

IN THE MATTER OF:

**ANSETT AUSTRALIA LTD**  
(ACN 004 209 410) & ORS (in accordance with  
the schedule attached) (All subject to a Deed of  
Company Arrangement)

and

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

Plaintiffs

**PLAINTIFFS' OUTLINE OF SUBMISSIONS**

- 1 The Plaintiffs seek orders and directions from the Court relating to their voting of intercompany debt at meetings to be called under s.445F of the *Corporations Act* 2001 (Cth) ("**Act**") to propose amendments to the Ansett Group companies' deeds of company arrangement ("**Ansett DOCAs**").
- 2 The purpose of the proposed amendments to the Ansett DOCAs will be to give effect to an arrangement whereby the assets of the Ansett Group companies will be "pooled" into one Ansett company, Ansett Australia Limited (subject to deed of company arrangement) ("**AAL**") with the creditors of all companies being entitled to prove in AAL *in lieu* of proving in the asset-assigning companies.
- 3 The Plaintiffs also seek ancillary orders and directions to give effect to the "pooling" arrangement, namely:
  - (1) approval of a Deed of Compromise relating to Ansett Aviation Equipment Pty Ltd (subject to deed of company arrangement) ("**AAE Pooling Deed**"),
  - (2) approval of voting with respect to trust assets,

- (3) approval of certain distributions of trust assets; and
- (4) approval of less costly means to call the s445F meetings.

4 A copy of the draft orders sought by the Plaintiffs is **annexed** to this outline.

### **Material in support of the Application**

5 The Deed Administrators have filed the following affidavits in support of the application:

- (a) Affidavit of Mark Anthony Korda sworn 21 June 2005 ("**First Korda Affidavit**")
- (b) Affidavit of Mark Anthony Korda sworn 12 September 2005 ("**Second Korda Affidavit**")
- (c) Affidavit of Alexander William King affirmed 23 September 2005 ("**First King Affidavit**")
- (d) Affidavit of Mark Anthony Korda sworn 30 September 2005 ("**Third Korda Affidavit**")
- (e) Affidavit of Mark Anthony Korda sworn 13 October 2005 ("**Fourth Korda Affidavit**")
- (f) Affidavit of Alexander William King affirmed 18 October 2005 ("**Second King Affidavit**").

### **Notification of the Application and provision of further information**

6 The steps taken by the Deed Administrators to notify creditors of the application are set out in paragraphs 10 to 12 of the affidavit of the First King Affidavit.

7 The responses to those notifications are set out in paragraphs 10 to 22 of the Fourth Korda Affidavit. Significantly:

- (1) no creditor has expressed any intention of appearing at the hearing to oppose the application;

- (2) one creditor, WTH Pty Ltd, has agreed to appear as a contradictor at the hearing of the application for the purpose of assisting the Court by putting arguments contrary to the application.

- 8 The Deed Administrators have also taken steps to ensure that significant stakeholders, such as the Commonwealth, unions and Committees of Creditors, have been kept informed of the application. Similarly, information has been provided to ASIC and a meeting with representatives of ASIC held. These steps are described in paragraphs 2 to 9 and 13 to 19 of the First King Affidavit and paragraphs 25 to 36 of the Fourth Korda Affidavit.
- 9 The Deed Administrators have received requests for the provision of further information from various parties, as well as by the Court. The Deed Administrators' responses to those requests are contained in the Third and Fourth Korda Affidavits.

### Legal principles

#### (a) Jurisdiction to give directions pursuant to s447D(1)

- 10 In **Re Ansett Australia Ltd and Korda** (2002) 40 ACSR 433, Goldberg J held, at [60], that in order for the Court to have jurisdiction to give a direction to an administrator:

*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.*

And at [68] his Honour held that there must be a:

*"...controversial issue of power, conduct, propriety, reasonableness or legal principle in respect of which direction is sought"*

- 11 Similar views were expressed in **Re Ansett Australia** (2002) 41 ACSR 605, at [46]:

*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.*

**(b) Width of Court's jurisdiction under s447A**

- 12 The Court has a broad general power under s447A to make orders concerning the way Part 5.3A of the Act is to operate in relation to a particular company so long as any orders made and directions given are designed to achieve the objects of Part 5.3A set out in s.435A of the Act: see **Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd** (2004) 49 ACSR 1, at [55-56]:<sup>1</sup>

*The court has a general power under s 447A of the Act to make orders concerning the way Pt 5.3A of the Act is to operate in relation to a particular company. This is an intentionally broad power enabling the court to fashion the operation of Pt 5.3A to meet new issues in administration and respond to the requirements of justice in a particular case: **Cawthorn v Keira Constructions Pty Ltd** (1994) 12 ACLC 396 at 399-400; **Brash Holdings Ltd v Katile Pty Ltd** [1996] 1 VR 24 at 26-27; **Re Brashes Pty Ltd** (1994) 15 ACSR 477 at 481-483; **Wood v Laser Holdings Ltd** (1996) 19 ACSR 245 at 256-258; **Re Hellenic Athletic and Soccer Club of SA Inc** [1999] SASC 393 at [9]; **Australasian Memory Pty Ltd v Brien** (2000) 200 CLR 270; **Re Ansett Australia Ltd** (2001) 39 ACSR 355 at 375; **Re Ansett Australia Ltd; Korda v Ansett Australia Ground Staff Superannuation Plan Pty Ltd** (2002) 41 ACSR 598 at 601 (reversed in part but not on the construction of Pt 5.3A); HAJ Ford et al *Ford's Principles of Corporations Law*, (11th ed), Australia, Butterworths, 2003.*

*This broad objective 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.*

- 13 The Court's jurisdiction under s447A can be used, in an appropriate case, to expand the width of directions which can be given under s447D(1) so as to include a direction that an administrator may properly perform and give effect to an agreement: see **Re Ansett Australia** (2002) 41 ACSR 605, at [44]:

<sup>1</sup> See also, **Ansett Australia Ltd v Ansett Australia Ground Staff Superannuation Plan Pty Ltd** (2002) 41 ACSR 598, at [13]-[19] and **Mentha v GE Capital** (1997) 27 ACSR 696, at 706-707.

*The Court does not have express powers in Pt5.3A of the Act to give a direction that administrators or deed administrators appointed and acting pursuant to Pt5.3A of the Act may properly perform and give effect to an agreement entered into by them. Nevertheless, the power conferred upon the Court by s447A of the Act enables the Court to make an order that the directions which the Court may give an administrator appointed pursuant to Pt5.3A of the Act include a direction that the administrator may properly perform and give effect to an agreement, which is the subject matter of an application for directions: **Australasian Memory Pty Ltd v Brien** (2000) 200 CLR 270 at 279-280; *In the matter of Ansett Australia Ltd and Mentha* [2001] FCA 1439 at [82].*

(c) **Court's jurisdiction to give directions or advice to trustees**

- 14 Superior Courts have jurisdiction to make orders and give directions to a trustee upon his or her application, including authorising an action that otherwise would be a breach of trust. See **Jacobs' Law of Trusts in Australia**, 6<sup>th</sup> Edition, Butterworths, Sydney NSW at pages 419-428 and 653-656. See also **Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd** (2004) 49 ACSR 1, at [50]-[53]; **Re Pasminco Ltd** (2004) 49 ACSR 470, at [2]-[7].\
- 15 The Federal Court has accrued jurisdiction with respect to such matters where they arise as part of the same controversy as a matter within its original jurisdiction: see **Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd** (2004) 49 ACSR 1 at [54]:

*The court's power [to make the orders which were sought by the Trustee in relation to entering into the terms of settlement and distributing the assets of the fund in a particular manner] also derives from its accrued jurisdiction which arises once a federal matter is raised thereby empowering the court to deal with all the constituent claims involved in the controversy before it: **Johnson Tiles Pty Ltd v Esso Australia Pty Ltd** (2000) 104 FCR 564 at 596-602. By virtue of ss 22 and 23 of the Federal Court of Australia Act 1976 (Cth), the court has power to make such orders which would have the effect of conclusively dealing with all matters properly before it.*

(d) **Pooling via deeds of company arrangement**

- 16 In a group of companies under administration, pooling of assets and liabilities of the group of companies in one company within a group is sometimes not only just and equitable but essential.

17 In **Mentha v GE Capital** (1997) 27 ACSR 696, Finkelstein J held, at 702:

*What is unusual is that the proposal will bring about a "pooling" of assets and liabilities in the sense that all of the assets of the group are to be "pooled" in one company and the liability to all of the unsecured creditors of the group are to be assumed by that company. It is said that such an arrangement might be regarded as controversial. Presumably the reason for any controversy is that in insolvency the unsecured creditors of a company are usually only entitled to a rateable share of the assets of their insolvent debtor: see s555 of the Corporations Law; **British Eagle International Air Lines Ltd v Compagnie Nationale Air France** [1975] 1 WLR 758. But it is easy to envisage situations that might arise where a "pooling" of assets and liabilities is both just and equitable if not essential. Take for example the case of a group of companies where the assets have been so intermingled that their separation is practically impossible. In bankruptcy where estates are inextricably blended as to render it impracticable to keep them distinct the court has power to order the estates to be administered in consolidation: see **Anmi Pty Ltd v Williams** (1981) 52 FLR 309....In my opinion the power to enter into a deed of company arrangement under Pt5.3A 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 Pt5.3A must be more narrowly confined than arrangements made under s411.*

18 See also:

- **Re Switch Telecommunications Ex parte Sherman** (2000) 35 ACSR 172 at [10], [44]
- **Humphris, re ACN 004 987 866 Pty Ltd** (2003) 21 ACLC 1474 at [19]-[24]
- **Re Dean-Wilcocks; Alpha Telecom (Aust) Pty Ltd** (2004) 50 ACSR 15, at [9], [14]-[16], [22]-[25]
- **Tayeh; re Black Stump Enterprises Pty Ltd** (2005) 53 ACSR 684, at [10].

## **Pooling of Ansett Group company assets via amendments to deeds of company arrangement**

### *Reasons why pooling recommended*

- 19 As a result of their investigations, the Deed Administrators of the Ansett Group have concluded that, consistent with the applicable principles, the Ansett Group companies should be pooled in the manner contemplated by the application and propose to recommend pooling to creditors. In particular, the Deed Administrators consider that pooling will maximise returns to creditors on a group basis by avoiding the considerable extra costs of running 41 separate administrations as opposed to one "pooled" administration. It will also save considerable time and ensure that creditors receive further distributions in a more timely manner.
- 20 The Deed Administrators have identified 13 reasons why they propose to recommend pooling to creditors. Those reasons are summarised at points (a) to (m) in paragraph 19 of the Second Korda Affidavit. Each of the matters referred to in that paragraph is developed more fully in subsequent paragraphs of the Second Korda Affidavit. The inter-group issues are summarised in a graphical manner in the chart which is Exhibit **MAK-14** to the Second Korda Affidavit.

### *Court's jurisdiction enlivened under s447D*

- 21 As Deed Administrators of each of the Ansett Group companies, the Deed Administrators are entitled to cause each of the Ansett Group companies to exercise their entitlements to vote as Deed Creditors, via inter-company debt, in many of the Ansett Group companies. As the Deed Administrators are of the strong view that pooling is a highly desirable outcome they intend to vote the inter-company debt in favour of pooling in each meeting called to consider pooling. The practical effect of exercising such a vote is summarised in paragraphs 63 to 66 of the Fourth Korda Affidavit and the table found therein.
- 22 This intention raises an obvious conflict of interest, and issue of reasonableness and propriety. If pooling were not to occur, some of the

Ansett Group companies are likely to have positive asset balances in their own right, even after accounting for their share of the additional costs of running separate administrations ("**Asset Holding Entities**"). The effect of pooling will be that non-Priority Creditors in those Asset Holding Entities will not receive any distribution from AAL while Priority Creditors in those Asset Holding Entities may receive a lesser distribution from AAL than they would from the Asset Holding Entity of which they are a creditor. As Deed Administrators of each of the Ansett Group companies, the Deed Administrators have a duty to the creditors of each company to maximise returns to creditors in each company. In the companies with a likely positive asset balance this duty will conflict with the position the Deed Administrators have taken regarding pooling. This conflict is sufficient to enliven the Court's jurisdiction under s447D(1) to give directions to the Deed Administrators with respect to the course they ought to follow. For this reason the Deed Administrators seek draft orders 1 to 4.

*Likely effect of pooling*

- 23 The Deed Administrators have attempted, as best they can, to attempt to identify those Ansett Group companies and creditors who may be worse off should pooling occur. The assumptions the Deed Administrators have made are set out in paragraphs 198 and 199 of the Second Korda Affidavit. Distribution Tables setting out the Deed Administrators' estimates of distributions under different scenarios were originally included in paragraphs 200 to 205 of the Second Korda Affidavit, however those Distribution Tables have been replaced by the Distribution Tables set out in paragraphs 19 to 38 of the Third Korda Affidavit which include additional scenarios as requested by ASIC and correct an error in the original Distribution Tables. Reference be made to this second set of Distribution Tables, a copy of which is **attached**.
- 24 The likely impact of pooling on creditor returns can most easily be seen from a perusal of Distribution Table 4 (also at page 11 of the Third Korda Affidavit). The Deed Administrators consider Scenarios 1 and 2 to be most



directly relevant. Scenario 2 (no pooling but with the AAE Compromise in effect) shows that likely returns to creditors would be:

Group Employees: \$626.2M

SEES: \$298.6M

Non-Priority Creditors: \$49.0M

The non-Priority Creditor return can be further subdivided into:

AAE Bank Creditors: \$27.0M

Other non-Priority Creditors: \$22.0M

25 Scenario 1 shows the likely impact of pooling on these returns:

Group Employees: \$639.7M

SEES: \$307.1M

Non-Priority Creditors: \$27.0M

In Scenario 1 the entirety of the return to non-Priority Creditors is accounted for by the \$27.0M to be paid to the AAE Bank Creditors under the AAE Pooling Deed. Other ordinary non-Priority Creditors will receive no return.

26 The difference between the two Scenarios is therefore:

Group Employees: plus \$13.5M

SEES: plus \$8.5M

AAE Bank Creditors: no change

Non-Priority Creditors: minus \$22.0M (maximum)

27 It is important to note that while the effect of pooling is to effectively improve the position of the Priority Creditors of AAL (employees and SEES) by approximately \$22.0M, it does not follow that the non-Priority Creditors of the various Ansett Group companies are therefore \$22.0M worse off. This is because the non-Priority Creditors would only obtain a distribution if pooling did not occur, which would result in extra costs being borne by the Ansett Group as a whole, or if only particular companies did not pool, by those companies and the Ansett Group companies which did pool. To the extent

that the costs of separate administrations were borne by non-pooling companies, then those costs would reduce that sum of \$22.0M significantly.

- 28 At paragraphs 40 to 49 of the Third Korda Affidavit the Deed Administrators estimated that the additional costs of not pooling would lie in a range from \$9.9M to at least \$24M. This estimate is necessarily imprecise and subject to a large number of contingencies.

*Particular creditors affected by pooling*

- 29 At paragraphs 206 to 211 of the Second Korda Affidavit the Deed Administrators have identified those creditors whose likely returns will be altered should pooling occur. Corrections to some of the figures contained in those paragraphs are set out in paragraph 38 of the Third Korda Affidavit.

- 30 As set out in those paragraphs, the Deed Administrators' best estimate is that there will be six Ansett Group companies or entities whose non-Priority Creditors are likely to be worse off should pooling occur, being :

- (1) AAHL;
- (2) Westsky Trust;
- (3) AIL;
- (4) Pelican Trust;
- (5) Kendell; and
- (6) Showgroup.

Paragraph 209 of the Second Korda Affidavit indicates the likely number of non-Priority creditors adversely affected and effect on their likely returns in terms of cents in the dollar. As noted above, these are "worst case" figures as they do not include any allowance for the extra costs of running separate administrations. At the request of the contradictor, the Deed Administrators have included in the Fourth Korda Affidavit, at paragraph 59, a table setting out which of the various issues referred to at paragraph 19 of the Second

Korda Affidavit, as the reasons the Deed Administrators recommend pooling. they believe will affect each of these companies.

- 31 While Ansett Group employees (as persons able to prove as Priority Creditors in the AAL administration) will be better off as a result of pooling, to an amount of approximately \$13.5M (see paragraph 26 above), there are a small number of employees who are creditors of Show Group, Kendell and the Pelican Trust who may be slightly worse off as a result of pooling. This is due to the fact that, in the absence of pooling, those employees could prove as Priority Creditors in Show Group, Kendell and the Pelican Trust and would receive slightly higher distributions than they and the general body of employees will receive from AAL following pooling. Those employees and the relevant amounts are set out in paragraph 210 of the Second Korda Affidavit.
- 32 By way of summary:
- (1) Pooling will avoid the need to incur very considerable extra costs and time in attempting to resolve over a dozen inter-"pooling" issues, most of which arise from the historical intermingling of the Ansett businesses, funds and resources, as well as the high probability of further litigation.
  - (2) Pooling will result in an extra sum of approximately \$22.0M being available for distribution to Priority Creditors.
  - (3) There will be a body of creditors who are likely to be worse off, but for the vast majority of these creditors the sums involved are very small – more than 95% of the creditors who may be worse off are likely to be worse off only to the extent of approximately one third of one cent in the dollar.

*Need to hold s.445F meetings*

- 33 ASIC has queried whether, given the Deed Administrators' opinion that pooling is highly desirable, the preferable course to follow would be to simply apply to the Court for an order pursuant to s447A forcing pooling rather than

to hold meetings pursuant to s445F to propose amendments to the various Ansett DOCAs to allow pooling. It has been suggested by ASIC that this course of action would save the cost of holding s445F meetings.

34 The Deed Administrators do not consider that that would be a desirable course of action to follow, for three reasons:

- (1) First, and most importantly, because it is an express provision of each of the Ansett DOCAs that the Deed Administrators **shall** call s445F meetings to allow the creditors to vote on pooling. See Clauses 13.2 and 18.4 of the Ansett DOCAs as set out in paragraphs 10 and 11 of the First Korda Affidavit. Those Ansett DOCAs were passed by an overwhelming majority of creditors. While it would be possible to apply to the Court pursuant to s447A to include an application for an order varying each of the Ansett DOCAs so as to relieve the Deed Administrators of this obligation, the Deed Administrators do not believe that would be desirable.
- (2) Secondly, the Deed Administrators consider that it would be procedurally advantageous to proceed via s445F meetings. An application to the Court via s447A would mean that that would be the only opportunity for a creditor to object to pooling. However, if pooling is accomplished at a s445F meeting to vary the Ansett DOCAs, then any creditor who felt particularly aggrieved would have the opportunity to apply to the Court pursuant to s445B and in dealing with such an application the Court would have the benefit of knowing what view the body of creditors had taken to pooling as expressed in their votes at those s445F meetings.
- (3) Thirdly, at paragraph 50 of the Third Korda Affidavit an estimate of \$200,000 to \$300,000 is given for the costs of calling and holding s445F meetings. While not insubstantial, given the amounts in issue generally in these administrations, these costs are not a significant factor in deciding which course to follow.

### Pooling of Westsky and Pelican Trusts

- 35 The circumstances leading to the creation of the Westsky and Pelican Trusts are set out in paragraphs 173 to 197 of the Second Korda Affidavit.
- 36 Each of Skywest Airlines Pty Ltd and Aeropelican Air Services Pty Ltd were the operators of regional airlines. For commercial reasons, when the Deed Administrators came to sell those airlines it was necessary for those legal entities to be sold. It was not practicable to merely sell the businesses run by those entities.
- 37 As a result:
- (1) The two companies had to come out of administration to be sold.
  - (2) The proceeds of sale and certain other assets of the companies were placed into two trusts.
  - (3) Another Ansett Group company, Bodas Pty Ltd (**Bodas**) (which had been the owner of the two companies), was appointed as trustee.
  - (4) The creditors entitled to prove in the administrations of the two companies become potential beneficiaries under the respective trusts.
- 38 Insofar as was possible within the confines of trust law, the Deed Administrators attempted to replicate in each trust the rights and entitlements the creditors would have had if each company had remained in administration with its business being sold and the proceeds of sale becoming an asset of the company.
- 39 The Deed Administrators have three roles with respect to each trust:
- (a) first, as the Deed Administrators of Bodas they are the controlling minds of the trustee;
  - (b) second, pursuant to clause 3.2 of each of the trust deeds, the Deed Administrators are deemed to be agents of the trustee;

- (c) third, as Deed Administrators of AAL, the Deed Administrators control a creditor/beneficiary of each trust.

40 The course of action the Deed Administrators propose to follow with respect to the two trusts is set out in draft orders 5 to 10. The effect of that course of action will be to pool the assets of the two trusts into AAL by moving and voting for a resolution that the entirety of the trust assets be distributed to AAL. The Deed Administrators' reasons for proposing that course of action are the same as apply to the Ansett Group companies. That course of action will necessarily involve the Deed Administrators in conflicts of interest between the various roles set out in paragraph 39 above.

41 The jurisdiction of the Court to deal with these issues is as follows:

- (1) Insofar as the course of action proposed involves the Deed Administrators exercising a power or function as deed administrator then s447D(1) (combined if necessary with s447A) gives the Court jurisdiction to make the directions sought.
- (2) Insofar as the course of action proposed involves the Deed Administrators exercising a trustee power then the Court's accrued jurisdiction pursuant to sections 22 and 23 of the **Federal Court of Australia Act** 1976 gives the Court jurisdiction to make the orders sought.

### **Pooling of 501 Swanston Street Pty Ltd assets**

42 The circumstances which led to 501 Swanston Street Pty Ltd holding the proceeds of sale of the Head Office and Other Melbourne CBD Properties are set out in paragraphs 44-45 and 60-67 of the Second Korda Affidavit.

43 As those proceeds of sale are held on trust (via a resulting or implied trust) for either AAL or AAHL, the proceeds cannot be dealt with by an amendment to that company's DOCA and require specific directions from the Court.

44 The course of action the Deed Administrators propose to follow with respect to these trust moneys is set out in draft orders 11 to 12. The effect of that

course of action will be to pool the assets of the trust into AAL by moving and voting for a resolution that all of the trust assets be distributed to AAL.

45 As noted above, one of the two likely beneficial owners of these sums is AAL. For the reasons given above regarding the desirability of pooling Ansett Group company assets and Pelican and Westsky Trust assets into AAL, the Deed Administrators also consider it desirable to distribute these assets to AAL.

46 The jurisdiction for the Court to make such orders arises from s447D(1) (combined if necessary with s447A) and/or sections 22 and 23 of the **Federal Court of Australia Act 1976**.

### **Approval of AAE Compromise Deed**

47 The circumstances giving rise to the execution of this document and the Deed Administrator's reasons for entering this compromise are set out in paragraphs 212 to 217 of the Second Korda Affidavit, paragraphs 8 to 16 of the Third Korda Affidavit and **Confidential Exhibit AWK-16** to the Second King Affidavit.

48 In brief, the Deed Administrators' reasons for entering this compromise are:

- (1) the Deed Administrators do not control sufficient number or value of votes in AAE to pass a motion amending the AAE DOCA so as to pool the assets of AAE into AAL against the expressed opposition of the AAE Bank Creditors;
- (2) were AAE not to pool, then it is likely that AAL would ultimately only receive between \$3-\$5M as a distribution from a separate administration of AAE, less the additional costs of a separate administration of AAE;
- (3) were AAE not to pool, this would cause additional costs for the pooled Ansett Group companies and result in further delay while complex inter-company issues were resolved;

- (4) the Deed Administrators have claims against one of the AAE Bank Creditors, the NAB, in respect of sweeping of accounts;
- (5) by virtue of the AAE Compromise, AAL will receive a net sum of \$11M, that is, at least \$6-8M more than it would likely receive in the absence of the AAE Compromise, and AAE will be pooled.

49 In these circumstances, the Deed Administrators consider that the AAE Compromise is a satisfactory commercial resolution of these matters. It is for that reason, that the Deed Administrators seek draft orders 13 to 14.

### **Notice of meetings**

- 50 The Deed Administrators seek orders pursuant to s447 relieving them from strict compliance with the provisions of s445F(2) relating to notice of the various meetings. The Deed Administrators propose that notice of the meetings to be held under s445F be given via newspaper advertisements and the Ansett websites. Paragraphs 218 to 224 of the Second Korda Affidavit set out the basis on which the Deed Administrators seek these orders. See also paragraph 211(c) which relates to provable claims by Frequent Flyer creditors. The draft orders are at paragraphs 15 to 17.
- 51 The basis for the Deed Administrators' application is that given that only a very small percentage of Ansett Group creditors are directly affected in any appreciable way by the proposed pooling then the notice the Deed Administrators propose to give via newspaper advertisements and the websites will accomplish the aim of notifying creditors without the unnecessary wastage of costs.
- 52 While s445F does not require the Deed Administrators to provide a report or statement to creditors on the merits of the proposed resolutions (as s439A(4) does), clause 18.4 of the Ansett DOCAs requires the Deed Administrators to:

*"...advertise nationally and make available to the Deed Creditors on the Administrators' Website:*

*18.4.3 particulars of the propose 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 438A of the Act"*

The Deed Administrators will comply with clause 18.4 of the Ansett DOCAs.

### **Conclusion**

- 53 For those reasons, the Plaintiffs seek the orders set out in the annexure to this outline of submissions.

Michelle Gordon

Stephen Sharpley

Bernadette McMahon

Arnold Bloch Leibler

**20 October 2005**

## DRAFT ORDERS

The Court orders that:

### **Pooling of Non-AAL Ansett Companies**

- (1) Pursuant to s447D(1) of the **Corporations Act** 2001 ("**Act**"), the Court directs that at meetings of each of the Ansett Group companies (being the companies listed in Schedule A to these orders) ("**Ansett Group Companies**") save for Ansett Australia Limited (subject to deed of company arrangement) ("**AAL**") ("**Non-AAL Ansett Group Companies**"), called pursuant to s445F of the Act and these orders ("**Non-AAL Ansett Pooling Meetings**"), each of the Deed Administrators may, to the extent that each Ansett Group Company is entitled to vote as a Deed Creditor at each Non-AAL Ansett Pooling Meeting, properly cause each of the Ansett Group Companies to vote in favour of a motion to vary each deed of company arrangement applying to the Non-AAL Ansett Group Companies so as to effect a pooling arrangement by which:
  - (a) the assets of each of the Non-AAL Ansett Group Companies concerned will be assigned to AAL;
  - (b) the entitlement of each Deed Creditor to prove in the deed administrations of the respective Non-AAL Ansett Group Companies will be extinguished.
- (2) Pursuant to s447D(1) of the Act, the Court directs that at the Non-AAL Pooling Meetings, each of the Deed Administrators may properly exercise a casting vote, as chairman of the said meetings, in favour of each motion referred to in paragraph (1) above.

### **AAL Pooling**

- (3) Pursuant to s447D(1) of the Act, the Court directs that at a meeting of AAL called pursuant to s445F of the Act and these orders ("**AAL**"),

**Pooling Meeting**”), each of the Deed Administrators may, to the extent that each Non-AAL Ansett Group Company is entitled to vote as a Deed Creditor at the AAL Pooling Meeting, properly cause each of the Non-AAL Ansett Group Companies to vote in favour of a motion to vary the deed of company arrangement applying to AAL so as to effect a pooling arrangement by which the Deed Creditors of each Non-AAL Ansett Group Company whose deed of company arrangement is varied as described in paragraph (1) above (“**Pooling Deed Creditors**”) will be entitled to prove in the deed administration of AAL as Deed Creditors of AAL for the same amount and with the same priority under the AAL deed of company arrangement that the Pooling Deed Creditors have in the deed administration of their respective Non-AAL Ansett Group Companies prior to the taking effect of the variation to the deeds of company arrangement described in paragraph (1) above.

- (4) Pursuant to s447D(1) of the Act, the Court directs that at the AAL Pooling Meeting, each of the Deed Administrators may properly exercise a casting vote, as chairman of the AAL Pooling Meeting, in favour of the motion referred to in paragraph (3) above.

### **Pelican Pooling**

- (5) Pursuant to s447A(1) of the Act, s447D(1) of the Act is to operate in relation to Bodas Pty Ltd (subject to deed of company arrangement) (“**Bodas**”) so that in an application by the Deed Administrators of Bodas for directions pursuant to s447D(1) of the Act in relation to the proposed distribution of Pelican Trust assets to AAL, the Court may give a direction that at a meeting of the creditors of Aeropelican Air Services Pty Ltd called pursuant to clause 6.1 of the Pelican Trust Deed (“**Pelican Pooling Meeting**”) each of the Deed Administrators of Bodas may:

- (i) properly put a resolution pursuant to clause 6.1(c) of the Pelican Trust Deed the effect of which will be that the Fund (as defined

in the Pelican Trust Deed) and all other assets of the Pelican Trust will be distributed entirely to AAL; and

- (ii) properly exercise a casting vote, as chairman of the said meetings, in favour of the resolution referred to in sub-paragraph (5)(i) above.
- (6) Pursuant to s447D(1) of the Act, as it operates in accordance with paragraph (5) of these orders, alternatively pursuant to sections 22 and 23 of the **Federal Court of Australia Act 1976** ("**Federal Court Act**"), the Court directs that at the Pelican Pooling Meeting each of the Deed Administrators of Bodas may:
- (i) properly put a resolution pursuant to clause 6.1(c) of the Pelican Trust Deed the effect of which will be that the Fund (as defined in the Pelican Trust Deed) and all other assets of the Pelican Trust will be distributed entirely to AAL; and
  - (ii) properly exercise a casting vote, as chairman of the said meetings, in favour of the resolution referred to in sub-paragraph (6)(i) above;
- (7) Pursuant to s447D(1) of the Act, the Court directs that at the Pelican Pooling Meeting each of the Deed Administrators of AAL and other Ansett Group Companies may, to the extent that AAL and those other Ansett Group Companies are entitled to vote as creditors at such meeting, properly cause AAL and those other Ansett Group Companies to vote in favour of the resolution referred to in paragraph 6(i) above.

### **Westsky Pooling**

- (8) Pursuant to s447A(1) of the Act, s447D(1) of the Act is to operate in relation to Bodas so that in an application by the Deed Administrators of Bodas for directions pursuant to s447D(1) of the Act in relation to the proposed distribution of Westsky Trust assets to AAL, the Court may give a direction that at a meeting of the creditors of Skywest Airlines

Pty Ltd called pursuant to clause 6.1 of the Pelican Trust Deed ("**Westsky Pooling Meeting**") each of the Deed Administrators of Bodas may:

- (i) properly put a resolution pursuant to clause 6.1(c) of the Westsky Trust Deed the effect of which will be that the Fund (as defined in the Westsky Trust Deed) and all other assets of the Westsky Trust will be distributed entirely to AAL; and
  - (ii) properly exercise a casting vote, as chairman of the said meetings, in favour of the resolution referred to in sub-paragraph (8)(i) above.
- (9) Pursuant to s447D(1) of the Act, as it operates in accordance with paragraph (8) of these orders, alternatively pursuant to sections 22 and 23 of the **Federal Court Act**, the Court directs that at the Westsky Pooling Meeting each of the Deed Administrators of Bodas may:
- (i) properly put a resolution pursuant to clause 6.1(c) of the Westsky Trust Deed the effect of which will be that the Fund (as defined in the Westsky Trust Deed) and all other assets of the Westsky Trust will be distributed entirely to AAL; and
  - (ii) properly exercise a casting vote, as chairman of the said meetings, in favour of the resolution referred to in sub-paragraph (9)(i) above.
- (10) Pursuant to s447D(1) of the Act, the Court directs that at the Pelican Pooling Meeting each of the Deed Administrators of AAL and other relevant Ansett Group Companies may, to the extent that AAL and those other Ansett Group Companies are entitled to vote as creditors at such meeting, properly cause AAL and those other Ansett Group Companies to vote in favour of the resolution referred to in paragraph 9(i) above.

#### **Pooling of 501 Swanston Street Pty Ltd Trust Assets**

- (11) Pursuant to s447A(1) of the Act, s447D(1) of the Act is to operate in relation to 501 Swanston Street Pty Ltd (subject to deed of company arrangement) ("**501**") so that in an application by the Deed Administrators of 501 for directions pursuant to s447D(1) of the Act in relation to the proposed distribution of the Head Office Sale Proceeds and the proceeds of the sale of the Other Ansett Melbourne CBD Properties (as defined and referred to in the affidavit of Mark Anthony Korda sworn 12 September 2005) (collectively, "**Proceeds**"), the Court may give a direction that each of the Deed Administrators of 501 may properly cause 501 to distribute all of the Proceeds to AAL.
- (12) Pursuant to s447D(1) of the Act, as it operates in accordance with paragraph (11) of these orders, alternatively pursuant to sections 22 and 23 of the **Federal Court Act**, the Court directs that each of the Deed Administrators of 501 may properly cause 501 to distribute all of the Proceeds to AAL.

#### **Approval of AAE Pooling Deed**

- (13) Pursuant to s447A(1) of the Act, s447D(1) of the Act is to operate in relation to each of the Ansett Group Companies so that in an application by the Deed Administrators for directions in relation to the "AAE Pooling Compromise Deed" dated 29 August 2005 ("**AAE Pooling Deed**"), the Court may give a direction that it approves the AAE Pooling Deed and that each of the Deed Administrators may properly perform and give effect to the AAE Pooling Deed.
- (14) Pursuant to s447D(1) of the Act, as it operates in accordance with paragraph (13) of these orders, the Court directs that it approves the AAE Pooling Deed and that each of the Deed Administrators may properly perform and give effect to the AAE Pooling Deed.

#### **Notice of Ansett Pooling Meetings**

- (15) Pursuant to s447A(1) of the Act, Part 5.3A of the Act is to operate in relation to each of the Ansett Group Companies as if section 445F(2) of

the Act provided that notice of each Non-AAL Pooling Meeting and the AAL Pooling Meeting is to be given by posting on the Ansett websites notice of those meetings and causing details of the said websites and meetings to be published in a national newspaper, or in each jurisdiction in which the Ansett Group carries or carried on business in a daily newspaper that circulates generally in that jurisdiction, at least five days before the meetings.

### **Notice of Pelican and Westsky Pooling Meetings**

- (16) Pursuant to s447A(1) of the Act, s447D(1) of the Act is to operate in relation to Bodas so that in an application by the Deed Administrators of Bodas for directions pursuant to s447D(1) of the Act in relation to the giving of notice to creditors of the holding of the Pelican Pooling Meeting and the Westsky Pooling Meeting, the Court may give a direction that each of the Deed Administrators of Bodas may properly give notice of the said meetings by posting on the Ansett websites notice of those meetings and causing details of the said websites and meetings to be published in a national newspaper, or in each jurisdiction in which the Ansett Group carries or carried on business in a daily newspaper that circulates generally in that jurisdiction, at least five days before the meetings.
- (17) Pursuant to s447D(1) of the Act, as it operates in accordance with paragraph (16) of these orders, alternatively pursuant to sections 22 and 23 of the **Federal Court Act**, the Court directs that each of the Deed Administrators of Bodas may properly give notice of the Pelican Pooling Meeting and the Westsky Pooling Meeting by posting on the Ansett websites notice of those meetings and causing details of the said websites and meetings to be published in a national newspaper, or in each jurisdiction in which the Ansett Group carries or carried on business in a daily newspaper that circulates generally in that jurisdiction, at least five days before the meetings.

**Liberty to apply**

- (18) Liberty is reserved to any party to apply for such further or other orders and directions as may be necessary to implement the terms of this order.



## SCHEDULE OF ANSETT GROUP OF COMPANIES

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

24.	ANST Westsky Aviation Limited (Formerly Skywest Aviation Limited) (Subject to Deed of Company Arrangement)	004 444 866
25.	ANST Westsky Holdings Pty Ltd (Formerly Skywest Holdings Pty Ltd) (Subject to Deed of Company Arrangement)	008 905 646
26.	ANST Westsky Jet Charter Pty Ltd (Formerly Skywest Jet Charter Pty Ltd) (Subject to Deed of Company Arrangement)	008 800 155
27.	South Centre Maintenance Pty Ltd (Subject to Deed of Company Arrangement)	007 286 660
28.	Spaca Pty Ltd (Subject to Deed of Company Arrangement)	006 773 593
29.	Traveland International (Aust) Pty Ltd (Subject to Deed of Company Arrangement)	000 275 936
30.	ANST Travel International Pty Ltd (Formerly Traveland International Pty Ltd) (Subject to Deed of Company Arrangement)	000 598 452
31.	Traveland New Staff Pty Ltd (Subject to Deed of Company Arrangement)	080 739 037
32.	ANST Travel Pty Ltd (Formerly Traveland Pty Ltd) (Subject to Deed of Company Arrangement)	000 240 746
33.	Walgali Pty Ltd (Subject to Deed of Company Arrangement)	055 258 921
34.	Westintech Limited (Subject to Deed of Company Arrangement)	009 084 039
35.	Westintech Nominees Pty Ltd (Subject to Deed of Company Arrangement)	009 302 158
36.	Whitsunday Affairs Pty Ltd (Subject to Deed of Company Arrangement)	009 694 553
37.	Whitsunday Harbour Pty Ltd (Subject to Deed of Company Arrangement)	010 375 470
38.	Wridgways Holdings Limited (Subject to Deed of Company Arrangement)	004 449 085
39.	Wridgways (Vic) Pty Ltd (Subject to Deed of Company Arrangement)	004 153 413

Distribution Table 1

1. Asset Holding Entities, Employee Entitlements and Surplus over Entitlements (if applicable)								
	The Westsky Trust \$m	AIL \$m	The Pelican Trust \$m	Show Group \$m	AAE \$m	Kendell \$m	AAL \$m	Total \$m
<b>BEFORE INTERCOMPANY DISTRIBUTIONS</b>								
Estimated Net Realisations	2.23	1.90	5.57	9.63	38.00	25.72	506.95	590.00
Gross Employee Entitlements		0.16	0.25	0.87		9.36	749.36	760.00
Surplus over Emp'ee Ent's	2.23	1.74	5.32	8.76	38.00	16.36	0.00	72.41

## Distribution Tables 2 & 2A (Scenario 2)

### 2. Distribution of Surplus (over Employee Entitlements)

### Scenario 2.

Distribution - Round 1.					Related Party Receipts		Third Party Receipts
Dist'ns to Related Party Creditors	Funds Avail (after Priority Cr's) \$m	Non-Priority Third Party Crs \$m	Non-Priority Related Party Crs \$m	Dist'n to Related Party Creditors \$m	AAL \$m	AAHL \$m	Third Party \$m
The Westsky Trust *	2.23	668.09	63.10	0.19	0.04	0.15	2.04
AAL (from The Westsky Trust)							
AAHL (from The Westsky Trust)							
AIL	1.74	221.06	290.68	0.99	0.02	0.97	0.75
AAL (from AIL)							
AAHL (from AIL)							
The Pelican Trust	5.32	0.86	4.50	4.46	4.46		0.86
AAL (from The Pelican Trust)							
Kendell	16.36	36.63	162.70	13.35	1.21	12.15	3.01
AAL (from AIL)							
AAHL (from AIL)							
Showgroup	8.76	6.75	24.96	6.89	3.00	3.89	1.86
AAL (from AIL)							
AAHL (from AIL)							
AAE	38.00			11.00	11.00		27.00
AAL (via Deed of Compromise)							
<b>Total</b>	<b>72.41</b>	<b>933.39</b>	<b>545.94</b>	<b>36.89</b>	<b>19.73</b>	<b>17.16</b>	<b>35.52</b>

\* The Westsky Trust - third party creditors include those of AHL via the Class C Cross-Guarantee

### 2. A) Further Distribution of Intercompany Receipts

Distribution - Round 2. etc.	
Dist'ns to Related Party Creditors	Funds Avail (from above) \$m
<b>AAL</b>	<b>19.73</b> - straight to Priority Creditors
<b>AAHL</b>	
AAHL distribution would be:	
- AAL	2.70 - being portion of AAHL funds that flow back to AAL (via interco) and straight to Priority Creditors via approx 100 "round robin" iterations
- AAL Priority Creditors	0.96 - being \$329m/\$4,958m - which is the pro-rata portion of distribution to AAL Priority Creditors via a nonpriority distribution of Class B
- AAL, AAHL third party	13.50 - being amount to third party non-Priority Creditors of Class B (being AAL and AAHL) via a NON priority distribution of Class B
	<b>17.16</b>
<b>Total</b>	<b>36.89</b>

## Distribution Tables 2 & 2A (Scenario 4)

### 2. Distribution of Surplus (over Employee Entitlements)

### Scenario 4.

Distribution - Round 1.					Related Party Receipts		Third Party Receipts
Dist'ns to Related Party Creditors	Funds Avail (after Priority Cr's) \$m	Non-Priority Third Party Crs \$m	Non-Priority Related Party Cr's \$m	Dist'n to Related Party Creditors \$m	AAL \$m	AAHL \$m	Third Party \$m
The Westsky Trust *	2.23	668.09	63.10	0.19	0.04	0.15	2.04
AAL (from The Westsky Trust)							
AAHL (from The Westsky Trust)							
AIL	1.74	221.06	290.68	0.99	0.02	0.97	0.75
AAL (from AIL)							
AAHL (from AIL)							
The Pelican Trust	5.32	0.86	4.50	4.46	4.46		0.86
AAL (from The Pelican Trust)							
Kendell	16.36	36.63	162.70	13.35	1.21	12.15	3.01
AAL (from AIL)							
AAHL (from AIL)							
Showgroup	8.76	6.75	24.96	6.89	3.00	3.89	1.86
AAL (from AIL)							
AAHL (from AIL)							
AAE	38.00	147.50	14.00	2.91		2.91	35.09
AAHL (via AEF adjusted for \$380k)							
<b>Total</b>	<b>72.41</b>	<b>1,080.89</b>	<b>559.94</b>	<b>28.81</b>	<b>8.73</b>	<b>20.08</b>	<b>43.60</b>

\* The Westsky Trust - third party creditors include those of AHL via the Class C Cross-Guarantee

### 2. A) Further Distribution of Intercompany Receipts

Distribution - Round 2. etc.	
Dist'ns to Related Party Creditors	Funds Avail (from above) \$m
AAL	<b>8.73</b> - straight to Priority Creditors
AAHL	
AAHL distribution would be:	
- AAL	3.15 - being portion of AAHL funds that flow back to AAL (via interco) and straight to Priority Creditors via approx 100 "round robin" iterations
- AAL Priority Creditors	1.13 - being \$329m/\$4,958m - which is the pro-rata portion of distribution to AAL Priority Creditors via a non- priority distribution of Class B
- AAL, AAHL third party	15.80 - being amount to third party non-Priority Creditors of Class B (being AAL and AAHL) via a non-priority distribution of Class B
	<b>20.08</b>
<b>Total</b>	<b>28.81</b>

### 3. Ansett Group End Distribution Tables

at AAL - includes distributions to AAL native third party creditors and to AAL third party creditors via their Class B Cross Guarantee

\*\*\* The Westsky Trust - includes distributions to Westsky native third party creditors and to AHL third party creditors via their Class C Cross Guarantee

\*\*\*\*\* AAE (Scenario 4 only) - the distribution under Scenario 4, to third party creditors includes a distribution to AEF third party creditor as a result of AEF being related party creditor recipient of AAE distribution. Note the balance of funds flows to AAHL (as parent company of AEF (as AEF has no other known liabilities))

Distribution Table 4

**4. Global Receipts (Employees, SEES and Non-Priority Creditors)**

Summary of Specific Stakeholder Positions:	Pooling (with AAE Compromise) Scenario 1. \$m	No Pooling (with AAE Compromise) Scenario 2. \$m	Pooling (No AAE Compromise) Scenario 3. \$m	No Pooling (No AAE Compromise) Scenario 4. \$m
<b>Group employees:</b>				
Group employees receive:	639.7	626.2	656.2	619.9
out of total of:	760.0	760.0	760.0	760.0
which is a % rtn of (on average):	84.2%	82.4%	86.3%	81.6%
Group employees shortfall	120.3	133.8	103.8	140.1
<b>SEES:</b>				
SEES receive:	307.1	298.6	317.7	294.5
out of total of:	383.8	383.8	383.8	383.8
which is a % rtn of:	80.0%	77.8%	82.8%	76.7%
SEES shortfall	76.7	85.2	66.1	89.3
<b>Non Priority third party Party Creditors</b>				
Non Priority third party Creditors receive:	27.0	49.0	0.0	59.4