

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL LIST

F.5382

No. 2115 of 2001

BETWEEN:

**ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION PLAN PTY LTD
(ACN 065 590 178) (as Trustee of the Ansett Australia Ground Staff
Superannuation Plan) and ANSETT AUSTRALIA PILOTS/MANAGEMENT
SUPERANNUATION PLAN PTY LTD (ACN 065 590 043) (as trustee of the Ansett
Australia Pilots/Management Superannuation Plan)**

Plaintiffs

and

**ANSETT AUSTRALIA LIMITED (subject to deed of company arrangement) (ACN
004 209 410)
AND OTHERS**

Defendants

AFFIDAVIT OF NIGEL ANTONY FISH No. 2

Date of document:
Filed on behalf of:

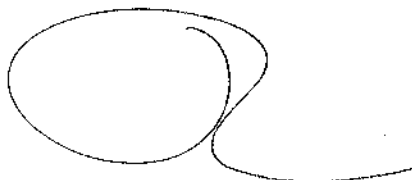
9 May 2002
The plaintiffs

Prepared by:
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I, **Nigel Antony Fish** of Level 5, 333 Collins Street, Melbourne, Victoria, manager,
make oath and say as follows:

1. From January 1998 until 22 February 2002 I was the Superannuation Manager of Ansett Australia Limited (subject to deed of company arrangement) ("**Ansett**"). Between 28 October 1996 and January 1998 I was the Superannuation Administration Manager of Ansett. In both positions, I worked in the Ansett Superannuation Department and my principal responsibility was the superannuation arrangements for Ansett staff. Since January 1998 I have also been the Fund Secretary of each of the 5 Ansett employee superannuation funds, including those described in paragraph 3 below. I have continued in that role after the termination of my employment by Ansett.



2. I am authorised to swear this affidavit on behalf of each of the plaintiffs. Save where otherwise indicated, I make this affidavit from facts within my own knowledge.
3. This affidavit is sworn by me in relation to 2 superannuation funds:
 - Ansett Australia Ground Staff Superannuation Plan ("**Ground Staff Plan**")
 - Ansett Transport Industries Pilots/Management Superannuation Plan ("**Pilots/Management Plan**")(collectively, "**Relevant Plans**").
4. This affidavit is supplementary to my affidavit sworn on 21 December 2001.

Ground Staff Plan

5. The administrators of the Ground Staff Plan have been as follows:
 - From 1988 until 30 June 2001, AMP Life Limited.
 - From 1 July 2001, NSP Buck Pty Ltd.
6. According to NSP Buck Pty Ltd's Monthly Administration Report effective 1 September 2001, there were 8,540 members of the Defined Benefit Section, 45 spouse members and 871 members of the Accumulation Section.
7. The document numbered **5.1.10** in the plaintiffs' index of documents is a copy of the Ground Staff Plan Actuarial Investigation as at 1 July 2000 prepared by Mr Paul Francis, consulting actuary for NSP Buck Pty Ltd, dated 29 March 2001.
8. The Defined Benefit Section includes a retrenchment benefit under rule 1.13 of the first schedule. For the entire period I have been involved in the administration of the Ground Staff Plan (that is, since October 1996), the practice in relation to that plan has been that retrenchment benefits were paid under rule 1.13 of the first schedule if Ansett advised the trustee of the Plan either that the member concerned had been made redundant, or that they had been retrenched.
9. To the best of my knowledge, information and belief, at no time since October 1996 (when I was appointed the superannuation administration manager for Ansett) has Ansett ever made a formal declaration of a reduction of staff for the

purposes of the Ground Staff Plan's rules in the exact terminology of the definition of "retrenchment" in rule 1.1 of the first schedule.

10. Upon the termination of the employment of a member of the Ground Staff Plan, the practice from 1996 until some time in 2000 was for Ansett's payroll section to send a "termination advice" to the Ansett Superannuation Department, on behalf of the trustee of the Plan. The documents numbered **3.3.8B - 3.3.100** in the plaintiffs' index of documents are examples of termination advices, with those members' names deleted. Those numbered 3.3.8B, 3.3.9, 3.3.10, 3.3.30, 3.3.40, 3.3.50 and 3.3.70 have resulted in the payment of retrenchment benefits to the relevant members. The Ansett Superannuation Department then forwarded a copy of that termination advice to the Plans then administrator, AMP Life Limited. In 2000 the practice was altered so that a copy of the termination advice was sent by Ansett's payroll section direct to AMP life Limited or, from July 2001, NSP Buck Pty Ltd.
11. I have been advised by Mr Peter Salerno of NSP Buck Pty Ltd that since the appointment of that company as administrator of the Ground Staff Plan in July 2001, its administrative systems have never provided for any distinction to be drawn between the handling of a termination specified by Ansett to be a "redundancy", on the one hand, and a termination specified by Ansett to be a "retrenchment", on the other hand. I am advised by Mr Salerno that, in either case, NSP Buck would pay a retrenchment benefit under rule 1.13. The document numbered **3.9.10** in the plaintiffs' index of documents is a copy of a letter from Mr Salerno to the plaintiffs' solicitors dated 14 November 2001. In relation to AMP Life Limited, I received advice to like effect from Mr Mark Rozanic. The document numbered **3.9.20** in the plaintiffs' index of documents is a copy of a letter from Mr Rozanic to the plaintiffs' solicitors dated 14 November 2001.
12. The retrenchment benefit payable under the Ground Staff Plan is described on page 9 of the current members' booklet for the Plan, dated September 1995. A copy of that booklet should have been provided to all members of the Ground Staff Plan. The document numbered **2.1.40** in the plaintiffs' index of documents is a copy of that booklet.
13. Members receive an annual statement of their entitlements under the Ground Staff Plan. The document numbered **2.4.10** in the plaintiffs' index of documents is a copy of a typical annual statement, with the member's name deleted. The

nature of the information in the annual statement is largely determined by the requirements of the SIS legislation and, prior to the introduction of that legislation in 1993, by the OSSA legislation.

14. In about March 2001 I received a draft Actuarial Investigation as at 1 July 2000 from Paul Francis, the Actuary of the Ground Staff Plan. I had requested him to prepare such an Investigation at the instruction of the trustee of the Ground Staff Plan.
15. In that draft Report, Francis recommended that Ansett's rate of contribution should be 9% of salaries. I referred this recommendation to my immediate superior at Ansett, Andrew Boyd. Boyd was then the Human Resources Manager – Performance and Remuneration of the Air New Zealand group of companies. Boyd informed me that this recommendation was acceptable to Ansett.
16. I subsequently informed Francis of this and on 3 April 2001 he provided me with the 2000 Actuarial Investigation in final form, in which he recommended contributions by Ansett at 9% of salaries. A copy of that document and the covering letter from NSP Buck Pty Ltd is numbered 5.1.10 in the plaintiffs' index of documents.
17. On 19 April 2001, I attended a meeting of a sub-committee of the Trustee Board held to formally discuss the report on the Actuarial Investigation. At that meeting, I confirmed that Ansett would accept the contribution recommendations contained in the Actuarial Investigation. The document numbered 5.8.165 in the plaintiffs' index of documents is a copy of the minutes of the meeting of the Administration Sub-committee held on 19 April 2001.
18. Following the meeting, I sent Boyd a copy of section 1.4 of the Actuarial Investigation, headed "Recommended Contributions". Thereafter, Ansett continued to pay contributions at the rate of 9% of salaries.

Pilots/Management Plan

19. The administrators of the Pilots/Management Plan have been as described in paragraph 5 of this affidavit.
20. According to NSP Buck Pty Ltd's Monthly Administration Report effective 1 September 2001, the Pilots/Management Plan had 147 Defined Benefit

Members under schedules 1 and 2, 2 spouse members and 298 accumulation members under schedule 3.

21. The document numbered **5.2.10** in the plaintiffs' index of documents is a copy of the Pilots/Management Plan Actuarial Investigation as at 1 July 2000, prepared by Mr Paul Francis, consulting actuary for NSP Buck Pty Ltd dated 15 May 2001.
22. The Defined Benefit Section for pilots includes a retrenchment benefit under rule 1.11(a) of schedule 1. The Defined Benefit Section for managers includes a retrenchment benefit under rule 2.12 of schedule 2.
23. For the entire period since I have been involved in the administration of the Pilots/Management Plan (that is, since October 1996), the practice in relation to that plan has been that retrenchment benefits were paid under rule 1.11(a) or rule 2.12 if Ansett advised the trustee of the Plan either that the member concerned had been made redundant, or that they had been retrenched. At no time during that period has any formal declaration been made by Ansett (or by any other employer) of a reduction of staff for the purposes of the Pilots/Management Plan rules in the exact terminology of the definition of "retrenchment" in rule 1.1, as it applies to rules 1.11(a) and 2.12.
24. Upon the termination of the employment of a member of the Pilots/Management Plan, the practice has been for Ansett's payroll section to send a "termination advice" to the Ansett Superannuation Department, on behalf of the trustee of the Plan. The document numbered **3.4.10** in the plaintiffs' index of documents is a copy of a termination advice typical of those that have resulted in the payment of retrenchment benefits to members of the Plan, with the relevant member's name deleted.
25. I refer to paragraph 11 of this affidavit. The advice from each of Salerno and Rozanic referred to in that paragraph related equally to the Pilots/Management Plan.
26. The retrenchment benefit payable under the Pilots/Management Plan is described on page 9 of the current members' booklet for the management section of the Plan, dated November 1995. A copy of that booklet should have been provided to all members of the Pilots/Management Plan. The document numbered **2.2.40** in the plaintiffs' index of documents is a copy of that booklet.

27. Members received an annual statement of their entitlements under the Pilots/Management Plan. The document numbered 2.5.10 in the plaintiffs' index of documents is a copy of a typical annual statement, with the member's name deleted. I believe that annual statements have been provided substantially in this form since the inception of the Pilots/Management Plan.

Appointment of the Administrators

28. Administrators were appointed to Ansett on 12 September 2001. The second defendants, Mark Mentha and Mark Korda ("**Administrators**"), were appointed by the Federal Court of Australia on 17 September 2001. Most employees of Ansett, including most members of each of the Relevant Plans were stood down without pay on 13 September 2001. Some members of the Relevant Plans were employed by the Administrators after 13 September 2001, and some members continue to be so employed (since 2 May 2002, by the Administrators in their capacity as administrators of the deed of company arrangement).
29. On 17 October 2001 the Administrators sent a standard letter, headed "Opportunity to Apply for Redundancy", to every Ansett employee, including the employee members of the Relevant Plans. The document numbered 3.1.60 in the plaintiffs' index of documents is a pro forma copy of that letter. The letter invited the recipients to apply for "redundancy". It was said on the first page of the letter:

"It is also in the interests of all creditors, including Ansett employees, to establish a commercially viable new Ansett business. However, the ongoing business will be very different to that which operated before 14 September 2001. Its services will be reduced, and less employees will be required for operations."

30. The letters of 17 October 2001 referred to superannuation in part (g) on the third page, in the following terms:

"(g) Your benefits under the relevant superannuation scheme are separate to these proposed arrangements. If your application for redundancy is accepted, your fund will supply you with details of your superannuation entitlements."

31. I have been advised by the Administrators, and I therefore believe, that many Ansett employees responded to the 17 October 2001 letter by applying for the

termination of their employment on the basis of redundancy. I have been advised by the Administrators, and I therefore believe, that on 9 November 2001 they sent approximately 3,500 standard letters to employees of Ansett headed "Notice of Redundancy". The document numbered 3.2.50 in the plaintiffs' index of documents is a copy of one of those standard letters, with the name of the employee deleted.

32. The 9 November 2001 letter states in part (page 1):

"I regret to advise you that following a review of the likely structure required for ongoing operations, your position is no longer required. Accordingly, your employment will conclude, by reason of compulsory redundancy, effective November 9, 2001."

33. I believe that by their letters of 9 November 2001 the Administrators terminated the employment of:

- (a) 3,330 members of the Defined Benefit Section of the Ground Staff Plan;
- (b) 115 members of the Defined Benefit Section of the Pilots/Management Plan;

34. Subsequent to 9 November 2001, and, I believe, also prior to that date, the Administrators have sent similar letters terminating the employment of other members of the Defined Benefit Section of the Ground Staff Plan and other members of the Defined Benefit Section of the Pilots/Management Plan. Copies of such letters and pro formas of such letters are numbered 3.2.40, 3.2.42, 3.2.44, 3.2.57, 3.2.59, 3.2.60, 3.2.70, 3.2.80 and 3.2.90 in the plaintiffs' index of documents. My belief as to when those letters was sent is based upon the contents of a letter from Arnold Bloch Liebler to Deacons dated 19 March 2002, which is numbered 3.9.40 in the plaintiffs' index of documents.

35. I am informed by the plaintiffs' solicitors, and I therefore believe, that on 12 November 2001 the Administrators' solicitors, Andersen Legal, sent them a letter which read in part as follows:

"With regard to the current redundancy programme, the present intention of the Administrators is to notify your clients in a manner consistent with the way in which notification has been made by Ansett in the past."

A copy of that letter is the document numbered **6.1.70** in the plaintiffs' index of documents.

36. Following the appointment of the Administrators, there were discussions between the Administrators, NSP Buck Pty Ltd, staff in the Ansett payroll section and myself to identify the most efficient method of advising NSP Buck Pty Ltd of the termination by the Administrators of the employment of members of the Relevant Plans (instead of by the preparation and transmission of "hard copy" termination advices as has occurred previously, as outlined in paragraphs 10 and 24 of this affidavit).
37. The Administrators subsequently provided NSP Buck Pty Ltd with a spreadsheet listing each Ansett employee and containing relevant information such as their current employment status and, if their employment had been terminated, the date of the Administrators' letter advising them of that termination and the effective date of termination. That spreadsheet has been periodically updated since then.
38. The most recent version of the spreadsheet received as at the date of swearing this affidavit (current as at 19 April 2002) is the "combined" sheet forming part of the document numbered **7.1.110** in the plaintiffs' index of documents.
39. I am informed by Wendy Barton of NSP Buck Pty Ltd, and I therefore believe, that she has received from the Administrators the following explanation of the columns in that spreadsheet headed "Status" and "SevDate":

"This info is contained within the "Status" and "Sev Date" (exit date) columns of the report as follows:

1. *Exit Red = Exit Redundancy. Employee has exited Ansett on a redundancy on the date noted in "Sev Date" column.*
2. *Exit Resign = Resignation only.*
3. *Exit Air NZ = No redundancy. May have been on an Air NZ contract or transmitted back to Air NZ.*
4. *Exit CC = Redundancy. This is just some additional Call Centre employees made redundant.*
5. *Exit Pre Admin CR = Redundancy. Employees who were due to exit on redundancy [sic] prior to the 14/9/01.*
6. *Exit Terminated & Terminated = No redundancy. This represents employees who may have had contract terminations, loss of license etc.*
7. *Exit Air NZ Grad = No redundancy. Graduate secondment from Air NZ only.*

8. *Require Post = Currently still required by Ansett. No action required.*
9. *Retain = As per # 8*
10. *Hold = No action yet. These employees will eventually be cleared.*
11. *NZ = No action yet. These employees will eventually be cleared."*

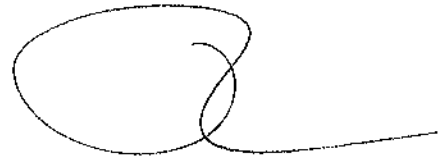
40. I am informed by Peter Salerno of NSP Buck Pty Ltd, and I therefore believe, that on the basis of the information in that spreadsheet the current status of defined benefit members of the Relevant Plans is as follows:

• **Ground Staff Plan**

1	Exit (Red)	7,705
2	Exit Resign	50
3	Exit (Air NZ)	10
4	Exit (CC)	5
5	Exit (Pre Admin)	3
6	Exit (Terminated)	2
7	Exit Air NZ Gad	1
8	Require Post	333
9	Retain	546
10	Hold	1
11	NZ	0
	Blank	7
	TOTAL	8,663

• **Pilots/Management Plan**

1	Exit (Red)	112
2	Exit Resign	7
3	Exit (Air NZ)	4
4	Exit (CC)	1
5	Exit (Pre Admin)	0
6	Exit (Terminated)	1
7	Exit Air NZ Grad	0
8	Require Post	29
9	Retain	0
10	Hold	0
11	NZ	3
	Blank	0
	TOTAL	157



41. I have been advised by the plaintiffs' solicitors, and I therefore believe, that they had the following correspondence with the Administrators and their solicitors in relation to the matters in issue in this proceeding:

- 17 October 2001 Fax from Mark Abramovich to Dennis Thorn and Michael Binetter (the document numbered **6.1.10** in the plaintiffs' index of documents).
- 24 October 2001 Fax from Mark Abramovich to Dennis Thorn (cc Michael Binetter) (the document numbered **6.1.30** in the plaintiffs' index of documents).
- 5 November 2001 Letter from Mark Abramovich to Mark Mentha (the document numbered **6.1.50** in the plaintiffs' index of documents).
- 9 November 2001 Letter from Peter Cash to Mark Mentha (the document numbered **6.1.60** in the plaintiffs' index of documents).
- 12 November 2001 Letter from Dominic Emmett to Peter Cash (the document numbered **6.1.70** in the plaintiffs' index of documents).
- 13 November 2001 Letter from Peter Cash to Dominic Emmett (document numbered **6.1.80** in the plaintiffs' index of documents).

Sworn at Melbourne, Victoria on
9 May 2002

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)
) _____ *Nigel*

Nigel Antony Fish

Before me:

Peter Edmund Cash

Peter Edmund Cash
 385 Bourke Street
 Melbourne, Victoria

A natural person who is a current practitioner within the meaning of the *Legal Practice Act 1996*

This affidavit is filed on behalf of the plaintiffs