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TRANSCRIPT OF PROCEEDINGS

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FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GOLDBERG J

No VID621 of 2005

IN THE MATTER OF ANSETT AUSTRALIA LIMITED

MELBOURNE

10.18 AM, MONDAY, 24 OCTOBER 2005

DAY ONE

MS M. GORDON SC with MR S. SHARPLEY appears for the applicants
MR D. WILLIAMS appears for WTH Pty Ltd
MR M. SIFRIS SC with MR R. RANDELL appears for ASIC
MR D. STAR appears for the Australian Council of Trade Unions
MR P. CRUTCHFIELD appears for BNP Paribas and the Commonwealth Bank of Australia
MR T. GINNANE SC with MR S. GARDINER appears for the Commonwealth of Australia
MR TROIANI appears for the National Australia Bank Limited

MS M. GORDON SC: May it please the Court, I appear with my learned friend, MR S. SHARPLEY, for the Administrators of the Ansett Group of Companies.

HIS HONOUR: Ms Gordon.

MR D. WILLIAMS: May it please the Court, I appear for WTH Pty Ltd, the Contradictor to the application.

HIS HONOUR: Thank you, Mr Williams.

MR M. SIFRIS: If it please the Court, I appear with my learned friend, MR R. RANDELL, for ASIC.

MR J. GINNANE SC: If your Honour pleases, I appear with my learned friend, MR S. GARDINER, for the Commonwealth of Australia.

HIS HONOUR: Thank you, Mr Ginnane.

MR D. STAR: Your Honour, I appear on behalf of the Australian Council of Trade Unions and the following 11 unions, whose members included employees of companies within the Ansett Group. The Ansett Pilots Association; The National Union of Workers; The Transport Workers Union of Australia; Australian Services Union; Communication, Electrical and Plumbing Union; Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Australian Workers Union; Association of Professional Engineers, Scientists and Managers, Australia; Flight Attendants Association of Australia; Australian Liquor, Hospitality and Miscellaneous Workers Union; and The Australian Licensed Aircraft Engineers Association, and for convenience, your Honour, I can hand up a list of all those unions.

HIS HONOUR: Yes, I would be grateful if you would do that please. Mr Crutchfield?

MR P. CRUTCHFIELD: If your Honour pleases, I appear for BNP Paribas and the Commonwealth Bank of Australia.

HIS HONOUR: Thank you.

MR TROIANI: Your Honour, I appear for the National Australia Bank Limited.

HIS HONOUR: Yes. Thank you, Mr Troiani. Well, Ms Gordon, I think it is your call.

MS GORDON: It is, your Honour. As your Honour is aware, this is an application by Mark Korda and Mark Mentha, the Administrators of the Ansett Group of Companies, in connection with the course they propose to follow. The application falls into two parts. One is to deal with the proposed pooling and orders and directions that are sought in relation to that. The second concerns what we have described as the AAE compromise deed. These applications are made, as your Honour will have seen, pursuant to sections 447A and 447D of The Corporations Act, and also the accrued jurisdiction of this Court, because there are some trustee issues.

The specific orders and directions that the Administrators seek are set out as an attachment to the outline of the submissions that were filed by the Administrators last week, your Honour.

HIS HONOUR: Just let me pick those up.

MS GORDON: If your Honour pleases.

HIS HONOUR: Yes, I have got those.

MS GORDON: If your Honour pleases. Your Honour will have seen that those directions and orders, as I say, fall into two groups. The first grouping of them deals with orders and directions from the Court relating to the Administrators voting intercompany debts at meetings to be held under section 445F of The Corporations Act, to propose amendments to the Ansett DOCAs - I will use that short term for the deeds of company administration. Those proposed amendments to the Ansett DOCAs are, as I said, to give effect to the pooling of the assets and liabilities of the Ansett Group of Companies, with all the creditors of those companies being entitled to prove in the one - as one company that would then be left, which would be AAL.

HIS HONOUR: The effect of the pooling proposal, as I understand it, is in effect to disadvantage the creditors of about five or six of the companies. Is that right?

MS GORDON: Yes. They are collectively described as the asset holding entities. There is no disadvantage to the other creditors in the Ansett Group of Companies, whether the entities are pooled or not. But there are disadvantage to what are described as the asset holding entities in a variety of ways, and we will come to those if we may.

HIS HONOUR: So in effect, what the Administrators are seeking to do is to seek approval for them to vote in a way which, in the ordinary course, they wouldn't vote.

MS GORDON: Correct, your Honour. There is no doubt that at the moment what we are seeking is contrary to the regime provided for by The Corporations Act and the reasons why you will see in the draft orders and directions have been drafted in the way they have. That is, in effect, to bring about an amendment to the Act to permit them to do that.

HIS HONOUR: What occurred to me as I was reading the material over the weekend is we have a Contradictor. I think Mr Williams is appearing for the Contradictor. Does that Contradictor, in effect, in a position to push the barrow, as it were, for all the people who would be disadvantaged by the orders being made?

MS GORDON: Yes, he is, your Honour, as I understand the position. In other words, if your Honour is asking me - - -

HIS HONOUR: There is no difference between the classes of creditors in the five or six asset holding companies.

MS GORDON: No, there is, your Honour. In this sense. That if you deal with just the asset holding entities for the moment, before pooling, in relation to the non-priority

creditors, they would get certain sums, and the third party non-priority creditors in there would get a significant sum. After pooling you need to divide the creditors affected into what I will describe as third party non-priority creditors, and priority creditors, and there are a number of affected third party non-priority creditors, but the extent to which they are affected is on average about a third of a cent in the dollar. So there is no doubt that there is a distinction to be drawn between priority creditors, and third party non-priority creditors, as a result of pooling.

HIS HONOUR: When you call them third party non-priority creditors, in what sense do you use "third party"?

MS GORDON: I mean unrelated to the Ansett companies.

HIS HONOUR: You mean non-employees?

MS GORDON: No. I mean non-intercompany debts. They are - - -

HIS HONOUR: Trade creditors.

MS GORDON: Trade creditors. Yes, your Honour.

HIS HONOUR: Yes, I understand.

MS GORDON: So there is a distinction to be drawn as a result of pooling in those asset holding entities between the trade creditors and the priority creditors, because there are a small group of priority creditors who will also be affected.

HIS HONOUR: Have all the parties, the priority creditors and the third party creditors who can be affected by the pooling proposal and the Administrators voting in favour of pooling been adequately put on notice of these proceedings?

MS GORDON: Yes. As your Honour is aware, notice was given in three ways. First, copies of the relevant documents were put on the three websites, as usual. That is, the Korda Mentha website, the Ansett website, and the Arnold Bloch Leibler website. Secondly, on 15 and 16 September the Administrators sent letters to various Ansett Group creditors, advising them that they may be adversely affected by the pooling, and inviting those participants and creditors to either participate in, oppose this application. That is set out in paragraph 11 of Mr King's affidavit of 23 September.

Those letter recipients were the Ansett Group creditors, other than Commonwealth, who is here today, National Australia Bank who Mr Troiani represents, and the banks that Mr Crutchfield represents. So, other than those who are here today, each of those creditors who would be likely to suffer a reduction of $10,000 or more as a result of pooling were sent a letter.

HIS HONOUR: All of them?

MS GORDON: All of them, and - - -

HIS HONOUR: How many creditors under $10,000 were there who wouldn't have been sent letters?

MS GORDON: About 200, on my instructions. Now, as a result of that - and the third form of notification was an advertisement was placed in The Australian newspaper on 21 September. So there were three forms of notification. As a result of that notification three creditors contacted the Administrators, and those creditors were Rockwell Collins Australia Pty Ltd, Skippers Aviation Pty Ltd, and Hewlett-Packard Australia, and those communications and responses are set out in paragraphs 10 to 22 of the fourth affidavit of Mr Korda, sworn on 13 October. In short - - -

HIS HONOUR: I would ask you to take me to these matters in due course.

MS GORDON: I will, your Honour. But in short, what happened was those three creditors who contacted the Administrators were advised that the necessary papers, subject of the application today, were on the website. They were told the extent to which they were to be jeopardised, and each of them said that they did not wish to appear, and would in effect - - -

HIS HONOUR: Abide the result.

MS GORDON: Yes, your Honour. And they were also told there would be a Contradictor. That is correct.

HIS HONOUR: Yes. Well, that then means the only people who haven't been specifically contacted who can be - who might be, or who would be affected by the proposal that the Administrators want, there are about 200 people whose debts are under $10,000.

MS GORDON: Yes, and there is two things to say in relation to that, your Honour. The first is that they have had what I will call the broad notification by the means I have outlined. And secondly, your Honour, as your Honour will have seen, as a result of the way in which it is proposed to put the motions about pooling, those creditors will then receive the notification as a result of the application being made by the Administrators to vary the DOCAs in the manner proposed, giving them the right, which I think is important, under section 445B to come along and complain later if they want to.

HIS HONOUR: Yes. That would be an expensive process, of course.

MS GORDON: There is no doubt that is right. But at that point in time the Court would have not only the benefit of the form of the material that went out, but also the pattern of voting.

HIS HONOUR: What is going through my mind is whether or not it might be advisable or prudent for the 200 to receive letters.

MS GORDON: Your Honour, the 200 received the letters, as I understand the position. What happened was, was that the group that - there is two things I should say. As your Honour knows, there is a $25 cut off. And so as a result of that there is a large number of

creditors in the Ansett Group of Companies whose debts are extinguished as a result of the $25 materiality amount.

HIS HONOUR: But that is extinguished by the deed.

MS GORDON: Correct. Then there is the group of creditors who are likely to be adversely affected by more than $10,000 and in respect of those they all received notifications.

HIS HONOUR: Yes. So between the under 10,000 and over 25 - - -

MS GORDON: There are a large number of creditors - - -

HIS HONOUR: Two hundred.

MS GORDON: No, no, a large number of creditors in that group who will not have received notification.

HIS HONOUR: When you say a large number, how many do you mean; a ball park figure?

MS GORDON: About 30,000. And they are the ones that are the subject of a large number of, if you have seen the material, trade creditors and other creditors whose consequence or down-side of pooling is at the most, on average, about one third of a cent in the dollar.

HIS HONOUR: Well, I am a little bit confused about the 200.

MS GORDON: The 200 are the ones who are likely to be adversely affected from pooling for more than $10,000 who have received notification.

HIS HONOUR: I am sorry, I misunderstood you. I thought there were 200 who haven't received notification.

MS GORDON: No, your Honour. So the ones that are likely to be adversely affected by more than 10,000 received notification directly, except for the Commonwealth, National Australia Bank and the two banks Mr Crutchfield appears for. The balance of them are the ones which total some 30,000 creditors who with respect to the extent to which they are likely to be adversely affected on average it is about a third of one cent in the dollar. Now, that is not to say they haven't received notification in the general way because your Honour will have seen the advertisement was placed in The Australian newspaper, it has been put on the websites, and what is interesting is in relation to those who received letters, the three creditors came forward and their concerns were dealt with in the manner in which I have outlined.

HIS HONOUR: Yes.

MS GORDON: Your Honour will have seen that the application is supported by a number of affidavits. For the sake of completeness, I will just make sure that your Honour has got, in a sense, everything that your Honour needs. There are seven affidavits. The

first are four affidavits sworn by Mr Korda: the first is dated 21 June, the second is dated 12 September, the third is 30 September, and the fourth is 13 October.

HIS HONOUR: Yes.

MS GORDON: Then there are two affidavits affirmed by Mr King, a partner of Arnold Bloch Leibler: the first is dated 23 September, the second is dated 18 October.

HIS HONOUR: And that is the material on which you move.

MS GORDON: It is, your Honour. There has been no notices to attend for cross-examination and no objections. In addition to that, an affidavit was sworn and filed by the Commonwealth by a Ms Jenet, J-e-n-e-t, Connell dated 18 October 2005.

HIS HONOUR: Yes, I think I have read that one. That explains the SEESA scheme I think.

MS GORDON: That is correct, your Honour.

HIS HONOUR: Just before you go into the matter in more detail, it would assist me to know generally what the attitude of the various parties is towards the application so I can see what are the grounds of contention, if there be any significant ones.

Mr Sifris, ASIC?

MR SIFRIS: Well, your Honour, we are satisfied that the proper procedures are being followed; proper notice has been given. There is an appropriate Contradictor and there is power to make the orders, and the orders sought involve an appropriate use of section 447A and 447D. Now, although ASIC raised the desirability of a direct pooling application, we do submit that the appropriate course is for the holding of meetings, and if the meetings are properly convened and held and minuted, in our submission, that is the appropriate way to proceed.

Ultimately it is a matter for the creditors and, although the proposed orders will to some extent compromise creditor democracy, if you like, we do think that it is an appropriate way to proceed. We would submit though that the 200 creditors likely to be affected, those creditors with claims of more than $10,000 should perhaps get more formal notification of the meetings, rather than downloading anything from the web so that they are clearly advised - - -

HIS HONOUR: You don't mean in relation to this proceeding though.

MR SIFRIS: Well, there are orders sought in this proceeding that - - -

HIS HONOUR: No, but you don't - you are not suggesting they haven't received adequate notice of this application.

MR SIFRIS: No, no.

HIS HONOUR: You are saying further down the track.

MR SIFRIS: Yes, for the purpose of convening the meetings.

HIS HONOUR: Yes, I understand.

MR SIFRIS: But other than that, if your Honour is minded to make the orders, and we make no submission as to the merits of that, then the orders as proposed, the form of the orders are appropriate orders.

HIS HONOUR: Yes, thank you.

MR SIFRIS: As your Honour please.

HIS HONOUR: Mr Ginnane, does the Commonwealth have a view at this early stage?

MR GINNANE: It does, your Honour, and the Commonwealth's view is that the orders - that the draft orders that we have received are appropriate orders. The Commonwealth - and I put this briefly, your Honour - for the reasons set out in the affidavit to which my friend Ms Gordon referred believes that the pooling is commercially appropriate and will mean that the Commonwealth and the vast majority of employee creditors will be better off, and in addition there is the saving in legal and administration costs that are referred to.

The one qualification that is set out in the submission we have filed in the affidavit is the Commonwealth wishes to make it clear that in supporting the orders sought it shouldn't be taken in any way as releasing any post-administration debts that are owed by - or that may become owed by - owing by any company in the Ansett Group.

HIS HONOUR: Well, there is no suggestion that that might occur in the material, as I understand it.

MR GINNANE: No, there has been correspondence between the Commonwealth and the administrators and the relevant representatives. We have set out, just out of abundant caution, that it be taken that any such things being released, any debt to the Commonwealth or to any other entity related to representative or control by the Commonwealth. The Commonwealth as a substantial creditor arising from the SEESA advances submits that the proposal is appropriate because it will benefit the vast majority of employee creditors and, of course, the Commonwealth itself who, through the SEESA advances, financed the key aspect of the administration. So in general terms, your Honour, without going at this point to the affidavit that has been filed, the Commonwealth does support the draft orders that have been circulated

HIS HONOUR: Yes, thank you. Mr Star.

MR STAR: As your Honour will be well familiar from previous applications, the body of former employees of the Ansett Group numbered approximately 15,000 people. The ACTU and the affiliated unions have watched this application for pooling quite closely and kept itself informed as to what has been occurring and the possible implications of pooling versus non-pooling. Having regards to the interests of the former employees, the ACTU and the affiliated unions do support the orders which will facilitate pooling. It is an issue equity, your Honour. The available funds will be distributed amongst the larger body of

former employees and has a beneficial effect for the vast majority of the former employees.

HIS HONOUR: On your understanding, will there be any groups of employees who will be adversely affected by the application?

MR STAR: There is, your Honour. The material which has been filed by the administrators shows that the most number of employees who may be worse off as a result of pooling would total up to 84 people. Now, of course, that is 84 people out of a former work force of approximately 15,000 people. In a sense it is a necessary evil of pooling in the context of this application that there will be even one former employee who will be worse off.

HIS HONOUR: We must remember that even Mr Gambotto succeeded in the High Court.

MR STAR: I appreciate that, your Honour, but the - of the - if we take even that number of 84 people, your Honour, the material shows that the maximum number of employees who could be adversely affected by an amount greater than $10,000 is three employees, and the balance of 81 employees are persons who may be adversely affected by an amount of less than $10,000, but for the vast majority, over 14,900 of the former employees, the implications of pooling are positive or have a better result than non-pool.

HIS HONOUR: Have the 84 employees been put on notice of the - any discussion with them about the consequences of this order being sought?

MR STAR: Well, if I can take that in stages, your Honour, I would assume that the three employees who could be affected by an amount of more than $10,000 would be covered by the group which my learned friend has talked about, people getting a special letter if they are possibly affected by an amount of more than $10,000.

HIS HONOUR: What about the 81?

MR STAR: Well, the 81 would fall within the category which my learned friend has described as being on notice in the general way by websites or by advertisements, but can I say this also, your Honour, the unions and the ACTU have also in the context of pooling kept its members generally informed about support for pooling. Indeed, the material shows that the ACTU and its affiliated unions have supported pooling to consistently throughout various issues of this administration. It was a matter which arose in the context of the SEESA Deed, it was a matter which arose with the Memorandum of Understanding as well, and that was something which the membership supported and the unions itself have also been - have its own measures to try and ameliorate disadvantage for its membership, should there be any.

HIS HONOUR: But do you know whether the 81 employees know that their representative is taking a position which is adverse to their individual interests?

MR STAR: I have no instructions that those 81 have been specifically informed, your Honour, but the ACTU and the affiliated unions support for pooling is a public position which the ACTU and its affiliates understands to be supported by its members.

HIS HONOUR: Yes. Yes, well, I will reserve my position at the moment about the 81 employees whether or not they should be given some specific notice of this proceeding. I understand the basis of your representation and your instructions, but I want to think that matter through to determine whether or not their interests are adequately represented, for example, by Mr Williams's position; I am not sure. Thank you for that.

MR STAR: If your Honour pleases.

HIS HONOUR: Mr Troiani, what is the position of the National Australia Bank?

MR TROIANI: Your Honour, one of the effects of the orders sought by the administrators would be to enliven by, in effect, the - - -

HIS HONOUR: Just wait a minute. Can you hear Mr Troiani on your recording machine? You can, yes, thank you. Yes, Mr Troiani.

MR TROIANI: Thank you, your Honour. One of the effects of the pooling orders at least to the extent that it affects the company, Ansett Aviation Equipment, AAE, is that it will enliven the so called AAE Pooling Compromise Deed which has the effect of among other things resolving some very complex matters between the bank and the Ansett companies.

HIS HONOUR: For which I am most grateful.

MR TROIANI: And for that reason National is in support of the orders being sought today.

HIS HONOUR: Thank you. Mr Crutchfield, CBA and BNP Paribas.

MR CRUTCHFIELD: Yes, your Honour. My client's position is the same as Mr Troiani's client, that is, we are a party to the AAE Pooling Compromise Deed. Your Honour will recall we originally opposed pooling but as a result of the compromise deed we now support the administrator's position.

HIS HONOUR: Yes. Mr Williams, I think your position is set out in your draft submissions. Do you wish to - - -

MR WILLIAMS: It is, your Honour, and I should update you, because we reserved our position in that draft as to the AAE Pooling Compromise Deed.

HIS HONOUR: Indeed, you did.

MR WILLIAMS: So called. It is our view that we ought to advance no submissions in opposition to that deed.

HIS HONOUR: I am sorry?

MR WILLIAMS: We - it is our submission that we have nothing to say about that deed.

HIS HONOUR: Yes.

MR WILLIAMS: In respect of that, your Honour, there are other parties before the Court today which have at least as much interest as the third party non-priority creditors, namely the Commonwealth and the union representing employees who could potentially be adversely affected to the very small amount possible as referred to in the material. It is our view that we can add nothing to what they might have chosen to say. We note that they have chosen to say nothing about it, and we see it as being a commercial compromise about which no sensible submissions could be advanced.

HIS HONOUR: Yes. Thank you for that.

MR WILLIAMS: I should say one other matter, your Honour. In relation to questions of notice of this application we are - we consider ourselves briefed to deal with the merits of the application. We haven't considered it necessary to advance submissions to the Court as to notice of the application. We hear what ASIC has said about that. We would have thought that is a matter for the Court and the applicant as to whether all parties have given notice. I should say though, your Honour, we would consider that the position of our client and its status as a third party non-priority creditor is by analogy equivalent to the position of all of the sort of people that have been referred to who have not got notice.

HIS HONOUR: Including the employees?

MR WILLIAMS: Yes, but perhaps to a lesser extent because the potential harm to employees of pooling is significantly less than the potential harm to third party non-priority creditors, and so is a question of degree, but in substance, your Honour, we would see the same arguments as being relevant to them.

HIS HONOUR: Yes. In a sense it sounds like a question of a degree in democracy, I suppose.

MR WILLIAMS: Well, much of the case comes to that, your Honour. The part of the application that we are most troubled about is in fact, I think it was rightly summarised by one of my learned friends as having an impact on the democracy or the outcome of the democracy, and that is the substance of the matter that is before the Court on the - what is called the pooling application, but is in fact not a pooling application, but an application for directions as to voting at pooling meetings.

HIS HONOUR: Yes, because in a sense the administrators aren't being asked, or are asking for permission to do something which by all commercial considerations they ought not to do.

MR WILLIAMS: Perhaps by more than commercial considerations, your Honour, perhaps by legal and equitable considerations. But I don't want to impinge on or advance on the argument.

HIS HONOUR: Well, we will have the arguments developed in due course.

MR WILLIAMS: Might I, your Honour, just while I am on my feet say something about the way in which the application might proceed today?

HIS HONOUR: Yes.

MR WILLIAMS: Your Honour has heard, I think, that apart from my client there is nobody before the Court who proposes to oppose the orders that are sought. In those circumstances, in my respectful submission, I should go last and have an opportunity to hear all of the submissions advanced by any party in favour of the application before I respond.

HIS HONOUR: Subject to what anyone else says I am content for that and subject to Ms Gordon I am happy even to give you the last word, or the penultimate last word, or the last word.

MR WILLIAMS: Well, if the last word is - - -

HIS HONOUR: Depending on who gets up last.

MR WILLIAMS: Your Honour, if the last word is offered to me I will never knock it back.

HIS HONOUR: Yes, indeed. You make it sound like a Court of Petty Sessions. Ms Gordon.

MS GORDON: If your Honour pleases. Can I deal with just one factual matter, which is this question of these 84 that are potentially worse off?

HIS HONOUR: The 84 employees?

MS GORDON: Yes. This is on the basis of pooling. The reason why it needs to be considered in context. The maximum total amount that they will be worse off, and I say maximum, because it takes into account nothing about the separate costs of the administrations, is $280,000. That is, the total for the 84. Seven would be worse off to the extent of 8 cents in the dollar. 66 would be worse off - and these are all maximums - to the extent of 1.6 cents in the dollar, and 11 to the extent of 12.6 cents in the dollar, and on an averaging only, at worst, it would be about $3500. But I say they are all maximums because they take into account none of the separate costs of administration that would flow - - -

HIS HONOUR: If there was no pooling.

MS GORDON: Yes, your Honour. And, your Honour, that information, that evidence is before the Court. That is, those considerations are, because they are set out in table 3 which were annexed to the submissions, having been extracted from an earlier affidavit of Mr Korda. So I will take your Honour through that in a - - -

HIS HONOUR: Yes, I would be grateful if you would. Yes.

MS GORDON: Your Honour, the way we propose to deal with the matter is this. We propose to take your Honour through the notice that was given to the application so your Honour can see that. Then, deal with the question of jurisdiction, both in terms of the

statutory powers and the inherent power of the Court, and then deal with, in a sense the basis of the application, and my learned friend is right. It is not an application for pooling. It is an application for directions and orders about the way in which the Administrators seek to vote at meetings.

But the underlying subject matter of those is pooling, and so therefore, to the extent that your Honour needs to consider the veracity of the proposals that are put it is necessary to look at the reasons why it is they say pooling is both just and equitable, and also in this case, essential.

HIS HONOUR: Well, they say it is essential, I guess, for what I will call loosely, commercial reasons. The Administrators paint a spectre, and I can only call it a spectre, of enormously complex investigations which may or may not achieve an outcome involving charging back expenses and trying to work out ownership of assets and everything. What has intrigued me a little, the administration has now been running for what? Four years?

MS GORDON: Yes, your Honour.

HIS HONOUR: And I wonder why during those four years a lot of these matters wouldn't have been dealt with.

MS GORDON: There is a number of answers to that. Can I deal with your Honour's earlier observation that it really was commercial considerations? That is right, but significantly there is, in a sense, a fundamental here, and that is that this Ansett Group was really conducted through one entity with 40 divisions, and historically, when one looks at the material that has been put before the Court, that is clear.

So if you start from that premise, and it is submitted that you must, what we are really seeking to do is to return the group back to the way in which it historically operated, and that is, in a sense, what the Americans would describe as the reliance test. There has been this interwoven, inter-relationship between them, which is really in a sense, and in substance, and in form, arguably a single entity.

HIS HONOUR: It may well arise that if that is what happens in practise, that it makes a mockery of a lot of insolvency provisions and creditors need to be protected from businesses being conducted that way.

MS GORDON: And then you ask - and that is right, your Honour. So then you say to yourself, well, consistent with the authorities, when you are faced with that sort of entanglement one has got to then move to not only the considerations of entanglement, but how you then move to deal with, as my learned friend would put, creditors and democracy balanced on one side, versus the pragmatic considerations of disentangling the present situation, and there is absolutely no doubt, as your Honour knows very well, that that sort of balancing exercise is precisely the task that is faced when you consider pooling.

It starts from the premise that certain creditors are likely to be disadvantaged. In some of the cases that your Honour has considered, substantially disadvantaged. Here we say it is not substantial disadvantages. We are not in that category. But there is no doubt that one works from the fundamental presumption that the statutory priority regime is about to be

interrupted, that there are going to be creditors that are going to be disadvantaged, but it has got to be balanced against, in a sense, the consequences that flow.

Young J in Re Charter talks about the fact that at the end of the day one has got to approach this pragmatically. One can't look at these technical rules and say I am going to use those technical rules as some sort of - - -

HIS HONOUR: Well, they are more than technical rules, in a sense, aren't they? Aren't they there for the protection of creditors?

MS GORDON: And they are, and I accept that. But the question is, is this balancing exercise has to, in effect, take them - that is, take the fact that we have got a priority regime, we have got the principle we all learned in the first case of Corporations Law of Salomon's case, and say, I understand that, and I understand creditors are entitled to be protected. Here, I have got this terrible single purpose entity really, and I have got the entanglement questions. I now must do a balancing exercise, and where does that balancing exercise fall out?

And what we had hoped that the Korda affidavits would do was to explain to your Honour in the end - and your Honour, the criticism is a valid criticism. We are about to seek to alter the priority regime. We are - - -

HIS HONOUR: You see, I wouldn't want the situation to occur that cases like this are seen to be a licence to the commercial community, "Don't worry about corporate structures and creditor's rights and insolvency regimes. Bundle everything together and in due course the Court will work it out for you."

MS GORDON: I understand that is your Honour's fear, but I think there are - it is interesting historically to go back. There are very few cases in which pooling, in a sense, has been necessary or required. And secondly, at the end of the day the protection mechanism is this question of balance. Trying to work out whether or not it is appropriate in the circumstances that the disentangling be undertaken, against the costs and benefits of not doing it.

Now, there is no doubt that there will be some cases where an application will be made, and the Court will say, well, I understand - I pick up your Honour's point - this has been run as a single purpose entity, contrary to the law. But there is a priority regime and I am going to force the Administrators to undertake the exercise of disentanglement and allocate creditors and assets to the appropriate entity, because at the end of the day I think that the return to creditors will be greater.

Now, here there is no doubt that if you look at the objectives of Part 5.3A, one of which is to maximise the return to creditors as a whole, the appropriate course, it is submitted is that the assets are pooled into one entity, as well as the liabilities. Now, that may not be an answer at a satisfactory level intellectually, but there are protection mechanisms in place.

HIS HONOUR: Yes. Well, certainly I would have thought as a matter of first principle I think, although I haven't really thought it through, that pooling ought to be the exception, the extreme exception rather than the rule.

MS GORDON: I think that is a valid observation, your Honour. The difficulty here is that the facts necessarily, it is submitted, lead to this being one of these exceptions to the rule. But there are a number of cases, including some of the decisions of your Honour, yourself, where pooling has been described as controversial, and it is controversial for the very reasons your Honour has noted.

HIS HONOUR: See, one of the things that concerns me is very early in this administration - I think it happened with the approval of the Memorandum of Understanding with Air New Zealand and again with the SEESA scheme - the administrators committed themselves contractually, as it were, to a best endeavours clause to achieve pooling and that was done at a very early stage when the administrators weren't fully seized of all the facts because it has been a very very complex and lengthy administration, probably one of the biggest we have had in this country I suppose apart from perhaps Pasminco. And having got to this stage now, having committed themselves at an early stage to pooling, I am wondering whether, as it were, they locked themselves into that. I am not being critical. It was - decisions had to be made at the time.

MS GORDON: There is two answers I think to say to that. The first is, is that there is no doubt that the contractual provisions, both in the MOU, the SEESA and the DOCAs provided for pooling in some shape or form in terms of the consideration of the matter. But in each of those cases the alternatives set out was a wind up. In other words, if the objectives of Part 5.3A which was the maximising of return to creditors was not going to be achieved, then the provisions in each of those documents - and I will take your Honour to them - dealt with this question and it in a sense said, we are going to recommend pooling but in the alternative the wind-up.

So there is no doubt the contractual provisions provided for them, but there is also no doubt that the administrators, consistent with their statutory duties, provided also for the alternative that was provided for under the Act. So that is the first thing to say.

The second thing is that even if your Honour was minded to put to one side the views of the administrators, which seem to be the suggestion of the Contradictor, and one looked at what the present position was in relation to the way in which this administration has now proceeded, and critically the consequences of both pooling and not pooling for the creditors, then it is submitted that in those circumstances the Court would still, in effect, provide the orders and directions sought because the outcome for the creditors as a whole is so much better. And your Honour has heard from the others around the bar table, other than the Contradictor, that on any view the benefits of pooling are sufficient to attract their support for it.

HIS HONOUR: The one thing that I am not clear on is whether - and I think this is a point made by Mr Williams in the outline - that if there is no pooling, do we know, have we got some sort of estimate of the extra costs involved in carrying out the rest of the administration and the extent to which there will be - I think they were called complicating factors.

MS GORDON: They are, your Honour. The answer is, is that the best estimate that the administrators could give was a range of between 9 million and 24 million of separate administrations for the remaining entities in the Ansett Group, and they are set out in paragraph 40 of the third Korda affidavit of 30 September. And what the balance of that

affidavit does is seek to allocate those costs to these factors which would make the separate administration difficult; and, in particular, allocates these factors to, or issues to each of the asset holding entities.

HIS HONOUR: Can you remind me again at the present time, in gross terms, how much is left in assets? Do we know that figure roughly? I suppose - I am not sure what has happened to the real estate; whether the real estate has been sold.

MS GORDON: The real estate has been sold and that money is presently being held in 501 Swanson Street, and you will see that there is orders sought in relation to 501 Swanson because at the moment there are difficult issues about ownership; about whether it is AAL or AAHL. And if the assets are not pooled, what the administrators have said is, is that it will be necessary for them to make separate application to the Court in order for your Honour to resolve the question of ownership. And in paragraph 42 of that affidavit they identify what the likely costs are of seeking to resolve that issue separately.

HIS HONOUR: And that is between 100 and 500 thousand dollars I think.

MS GORDON: So that each of the issues which your Honour has - of which your Honour has identified one are separately identified in terms of cost of seeking to resolve that if the matter was not pooled. Now, that - as your Honour may well know, there is a sum to complete the administration.

HIS HONOUR: There is?

MS GORDON: There is a sum allocated to complete the administration. The 9 to 24 million is the additional cost that would arise from separate administrations. So it is not just the cost in the sense of - it is the additional cost that would arise.

HIS HONOUR: Is there any expectation as to when the administration will come to a conclusion?

MS GORDON: I can get some instructions about that, your Honour. Can I say this, we were asked by the Contradictor and criticised for, in a sense, not allocating in the asset holding entities the costs that would be attributed to each of these issues in those entities. And as the administrators have stated, it is just simply impracticable to do so, and to do it would require them to undertake the very sort of tasks which we are seeking to avoid because of the cost.

HIS HONOUR: Which would inevitably extend the administration.

MS GORDON: Yes. I am told two things, your Honour. Administration is unlikely to end before the end of 2007.

HIS HONOUR: yes.

MS GORDON: And, secondly, and putting cash to one side which is the large part of the pooling application, I am instructed there are about $50 million worth of assets still to realise, and they comprise primarily spare parts of aircraft and a few aircraft and, as I understand my instructions, those aircraft are likely to be broken up themselves and sold as spare parts.

HIS HONOUR: Yes, thank you.

MS GORDON: Can I go back, your Honour, and deal with the notification questions, and can I ask you to go to the first King affidavit of 23 September.

HIS HONOUR: Yes.

MS GORDON: Your Honour, this is the first form of notification that was given, and in paragraph 10 Mr King, a partner from Arnold Bloch Leibler, sets out that he caused copies of certain documents which are then set out at the foot of page 3 of that affidavit to be placed on the three websites: that is the Ansett website, the Korda Mentha website and the Arnold Bloch Leibler website. And in relation to that, what was put on was the application, the first Mark Korda affidavit sworn on 21 June, the second Mark Korda affidavit which is the one which sets out in detail the reasons giving rise to the application, the orders made by your Honour on 30 August together with the transcripts of the four previous hearings. And at exhibit AWK8 Mr King annexes the relevant pages and printouts from those websites so - - -

HIS HONOUR: As a matter of - I was going to say as a matter of interest, it has some relevance. Do we have any record or any knowledge of the hits on the website that contains those documents?

MS GORDON: I am told we don't have them but we can find them if you would like them.

HIS HONOUR: It might be of some marginal relevance.

MS GORDON: We will get them, your Honour. If your Honour pleases. The second form of notification is then dealt with in paragraphs 11 and 12, your Honour, sorry, 11, and that relates to the administrator sending letters to the various Ansett Group creditors who are likely to be adversely affected by pooling and inviting those creditors to participate in the application to oppose it or support it, and your Honour will see that at AWK9 to 12 a copy an example of the letters that were sent. Does your Honour have AWK9?

HIS HONOUR: Yes, I am just looking at 9 now very briefly.

MS GORDON: Your Honour will see that the Ansett Group creditors are told that they have issued an application in relation to pooling. Pooling is defined to mean the combining of all the assets and liabilities into AAL. In the application they then set out the orders or directions they seek. They tell them that the material is available on the websites that I have taken your Honour to, and then tells them in the middle paragraph that they may be adversely affected if the assets and liabilities of the Ansett Group Company of which they are a creditor are pooled, and then refer them particularly to paragraphs 198 to 211 of the affidavit which set out the opinions as to which Ansett Group creditors may be adversely affected and their best estimates of the extent to which those effects would be adverse and when it was presently listed for hearing.

And then if after reading it you wish to participate you are asked to either telephone Sebastian Hams at Korda Mentha or correspond with him. And similar letters are then set

out in relation to Skywest creditors and Aeropelican creditors. And as Mr King says in paragraph 11 of his first affidavit, the letter recipients - your Honour sees that at the foot of paragraph 11:

> *...are those Ansett creditors except for the Commonwealth, NAB and the two banks who, based on the tables and assumptions would be likely to suffer a reduction of 10,000 or more in the amount of the dividend they would receive if the companies were pooled as opposed to not being pooled.*

Then the third form of advertising and notification of this application is set out in paragraph 12, and Mr King deposes to the fact that he caused an advertisement to be published in The Australian newspaper and a copy of that is AWK13. And your Honour will see that in substance the content is similar to the letter that was served on each of the creditors identified in paragraph 11.

HIS HONOUR: Yes, thank you.

MS GORDON: Now, I ask your Honour then to go to the Korda affidavit of 13 October.

HIS HONOUR: Yes, Ms Gordon.

MS GORDON: I ask you to go paragraph 10, and there is a subheading which reads:

> *Contact with creditors notified of the application.*

Does your Honour have that subheading?

HIS HONOUR: Yes, I do.

MS GORDON: And there Mr Korda refers to the earlier King affidavit I have taken your Honour through and then deposes to the conversations that Sebastian Hams, one of the employees of Korda Mentha had in response to the letters that have been sent in paragraph 11. So these are the particular letters to the creditors identified by the administrators as being adversely affected. As I told your Honour earlier, three creditors contacted Sebastian Hams. One was Rockwell Collins Australia Pty Limited, the second was Skippers Aviation Pty Limited and the third was Hewlett Packard Australia. And in paragraphs 12 through to paragraph 22 Mr Korda sets out what he was told by Sebastian Hams as a result of those communications.

In general terms each of them was advised of the nature of the application, requested to read the affidavits placed on the website, and had explained to them the extent to which creditors would be worse off. And your Honour will see at the foot of the page, of page 3 of the affidavit, that they were told particularly that 31,296 third party non-priority deed creditors may be adversely affected by pooling in a sum of approximately $13.47 million dollars, representing a maximum reduction in their likely distribution of just over a third of a cent in the dollar. and then the same dealt with the non-priority deed creditors of the Westsky Trust and then in the third paragraph, the non-priority deed creditors of Kendell.

The other thing they were told, as my learned friend Mr Williams informed your Honour earlier, that a Contradictor would appear at the hearing and in that role would be likely to argue against pooling. Third, they were told that the application was one for directions in relation to the administrators voting at meetings of Ansett deed creditors to affect pooling, the giving of effect of the AAE compromise and the form of the notification of those meetings to the deed creditors. Fourth, they were told that all relevant information could be located on the website. Each was asked whether they had read the material that had been posted on the website. They had not.

They were asked to go away and read it and then to get back to Mr Hams if they had any further queries. Despite leaving that Mr Hams if not had - if he hadn't heard from them, contacted himself, that is, took positive steps to make sure that they were satisfied, and in paragraphs 15, 18 and 22 he records the fact that having not heard from them he spoke to each of them and asked them whether or not they had read the affidavit material and had any further questions, and in each case the representative from each of those creditors told Mr Hams they did not have any further questions, would not be appearing at the hearing of the application, but would await the outcome of the hearing.

So, in relation to the steps of notification there were, as I said to your Honour earlier, three forms. They did elicit some response. They elicited response from three creditors, and those creditors' concerns were satisfied in the manner I have outlined. In addition to those forms of notification, as your Honour is well aware, a Contradictor was found to put the contrary argument, and in addition to that, the administrators have taken steps to ensure that significant stakeholders in these administrations have been kept informed, and they include the Commonwealth, the unions, ASIC and also the committees of creditors.

I don't propose to go through the various steps that have been taken in relation to those, because each except for the committee of creditors is here today, but for your Honour's own information they are set out in paragraphs 2 to 9 and 13 to 19 of Mr King's first affidavit and paragraphs 25 to 36 of the fourth Korda affidavit. In general terms in relation to what I will call the stakeholders where they have requested information as a result of the application it has been provided, and as I have said, each of those significant stakeholders are here except for, of course, the committees of creditors. So, your Honour, in relation to notification they are the steps that have been taken by the administrators to ensure that those parties who are adversely affected have had notice.

HIS HONOUR: Yes.

MS GORDON: Can I move to deal with the question of jurisdiction. As we said at the outset, the application is made pursuant to sections 447A and 447D and also the accrued jurisdiction of the Court because of the trust questions.

HIS HONOUR: Is that similar to the issue that arose in the superannuation matter?

MS GORDON: Yes. Precisely, your Honour. So it is on that basis that we need to deal with those questions, and your Honour will have seen from the orders and directions that they are separate orders and directions to deal with those three matters. I don't propose to say much about the jurisdiction but I think I should say - at least outline the position. As your Honour is well aware, in order for this Court to give directions to an Administrator

under 447D, the issue or question must involve something more than a business or commercial decision.

It must be either a legal question of substance, or a procedure, or involve questions of power, propriety or reasonableness. And so much was made clear by your Honour in an earlier Ansett decision, which was the commercial judgment decision about whether or not the administrator should continue trading, and I hope your Honour has been given a volume of authorities.

HIS HONOUR: Yes, I have.

MS GORDON: The relevant decision appears under tab 1, reported in (2002) 40 Australian Corporations and Securities Reports 433. The relevant passages, your Honour, are at paragraph 65 and 68. At 65 - there was a typo in our submissions, your Honour. It should have been 65 and not 60. We rely upon the whole of paragraph 65, your Honour, and critically about the 8th line, commencing with the words:

There must be something - - -

HIS HONOUR: Yes.

MS GORDON: Is where your Honour extrapolates the relevant principle to be applied in applications of this nature.

HIS HONOUR: Yes.

MS GORDON: Your Honour then picks up the same concept in applying it to the facts of that case at that time, which was, as I said, the application for directions to permit the Administrators to continue trading, at paragraph 68 on page 452.

HIS HONOUR: Yes. I have read that.

MS GORDON: If your Honour pleases. Similar views were again expressed by your Honour in the later decision when the Administrators sought directions about the sale of the Sydney Air Terminal. A copy of that decision is under tab 2 and is reported in (2002) 41 Australian Corporations and Securities Reports at 605, and the critical passage in that case is at paragraph 46. By that time the Administrators had learned from your Honour and adopted the position of - referring to your Honour's earlier decision that I have just taken you to, halfway through that paragraph. Does your Honour have that passage, commencing with the word "However"?

HIS HONOUR: Yes.

MS GORDON: And as I said, then goes on to cite the critical passage from paragraph 65 of the earlier decision.

HIS HONOUR: Yes, I recall all that.

MS GORDON: If your Honour pleases. In the present case there doesn't appear to be any dispute about the Court having jurisdiction to give directions under section 447D as a question of power - - -

HIS HONOUR: Yes. Well, no-one seems to have challenged it.

MS GORDON: No, it doesn't. So this is really making sure, your Honour, that I have taken you to considerations that must exercise your Honour's mind. The issues before your Honour clearly involve questions of substance. They involve questions about the manner in which the Administrators may act, which necessarily bring about potential conflicts of interest. As I said to your Honour earlier, they also raise questions which will alter the priority regime provided for by the Act. In other words, instead of having a company acting independently to which the creditors have access to the assets of that entity, the orders and the effect of them would seek to alter that fundamental premise of corporations law.

In relation to the AAE pooling deed, as I think has been now acknowledged by other parties to that deed, that deed itself involved settlement of a series of complicated legal claims, where rights and duties have been comprised, causes of action have been given up, and which would again lead to a variation of the statutory priority regime provided for by the Act, and in that sense, your Honour, it is not dissimilar, the AAE pooling deed aspect of the case, from what I will describe as the staff superannuation case involving the Ansett administration, which your Honour considered, a copy of which is under tab 3, reported at (2004) 49 Australian Corporations and Securities Reports page 1, and the relevant passage is at page 13, at paragraphs 48 and 49.

HIS HONOUR: Yes.

MS GORDON: That deals with the jurisdiction of this Court and the power of this Court to make the directions under 447D. Can I then move to deal with the orders power under section 447A of The Corporations Act? As your Honour is well aware, the Court has a very broad power to make orders concerning the way Part 5.3A of The Corporations Act is to operate in relation to a particular company subject to administration.

It is subject to one caveat, and that caveat is that so long as the orders that are sought and the directions given are designed to achieve an objective of Part 5.3A, and here critically that objective is to maximise the return to creditors - that principle was most recently stated by your Honour in the case I just took your Honour to, and that is the staff superannuation case under tab 3. The critical passage about the breadth and the power itself is dealt with at paragraphs 55 to 56 on page 15.

HIS HONOUR: Yes.

MS GORDON: The power itself is dealt with in paragraph 55, and the caveat is set out in paragraph 56 in the opening words.

HIS HONOUR: Yes.

MS GORDON: If your Honour pleases. Similar views have been expressed by other Judges in other cases. I don't propose to take your Honour to it. Your Honour's latest

decision is the latest word in relation to that matter. Can I make some number of points about the Court's jurisdiction under 447A? The first is that in an appropriate case it can be used to expand the width of the directions that can be given under 447D, and that includes, as your Honour has yourself used the power, to perform and give effect to an agreement, and your Honour dealt with that in the Sydney Air Terminal case.

Secondly, and this is the important aspect of the matter, the restraint on that very broad power is the restraint I have taken your Honour to, and that is to make sure that any orders or directions made are orders or directions designed to achieve, and consistent with the objects of Part 5.3A. In the present matter it is submitted that the entire focus or reason for the orders and directions we seek is to achieve that core objective. In other words, to provide a better return to the creditors of the Ansett Group of Companies as a whole, acknowledging as we must that there are some creditors who will be disadvantaged.

HIS HONOUR: Yes.

MS GORDON: That deals with what I will call the statutory powers under 447A and 447D. Can I then say something shortly about the Court's accrued jurisdiction to deal with the trustee question? As your Honour pointed out, your Honour had to consider that question when you came to deal with the superannuation matter. The reason why this aspect of the jurisdiction of the Federal Court is required to be considered is because one Ansett Group company, which is called Bodas Pty Ltd, holds cash at bank under two trusts, for either AAHL or AAL, two entities in the Ansett Group of Companies.

The cash at bank arises from the sale of two businesses, Aeropelican Air Services, and Skywest Airlines. The circumstances in which those trusts arose are set out in the second Korda affidavit of 12 September at paragraphs 173 to 197, and I don't propose to take your Honour through all of them, but can I outline in short compass how the issue arose? Skywest and Aeropelican were the operators of regional airlines. For commercial reasons, when the Administrators came to sell those airlines it was necessary for the legal entity of those airlines to be sold.

In other words, it wasn't practical just to sell the businesses run by those entities, and as a result the two companies had to come out of administration to be sold. The proceeds of sale and certain of the assets of the companies were placed into two trusts. Another Ansett Group company, Bodas, was appointed as trustee, and the creditors entitled to approve in the administrations of the companies before sale became potential beneficiaries under those trusts.

HIS HONOUR: Yes.

MS GORDON: So, insofar as possible, what happened was that the Administrators attempted to replicate in each trust the rights and entitlements that creditors had as if each company had remained in administration with its business being sold and the proceeds of the sale being held by those companies. As a result of that, the administrators now have, in a sense, three roles in relation to the trusts. First, as the deed administrators, they are the controlling minds of the trustee which is Bodas. Secondly, under each of the trust deeds and, in particular, clause 3.2 the administrators are deemed to be agents of the trustee. And thirdly, as deed administrators of AAL they control a creditor or beneficiary of each trust.

Now, the effect of the orders and directions that the administrators seek will be to pool the assets of the two trusts into AAL by, in a sense, moving and voting for a resolution that they be distributed in their entirety to AAL. The reasons for doing that are precisely the same as the reasons I will come to for the group being pooled itself but, because of the various roles that they hold, it necessarily raises questions of conflict. And it is for that reason that the administrators rely upon the accrued jurisdiction of this Court to make orders and directions to those trustees authorising them to do something which otherwise would be arguably a breach of trust. Jurisdiction itself, as your Honour knows, was considered in the staff superannuation case which is under tab 3 of the folder.

HIS HONOUR: Yes, I remember those details.

MS GORDON: And your Honour understands the jurisdiction comes by the Judiciary Act, etcetera.

HIS HONOUR: Yes.

MS GORDON: I don't propose to take your Honour through it but it is for those reasons that we rely upon that accrued jurisdiction to deal with those trust questions. If your Honour pleases. Now against that background as to power, what we propose to deal with is first the application - or the merits of the application that these entities be pooled, and then deal with the question of the AAE compromise. And in relation to the question of pooling, we propose to deal with it in five parts if we may.

The first is the concept of pooling and the principles established by the authorities. Secondly, the history of the administrations of the Ansett Group of Companies, and the conclusions reached as to why pooling is both necessary and appropriate. Thirdly, consider the effect of pooling on the creditors of the Ansett Group of Companies as a whole, and the extent to which some creditors will be disadvantaged.

Fourthly, then deal with the manner i which the deed administrators intend to approach the creditors and the way in which they propose to vote therein to company debts. And, finally, the form of notice that is proposed to be given to the creditors about the variations to the DOCAs which are required to affect pooling.

HIS HONOUR: Yes.

MS GORDON: Can I deal first with the concept of pooling. As your Honour will have seen, the applications for orders and directions relate to the voting of inter-company debts at meetings under section 445F. And at these meetings the creditors will be asked to consider amendments to the DOCAs to give effect to the pooling of the assets and liabilities into one entity, namely AAL, with the creditors of all companies being entitled to prove in AAL with the same right of proof and the same priority they had in the other Ansett Group entity.

It is submitted that the principles in relation to pooling are now well established. There is no doubt that it might be regarded as controversial in the manner I outlined earlier; controversial because creditors of one company are usually only entitled to a rateable share of the assets of their debtor, and so much is made clear by section 555 of the Corporations

Act. And most recently described in that way as controversial by Finkelstein J in the GE Capital case which is reported in 23 ACSR 696 at 702, and a copy of that decision is under tab 5.

HIS HONOUR: Yes, I am familiar with that case.

MS GORDON: If your Honour pleases. Notwithstanding that controversy, the Courts have recognised that situations arise where pooling of assets and liabilities is both just, equitable, if not essential, and that formulation was adopted by Finkelstein J in that case, that is the GE Capital case, at 702.

The third thing to note is that Part 5.3A of the Corporations Act is sufficiently broad consistent with authority to permit an arrangement binding two or more insolvent companies under which their assets and liabilities are pooled. An authority for that is found again in the decision of Finkelstein J in the GE Capital case, and also the decision of your Honour in re Hilton Stores.

A copy of that is under tab 9, and your Honour's analysis of it commences at paragraphs 19 and proceeds through to the end; with the critical paragraphs being paragraph 19 dealing with power, paragraph 21 dealing with the decision of Young J in Deane Wilcox v Soluble Solutions, again citing the decision of Young J in re Charter Travel at paragraph 22, and your Honour's conclusion in paragraphs 23 and 24 where your Honour acknowledges - correctly it is submitted - that:

> *Although the concept interferes with the rights of creditors and intrudes into the principle that in an insolvency situation the unsecured creditors of the company are entitled to a rateable or proportionate share of the assets of their particular debtor, in a situation of intermingling of assets and liabilities that there should be little complaint that some creditors will be substantially disadvantaged, whereas other creditors will be significantly advantaged by a pooling situation.*

HIS HONOUR: Yes.

MS GORDON: And your Honour then goes on to consider what would happen if pooling did not occur, in paragraph 24 in that case. The fifth proposition in relation to pooling is this. What I have described as this pragmatic solution which has been adopted by the courts has been adopted in what has been described as special circumstances, and special circumstances have been held to include the impossibility of determining the true debtors of each company, the impossibility of having to go through other mechanisms that are available. And it is submitted that in this case we clearly fall within that consideration, having regard to the way in which this group historically has operated and has continued to be operated.

And, finally, we pick up what your Honour had to say in re Hilton Stores; that although the concept of pooling does interfere with the rights of creditors, it has got to be in a sense, to adopt the US language, this balancing exercise between advantages achieved by pooling and the disadvantages to some, even if that is significant or substantial - I am adopting the language of your Honour. And here, as in re Hilton Stores, especially is that so because it is inevitable that all creditors will be worse off if pooling does not occur. And the inevitable

concepts of pooling that interest of particular creditors will be disadvantaged must be balanced against the very substantial advantages that have been outlined in the affidavit material.

HIS HONOUR: Yes.

MS GORDON: Now, that is a short walk through what your Honour is very familiar with: the concept of pooling, why it is and why it is that courts adopt what they have described as this pragmatic approach. Can I then deal with the position of the Ansett Group of Companies themselves. As your Honour has heard now, they seek it, the orders and directions that are set out in the attachment to the submissions, to maximise a return to the creditors as a whole and in fact have expressed the view that if the orders and directions that are sought are not made then it is the view of the administrators that the result would be contrary to the objective or primary objective of Part 5.3A, in other words, the return to the creditors overall would not be maximised.

This group went into administration some four years ago, between 12 and 14 September and at the time of the appointment of these administrators there were some 80 separate legal entities employing some 15,000 people with substantial annual payrolls, a huge domestic and international flight business, owning or leasing 133 aircraft, including three regional airlines, a freight and cargo business, travel agencies, ticket agencies, in respect of which much of their management, financial and treasury systems were actually centralised in New Zealand and in respect of which there are - and to any litigator this is just horror - 45,000 archive boxes stored in seven locations around Australia which are in disarray, but in disarray in circumstances where they were and remain incorrectly indexed and documents are missing, so the reconstruction is not even just an ordering, it is a - - -

HIS HONOUR: I take it no-one is seeking an order for discovery.

MS GORDON: That would be the most opposed application. And that is relevant. It is relevant because the mere task in the exercise of undertaking that itself is an exercise which itself indicates not only the historical size of the task, but the ongoing size of the task. At present the group under administration is comprised of 39 entities with two trusts. As a result of the administrator's extensive examinations and investigations they have undertaken in the four years since their appointment they proffer 13 reasons why it is appropriate consistent with the earlier principles about pooling that I have outlined, that pooling is both just, equitable and if not essential.

And what I want to do, if I might, your Honour, is divide those 13 reasons into two periods. The first is what I describe as the pre-administration period, and then I will deal with the post-administration period. I deal with the pre-administration period first. Historically - and the first reason is the historical way in which this group was conducted. Historically this Ansett Group has operated as a single business and not as separate entities.

HIS HONOUR: Yes. I have read the material about that, which finishes up how everything seemed to be centralised in New Zealand and the team was regarded as 24,000 employees, I think.

MS GORDON: And they are important factors. The other important factor is the cash question. And I say that for this reason. The treasury function was centralised in New Zealand and bank accounts were regularly swept between entities, so that - - -

HIS HONOUR: That is a curious expression, "swept", because - - -

MS GORDON: It is a banking expression, your Honour.

HIS HONOUR: Well, it might be a banking expression, but it conceals I think probably what I can only describe in biblical terms as a number of sins.

MS GORDON: Yes, that is true. But it is a term of - and you will have seen this from the AAE compromise material - a great debate about banks' powers to sweep and in certain circumstances, and it leads to very complicated legal questions.

HIS HONOUR: That depends upon what guarantees are in existence, I suppose.

MS GORDON: Well, that is another complicating factor.

HIS HONOUR: Even that doesn't resolve - - -

MS GORDON: No, it doesn't resolve it, your Honour, especially here where you have got ASIC orders and you have got three sets of deeds across guarantee as well. So, all I am saying, the cash position here is very interesting, because what it goes to show is that the very thing we seek to do here now in a post-administration period is precisely the steps that were taken pre-administration.

HIS HONOUR: Yes. Well, I guess this is the very week in which one should be concerned with the legality of sweeps, I suppose.

MS GORDON: I can't do better than that.

MR WILLIAMS: It is a judge's joke; you can never do better than that.

MS GORDON: That is exactly right.

HIS HONOUR: Meanwhile, back at the bank.

MS GORDON: The other interesting thing about the cash position in the bank accounts is that if you actually look at AAE which is the subject of the compromise and the one in which presently there is the proposal to deal with the claims between the banks and the Ansett companies. It was a special purpose vehicle set up to acquire and finance the acquisition of aircraft, but it had no separate bank account, and so you have got this - other entities in the group providing the necessary cash in order for the acquisitions to proceed.

HIS HONOUR: Without necessary documentation as to the relationship.

MS GORDON: No, your Honour. Now, I can take you through the other factors. There is the sharing of the employees, this is all pre-administration, and your Honour will have seen not only is there the fact that employees were shared, there is the difficulties

because of the way in that was accounted for was not done formally and to the extent it was done was done inconsistently. In other words, the administrators are given example in paragraph 28 where the manner in which the charge back was done for the sharing of capital from month to month for the same work was done at different rates, so that we have got complicating factors of even where they have taken steps to in effect create the charge back there is doubt about which entry in a sense is the correct entry.

In addition to the cash, the employees, there is the sharing of the assets and liabilities, and at first blush you might think, well, that is the simulator and a few trade marks. When you actually look at the list it includes everything from the sharing of fuel, the telephones, and the most basic things an entity would require to conduct its business, so that again you have got this - although I - as your Honour points out correctly, as a matter of legal analysis you have got a number of entities at an operational level that is really one entity with a number of divisions.

HIS HONOUR: But auditors have picked up a lot of these issues? Perhaps that is an unfair question to put to you without notice, but what was intriguing me as I was looking at the material over the weekend was a lot of the way in which the business was organised from a recording and a point of view I suppose the administrators would tell me wouldn't pass accountancy 1A, yet this was a very large organisation, it probably had, well, must have had auditors. Are these things not the subject of proper audit procedures? I guess I am dealing with something that is not relevant to today's application, but in the sense there is so much to be learned from this administration. I assume one day the administrators will write a postscript.

MS GORDON: Well, I think the first thing they would do would be publish MAK-14. Do you know what MAK-14 is, your Honour?

HIS HONOUR: Is that the one that hangs down from floor to ceiling?

MS GORDON: Yes, I love it. I have had it in my chambers all week. I mean, it is the first thing they should give to Corporations Law 101. I am serious. It is - - -

HIS HONOUR: It looks like an ..... diagram, actually.

MS GORDON: It is beautiful. Your Honour, that is a good example of the complexity of a group that is structured in the way it is, and - - -

HIS HONOUR: But complexities like that conceal more than they expose.

MS GORDON: Well, that is a consequence of the complexity, inevitable.

HIS HONOUR: I am sorry, I think I have digressed.

MS GORDON: No, that is fine, your Honour. I have dealt with the cash, the employees, the assets and liabilities being shared. There were complex leasing and financial arrangements in relation to the aircraft. The AAE not having its own bank account but being the special purpose vehicle for the acquisition is a good example of that.

We have got the treatment of the group as a whole for taxation purposes, which itself is important, and as I said to you at the outset, what this application in substance seeks to do is to restore the group to, in effect, what really is its true position, and - - -

HIS HONOUR: To restore it to a position which it shouldn't have been in.

MS GORDON: Well, to a position it should have been in. That is, one entity with a number of divisions. As a matter of substance, that is what it is. Now, I understand that as a matter of legal analysis, because of the way in which it is set up, that is not right. But in substance that is what it is. In addition to those matters in the pre-administration period can I identify a number of others? The charge-backs in this pre-administration period, as a result of the group operating as it did, are such that as is pointed out by the Administrators, they have failed to levy them in a way you would expect them to be levied for the items I have identified. That is, cash, the sharing of the assets, the sharing of the employees, and the like.

The cost to the Administrators of determining not only, (a), whether they should have been levied, and if so the amount of the levying of those charge-backs, is significant, both in term of time and costs. One consequence of pooling is that that task is avoided. The consequence of not pooling is not only is that task required to be done, but necessarily no-one could undertake at the end of it to guarantee, even to a level of materiality, that that task could be accurate or fair. Now, that itself is a relevant consideration in relation to that pre-administration period. Add to that the following fact, and that is, as your Honour will have seen there is great uncertainty about which of these Ansett entities owned the assets.

HIS HONOUR: Yes. I follow that material.

MS GORDON: And that relates not only to what I will call real estate, but also the aircraft. And also the information technology that was the subject of much dispute with Air New Zealand. The fourth thing that needs to be identified in relation to the pre-administration period are the deeds of cross-guarantee.

HIS HONOUR: Yes. I am familiar with those.

MS GORDON: And your Honour will notice that there is three of those, affecting different entities. So in relation to a pre-administration period there are those matters that we rely upon in order to establish that not only is pooling just, equitable, but it is essential for the reasons I have outlined. Can I come to the post-administration period? In the post-administration period there have again been the use and sharing of assets between Ansett Group companies, and if the assets - sorry, if these entities were not to be pooled, then there would be significant time and costs incurred in seeking to raise those charge-backs for the use of assets between entities in the post-administration period.

The second thing is in addition to those charge-backs there would need to be an apportionment of certain administration costs. So far these costs have been funded out of AAL, which is the entity in which we seek to pool. If the entities are not pooled, the administration costs would need to be apportioned between the 41 entities that remain.

HIS HONOUR: On what principle?

MS GORDON: Well, that the apportionment again would have to be a process of - the extent to which an issue considered was relevant to either 1, 2, 5 or 41 entities, there would have to be some sort of apportionment process undertaken. Some view taken as a matter of, in effect, use and fairness as to whether or not it was entity 1, 2, 3, 4 or 41. In relation to tax issues, if pooling does not occur, then again there would be various tax issues that would arise between the various Ansett Group entities which would need to be resolved, and again, that would be a costly exercise.

One of the largest problems for post-administration period is what I will describe as the costs of the proof of debt processes. At the moment, and this is set out in paragraphs 100 to 104 of the main Korda affidavit - - -

HIS HONOUR: Yes. I have read that.

MS GORDON: The next factor in the post-administration period is the apportionment of the MOU moneys. As your Honour will recall, your Honour gave judgment in relation to the MOU matter.

HIS HONOUR: That was hard enough between Ansett and Hazelton.

MS GORDON: You got it. That is the point.

HIS HONOUR: Well, I didn't get it.

MS GORDON: Well, that is the point. The point is that assessing the value, as your Honour found, of each of the claims of each of the remaining entities to the MOU moneys would be a logistical nightmare. As your Honour pointed out, trying to get the Hazelton disputes, between the Administrators of Hazelton and the Administrators of Ansett was a big enough issue. So that is an issue which arises in the post-administration period which must be given, it is submitted, a huge amount of significance, because the amount at issue is still quite large.

As a result of a request made by Mr Williams for the Contradictor, as I pointed out to your Honour earlier, the Administrator sought to allocate a cost - an estimate of what it would cost to resolve each of these issues, and they are set out in the third Korda affidavit of 30 September '05 at paragraphs 40 to 49.

HIS HONOUR: Yes.

MS GORDON: I don't propose to take your Honour through each of those, unless you want me to.

HIS HONOUR: No. You don't need to do that.

MS GORDON: The primary position is that if there were to be separate administration costs the range - and this is the additional cost to the cost to complete - would range between 9.9 million and 24 million. Now, that is an estimate. That has to be the minimum, but it is a huge cost that is likely to be incurred if there are separate administrations. Now, if you look at the test and adopt the language the US use of the reliance test as a single economic unit, it is submitted that it is clear that is precisely what happened in this case.

Secondly, if you adopt the language of this entanglement test, that is the inter-relationship of the group is so hopelessly inter-related that to disentangle it would be both time and cost prohibitive, then it is clear that that is the position in this case. And if you get to the third and final test which they describe as the balancing test - that is, do the benefits of the consolidation outweigh the harm it would cause creditors - it is submitted that it does, and it is that matter I want to now return, if I may, your Honour.

Can we say at the outset that the Administrator's knowledge, as we must, that pooling by its very nature necessarily will disadvantage some creditors. And as I said to your Honour, the question is really a balancing exercise, having regard to the fact that we have got this single economic unit and we have got the extent to which we have of the entanglement. The Administrators prepared tables setting out their estimates of the distributions to be made to priority and non-priority creditors, and they were set out on pages 7 to 11 of the second Korda affidavit. We also, for the sake of completeness, your Honour, attached them to the outline of our submissions.

HIS HONOUR: Yes. I have got those.

MS GORDON: Can I say a number of things about these tables, your Honour? The first is that the estimated distributions reflect the Ansett DOCA priority regime.

HIS HONOUR: Reflect the?

MS GORDON: Ansett.

HIS HONOUR: Yes.

MS GORDON: DOCA priority regime. They show estimated distributions, first after the pooling of the Ansett Group; and secondly, as though pooling doesn't occur. The third thing to say about them, your Honour, is that they were prepared based upon a number of assumptions, and those assumptions are set out in paragraph 198 of the second Korda affidavit of 12 September.

HIS HONOUR: Paragraph 198, did you say?

MS GORDON: 198, your Honour.

HIS HONOUR: Thank you.

MS GORDON: And the particular assumptions that are made are then set out in subparagraphs (a) through to (l) of paragraph 199.

HIS HONOUR: Yes. I remember those matters.

MS GORDON: And I don't think it is necessary to take your Honour through each of those assumptions. What is important though is to indicate some of them, because they recognise the importance of the way in which the tables have been prepared. The first is that in relation to the inter-company loan positions, the Administrators used the 2000 and 2001 audited accounts.

HIS HONOUR: The 2000 audited and 2001 unaudited, I think.

MS GORDON: Yes, your Honour. Sorry. You are right to correct me. The second thing is that AAL is assumed, for the purposes of these tables, to be the owner of the head office. Thirdly, the MOU moneys, the moneys that were the subject of the recent exchange between your Honour and I about the post-administration period, have not been apportioned. Nor have the post-administration costs, and in relation to the Commonwealth's position, all outstanding matters between the Ansett Group and the Commonwealth are assumed to be settled, and my learned friend, Mr Ginnane, for the Commonwealth, this morning identified the Commonwealth's position in relation to that.

I am instructed that given the state of the affairs of the Ansett Group, the deed Administrators consider there is reasonable prospect that the Commonwealth, and in particular the ATO, may agree to resolve all post-administration tax issues so as to permit pooling to proceed as contemplated without the imposition of any further tax, and that is presently the subject of discussion between the Commonwealth and the Administrators.

HIS HONOUR: Yes.

MS GORDON: Now, taking into account all those assumptions, can I move to deal with the effect on the creditors of pooling? And I want to deal first with what I will describe as a non-asset holding entities. That is, not the entities that are listed on distribution table number 3. Does your Honour have that table?

HIS HONOUR: This is one that is also annexed to your submissions, is it?

MS GORDON: Yes, it is, your Honour.

HIS HONOUR: Distribution table number?

MS GORDON: 3.

HIS HONOUR: Yes, I have that.

MS GORDON: Now, I am blind, and I asked my instructors to give me an A3 version so I could read it. Would you like an A3 version?

HIS HONOUR: Is it in larger print?

MS GORDON: Yes, it is.

HIS HONOUR: If you have a spare one it would be an advantage.

MS GORDON: If your Honour pleases.

HIS HONOUR: Thank you for that.

MS GORDON: Now, I am about to deal with those entities that are the non-asset holding entities. So this is not the ones that are listed on distribution table 3. These are the

balance of the entities in the Ansett Group who don't hold assets. And the position of creditors of those Ansett Group companies is that they will be unaffected by pooling. And they are unaffected by pooling, your Honour, because there are no priority creditors in those non-asset companies. All the priority creditors are in the asset holding companies listed on distribution table 3, and AAL.

So other than AAL and the asset holding companies there are no priority creditors in the other entities, and in relation to the non-priority creditors in those entities, they will receive zero distribution whether or not those entities are pooled or not pooled. So the primary position to understand in relation to the non-asset holding entities is that they are unaffected. That is, the creditors are unaffected by pooling. The Contradictor says in paragraph 7 of his outline:

> *The creditors will vote for pooling because without it they will receive no distribution, and pooling offers some distribution.*

With respect to my learned friend, that is incorrect, and it is incorrect because they will get nothing whether the entities are pooled or not pooled. However, it does not follow that the way in which the Administrators vote, to adopt the words of the Contradictor, is of little moment, which is what he says in paragraph 7. With respect to our learned friend, it is not of little moment because, as I have sought to outline before, pooling will save enormous separate administration costs, and time and expense, and that has not only cost consequences if they are not pooled, but also delay, and that is important for the payment of the employees.

So it is submitted that in relation to the non-asset holding entities the creditors are unaffected by pooling, but the advantages of pooling are significant, and they are significant for the group of creditors of the Ansett Group companies as a whole.

HIS HONOUR: Yes.

MS GORDON: Can I then move to the asset holding entities? These are the seven entities which are listed on distribution table 3, and these entities, with the exception of AAL, have a surplus of assets over employee entitlements. If there is no pooling, then what distribution table number 2 shows, that on a pro rata basis to the non-priority creditors of those entities, and they fall into - - -

HIS HONOUR: I am sorry. Start that again. I lost my train - you are now on to distribution table number 2.

MS GORDON: I am, your Honour.

HIS HONOUR: Thank you for that. There is two scenarios there. Is that right?

MS GORDON: Yes, and I want to look at - for the present purposes it doesn't really matter. But can I take scenario 2, which assumes the AAE compromise and no pooling. It makes the same point, your Honour. what your Honour sees there, that the funds available after the payment of the priority creditors, which is column 1, is $72.41 million dollars. Does your Honour see that?

HIS HONOUR: Yes, I do.

MS GORDON: And that is the surplus after payment of employee entitlements in those entities.

HIS HONOUR: Yes.

MS GORDON: And what your Honour sees, that as a result of a pro rata distribution to the non-priority creditors of those entities - this is the asset holding entities - you have AAL and AAHL are the first two groups, and the third group are what are described as third party non-priority creditors, or what I will call trade creditors.

HIS HONOUR: I am sorry. Are you now reading from table 2 again?

MS GORDON: I am, your Honour. So if you come across to scenario 2 on the far right - - -

HIS HONOUR: Yes.

MS GORDON: - - - you will see that the intended recipients if it is not pooled - - -

HIS HONOUR: I see.

MS GORDON: - - - are AAL - - -

HIS HONOUR: Yes.

MS GORDON: - - - to 19.73 million, AAHL to 17.16 million, and $35 million would leave the group and go to third party non-priority creditors.

HIS HONOUR: Yes. I follow that.

MS GORDON: Now, in contrast, after pooling, creditors affected fall into two groups.

HIS HONOUR: I am sorry. Again, remind me. I am a bit slow on this. Distribution table 2 is before pooling.

MS GORDON: It is, your Honour.

HIS HONOUR: Yes. Now, you are taking me to - - -

MS GORDON: Back to table 3 - - -

HIS HONOUR: Yes.

MS GORDON: - - - which deals with the four scenarios. In general terms I will explain to your Honour which two groups are affected, and I will show you where that appears on the chart. The two groups that are affected in the Asset Holding Companies, because they are the only companies' creditors that are affected by pooling, fall into two groups. They are the third party non-priority creditors, the trade creditors; that is the first group. And the second group is a small group of priority creditors who are employees that Mr Star was

talking about. And the best way of demonstrating that, your Honour, is if you take replacement distribution table number 3, you will see under the heading: Pooling with AAE compromise, scenario number 1.

HIS HONOUR: Yes.

MS GORDON: If you come down to the - the first block across the top where it has got: Distributions to employees; does your Honour see that?

HIS HONOUR: This is a - - -

MS GORDON: They are what I called the priority creditors, so I have written priority creditors in there to remind me. The block underneath that: Distributions payments to third party creditors, are non-priority creditors. So that is how you work out that there is these two groups and how the two different groups are affected. If there is pooling with the AAE compromise, your Honour will see that other than AAE in the non-priority creditors box none of the third party creditors receive a distribution. Does your Honour see that?

HIS HONOUR: Yes, I do.

MS GORDON: And I will deal with AAE in a moment. The priority creditors at the top, that is the employee parts of those five asset holding companies, receive distributions. In the case of AIL of 100 cents in the dollar for $160,000 maximum payout. In the Pelican trust of 92 cents in the dollar in respect of an overall payment to employees of 230,000. Kendell 98.4 cents in the dollar, total payment to creditors is 9.21 million and so on, the major one being AAL which is the major employer, where 9431 employees will receive 83.98 cents in the dollar out of an overall payment to employees of $629,310,000. Does your Honour see that?

HIS HONOUR: Yes, I do.

MS GORDON: So that is scenario 1, pooling with the AAE compromise. The way in which you work out how it is those two groups are affected is by comparing scenario 1 with scenario 2. And I want to take, if I may, the priority creditors first. In relation to AIL, your Honour will see that the position is unchanged. A hundred cents in the dollar, maximum payout of 160,000. Does your Honour

HIS HONOUR: Yes, I do.

MS GORDON: In relation to the Pelican trust where there are seven employees, they are worse off in this sense, they are worse off because they go from receiving a hundred cents in the dollar to 92 cents in the dollar. So seven employees will receive eight cents in the dollar less for a maximum payout of $250,000; and they go down from 250 to 230. In relation to Kendell, again the employees go from a hundred cents in the dollar down to 98.4 cents in the dollar, that is 1.6 cents in the dollar; and the payout, the overall return goes down from 9.36 million to 9.21. A similar position with Show Group in relation to eleven employees. But the majority of the employees which are in AAL go up from 82.15 cents in the dollar to 83.98 cents in the dollar, and that is 9431 of them; and the overall payment to them increases from $615,580,000 to $629,310,000.

HIS HONOUR: Yes.

MS GORDON: So as we were putting to your Honour earlier, we have 84 creditors, priority creditors, namely 84 employees who are $280,000 worse off as a result of pooling being employees of the Pelican trust, Kendell and Show Group balanced against the 9431 who are better off to the extent of $14 million.

HIS HONOUR: Yes, I follow that.

MS GORDON: Can I then move, please, to deal with the non-priority creditors. So what I have said up till now about the adverse effect of pooling has only been in relation to the priority creditors in the asset holding entities. I want to now deal with the non-priority creditors in these asset holding entities. And again, as your Honour will have seen, under pooling the distributions are zero except for AAE. Does your Honour see that?

HIS HONOUR: Yes.

MS GORDON: Can I then come to column 2 which is no pooling with the AAE compromise, and what your Honour will see is that in AAHL there are 31,296 third party non-priority creditors who will be worse off to the extent of $13.5 million but only to the extent of .37 cents in the dollar, so that is less - a third of a cent in the dollar.

HIS HONOUR: Yes.

MS GORDON: Secondly, 245 third party non-priority creditors of the Westsky trust will have a maximum reduction of 2.04 million, again about a third of a cent in the dollar. Similarly in AIL, about a third of a cent in the dollar for a maximum payout of 750,000. In the Pelican trust there is 79 of them maximum - - -

HIS HONOUR: Yes, I follow these figures.

MS GORDON: If your Honour pleases. So in relation to the 84 priority creditors adversely affected in the way I have outlined, the creditors, being the third party non-priority creditors, totalling some 33,000 are to be adversely affected by pooling. Balanced against those adverse consequences, the following things need to be kept in mind. As is set out in distribution table number 4 - - -

HIS HONOUR: Yes.

MS GORDON: - - - priority creditors will receive $22 million more if pooling occurs than would be the case if pooling did not occur. And that $22 million is made clear by comparing the 626.2 million group employees receive with no pooling compared to the 639.7 million - does your Honour have those two figures?

HIS HONOUR: Yes, I do.

MS GORDON: It gives you a positive 13.5 million on pooling. And SEES, that is the Commonwealth, will get an extra 8.5 million representing the difference between 37.1 million and the 298.6 million in column 2. However, although that amount would appear to be to the benefit of the priority creditors, it cannot be said that the same adverse

consequence - that is $22 million adverse consequence - flows to the non-priority creditors because, as I said to your Honour, one of the essential assumptions prepared and - used in preparing these distribution tables and charts is that they don't take into account the additional separate administration costs, and they don't take into account anything caused by the delay that would necessitate pooling - sorry, non-pooling.

The third thing is they don't take into account the operations of the provisions of the DOCAs dealing with non-cost effective claims that your Honour alluded to earlier, and that is that claims where the dividend for the amount to be received is less than $25 are extinguished by the DOCAs, and as your Honour knows, it is the amount of the dividend, not the amount of the claim. For example, if you go to AI - sorry, I withdraw that. To AAHL, where the downside - - -

HIS HONOUR: Which table is this again?

MS GORDON: On table 3.

HIS HONOUR: Yes, I have that.

MS GORDON: Where the expected dividend was 37 cents in the dollar if there was to be no pooling, in order for a - - -

HIS HONOUR: 37 cents, or .37?

MS GORDON: Sorry. I withdraw that. .37 cents in the dollar. You were right to correct me. A deed creditor of AAHL would have to have a provable claim worth at least, on my calculation, of about $7000 in order to avoid extinguishment. Now, these claims here, this is the 33,000, don't take into account those extinguishments.

HIS HONOUR: Yes. I see.

MS GORDON: The fourth thing to note, your Honour, is the distribution tables don't take into account the claims of the deed creditors who are the Global Rewards or Golden Wing creditors, and unless it is necessary I won't take your Honour through that. As your Honour knows, each of the Frequent Flyer Global Rewards points were given a value, and in order for them to be able to prove in the way in which it is presently proposed you would need to have in excess of about 3.47 million Global Rewards points, and so far as the Administrators are aware there is only one person who has or had that many Global Rewards points, and it wasn't me.

HIS HONOUR: I should say for the record it wasn't me either.

MS GORDON: So in respect of the creditors adversely affected by pooling you have got two groups. You have the 84 employees, to the extent to which they are adversely affected; balanced against the overall benefit to 9400, and in relation to the non-priority creditors, yes, there is a large number of them. But on balance and average it is about a third in cents in the dollar for over 95 per cent of them, against the benefit to the payments to the employees.

HIS HONOUR: Yes, I follow those tables.

MS GORDON: Can I deal with a position adopted by the Contradictor in relation to these asset holding entities which is set out in paragraph 8 of his helpful outline? He makes two contentions. The first is that creditors will be worse off. That is true. But it is submitted that the context and the advantages achieved as a result of pooling, both in terms of the group as a whole and the particular entities cannot be ignored. The second contention our learned friend makes is that if you put to one side the additional costs of the administration and the significance of the inter-company transactions, creditors acting rationally would vote against pooling.

It is submitted that contention is also flawed, and it is flawed for the following three reasons. First of all, one cannot put to one side the additional costs of the administrations. They are massive, and likely to consume a large part of the additional projected $24 million cost to complete, on top of that which has been set aside. So that the proposal that you would somehow wipe from your mind that consideration, it is submitted, is unrealistic.

Similarly, it is unrealistic to ask you to put to one side the significance of the inter-company transactions, and at the request of our learned friends, the Administrators allocated what is described as these inter-company transactions between each of the asset holding entities. In other words, we worked out whether or not these inter-company transactions related and were relevant to each of the asset holding entities, and that is set out on page 16 of the affidavit sworn by Mr Korda of 13 October.

HIS HONOUR: Page 16?

MS GORDON: Yes, of the affidavit of Mr Korda, sworn on 13 October. Does your Honour have that table?

HIS HONOUR: Yes, I do.

MS GORDON: There, what the Administrators did to the best of their ability, was to identify the 12 issues by reference to whether or not they were an issue in the administration of the affairs of each of the asset holding entities, including AAL, and as they set out in paragraph 61, where it was impossible for them to know whether or not it was going to have an effect they inserted the word "maybe". And as your Honour will see, each of the issues relied upon and described as these inter-company issues arose in the majority of the asset holding entities, not one entity did not face any issue, and most faced all of them.

So in other words, one can't carve out the asset holding entities and seek to treat them differently, and that is not surprising, given the way in which these companies have both been run, both pre and post-administration. The third issue which we submit is contrary to the assertion put by our learned friends is that most creditors are unlikely, it is submitted, to vote against pooling, and we say "most" because - - -

HIS HONOUR: Most creditors will what?

MS GORDON: Are unlikely to vote against pooling, contrary to our learned friend's submission, and we say "most" because, as I have taken your Honour to, over 95 per cent of them would only receive about a third of a cent in the dollar, at most, if these entities

were not pooled. And acting rationally, one wonders why they would pursue such a claim, having regard to the size of these claims.

HIS HONOUR: They may say it is a matter of principle.

MS GORDON: They might. But acting rationally, I have never known - - -

HIS HONOUR: Rational people to act on a basis of principle?

MS GORDON: No. Of course I have. But there is - in the context of - - -

HIS HONOUR: Self-interest would probably be dominant, I suppose, in that area. If there is nothing in it for them they don't want to mix in.

MS GORDON: And if there is nothing in it for them, in the sense that they have got to - and the potential maximum amount is a third of a cent in the dollar, then it is submitted, having regard to the fact that the majority of them are going to be subject to the extinguishment anyway but for the reasons I outlined to your Honour.

HIS HONOUR: Yes. I take your point.

MS GORDON: If your Honour pleases. What the Contradictor does is he takes Show Group - if your Honour has table 3 there I will work your Honour through this. My learned friend takes Show Group as an example of the effect of pooling on these asset owning companies, and there are a number of facts and matters that need to be stated in relation to Show Group. As your Honour will have seen, it is clear that in Show Group there are - sorry. I have got the wrong table. If your Honour has MAK-22 - - -

HIS HONOUR: Ms Gordon, for purely administrative reasons, how long are you going to be?

MS GORDON: I wouldn't have thought - I would have thought another hour, probably.

HIS HONOUR: Yes. And how long do you think - will any of the other people, other than Mr Williams, take any significant time?

UNIDENTIFIED SPEAKER: No, your Honour.

HIS HONOUR: Mr Williams, have you got a tentative, preliminary, non-binding view as to how long you will be?

MR WILLIAMS: An hour and a half, your Honour.

HIS HONOUR: Yes. Well, go to 1 o'clock then.

MS GORDON: If I can ask your honour to go to MAK-22 your Honour will see there, if your Honour follows through the Show Group position to the end of the chart, it has total intercompany debt of some $22.5 million. Does your Honour see that?

HIS HONOUR: It starts off with 8.3 and then is 14.1 - - -

MS GORDON: It is 14 million and then there is 76,000 for Bodas and it totals to 22.5 million.

HIS HONOUR: I am sorry, I am not sure I am looking at the right table. Which sheet are you referring to in MAK-22?

MS GORDON: Mine is in three pages, your Honour.

HIS HONOUR: Yes.

MS GORDON: Do you have three pages?

HIS HONOUR: Yes, I do.

MS GORDON: On the first page, under Show Group, Ansett Australia Limited owes Show Group 8.36 million.

HIS HONOUR: Yes.

MS GORDON: If you keep going across the page, AAHL owes Show Group 14.131 million.

HIS HONOUR: Yes, I have picked that up.

MS GORDON: Over the page, Bodas owes Show Group 76,000.

HIS HONOUR: Bodas owes - - -

MS GORDON: Show Group. Do you see Show Group is listed again?

HIS HONOUR: I see that now, yes.

MS GORDON: And then if you go across the page you have got nothing on that page until the next page where it is totalled at $22.569 million.

HIS HONOUR: Yes, I follow that now.

MS GORDON: Now, it is true that the majority of the creditors in Show Group are related in the sense that they are related Ansett parties, and it is true as my learned friend states that it would be possible in those circumstances for the administrators to determine the outcome of pooling. And it is true, as I have pointed out to your Honour before, that if the entity is pooled your Honour sees from distribution table 3 that the effect will be that the non-priority creditors of Show Group, that is the 673 of them, will be disadvantaged because they will receive no dividend rather than a dividend of 27.62 cents in the dollar. Does your Honour see that?

HIS HONOUR: Yes, I do.

MS GORDON: But there are a number of facts and matters that need to be borne in mind in considering that. The first is that as your Honour and I discussed earlier this morning the conduct and outcome of those meetings that would ultimately consider pooling are subject to review under section 445B of the Act and it is submitted that if such application were made then the Court would not only have the benefit of the material that was put before the creditors, but also the voting patterns. In other words, the views of other creditors.

The second point is to reiterate that although the reduction is some 27.62 cents in the dollar, that is the maximum amount, because it fails to make any allowance with separate costs of the administration if the companies were not pooled, which is one of the assumptions on which the tables were prepared.

And thirdly it is submitted that in the context of the administration of the group as a whole the amount that is the extent to which these creditors are disadvantaged should not be considered to be significant, and as we have said, the non-priority creditors will miss out to the extent of a maximum of $1.86 million against total third party claims of $6.75 million. That has got to be considered in the context of the total non-priority creditors of the group of some $3.7 billion.

HIS HONOUR: Yes.

MS GORDON: And the reason why the figure of 3.7 billion doesn't appear on distribution table 3, which is a question I asked when I was preparing this, is because one creditor will have claimed in more than one company because of their alleged debts in relation to the same debt for more than one entity.

HIS HONOUR: Yes, I follow.

MS GORDON: And that is why it says 4.8 billion down the bottom. The fourth point to make, again in the context of the overall group, is that the reduction in dividend that the priority creditors of Show Group will be disadvantaged, and your Honour will see up in the top box they go from 100 cents in the dollar to 87.36 cents in the dollar is that, and it is about 12 cents on my calculation, is that they are 11 employees disadvantaged whereby their total payout is reduced from 870,000 to 760,000. It is a reduction of 110,000 or a maximum of about $10,000 per employee.

And two things need to be said about that. First of all, they are better off than the 9431 employees in AAL, which was the major employer, as your Honour will see, and they must be considered in the context of the overall claims of 9500 employees generally. So, in view of those facts it is submitted that the contention that the creditors would receive a substantially lesser dividend is passed is not correct, and secondly, it is not correct having regard to the context in which it appears vis a vis the whole group, whether you are looking at priority creditors or non-priority creditors. Can I then move to deal with this assertion put by our learned friend that the views of the administrator should be given little or no weight.

HIS HONOUR: Yes.

MS GORDON: There is no doubt that both the MOU, the SEESA Deed and the DOCAs contemplated pooling that might be available in the circumstances of the administration of this case, and it is no doubt that contractually the administrators would take all reasonable steps to propose and recommend entering into a DOCA which would seek to pool the assets and liabilities. That is not to say that consistent with the administrators' statutory obligations that they would stand before your Honour ignoring those obligations and recommend pooling without giving it serious consideration.

HIS HONOUR: Well, they verified on oath the reasons why in a substantial way it is not suggested, and this doesn't - it is no grounds for doing so - that they should be cross-examined on their oath on those matters. I don't know that that is really an issue that you need to pursue to that extent. The material is before me, and it is true they have entered into early contractual obligations, but they haven't just relied upon their contractual obligations. They have sought to put substantial reasons before the Court.

MS GORDON: Yes, and that is all I seek to state, that there was no doubt there were contractual provisions dealing with it which were entered into at the time for the reasons specified. There is no doubt that the administrators have now put before you material in which they recommend pooling regardless of those contractual obligations and which would justify that course.

HIS HONOUR: All it means is that you look at their reasons, I suppose, with a greater degree of examination than you might otherwise do so.

MS GORDON: Or - and the next submission we would make was that even if you were minded to put to one side the views of the administrators, the circumstances of this case are sufficient on the material put for you objectively determined to warrant pooling being both just, equitable and we would submit, essential, having regard to the way in which this group was administered.

HIS HONOUR: Yes. Thank you.

MS GORDON: If your Honour pleases. Against that background, your Honour, it is submitted that it is in the best interests of the creditors of the group as a whole for pooling. No creditor has objected except for the Contradictor, despite being provided with notice and an opportunity to attend. Other interested parties support pooling.

HIS HONOUR: Yes, well we have been through all this earlier.

MS GORDON: Can I then move to deal with the question of the voting at pooling meetings, your Honour. As your Honour will have seen that at each pooling meeting the administrators intend to demand a poll in relation to the votes on the pooling resolution by reference to regulations 5.6(21) and 5.6(23). I don't propose to take your Honour, your Honour is aware of those regulations.

Consistent with their capacities as administrator which is identified in regulation 5.6(23), they intend for the purpose of voting at those pooling meetings to admit the Ansett Group inter-company debts and to vote those debts in favour of pooling. Now, a number of issues arise in relation to that: the ability of them to do that, the exercise of the casting vote, and the exercise of the proxy vote. It is submitted that one of the reasons for this

application in the form in which it was made was that the inevitable position was that the administrators, just like trustees, were in positions of conflict that could not be resolved without seeking directions from the Court; and seeking directions from the Court, having first explained not only the existence of the problem, the reasons for it, the manner in which they propose to resolve it, the notice that had been given, and the protection mechanisms that were in place for the creditors themselves at those meetings.

And against that background the administrators have done that, it is submitted. First of all they have made the application. They had explained the reasons for it. They had explained the manner in which they proposed to deal with it. They have given notice about it. And they have identified that this is the appropriate procedure to adopt in order to provide two things. First of all, that it is still to the extent possible under the control of the creditors and, secondly, they have got the protection mechanisms provided by sections 445B of the Corporations Act.

The position adopted by the administrators is really not very different from the manner your Honour noted in the continue to conduct the business decision - that is the decision back in the early stages of the administration - where the administrators said the protection for the steps they were about to take in circumstances in which they are entitled, it is submitted - and your Honour deals with this paragraph 44, the decision under tab 1 to that protection where they have made full and frank disclosure, both as to the existence of the problem, the reasons for the problem and how they propose to deal with it.

Against that background, although the Contradictor is right to assert that there is a body of authority which explains the manner in which administrators ought to exercise the casting vote, it is submitted that the comparison drawn by the Contradictor is largely illusory, and it is illusory because a primary consideration for the administrator consistent with the authorities is to exercise the vote in the interests of the creditors as a whole. Here, because of the way in which it is submitted this group of companies should be considered, that is precisely what they are doing. And so the contention put against the administrators is, as we say, largely illusory.

Now, it is put against us that the creditors in Show Group have much to gain by keeping Show Group outside of the pooled group. That is asserted against us in paragraph 19. Again it is submitted that is wrong. As we have shown - sought to show your Honour, at worst the 673 would lose up to 1.86 million; that is about $2700 per creditor on our calculation without any allowance having been made for the separate administration costs, the delay and the uncertainty. The 11 priority creditors would be 12 cents worse off. And again it is submitted for the reasons we have outlined earlier, that is not a substantial reduction in the context of the overall way in which the other creditors are dealt with.

It is then put against us that the exercise of the casting vote by the administrators is likely to be overturned by a court under section 600B of the Act. Again it is submitted that is misconceived for three reasons. First, in the present case if the submissions of the administrators are accepted, this approach both in terms of process and also in terms of procedure will have the imprimatur of the Court. That is the very reason why we have made the application in the way we have. Secondly, that imprimatur necessarily carries with it the consideration of the merits of the application for pooling.

Thirdly, it is submitted that consistent with the authorities, it cannot be said that the administrators are not voting in the interests of the creditors as a whole, they are. And, finally, if an attack had been made in a hypothetical way that the Contradictor has put against us, it is submitted it would be open for the administrators to seek and it is submitted in the circumstances to have obtained relief either under sections 447A and D so as to ensure that the operation of Part 5.3A was altered in order to achieve its principal objective, namely maximising the return to creditors.

Now, in a sense it is put against us this morning it is a question of democracy. Yes, it is a question of democracy, but it is a question about working out what was the appropriate procedure and steps to be taken in the circumstances. And here it is imported now by ASIC and others it is submitted that this is the appropriate course, but there are protection mechanisms built in so that disenfranchised creditors can, if they are so minded, seek relief in the appropriate way.

Can I then move to deal with the proxy vote, please, your Honour. And this is another basis upon which the Contradictor challenges the manner in which the administrators intend to vote. He provides a number of factual bases in paragraph 22 of his submissions. Can I deal with each of them. The first contention put against us is that non-priority creditors AAL and AAHL will receive no dividend from Show Group if pooling proceeds.

That is not correct, your Honour. If there are separate administrations, because of their related party creditor status, they will get about 80 per cent of the distribution. And that is made clear by the table on page 17 of the fourth Korda affidavit. AAL and AAHL will get 24 million out of the 32 million which is about 78 per cent.

So if no pooling, they get four fifths. If they are pooled, they will receive 100 per cent of the distributions without the separate costs of the administrations not only of Show Group but also no separate administration costs for AAL and AAHL. So the first basis upon which our learned friend relies is factually inaccurate.

The second contention is that insofar as there may be adjustments against Show Group for inter-company transactions if there is no pooling, then AAL where most of the employees are would obtain a greater share. Again that is not correct because the lion's share would go to AAHL which is made clear by MAK-22. And in the circumstances the assertion that voting in relation to Show Group would be contrary to the interests of AAL and AAHL is not correct. It is clearly in the interests of both of them to vote for pooling.

HIS HONOUR: Yes.

MS GORDON: That deals with that aspect of the matter. What I propose to do now is to move to the orders and directions in relation to the pooling question. Does your Honour wish me to start that now or do you want me to - - -

HIS HONOUR: The order, the draft orders you mean?

MS GORDON: Yes, your Honour.

HIS HONOUR: Let me read those over lunch time.

MS GORDON: If your Honour pleases. What I put those to one side and deal with the notice questions?

HIS HONOUR: How do you mean?

MS GORDON: You said you were going to - - -

HIS HONOUR: The notice question in the orders?

MS GORDON: No, no. Yes, your Honour. Do you want to deal with that as well by reading it over lunch time?

HIS HONOUR: Yes. Let me refresh my memory from the orders in light of what you have said this morning.

MS GORDON: If your Honour pleases.

HIS HONOUR: We will adjourn until 2.15.

ADJOURNED **[12.52pm]**

RESUMED **[2.13pm]**

HIS HONOUR: Ms Gordon?

MS GORDON: Your Honour, can I mention five matters briefly, which arose out of this morning, namely - the first is that I forgot to mention that the web sites that have been maintained by way of notification have been updated as documents have been filed, and as of last Friday were complete. That is, everything that is before your Honour is on the web sites.

HIS HONOUR: Thank you.

MS GORDON: So at the time the affidavits were sworn they dealt with the material that was then in existence.

HIS HONOUR: Yes.

MS GORDON: Secondly, we have made inquiries over lunch and none of the web sites have a hit detector, I am told. The third thing is that I put to your Honour this morning that AAL had paid the costs, and therefore there would need to be a charge-back and an apportionment of costs in relation to post-administration expenses.

HIS HONOUR: Yes.

MS GORDON: What I am told I should have said is that it has paid the costs of the general matters. For example, the costs of this sort of application. If there are specific costs for specific entities, then they were dealt with by that entity.

HIS HONOUR: I think there was one example of one of the companies - I think it was AAE - that was asset rich and had no money in order to - - -

MS GORDON: Had no bank account.

HIS HONOUR: Had no bank account, and in order to pay insurance and preserve assets - - -

MS GORDON: That is exactly right, your Honour. That is a good - - -

HIS HONOUR: - - - money had to be paid by someone else.

MS GORDON: That is a second basis. But in terms of what I call the more general charges, for example, costs of this sort of application, and they have been borne by AAL and there would need to be an apportionment.

HIS HONOUR: Thank you.

MS GORDON: In relation to non-priority third party claims, when we were considering the context of the extent to which creditors would be disadvantaged, and I said to your Honour that the small amount of money needed to be balanced against the overall pool of third party non-priority creditors, I am told it is now $4.6 billion.

HIS HONOUR: What is 4.6 billion?

MS GORDON: The total third party non-priority creditors. And finally, your Honour raised with me your concern about the effect that a decision in this case about pooling might have on future administrations.

HIS HONOUR: Well, that was really a - - -

MS GORDON: I understand, but - - -

HIS HONOUR: - - - throwaway line.

MS GORDON: It is interesting, because of course in the modern world two things have happened. One is the consolidation provisions in the Tax Act, which have really fundamentally altered the way in which corporations now conduct themselves. And secondly, unlike this case where you have ASIC class orders, usually there is only one, and therefore invariably the trust deeds that guarantee between entities within the group are usually, unlike this case, not dealt with in the way that it has been dealt with here. In other words, there is three class orders here, as you know. Not one. Can I move to deal with the orders and directions?

HIS HONOUR: Yes.

MS GORDON: A copy of those were annexed to the outline of submissions that we filed.

HIS HONOUR: Yes. I have got it in front of me.

MS GORDON: Thank you, your Honour. And as your Honour will see, we have broken them up into five groups. The first deal with the non-AAL Ansett companies. So this is everybody except for AAL and the trusts, and consistent with the way in which your Honour has dealt with these matters before, we have set out the power pursuant to section 447D.

So there is a direction given that the Court directs that meetings of each Ansett company, except for AAL, be called pursuant to 445F, and that at each of those meetings the deed administrators may, to the extent that that Ansett company is entitled to vote as a deed creditor in those companies, cause them to vote in favour of a motion to vary the DOCA.

And the variations are to give effect to two important orders, or conditions. The first is that the assets of each of those non-AAL Ansett companies be assigned to AAL. And secondly, that the entitlement of the deed creditors in those companies be extinguished.

HIS HONOUR: Does that paraphrase the pooling provisions of the DOCA?

MS GORDON: It does, and you will see that - - -

HIS HONOUR: Because I am wondering whether or not it might be better to actually annexe as a schedule the actual amendments.

MS GORDON: We don't have the amendments drafted, your Honour. If your Honour goes to - - -

HIS HONOUR: But presumably they will be drafted in due course.

MS GORDON: They will be, your Honour. That is true. What the DOCAs provide for is in clause 18.4, and it provides that:

> *The deed administrator shall convene a meeting of creditors under section 445F to consider (1), any proposed variation to the deed, including provisions for releasing, and the pooling of assets and liabilities.*

HIS HONOUR: Yes. But shouldn't such leave as I give be specifically tied to the specific proposal which is put before me in respect of which the Administrators seek the protection?

MS GORDON: Well, the protection they seek is twofold. First is the procedure by which they propose to bring about the calling of the meetings. And secondly, that they be entitled to vote at the meetings in favour of the pooling of the assets and liabilities.

HIS HONOUR: Yes. But when you say vote in favour of the pooling of the assets and liabilities, does that mean there is just going to be a simple provision in the amendment in terms of (a) and (b), or will the drafting be more complex?

MS GORDON: The drafting will necessarily be more complex in the sense that there will need to be amendments to the DOCA by way of deletions, I would have thought. I mean, I haven't given this complete consideration, but one would imagine that various provisions of the DOCAs will need to be deleted in order to effect the two substantive matters that are there set out.

HIS HONOUR: What I want to avoid is any situation that might arise from a dissident creditor or even a scrupulous regulator that looks at the amendments which are actually put before the meeting and said, "Hey, that is not what you put before the Court." And the answer is, "Well, it is effectively what we put before the Court, but when we came to draft it we realised we had to put X and Y in as well."

MS GORDON: I can't take that matter much further, other than what is critical here and is set out in the orders we seek are two things. That the assets of each of the non-AAL Ansett companies will be assigned to AAL. That is the critical aspect of the first part of pooling. And the second critical aspect is that the debts of those deed creditors will be extinguished in those companies.

HIS HONOUR: But the pooling arrangement isn't just (a) and (b), is it? The pooling arrangement will consist of much more.

MS GORDON: And then, your Honour, you need then to go to the AAE pooling - - -

HIS HONOUR: Indeed you do.

MS GORDON: - - - and that is why we are drafting then this order, because what then 3 and 4 deals with is an acknowledgment that the deed creditors in the non-AAL companies, in order 3, will be entitled to prove in AAL for the same amount and with the same priority.

HIS HONOUR: I think you and I are in heated agreement.

MS GORDON: Right.

HIS HONOUR: Except I am being more pedantic. And I like to think I am not being pedantic for the sake of being pedantic. I am trying to avoid any issue arising. What you are really saying is, in 1, the words:

> *So as to effect a pooling arrangement by which inter alia (a) and (b) is going to occur.*

when you look at (a) and (b), properly drafted, properly construed, strictly construed, whether it be original intention or purpose and consequence, which I learned about over the weekend, what that reads is:

> *...is to effect a pooling arrangement by which (a) and (b) will happen.*

But the pooling arrangement is much more than that.

MS GORDON: It is, and I make no apologies for that. It was structured - these draft orders were structured in such a way that 1, 2, 3, 4 and following are, in effect, a package of orders.

HIS HONOUR: That is fine. And what might not be a bad idea - what I want to do is to ensure there is no further Court proceedings.

MS GORDON: I understand, your Honour.

HIS HONOUR: Or no collateral challenge to what the Administrators have done, or anyone having a look at the matter and saying with good will in the world we slipped up on that, we now realise when it comes to the drafting that we should have put something else in, and it needs to be covered by the Court protection, and it seems to me that in order to get the matter insulated from any suggestion that what happens is not consistent with the orders which you seek to have made is to - and I am thinking aloud for the moment - so as to affect the pooling arrangement brought about by amendments to the DOCA, a copy of which is schedule 8 of this order by which, inter alia, A and B.

MS GORDON: Yes, and - - -

HIS HONOUR: That is what I have got in mind.

MS GORDON: Well, in those circumstances my instructions are that if your Honour was minded to make the orders, my understanding haven't heard from the Contradictor yet, then we would arrange for draft amendments to the DOCAs.

HIS HONOUR: Well, subject to what she is saying, you may wish to get instructions, because I have put this to you out of left field, as it were - - -

MS GORDON: No, that is fine.

HIS HONOUR: - - - it is - I think it achieves the purpose for which the administrators are coming to the Court.

MS GORDON: I understand.

HIS HONOUR: And I think it achieves it in a way which is more protective and more conclusive than a paraphrase.

MS GORDON: There is no doubt that the intellectual exercise of drafting the orders helped formulate the way in which the administrators come to your Honour, so that exercise as you say of drafting the amendments, but I want to make it clear, having looked at it initially as - in order to draft these orders, much of the amendments to the DOCAs we believe will be actually deletions.

HIS HONOUR: That is fine.

MS GORDON: I understand, your Honour. So - - -

HIS HONOUR: In other words you can't be criticised for deleting anything.

MS GORDON: Exactly. That is right. Anyway, I am instructed that that will be done and before the end of day, if assuming your Honour - - -

HIS HONOUR: Well, it doesn't necessarily - - -

MS GORDON: No, no.

HIS HONOUR: Beware of that.

MS GORDON: Well, what we might say to your Honour is, before the end of the day we will tell your Honour how long it will take us.

HIS HONOUR: I see. Thank you. That sounds like a definite maybe.

MS GORDON: It is about as high as it gets.

HIS HONOUR: Yes, Ms Gordon.

MS GORDON: If your Honour pleases. So, subject to that matter, your Honour, your Honour sees the structure of the orders, your Honour is right to point out that the split between the non-AAL Ansett companies and the AAL are dependent on each other and what happens under the first is the assignment of the assets, the extinguishment of the debt, and then in AAL the acknowledgment there that the old deed creditors of the other companies are entitled to prove in AAL for the same amount and with the same priority they had in the non-AAL companies and again the exercise of the casting vote in 4. Can I then move to deal with the trusts, your Honour. Orders 5, 6 and 7 deal with the Pelican Trust, and this arises out of the sale of Aeropelican, one of the regional airlines.

HIS HONOUR: Yes, I am familiar with that issue.

MS GORDON: Now, what 5 does again is to alter Part 5.3A using the powers under 447A and 447D, so that a meeting of creditors of Aeropelican Air Services Pty Limited is called pursuant to clause 6.1 of the Pelican Trust Deed and for that purpose, your Honour, a copy of the Aeropelican Trust Deed is to be found at MAK-47.

HIS HONOUR: Yes. I don't need to look at it, I don't think.

MS GORDON: Of 12 September.

HIS HONOUR: Yes, thank you.

MS GORDON: So order 5 provides for the modification, order 6 provides critically for the distribution of the trust to one of the beneficiaries of that trust in preference to all others, and your Honour will recall there that there was a dispute about which beneficiaries were entitled to it. Casting vote again, 6(ii), and then in 7 the inter-company debts, ability to vote those in favour of the resolutions.

HIS HONOUR: Yes.

MS GORDON: The same structure applies in relation to Westsky Trust. And in that, your Honour, there is an amendment that needs to be made in the sixth line where it has got: Pelican Trust Deed under paragraph 8, it should be the Westsky.

HIS HONOUR: In the - which line?

MS GORDON: In the sixth, the sixth line of order 8, your Honour. Does your Honour have that?

HIS HONOUR: So the Pelican Trust should be the - - -

MS GORDON: Westsky Trust.

HIS HONOUR: Yes, of course.

MS GORDON: And that is in the same structure as the one in relation to - - -

HIS HONOUR: Yes, I follow that.

MS GORDON: If your Honour pleases, can I then move to the pooling in relation to 501 Swanston Street Pty Limited. That is dealt with in orders 11 and 12. Your Honour will recall 501 held as trust - on trust - the proceeds of sale of the real estate, and there was a dispute about whether the owner of the property was AAHL or AAL and as a result of that, separate directions are dealt with in relation to those proceeds of the real estate.

HIS HONOUR: Yes, thank you.

MS GORDON: 13 and 14 deal with the approval of the AAE Pooling Deed in the usual form in the way in which your Honour has dealt with settlement proposals before. And then we have the notice provisions for both the pooling meetings in relation to the Ansett companies, and also the trusts. I might move and deal with that now, if I might, your Honour.

HIS HONOUR: Yes.

MS GORDON: The administrator has set orders pursuant to section 447A relieving them from strict compliance with the provisions of sections 445F subsection 2. What they propose, your Honour, is that notice be given via newspaper advertisements and the websites and the basis for that application is that a very small percentage of creditors are directly affected in any appreciable way. Critically there are two things to note, your Honour, that while section 445F doesn't require the administrators to provide a report or statement to creditors on the merits of the resolutions, unlike section 439A, clause 18.4 of the Ansett DOCAs does and the administrators will comply with that clause. So, in a sense the substance of the matter, the merits of it will be considered by way of that report.

HIS HONOUR: Can I just ask you this; I am wondering whether the disjunctive should be conjunctive in the fourth last line:

> *...cause details of the websites, the meetings to be published in a national newspaper or in each jurisdiction in which the Ansett Group carries on -*

MS GORDON: It should be "and in which".

HIS HONOUR: Or carried on - wouldn't that be better to be "and in each"?

MS GORDON: Yes, your Honour. I don't propose to take your Honour through the creditors who may be adversely affected or the submissions I put to your Honour earlier this morning.

HIS HONOUR: No, you have dealt with those.

MS GORDON: If your Honour pleases. And the cost saving so far as that is relevant is in the vicinity of some $1-1/2 million down to approximately $20,000, that is, by being relieved of their obligations under section 445F(2).

HIS HONOUR: Yes.

MS GORDON: In that context, also your Honour, is it worth pointing out that the administrators obtained similar orders or directions in the earlier proceedings and we have sought to follow the form of that for the purpose of this order?

HIS HONOUR: Yes. Well, I am comforted or supported by the fact that ASIC has had a look at the matter and has no objection.

MS GORDON: If your Honour pleases.

HIS HONOUR: And I regard ASIC in this context as looking at the matter in the public interest and in the interests of creditors generally.

MS GORDON: If your Honour pleases. Can I then move to deal with the approval of the AAE Pooling Deed, that is the last matter which is related but independent from the question of pooling. Your Honour will have seen that we filed a confidential affidavit with some exhibits in relation to that matter. The reasons for entering into that compromise are set out both in those confidential exhibits and in the earlier affidavits. In terms of the legal issues your Honour will have seen they are very complicated. Your Honour will have also seen the manner in which it is proposed to be compromised. I don't know whether your Honour proposes or requires me to take your Honour through those.

HIS HONOUR: I don't think so at this stage. It involves compromising claims, giving up rights - I was going to say failing; not taking proceedings.

MS GORDON: Correct, your Honour.

HIS HONOUR: And the same similar sorts of issues that arose - - -

MS GORDON: In the sale of the air terminal case.

HIS HONOUR: yes.

MS GORDON: In that context, and also in the staff superannuation case.

HIS HONOUR: Indeed.

MS GORDON: So you have got the question about legal rights and compromise in that context, and you have also got issues about the reasonableness and propriety of the conduct of the administrators in taking the steps they have taken.

HIS HONOUR: Yes, well - - -

MS GORDON: So both sets of consideration - - -

HIS HONOUR: Your proposition is, as I understand it - and I have to think it through - it goes much further than just a commercial arrangement.

MS GORDON: Yes, it does, your Honour. And what we have sought to do is to explain when I was dealing with the jurisdictional questions this morning that it raises both sorts of issues. It raises the questions about the compromise of legal rights, causes of action being foregone and - - -

HIS HONOUR: Yes. Well subject to anything further Mr Williams may say, I don't need to hear you further on that issue for the moment.

MS GORDON: If your Honour pleases. They are our submissions, your Honour.

HIS HONOUR: Mr Sifris.

MR SIFRIS: Well, your Honour, there is not much we wish to add to what we said this morning. On the last point of notice we do say that there are a limited number of creditors in excess of $10,000 that are likely to be affected. And this morning we mentioned that it is more desirable that those creditors get formal notice of the meeting rather than the publication in the newspapers.

HIS HONOUR: How many are there; 200?

MR SIFRIS: Two hundred, yes.

HIS HONOUR: Is that an issue, Ms Gordon?

MS GORDON: No. We have written to them about this application. There is nothing preventing us from writing to them again in relation to the calling of the meetings.

HIS HONOUR: I think, having regard to the extent of their - that they are in their debt at the moment, it might be prudent.

MS GORDON: If your Honour pleases.

HIS HONOUR: Yes, Mr Sifris.

MR SIFRIS: Your Honour, we assume that reference in the notice orders, orders 15 and 16, to providing notices of those meetings; no doubt the notices will contain the proposed variation, and we assume it will be exhibited to the notice.

HIS HONOUR: Yes.

MR SIFRIS: So that creditors will be able to see the variation and decide whether to attend the meetings or not.

HIS HONOUR: Well, the learning in relation to notices of meetings is something I touched on a week or so ago in a different context. It is important that the notice give the creditors the opportunity to consider whether or not they should attend the meeting or not for starters.

MR SIFRIS: Yes.

HIS HONOUR: And then whether or not how they should exercise their vote one way or the other.

MR SIFRIS: Yes.

HIS HONOUR: I assume the notice of meeting will - or maybe I have an assumption I shouldn't. I assume the notice would indicate what is the form of resolution to be proposed.

MR SIFRIS: Well, we have assumed that as well, yes.

HIS HONOUR: And the form of the resolution would be deletion of clauses 4, 5, 6 and 7, and the addition of clauses 8A, B, C and D; something along those lines.

MR SIFRIS: Yes, yes. As long as those creditors in excess of 10,000 are notified that there is going to be a variation to the deed to effect the verdict; that is the important matter.

HIS HONOUR: Yes, well - - -

MR SIFRIS: Because they will base their decision on whether to attend or not.

HIS HONOUR: Well, I think that is a valid point. It is a prudent point to take. I understand the administrators wouldn't object to that, and that can be inserted in the order in an appropriate form.

MR SIFRIS: Yes. The final matter, your Honour, is we have mentioned this morning that we do not make any submission on the merits; those are my instructions, not to make any submission on the merits of the application itself. There is a Contradictor. The Contradictor will make appropriate submissions. What we do say though is that if your Honour is minded to make the orders, there is power to make the orders and the orders, as proposed, subject to the two matters that we have identified, are appropriate orders to make in the circumstances if your Honour decides that pooling is appropriate.

HIS HONOUR: Thank you for that.

MR SIFRIS: Thank you, your Honour.

HIS HONOUR: Mr Ginnane.

MR GINNANE: If your Honour pleases. As we indicated this morning, the Commonwealth supports the package of orders that have been put before the Court. For the reasons set out in our submission and in the supporting affidavit, the Commonwealth considers that the orders directed towards achieving the pooling are commercially appropriate and would benefit the vast majority of employee creditors as well as, of course, the Commonwealth that provided though the SEESA arrangement substantial sums to enable the arrangement to proceed. I mentioned this morning the caveat and qualification about post administration liabilities that set out - - -

HIS HONOUR: That doesn't seem to be an issue.

MR GINNANE: It doesn't seem to be an issue. We should just say for the sake of completeness, your Honour, my learned friend Ms Gordon when going to the paragraph 199 of Mr Korda's affidavit of 12 September one of the assumptions there referred to which was that - yes, 199(j) on page 66 of that affidavit, that "all outstanding matters between the Ansett Group and the Commonwealth were assumed to be settled." We added that qualification to take account of that paragraph. And mention has been made of approaches to the tax department on behalf of the companies or the administrators about taxation liabilities. We have no instructions about those matters, your Honour, because we heard that they were merely an indication of steps the administrators had taken.

Might I conclude by saying this. The Commonwealth supports the package of orders as a group, and by that we mean if the Court - I go back a step. We support the AAE pooling deed compromise because we - the Commonwealth regards it as clarifying matters that would otherwise remain uncertain when people came to vote on proposals for pooling. If the Court didn't approve pooling, well, then we would want to have a right to revisit Commonwealth support for the compromise and vice versa. If the Court did not approve the AAE pooling deed, then the Commonwealth would want to revisit its support for the measures directed towards having a vote on pooling. So the Commonwealth supports the orders as a package in that sense, your Honour.

HIS HONOUR: Yes. Well, I understand that. It seems to me that I - I propose to reserve on this matter for a number of reasons, one of which is the need probably to have before me the actual forms of amendments to the deed which are proposed.

MR GINNANE: Yes.

HIS HONOUR: Which should be part of any order if I am disposed to make it.

MR GINNANE: Yes.

HIS HONOUR: And, of course, I haven't heard from Mr Williams yet.

MR GINNANE: Yes.

HIS HONOUR: But it seems to me if I were to be - were to accept some of the Contradictor's submissions and was against some or part of either the pooling deed or the pooling arrangement, I would need to come back before making final orders in any event.

MR GINNANE: We would think that appropriate, your Honour, because the basis certainly of our consent would change and it may be others would be affected as well.

HIS HONOUR: Yes, I understand.

MR GINNANE: Your Honour, unless we can assist further, that is the basis on which the Commonwealth supports the package of orders and submits that they are appropriate.

HIS HONOUR: Thank you for that.

MR GINNANE: I am reminded of costs. We would say that certainly the costs of parties such as the Commonwealth should be costs in the administration, your Honour.

HIS HONOUR: Well, subject to anything further any other party may say, that has been the order - that is the type of orders that have been made in the past.

MR GINNANE: If your Honour pleases.

HIS HONOUR: Mr Star.

MR STAR: Your Honour, in this and other applications before the Court in the Ansett administration, the ACTU and the affiliated unions have been vigilant to attempt to protect the interests of the former employees. The ACTU and its affiliated unions early on in this administration identified pooling as an issue that would promote equity amongst the former employees who have been hurt by the collapse of the Ansett companies, and that has been the public position of the ACTU and, indeed, a matter which the ACTU and its affiliated unions understand the rank and file support.

HIS HONOUR: Even though to some extent some employees might not get as much as they otherwise would have?

MR STAR: Your Honour, the short answer to that is, yes. And it is fair to - when one has a cold hard look at the analysis in table 3, what table 3 demonstrates that for the majority of former employees who have suffered a lot in this - - -

HIS HONOUR: There is about some 9600 of them or something.

MR STAR: That is right, and so it is a matter of maximising the best possible position for the most number of the former employees; and that in this case will involve approximately 9-1/2 thousand former employees better off. Unfortunately, there are a number - less than a hundred - who that is not the case. And there is also, your Honour, it is apparent about 5-1/2 thousand employees who pooling is irrelevant to, it is indifferent to, because they have been paid their entitlements.

HIS HONOUR: Yes, I understand.

MR STAR: So in the interests of a large number of people that have been hurt a lot by this affair, we identify pooling as something that is in their interest.

HIS HONOUR: Yes, thank you. Mr Troiani, have you got nothing further to add?

MR TROIANI: No, your Honour, I have indicated the National Bank's support to the orders that are sought now by the Administrators. I might just add, your Honour, that whilst the bank is only one in number in terms of being a creditor, it is a very substantial creditor of the Ansett Group generally. It was the banker to the Group, and therefore your Honour may take that into account when assessing the pros and cons of this application.

HIS HONOUR: Yes. Thank you for that. Mr Crutchfield?

MR CRUTCHFIELD: If I could just raise one matter, your Honour, in relation to the fact that from a very early stage the Administrators were contractually bound to advocate pooling. If I might say, that is true that one ought not ignore the fact that - take Air New Zealand, for example. That was a - wasn't a contract of adhesion. That was a heavily negotiated contract, and Air New Zealand - it was a provision in that contract that pooling take place. They provided just under $200 million, which is a very substantial sum of money in the scheme of this administration.

And the submissions of the Contradictor seem to assume - if you take Show Group, for example. I think my learned friend, Ms Gordon, said that Show Group stood to lose up to 1.86 million if there was no pooling. But that is on the assumption that Show Group somehow has an entitlement or could obtain access to that money, which the MOU makes clear was provided to the group as a whole.

HIS HONOUR: Yes, I understand that.

MR CRUTCHFIELD: The only other thing is in relation to costs. My instructions are to seek costs on an indemnity basis, based on the reasons set out in the decision of Finkelstein J in the Pasminco decision, which is at tab 7 in your Honour's material. His Honour there, at paragraphs 36 and following states the general rule:

> *In the case of a fund or an estate under the administration of the Court the trustee is entitled to his litigation costs, including an application for directions, out of the fund.*

And then on the next page, your Honour:

> *The costs are taxed on an indemnity basis so that the trustee is not out of pocket.*

And then his Honour makes the observation, and in my submissions the facts there are very similar to the facts here, that:

> *...the necessary and/or proper parties all get their costs on an indemnity basis.*

HIS HONOUR: Yes. Well, I will hear from Ms Gordon about that in due course.

MR CRUTCHFIELD: If your Honour pleases.

HIS HONOUR: Who have I forgotten? I think it is your call, Mr Williams.

MR WILLIAMS: I think it is, your Honour. Might I perhaps start by addressing the point that Mr Crutchfield just referred to, the fact that the Administrators were, from an early point in the administration, contractually bound to advocate pooling. Could I say at once, your Honour, that is not meant to be a criticism of them, and - - -

HIS HONOUR: I didn't take it as a criticism.

MR WILLIAMS: Yes. There were obviously sound commercial imperatives for them to do the deals that they did, and we don't say that they shouldn't have done those deals. Nor do we say, your Honour, that your Honour shouldn't have regard to the evidence that they put forward and the matters that they rely on to support an argument in favour of pooling. We simply make a really very limited point, and I am sorry if it has been taken as meaning more than it means. The really very limited point is that your Honour doesn't have the assistance that a Court sometimes has of a Liquidator or an Administrator providing an opinion that the Court can have regard to as adding, in effect, additional weight to the evidence itself.

HIS HONOUR: No. The Administrators in this particular case are in an unusual situation.

MR WILLIAMS: Yes.

HIS HONOUR: There have been many unusual aspects to the administration starting in September, four years ago, that they committed themselves to a course of conduct, properly so, indeed it was approved and sanctioned and protected by Court decision, and then find themselves in a further position down the track where they have to go to the next stage, and they recognise quite openly and frankly that they have got a potential conflict issue, and that is when they come to the Court.

MR WILLIAMS: Yes. And those of us acting for the Contradictor, your Honour, appreciate that. All we simply do is draw the Court's attention to it. The Court's attention, of course, is already drawn to it, so perhaps we needed to say nothing.

HIS HONOUR: Yes.

MR WILLIAMS: But - - -

HIS HONOUR: No. I understand your submission.

MR WILLIAMS: Now, your Honour, really central to what the Contradictor wishes to put before the Court in opposition to this application is the question of who ought decide whether or not, in particular in relation to the half dozen or so asset rich or asset holding companies, those companies should or should not enter into a pooling arrangement. And, your Honour, the fact that there is only six or seven of them is important, because as we have indicated, we see it as being of no moment, and I will deal with my learned friend's comments on the way that we have used that expression.

We see it as being of no moment to the creditors of the other 34 or 35 companies whether they pool or don't, because particularly the non-priority creditors of those companies, which in all but one case is all of the creditors, are not going to get anything either way.

HIS HONOUR: No matter what happens.

MR WILLIAMS: That is right, and that is what we meant, your Honour, by "of no moment".

HIS HONOUR: I understand.

MR WILLIAMS: Of no moment to the creditors of those companies.

HIS HONOUR: It is of moment to the overall group though.

MR WILLIAMS: Absolutely, your Honour. We don't say otherwise, but - - -

HIS HONOUR: Well, I understand that distinction.

MR WILLIAMS: But what we say in relation to the way in which the Administrators propose to exercise their votes in those companies, the creditors of those companies are not going to be affected one way or the other by the outcome. So they really don't have the same interest in the application, or in the pooling meetings, that the creditors of the half dozen asset holding companies have. In those circumstances, your Honour, it would be difficult to see how a sensible argument could be advanced against the pooling of those - let us take the base case - 34 Ansett companies.

There is nothing to be gained by keeping them separate. No creditor of any of them will be better of if they are kept separate. And so, your Honour, importantly, if your Honour accepts that proposition and if those 34 companies, as we expect them to do, all either vote for pooling or at a worst case, come back to Court and asked to be pooled, and we would expect such an application probably to be granted for the reasons I have just enunciated. This is not today a choice between 41 administrations and 1 administration. It is a choice between 8 administrations and 1 administration.

There is not before the Court, despite our requests, any evidence of how, in a monetary sense, that is a quantum sense, that impacts on the overall cost of the administration. One can appreciate, of course, that some of the issues that the Administrators raise as needing determination in a 41 separate administration scenario will still need to be determined. Perhaps many of them. But whether the cost of doing so is the same for 8 administration as it is 41 administrations we don't know.

HIS HONOUR: Is what you are saying, until I have some understanding of what the cost of 8 administrations might be and how the complexities break up between the 34 companies on the one hand and the 7, 6 or 7 companies/trust on the other - - -

MR WILLIAMS: Yes.

HIS HONOUR: - - - I have got inadequate material to compare the with and without.

MR WILLIAMS: Yes.

HIS HONOUR: Yes. I follow that.

MR WILLIAMS: At the very least, your Honour, it seems likely that the 9.9 to 24 million figure that has been given as the best estimate available on a global sense of a 41 administration scenario, is likely to be over-stated. But your Honour really doesn't know by how much, if 34 of those separate administration don't have to be separated, because you don't have to resolve at least a significant number of the inter-company loan issues because as between those 34 companies those matters will not need to be resolved. It is only between that block of companies on the one hand and say Kendell Airlines on the other hand that one needs to have regard to it. Now, your Honour, of course there are such issues. There are, as the administrators point out in that table that your Honour has been taken to in Mr Mentha's most recent affidavit, sorry, Mr Korda's most recent affidavit.

There are issues in relation to taking Kendell as the example, the use of staff and use of head office facilities and use of trademarks and so on, but what one doesn't know is how much the estimate that is given for that matter to be determined on a 41 company scenario would be reduced, if at all, on a seven or eight company scenario.

HIS HONOUR: So are you saying that another model should be put up, pool 35 companies or whatever the number is, pool 34 companies, and pool seven. Is that what you are saying?

MR WILLIAMS: Not pool the other seven, leave the other seven as stand alones.

HIS HONOUR: Seven separate at least.

MR WILLIAMS: Because without that, your Honour, your Honour is not in a position to conduct the balancing exercise that my learned friend, Ms Gordon, asked you to conduct. Even if you get to that point, and for other reasons I will advance your Honour doesn't get to that point, but even if you get to that point, in my respectful submission, you ought to be considering that alternative, not what is really a wholly unrealistic scenario of 41 separate administrations.

HIS HONOUR: But if I didn't - if I were not to allow pooling, wouldn't each of the 34 companies have to be dealt with separately?

MR WILLIAMS: No, your Honour, because the way that the proposed pooling operates it is essentially an opt in process, that you start with AAL as the sort of central entity of the pooling, and each other company has the option of pooling into the pool with AAL. If it opts in, then it is in the pool, and if it doesn't it remains a separate administration. And that option is available to each of the other 40 companies.

HIS HONOUR: And if it remains a separate administration your point is your point is you don't know what is involved in the costs of it.

MR WILLIAMS: In relation to the only six or seven that realistically are likely to stay outside, yes, your Honour.

HIS HONOUR: Yes, I follow.

MR WILLIAMS: Now, we would concede, your Honour, that obviously there will be substantial additional costs involved, even in just holding those six or seven companies outside the pool and administering separately. It would be wholly unrealistic to say that there won't be, but your Honour doesn't know the nature or extent of those costs.

HIS HONOUR: The probability is the costs would be - take up a substantial part of the estimate at the moment, would it not, because of the nature of those companies and the nature of the assets they hold and the nature of their creditors?

MR WILLIAMS: Yes, your Honour, if the matter had to be determined down to the last dollar and by a thoroughly exhaustive process.

HIS HONOUR: The problem with that is it is like throwing the baby out with the bath water. You are spending an enormous amount of money to achieve a particular monetary result.

MR WILLIAMS: Yes.

HIS HONOUR: Which are odds that you wouldn't want to have on Tuesday of next week.

MR WILLIAMS: Yes, your Honour. The scenario is though that if there are only six or seven companies that are outside the pool it is not beyond the realms of possibility, surely, that the administrators could propose some form of relatively inexpensive and expeditious resolution of the issues between those six and seven companies and the pool, or if necessary, as between each other, rather than a complete down to the last dollar analysis of everything. All matters are capable of commercial resolution, your Honour. On the face of it those companies at the present and the creditors of those companies are faced with a something versus nothing scenario.

It is all very well to say that the total sum involved for these creditors has only - in the case of Show Group, which is the one that I made specific reference to in the outline, it is only $1.86 million, and it only works out to a few thousand dollars per creditor, but your Honour, to those creditors that is important, particularly when their only alternative is to vote for pooling and get a guaranteed duck egg. They know that if they vote for pooling they get nothing. They have absolutely nothing to lose by voting against pooling. Your Honour referred to - in discussion with my learned friend, Ms Gordon, that one can assume that creditors will by and large vote in their economic self-interest.

With respect, I agree and adopt your Honour's observation. Why would one expect a creditor who himself is not being called upon to fund a liquidation of the administration, who is told, if you vote yes, you will with an absolute certainty get nothing, if you vote no you might get nothing or you might get something. It is a question which answers itself. It costs the creditor nothing to vote no. Perhaps the cost of a 45 cent stamp to send in a proxy, 50 cent stamp, or whatever the cost we have to pay these days. Why would creditors do other than vote no if they were acting rationally in their economic self-interest?

HIS HONOUR: Yes, I understand.

MR WILLIAMS: And in those circumstances, your Honour, why ought those creditors be deprived of the opportunity of having some commercial resolution reached between their company - and I mean that in the sense of the company of which they are creditors - and the group on the other hand reaching a commercial resolution of all of the issues in a short form and global way, and perhaps a mediated context, perhaps by appointing someone to represent each side because obviously the administrators are in difficulty in that sense, but why ought that opportunity be deprived to those creditors when the only alternative is a guaranteed zero?

HIS HONOUR: Yes.

MR WILLIAMS: The ultimate effect of the pooling resolution if it succeeds is to put an additional $22 million in the hands of employees and the Commonwealth combined, funded essentially in two ways, and we don't really know what the division is, but it is paid for in part by savings of additional administration costs, and in part by the third party non-priority creditors of the asset holding companies getting less than they would otherwise get.

One supposes it is at least theoretically possible that if the additional costs consumed the whole of that $22 million that the third party non-priority creditors will be no worse off, because then it becomes a nothing versus nothing scenario, and obviously, your Honour, the Court will not want to have a scenario where all that might be gained by anybody is lost and simply chewed up in costs, and we understand that.

HIS HONOUR: That would be a sterile exercise.

MR WILLIAMS: Absolutely. But, your Honour, if there is $22 million at stake it can't be beyond the ken of commercial parties to work out a way of resolving those issues as between half a dozen companies on the one hand and 34 companies on the other without spending $22 million doing it. And if one now proceeds immediately to pooling, the opportunity to do that will be lost. And while it may be desirable from a range of perspectives for the employees of this group to get $22 million more than they otherwise entitled to, that is not, with respect, the purpose of the law.

If there would be some form of resolution, whether by the full thorough examination by the administrators and the spending of every lost dollar to investigate the issues or by some lesser process that would result in less than $22 million being spent determining those issues, then the net effect of this application is a transfer of wealth from one group of creditors of six companies to the employees of some other companies, or in particular one other company. And, in my respectful submission, that is what must be borne steadily in mind as the real outcome of this application if it succeeds.

HIS HONOUR: Yes.

MR WILLIAMS: And, of course, your Honour, while the difficulties are pointed to, this is not one of those cases which are referred to in some of the authorities that my learned friend has gone to where there is real uncertainty about which assets sit in which companies, or which companies are - or which debtors may belong to which companies and so on. We don't have that situation. Insofar as there is any dispute about who owns

assets, by and large it is within the group of the 34 that are going to pool anyway on the proposition that I have put to your Honour.

That is not necessarily true in relation I think to some aircraft, and that might need to be determined. But certainly in relation to head office, it doesn't matter whether head office is owned by 501 Swanson Street or by one of the other central Ansett companies, if all of those companies are going to pool come what may. So there is one issue that will never arise, for example.

The other thing about the head office matter that I do want to put to your Honour in this context is that as it happens the asset holding companies include, as your Honour knows, the regional airline companies which by and large operated, it seems, as discrete entities. Now, true it may be that they used some Ansett branding but, of course, they also had their own names and were known by their own names; and had a degree of obviously public understanding of the fact. Kendell Airlines operated as Kendell Airlines and people caught Kendell Airlines' flights. They caught Aeropelican flights, and they caught Skywest flights.

So even if there happened to be an Ansett sign on the tail of the plane when it was owned by one of the other Ansett companies, and even if the ticket they got had Ansett written on it, it is not quite in the same scenario as some of the other companies which were much more intermingled. And so one would have liked to have seen amongst the material in response to the requests that were made some explanation of just how much of Kendell's and Aeropelican's and Skywest's management and administration was really conducted centrally, and to what extent, if at all, they had their own management and administration. But, unfortunately, the material before your Honour doesn't descend into that degree of detail.

Now, given that there only ever were these six or seven companies which were materially affected and whose - the creditors of whom were materially affected by this application, we would have hoped that some attempt would have been made to put some numbers on those items for those companies.

HIS HONOUR: Yes, I understand.

MR WILLIAMS: For the same reason, your Honour, that I have just put that there was not the degree of uncertainty about the true assets owned by debtors owed to and so on of each of the companies, this is in reality not a case where my learned friend's use of the word "essential" is appropriate. She offered three grounds or different words as to the reason why pooling was ultimately appropriate in this case. She said it was "just equitable, if not essential." And what I would say to your Honour is that really the case for the plaintiffs in this case is put on the ground of just and equitable, properly and fairly.

One can see that it could be argued - and has been well argued, with respect - that it would be just and equitable to the body of creditors of the Ansett Group taken as a whole, if it is appropriate to take them as a whole, that there be pooling. But not essential, with respect, your Honour, not essential.

HIS HONOUR: No, I am not quite sure what essential means in that context.

MR WILLIAMS: Well, essentially, in my respectful submission , arises where the conduct of separate administrations is a practical impossibility; where the records simply don't allow you to know as between which companies a debtor to the group which is the creditor. That is where it becomes essential to pool, or could become essential to pool. Because you simply couldn't ever practically resolve the issues that would arise between the companies.

HIS HONOUR: But do I understand there to be issues in relation, for example, that a determination of the extent of inter-company debts and a determination of whether there should be further charges raised, having regard to the historical incidence which occurred?

MR WILLIAMS: Yes, and we understand, your Honour, that some of those matters might take a fair bit of work and be quite expensive, we appreciate that; but no one is saying it can't be done.

MS GORDON: Yes, we are.

HIS HONOUR: I suppose if you have an unlimited fund, anything can be done in the commercial world.

MR WILLIAMS: Yes, and if it can't be done - if it can't be done perfectly, at least it can be approximated. And if it can be - even if it can't be approximated, it can be settled.

HIS HONOUR: Yes, but the settlement itself if it involves many many settlements of many many issues, you increase the costs I suppose.

MR WILLIAMS: You might, but you might say to someone who is in control - who is put in control, let us say, of Show Group for this purpose, whether you create a Chinese wall within Korda Mentha or whether you put someone else in control of it for this purpose and say you are Korda Mentha - you are Show Group for the purpose of settling all of these issues with AAL and its 34 pooled associates. Now, to some extent, your Honour, that person might be in a weak bargaining position because he knows if he fights everything, he will finish up with nothing. But he is not without a bargaining position at all, and the other side knows that it is going to be an expensive exercise as well, and you would hope that the parties would reach a commercial resolution without spending the whole $1.86 million perhaps on both sides in having the fight.

HIS HONOUR: I wish they had done that earlier in the superannuation fight.

MR WILLIAMS: Well - - -

HIS HONOUR: But that is water under the bridge, and I shouldn't go back to that.

MR WILLIAMS: It is water under the bridge, your Honour, and it is a bridge that we weren't allowed to cross in any event. We are only where we are now, and what we say, your Honour, is that creditors of Show Group and Kendell and Aeropelican and so on ought to have some opportunity to get something for the fact that on the fact of it they have an entitlement to share in the assets of those companies, rather than simply having all of their entitlements washed away because it looks too hard.

HIS HONOUR: Yes, I understand that.

MR WILLIAMS: Now, if I could come more specifically, your Honour, to the submissions which I have outlined in writing.

HIS HONOUR: Yes. Well, I have those and they are very helpful.

MR WILLIAMS: Could I advance on the matter I raised in paragraph 5 that Ms Gordon indicated in her outline - sorry, in her oral submissions today that the administrators would see a 600A application by a disaffected creditor who was disappointed by the outcome of a pooling meeting at which that creditor's vote against pooling was overridden would be a claim which that creditor would effectively be unable to bring because the administrators' conduct in voting for the resolution and, if necessary, in exercising a casting vote for the resolution would have been sanctioned in advance by the Court.

And with respect, your Honour, that shows exactly the problem that is created by the way in which the administrators presently approach the Court and the relief which they presently seek from the Court.

HIS HONOUR: You see it as a pre-emptive strike.

MR WILLIAMS: Yes, because if - I am not certain that Ms Gordon is correct, I might say, your Honour, in saying that it would be an answer; and perhaps she wasn't, to be fair, saying it would be a complete answer to a 600A application that the Court had in advance given its imprimatur because, of course, different considerations will arise when the application actually comes before the Court.

HIS HONOUR: With someone who wasn't a party to the proceeding.

MR WILLIAMS: Yes, and the Court would also, as I think my learned friend said in another context, at that point have information before it as to who had voted, how many had voted, how many had voted which way both in number and in value, which the Court doesn't presently have. So it may or may not be that the giving of advance sanction by the Court to the administrators by way of direction to protect them from the consequences of voting in favour of a pooling deed would actually head off a 600A application.

I would just remind your Honour, 600A is the section which applies where a vote is determined by related creditors, in effect. And the Court has the power to disregard - to call for another vote, disregarding the votes of related creditors, or to make some other order dealing with the resolution. And, of course, your Honour, that is in the circumstances where a vote is determined, one also has the alternative scenario where the casting vote is decisive, and the Court has other powers to supervise the casting vote. It, in my submission, would not necessarily preclude a disaffected creditor from coming before the Court, on 600C, that the Court had given the Administrators authority in advance to exercise the casting vote in that way, although one would have to concede it would make it harder for that creditor.

So in summary, your Honour, what I say about this matter is twofold. First, I am not sure that it does give the degree of certainty that an application could not be brought. But secondly, to the extent that it does, or to the extent that it does give any protection to the

Administrators it is, in my respectful submission to adopt your Honour's language, a pre-emptive strike which is inappropriate. That is, I adopt your Honour's comments about it being a pre-emptive strike, not about it being inappropriate. I go further and say it is inappropriate.

HIS HONOUR: Yes, I understand.

MR WILLIAMS: One might say, your Honour, to draw further on the democratic analogy, that if my learned friend's clients are so persuaded of the force of their case, let them put it to the creditors without themselves becoming players in the process.

HIS HONOUR: You mean abstain from voting?

MR WILLIAMS: Yes. But not vote, in my respectful submission, in a way which would be otherwise not sanctioned by the Court, because really what the Administrators are doing by this application is asking to achieve a result by what is quite a roundabout means. What they say to your Honour is that in reality, in relation to all of these companies their votes will carry the day. They say that that is in some cases an absolute certainty, because they have a majority in value, just by related creditors alone, and with their intended use of the casting vote. That is enough.

Because if they have majority in value, even if majority in number is against them, they exercise the casting vote, it will be passed. In other cases they say even though we don't have a majority as such we have of the order of 30-something per cent plus, and our experience tells us that with the number of people who don't turn up and vote at these meetings that should be enough to carry the day. So what they are saying to your Honour is if you grant the relief that they seek today they can, if necessary, determine the outcome of every meeting of these 41 companies, and certainly every meeting of the 7 that matter. Certainly every meeting of the 7 that matter.

HIS HONOUR: What is the effect of the Administrators not voting the debts of the related parties? It still leaves a number of creditors there to vote, doesn't it?

MR WILLIAMS: It does. And they are the people who the Administrators say - I will withdraw that. If the case is so compelling, your Honour, one would like to think the Administrators could persuade those people, rather than impose their will on them by a proposed course of voting.

HIS HONOUR: Yes, I understand.

MR WILLIAMS: And might I add, your Honour, that the fact that I am not supported here by half a dozen or 10 of these creditors coming along to make submissions is not a matter that your Honour ought have regard to as affording some sort of support by inference for the application, because of course, those creditors who made inquiries found out, and those creditors who read the web site, which includes a transcript of the last hearing, would know that there has been a Contradictor appointed to put submissions in opposition to pooling.

HIS HONOUR: So they see you as their knight in shining armour.

MR WILLIAMS: Presumably they do, your Honour. Whether they are well advised to see that is a matter for them. It is a heavy responsibility. But if they know that there is a person who has been appointed to put the sort of arguments that they would expect to be put on their behalf, why would they come themselves as well? Your Honour may recall giving advice as a barrister to a client, from time to time, why have a dog and bark? Here they have got a dog that is being fed by somebody else. Why buy their own?

HIS HONOUR: Yes, I understand.

MR WILLIAMS: So really, your Honour, the matter needs to be determined on its merits, and those merits are not the merits of pooling, per se, but the merits of authorising and giving the Court's imprimatur to a course of conduct in relation to the voting that is proposed. Now, your Honour, we have not put a proposition that section 447A of The Corporations Act is not wide enough to permit the sort of orders that are sought. That submission is one which would not stand in the face of the authorities recently determined in relation to that matter. The train has left the station in relation to the width of 447A.

HIS HONOUR: Yes. Well, Brien v Australian Memory decided that, effectively.

MR WILLIAMS: That is right. But, your Honour, your Honour still has to determine whether or not 447A is being called in aid in proper circumstances, and in particular whether, as my learned friend rightly put it, it is being used to advance the interests, or advance the purposes of Part 5.3A of the Act. Now, my learned friend - - -

HIS HONOUR: In a sense it advances the purposes of 5.3A in the sense that it resolves an issue and gives a - assuming the figures are correct - a potentially greater return to some creditors than others. But, on the other hand, you seem to be putting it, it doesn't advance 5.3A because it takes it out of the hands of the creditors who don't have any potential conflicts in relation to the way they would vote their debts.

MR WILLIAMS: Your Honour, I, with respect, would adopt the second part of what your Honour said but not the first. I don't concede that it advances the purposes of 5.3A in improving the return for creditors of the company in question, and again here I limit my submission to the asset holding companies.

HIS HONOUR: Yes, I follow that.

MR WILLIAMS: The result of a pooling meeting, voting for pooling in relation to say, Show Group, may well be - in my submission probably would be - to reduce the amount of funds available to creditors of Show Group as a whole.

HIS HONOUR: Yes. I follow that.

MR WILLIAMS: It may well advance the purposes of clause 5.3A as it applies to some other company, or 34 of them.

HIS HONOUR: Yes, I think my expression is inelegant.

MR WILLIAMS: Not at all, your Honour. With respect, I would say your Honour was led into error by my learned friend's submission which really is a bootstraps argument. It

assumes that one is to apply 447A as having regard to the interests of Part 5.3A to the creditors of the group as a whole before it is determined whether the creditors of the group ought be treated as a whole. In other words, it almost assumes pooling. Whereas, the opening words of 447A direct the Court to how Part 5.3A ought to apply in relation to a company, and that must mean the company in respect of which the meeting is occurring.

HIS HONOUR: Yes, I follow that.

MR WILLIAMS: Not some other company.

HIS HONOUR: Yes.

MR WILLIAMS: Just excuse me, your Honour. I am trying not to simply repeat things I have said in writing.

HIS HONOUR: I would appreciate that. Well, as I said, you can take it that I have read your submissions more than once, and will do so again.

MR WILLIAMS: Yes. Could I ask your Honour to have regard to Exhibit MAK-22 to which my learned friend took your Honour, and that is an exhibit to the 12 September affidavit which perhaps might be called a principal affidavit in this application.

HIS HONOUR: Thank you.

MR WILLIAMS: Your Honour was taken to this exhibit to support an attack, which I might say is in part correct, on something I said in the written outline, and the attack was in relation to the proposition that in exercising proxy votes, as opposed to casting votes, the Administrators insofar as they were voting on behalf of AAHL and AAL, would be not acting in the interests of those companies. Now, if I could take your Honour to Exhibit MAK-22, your Honour will see that the way this exhibit works is that the lists of - or that the names of all of the companies, or almost all of them at least, appear both across and down.

HIS HONOUR: Yes, I see that.

MR WILLIAMS: It is a cross table of debt, inter-company debt, and the creditor appears on the left-hand side with the debtor company appearing on the top. The creditor appears on the lefthand side with the debtor company appearing on the top, so put simply, in a meeting of one of the companies along the top the - any company down the lefthand side with an amount corresponding in that column will be entitled to vote on the way the administrators propose to vote in a meeting of that company as it appears along the top. To be more specific, if I could take your Honour to the - I have got a back to back copy, your Honour, I don't know whether you have, but the page where the first one along the top is Kendell.

HIS HONOUR: Yes, I have that.

MR WILLIAMS: If you go along about two-thirds of the way across you get to Show Group.

HIS HONOUR: Yes, I have that.

MR WILLIAMS: And I think in fact I was wrong in telling your Honour that the creditors of Show Group included both AAL and AAHL, because that document appears to show that it is only AAL in the sum of $256-odd thousand.

HIS HONOUR: Yes.

MR WILLIAMS: I apologise that I have got that wrong, your Honour. I think for what it is worth your Honour may also have been led into error in relation to the amounts involved, because I think my learned friend may have been reading from the next column in relation to Skywest which is perhaps therefore a better example. The next column in relation to Skywest shows that its creditors include Ansett Australia Limited for a sum in excess of 8 million, and tracking across to the left, Ansett Australia Holdings Limited, or AAHL for a sum of almost 24 million which are the figures my learned friend referred to. I think my learned friend referred to those figures as being in relation to Show Group, but really it is of no moment.

The general proposition that I would like to put to your Honour is that except in the case of Ansett Australia Limited, which is in a special situation, the creditors of the other companies are not served by pooling, and therefore they have no interest in the administrator voting their debt in favour of pooling. It is probably fair to say, your Honour, that contrary to what is in my submission, they also have no interest in them voting against pooling. They have no interest either way.

So that if one takes Skywest and the 24 million approximately owed by it to AAHL the creditors of AAHL are not going to see that $24 million, whether they vote for or against pooling, except in this respect; if they vote for pooling that $24 million, well, not the $24 million, all of the assets of Skywest or the Westsky Trust as it now is, or Westsky Trust, will go into the pool, and as your Honour knows, the pool will be entirely consumed by priority claims.

There are no priority creditors of AAHL, because your Honour has heard that the only companies which had employees were the asset-holding companies and AAL. So that the creditors of Ansett Australia Holdings Limited, or AAHL, will get nothing if pooling occurs. They are all non-priority creditors. They will all get zero. So it doesn't help them at all for there to be pooling. If there is not pooling and there is a distribution to non-priority creditors of the Westsky Trust, then they will share in that to the extent that their $24 million worth of debt entitles them to do so on a rateable basis.

HIS HONOUR: Yes.

MR WILLIAMS: And having no priority creditors it may well be that that secures something which the AAHL creditors otherwise can't get, which is a dividend.

HIS HONOUR: Yes, I follow that.

MR WILLIAMS: So the creditors of AAHL can't be any better off for pooling, and might be worse off.

HIS HONOUR: Yes.

MR WILLIAMS: So in those circumstances one wonders on what basis the administrators could properly vote AAHLs proxy in favour of pooling at a meeting of the Westsky Trust. The answer could only be if the Court gave its imprimatur to that conduct based on a wider principle - - -

HIS HONOUR: Not related to - - -

MR WILLIAMS: - - - in effect sanctioning pooling in advance before it was considered by the creditors.

HIS HONOUR: On a wider principle of looking at the group as a whole rather than individual companies?

MR WILLIAMS: Yes, that is so.

HIS HONOUR: Is the way you seem to be putting it.

MR WILLIAMS: Yes. And if the Court is persuaded by that, that it is appropriate at this time based on that wider benefit to give the administrators the direction then no doubt that is what they will do. But in my respectful submission, having regard to the fact that the Court would be authorising them to do the opposite of what would otherwise be their duty in relation to the particular company involved, that is a matter which ought to give the Court very great pause.

Whether or not they have duties, as obviously they do in their capacity as deed administrators of all of the other companies, and in particular AAL which has the overwhelming majority of the employees as creditors ought not be an influencing factor as to how they exercise a vote on behalf of the creditors of another company when the creditors of that company, in this case, AAHL, have no interest in funding the employees of AAL. Now, your Honour, it would be different if the administrators were coming as ASIC I think at one point suggested that they do, and asking the Court to make a pooling order under 447A, and simply saying to the Court, these companies' affairs are so intermingled that they must be pooled, regardless of what the creditors think, let us just do it. It is just and equitable and necessary.

And that is a case which could have been put before your Honour, but it hasn't been. But the fact that it hasn't been shouldn't be allowed to cause the Court to give directions to achieve that result by what are really quite inappropriate and unseemly means which is having the administrators engage in conduct which would be in breach of the duties that they owed to the creditors of the particular company in respect of which they are acting when they engage in tat conduct.

HIS HONOUR: And as you put it, in effect achieve an order which is a specific order that the Court has been asked to make, the pooling order.

MR WILLIAMS: Yes.

HIS HONOUR: Yes, I understand.

MR WILLIAMS: Now, your Honour, again, might I say we are not here saying that the administrators are acting improperly in doing so. Of course they are doing this out of the best of motives, and we understand that. The fact that they are approaching the Court and to frankly acknowledge to the Court that they appreciate that they face a conflict is to their credit, not otherwise. But for the reasons I have enunciated, what we put is that the approach is misconceived and ought be rejected.

HIS HONOUR: Yes.

MR WILLIAMS: Now, your Honour, there is one matter in relation to the proposed notice to be given to creditors which does concern the Contradictor, and we have raised it in correspondence, and that is this. If we are right in suggesting to the Court that it is what the Americans would call a no brainer for a creditor of any of these asset-holding companies to vote no because they vote yes, they get nothing, they vote no, they will get something between nothing and something. Then, in our respectful submission, they should be told that. They should be told very clearly when they come to these meetings in the notice of meeting that is sent to them and posted and put on - posted on websites and put in advertisements.

Their attention should specifically be drawn to the fact as creditors of these particular asset-holding companies that a vote in favour of pooling will result in them getting nothing. To do less would be not to adequately inform them of the situation.

Many of these people, many of these creditors are in for relatively modest sums, or likely to get distributions which are relatively modest. It is asking too much of them simply to put forward a complex series of proposed amendments to deed of company arrangement and say, you work it out. Nor should there, in our respectful submission, be a single report which fails to differentiate between the position of particular creditors. Now, obviously we are not yet at this stage, because we don't yet know exactly what is going to be sent to creditors. But - - -

HIS HONOUR: Are you suggesting the Court should settle the notice?

MR WILLIAMS: If your Honour is going to - - -

HIS HONOUR: I am not offering it.

MR WILLIAMS: - - - adjourn - if your Honour is going to adjourn or reserve for the purpose in part of seeing what the exact proposal is going to be in terms of the amendment, your Honour could be - - -

HIS HONOUR: Well, that is my present intention, subject to anything you say.

MR WILLIAMS: Your Honour could be presented at the same time with the explanation that is proposed to be sent to creditors. One would think that the two would be prepared hand in hand, in any event. But we would like to see it be made very clear to creditors who have clearly no interest in pooling being made that that is so. This shouldn't drift through on the basis of ignorance or apathy.

HIS HONOUR: Well, if it is going to go through it should go through on full and adequate information, surely.

MR WILLIAMS: Yes, your Honour. And your Honour has made that very clear in the cases that you have decided in the past, as did Finkelstein J in Mentha v GE Capital. There must be a fully informed decision. Where before, what is otherwise really quite extraordinary relief is granted. Your Honour indicated, and I think my learned friend, Ms Gordon, accepted that pooling is really quite exceptional. And before one accepts the outcome of a meeting where pooling is voted for as enabling a departure from the normal principles of company winding up and administration, one would want to be satisfied that it was a fully informed decision.

HIS HONOUR: Yes, I follow that.

MR WILLIAMS: Now, your Honour, if the result of that is that creditors in number turn up and vote against it, then so be it. The Administrators can come back to the Court and say that nonetheless the greater good of the greater number should, for just and equitable, if not necessary reasons, be imposed over the will of those creditors, and make the direct application that at the moment they don't wish to make, well, I say, your Honour, so be it. But let those creditors make their fully informed decision first.

HIS HONOUR: Yes, I follow that.

MR WILLIAMS: Would your Honour excuse me for a moment?

HIS HONOUR: Yes.

MR WILLIAMS: Unless your Honour has some questions, that covers the matters I wanted to put before the Court.

HIS HONOUR: No. I am very much indebted to you and those instructing you for those submissions. Thank you.

MR WILLIAMS: As your Honour pleases.

MS GORDON: If I may, some very short points in reply. Can I deal with the suggestion that it is a choice between, in effect, one pool and what my learned friend describes as eight pools. That is, one with the 34 companies, and then seven separate pools for each of the seven asset holding entities. Your Honour, there is no doubt, as set out in the affidavit, that each of the inter-company issues that I took your Honour to before on page 17 of the affidavit of 13 October, arises in each of - even if you adopt my learned friend's construction - the eight pools, and your Honour has seen that from the table that has been prepared.

He says to us we should have allocated a cost mechanism for conducting eight pools, and what the Administrators have said, "We can't, it is too difficult. It is the very reason why we have come here."

HIS HONOUR: Well, they have explained that.

MS GORDON: And what is important to understand is that my learned friend's contention that it would be quite easy to work out the assets and costs in relation to the seven is, with respect to him, misconceived, because it would mean, just as we said in relation to these factors that are set out on page 17, a need to work out in relation to both each asset and each cost the apportionment between the seven or eight pools. Completely contrary to the entire proposal for pooling to deal with it in that way.

Moreover, as your Honour pointed out, both the nature of the assets and the nature of the companies would militate against that because most of it involves property and airlines, and you have seen the difficulties they have had in the past with the aircraft. It is very difficult to quantify. He conceded the costs would be substantial, and for those reasons alone, and your Honour will have seen the extent to which we tried to allocate the 24 million amongst the issues, a large part of that, it is submitted, will be consumed up, even if it was decided to have eight rather than one pool.

The second thing is, can I deal with this attitude of non-priority creditors? My learned friend is right to say that they were told those ones who had called - and he said three of them - that there was a Contradictor and if they had read the website they would have been. But there has been no correspondence from any of those creditors saying that they oppose it. They haven't turned up. And what is interesting, your Honour, is that t he concept of pooling was first raised as your Honour knows by reference to the DOCAs way back in the beginning, DOCAs which themselves had extinguishment of $25 claims built into them at that time. And yet they still support, as I understand it, of somewhere between 95 and 98 per cent support.

So as our learned friend - as the administrators have said in their affidavits, history tells them having regard to the conduct of this administrations and the history of the voting at them, that they do act rationally and they do act in the interests of the group as a whole in maximising the return to creditors.

I have dealt with the question about the debate and dispute about asset ownership and proofs of debts. There is no inter-relationship between the 34 and 6 and 7, as your Honour has seen from the chart on page 16. In relation to the regional airlines which seemed to be the focus of some of my learned friend's submissions where he asserts that they must be easier because they were operated and people got on an Aeropelican flight.

HIS HONOUR: I think he was dealing with the relationship between the assets or the value of brands, for example.

MS GORDON: Well, the difficulty about that, your Honour, is that they shared the fuel and the IT system and the ticketing and staff and the head office. One can keep giving the list of factors which have led to the application being made. So there is - to suggest that they could somehow insulate those six or seven is unrealistic. And the administrators have set out why it is they believe that is cost prohibitive to go through it because, in effect, it will beg the question.

HIS HONOUR: I follow that.

MS GORDON: He then sought to challenge the basis upon which we made the application on the basis that it was put on just and equitable, and he I think conceded that it

was able to be put on that basis. But then sought to question whether or not it could be put on the essential basis. He said that in his view essential meant could not practically resolve the issues. And in that circumstance I don 't propose to take your Honour through it but can I identify at paragraphs in the second affidavit of 12 September - I will give you the numbers, your Honour, rather than take you to them - in where it is clear that that application is put on the basis that it is essential. And by way of example only - paragraphs 54, 69, 70; and there are many others.

HIS HONOUR: I follow that.

MS GORDON: Can I then move to deal with the question of abstaining from voting. As your Honour will have seen, there are two things to say about that. First of all, there are large inter-company debts, as your Honour will have seen from MAK-22. They exist. Here a sort of analogous drawing to questions of democracy are really irrelevant. It is not one man, one vote. The question here is one dollar, one vote.

And in these circumstances the dollars with the inter-company debts is based upon the 2001 and 2000 accounts are large. And what your Honour will see from distribution table number 2, scenario 2 which is pre pooling is that the only reason why these things, like the Westsky trust, of actually putting up their hands is because of very large amounts of inter-company debt that has been given. That is financial support by other entities within the group, and it was for that reason they should be entitled to vote at them.

HIS HONOUR: The interesting thing about abstaining from voting is this, as a matter of principle one can be attracted to the proposition that if you have got a conflict of interest you should abstain from voting. But then if an administrator abstains from voting, in relation to the company for which he abstains he is not getting any assets there for the creditors of that company.

MS GORDON: That is exactly right, your Honour.

HIS HONOUR: And that is what occurred to me when I - - -

MS GORDON: Yes.

HIS HONOUR: I thought initially that maybe there is something in abstaining.

MS GORDON: No.

HIS HONOUR: But then there is the other side of the coin, isn't there?

MS GORDON: There is, your Honour, and that is very important that those two considerations are kept in clear. And the other thing we say about it is, and the reason why I emphasise the process we have gone through, is these Administrators have come, acknowledging they have got a conflict question and seeking to explain to the Court full and frank disclosure what it is, how it arises, how they propose to deal with it, the protection mechanisms that are in place in order to, in effect satisfy not only the Court but the creditors of the process they are going through.

HIS HONOUR: Yes, I understand.

MS GORDON: If your Honour pleases. Can I deal with the question about whether section 447A is wide enough? My learned friend didn't seek to resile from the proposition that it was wide enough, but he said I, in effect, had the cart before the horse because I was looking at the group as a whole, rather than the entities of each individual company. There is two things to say about that. As your Honour knows, under 435A the objective is to maximise the return to creditors. It is not limited to particular entities, and moreover the second proposition which is important is that the concept of pooling operates in large part - especially in relation to groups of companies where you have got this whole entity and your relationship problem, where you can't differentiate and identify precisely which creditors belong to which company, and I took you this morning through the problems we have got with the proof of debt process.

HIS HONOUR: Yes, I followed that.

MS GORDON: Now, finally, my learned friend raised a matter which had been raised previously by ASIC, and that was whether or not it was better, in a sense, to apply to the Court for a pooling order and get the Court to do it, and in effect, too bad for the creditors. There are two answers to that. First, your Honour will have seen from the contractual arrangements that we said we would go to creditors, and we therefore will - the Administrators wish to honour that.

HIS HONOUR: Yes, I follow that.

MS GORDON: And that is in the DOCAs themselves. Secondly, it has been a fundamental principle of the way in which these arrangements have been set up under Part 5.3A that the matters should rest with the creditors, and in those circumstances the creditors be entitled to vote on it, and consistently with that have a right to challenge it under 445B, acknowledging of course that would be difficult and costly. But it does provide them with an out in which they can seek to challenge it if they so wish.

HIS HONOUR: Yes, I understand.

MS GORDON: Finally, may I deal with the notice requirements, and they are these. There are two obligations on us. One is statutory under section 445F, and that is to provide the resolution which is prescribed by a statute which we will comply with, and we have heard what your Honour has said in relation to that. The second is unlike 439A there was no statutory requirement on us to provide a report. That obligation arises on us by reason of clause 18.4 of the DOCA, and it is for that reason that the Administrators will be forwarding a report in relation to each of the companies - that is, they will deal with each of the companies separately - dealing with this question of proposed voting for pooling.

And there can be no suggestion that we are not going to comply with the law. We will, and what is presently proposed is that that, consistent with the notice orders we seek, will be put on the web sites so that each of the creditors can access that in the usual way. If your Honour pleases.

HIS HONOUR: Yes, I - what do you say as to Mr Crutchfield's proposition that the parties should get indemnity costs?

MS GORDON: Can I deal with it in this way, please, your Honour? We differentiate, your Honour, between certain parties for these reasons. In relation to the Contradictor and ASIC, Commonwealth and the unions, we say that they are entitled to their costs and entitled to the costs on an indemnity basis. In relation to the AAE banks - and for that it is Mr Crutchfield's client, Mr Troiani's client - we adopt a different position, and we adopt a different position as a result of the agreement reached which is set out in the AAE pooling deed. I can take your Honour through that if your Honour would like me to.

HIS HONOUR: What is the provision you rely upon?

MS GORDON: Set out in the definitions is the releases over claims and liabilities re relevant matters, and the relevant matters includes in the third bullet point of the definition:

> *Any matter referred to in correspondence between the parties in connection with the pooling application, and any matter outlined in the background paragraphs to this deed.*

And the pooling application is expressly referred to in paragraphs L, M, O and P. Now, in other words, that is dealt with by the deed itself. In relation to it, there is another matter as well besides that, and that is that the AAE banks would then be the only non-priority third party creditor to have got a payment out of this application if it is successful. And in those circumstances, it is submitted that they shouldn't be entitled to their costs.

HIS HONOUR: Yes, thank you.

MS GORDON: If your Honour pleases.

HIS HONOUR: Mr Crutchfield.

MR CRUTCHFIELD: Your Honour, I am a little surprised; I wasn't aware that there was opposition to the costs. But can I just say this. As your Honour knows, at the directions hearing on 23 June your Honour indicated that your Honour wished to hear from those persons who were in favour of and or opposed to pooling. At that stage my clients were opposed to pooling because they would have been better off without it. They entered in to the pooling compromise deed. The pooling compromise deed contemplates that in 7.9, as my learned friend points out, that:

> *Each party must bear its own legal, accounting and other costs for the preparation and execution of this deed.*

It has got nothing to say about the costs of and incidental to this application. And insofar as they - - -

HIS HONOUR: Well, your short point is you can't enter support for the passage of the approval of the deed - - -

MR CRUTCHFIELD: Yes.

HIS HONOUR: - - - to indicate that - well, to support it, to show that there was no issue as between the parties.

MR CRUTCHFIELD: Yes, your Honour, and it is a condition - - -

HIS HONOUR: I follow that.

MR CRUTCHFIELD: And it is a condition precedent to the deed coming into effect and resolving all of that litigation that your Honour was anxious to resolve that pooling occur, and we have undertaken in accordance with that deed to support the pooling application.

HIS HONOUR: I understand that.

MR CRUTCHFIELD: If your Honour pleases.

HIS HONOUR: Do you wish to say anything further, Mr - - -

MR WILLIAMS: We are in the same position, your Honour.

HIS HONOUR: Yes. Ms Gordon, what do you want - what do you say about the preparation of the form of order? You said you would be able to tell me by the end of the day how long it would take, and I am in no rush.

MS GORDON: The employees are.

HIS HONOUR: I understand that.

MS GORDON: Yes. My instructions are we could have it to you next Monday, your Honour.

HIS HONOUR: Well, I propose to reserve my decision on this matter. Although the matter - some of the issues are fairly narrowly confined there are considerable issues of principle which have arisen, and a number of the matters put by Mr Williams are matters which need to be given significant consideration. If you could - what I suggest you do is prepare a further form of order incorporating the matters to which I have referred so that the actual pooling provisions are in the order which I think is probably a good idea in terms of the Court indicating if I am disposed to go your way so all the creditors know exactly what it is that is being approved for the purpose of the voting of the administrators, if it gets to that stage.

If you could circulate that to all relevant parties by a particular date and then the parties could indicate whether subject to Mr Williams of course saying that I shouldn't make an order, but if I were disposed to make an order, if the form of order could be initialled if there are any issues which are controversial they could come back before me. So, you would want what, until next Monday to do that?

MS GORDON: Yes, your Honour.

HIS HONOUR: And then if I could have it by the end of that week.

MS GORDON: Yes, your Honour.

HIS HONOUR: Is that convenient to everyone else?

MR WILLIAMS: Yes, your Honour.

MR CRUTCHFIELD: Yes, your Honour.

HIS HONOUR: Yes. Well, I thank the parties for their submissions. Is there anything else?

MR WILLIAMS: There was, your Honour. Your Honour sort of half promised me the possibility of the last word, and I wondered if I could ask your Honour to take you up on that half promise, one to reply, and one to rectify an omission.

HIS HONOUR: Yes.

MR WILLIAMS: The reply point was to something that my learned friend just mentioned, my learned friend Ms Gordon just mentioned, which was that the DOCAs got between 95 and 98 per cent support, and that - at any early stage of course of the administration when they were considered, and your Honour ought have some comfort from that, that there is widespread support for pooling amongst the creditors. I just wanted to say two things in response to that, your Honour. Perhaps they are obvious. The first is of course that was at an early stage when it wasn't necessarily apparent to people who might be the winners and who might be the losers.

HIS HONOUR: I understand that.

MR WILLIAMS: The other, of course, is that if one were to put a proposition to the Australian people that 3 per cent of them should pay all of the tax that might get 95 to 98 per cent as well, but it doesn't make it just and equitable.

HIS HONOUR: Nor does it make it essential.

MR WILLIAMS: No, your Honour. But what it does mean, of course, is that - and it is not dissimilar in one sense. I know it is - - -

HIS HONOUR: No, I take your point.

MR WILLIAMS: - - - a crass example, but here you have got a small number of people who are most affected.

HIS HONOUR: I understand the point.

MR WILLIAMS: The other matter I should have raised, your Honour, is in relation to the cases on 447A and pooling, while your Honour in Hilton Stores did say that there might be an appropriate case in which some creditors might just have to basically wear it, if I could put it in the vernacular - - -

HIS HONOUR: I hope I didn't put it that bluntly.

MR WILLIAMS: No, your Honour didn't. I am just putting it in the vernacular. Your Honour said that if it means that some creditors are materially worse off and some better off, but it is in the overall interests, then so be it. What I wanted to say, your Honour, is that in that case your Honour nonetheless didn't need to decide that question because your Honour was of the view that no creditor will actually be worse off in pooling, because your Honour had formed the clear view that the net result for everybody if it wasn't pooled was that there would be virtually nothing left.

HIS HONOUR: Yes. I follow that.

MR WILLIAMS: There is in fact no case amongst the authorities to which my learned friend has referred, nor amongst my own researches where in fact a Court has imposed over the wish of a significant minority a pooling proposition which is manifestly against the interests of that minority.

HIS HONOUR: It brings to mind again the name of the case I mentioned at the start of this hearing, Mr Gambotto.

MR WILLIAMS: Well, in a different context of course, yes.

HIS HONOUR: Of course it was a different context.

MR WILLIAMS: But in terms of pooling Mr Gambotto of course was exercising his legal rights. In terms of pooling, the Court is being asked to apply section 447A to really divert or overcome what would otherwise be parties' legal rights.

HIS HONOUR: Or to vary or eliminate perhaps even.

MR WILLIAMS: Yes. So that is really quite a different matter to Mr Gambotto's situation.

HIS HONOUR: Yes. Well, I was reasoning by analogy is the metaphor rather than anything else.

MR WILLIAMS: I appreciate that, your Honour, but since your Honour comes back to the analogy I think - I just seek to say that there is a distinction to be drawn.

HIS HONOUR: Yes, I follow that.

MR WILLIAMS: If your Honour pleases.

HIS HONOUR: Nothing further from anyone else? I am indebted to the parties for their submissions. Adjourn the Court.

MATTER ADJOURNED at 3.58pm INDEFINITELY