FEDERAL COURT OF AUSTRALIA

In the matter of Ansett Australia Limited (ACN 004 209 410) [2006] FCA 277

CORPORATIONS – application by deed administrators for directions pursuant to ss 447A(1) and 447D(1) of the *Corporations Act* 2001 (Cth) – where deed administrators seek to pool assets and liabilities of group of companies into one company – where deed administrators seek to give effect to a deed of compromise between one company and three major creditors - manner in which deed administrators seek to vote on pooling proposal at creditors' meetings - exercise of casting vote – voting inter-company debt – where conflict of interest of deed administrators in capacity as deed administrators and as trustees – where pooling proposal will disadvantage some priority and non-priority creditors of companies and beneficiaries of trusts – where group of companies historically operated as a single business in some respects – where administration is time-consuming and expensive if there is no pooling and each company continues to be administered separately

Corporations Act 2001 (Cth): Pt 5.3A, ss 435A, 447A(1), 447D(1)
Federal Court of Australia Act 1976 (Cth): ss 22, 23
Trustee Act 1958 (Vic): s 63
Trustee Act 1925 (UK): s 57
Trustee Act 1925 (NSW): s 81

Corporations Regulations 2001 (Cth): regs 5.6.17, 5.6.21

Re Ansett Australia Ltd and Korda (No 3) (2002) 115 FCR 409, applied
Re Ansett Australia Ltd and Mentha (2002) 41 ACSR 605, applied
Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd (2004) 49 ACSR 1, applied
Riddle v Riddle (1952) 85 CLR 202, considered
Re Royal Society's Charitable Trusts [1956] Ch 87, considered
Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd (1997) 42 NSWLR 209, considered
Anmi Pty Ltd v Williams [1981] 2 NSWLR 138, considered
Re Charter Travel Co Ltd (1997) 25 ACSR 337, considered
Re Switch Telecommunications Pty Ltd (in liq); Ex parte Sherman (2000) 35 ACSR 172, considered
Dean-Willcocks; Alpha Telecom (Aust) Pty Ltd (in liq) (2004) 50 ACSR 15, considered
Mentha v GE Capital (1997) 27 ACSR 696, considered
Humphris, Re ACN 004 987 866 (2003) 21 ACLC 1474, considered
Re Tayeh; the Black Stump Enterprises Pty Ltd (2005) 53 ACSR 684, considered
In Re Owens Corning 419 F.3d 195 (3rd Cir. 2005), considered
In re Augie/Restivo 860 F.2d 515 (2nd Cir. 1988), considered
Re Coaleen Pty Ltd (Admin. Appointed) [2000] 1 Qd R 245, applied

Re Martco Engineering Pty Ltd (1999) 32 ACSR 487, applied
Kirwan v Cresvale Far East Ltd (2002) 44 ACSR 21, applied

Archbold on Bankruptcy, 11th ed, p598

IN THE MATTER OF ANSETT AUSTRALIA LIMITED (ACN 004 209 410) & ORS (in accordance with the Schedule attached) (all subject to Deeds of Company Arrangement) and MARK ANTHONY KORDA and MARK FRANCIS XAVIER MENTHA (as Deed Administrators)

VID 621 of 2005

GOLDBERG J
22 MARCH 2006
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 621 of 2005**

IN THE MATTER OF:

ANSETT AUSTRALIA LIMITED (ACN 004 209 410) & ORS
(in accordance with the Schedule attached)
(all subject to Deeds of Company Arrangement)

MARK ANTHONY KORDA and
MARK FRANCIS XAVIER MENTHA
(as Deed Administrators)
Plaintiffs

JUDGE: **GOLDBERG J**
DATE: **22 MARCH 2006**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 This application for directions by the Deed Administrators of Ansett Australia Limited (ACN 004 209 410) and the companies set out in the schedule attached to these reasons (the "Ansett Group") is the latest of a long line of applications to the Court which commenced with the entry of the Ansett Group into voluntary administration between 12 and 14 September 2001.

2 The Deed Administrators ("the Administrators") seek directions in relation to:

(a) the manner in which they may vote at proposed meetings of creditors of the companies in the Ansett Group to approve the pooling of the assets and liabilities of the companies in one company, Ansett Australia Limited ("AAL");

(b) the approval, and giving effect to, of a deed of compromise between Ansett Aviation Equipment Pty Ltd and three of its major creditors (the "AAE Pooling Compromise Deed");

(c) the manner of the notification to creditors of the proposed meetings to consider pooling, that is allowing them to give notice of the meetings to creditors by posting

notices of the meetings on the Ansett websites and by publishing such notices in daily newspapers.

3 Of the forty-one companies which originally were placed in administration in September or October 2001, thirty-nine companies remain in administration. Skywest Airlines Pty Ltd ("Skywest Airlines") and Aeropelican Air Services Pty Ltd ("Aeropelican") have come out of deed administration as a result of the sale of the shares in them to other entities. In a separate transaction, certain assets of Skywest Airlines and Aeropelican were transferred to Bodas Pty Ltd to hold as trustee in favour of creditors who may have had claims against the two companies as at the date of the appointment of the initial Administrators.

4 A substantial number of the companies in the Ansett Group had their own individual group of creditors. In the deeds of company arrangement entered into by most Ansett Group companies on or about 2 May 2002 (the "Ansett DOCAs"), there are provisions dealing with the pooling of assets and liabilities. The main provisions are cll 13.1, 13.2, 18.4, 20.2.14 and 20.2.15 which provide:

> *"13.1 The Voluntary Administrators are required, pursuant to the terms of the Air New Zealand MOU and the SEESA Deed, to take all reasonable steps to propose and recommend that each Ansett Group Company shall seek to pool all of the assets and liabilities of the Ansett Group, so that all Ansett Group Companies are treated as one company.*
>
> ...
>
> *13.2 The Deed Administrators shall convene a further meeting of Deed Creditors to consider a variation to the Deed which shall include a regime for the pooling of all assets and liabilities.*
>
> ...
>
> *18.4 When the Deed Administrators have sold or otherwise realised sufficient assets so that they are able to make an accurate estimation of the amounts to be paid to Participating Creditors in accordance with the priority regime set out in Clause 18 and prior to the distribution of any money to Participating Creditors (other than Priority Creditors) in accordance with Clause 18.2.5, the Deed Administrators shall convene a meeting of creditors under Section 445F of the Act to consider:*
>
> *18.4.1 any proposed variation to the Deed, including the incorporation in the Deed of provisions for releasing Claims of Deed Creditors less their Entitlements and the pooling of assets and liabilities; or*

18.4.2 in the alternative, a resolution to terminate this Deed and wind up the Company.

For the purposes of such a meeting, the Deed Administrators shall advertise nationally and make available to the Deed Creditors on the Administrators' Website:

18.4.3 particulars of the proposed variation; and

18.4.4 such information which would be sent to Deed Creditors as if the meeting were a Second Meeting of Creditors under Section 439A of the Act.

...

20.2 Without limiting clause 20.1 the Deed Administrators shall have the following powers:

...

20.2.14 the power to assign and transfer property, assets and rights, and novate liabilities, of the Company to another Ansett Group Company for the purpose of maximising the sale of assets or for maximising the return to Deed Creditors;

20.2.15 the power to accept and take an assignment or transfer of property, assets and rights and to accept novation of liabilities from another Ansett Group Company".

5 The deeds of company arrangement entered in to by five companies Skywest Aviation Limited (now ANST Westsky Aviation Pty Ltd), Skywest Holdings Pty Ltd (now ANST Westsky Holdings Pty Ltd) and Skywest Jet Charter Pty Ltd (now ANST Westksy Jet Charter Pty Ltd) (the "Skywest Entities"), Skywest Airlines (collectively with the Skywest Entities "the Skywest Group") and Aeropelican do not contain provisions relating to the possible pooling of the assets and liabilities of the companies in the Ansett Group.

6 At the date of the commencement of the administration of the Ansett Group, the Skywest Group and Aeropelican were the operators of regional airlines. Early in the administration a proposal evolved to sell the business of the Skywest Group and the shares in Skywest Airlines and Aeropelican. The Skywest Group's activities were in Western Australia. Aeropelican's activities were in New South Wales.

7 The Skywest Group companies and Aeropelican executed deeds of company arrangements which, unlike the Ansett DOCAs, did not contain clauses relating to the identification of persons who had admissible claims, the distribution of assets or the possible pooling of the assets and liabilities of the Ansett Group. Those deeds did include the following provisions:

> *"6.5 The method of calculation of and method of payment of Claims, dealing with the Company's assets, if any, available for distribution and the determination of persons entitled to a Claim will be determined at a meeting of creditors of the Company to be held on or about the date to which the second meeting of creditors of various companies in the Ansett group has been adjourned (**'the Subsequent meeting'**) and to which the provisions of clause 10 will apply.*
>
> ...
>
> *10.1 Meetings of creditors of the Company may be convened by the Administrators from time to time in accordance with section 445F* [of the Act].
>
> ...
>
> *11.5 This Arrangement may be varied by a resolution passed at a meeting of the Claimants convened under this Arrangement only if the variation is not materially different from a proposed variation set out in the notice of meeting."*

8 A series of agreements and deeds led to Bodas Pty Ltd ("Bodas"), a company in the Ansett Group, itself in administration, holding cash and certain assets of Skywest Airlines and Aeropelican as trustee. Each of Skywest Airlines and Aeropelican agreed to transfer to Bodas its shares and certain of its assets. Bodas sold those shares in February and March 2002 and held the proceeds of sale and certain of the assets as trustee. By a trust deed dated 7 March 2002 Bodas declared a trust over the assets transferred to it by Skywest Airlines in favour of creditors who may have had claims against Skywest Airlines as at the date of the commencement of the administration (the "Westsky Trust Deed" and the "Westsky Trust"). Similarly, by a trust deed dated 11 June 2002, Bodas as trustee declared a trust over the assets transferred to it by Aeropelican in favour of creditors who may have had claims against Aeropelican as at the date of the commencement of the administration (the "Pelican Trust Deed" and the "Pelican Trust").

9 Each trust bound all persons having a debt owing by, or a claim subsisting against, the relevant company in favour of a person. The trust deeds did not provide a regime for the identification of persons who had admissible claims, the distribution of the trust assets or for the possible pooling of the assets and liabilities of the Ansett Group. Each trust deed provided that the Administrators who were appointed to act as agents for Bodas as trustees would call a meeting of creditors of the relevant company which would determine admissible claims and the method of their distribution. Each trust deed provided for the variation of its terms by a simple majority resolution of admitted creditors who attended the meeting, whether personally or by proxy.

10 Accordingly the Administrators have multiple roles in relation to each trust. They are the Deed Administrators of Bodas and therefore the controlling mind of the trustee; they are, under the terms of each trust deed, agents for the trustee; as Deed Administrators of AAL they control a beneficiary/creditor of each trust.

11 The course of action the Administrators propose to follow with respect to each trust is to pool the assets of the two trusts into AAL by moving, and voting for, a resolution that the whole of the assets of the trust be distributed to AAL. Such a course of conduct will involve the Administrators in a conflict of interest at a number of levels. In particular, by so voting, they will be acting contrary to the interests of a number of the beneficiaries/creditors of each trust.

12 A further trust situation arises in relation to the proceeds of sale of a number of real estate properties. The Administrators are uncertain as to which company was the beneficial owner of each of the properties and is therefore entitled to the proceeds of sale which are presently held by 501 Swanston Street Pty Ltd on trust for the ultimate identified beneficiary or beneficiaries. In substance, the Administrators have the duties of trustees in relation to the allocation and disposition of those proceeds.

13 On or about 5 October 2001, the Administrators entered into a Memorandum of Understanding with Air New Zealand Limited and others (the "MOU") whereby, *inter alia*:

(a) Air New Zealand agreed to procure the New Zealand Government to pay $150 million to the Administrators;

(b) Air New Zealand agreed not to prove in the administration of the Ansett Group;

(c) the Administrators and the Ansett Group released Air New Zealand and its directors from various claims.

14 The MOU provided that:

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

15 On 14 December 2001 the Administrators entered into a deed with the Commonwealth and certain Ansett Group companies as part of the Special Employee Entitlements Scheme for Ansett Group employees (the "SEESA Scheme"). The SEESA Scheme was designed to effect early payment of the outstanding entitlements of certain unpaid Ansett Group employees, provided that the Commonwealth could be subrogated to the rights of those employees to recover their entitlements from the administration or liquidation of the Ansett Group.

16 Clause 2.5 of the SEESA Deed related to pooling and relevantly provided:

> *"2.5 If the Administrators decide to recommend that each eligible company enter into a Deed of Company Arrangement, the Deed of Company Arrangement which the Administrators recommend will:*
>
> *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"*

17 The Administrators have made a number of interim distributions to priority creditors of the Ansett Group (the term "priority creditors" in these reasons means employees) and have now reached a position where they propose to call a meeting of creditors of each Ansett Group company to consider variations to the company's DOCA so as to pool all the assets and liabilities of the Ansett Group into a single entity so that such Ansett Group companies are treated as the one company.

18 The Administrators are administrators of each of the companies in the Ansett Group and will accordingly represent each of those companies as a creditor where there is a debt due to each such company from another company in the Ansett Group.

19 There are a considerable number of inter-company debts and the Administrators are entitled to vote as a creditor in respect of a large number of companies in the Ansett Group. The Administrators perceive, quite rightly, a conflict of interest and seek a direction from the

Court that they may properly and justifiably cause each of the companies in the Ansett Group to vote in favour of pooling to the extent that each such company is entitled to vote as a Deed Creditor at a meeting of that company and that each Administrator in his capacity as Deed Administrator may properly and justifiably exercise a casting vote as chairman of the meeting in the event that no result is reached on the poll.

20 There are five major creditors of one of the Ansett Group companies, Ansett Aviation Equipment Pty Ltd ("AAE"), in respect of which issues have arisen as to the indebtedness of AAE to those creditors. The Administrators believe that, but for the compromise they have reached with some of those creditors, the creditors of AAE would vote against a pooling resolution. Those creditors and their claimed debts are: Ansett Equipment Finance Limited ($14,050,000), Australian Taxation Office ($3,500,000), National Australia Bank Limited (up to $179,600,000), Commonwealth Bank of Australia ($20,000,000) and BNP Paribas ($20,000,000), a total of up to $237,150,000. The Administrators have not admitted these claims and are confident that if the claims had to be resolved by litigation, it would be time-consuming and expensive. In any event, the Administrators are confident that regardless of the outcome of any litigation, third party creditors would control a significant majority of votes at a creditors' meeting of AAE.

21 The Administrators have reached a compromise with three of those creditors, National Australia Bank Limited, Commonwealth Bank of Australia and BNP Paribas (the "AAE Bank Creditors"). The compromise is contained in the AAE Pooling Compromise Deed made on 29 August 2005. The Administrators seek a direction from the Court approving the AAE Pooling Compromise Deed and a direction that the Deed Administrators may properly perform and give effect to the AAE Pooling Compromise Deed.

22 The financial position of AAE as at 15 August 2005 was that without pooling approximately $38 million was estimated to be available for distribution to its creditors. That estimate does not take account of any amount which might be received by AAE if the $150 million received under the MOU is apportioned; nor does it take account of the likely future costs of administering AAE separately if there is no pooling.

23 The AAE Pooling Compromise Deed provides for the three bank creditors agreeing:

- to vote in favour of pooling at the AAE pooling meeting and at any other pooling meeting of a company in the Ansett Group of which they are a creditor;
- save for the National Australia Bank, not to lodge a proof of debt against any company in the Ansett Group following pooling;
- to the release of certain claims.

In return, AAL is to pay from the pooled assets, $7 million to the National Australia Bank Limited, $10 million to the Commonwealth Bank of Australia and $10 million to BNP Paribas.

24 The consequence of the approval of the AAE Pooling Compromise Deed is that $38 million is transferred to AAL of which there is a net benefit to that company of $11 million which will be distributed to Ansett Group priority creditors.

25 Although there are advantages in pooling the assets and liabilities of all the companies in the Ansett Group there are two significant consequences of the pooling proposal. First, the Administrators, in respect of companies with substantial assets, will be voting in a way which is contrary to the interests of the creditors of that company. Secondly, some creditors of those companies which have substantial assets will be disadvantaged as they will receive a distribution less than they would likely receive if there were no pooling.

26 Generally speaking, the need for pooling and the arguments in favour of pooling advanced by the Administrators can be categorised and summarised as follows:

(a) The Ansett Group historically operated as a single entity in many respects. For example, various Ansett Group companies shared personnel, assets, resources, intellectual property, information technology and software. The Ansett Group was treated as a whole for the purposes of taxation. Significant time and costs would be required to determine whether charge-backs should be, or could be, properly raised as between various companies in the Ansett Group.

(b) It is impossible or impracticable without expending substantial costs and using substantial resources to determine which Ansett Group companies own certain assets,

such as, the head office building at 501 Swanston Street, Melbourne, other Melbourne CBD properties, certain aircraft and engines, and information technology systems and software.

(c) The operation of certain deeds of cross guarantee may affect the various companies in the Ansett Group in such a manner as will create substantial uncertainty as to their potential liability. The resolution of this issue will involve the use of substantial resources and the expenditure of large sums of money.

(d) If pooling does not occur, the costs of the administration would need to be apportioned among the various companies in the Ansett Group given that to date they have been funded by AAL.

(e) If pooling does not occur, the time and cost required to resolve tax issues would be substantial and without guarantee of accurate, fair or equitable results.

(f) If pooling does not occur, significant time and costs would be involved in conducting a proof of debt process for each Ansett Group company.

(g) It would be impracticable, if not impossible, to apportion money received under the MOU between the Ansett Group companies without seeking directions from the Court, and if monies were apportioned with directions from the Court, it would be likely to result in lengthy and costly litigation.

(h) The provisions of the MOU require the Administrators to facilitate pooling and ensure payment in full of all priority entitlements held by employees.

(i) The provisions of the SEESA Deed require the Administrators to seek pooling so as to maximise repayment of monies loaned to the Administrators.

(j) The provisions of the Ansett DOCAs expressly contemplate pooling.

(k) No Ansett Group company creditor objected to, or opposed, the proposed 'pooling' provisions of the MOU, SEESA or the Ansett DOCAs.

27 Essentially, the advantages of pooling are that significant time and costs will be saved. A saving in time means that the administrations will be finalised more quickly, with the consequent result that any distributions to be made will be made more quickly. A saving

in costs of the administration will maximise the pool of monies available to be distributed to creditors.

28 However, pooling will have the result that some creditors of some Ansett Group companies will be disadvantaged, albeit to a small extent in Ansett Group terms, but nevertheless in not insubstantial amounts for individual persons, particularly former employees. This is dealt with in detail in pars [50] below and following.

29 I turn to examine in greater detail the Administrators' arguments for pooling. WTH Pty Ltd, a third party non-priority creditor of a number of the Ansett Group companies, appeared as a contradictor in this proceeding, represented by counsel. This was a course of action which I suggested and which was accepted by the Administrators, to ensure that a contrary argument was put before the Court.

30 Although the Ansett Group consisted of a number of separate and discrete companies, it was in many respects operated as a single business. However, it is not suggested that the creditors of the various companies in the Ansett Group regarded themselves as dealing with a single Ansett Group business or an organic entity rather than dealing with the particular or separate entities which became indebted to them. There was no evidence to this effect.

31 The Administrators relied, in part, in support of the proposition that the Ansett Group has operated as a single business, on the fact that some Ansett Group companies provided cash to other Ansett Group companies without the taking of security and without being repaid. Nevertheless, inter-company loan balances were adjusted to reflect these movements of cash and it is not suggested that the amount of the loan balances cannot be determined with a reasonable degree of precision.

32 The Administrators also relied on the fact that the companies in the Ansett Group shared Ansett Group employees between the various companies in circumstances where no charge-backs were raised by the employer company against the recipient company. The Administrators say that it is apparent that the Ansett Group workforce was viewed by executive management as a single team and they cite examples of how Ansett Group employees were shared amongst different entities within the Ansett Group. Charge-backs for the services rendered by the employing company to the recipient company were not always

raised. Further, the Administrators have been unable to locate the source documents supporting some of the charge-backs which had been made. Nevertheless, in the absence of such documents, it is a matter for the Administrators to make a decision whether or not to accept the charge-backs made.

33 The Administrators also relied, in support of the proposition that the Ansett Group was operated as a single business, upon the fact that many companies in the Ansett Group shared numerous assets and resources in circumstances where the asset holding companies did not charge commercial rates to the recipient companies for the use of assets or raised charge-backs on an inconsistent and haphazard basis. Such assets included the Ansett Flight Simulation Centre, Ansett Group brands, trademarks and other intellectual property, software applications, the Ansett Group headquarters at 501 Swanston Street, Melbourne and adjoining properties.

34 In particular the Administrators say that despite their investigations they cannot determine which Ansett Group company beneficially owned the head office. The registered proprietor was 501 Swanston Street Pty Ltd although AAL treated the head office as its own asset, and arranged for parts of it to be sublet to other companies. Ansett Group companies, including AAL, always occupied at least 90% of the head office.

35 The Administrators have examined a number of documents in relation to the ownership of the head office at 501 Swanston Street, Melbourne. The Administrators say that "the best that we can surmise" is that up until at least 1997, 501 Swanston Street Pty Ltd held the head office property as trustee for AAHL and AAL pursuant to a unit trust but they have been unable to locate the unit trust document and they are unsure whether it was in existence after June 1997. If pooling does not occur then the Administrators will need to seek directions from the Court about the ownership and proper allocation of the sale proceeds of the head office building

36 Other properties were owned by Ansett Australia Holdings Limited ("AAHL"), that is, it was the registered proprietor of them but AAL treated these other properties as if it owned them.

37 There were also complex leasing and financing arrangements in existence in relation to the use and operation of numerous aircraft by various companies in the Ansett Group. The Administrators contend that if the assets and liabilities of the Ansett Group are not pooled, they will need to undertake a detailed, costly and time-consuming investigation into the nature and extent of the aircraft leasing and financing arrangements and the effect of a number of associated guarantees.

38 The Administrators have established that the wider Ansett Group was treated as a tax group and that group tax returns were prepared for each income tax year. However, the Administrators say that the inter-company loan balances as at the date of the commencement of the administration may not accurately reflect the intra-Ansett Group treatment of Ansett Group tax losses.

39 Because of the manner in which the Ansett Group was run as a single business operation, the Administrators say they will need to spend a significant amount of time and incur significant costs in attempting to determine whether or not charge-backs should be raised in relation to the pre-administration use by some of the Ansett Group companies of particular assets and their use of tax benefits and the use of personnel. The Ansett Group has inter-company loan transactions to a total value of approximately $2.95 billion so that any charge-back adjustments would affect the inter-company loan position.

40 In particular, the Administrators make the following observations:

> *"54 As a result of our Investigations we have formed the opinion that the inter-company loan balances in each Ansett Group Company are either impossible or impracticable to accurately reconstruct and reconcile. In many instances the books and records contain insufficient information to determine whether the liabilities recorded are actually payable and, if so, whether those liabilities have, in fact, been paid.*
>
> *55 Any reconstruction of the inter-company loan balances would require us to consider whether to charge interest on unpaid (or apparently unpaid) amounts and, if so, to undertake those calculations. That exercise would be complex, time-consuming and costly.*
>
> *56 Even if the inter-company loan balances were capable of accurate reconstruction and reconciliation, the sheer complexity of the loan transactions and the lack of source documentation means that auditing and proving each loan balance to reconstruct the entire Ansett Group*

inter-company account would involve detailed and time-consuming accounting work at a total likely cost of between $2 million and $4 million."

In order to reconstruct accurately and reconcile all the inter-company accounts the Administrators would have to re-employ or interview ex-staff from all business divisions of AAL and also from the other Ansett Group companies.

41 The aircraft and engines of the Ansett Group were owned by a number of different Ansett Group companies and as a result of the swapping of engines among airframes from time to time (a common practice) it has been very difficult for the Administrators to determine which Ansett Group company owned a particular aircraft or engine. Although the Administrators have attempted to determine accurately the ownership of aircraft and engines and allocate accurately the proceeds of their sale to the relevant companies, there is a degree of uncertainty about whether the allocations are accurate.

42 The financial situation of the companies in the Ansett Group is complicated further by the existence of a number of deeds of cross-guarantee entered into by various Ansett Group companies in order to obtain Australian Securities and Investment Commission class order relief from certain statutory accounting and audit requirements. In return for the disclosure concessions granted under the class orders each class company, a party to a cross-guarantee, was required to cross-guarantee the debts of each other class company, a party to that same cross-guarantee. Under each cross-guarantee, each class company became co-surety for the deficiencies of the other class companies in the liquidation of any of them. The cross-guarantees are significant because the value of the combined net realisations of assets held in the class companies is approximately $512 million out of total net realisations of $590 million across the Ansett Group and, according to the Administrators, the claims of creditors under the cross-guarantees are likely to be admissible for voting and all other purposes in the administration of all class companies.

43 The Administrators, post-administration, continued the pre-administration practice of certain of the companies in the Ansett Group using assets owned by other companies until the relevant assets were de-commissioned or sold. If pooling does not occur significant time and costs will be required to raise charge-backs as between various companies in the Ansett Group for the post-administration use by some of them of particular assets and tax benefits

and personnel. An example of what occurred post-administration can be seen in the sale of aircraft and engines by AAE. That company had no cash of its own although it had significant assets in the form of aircraft and engines to sell. In order to maximise the proceeds of their sale, that company used AAL's assets and resources to meet costs and expenses such as insurance, maintenance and preservation of certification records.

44 However, it does not appear that the raising of charge-backs or contra-entries to reflect such transactions cannot be undertaken. The extent of post-administration use of AAL's assets has been accurately recorded and it is not suggested that the charge-backs cannot be carried out or implemented.

45 Since the commencement of the administrations costs have been incurred in relation to particular transactions, dealings and litigation in relation to companies in the Ansett Group. These costs have been incurred by AAL. Examples of them include the MOU negotiations and Court applications, the SEESA negotiations and administration, the preparation of deeds of company arrangement, the convening and holding of meetings of creditors and the administration of Ansett websites. These post-administration costs have been accurately recorded but if pooling does not occur it will be necessary to undertake an apportionment of the costs incurred by AAL in relation to non-AAL transactions, dealings and litigation and apportion those costs to the relevant company which will be a time-consuming and costly exercise.

46 If pooling does not occur many pre-administration Ansett Group tax issues would need to be reviewed which will involve expenditure of a considerable amount of money and take, according to the Administrators, months or years to conclude.

47 The Administrators have not called for formal proofs of debt from unsecured creditors in the administrations but have rather reviewed the books and records of the Ansett Group to identify potential creditors and their values.

48 The Administrators' creditors' database lists 33,922 unsecured creditors of the Ansett Group which records claims in excess of $7.55 billion (later figures submitted by the Administrators suggest that there are 42,653 Deed Creditors). This includes 182 related party unsecured creditors with claims totalling approximately $2.95 billion and 33,740 other

unsecured creditors (including employees) with claims totalling approximately $4.6 billion. The calling for and examination of formal proofs of debt will be extremely costly and time-consuming and the Administrators estimate that the number of proofs of debt likely to be submitted will be huge. If pooling does not occur it may be necessary to conduct a formal proof of debt process for each Ansett Group company which will be very time-consuming and costly. The Administrators initially estimated that the administrative costs alone of conducting a formal proof of debt process across the entire Ansett Group could be between $2 million and $4 million, if not more, which estimate did not allow for potential legal costs in excess of $5 million. Subsequently the Administrators attempted to formulate a better estimate of the likely costs of the formal proofs of debt process. The latest figures show that there are at least 42,653 Deed Creditors who may be entitled to a distribution (excluding Global Rewards and Golden Wing creditors). Allowing for the administrative cost of assessing claims and disputes, the Administrators estimate that the cost of the proof of debt process could be in the range of $5.5 million to $10 million including legal fees.

49 The Administrators are also concerned about the possibility of outstanding issues in relation to the MOU whereby $150 million was paid to the Administrators. As a result of issues raised by the Hazelton Group Administrator, litigation and directions sought from the Court in relation to apportionment as between the Ansett Group and Hazelton Group were settled on the basis of the Administrators paying the Hazelton Administrator $3.2 million in full and final settlement of Hazelton's claim. The Administrators are concerned that there is a real risk that the process of allocating the MOU monies among the companies in the Ansett Group will give rise to potentially costly disputes and litigation and conflicts of interest for the Administrators, as illustrated by the time and expense involved in settling the Hazelton dispute. The pooling of the MOU monies into a single Ansett Group company will avoid potential dispute and litigation about the allocation of those funds which the Administrators believe is impracticable, if not impossible, for them to apportion amongst the various companies in the Ansett Group.

50 I turn to the effect of pooling on creditors. The Administrators have prepared tables setting out their estimates of distributions to priority and non-priority creditors, which distributions reflect the Ansett DOCA priority regime.

51 The distribution tables show estimated distributions on several bases:

(a) after pooling of the Ansett Group, including the effect of the AAE Pooling Compromise Deed;

(b) on the basis that pooling does not occur, but also including the effect of the AAE Pooling Compromise Deed;

(c) after pooling of the Ansett Group but with no AAE Pooling Compromise Deed; and

(d) on the basis that pooling does not occur and with no AAE Pooling Compromise Deed.

52 In arriving at these estimates the Administrators have made a number of assumptions and taken into account a number of matters which are relevant for consideration, namely:

(a) the 2000 audited accounts and the 2001 unaudited accounts have been used as a starting point, particularly in relation to the inter-company loans;

(b) estimated final net realisations assume that pooling occurs and the AAE Pooling Compromise Deed is given effect;

(c) AAL is assumed to be the beneficial owner of the head office;

(d) priority and non-priority creditors of each of the class companies party to a cross-guarantee have contingent claims in the administration of each other class company party to that cross-guarantee;

(e) the priority afforded to employee entitlements (and SEESA) under s 556(1) of the *Corporations Act 2001* (Cth) (the "Act") would not be afforded to employees who prove as creditors of related Ansett Group companies by virtue of the operation of the cross-guarantees;

(f) the creditor database accurately reflects likely proofs of debt in the Ansett Group, were formal proofs of debts to be called;

(g) post-administration charge-backs are not factored in, except in respect of AAE;

(h) the MOU monies have not been apportioned among individual Ansett Group companies;

(i) the post-administration costs have not been apportioned to individual Ansett Group companies except in respect of AAE's costs;

(j) all outstanding matters between the Ansett Group and the Commonwealth are assumed to be settled;

(k) the Commonwealth (including ATO and SEESA) agrees to vote in favour of pooling, or agrees not to oppose pooling;

(l) the "round robin" effect of repeated distributions through the inter-company loan accounts is factored in.

53 The Administrators have identified seven asset holding companies in the Ansett Group all of which, except for AAL, have a surplus of assets over employee entitlements. Estimates have been made of the net realisations of these assets before inter-company distributions and these are shown in the following table:

TABLE No 1

Asset Holding Companies			
	Estimated net realisations	**Gross Employee Entitlements**	**Surplus over employee Entitlements**
	$m	**$m**	**$m**
Westsky Trust	2.23	–	2.23
Ansett International Limited	1.90	0.16	1.74
Pelican Trust	5.57	0.25	5.32
Show Group	9.63	0.87	8.76
AAE	38.00	–	38.00
Kendell Airlines (Aust) Pty Ltd	25.72	9.36	16.36
AAL	506.95	749.36	0
Total:	590.00	760.00	72.41

54 When one looks at the estimated final position of Ansett Group employees, SEESA and non-priority creditors under "pooling" and "no-pooling" scenarios (without taking into account the extra administration costs that will be incurred in a no-pooling scenario), it can be seen that under pooling the employees are better off whereas under no-pooling third party non-priority creditors are better off. This is shown in the following table:

TABLE No 2

	Pooling with AAE Compromise	**No Pooling with AAE Compromise**	**No pooling and no AAE Compromise**	**Pooling and no AAE Compromise**
	$m	**$m**	**$m**	**$m**
Group employees receive	639.7	626.2	619.9	656.2
- percentage return	84.2%	82.4%	81.6%	86.3%
- shortfall	120.3	133.8	140.1	103.8
SEESA receives	307.1	298.6	294.5	317.7
- percentage return	80.0%	77.8%	76.7%	82.8%
- shortfall	76.7	85.2	89.3	66.1
Third party non-priority creditors receive	27.0	49.0	59.4	0

In the no-pooling (with AAE compromise) scenario the $49 million return to third party non-priority creditors is apportioned, $27 million to AAE Bank Creditors and $22 million to other non-priority creditors. In the pooling scenario (with AAE compromise) all the $27 million goes to the AAE Bank Creditors and ordinary third party non-priority creditors receive no return. In summary, the Administrators say that the difference between the pooling and the no-pooling scenarios with AAE compromise (without taking into account the extra administration costs that will be incurred in a no-pooling scenario) is that with pooling:

- Group employees receive $13.5 million more than with no-pooling
- SEESA Scheme receives $8.5 million more than with no-pooling
- AAE Bank Creditors have no change
- Third party non-priority creditors receive $22.0 million less than they would with no-pooling.

55 However, it seems to me that the appropriate comparison to be made in relation to a pooling/no-pooling comparison is between pooling with the AAE Pooling Compromise Deed implemented and no pooling without the AAE Pooling Compromise Deed being implemented. I do not see how a situation could be reached where there would be no pooling but with the AAE Pooling Compromise Deed being implemented. That Deed, in its terms, depends for its implementation on pooling being achieved. Although cl 2.1 of that Deed provides that the operation of the Deed is conditional upon the Court's approval of, or non-objection to, the Deed and the pooling of AAE, the Deed cannot be implemented unless there is pooling of the assets and liabilities of all the companies in the Ansett Group. The payments to be made to the AAE Bank Creditors pursuant to cl 3 of the Deed are to be made

from "the Pooled Assets", which expression is defined as meaning "the assets of the Ansett Group Companies as pooled into AAL by way of Pooling". Thus, if there is no pooling of the assets and liabilities of all the companies in the Ansett Group, there is no fund out of which the payments to the AAE Bank Creditors can be made.

56 That being so, it seems that the difference between the pooling and the no-pooling scenarios (without taking into account the extra administration costs that will be incurred in a no-pooling scenario) is that with pooling:

- Group employees receive $19.8 million more than with no-pooling
- SEESA Scheme receives $12.6 million more than with no-pooling
- AAE Bank Creditors have the benefit of the AAE Pooling Compromise Deed
- Third party non-priority creditors receive $32.4 million less than they would with no-pooling.

57 According to the Administrators, pooling has different effects for priority creditors and non-priority creditors depending upon the particular company in the Ansett Group involved. The Administrators have formed a number of opinions as to these effects if there is pooling (assuming the AAE Pooling Compromise Deed is implemented).

58 The Administrators expressed the opinion that AAL's priority creditors would be better off under pooling by approximately $22 million, an increase of 1.5 cents in the dollar. However, the tables setting out the Administrators' estimates of distributions to priority and non-priority creditors do not disclose how this figure of $22 million is calculated. The relevant distribution table to consider is "Replacement Distribution Table 3". This sets out calculations under four scenarios – pooling with the AAE Pooling Compromise Deed implemented, no pooling with the AAE Pooling Compromise Deed implemented, pooling without the AAE Pooling Compromise Deed being implemented and no pooling without the AAE Pooling Compromise Deed being implemented.

59 As explained above (par [55]), it seems that the correct comparison is between pooling with the AAE Pooling Compromise Deed implemented and no pooling without the AAE Pooling Compromise Deed being implemented. Using that comparison, it appears that AAL's priority creditors would be better off under pooling by approximately $20.08 million, an increase of 2.68 cents in the dollar.

60 The Administrators have also formed the opinion that pooling has no effect on the creditors of the companies in the Ansett Group other than the asset holding companies referred to in Table 1 above (par [53]) and AAHL and that the following third party non-priority creditors would be adversely affected by pooling:

(a) 31,296 third party non-priority creditors of AAHL would miss out on approximately $13.5 million, a maximum likely distribution of 0.37 cents in the dollar. An average loss of $431.37.

(b) 245 third party non-priority creditors (or claimants) of the Westsky Trust would miss out on approximately $2.04 million, a maximum likely distribution of 0.31 cents in the dollar. An average loss of $8,326.53.

(c) 96 third party non-priority creditors of Ansett International Limited would miss out on approximately $750,000, a maximum likely distribution of 0.34 cents in the dollar. An average loss of $7,812.50.

(d) 79 third party non-priority creditors (or claimants) of the Pelican Trust would miss out on approximately $860,000, a maximum likely distribution of 99.19 cents in the dollar. An average loss of $10,886.08.

(e) 745 third party non-priority creditors of Kendell would miss out on approximately $3.01 million, a maximum likely distribution of 8.21 cents in the dollar. An average loss of $4,040.27.

(f) 673 third party non-priority creditors of the Show Group would miss out on approximately $1.86 million, a maximum likely distribution of 27.62 cents in the dollar. An average loss of $2,763.74.

These amounts appear to be calculated on the basis that in a no-pooling scenario the AAE Pooling Compromise Deed will be implemented and given effect. No similar calculations were made comparing a pooling with AAE Pooling Compromise Deed scenario with a no pooling without AAE Pooling Compromise Deed scenario (although the base figures are available as they are set out in Replacement Distribution Table 3).

61 According to the Administrators, the following priority creditors would be adversely affected by pooling:

(a) 11 priority creditors of Show Group would lose approximately $110,000, representing a maximum reduction in the likely distribution of 12.64 cents in the dollar. An average reduction of $10,000.

(b) 66 priority creditors of Kendell would lose approximately $150,000, representing a maximum reduction in the likely distribution of 1.6 cents in the dollar. An average reduction of $2,272.72.

(c) 7 priority creditors of the Pelican Trust would lose approximately $20,000, representing a maximum reduction in the likely distribution of 8 cents in the dollar. An average reduction of $2,857.14.

62 Put another way, if there is no pooling (and assuming the AAE Pooling Compromise Deed is implemented) the Administrators say that the following creditors are better off than they would be if there was pooling and the AAE Pooling Compromise Deed was implemented:

(a) 31,296 third party non-priority creditors of AAHL will receive approximately $13.5 million, representing a likely distribution of 0.37 cents in the dollar. An average receipt of $431.37.

(b) 245 third party non-priority creditors (or claimants) of the Westsky Trust will receive approximately $2.04 million, representing a likely distribution of 0.31 cents in the dollar. An average receipt of $8,326.53.

(c) 96 third party non-priority creditors of Ansett International Limited will receive approximately $750,000, representing a likely distribution of 0.34 cents in the dollar. An average receipt of $7,812.50.

(d) 79 third party non-priority creditors (or claimants) of the Pelican Trust will receive approximately $860,000, representing a likely distribution of 99.19 cents in the dollar. An average receipt of $10,886.08.

(e) 745 third party non-priority creditors of Kendell will receive approximately $3.01 million, representing a likely distribution of 8.21 cents in the dollar. An average receipt of $4,040.27.

(f) 673 third party non-priority creditors of the Show Group will receive approximately $1.86 million, representing a likely distribution of 27.62 cents in the dollar. An average receipt of $2,763.74.

(g) 11 priority creditors of Show Group will not lose approximately $110,000, that is 12.64 cents in the dollar, an average of $10,000 per creditor.

(h) 66 priority creditors of Kendell will not lose approximately $150,000, that is 1.6 cents in the dollar, an average of $2,272.72 per creditor.

(i) 7 priority creditors of the Pelican Trust will not lose approximately $20,000, that is 8 cents in the dollar, an average of $2,857.14 per creditor.

63 These figures for no-pooling are best case figures as they do not take into account any allowance for the extra administration costs that will be incurred as a result of the separate administration of each company in the Ansett Group if pooling does not occur. The Administrators estimate that the administration costs likely to be incurred if the Ansett Group companies continue to be separately administered and not pooled, is in the range of $9.9 million to at least $24 million. This is dealt with in detail at pars [68] and [70] below.

64 Such separate administrations would mean that the net adverse or differential effect on the third party non-priority creditors would be less. At the end of the day, because of the extra costs in separately administering the Ansett Group companies, the financial benefits obtained by pooling for priority creditors do not necessarily correlate to the financial benefits that third party non-priority creditors would enjoy in a no-pooling scenario.

65 The analysis and consideration of these figures and conclusions which flow from them must also take into account the following matters:

(a) although priority creditors (including SEESA) will receive approximately $32.4 million more if pooling occurs, it does not follow that non-priority creditors will receive $32.4 million more if pooling does not occur because in a no-pooling situation there will be further additional administration costs which each company in the Ansett Group would incur if it continues to be administered on a separate basis. A number of these further administration costs are referred to in par [69] below. These costs would no doubt differ from company to company.

(b) with the exception of Global Rewards and Golden Wing creditors, the estimated returns do not take into account the operation of the provisions in the Ansett DOCAs dealing with non-cost effective claims. These are claims of creditors which would result in a dividend for an amount less than $25. These claims are extinguished by the Ansett DOCAs. As the definition of these claims is by reference to the amount of the dividend and not the amount of the claim then, for example, in the case of AAHL where the expected dividend is approximately 0.36 cents in the dollar, a Deed Creditor would need to have a provable claim worth at least $6,945 ($25/0.0036) to avoid extinguishment.

(c) the estimates do not take into account claims of Deed Creditors who are Global Rewards creditors or Golden Wing creditors. As frequent flyer points are carried at a value of not more 0.2 cents per point, a Global Rewards creditor or Golden Wing creditor would need at least 3,472,500 frequent flyer points to have a provable claim in the administration of AAHL that was not extinguished having regard to the operation of the non-cost effective claims provision. According to Mr Korda, one of the Administrators, only one person had more than 3 million frequent flyer points on the commencement of the administration.

66 If the Administrators obtain directions that they can vote in favour of pooling at the meetings of the respective companies they consider that all the companies in the Ansett Group will resolve to pool. However, as set out in par [20] above, they consider that were it not for the AAE Pooling Compromise Deed they are certain that the creditors of AAE would reject pooling. Those creditors have substantial claims. The Administrators have not admitted their claims and if AAE was to be separately administered the resolution of the consideration of formal proofs of debt would be very complex and time-consuming and expensive litigation would likely result. The Administrators are confident that if they called for and admitted proofs of debt in AAE third party creditors would control a significant majority of votes and would vote against pooling.

67 The Administrators entered into the AAE Pooling Compromise Deed in order to resolve existing disputes, avoid potentially costly and uncertain litigation and with a view to maximising returns to Deed Creditors. In those circumstances they consider that the

compromise with the AAE Bank Creditors is in the best interests of the Ansett Group as a whole.

68 A relevant consideration in considering a pooling scenario as against a no-pooling scenario is the extent to which a no-pooling scenario will result in such an increase in costs so as to erode such advantages or benefits to creditors as might accrue. This issue requires a determination of what extra costs and expenses will be incurred in a no-pooling scenario which would diminish the return to creditors. The Administrators have made estimates of the costs likely to be incurred by the companies in the Ansett Group were they to continue to be separately administered and their assets and liabilities not pooled. The Administrators' overall costs estimate is within the range of $9.9 million to at least $24 million. This is a very broad range but the Administrators acknowledge that in their opinion it is extremely difficult to estimate accurately the costs likely to be incurred. They also observe that their estimate is more likely to increase rather than decrease as the relevant tasks are undertaken. The Administrators have not sought to apportion the costs, or allocate them, to particular companies.

69 Their estimate is broken down into the following components:

(a) determining pre-administration charge-backs by auditing and proving each loan balance to reconstruct the Ansett Group inter-company accounts: $2 million - $4 million;

(b) the resolution of ownership of assets of companies in the Ansett Group, including relevant litigation: $100,000 - $500,000;

(c) reconstruction of post-administration charge-backs: $150,000 - $250,000;

(d) apportionment of administration costs funded out of AAL and apportionment across companies in the Ansett Group: $150,000 - $250,000;

(e) resolution of Ansett Group tax issues, including the obtaining of legal advice and any necessary court directions: $500,000 - $5 million;

(f) implementation of a formal proof of debt process for each company in the Ansett Group, including the legal costs of and incidental to calling for, assessing and (if so advised) rejecting proofs: $5.5 million - $10 million;

(g) determining the apportionment and allocation of the money received from Air New Zealand under the MOU including obtaining directions from the Court: $1.5 million - $3 million;

(h) the likely need of the appointment of special purpose administrators in the event of conflicts of interest and duty arising in relation to inter-company issues: in excess of $1 million.

There must also be taken into account the costs involved in the preparation of reports to Deed Creditors for the purpose of the holding of the creditors meetings to consider pooling. The Administrators estimate the costs of venue hire, legal fees, staff costs and administrative costs within the range of $200,000 - $300,000.

70 These costs have been estimated on a global basis. The Administrators say that it is either impractical or impossible to estimate the costs on a company by company basis. All the asset holding companies and AAHL, with some exceptions, are directly affected, or impacted, by the issues which give rise to the extra costs and expenses which will be incurred in a no-pooling scenario. But to what extent is not known.

71 The existence of the inter-company debts is significant when considering the votes which can be cast at any meetings of Deed Creditors called to consider a resolution to pool the debts and liabilities of all the companies in the Ansett Group into one company. The extent of the inter-company debts of the asset owning companies is such that (other than in relation to the Westsky Trust) the Administrators can either control or substantially influence the voting on the proposed pooling resolutions. The vast majority of Deed Creditor claims, by value, in the Pelican Trust, Kendell, and Show Group, in each case in excess of 78%, are inter-company debts, as are a majority of debts, by value, in Ansett International Ltd (56.8%). Further, if a majority in number of Deed Creditors or claimants were to vote against the pooling resolutions so as to create a deadlock between the number of creditors and their values then the Administrators would exercise their casting vote in favour of pooling.

72 The position is a little different in relation to the other asset owning companies (other than the Westsky Trust). Approximately 31% of Deed Creditors' claims against AAL, and approximately 27.5% of Deed Creditors' claims against AAHL are comprised of inter-company debts. As the Administrators point out, many creditors often choose not to

turn up and vote at creditors' meetings. Thus it is possible that the Administrators will have a majority of votes in value at the meetings of Deed Creditors of AAL and AAHL. The Administrators say that if a majority in number of creditors of AAL and AAHL were to vote against pooling so as to create a deadlock between the number and value of creditors they would exercise their casting vote in favour of pooling the assets and liabilities of AAL and AAHL.

73 The jurisdiction of the court to give directions of the type sought by the Administrators is found in s 447D(1) of the Act:

> *"The administrator of a company under administration, or of a deed of company arrangement, may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers."*

That power is not unlimited. For example, it does not extend to giving an administrator a direction as to a decision which is wholly business or commercial in nature. In *Re Ansett Australia Ltd and Korda (No 3)* (2002) 115 FCR 409 I said at 428:

> *"There must be something more than the making of a business or commercial decision before a court will give directions in relation to, or approving of, the decision. It may be a legal issue of substance or procedure, it may be an issue of power, propriety or reasonableness, but some issue of this nature is required to be raised. It is insufficient to attract an order giving directions that the liquidator or administrator has a feeling of apprehension or unease about the business decision made and wants reassurance. There must be some issue which arises in relation to the decision. A court should not give its imprimatur to a business decision simply to alleviate a liquidator's or administrator's unease. There must be an issue calling for the exercise of legal judgment."*

Shortly thereafter in *Re Ansett Australia Ltd and Mentha* (2002) 41 ACSR 605, I said at 616:

> *"However, where issues as to the propriety or reasonableness of the conduct undertaken, or the decision made, by an administrator is called in question, it is open to the court to give a direction which, in substance, sanctions or approves the conduct undertaken, or decision made, by the administrator."*

74 It is clear that the issues which are the subject of the Administrators' application for directions raise complex legal issues. The Administrators face a number of conflicts of duty and interest in relation to the pooling proposal having regard to their role as administrators of numerous companies, their role as trustees of various trusts and their role as representative

creditor of a number of companies. They are not seeking the Court's direction on matters of business judgment. They cannot make a number of decisions in relation to the pooling proposal without involving themselves in a conflict of interest or conflict of duty. In short, they seek protection from potential liability for making decisions which, although in the overall interests of the Ansett Group as a whole, might be said are not in the interests of particular creditors of particular companies in the Ansett Group.

75 The power of the Court to give directions to administrators is also enhanced by the operation of s 447A of the Act as it enables the Court to order that the directions power in s 447D operate in relation to a particular company in a particular way: see *Re Ansett Australia Ltd and Mentha* (supra) at 615-616. However that broad power and the objective underpinning it:

> *"is limited by the overriding requirement that any orders made and directions given must be designed to achieve the objects of Pt 5.3A as expressed in s 435A of the Act."*

(*Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* (2004) 49 ACSR 1 at 15). Those objects include bringing about a better return for the particular company's creditors than would result from a liquidation.

76 I turn to the issues arising under the trusts. The Court has similar jurisdiction in relation to giving directions to trustees as to how they may discharge their obligations as trustees. Trustees can obtain protection by the obtaining of such directions if they are concerned that they may be acting in a manner contrary to the terms of their trust or otherwise beyond their power. But, in general terms, such directions will be given if the proposed course of action or course of conduct is for the benefit of the trust property or beneficiaries generally and not inimical to their interests.

77 The Administrators are seeking directions, in substance, that they can put, and vote in favour of, a resolution to transfer the funds held pursuant to the Pelican Trust Deed and the Westsky Trust Deed entirely to AAL. Under each trust deed the funds available are held for the purpose of paying claims determined by meetings of creditors of the relevant Skywest Airlines and Aeropelican. Clause 6.1 of the Westsky Trust Deed provides:

> *"A meeting of creditors of the Company will be called by the Administrators at such time and place as is determined by the Administrators. Unless*

otherwise determined by the Administrators, the meeting shall be held on or about the date to which the second meeting of creditors of the Ansett Group has been adjourned. Subject to any order of the Court to the contrary, that meeting of creditors of the Company will determine:

(a) Admissible Claims and persons entitled to Admissible Claims;

(b) the method of calculation of and/or value of and the method of payment of Admissible Claims; and

(c) the distribution (including the method of distribution) of the Fund to Admitted Creditors or as otherwise resolved at the meeting."

Clause 6.1 of the Pelican Trust Deed provides:

"A meeting of creditors of the Company will be called by the Administrators at such time and place as is determined by the Administrators. Subject to any order of the Court to the contrary, that meeting of creditors of the Company will determine:

(a) Admissible Claims;

(b) the method of calculation of and/or value of and the method of payment of Admissible Claims; and

(c) the distribution of the Fund (other than amounts paid, payable or set aside under clause 5.3(a) or (b)) to Admitted Creditors or as otherwise resolved at the meeting."

The Administrators seek a direction that at the meetings called pursuant to these clauses they may put a resolution pursuant to cl 6.1(c) of each trust deed that the assets of each trust be distributed entirely to AAL. They seek a further direction that they may properly exercise a casting vote as chairman of the respective meetings in favour of such a resolution. They draw in aid the provisions of s 447A(1) and s 447D(1) of the Act and they also draw in aid s 22 and s 23 of the *Federal Court of Australia Act 1976* (Cth) in order to invoke the accrued jurisdiction of the court to the extent to which the direction is a direction given to a trustee.

78 In the absence of a direction, or some other protection from the Court, the Administrators, in seeking to put and vote in favour of such a resolution, are facing a clear conflict of interest, having regard to their role as administrators of other companies in the Ansett Group. Further, they are seeking to put resolutions and vote in favour of resolutions which are contrary, and indeed adverse, to the interests of the beneficiaries under each of the trusts, namely the creditors of Skywest Airlines and Aeropelican.

79 In short, the Administrators are asking the Court to give them a direction that they may act contrary to the interests of the beneficiaries of whose trusts they are the trustees.

80 Does the Court have power to give such a direction? Sections 22 and 23 of the *Federal Court of Australia Act 1976* (Cth) gives the Court power, in cases such as the case presently before the Court, to give directions to trustees but those sections do not provide a substantive or affirmative basis for directing the trustees that they may transfer or dispose of the trust property in a manner otherwise than in the interests of their beneficiaries. Similarly, notwithstanding the scope of the power under s 447A(1) of the Act, I do not consider that it extends to directing the Administrators in their capacity of trustees to act otherwise than in the interests of the beneficiaries under the trusts. I do not consider that s 447A(1) has any operation in a context where the Administrators are acting in a specific and discrete trustee capacity.

81 The proper characterisation of the actions which the Administrators want to undertake is that they are seeking the approval of the Court for them to dispose of the funds held under the trusts to persons other than the beneficiaries under the trusts. Although cl 6.1 of each trust deed provides that it is for the meeting of creditors to decide how the funds are to be distributed, I would expect that the creditors would vote in such a way as to ensure that the funds are made available only to those creditors of the relevant company.

82 Looking at the matter solely in the interests of the beneficiaries under each trust, I cannot see any basis upon which it would be appropriate or proper to give the Administrators the directions they seek. In substance the direction seeks approval for the Administrators to enter into a transaction and effect a distribution of the funds otherwise than in the interests of the beneficiaries.

83 If there be any power in the Court to give the Administrators qua trustees the directions sought, it is to be found in s 63 of the *Trustee Act 1958* (Vic), a provision which is found in trustee legislation in numerous other jurisdictions. Section 63 provides:

> *"(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that*

> *purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions (if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.*
>
> *(2) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order.*
>
> *(3) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust."*

84 The genesis of this provision was s 57 of the *Trustee Act 1925* (UK) which is in substantially the same terms. In *Riddle v Riddle* (1952) 85 CLR 202 the High Court considered the scope of the power of s 81 of the *Trustee Act 1925* (NSW) which is in similar terms to the Victorian Act. The majority of the High Court construed s 81 in very wide terms. Dixon J said at 214:

> *"Section 81 is a provision conferring very large and important powers upon the Court which depend upon the Court's opinion of what is expedient, a criterion of the widest and most flexible kind.*
> ...
> *I do not think that the powers given by s. 81 were intended to be restricted by any implications."*

Williams J said at 220:

> *"The section is couched in the widest possible terms. The sole question is whether it is expedient in the interest of the trust property as a whole that such an order should be made."*

and at 222:

> *"The one and only test is the expediency of the act or thing which the Court is asked to authorise a trustee to do or abstain from doing. The Court has only to be of the opinion that the trust property as a whole will in fact benefit from the making of the order."*

(*Riddle v Riddle* (supra) was subsequently applied in *Re Baker* [1961] VR 641 and *Arakella v Paton* (2004) 60 NSWLR 334).

85 In *Re Royal Society's Charitable Trusts* [1956] Ch 87, Vaisey J was asked by the Royal Society to permit it, *inter alia*, to consolidate various different trust funds of which it

was trustee for investment and accounting purposes. Vaisey J held that the application did not come within s 57 of the *Trustee Act 1925* (UK) (the equivalent section to s 63 of the *Trustee Act 1958* (Vic)) or alternatively under what he called "the rather ill-defined scope of the court's general jurisdiction". However, he held that the Court had power under its special jurisdiction relating to charities to consider the applications.

86 I doubt whether s 63 provides a basis for the directions sought by the Administrators as they are seeking directions as to how they may exercise their power as trustees, rather than seeking a direction for a particular transaction, even though a particular transaction will result from the exercise of their power, if approved or directed by the Court. Notwithstanding the breadth of the definition of "expedient", I do not consider that it is expedient, in the interests of the trust properties or the beneficiaries under the trusts that the Administrators be given the power to put a resolution and vote in favour of it adversely to the interests of the beneficiaries.

87 I turn to deal with the issue of the pooling of assets and liabilities of companies. Pooling of assets and liabilities of companies in administration or liquidation as a concept is well known although it does not appear that pooling has been approved in circumstances where a number of the creditors of one or more of the companies have been disadvantaged by the pooling proposal and the creditors have not unanimously consented to, or approved of, the pooling proposal.

88 In *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209, Young J gave effect to pooling resolutions passed by creditors of two companies at s 439A meetings by recourse to s 447A of the *Corporations Law*. Young J noted at 213, the rule that had grown up in the bankruptcy jurisdiction that:

> *"where estates were so inextricably blended as to render it impracticable to keep them distinct, the court would order them to be administered in consolidation."*

Young J found support for this principle of consolidation in corporate insolvency in *Anmi Pty Ltd v Williams* [1981] 2 NSWLR 138 which involved an application by a liquidator in the course of the winding-up of three companies which carried on business in partnership. Powell J at 164 referred to the exception to the rule in bankruptcy that separate creditors could not have access to joint assets, namely that separate creditors could have access to a

pool comprising joint and separate assets. Powell J relied on the following statement in *Archbold on Bankruptcy*, 11th ed, p 598 as a formulation of the exception:

> *"'Where (the joint and separate) estates are so blended together as to render it impracticable to keep them separate, they may be consolidated; but not where the accounts can be kept distinct, and a single creditor objects (In re Buliver; Ex p Sheppard (1833) Mon & B 415; 3 Dea & C 190); and even if the creditors at a general meeting agree to consolidate the estates, they will not be consolidated without it is ascertained that the proposed consolidation will be for the benefit of creditors generally (In re Higton and Breever; Ex p Strutt (1821) 1 G1 & J29)': Archbold on Bankruptcy, 11th ed, p 598.'*

Powell J continued:

> *"To this must be added, as a gloss, that the mere fact that proofs may be difficult of investigation or that difficult questions may arise as to whether creditors are joint or separate creditors seems not to be sufficient to bring a case within the exception: Re Kriegel; Waring & Co; Ex parte Trotman (1893) 68 LT 588; 10 Morr 99; Re Sydney Barker & Co (1914) 21 Mans 238".*

89 In *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (supra) all the creditors except the Deputy Commissioner of Taxation attended the meetings and approved of the resolution. However the order made by Young J approving of the pooling resolutions was made expressly subject to the opportunity given to the Deputy Commissioner of Taxation to apply to the Court to have the order discharged. Young J set out a number of principles which he considered applied which included the following (at 216):

> *"It would be possible for the court to advise a liquidator in a court winding up that he should consolidate debts, but it would be unlikely that the court would do so unless every creditor agreed or a regime was put in place for creditors to object."*

90 In *Re Charter Travel Co Ltd* (1997) 25 ACSR 337, Young J approved of the calling of a joint meeting of creditors of two companies to consider a pooling proposal for two companies in liquidation in circumstances where it was virtually impossible to define which creditor belong to which company. Young J said at 338:

> *"As I indicated in my judgment in* Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd *(1997) 24 ACSR 79, administration of two companies in insolvency conjointly is something that can occur only in exceptional cases. As I said at 85, this normally means a scheme of arrangement, but if no creditor objects and it is impracticable to keep the assets and liabilities of different companies separate, and the consolidation is for the benefit of*

> *creditors generally, then the court might advise the liquidators concerned that they would be justified in consolidating the administration."*

One of the factors which persuaded Young J that the case fell within the exceptional circumstances was that no creditor could be disadvantaged by the proposal.

91 In *Re Switch Telecommunications Pty Ltd (in liq); Ex parte Sherman* (2000) 35 ACSR 172, Santow J approved of a pooling proposal for two companies in liquidation pursuant to ss 510 and 1322(4) of the *Corporations Law*. A combined meeting of creditors of both companies had been unanimously in favour of the proposal. It does not appear from the judgment whether any creditors were disadvantaged by the proposal.

92 In *Dean-Willcocks; Alpha Telecom (Aust) Pty Ltd (in liq)* (2004) 50 ACSR 15, Barrett J approved a pooling proposal by recourse to ss 447A of the Act for two companies in liquidation over the objection of one creditor. The dissenting creditor objected to the pooling proposal at a meeting of creditors held pursuant to s 439A of the Act, and also availed itself of the opportunity to have its grounds of dissent placed before the court. Barrett J was satisfied that the circumstances in which the pooling proposal was put before the creditors of the relevant company and voted upon justified a conclusion that the majority vote both by number and value ought to be recognised as a properly informed expression of the will of the creditors reflective of the interests of the general body of creditors.

93 In *Mentha v GE Capital* (1997) 27 ACSR 696, Finkelstein J accepted that in appropriate circumstances pooling of assets and liabilities of companies in insolvency might be "both just and equitable if not essential". His Honour said at 702:

> *"In my opinion the power to enter into a deed of company arrangement under Pt 5.3A is sufficiently broad to permit an arrangement binding on two or more insolvent companies pursuant to which their respective assets and creditors will be consolidated. There is no justification for a construction of this part of the Corporations Law that would lead to the conclusion that arrangements made pursuant to Pt 5.3A must be more narrowly confined than arrangements made under s 411."*

However, Finkelstein J was not required to address this issue in circumstances where it was apparent that any creditors would be disadvantaged by the pooling proposal.

94 In *Humphris, Re ACN 004 987 866* (2003) 21 ACLC 1474, I approved of a pooling proposal where the creditors present at the meetings unanimously approved of the proposal to enter into deeds of company arrangements which contained provisions to pool the assets and liabilities of each company. In those particular circumstances, it was inevitable that if pooling did not occur, all creditors would be worse off. This was because the costs which would be incurred if there was no pooling would erode the balance available for distribution to creditors.

95 In *Re Tayeh; the Black Stump Enterprises Pty Ltd* (2005) 53 ACSR 684, an application for approval of a pooling proposal in a creditors' voluntary liquidation scenario was dismissed. What weighed heavily in the reasoning of Barrett J was the fact that the creditors as a body had not been given a clear opportunity to make a positive expression of their views. Barrett J said at 692:

> *"As I have said,* Charter Travel *was a case in which what was effectively a clearance for the liquidators to implement a specific pooling arrangement if 'creditors unanimously approved the proposal' was given by Young J in a context where his Honour made an order that the liquidators would be justified in convening a combined meeting of the creditors of two companies. There was thus to be a forum for the positive statement of opinions and wishes actively sought, no doubt by way of proposed resolution in relation to a specifically identified proposal. The lack of objection contemplated there (as well as in* Soluble Solution *which involved a s 447A application) was in a context quite different from the context involved in the present case. Here, there has been no attempt to engage any of the statutory provisions under which rights in a winding up may be varied."*

96 The Administrators submitted that pooling was justified on the basis of a number of propositions to be extracted from United States of America authorities. They relied upon what they called:

- the reliance test as a single economic unit;
- the entanglement test, that is to say the interrelationship of the companies in the group is so hopelessly inter-related that to disentangle it would be both time and cost prohibitive; and
- the balancing test, that is to say the benefits of the consolidation outweigh the harm it would cause creditors if there was no consolidation.

97 The principles applicable to what is called in the United States of America "substantive consolidation", which is akin to "pooling", were recently re-stated by the United States Court of Appeals for the Third Circuit in *In Re Owens Corning* 419 F.3d 195 (3rd Cir. 2005). The Court analysed *In re Augie/Restivo* 860 F.2d 515 (2nd Cir. 1988) where the Court found that there were two rationales, to be extracted from previous decisions, for substantive consolidation. These rationales were:

(a) where the creditors dealt with the various entities in the group as a single economic unit and did not rely on their separate identity in extending credit;

(b) where the affairs of the companies in the group were so entangled that consolidation would benefit all creditors.

The Court noted that there was nearly unanimous consensus in the substantial body of case law on substantive consolidation that it was a remedy to be used "sparingly".

98 Having analysed the competing lines of authority on substantive consolidation, the Court's conclusion was to follow the *In re Augie/Restivo* (supra) approach. It said, at 211:

> *"In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors."*

The Court rejected the proposition that mere benefit to the administration of the various companies was sufficient to warrant substantive consolidation. The Court also rejected the proposition that the commingling of assets justified consolidation when the affairs of the companies were so entangled that consolidation would be beneficial. The Court set out the following principle at 214:

> *"...commingling justifies consolidation only when separately accounting for the assets and liabilities of the distinct entities will reduce the recovery of* every *creditor – that is, when every creditor will benefit from the consolidation. Moreover, the benefit to creditors should be from cost savings that make assets available rather than from the shifting of assets to benefit one group of creditors at the expense of another. Mere benefits to some creditors, or administrative benefit to the Court, falls far short."*

The Court emphasised that the theoretical justification for what it called "hopeless commingling" consolidation was that no creditor's rights would be impaired.

99 I consider these principles appropriate to apply within the context of the proper approach to pooling in the Australian jurisdiction. They are not inconsistent with the Australian decisions on pooling to which I have referred and I consider that they complement the principles which underlie those decisions.

100 This review of the recent authorities on pooling leads me to the conclusion that there is no authority or support for the view that a Court will approve a pooling proposal in circumstances where a number of the creditors of one or more of the companies will be significantly disadvantaged. These authorities also proceed on the basis that it is not sufficient for an order for pooling that the administration or liquidation is complex or that the identity of creditors is difficult to determine. So much was stated by Powell J in *Anmi Pty Ltd v Williams* (supra) at 164 (par [88] above). The observation of Powell J was cited with approval by Young J in *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (supra) at 213 and by Barrett J in *Dean-Willcocks; Alpha Telecom (Aust) Pty Ltd (in liq)* (supra) at 17.

101 It is important to keep in mind that the Administrators are not asking the Court to make a pooling order per se but are rather asking the Court to give them a direction that has effect at an anterior point of time. In short the Administrators are asking for a direction as to the manner in which they may be the cause of the trusts and the companies voting in favour of the pooling resolution at the various meetings of creditors of the companies in the Ansett Group. Approval of the pooling resolution is not sought from the Court, nor is the Court being asked to sanction pooling.

102 The direction sought in relation to voting has two aspects to it. First, a direction that the Administrators may vote inter-company debt in favour of the resolution; secondly, a direction that they may exercise a casting vote in favour of the resolution, should the need for the exercise of a casting vote arise. The direction sought in relation to the exercise of a casting vote arises because of reg 5.6.21 of the Corporations Regulations 2001 (Cth) which provides:

> *"(1) This regulation applies to a poll taken at a meeting of creditors.*
>
> *(2) A resolution is carried if:*
>
> *(a) a majority of the creditors voting (whether in person, by attorney or by proxy) vote in favour of the resolution; and*

(b) the value of the debts owed by the corporation to those voting in favour of the resolution is more than half the total debts owed to all the creditors voting (whether in person, by proxy or by attorney).

(3) A resolution is not carried if:

(a) a majority of creditors voting (whether in person, by proxy or by attorney) vote against the resolution; and

(b) the value of the debts owed by the corporation to those voting against the resolution is more than half the total debts owed to all creditors voting (whether in person, by proxy or by attorney).

(4) If no result is reached under subregulation (2) or (3), then:

(a) the person presiding at the meeting may exercise a casting vote in favour of the resolution, in which case the resolution is carried; or

(b) the person presiding at the meeting may exercise a casting vote against the resolution, in which case the resolution is not carried."

103 Under Reg 5.6.17, if the meeting is convened by the Administrator then that person, or a person nominated by the Administrator, must chair the meeting. Pursuant to s 600A of the Act the Court has the power, *inter alia*, to set aside a resolution passed at a creditors' meeting where the outcome was determined by a related entity. Section 600B of the Act gives the Court power to review a resolution of creditors passed on the casting vote of the person presiding at the meeting.

104 No guidelines are provided by the statute or the regulations as to the manner in which the casting vote may be exercised. The cases support the proposition that a person in the position of an administrator has a discretion as to how to exercise a casting vote at a meeting of creditors but that such a vote should be exercised honestly and in the best interests of the body of creditors as a whole: *Re Coaleen Pty Ltd (Admin. Appointed)* [2000] 1 Qd R 245; *Re Martco Engineering Pty Ltd* (1999) 32 ACSR 487; *Kirwan v Cresvale Far East Ltd* (2002) 44 ACSR 21.

105 What is apparent from the authorities, is that when considering whether the Court ought to intervene with respect to the exercise of a casting vote, a relevant factor is whether or not any particular class of creditor would be unfairly affected by the vote. It is difficult in

the circumstances of this application to see on what basis the Court could sanction the Administrators' exercise of their casting vote in the manner they propose in circumstances where it is likely that a particular class of creditor will be disadvantaged.

106 The Administrators have certain contractual obligations to pursue a process to achieve pooling but they recognise and acknowledge, as their counsel submitted, that they have a conflict of interest. They have come to the court acknowledging the conflict of interest, they have made full and frank disclosure as to what it is, how it arises and how they propose to deal with it. They recognise that, as they submitted "just like trustees" they were in a position of conflict that could not be resolved without seeking directions from the Court.

107 What is critical is that the Administrators are asking the court for a direction in relation to some of the companies in the Ansett Group that would authorise them to act in a manner which, absent the direction, would be acting in a manner opposite to that which would be their duty in the ordinary course. This would result in them acting in a manner disadvantageous to priority creditors of Show Group, Kendell and the Pelican Trust and to third party non-priority creditors of a number of companies in whose interests they are supposed to act as Administrators.

108 Section 447A of the Act has little room for operation in this context. That section enables the Court to say how the statute is to operate in relation to a particular company. That power must be considered against the backdrop of the object of Pt 5.3A of the Act which, according to s 435A is to provide, *inter alia*, in an administration scenario, for a better return for the company's creditors and members than would result from an immediate winding up of the company. In a group situation, like the Ansett Group, I do not consider that one can consider an exercise of power under s 447A without regard to the interests of the particular company, the subject of the exercise of this power, and its creditors.

109 The Administrators argued that the object of the Act in accordance with s 435A was to maximise the return to creditors and was not limited to particular entities. They further argued that the concept of pooling operated, particularly in relation to groups of companies, where one cannot identify precisely which creditors belong to which company. This argument over-simplifies the issue. I do not consider that one can disregard a corporate structure when one is seeking to exercise power under s 447A especially when the company

has a group of clearly identified creditors who may be disadvantaged by the exercise of the power. There may be room to group companies together when the creditors of the various companies have, in substance, treated the companies in the group as one entity or, putting the matter another way, have relied on the group as such as the source for payment of their debts.

110 Certainly in the absence of an exercise of power under s 447A, or a direction from the Court, it is not open to an administrator to conduct the affairs of a company under administration in a manner detrimental to its creditors. This proposition is equally applicable, if not more so, to trustees of a fund for beneficiaries, a role undertaken by the Administrators in relation the Westsky Trust and the Pelican Trust.

111 The Administrators, as administrators of thirty-four of the companies in the Ansett Group, do not face this conflict. As a matter of practical reality as it does not disadvantage the creditors of each of those thirty-four companies if the Administrators vote in favour of pooling at any meeting of the creditors of that company. If anything, it gives them a potential source for repayment of their debt which they would not otherwise have, although on the present material the creditors of all those companies, save for AAL which is in a special position because of its number of employee priority creditors, have no interest one way or the other in how the Administrators vote on any pooling resolution.

112 Although the Administrators are administrators of all the companies in the Ansett Group they are not excused from their duty to act in the interests of the creditors of each of the companies. The Administrators submitted that a primary consideration for them is to exercise their vote "in the interests of the creditors as a whole". They submitted in substance that because the Ansett Group of companies was administered as a group, often without regard to which precise company should incur a liability, or the basis or terms upon which one company made an asset available to another company, the group's creditors should be considered and treated as a whole.

113 That proposition has an initial attraction as it provides for an element of equity and equality across the whole spectrum of Ansett employees, the priority creditors, and the financial institutions and trade creditors, the non-priority creditors. However the evidence does not support the proposition that all the employees, financial institutions and trade creditors regarded themselves as working for, dealing with, or having rights against, the

Ansett Group as a whole rather than being in a relationship with a particular Ansett Group company. Particularly is this so in relation to the eighty-four employees who are likely to be disadvantaged by the pooling proposal for which the Administrators want to cast an affirmative vote.

114 I have not lost sight of the fact that the pooling proposal by the Administrators is sensible and advantageous to most of the creditors from a practical point of view. I am mindful of the observations of Young J in *Re Charter Travel Co Ltd* (supra) at 338:

> *"So long as there is a power under the Corporations Law or otherwise available to the court, the court is anxious to see that liquidations are conducted with commercial efficiency and will not allow any technical rules to frustrate that attempt".*

(This passage was referred to with approval by Santow J in *Re Switch Telecommunications Pty Ltd (in liq); Ex parte Sherman* (supra) at 184).

115 However, I do not see my concern about, or objection to, the pooling proposal based on its disadvantageous consequence for a number of priority creditors in particular as a matter of applying a technical rule of insolvency. Nor is it a matter of inefficient conduct of the administration of the companies in the Ansett Group. Rather, I see my concern as being grounded in substantive principle having regard to the rights of creditors of companies under administration not to be disadvantaged.

116 An example of the effect of giving the directions sought by the Administrators can be seen by reference to the Show Group. Pooling is likely to result in 673 third party non-priority creditors of the Show Group losing out on a likely distribution of approximately $1.86 million representing a loss of 27.62 cents in the dollar, an average loss per creditor of $2,763.74. Show Group's 11 priority creditors are likely to suffer a maximum reduction in distribution of $110,000 representing a reduction of 12.64 cents in the dollar, an average reduction per creditor of $10,000.

117 The Administrators say that those calculations and figures do not make any allowance for separate administration costs, delay and uncertainty. But they are unable to apportion any part of the estimated $9.9 million to $24 million as the extra costs for the administration of Show Group. I can only assume in the absence of further evidence, that the creditors of the

Show Group will be significantly disadvantaged if the Administrators of the Show Group vote in favour of pooling and pooling occurs throughout the Ansett Group.

118 The Administrators submitted that the financial disadvantage to Show Group's priority creditors was not a substantial reduction in the context of the overall way in which the other creditors are dealt with. I do not accept that submission. It may be that in money terms the total amount is a small proportion of the overall distribution to the employees of all the companies in the Ansett Group. But it is a not insignificant or insubstantial reduction for the individual Show Group employees involved.

119 The Administrators accepted that the interruption of the normal regime for the payment of creditors, brought about by the pooling proposal, would result in a disadvantage to some creditors. They countered this consequence with the proposition that that consequence had to be balanced against the benefits that flowed from pooling. I do not see the issue before the Court as a balancing exercise. Rather I see it is an application by the Administrators, albeit in good faith (and I make no criticism of them for making the application; indeed they were probably bound contractually to do so), for directions that they not act in accordance with their duties as administrators and trustees.

120 I am not satisfied that the circumstances involved in the administration of the companies in the Ansett Group and in particular, the asset owning companies, are such that it is appropriate that the Administrators be given a direction that they may vote at a meeting of creditors of those companies in favour of the exceptional situation of pooling all the assets and liabilities of all the companies and trusts in the Ansett Group into one company. I summarise my reasons for reaching this conclusion.

121 So to vote, in the case of the meetings of the asset owning companies and trusts is to vote in a manner adverse to the interests of a number of creditors of those companies and beneficiaries of those trusts. Although the casting of such a vote is intended and calculated to bring about a pooling of all the assets and liabilities of the companies and trusts in the Ansett Group, it is not appropriate in all the circumstances to which I have referred to give the Administrators the power to achieve that exceptional situation.

122 Although the Ansett Group historically operated as a single entity in many respects it does not appear that the various creditors of the companies, both priority and non-priority, dealt with the various companies as a single economic unit when their debts were incurred. It cannot therefore be said that the creditors, in substance, relied upon all the companies in the group as being responsible for the payment of their debts.

123 Although significant time and costs might be required to determine what charge-backs should be raised between various companies in the Ansett Group, it is not suggested that the task is impossible for all the companies, particularly the asset owning companies. It may be complex, it may be costly, but that is part and parcel of the administration of a substantial commercial enterprise.

124 It is not put that it is impossible or impracticable to determine the ownership of various assets of companies in the Ansett Group such as the head office building at 501 Swanston Street, Melbourne and certain aircraft, engines and information technology systems and software. Rather it is said that this cannot be done without the expenditure of substantial costs and the use of substantial resources. However, the expenditure of such costs is no reason to disadvantage creditors who would otherwise receive a particular distribution in a no-pooling situation. This is particularly so when it is not submitted that in a no-pooling situation they will inevitably get less than they would in a pooling situation.

125 The fact that the determination of certain questions, such as the apportionment of the Air New Zealand MOU monies and the determination of proofs of debt may involve seeking the directions of the Court is an insufficient reason to warrant pooling, particularly if that litigation can resolve the issues in an effective manner.

126 The fact that the Administrators may have a contractual obligation to seek, or to facilitate, pooling is no answer to the proposition that, in the case of particular companies in the Ansett Group, to vote in favour of pooling or to exercise a casting vote in favour of pooling would be a breach of the duty they owed to such creditors or beneficiaries.

127 The Administrators say that the figures set out in the distribution tables for no-pooling are best case figures as they do not take into account the substantial costs that would be involved in the separate administration of the companies. It seems to be suggested that those

extra costs could in fact, produce a situation where companies such as, for example, the Pelican Trust and Show Group (which would otherwise seem to be better off under no-pooling) could be better off under pooling because of those extra administration costs. However, that proposition is not sustainable in circumstances where the Administrators have not sought to apportion any of the costs involved in the separate administration of the companies to each company, and in particular, the asset holding companies. The Administrators have determined the costs of separately administering the companies in the Ansett Group as falling within the range of $9.9 million to $24 million. That assessment has been determined on such a broad brush basis as to be of limited assistance in determining the costs of separate administrations. One does not know, for example, what are the costs involved in the separate administration of the Show Group or the Pelican Trust. It may be, for example, that there will be relatively limited extra costs involved in the further administration of that company and that trust.

128 If the Administrators could establish with a greater degree of precision the extent of the extra costs involved in the administration of each of the asset owning companies and trusts if there is no pooling, there would be a better opportunity to assess whether it is likely in a no-pooling situation that the extra costs of administration would erode the amount the creditors of those companies would receive in a no-pooling situation. If such a conclusion were to be reached then it might be said that pooling would benefit all creditors because, at the end of the day, all creditors are advantaged by the savings in the extra costs of administration and no creditor is disadvantaged. The creditors who otherwise might have become entitled to a greater distribution would have had the extent of that distribution eroded or eliminated by the extra administration costs that would have been incurred in a no-pooling situation.

129 At the present time the evidence is insufficient to enable me to reach that conclusion. If further evidence is available in relation to this issue I would be disposed to give the matter further consideration.

130 The Administrators say that no creditor, whether priority or non-priority has objected to the pooling proposal, other than the contradictor represented by counsel. I do not regard that as determinative in the circumstances which exist. The creditors adversely affected by the pooling proposal, particularly the priority creditors earlier identified, have not been put on

notice of the monetary extent to which they may be adversely affected by the pooling proposal. Although the material before the Court has been placed on the Administrators' website and various related websites, my understanding of the evidence is that eighty-four priority creditors in particular did not receive letters of the type which were sent to various Ansett Group creditors on or about 15 September 2005. I am referring to the letters which are found in exhibits "AWK-9" to "AWK-12" to the affidavit of the solicitor Mr King sworn on 23 September 2005.

131 Although an advertisement was placed in a national newspaper on 21 September 2005 notifying all Ansett Group creditors of the application in the Federal Court in connection with the pooling proposal, the notice does not put the relevant creditors who may be disadvantaged by the pooling proposal on notice that they will be disadvantaged to the extent identified in the material before the Court.

132 Counsel for the ACTU and affiliated unions supported the application by the Administrators, and in substance, supported the pooling proposal. However, he did so on the basis of representing the interests of all former Ansett employees. His approach was that the ACTU was seeking to maximise the best possible position for the most number of the former employees who would be better off with the pooling proposal. Counsel for the ACTU had no instructions that the employees adversely affected by the pooling proposal had been put on notice that the ACTU was taking a position adverse to their individual interests.

133 I turn to the issue of the approval of the AAE Pooling Compromise Deed. I am disposed to approve of that Deed, on the basis that it provides benefits and advantages for AAE and for its creditors generally which would not otherwise be obtainable. The advantages of AAE entering into the Deed are supported by confidential legal advice given to the Administrators which I have read. The operation of the Deed is expressed to be conditional upon first "the approval of or non-objection to" the Deed by the Court in this proceeding and secondly, the pooling of the assets and liabilities of AAE into AAL. The first condition is satisfied by my approval of it. The satisfaction of the second condition must await the outcome of the meeting of creditors of AAE.

134 However, as I read the deed, it is not intended to operate or be carried into effect unless the assets of all the companies and trusts in the Ansett Group are pooled into AAL. So

much follows from cl 3 of the Deed which provides for the payments to the Bank Creditors to be made from the "Pooled Assets" which are defined in cl 1.1 as "the assets of the Ansett Group of Companies as pooled into AAL by way of Pooling". In the absence of the directions sought by the Administrators as to the manner in which they may vote at creditors' meetings of the various companies in the Ansett Group, it is problematic whether pooling of the assets of the Ansett Group of companies into AAL will occur. Nevertheless I consider it appropriate that I approve of "the agreements and the companies documented" in the Deed as it is advantageous and beneficial for, the creditors of AAE and its administration.

135 The Administrators also seek a direction in relation to 501 Swanston Street Pty Ltd that as its deed administrators they may properly cause it to distribute the proceeds of the sale of the head office and other properties to AAL. I am not disposed at this stage to give such a direction as I do not know the extent to which, if any, there are any creditors of 501 Swanston Street Pty Ltd or any creditors of any other company in the Ansett Group which may be disadvantaged by such a direction. I am prepared to reconsider this matter on the basis of any further material and submissions which the Administrators may wish to file or make.

136 Consistently with my earlier reasoning, I consider that any notice of the proposed pooling meetings should be given specifically to those creditors, whether priority or non-priority, who may be disadvantaged by the proposed resolutions. I do not consider that it is sufficient, in all the circumstances, for those creditors only to be given notice through the publication of newspaper advertisements or the placing of relevant documents on the Administrators' website.

137 Having regard to the conclusions I have reached, I am not disposed at this stage to make any specific orders but will hear from the parties as to what orders and further directions, if any, should be made.

I certify that the preceding one hundred and thirty-seven (137) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Goldberg.

Associate: Annabell

Dated: 22 March 2006

Counsel for the Applicants:	Ms M Gordon S.C. and Mr S Sharpley
Solicitor for the Applicants:	Arnold Bloch Leibler
Counsel for WTH Pty Ltd:	Mr D Williams
Solicitor for WTH Pty Ltd:	Deacons
Counsel for the Australian Council of Trade Unions and unions:	Mr D Star
Solicitor for the Australian Council of Trade Unions and unions :	Maurice Blackburn Cashman
Counsel for BNP Paribas and the Commonwealth Bank of Australia:	Mr P Crutchfield
Solicitor for BNP Paribas and the Commonwealth Bank of Australia:	Minter Ellison
Counsel for the Commonwealth of Australia:	Mr T Ginnane S.C. and Mr S Gardiner
Solicitor for the Commonwealth of Australia:	Australian Government Solicitor
Counsel for the Australian Securities and Investments Commission:	Mr M Sifris S.C. and Mr R Randall
Solicitor for the Australian Securities and Investments Commission:	Australian Securities and Investments Commission
Counsel for the National Australia Bank Limited:	Mr Troiani
Solicitor for the National Australia Bank Limited:	Mallesons Stephen Jaques
Date of final submissions:	11 November 2005
Date of Judgment:	22 March 2005

SCHEDULE A

1. 501 Swanston Street Pty Ltd (ACN 005 477 618) (subject to Deed of Company Arrangement)
2. Airport Terminals Pty Ltd (ACN 053 976 444) (subject to Deed of Company Arrangement)
3. Aldong Services Pty Ltd (ACN 000 258 113) (subject to Deed of Company Arrangement)
4. Ansett Aircraft Finance Limited (ACN 008 643 276) (subject to Deed of Company Arrangement)
5. Ansett Australia and Air New Zealand Engineering Services Limited (ACN 089 520 696) (subject to Deed of Company Arrangement)
6. Ansett Australia Holdings Limited (ACN 004 216 291) (subject to Deed of Company Arrangement)
7. Ansett Australia Limited (ACN 004 209 410) (subject to Deed of Company Arrangement)
8. Ansett Aviation Equipment Pty Ltd (ACN 008 559 733) (subject to Deed of Company Arrangement)
9. Ansett Carts Pty Ltd (ACN 005 181 215) (subject to Deed of Company Arrangement)
10. Ansett Equipment Finance Limited (ACN 006 827 989) (subject to Deed of Company Arrangement)
11. Ansett Finance Limited (ACN 006 555 166) (subject to Deed of Company Arrangement)
12. Ansett Holdings Limited (ACN 065 117 535) (subject to Deed of Company Arrangement)
13. Ansett International Limited (ACN 060 622 460) (subject to Deed of Company Arrangement)
14. Bodas Pty Ltd (ACN 002 158 741) (subject to Deed of Company Arrangement)
15. Brazson Pty Limited (ACN 055 259 008) (subject to Deed of Company Arrangement)
16. Eastwest Airlines (Operations) Limited (ACN 000 259 469) (subject to Deed of Company Arrangement)
17. Eastwest Airlines Limited (ACN 000 063 972) (subject to Deed of Company Arrangement)
18. Anst Lednek Airlines (Aust) Pty Ltd (ACN 000 579 680) (formerly Kendell Airlines (Aust) Pty Ltd) (subject to Deed of Company Arrangement)
19. Morael Pty Ltd (ACN 003 286 440) (subject to Deed of Company Arrangement)
20. Northern Airlines Limited (ACN 009 607 069) (subject to Deed of Company Arrangement)
21. Northern Territory Aerial Work Pty Ltd (ACN 009 611 321) (subject to Deed of Company Arrangement)
22. Rock-It-Cargo (Aust) Pty Ltd (ACN 003 004 126) (subject to Deed of Company Arrangement)
23. ANST Show Pty Ltd (ACN 002 968 989) (formerly Show Group Pty Ltd) (subject to Deed of Company Arrangement)
24. ANST Westsky Aviation Limited (ACN 004 444 866) (formerly Skywest Aviation Limited) (subject to Deed of Company Arrangement)
25. ANST Westsky Holdings Pty Ltd (ACN 008 905 646) (formerly Skywest Holdings Pty Ltd) (subject to Deed of Company Arrangement)

26. ANST Westsky Jet Charter Pty Ltd (ACN 008 800 155) (formerly Skywest Jet Charter Pty Ltd) (subject to Deed of Company Arrangement)
27. South Centre Maintenance Pty Ltd (ACN 007 286 660) (subject to Deed of Company Arrangement)
28. Spaca Pty Ltd (ACN 006 773 593) (subject to Deed of Company Arrangement)
29. Traveland International (Aust) Pty Ltd (ACN 000 275 936) (subject to Deed of Company Arrangement)
30. ANST Travel International Pty Ltd (ACN 000 598 452) (formerly Traveland International Pty Limited) (subject to Deed of Company Arrangement)
31. Traveland New Staff Pty Ltd (ACN 080 739 037) (subject to Deed of Company Arrangement)
32. ANST Travel Pty Ltd (ACN 000 240 746) (formerly Traveland Pty Limited) (subject to Deed of Company Arrangement)
33. Walgali Pty Ltd (ACN 055 258 921) (subject to Deed of Company Arrangement)
34. Westintech Limited (ACN 009 084 039) (subject to Deed of Company Arrangement)
35. Westintech Nominees Pty Ltd (ACN 009 302 158) (subject to Deed of Company Arrangement)
36. Whitsunday Affairs Pty Ltd (ACN 009 694 553) (subject to Deed of Company Arrangement)
37. Whitsunday Harbour Pty Ltd (ACN 010 375 470) (subject to Deed of Company Arrangement)
38. Wridgway Holdings Limited (ACN 004 449 085) (subject to Deed of Company Arrangement)
39. Wridgways (Vic) Pty Ltd (ACN 004 153 413) (subject to Deed of Company Arrangement)