

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

F. 5382
BETWEEN:

No. 2115 of 2001

**ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION PLAN PTY LTD
(ACN 065 590 178) (as Trustee of the Ansett Australia Ground Staff
Superannuation Plan) AND OTHERS**

Plaintiffs

and

**ANSETT AUSTRALIA LIMITED (Administrators Appointed) (ACN 004 209 410)
AND OTHERS**

Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date of document:
Filed on behalf of:

7 February 2002
The plaintiffs

Prepared by:
DEACONS
Lawyers
385 Bourke Street
MELBOURNE VIC 3000

Solicitors code: 370
DX 445
Tel: (03) 8686 6000
Ref: P E Cash

This is the document marked "PEC1" produced and shown to **Peter Edmund Cash** at
the time of swearing his affidavit on

Before me:



EMMA KATE PARMENTER

385 Bourke Street
Melbourne, Victoria

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

Exhibit "PEC1"

**Copy letter to Arnold Bloch Leibler dated
7 February 2002**

"PECL"

Deacons



(incorporating Dunhill Madden Butler)

Our Ref: 524015/00354
Contact: Peter E Cash
Direct line: 8686 6672
Direct email: peter.cash@deacons.com.au

7 February 2002

Attention: Mr Paul Chiappi

Arnold Bloch Leibler
Lawyers
Level 21
333 Collins Street
MELBOURNE VIC 3000

Dear Sir

**ANSETT AUSTRALIA LTD (ADMINISTRATORS APPOINTED) AND
THE TRUSTEES OF THE ANSETT AUSTRALIA SUPERANNUATION
PLANS**

We refer to your letters dated 25 January 2002 and 1 February 2002.

Each of those letters relates to the appropriate forum for hearing of the questions raised by the Trustees of the Superannuation Plans ("the Trustees") in the Supreme Court of Victoria.

We refer also to:

- (a) the Application issued on behalf of the Administrators of Ansett Australia Limited ("Ansett") in proceeding No. V3075 of 2001 ("the Administrators' proceeding");
- (b) the Originating Motion issued on behalf of the Trustees in proceeding No. 2115 of 2001 ("the Trustees' proceeding").

ABL letter dated 25 January 2002

We agree that the relief sought in paragraphs 1 to 6 and 12 to 14 of the Originating Motion in the Trustees' proceeding may be within the

Lawyers

Level 24
385 Bourke Street
Melbourne VIC 3000
Australia
Telephone 03 8686 6000
Internat + 61 3 8686 6000
Facsimile 03 8686 6505
www.deacons.com.au
DX 445 Melbourne
melbourne@deacons.com.au

Other Offices

Brisbane
Canberra
Perth
Sydney

**Independent
Affiliated Firms**

Bangkok
Hanoi
Ho Chi Minh City
Hong Kong
Jakarta
People's Republic of
China
Singapore
Taipei

jurisdiction of the Federal Court to grant. We note, however, that (see below) ASIC has raised doubts about jurisdiction. It is not in the Trustees' interests to continue with a proceeding in a Court which may have insufficient jurisdiction.

You refer to paragraphs 8 to 11 of the Originating Motion. Those paragraphs raise questions arising out of the general supervisory jurisdiction of courts of equity in relation to trusts. With respect to the particular questions asked, we refer you to *Mettoy Pension Trustees Ltd. v. Evans* [1990] 1 WLR 1587. In particular, we refer you to the discussion, at 1615-1618, of the court's jurisdiction to exercise powers. It may be necessary to ask the Court to exercise such a power where facts and circumstances exist which may disentitle the employer from exercising powers provided for in a trust instrument. In that regard, we refer to the First Report by Administrators made pursuant to section 439A of the *Corporations Act*, dated 16 January 2002. We note the statement made by the Administrators in par. 8.4.8:

"We are unable to make the declaration of retrenchment because it may adversely impact upon the return available to the ordinary unsecured creditors."

You refer to paragraph 7 of the Originating Motion. We refer you to clause 13(4) of the Ground Staff Plan and clause 13(4) of the Pilots/Management Plan. We can refer you to several authorities which relate to the interpretation of powers such as the powers contained in those clauses.

ABL letter dated 1 February 2002

In your letter dated 1 February 2002, you state "we believe that the Federal Court is the appropriate jurisdiction for the issues raised by the trustees". We note that you do not give the reasons upon which your belief is based. We are unable to discern for ourselves any advantage in continuing in the Federal Court.

As we understand it, you would concede that there is no question but that the Supreme Court has plenary jurisdiction over all questions arising in the Trustees' proceeding.

The present circumstances relating to Ansett have raised many issues for the Trustees. At all times, the Trustees must exercise their powers in a way which they reasonably believe will be in the best interests of the members of each of the Plans.

Questions have been raised as to the jurisdiction of the Federal Court to hear and determine all the issues raised in the Trustees' proceeding.

We refer to the submissions of ASIC made orally on 29 November 2001 and in paragraph 14 of its written submission dated 14 December 2001 and filed in the Administrators' proceeding.

We also refer to the following rules of the Supreme Court of Victoria:

- (a) Rule 54.02(2)(a)(i) which confers jurisdiction on that Court to determine any question in an administration proceeding arising in the execution of a trust;

07/02/2002

- (b) Rules 16.01(2)(b) and (3) which confer jurisdiction on the Court to appoint a person to represent other persons in the same class and thereafter to make a judgment or order binding all the persons in the class represented as if they were parties.

We note that there appears to be no comparable jurisdiction in the Federal Court. In particular, we draw your attention to Rule 6.13(7) of the Federal Court Rules, which applies in the present case. It appears that the Federal Court has no jurisdiction to appoint representative defendants to act on behalf of different classes of members of a superannuation fund. Since there are different classes of members of the Plans with different interests, the Trustees cannot act for all of those classes. In other words, for the present proceedings to be properly constituted, there must be representative parties.

It is reasonable to anticipate that further questions will arise which will require determination by the Court. For example, questions may arise whether the further terminations of employment recently notified in the press may themselves involve retrenchments.

The Trustees would not wish to be constrained from raising any further such questions by reason of any doubt as to the jurisdiction of the Court. They do not see it is in the interests of members to have doubts about jurisdiction affecting the determination of these questions. It is not within the power of either the Administrators or the Trustees to settle between themselves questions of jurisdiction. Further, the Trustees may also need to join further representative parties in their proceeding in order to deal with the further redundancies described above. That can be done in the Supreme Court. It is not at all clear that the Federal Court can do this.

Another issue for the Trustees, were the Federal Court to be the forum, is that it would be unwise for them to run the risk of a member complaining that he or she was not bound because of an absence of jurisdiction.

You will also appreciate that having the Trustees as the moving party in any proceeding with respect to the proper interpretation of the various Plans, including the proper interpretation of the Trustees' powers, confers certain advantages. Before the commencement of the Trustees' proceeding, we did ask you to include further questions in the Administrators' proceeding. You will recall that there was some controversy between the Trustees and the Administrators as to the scope of the Administrators' proceeding and there have been no amendments made in that proceeding. So long as the proceeding is in the Supreme Court, the Trustees can readily approach the Court to add further questions if they wish to do so.

We also remind you that, on 9 January 2002, the Administrators opposed the grant of leave to the Trustees to commence the Trustees' proceeding. Submissions were made to the Supreme Court of Victoria (Beach J.) that leave should be refused on the basis that it was more appropriate that the Trustee bring its questions and issues before the Federal Court. The Court overruled that submission and granted leave.

Perhaps, you have in mind that the fact that the Federal Court has been seized of several applications arising out of the administration of Ansett gives it an advantage when it comes to hear and determine the Trustees' proceeding. Although we are well aware of the work done in the Federal Court, we do not think that any of the issues determined there have given that Court some advantage, in terms of efficiency, in hearing and determining the questions and issues in the Trustees' proceeding.

07/02/2002

As you are aware, the Supreme Court has assigned to one judge responsibility for the management of the Trustees' proceeding.

As to your observation in your letter of 1 February 2002 that it is "unsatisfactory" for the Supreme Court proceeding not to have a statement of claim or points of claim from the Trustees, we remind you that the principal responsibility of a trustee is to advise the Court of the difficulties it faces, and to leave it largely to the various parties to make such arguments as they see fit. Given the complexity of the issues in the Supreme Court, however, the Trustees propose to prepare a "Briefing Paper" to assist all the defendants. At this stage, we expect that Paper to be of a preliminary nature only, and what we would also propose is that the Trustees file detailed, written submissions after the interlocutory steps have been completed and sufficiently in advance of the final hearing for the issues hopefully to be clarified. Pleadings or points of claim seem to us to be inappropriate, at least from the Trustees.

Finally, we refer to your requests for copies of the exhibits to Mr Fish's affidavit. As you know, each of the documents exhibited to that affidavit were also exhibited to his first affidavit in the Administrator's proceeding. Accordingly, rather than duplicating those voluminous documents yet again, we refer you to the attached table which enables the exhibit markings to be readily cross-referenced. Of course, save in particular cases (which are not relevant here), parties are not actually obliged to serve copies of exhibits at all.

Yours faithfully

Peter E Cash
Partner
Deacons

cc. Maurice Blackburn Cashman
Employment & Industrial Section

Pointon Partners

Herbert Geer & Rundle

AFFIDAVITS OF NIGEL ANTONY FISH

Summary of exhibits

SUPREME COURT Affidavit sworn 21 December 2001	FEDERAL COURT Affidavit sworn 27 November 2001
NAF1	NAF1
NAF2	NAF2
NAF3	NAF3
NAF4	NAF4
NAF5	NAF11
NAF6	NAF12
NAF7	NAF13
NAF8	NAF14
NAF9	NAF19
NAF10	NAF20
NAF11	NAF21
NAF12	NAF22