away some of the rights given to unsecured creditors by the provisions of Pt 5.3A?

[51] Section 447A is couched in very wide and general terms, but as the High Court observed in *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 280; 172 ALR 28 at 35; 34 ACSR 250 at 258, the powers under s 447A are not entirely without limit. The High Court did not identify what those limits were. In *Cawthorn v Keira Constructions Pty Ltd* (1994) 33 NSWLR 607, Young J said (at 611):

> It seems to me that this reinforces the construction that I have placed on s 447A, that the court is to have plenary powers to do whatever it thinks is just in all the circumstances, but the court is to bear in mind when exercising those powers the rights of the various groups of people that are affected by voluntary administration, and that there is a very great public interest in not permitting such voluntary administration to go on for a long period of time. Provided that those principles are borne in mind, the court is to ensure that the object of the exercise, that is to consider whether in everybody's interest it is better to have some form of administration short of winding up, is fulfilled.

I do not read Young J's observation "that the Court is to have plenary powers to do whatever it thinks just in all the circumstances" as meaning that the court has power to do what it likes. Like Finkelstein J in *Mentha v G E Capital Ltd* (1997) 154 ALR 565 at 575; 27 ACSR 696 at 706, I doubt whether Young J's statement can be taken literally. The plenary power to which his Honour referred is a power within the framework of Pt 5.3A.

[52] In *Deputy Commissioner of Taxation v Portinex Pty Ltd* (2000) 34 ACSR 391 at 398; 156 FLR 453 at 460, Austin J observed that s 447A:

> ... gives the court a broad power which is an integral part of the legislative scheme provided for by Pt 5.3A, not to be read down or confined to curing defects or remedying consequences of departures from other provisions of Pt 5.3A.

Nevertheless, I consider that any exercise of power under s 447A must be consistent with the object of Pt 5.3A found in s 435A. As the High Court observed in *Australasian Memory Pty Ltd v Brien* (at CLR 279; ALR 33; ACSR 255–6):

> It is important to notice that the orders that may be made under s 447A(1) are described as orders about how Pt 5.3A is to operate "in relation to a particular company". The power is not cast in terms of a power to make orders to cure defects or to remedy the consequences of some departure from the scheme set out in the other provisions of Pt 5.3A. Its operation is not confined to such cases. Nor is there anything on the face of s 447A(1) that suggests that it should be read down. In particular, the words of the provision are wide enough to confer power to make orders which will have effect in the future but which are occasioned by something that has been done (or not done) under the other provisions of Pt 5.3A before application is made under s 447A(1). As was said in the judgment of the court in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* [(1994) 181 CLR 404 at 421; 125 ALR 1 at 10]:
>
> "It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words."
>
> Cogent reasons must be advanced, then, if the power given by the general words of s 447A(1) is to be read down.

[53] The High Court made it clear (at CLR 279; ALR 33; ACSR 255) that s 447A(1) empowers the court to make orders which may alter the operation of other provisions of Pt 5.3A. An analysis of the High Court's consideration of the particular limitations on the power under s 447A suggested to it in the course of argument, leads me to the conclusion that it is not a limitation on the power which may be exercised under s 447A that such exercise must not impinge upon or affect the rights of unsecured creditors found in Pt 5.3A. The High Court said (at CLR 281–2; ALR 35; ACSR 257–8):

> Section 447A is an integral part of the legislative scheme provided for by Pt 5.3A. In its terms, it enables the making of orders which alter the way in which "this Part is to operate in relation to particular company". That is, it permits the making of orders

which would alter how s 439A is to apply. It is not right to seek to characterise s 447A as some general source of power to which resort cannot be had because to do so would "circumvent" the statutory limitations upon the exercise of the power that is given by s 439A(6) to extend the convening period. So to characterise s 447A is to give to all of the other provisions of Pt 5.3A a fixed and unchanging operation in relation to all companies. Yet the evident legislative intention of s 447A is to permit alterations to the way in which Pt 5.3A is to operate.

It is in s 439A that one finds the provisions relating to the convening of the critical meeting of creditors at which the future of the company is to be determined in accordance with s 439C. The passage to which I have referred makes it clear that there is no limitation on the power under s 447A that the alteration to the way in which Pt 5.3A is to operate cannot affect or impinge upon creditors. Of course, whether the power under s 447A should be exercised in a way that may affect or impinge upon creditors will depend upon the particular circumstances of the case. But that issue raises matters as to the exercise of discretion, rather than the existence of the power.

[54] Whatever be the limits of the power exercisable under s 447A, I am satisfied that what is proposed in the present case is within that power.

[55] The remaining issue to consider is whether I should, as a matter of discretion, make the orders sought. I am satisfied that I should do so.

[56] If I make orders that the debts incurred by the administrators, as a result of advances made to the administrators by the Commonwealth under the scheme, are debts incurred in the performance and exercise of their powers and functions as administrators for services rendered, then those debts become debts incurred in the administration. The repayment of the debts, therefore, forms an expense of the administration, which expenses are to be paid out of the property of the Ansett Group before any distribution is made to unsecured creditors. The liability of the administrators to pay such debts (s 443C), is supported by the indemnity they have in respect of those debts out of the property of the Ansett Group (s 443D(a)). That right of indemnity in a non-liquidation situation takes priority over all other unsecured debts: s 443E(1)(a). The indemnity is secured by a lien over the property of the Ansett Group: s 443F(1).

[57] It is not conceivable that to the extent to which those debts could not be met by the indemnity the administrators have against the assets of the Ansett Group, the Commonwealth would require the administrators themselves to pay the insufficiency. The Commonwealth has made it clear that it does not seek to achieve this result. The consequence is that to the extent of the insufficiency, the administrators are entitled to exhaust their indemnity against the assets of the Ansett Group as an administration expense. Although s 556(1)(c), in an administration situation, gives the administrators the right of first priority in payment of administration expenses and debts, creditors could not relegate that priority down the ladder of priorities covered by s 556(1). Section 443E(1) maintains that priority in an administration situation.

[58] Accordingly, no prejudice can arise to unsecured creditors in granting the priority for repayment sought by the Commonwealth as, absent the priority, the unsecured creditors are in no better a position. The administrators' right of indemnity under s 443D has priority over all the unsecured debts of the Ansett Group. Although that priority is subject to s 556 and although para 4 of Sch 8A brings s 556 into an administration, except if the deed of company arrangement

to be approved by the creditors otherwise provides, the priority given to the administrators' right of indemnity under s 443E(1) cannot be removed by the creditors so resolving.

[59] Further, once a debt is established as having been incurred in the course of the administration of a company, it is not a debt, the repayment of which is governed by a deed of company arrangement to be voted upon by the creditors. Such a deed only covers debts from claims arising on or prior to the day on which the administration began: ss 444D(1) and 444A(4)(i).

[60] However, it is more appropriate to consider the issue of prejudice to unsecured creditors at the point at which consideration is given to whether to order that Pt 5.3A is to operate as if s 443A(1)(a) provided that advances by the Commonwealth under the scheme fall within services rendered in s 443A(1)(a). I consider that any such prejudice is sufficiently remote and outweighed by the considerations in favour of making the orders sought that I should make the order sought.

[61] The Corporations Act enshrines the principle that priority is to be given to the payment of employee entitlements and to the repayment of advances made for that purpose: ss 556(1) and 560. It is unlikely that a meeting of creditors would resolve to dislodge that priority. If such a resolution was passed and the provision relating to the relegation of that priority was included in a deed of company arrangement, I consider that it is probable that a court would terminate the deed pursuant to s 445C, on the ground that the provision was oppressive or unfairly prejudicial to, or unfairly discriminatory against the Commonwealth: s 445D(1)(f).

[62] In all the circumstances, I consider it appropriate to make the order sought. If the Commonwealth had maintained its initial position, the issue of prejudice would not have arisen because the advances would not have been made if there was the opportunity for the creditors to dislodge the priority for repayment sought by the Commonwealth. Although the Commonwealth has now modified that position, it is appropriate, in order to mitigate the hardship being suffered by the employees of the Ansett Group, a substantial proportion of the creditors of the group, to put them in a position of being able to receive their employee entitlements, in respect of which they have an entrenched priority for payment, albeit that other creditors may be denied the possibility, which is remote, of dislodging the priority for repayment sought by the Commonwealth.

[63] The committee of creditors, after consideration of the matter, does not oppose the orders sought in relation to that priority and, apart from the two letters received by the court, no creditor has appeared to oppose the orders sought.

[64] I turn to some discrete matters that were argued. The ACTU submitted that the court should seek an undertaking from the Commonwealth that upon approval of the application, the Commonwealth would make funds available under the scheme as soon as possible to assist Ansett Group employees. Such an indication had already been given by the Commonwealth to the administrators and I can see no reason why such an undertaking should be extracted from the Commonwealth by the court. There has been no suggestion that, subject to the appropriate protection which the Commonwealth seeks being put in place, it will not act expeditiously.

[65] The ACTU submitted that although the Commonwealth said it was seeking to rank pari passu with employees in respect of their outstanding and unpaid entitlements, the agreement which was proposed did not reflect a true pari passu arrangement as some of the funds to be advanced by the Commonwealth would give rise to a priority ahead of some of the claims of employees. For example, under s 556(1) payments made in respect of wages (subpara (e)), and leave payments (subpara (g)), would have a priority for repayment over retrenchment payments (subpara (h)). That may be so, but I do not understand the arrangement, which has been proposed in the terms of the deed, intends to do anything other than provide that the Commonwealth be subrogated to the rights of the employees to whom the advances are made.

[66] The ACTU raised other matters which are not appropriate for consideration on this application. I refer to the position of employees transferred to what has been called "Ansett Mark II" and the securing of their entitlements, the quantum of the amount in respect of which the Commonwealth might be entitled to make a claim and the Commonwealth's position in relation to the manner in which it will use the funds generated by the ticket levy under the Ticket Levy Collection Act.

[67] The trustees for the four superannuation funds did not oppose the application made by the administrators, but were concerned to preserve the priority given to them by s 556(1)(e) of the Act in relation to superannuation contributions payable by the Ansett Group which s 444A(5) of the Act and cl 4 of Sch 8A of the Corporations Regulations preserve in a deed of company arrangement, subject to any other resolution of the creditors. The trustees were concerned to ensure that the only priority which was intended to be given to the Commonwealth in the administration was equal to the priority set out in s 556(1)(e)–(h) of the Act and that there was no priority given to the Commonwealth on any basis that the priorities in s 556(1)(a) and (c) were available to the Commonwealth. There was no suggestion by the administrators or by the Commonwealth that the Commonwealth intended its advances under the scheme to be repaid as an administration expense incurred by the administrators in priority to any payments otherwise due and payable to employees.

[68] This possibility was contemplated by subpara (c) of Pt 4 of the minister's determination dated 4 December 2001, which provided:

> (a) Entitlement payments under the Scheme will be made either:
>
> (i) on behalf of the Commonwealth, by the Department; or
>
> (ii) by a third party under an arrangement approved by the Department.
>
> (b) the entitlement payments made under paragraph (a) of this Part will be by way of a loan and, subject to (c), all such entitlement payments will be made as an advance to the eligible company, through the relevant Insolvency Practitioner (being either an administrator or a liquidator as those terms are defined in the Act), for the exclusive purpose of enabling the eligible company to make the payments described in Part 3 to eligible employees.
>
> (c) If directed, ordered or declared by a Court, the entitlement payments will be an "expense" within the meaning of s 556(1)(a) of the Act, and will be payable by the Insolvency Practitioner in accordance with the priority afforded by the Court.

However, the Commonwealth's position is, and always has been, that it does not seek any priority over and above the priority given by s 560 of the Act and it did not submit that I should make a direction, order or declaration in the terms of subpara (c) of Pt 4.

[69] The trustees also sought an order that the administrators make and maintain adequate records in relation to the receipt and disposition of the funds advanced by the Commonwealth. There has been no suggestion that the administrators would not keep such records and I do not consider that there is any need for the further directions and orders sought by the trustees.

[70] As I indicated in the course of argument, I was not disposed to approve of all the terms of the proposed deed or direct that the administrators may properly and justifiably execute a deed containing all the terms in it. Some of the provisions in the proposed deed did not bear directly on the issue with which the administrators and the Commonwealth were principally concerned, namely the terms on which payments made under the scheme to the administrators by the Commonwealth were to be received and repaid and the priority for repayment to be accorded to the Commonwealth. For example, I refer to cl 2.5.1 in relation to the pooling of assets and liabilities of the Ansett Group ([22] above) and the provisions of cl 3 relating to payments to employees in lieu of notice already made and to be made by the administrators.

[71] In these circumstances, I considered that a more appropriate course to adopt was to direct that the court approve of the administrators entering into a deed, or direct that the administrators may properly and justifiably execute a deed, containing particular provisions which should be set out in the court order.

Orders

(1) Pursuant to s 447A of the Corporations Act 2001 (Cth) (the Act), Pt 5.3A of the Act is to operate in relation to each of the companies set out in the schedule to this order as if s 443A(1)(a) provided that:

(a) Entitlement payments made to the plaintiff administrators (the administrators) pursuant to a determination dated 4 December 2001 by the Minister for Employment and Workplace Relations under s 22(1) of the Air Passenger Ticket Levy (Collection) Act 2001 (Cth), which is Ex "LZ-2" to the affidavit of Leon Zwier sworn 10 December 2001, are debts incurred by the administrators in the performance and exercise of their functions and powers as administrators of each of the said companies for services rendered;

(b) Notwithstanding subpara (a):

(i) if the administrators' indemnity under s 443D of the Act is insufficient to meet any such debt, the administrators will not be personally liable to repay such debt to the extent of that insufficiency;

(ii) as to the repayment of such debts to the Commonwealth of Australia or the entity making the entitlement payments, the debts are given the same priority in the payment of any debts of the applicable company during the administration of the applicable company as if the applicable company had been in liquidation and the debts had the priority governed and provided for under ss 556 and 560 of the Act.

(2) Pursuant to s 447A of the Act, s 447D(1) of the Act is to operate in relation to the said companies so that in an application by the administrators for directions pursuant to s 447D(1) in relation to a deed proposed to be executed by the administrators and the Commonwealth of Australia (the deed), the court may give a direction that the administrators may properly and justifiably execute and give effect to the deed in so far as it includes provisions substantially in the form of the provisions set out in para (3) hereof.

(3) Pursuant to s 447D(1) of the Act, as it operates in accordance with (2) of this order, the court directs that the administrators may properly and justifiably execute and give effect to the deed in so far as it includes provisions substantially in the form of the following provisions:

(a) Entitlement payments made pursuant to the determination dated 4 December 2001 under s 22(1) of the Air Passenger Ticket Levy (Collection) Act 2001 (Cth), which is Ex "LZ-2" to the affidavit of Leon Zwier sworn 10 December 2001, are debts incurred by the administrators in the performance and exercise of their functions and powers as administrators of each of the said companies for services rendered;

(b) Notwithstanding subpara (a):

(i) if the administrators' indemnity under s 443D of the Act is insufficient to meet any such debt, the administrators will not be personally liable to repay such debt to the extent of that insufficiency;

(ii) as to the repayment of such debts to the Commonwealth of Australia or the entity making the entitlement payments, the debts are given the same priority in the payment of any debts of the applicable company during the administration of the applicable company as if the applicable company had been in liquidation and the priority had been governed and provided for under ss 556 and 560 of the Act;

(c) If the administrators decide to recommend that each of the said companies enter into a deed of company arrangement, the deed of company arrangement which the administrators recommend will be consistent with the incorporation of the priority regime provided for under ss 556 and 560 of the Act;

(d) If any of the said companies enters into a deed of company arrangement which incorporates a priority regime other than as provided by subpara (c), then entitlement payments received by the administrators will constitute an expense properly incurred by the administrators in the administration of such company for services rendered and will be afforded nonetheless by force of the order of the Federal Court of Australia on 14 December 2001 a priority equal to the priority the Commonwealth of Australia or the entity making the entitlement payments would have received under s 560 of the Act in any winding up of the company had it advanced a payment of the kind contemplated by s 560 of the Act;

(e) The administrators will not express the opinion to the creditors of the said companies pursuant to s 439A(4) of the Act or recommend to them that it would be in the creditors' interests for the company to execute a deed of company arrangement other than one which provides for repayment to the Commonwealth of Australia or the said entity consistently with subparas (a)–(d).

(4) The costs of the administrators, the Commonwealth of Australia, the ACTU and other relevant unions and the trustees of the Ansett Australia Ground Staff Superannuation Plan Pty Ltd, Ansett Australia Pilots/Management Superannuation Plan Pty Ltd, Ansett Australia Accumulation Payment Pty Ltd and Ansett Flight Attendants Superannuation Plan Pty Ltd be costs in the administration of the said companies.

ANDREW BORROWDALE
BARRISTER

SCHEDULE

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*)