IN THE FEDERAL COURT OF AUSTRALIA
VICTORIAN DISTRICT REGISTRY

NO. VID 621 OF 2005

IN THE MATTER OF:

ANSETT AUSTRALIA LTD
(ACN 004 209 410) & ORS (all subject to a Deed of Company Arrangement)

and

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

Plaintiffs

OUTLINE OF SUBMISSIONS TO BE MADE ON BEHALF OF WTH PTY LTD IN ITS CAPACITY AS CONTRADICTOR

Introductory

1. The administrators seek orders from the Court approving their proposed course of action in relation to voting at the proposed forthcoming meetings of creditors in relation to each of the 41 Ansett companies. The administrators propose to vote all proxies available to them, and to exercise their casting vote or votes if required, in favour of a proposal to "pool" the assets and liabilities of the various Ansett companies so as to create a single administration.

2. The administrators also seek orders approving the compromise constituted by the AAE Pooling Deed.

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Filed on behalf of: The Contradictor
Prepared by:
Deacons
Lawyers
RACV Tower, 485 Bourke Street
MELBOURNE, VIC 3000

Solicitor's Code: 370
DX: 445
Tel: (03) 8686 6000
Fax: (03) 8686 6505
Ref: SFSP:SJP:2575871
Attention: F Murray, S Peters

3. WTH Pty Ltd ("**the Contradictor**") has been funded by the administrators to advance arguments in opposition to the application. Below is an outline of the submissions which will be made orally at the hearing of the administrators' application in relation to the pooling element of the application.

4. At the time of submitting this outline, the Contradictor has had limited time to consider the material recently served which bears on the approval of the AAE Pooling Deed. The Contradictor has not yet formulated the submissions (if any) which will be advanced in relation to that deed.

Administrators' application for directions that they may vote for pooling

5. It appears that one underlying purpose of the application for directions as to voting is to avoid the potential for a subsequent challenge to a pooling resolution passed at one or more of the proposed meetings. Such a challenge might arise, for example, under s.600A, 600B or 600C of the Corporations Law.

6. It is proposed by the administrators that each of the 41 companies would have its own creditors' meeting, at which a pooling resolution would be put to the creditors. The assets and liabilities of those companies in respect of which a pooling resolution is carried would be pooled. The assets and liabilities of any company in respect of which a pooling resolution was not carried would presumably remain outside the pool. The administration of any company whose assets and liabilities remained outside the pool would therefore continue as a separate administration.

7. The overwhelming majority of the Ansett companies appear to have no assets of substance. It seems highly likely that the creditors of those companies, acting rationally, will vote for pooling. That is because:

   (a) without pooling, it is a practical inevitability that they will receive no distribution whatsoever; and

(b) pooling offers them a prospect of a distribution, albeit a small one, by granting them access to a small share of the assets of the small number of companies (**"asset holding companies"**) in the Ansett group which do hold assets of substance.

It appears that 34 or 35 of the 41 Ansett companies are in this position. The way in which the administrators propose to vote at the meetings of creditors of those companies is accordingly of little moment.

The position of the asset holding companies

8. By contrast, creditors of the 6 or 7 asset holding companies (which term is used to include trusts) potentially stand to be worse off if pooling occurs. That is because the assets of the company of which they are a creditor will be made available not only to the creditors of that company, but to all other creditors of Ansett companies which form the pool. Putting aside factors relating to the additional cost of administration and the significance of inter-company transactions (to which further reference is made below) (together, "**complicating factors**"), it is likely that creditors of the asset holding companies, acting rationally, would vote against pooling. That is because pooling is likely to result in a diminution of the dividend which would otherwise be payable to them in the administration of the relevant asset holding company (a potential which is recognised in paragraphs 209 and 210 of the 12 September 2005 Korda affidavit). It is the manner in which the administrators propose to vote at the meetings of creditors of these asset holding companies which will be the focus of the Contradictor's submissions.

9. The asset holding companies are:

(a) AAHL;

(b) Westky Trust;

(c) AIL;

(d) Pelican Trust;

(e) Kendell;

(f) Show Group; and

(g) AAE (possibly, depending upon the outcome of the AAE Pooling Deed Approval, or the litigation with the banks if that deed is not approved).

Show Group as an example

10. It is convenient to consider the case of one of the asset holding companies in order to highlight the significance of the course which the administrators propose to adopt. Show Group is such a company. The table in paragraph 64 of the 13 October 2005 Korda affidavit indicates that the voting entitlements of creditors in Show Group may be summarised (rounding the figures for convenience) as follows:

(a) Total creditors – 771, for debts totalling $32M

(b) Employees - 11, for debts totalling $234K

(c) Related parties - 87, for debts totalling $25M;

(d) Third Parties - 673, for debts totalling $6.8M

11. As confirmed by Mr Korda in paragraph 65 of his 13 October 2005 affidavit, the vast majority of Deed Creditor debts (by value) in Show Group are intercompany debts. These are the debts in relation to which the administrators seek the Court's approval to vote by proxy in favour of pooling. If they do so, they would have the ability to force the pooling resolution to a casting vote even if the majority of creditors (in number) opposed pooling.

12. Further, in the event that a casting vote is required, the administrators also propose to exercise that casting vote in favour of pooling.

13. It follows from the foregoing that the administrators are in a position to determine the outcome of a pooling resolution in relation to Show Group regardless of how all or any of the other creditors may vote.

14. If a pooling resolution is passed in relation to Show Group, and in relation to all of the other Ansett companies, then on the basis of the material in support of the application the administrators expect the non-priority creditors of Show Group to receive a reduced dividend. The maximum reduction in dividend these creditors could suffer, according to paragraph 209(f) of the 12 September 2005 Korda affidavit, is 27.62 cents in the dollar. That is, they would on pooling receive no dividend at all, rather than a dividend of up to 27.62 cents in the dollar (depending on the adjustments, if any, for the complicating factors).

15. The priority creditors of Show Group would receive a lesser (but still significant) reduction in their dividend – quantified in paragraph 210(a) of the 12 September 2005 Korda affidavit as a reduction of up to 12.64 cents in the dollar (again, depending on the adjustments, if any, for the complicating factors).

16. Prima facie, therefore, the creditors of Show Group could receive a substantially lesser dividend if a pooling resolution is passed in relation to Show Group than they would receive if no such resolution is passed.

17. The administrators have noted, quite reasonably, that the reduction in distribution referred to in paragraphs 209 and 210 of the 12 September Korda affidavit are "maximum" reductions, before the effect of adjustments for the complicating factors are taken into account. However the Court has not been provided with any indication as to the likely amount, or even a range, of those adjustments <u>as they would specifically affect Show Group</u> (or any other of the asset holding companies). The administrators have indicated that it is not practicable to quantify the likely impact the complicating factors on any given company in this way. While the difficulties of doing so with any precision may be readily understood, the result is that Court is not in a position to conclude that the complicating factors will result in there being <u>no</u> reduction in the likely distribution to the creditors of Show Group (or any other of the asset holding companies) if pooling is approved. Put simply, the administrators have not sought to make a case that the creditors of Show Group (or of any other of the asset

holding companies) will be advantaged, or at the very least not disadvantaged, by pooling. It seems reasonable to conclude that the creditors of at least some of the asset holding companies will suffer at least some detriment if pooling occurs.

The exercise of a casting vote

18. There is a body of authority as to the manner in which an administrator ought to exercise a casting vote in his capacity as chairman at a meeting of creditors: see e.g. ***Re Coaleen Pty Ltd (Admin. Appointed)*** **(1999) 30 ACSR 200**; ***Re Martco Engineering Pty Ltd*** **(1999) 32 ACSR 487**. These authorities make it clear that an administrator must exercise the casting vote in the interests of the creditors of the company as a whole.

19. In view of the matters in paragraphs 14 to 17 above, it is difficult to see how the chairman of a meeting of Show Group's creditors could conclude that a pooling resolution is in the interests of the creditors of Show Group as a whole. Pooling will result in the overwhelming majority (by both number and value) of those creditors, namely the non-priority creditors, receiving no dividend. Those creditors have nothing to lose, and potentially much to gain, by keeping Show Group outside the pool. Even the priority creditors potentially suffer a substantial reduction in their dividend as a result of pooling.

20. In these circumstances, and especially absent the Court giving its prior imprimatur to such voting, the exercise by the administrators of a casting vote in favour of pooling at a meeting of Show Group's creditors would be likely to be overturned by the Court on any application made under s.600B of the Corporations Act. It is submitted that the Court should not give its imprimatur to such a course of action.

The exercise of a proxy vote

21. Although there does not appear to be any authority directly on point, it is submitted that an administrator exercising a proxy on behalf of a company

in administration ("**voting company**"), at a meeting of creditors of another company in administration, must be obliged to exercise that proxy in the interests of the creditors of the voting company.

22. Returning to the Show Group example, its related party creditors include AAL and AAHL. It is difficult to see how the creditors of AAHL and AAL would be better off if a pooling resolution is passed in relation to Show Group. That is because:

    (a) for the reasons outlined in paragraphs 14 to 17 above, as non-priority creditors, if pooling proceeds, they will receive no dividend from Show Group; and

    (b) insofar as there may be any adjustments to be made against Show Group in relation to intercompany transactions in the absence of pooling, most if not all of those adjustments would be in favour of AAL. Accordingly AAL would obtain a greater share of Show Group's assets.

23. In these circumstances, the exercise by the administrators of proxy votes on behalf of AAL and AAHL, as creditor companies, in favour of any pooling resolution at a meeting of Show Group's creditors would appear to be contrary to the interests of the creditors of AAL and AAHL. It is submitted that the Court ought not give its imprimatur to such a course of action.

No presumption in favour of pooling

24. The administrators have been amenable to pooling from the outset of the administration. That is not a criticism of them – plainly, this was always an administration in respect of which the possibility of pooling needed to be considered. However it is submitted that little or no weight can be given to their recommendation in favour of pooling, for the following reasons:

    (a) it is evident that the administrators were compelled, in order to secure the benefits of the Air New Zealand MOU and the

Commonwealth's SEESA scheme, to agree to advocate pooling. This was because both the New Zealand and Commonwealth Governments wished to promote an outcome which would maximise the return to the employees of all of the Ansett companies. This result was, however, for the governments involved, a political and not a legal or equitable consideration. The administrators, no doubt acting quite properly, accepted these conditions as part of achieving agreements for which there was a clear commercial imperative. However the result is that they are now duty bound to advocate pooling;

(b) in view of the matters in paragraph (a) above, the Court cannot be certain that it has the benefit of the administrators putting the case for pooling based solely on their own convictions. It may be that the administrators' convictions happen to coincide with their contractual obligations to advocate pooling, but the force of their opinion is diminished nonetheless;

(c) insofar as the creditors originally voted for DOCAs which provided for the possibility of pooling, that should not be regarded as an expression of their opinion in favour of pooling. The DOCAs simply reserved that question for a later date. In any event, the creditors did not at that time have before them information as to whether any and if so which of them would be likely to be disadvantaged by pooling;

(d) there is little evidence to suggest that the creditors of the asset holding companies were unaware of the identity of the company with which they were dealing, or that they regarded themselves as creditors of an amorphous conglomerate of Ansett companies. The only clear evidence (albeit limited to a small number of creditors, namely the banks, in the context of the AAE Pooling Deed issue) is to the contrary;

(e) the issue of the complicating factors has (the administrators would no doubt say, of necessity) been dealt with by the administrators only in a relatively broad-brush way. The Contradictor requested that the administrators specify the potential impact of those factors on the asset holding companies. In response to that request, Mr Korda has deposed in paragraph 69 of his affidavit to a table which sets out which of the inter-company issues are relevant to the various asset holding companies. However that table does not provide any information as to the likely quantitative effect of any or all of those issues on any or all of the asset holding companies;

(f) in the circumstances, no sufficient reason has been advanced as to why it would be equitable to impose pooling upon the creditors of the asset holding companies. Yet, in view of the information concerning voting strength and practical reality as deposed to in paragraphs 63 to 66 of the 13 October 2005 Korda affidavit, that would be the practical effect of the relief sought in this application.

25. For the foregoing reasons, the Contradictor submits that the Court should not grant the administrators the relief they seek in relation to the exercise of proxy and casting votes at forthcoming meetings of Ansett companies at which pooling resolutions are to be considered.