

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

No. 2115/01
F.5382

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 Transport Industries Limited Pilots/Management Superannuation Plan)

Plaintiffs

and

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

Defendants

AFFIDAVIT OF RICHARD SAMPSON MITCHELL

Date of document:
Filed on behalf of:

the Plaintiffs

Prepared by:
Deacons
Solicitors
Level 24
385 Bourke Street
Melbourne 3000.

Solicitors Code: 370
Tel: 9230 0411
Fax: 8686 6505
Reference: Mr. P. Cash

I, RICHARD SAMPSON MITCHELL, of Level 12, 440 Collins Street, Melbourne,
Consulting Actuary MAKE OATH AND SAY:

Introduction

1. I am a director of Mitchell & Co. Pty. Ltd. Consulting Actuaries.
2. My *Curriculum Vitae* is as follows:

(a) Qualifications and Professional Positions

Fellow of the Institute of Actuaries (London) 1969

D. R. Mitchell

Fellow of the Institute of Actuaries of Australia 1969

Associate of the Society of Actuaries (USA) 1972

Member of the International Association of Consulting Actuaries

President of the Institute of Actuaries of Australia 1999

Australian representative on the International Actuarial Association
2000

Member of the Professionalism Committee of the International
Actuarial Association.

(b) **Work Experience**

Mitchell & Co established October 1990

Founding principal of the firm and works as consulting actuary for some large superannuation funds. Also called upon to provide independent advice to funds seeking a second opinion, acting in mergers and acquisitions or providing expert testimony in court cases relating to superannuation and other financial matters.

Mercer Campbell Cook & Knight (now William M. Mercer) October 1985 to October 1990

Principal of firm in October 1985 and Senior Actuary from October 1988. Member of the firm's Investment Committee for 5 years. Extensive involvement in the firm's superannuation practice and Chairman of the Professionalism Committee from 1998.

E.S. Knight & Co. June 1972 to October 1985 – Consulting Actuaries

Partner in 1973 and conducted wide and extensive actuarial work for major national and international firms and a number of public sector funds.

National Mutual Life Association of Australasia (now AXA Asia Pacific) February 1960 to June 1972

Experience in Head Office actuarial and superannuation areas.
Assistant Actuary Head Office Actuarial and Superannuation Divisions.

Dictionary

3. In this affidavit, I refer to:

- (a) (the Ansett Australia Ground Staff Superannuation Plan 1999 Consolidated Trust Deed as "the **Trust Deed**")
- (b) the Ansett Australia Ground Staff Superannuation Plan as "the **Ground Staff Plan**";
- (c) the Rules for the Management of the Defined Benefit Section of the Ground Staff Plan which is Schedule 1 to the Trust Deed as "the **Rules**";
- (d) the Superannuation Industry (Supervision) Act 1993 (Cth) as "the **S.I.S. Act**";
- (e) the Superannuation Industry (Supervision) Regulations 1994 as "the **S.I.S. Regulations**";
- (f) the Superannuation Guarantee Charge Act 1992 as "the **Charge Act**";
- (g) the Superannuation Guarantee (Administration) Act 1992 as "the **Guarantee Administration Act**";
- (h) the Superannuation Guarantee (Administration) Regulations 1993 as the "**Guarantee Administration Regulations**".

4. I refer to:

- (a) the *Charge Act*; and
- (b) the *Guarantee Administration Act*;

collectively as "the superannuation charge legislation".

Role of Actuary

5. The Institute of Actuaries Australia has approximately 1,400 Fellows and Accredited Members. Such members are engaged in life assurance, general insurance, superannuation, banking and health insurance. In relation to general insurance, actuaries sign off on estimates of long-term liabilities. In relation to life insurance, actuaries are involved in pricing of life and disability risk products and the estimation of life insurance liabilities.

Professional Standards and Guidance Notes

6. The Institute of Actuaries of Australia has promulgated a Code of Conduct, several Professional Standards and Guidance Notes which are relevant to the conduct of an actuary in relation to a Defined Benefit Superannuation Fund.
7. Copies of the Code of Conduct, relevant Professional Standards and Guidance Notes are the documents numbered as follows in the Plaintiff's Index to Documents.

7.1.40	The Institute of Actuaries of Australia: Code of Conduct.	Revised December 2001
7.1.100	Guidance Note or Professional Standard?	December 1995
7.1.50	Professional Standard 400 Investigations of Defined Benefit Superannuation Funds	May 1995
7.1.51	Professional Standard 401 Summaries of Actuarial Reports on the Financial Condition of Defined Benefit Superannuation Funds	November 1999
7.1.60	Guidance Note 458 – Preparation of Benefit Certificates Required under the <i>Superannuation Guarantee (Administration) Act 1992</i>	March 1995

7.1.70	Guidance Note 460 Prudential Reporting to Trustees and the Regulator	December 1994
7.1.80	Guidance Note 461 Funding and Solvency Certificates	December 1994
7.1.90	Guidance Note 463 Valuation of Superannuation Fund Assets	November 1999

8. In respect of superannuation, there are two types of funds:

- (a) accumulation funds;
- (b) defined benefits funds.

In relation to accumulation funds, actuaries generally have only a minor role. For example, they may give advice with respect to the treatment of a surplus in an accumulation fund.

9. In relation to a defined benefit fund, legislation confers several functions upon the actuary of the fund.

S.I.S. Act

- 10. Section 10 of the *S.I.S. Act* defines an actuary to mean "a person who is a Fellow or an Accredited Member of the Institute of Actuaries of Australia".
- 11. The *S.I.S. Act* confers various functions upon the actuary of a fund. See ss. 10, 80A, 83A, 83E. See also ss. 117, 131A, 131B and 310.

Superannuation Charge Legislation

- 12. In 1992, Parliament enacted the superannuation charge legislation.
- 13. The superannuation charge legislation imposes the superannuation guarantee charge ("the charge") on employers in respect of each of their employees. The *Guarantee Administration Act* in effect requires an employer to provide a minimum level of superannuation support. As an alternative to

paying the charge, an employer may make use of some of the facilities provided under the *Guarantee Administration Act*.

14. When Parliament enacted the superannuation charge legislation, it provided that employers need not pay the charge if they made contributions at least at a particular level to complying superannuation funds. There are several incentives given to an employer to reduce or avoid liability to pay the charge. For example, payment of the charge is not a deductible expense for employers.
15. Particular provision was made when the relevant complying superannuation fund was a defined benefit fund. Under a defined benefit fund, employer contributions are not directly allocated to each member. The legislation provided that members of such funds would receive benefits equivalent to the money's worth of contributions that would have been required if, instead, they had been members of accumulation funds. Parliament included in the *Guarantee Administration Act* several formulas the application of which achieves that equivalence. Further, Parliament conferred on the actuary the function of applying those formulas or making other arrangements which would have similar effect.
16. The *Charge Act* imposes the charge upon any "superannuation guarantee shortfall" (s.5). The amount of the charge is "an amount equal to the shortfall" (s.6). The *Guarantee Administration Act* provides that the charge is payable by the employer (s.16). The *Guarantee Administration Act* operates by reference to obligations in respect of individual employees. Particularly, there may be a "shortfall" in respect of several employees. Accordingly, the legislation anticipates that an employer may have "one or more individual superannuation guarantee shortfalls" (s.17). Thus, the superannuation guarantee shortfall for a year for a particular employer comprises the aggregate of :
 - (a) the employer's individual superannuation guarantee shortfalls for the year; and
 - (b) an interest component for the year; and
 - (c) an administration component for the year (s.17).

The interest component is determined under s.31. The administration component is determined under s.32.

17. The *Guarantee Administration Act* defines an employer's superannuation guarantee shortfall for the year as the sum of its shortfalls "in respect of an employee for a quarter" (s.19). (Section 18 is a transitional provision which relates solely to 1992-1993).

18. The quarterly shortfall in respect of an employee is worked out according to the formula contained in s.19(2) of the *Guarantee Administration Act*. In particular, the application of the formula requires the determination of two values:

(a) the total salary or wages paid by the employer to the employee for the quarter; and

(b) the "charge percentage for the employer for the quarter".

19. Salary and wages will be agreed between employer and employee. "Total salary or wages" are subject to a "maximum contribution base" which is defined in s.15. However, the limit identified in s.19(3) means that the legislation operates in such a way that the employer's obligation attaches only to salary and wages at or below a particular indexed amount, i.e. the maximum contribution base. Certain salary and wages are excluded from consideration (ss. 27-29).

20. The "charge percentage for the employer" is stipulated by the *Guarantee Administration Act*. The "charge percentage" may be "that number (under s.20) as reduced" by s.22 of the Act. Section 22 of the Act provides for the reduction of the charge percentage in relation to "defined benefit superannuation schemes".

21. For example, in the case of an employee whose quarterly total salary and wages is \$20,000, the formula contained in s.19(2) to calculate the employer's quarterly shortfall will operate as follows:

$$\$20,000 \times 8/100 = \$1,600.$$

22. Accordingly, unless the charge percentage is a reduced number, the shortfall for one year will equal \$6,400 (being the sum of four quarterly shortfalls for

four identical quarterly amounts of salary or wages) together with an interest component and an administration component.

23. Sections 22 and 23 provide for the reduction of the charge percentage. It is available if an employer either makes superannuation contributions to an accumulation fund or otherwise provides benefits to a particular level in a defined benefit fund. In the case of a defined benefit fund, benefits at the requisite level are referred to as "minimum requisite benefits".
24. In the case of defined benefit funds, the following conditions must be satisfied:
- (a) there must be a "benefit certificate" in relation to one or more "complying superannuation schemes" (s.22(2)(a));
 - (b) the scheme in relation to which the certificate has effect is operating for the benefit of a person as an employee of the employer (s.22(2)(b)); and
 - (c) the certificate specifies a "notional employer contribution rate" ("NECR") (s.22(2)(c)).
25. If the conditions are met, the charge percentage is reduced according to the formula contained in s.22(2). That paragraph produces as the "charge percentage" the product of A multiplied by B where A is the NECR and B is either 1 or some other amount depending upon certain circumstances.

The Benefit Certificate

26. The benefit certificate referred to in s.22(2)(a) is defined in s.10 of the *Guarantee Administration Act*. The benefit certificate is produced by an actuary (s.10(1)).
27. The *Guarantee Administration Act* does not define the NECR. It is determined pursuant to the *Guarantee Administration Regulations*. See Regs. 4, 5 and 6.
28. The NECR is a rate stipulated in the benefit certificate. If the benefit certificate stipulates an NECR equal to the charge percentage otherwise calculated under s.20, then the difference between the two amounts will be

zero. Accordingly, there will be no "shortfall" and the employer will not be liable to any charge in respect of that employee.

29. Section 10(2) of the *Guarantee Administration Act* identifies the NECR. It is to be a rate which, in the opinion of the actuary, is "required to meet the expected long-term cost" to a contributing employer "of the minimum benefits accruing in respect of all employees of that class from the date of effect of the benefit certificate onwards".
30. The *Guarantee Administration Act* does not define "minimum benefits accruing in respect of all employees". However, s.10(6) of that Act provides that the regulations may make provision in relation to the "issue and form of benefit certificates".
31. Under the *Guarantee Administration Regulations* the NECR is usually determined in accordance with regs. 5 or 6 (reg. 4(1)). The minimum benefit appears to be identified as MB (reg. 6 (1)). MB has "the same meaning" as in reg. 6(5). Accordingly, MB is calculated using a formula which involves deducting from minimum requisite benefits ("MRB") benefits which accrued before 1 July 1992. Those pre-1992 benefits are identified as PAB (reg. 6).
32. The application of the procedure in reg. 6 involves complexity. For present purposes, the NECR is calculated by considering the minimum benefits accruing on and from 1 July 1992 (being the date upon which the superannuation guarantee legislation came into operation) and by making suitable allowance for member (as opposed to employer) contributions. In other words, contributions made by an employee member to such a fund are not taken into account in determining the obligations of the employer with respect to the charge.
33. Once the NECR is determined, it is stipulated in the benefit certificate. In effect, the benefit certificate proposes that, as an employer will provide benefits under the fund at least equal to the amounts calculated by reference to reg. 6, the employer will be deemed to have made contributions equal to the NECR.
34. The benefit certificate by itself does not purport to impose any obligation upon the employer to make any contributions.

Employer Contributions

35. The amount of the contributions which an employer will make to a fund in order that there will be assets in the fund sufficient to enable it to meet MRB will depend upon several factors. For example, a fund may be in surplus such that it is unnecessary for an employer in any particular year to make any contribution to the fund as fund assets are already sufficient to meet the minimum requisite benefits of members for some time.

The S.I.S. Regulations

36. Other regulations provide mechanisms to ensure that an employer contributes to a defined benefit fund amounts sufficient:
- (a) to meet fund benefits as they fall due; and
 - (b) to meet the MRB of members at all times.
37. Section 31(1) of the *S.I.S. Act* provides that the regulations made under that Act may prescribe standards applicable to the operation of regulated superannuation funds. Regulation 9.07 of the *S.I.S. Regulations* stipulates that the standards contained in regs. 9.08, 9.09 and 9.17 are such prescribed standards. In particular, regs. 9.08 provides for a funding standard and reg. 9.09 provides for an operating standard for funding and solvency certificates.
38. Regulation 9.05 provides, in effect, that Division 9.3 applies to defined benefits funds which have been used to reduce or remove the superannuation guarantee charge imposed by s.5 of the *Charge Act*.

Actuarial Report or Investigation

39. Division 9.5 of the *S.I.S. Regulations* is entitled "Actuarial Standards Relating to Defined Benefit Funds". The Division applies only to defined benefit funds (reg. 9.26). Regulation 9.29 provides that a trustee of a defined benefit fund must require an actuarial investigation to be made in relation to the fund at least once every 3 years.
40. Regulation 9.30 provides that a trustee of such a fund must obtain an actuarial report in accordance with the regulation in relation to each investigation which has been made under reg. 9.29. Regulation 9.30(3)

states what the actuarial report must contain. Relevantly, the contents are specified in reg. 9.31(1).

41. Regulation 9.31(1)(b) requires the report to contain a statement of the actuary's opinion as to whether the value of the assets of the fund are adequate to meet the value of the liabilities of the fund "in respect of accrued benefits in the fund of members of the fund". Regulation 9.27 defines "accrued benefits in relation to a member of a defined benefit fund" to mean "the benefits to which the member has an absolute or potential entitlement at the valuation date on account of the length of time the member has been a member of the fund at that date". Where an employee has been the member of a defined benefit fund for any period of time, accrued benefits will, in all likelihood, exceed MRB.
42. Regulation 9.31(1)(c) provides that the report shall contain a statement recommending the rate at which the actuary considers the employer contribution should be made. In that case, the rate at which the employer contribution should be made is the rate sufficient to ensure that the fund is able to meet all of its obligations to pay benefits from time to time.
43. Regulation 9.31(1)(e) makes specific provision where a fund which has been used "to reduce or remove the superannuation guarantee charge imposed" by s.5 of the *Charge Act*. (Such a fund will be one in respect of which a benefit certificate has been made under s.10 of the *Guarantee Administration Act*.)
44. The actuarial report must contain a statement that all funding and solvency certificates required under Part 9 of the *S.I.S. Regulations* have been obtained (reg. 9.31(1)(e)).

Funding and Solvency Certificate

45. Regulation 9.09 provides that (in those cases where the fund has been used to reduce or remove the charge) the trustee of a defined benefit fund must obtain a "funding and solvency certificate in relation to the fund."
46. Division 9.3 of the *S.I.S. Regulations* is entitled "Funding and Solvency of Defined Benefits Funds". In particular, reg. 9.08(2) provides:

- (1) In respect of each year of income of a defined benefit fund to which this Division applies, an employer-sponsor of the fund must pay contributions to the fund in accordance with this regulation.
 - (2) The contributions paid must not be less than the certified minimum contributions relating to the fund.
47. Regulation 9.10 specifies the contents of the funding and solvency certificate. Relevantly, the actuary must:
-
- (e) certify the solvency of the fund as at the effective date of the certificate; and
 - (f) certify the minimum contributions reasonably expected by the actuary to be required in respect of any member or class of members to secure the solvency of the fund on the expiry date of the certificate.
48. For the purposes of Division 9.3, a reference to "the solvency of a fund" is read "as a reference to the minimum benefit index of the fund being certified in accordance with this Division as not less than one" (reg. 9.06(2)).
49. In effect, this means that the "solvency of a fund" is considered to be satisfied and able to meet MRB. See reg. 9.15.
50. Thus, it is pursuant to Part 9 of the *S.I.S. Regulations* that provision is made to ensure that the assets of a defined benefit fund will be sufficient to meet the MRB of the members of that fund.
51. Regulation 9.12 provides for the period of effect of a funding and solvency certificate. Such certificates ceased to have effect on their expiry date. They also cease to have effect upon the happening of the events set out in reg. 9.12(2). When preparing a funding and solvency certificate, the actuary may identify certain so-called notifiable events. Pursuant to reg. 9.12, a certificate ceases to have effect if, amongst other things, the employer-sponsor of the fund fails to pay contributions relating to the fund in accordance with reg. 9.08 or a notifiable event occurs in relation to the fund.

Certification of minimum contributions

52. In certifying "minimum contributions" pursuant to reg. 9.10(1)(f), the actuary will have regard to several matters. The actuary will take into account the contents of Guidance Note 461 and, in particular:

- (a) anticipated investment earnings of assets from time to time;
- (b) anticipated benefit entitlements to be paid from the fund;
- (c) other expenses incurred in the conduct of the fund.

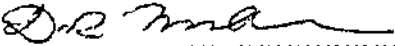
53. Accordingly, in my opinion, where an actuary has reason to anticipate that the assets of the fund will be significantly reduced by the payment of fund benefits, the actuary will be required to fix "minimum contributions" as an amount which will ensure that, at the expiry of the funding and solvency certificate, the assets of the fund will be sufficient to meet at least the MRB of remaining members.

Incorporation of legislative requirements in Trust Deeds

54. After the enactment of the superannuation charge legislation and the S.I.S. Act, some employers and trustees attempted to incorporate the effect of those statutory provisions in trust deeds. However, the process proved difficult. Constant amendments to legislation and regulations compounded the difficulty. As a result, trust deeds usually incorporate the effect of those statutory provisions in the same manner in which they have been incorporated in the Trust Deed and in the Rules as referred to in paragraph 3 above.

Sworn by RICHARD SAMPSON MITCHELL at)
Melbourne in the State of Victoria on 17 May)
2002)

Before me:


.....
Dean Robert Kambovski
385 Bourke Street Melbourne
A natural person who is a current practitioner within the meaning of the Legal
Practice Act 1996