HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No M51/2007

INTERNATIONAL AIR TRANSPORT ASSOCIATION APPELLANT

AND

ANSETT AUSTRALIA HOLDINGS LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) & ORS RESPONDENTS

Matter No M52/2007

INTERNATIONAL AIR TRANSPORT ASSOCIATION APPELLANT

AND

ANSETT AUSTRALIA HOLDINGS LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) RESPONDENT

International Air Transport Association v Ansett Australia Holdings Limited
[2008] HCA 3
6 February 2008
M51/2007 & M52/2007

ORDER

Matter No M51 of 2007

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 16 November 2006, except in so far as those orders varied the orders in respect of the costs of proceedings at first instance, and, in their place, order that the appeal to that Court be otherwise dismissed.*

3. *The appellant pay the respondents' costs of the appeal to this Court.*

Matter No M52 of 2007

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 16 November 2006, except in so far as those orders varied the orders in respect of the costs of proceedings at first instance, and, in their place, order that the appeal to that Court be otherwise dismissed.*

3. *The appellant pay the respondent's costs of the appeal to this Court.*

On appeal from the Supreme Court of Victoria

Representation

S J Gageler SC with C M Caleo SC for the appellant (instructed by Clayton Utz Lawyers)

N J Young QC with M C Garner and O Bigos for the respondents (instructed by Arnold Bloch Leibler)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

International Air Transport Association v Ansett Australia Holdings Limited

Contract – Construction – Agreements between the International Air Transport Association ("IATA") and participating airlines provided for the operation of a "Clearing House" in accordance with regulations ("the Regulations") – Pursuant to the Regulations IATA set off debits and credits that would otherwise exist between the airlines – The Regulations provided that no liability or right of action would accrue between participating airlines, including Ansett – Whether the effect of the Regulations was that IATA was the creditor of Ansett to the exclusion of other participating airlines.

Insolvency – Voluntary administration under Pt 5.3A of the *Corporations Act* 2001 (Cth) ("the Act") – Deed of Company Arrangement – Public policy – Whether Pt 5.3A of the Act or a rule of public policy required that the whole of the debtor's estate be available for distribution to all creditors – Whether any such rule invalidated the effect of the Regulations properly construed.

Insolvency – Voluntary administration under Pt 5.3A of the Act – Deed of Company Arrangement – Order of priorities – Relationship between contractual rights and obligations and the operation of Pt 5.3A – Whether the Regulations purported to circumvent the Deed or were otherwise repugnant to the Deed.

Corporations Act 2001 (Cth), Pt 5.3A.

1 GLEESON CJ. The primary issue in these appeals is one of construction of a contract, the Multilateral Interline Traffic Agreement – Passenger ("the Agreement"), of which the IATA Clearing House Regulations ("the Clearing House Regulations") are part. If the respondents' construction of the Agreement is accepted, an issue of public policy arises. Whether a similar issue arises if the appellant's construction is correct is a matter of controversy.

The proceedings and the issues

2 The facts concerning the Clearing House system operated by the appellant ("IATA"), the participation in that system by Ansett Australia Holdings Limited ("Ansett"), the insolvency of Ansett, the Deed of Company Arrangement ("the DOCA") executed on 2 May 2002 pursuant to Pt 5.3A of the *Corporations Act* 2001 (Cth) ("the Act"), and the claims by or with respect to Ansett under monthly clearances prior to the DOCA, are set out in the joint reasons of Gummow, Hayne, Heydon, Crennan and Kiefel JJ ("the joint reasons").

3 In December 2002, IATA brought proceedings in the Supreme Court of Victoria challenging decisions by the Deed Administrators of Ansett that IATA was not a creditor of Ansett in respect of the monthly clearances from August to December 2001. In June 2003, Ansett commenced proceedings in the same Court seeking a declaration that the Clearing House Regulations ceased to apply to all claims by or with respect to Ansett upon and by virtue of the execution on 2 May 2002 of the DOCA. The matters came before Mandie J[1], who described the principal issue in both proceedings as a question whether IATA was and remained a creditor of Ansett in respect of the monthly clearances. The amount claimed by IATA was $US4,370,989.

4 Relying on the authority of *British Eagle International Air Lines Ltd v Compagnie Nationale Air France*[2], Ansett argued that, by virtue of Ansett's execution of the DOCA, the Clearing House arrangement "became repugnant to the insolvency legislation and contrary to public policy". This argument was put upon the premise that the Agreement, on its true construction, was not materially different from the agreement that was before the House of Lords in *British Eagle* and, in particular, that a relationship of debtor and creditor existed between issuing and carrying Clearing House members. The argument of IATA was that, as appeared from the evidence and as was acknowledged on all sides, the Agreement had been re-drafted, following the *British Eagle* decision, for the purpose of overcoming the effect of that decision, and that under the new

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1 *International Air Transport Association v Ansett Australia Holdings Ltd (subject to a deed of company arrangement)* (2005) 53 ACSR 501; 23 ACLC 1161.

2 [1975] 1 WLR 758; [1975] 2 All ER 390.

Agreement the airlines were not, as between themselves, debtors and creditors. IATA, and IATA alone, it was said, was a creditor of Ansett in respect of the relevant clearances. On that basis, the other airlines never became debtors or creditors of Ansett; neither the DOCA nor any statutory provision required that they be treated as debtors or creditors; and the rights of the general body of creditors of Ansett were not displaced or interfered with by the Clearing House arrangement. Mandie J said:

> "In my opinion there was no relevant asset of Ansett, being a debt or other chose in action [arising in favour of Ansett against other airlines when it carried passengers for them], of which the non-airline creditors were deprived by virtue of the clearing house arrangement. It was conceded on behalf of Ansett that, if this was so, the *British Eagle* principle 'did not bite'. I so conclude."

5 Mandie J declared that IATA was a creditor of Ansett in respect of the transactions the subject of the clearances. The matters went to the Victorian Court of Appeal[3]. Maxwell P reached the same conclusion as Mandie J, that is to say, that according to the Agreement no relationship of debtor and creditor arose between the airlines who participated in the Clearing House system and that, instead, each airline had a monthly liability to, or a monthly claim against, IATA. That, as he saw the case, was all he needed to decide. Nettle JA, with whom Bongiorno AJA agreed, accepted the view for which Ansett contended, which was that debts and rights of action arose between the individual airlines, and they were not extinguished until they had been cleared. On that basis, there was no relevant difference between the Agreement and the clearing house arrangements considered in *British Eagle*; there was a purported contracting out of the relevant insolvency legislation; such contracting out was contrary to public policy; and the insolvency laws prevailed.

6 In this Court, IATA contends that the construction of the Agreement accepted by Mandie J and Maxwell P should be preferred. IATA further contends that, if its construction of the Agreement is correct, then there was no purported contracting out of any relevant insolvency laws; there was never any relationship of debtor and creditor between the individual airlines; and the questions of public policy considered in *British Eagle* do not arise.

7 On one matter the parties agree. The first step is to decide the meaning of the Agreement. Whether there is a further step remains to be considered. Nobody suggested in argument, and none of the judges who have considered this question in Australia, or who have considered a similar question in England,

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3 *Ansett Australia Holdings Ltd (subject to deed of company arrangement) v International Air Transport Association* (2006) 60 ACSR 468; 24 ACLC 1381.

suggested, that the construction of the Agreement is to be approached otherwise than according to the application of the orthodox principles used to decide the meaning of a commercial contract. Naturally, the airlines who were parties to the Agreement, and IATA itself, would have understood the potential significance of the insolvency laws of the countries in and between which the airlines provided services, and the differences between those laws. The risk of insolvency, which stands behind many commercial agreements, undoubtedly formed part of the context in which the Clearing House system was devised and intended to operate. Local insolvency laws, such as those of Australia, have to be applied in the light of the legal relationships created by the contract into which the airlines and IATA entered, but it is the agreement of the parties that establishes those legal relationships. In considering Ansett's public policy argument, it is necessary to be precise about the provisions of the Agreement that are said to offend public policy. There is no evidence, and no suggestion in argument, that the entire Clearing House system was designed to evade insolvency laws. In order to decide whether any aspect of the Agreement offends public policy, it is first necessary to decide what the Agreement means, for that is a matter of substantial dispute.

The construction issue

8 In giving a commercial contract a businesslike interpretation, it is necessary to consider the language used by the parties, the circumstances addressed by the contract, and the objects which it is intended to secure[4]. An appreciation of the commercial purpose of a contract calls for an understanding of the genesis of the transaction, the background, and the market[5]. This is a case in which the Court's general understanding of background and purpose is supplemented by specific information as to the genesis of the transaction. The Agreement has a history; and that history is part of the context in which the contract takes its meaning[6]. Before considering that history, it is necessary to explain, by reference to the text, how the issue of construction arises.

9 International airline operators regularly issue passenger tickets in respect of journeys where it is contemplated that, for some part, or perhaps the whole, of

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4 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 [22]; *Lake v Simmons* [1927] AC 487 at 509 per Viscount Sumner.

5 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22]; *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 350.

6 *Singh v The Commonwealth* (2004) 222 CLR 322 at 331-338 [8]-[23].

the journey, the carrier will be another airline operator. IATA is an association of international airline operators. The members of IATA desired to enter into arrangements under which each party might sell transportation over the routes of the others. The Agreement embodies those arrangements.

10 IATA was incorporated in 1945 under the Statutes of Canada. In or about November 1946, IATA established the IATA Clearing House, which is a division of IATA responsible for the clearance of accounts between member airline operators. The primary functions of the Clearing House are to effect monthly clearances and to pay or collect from IATA members the balance found to be due by or to the Clearing House. This enables airline operators to avoid having to make and receive numerous payments to and from other airlines. Mandie J pointed out that the essence of the process is that appropriate debits and credits are entered against or in favour of each operator in respect of dealings with other operators, and clearances of those entries result in settlements involving either a payment by an airline operator to the Clearing House (IATA) or a payment by IATA to an airline operator, rather than there being a multitude of payments between the operators themselves. Ansett joined this system in 1951, and at all material times since then was a party to the current Agreement.

11 The Clearing House system is operated pursuant to the Clearing House Regulations. Membership of the Clearing House is open to IATA members on a voluntary basis (reg 4). Application for membership is made pursuant to, and on the terms of, the Regulations. Regulation 9 provides that admission to membership in the Clearing House shall constitute a contract between each member and every other member and IATA, and sets out terms of that contract. Those terms are incorporated in the Agreement by Art 8, which provides:

> "8.1 PAYMENT OF TRANSPORTATION CHARGES
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> Each issuing airline agrees to pay to each carrying airline the transportation charges applicable to the transportation performed by such carrying airline ... in accordance with applicable regulations and current clearance procedures of the IATA Clearing House, unless otherwise agreed by the issuing airline and the carrying airline."

Regulation 9, in the form applicable to these appeals, provides:

> "(a) With respect to transactions between members of the Clearing House which are subject to clearance through the Clearing House as provided in Regulations 10 and 11 and subject to the provisions of the Regulations regarding protested and disputed items, no liability for payment and no right of action to recover payment shall accrue between members of the Clearing House. In lieu thereof members shall have liabilities to the Clearing House for balances due by them resulting from a clearance or rights of action

against the Clearing House for balances in their favour resulting from a clearance and collected by the Clearing House from debtor members in such clearance;

(b) Notification to the Clearing House of any claim (debit or credit) for clearance shall, subject to the Regulations, constitute an irrevocable authority to clear the same in accordance with the Regulations and current clearing procedures and to pay or collect any balances due by or to the Clearing House as a result of the clearances effected; provided, however, that if the Clearing House receives notification that the amount of a claim that has been notified for clearance has been attached, garnished or otherwise seized by issue of an order of Court, the Clearing House Manager shall, whilst such situation exists, suspend all clearance between the members concerned until notified by both parties that normal clearance between them may be reinstituted. During the period of suspension, the parties affected shall remain absolved from their respective obligations under Regulation 10 to settle only through the Clearing House.

(c) The effecting of a clearance and payment of the balances due to or by the Clearing House in accordance with these Regulations and current clearance procedures shall constitute a satisfaction and discharge of every claim dealt with in such clearance. IATA shall be entitled to recover any balances due to the Clearing House by legal action.

(d) Members of the Clearing House may include in the second clearance in which a new member participates their unpaid claims against the new member referring to pre-membership transactions, unless otherwise agreed between the new member and the member having the claim.

(e) The contract created hereby and the obligations created hereunder shall be binding upon the successors in interest, including administrators, trustees and receivers, of each member."

12 Other regulations bear upon the question. They include reg 12 which appears in the following context:

"SCOPE OF CLEARANCE

10. The following classes of transactions shall be cleared through the Clearing House and not otherwise in any manner, except for particular transactions or particular classes of transactions with respect to which the parties thereto have expressly agreed that they shall not be cleared through the Clearing House: all transactions between members pursuant to their participation in the IATA

Multilateral Interline Traffic Agreements, transactions arising from the Universal Air Travel Plan and Miscellaneous Charges of any nature including the carriage of mail, charters, Pool agreements, airport and terminal charges, aircraft servicing, maintenance and victualling charges, salvage work, catering and ground transportation services, telecommunications, etc and all similar services customarily rendered between carriers, including billings for authorised cash advances made by national airlines to representatives of foreign airlines for the following purposes:

(a) advances to crews for the purpose of accommodation and subsistence;

(b) advances to local representatives of foreign airlines under standing authority and within agreed monthly maxima for the purpose of meeting normal weekly and monthly current airport or town expenditure.

11. All other transactions including those relating to the purchase or sale of fixed assets such as aircraft, and aircraft engines and components, spares in bulk not obtained for immediate issue, plant and equipment and fittings, premises or properties, and transactions relating to leases may be cleared and settled through the Clearing House provided the consent of the member against which the claim is raised has first been obtained. It is an obligation of members to obtain all necessary approvals from their national bank or other appropriate authority before clearance through the Clearing House.

12. All transactions within the scope of clearance are hereby deemed mutual debts of the parties involved. Unless otherwise agreed to by the parties, a claim for such transaction shall arise upon the performance of the services rendered therefor."

13 It was common ground, and the evidence showed, that the form of reg 9(a) set out above was the result of amendments to the Regulations made, following the decision of the House of Lords in *British Eagle*, for the purpose of overcoming the effect of the decision in that case. Unless the purpose of overcoming the effect of the decision was, for some legal reason, impossible of fulfilment, then Ansett's argument must be that the changes were inadequate to produce the intended result. That, in substance, is what Nettle JA decided. He concluded that reg 9(a) "cannot receive effect according to its terms." That is the focus of the issue of construction. The question is whether, in the context of the whole Agreement, including the Regulations, the provision in reg 9(a), that no liability for payment and no right of action to recover payment shall accrue between members of the Clearing House, and that in lieu thereof members shall have liabilities to and rights of action against the Clearing House, has effect according to its terms. Those words spell out what the Regulations in their

previous form, without those words, had been held to mean in *British Eagle* by Templeman J[7], by the Court of Appeal[8], and by the minority in the House of Lords.

14 In *British Eagle*, it was alleged that, at the time of its insolvency, British Eagle, having carried passengers for Air France, was owed a certain sum by Air France, and that such amount was an asset available to the general creditors of British Eagle. Air France's defence was that it owed nothing to British Eagle, and that, under the Clearing House system, British Eagle's only relevant assets or liabilities were rights or obligations between British Eagle and IATA. That defence was upheld at first instance and in the Court of Appeal. Russell LJ summarised the opinion of the Court of Appeal, saying[9]:

> "[W]e do not consider that the contract is one that can fairly be said to contravene the principles of our insolvency laws. Those laws require that the property of an insolvent company shall be distributed pro rata among its unsecured creditors: but the question here is whether the claim asserted against Air France is property of British Eagle.
>
> In our judgment it is not: British Eagle has long since deprived itself of any such property by agreeing to the clearing house system."

The same view was taken by the dissenting members of the House of Lords, Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale.

15 The leading judgment for the majority in the House of Lords was given by Lord Cross of Chelsea, with whom Lord Diplock and Lord Edmund-Davies agreed. Lord Cross, after reviewing the detailed terms of the contract (which did not include what are now said to be the critical words of reg 9(a)), concluded, as a matter of construction, that British Eagle had a legal right to payment from Air France, which could properly be called a debt, even though it could not bring legal proceedings against Air France but was obliged to use the Clearing House system to obtain payment. Having reached that conclusion as a matter of construction, Lord Cross then dealt with the argument that the Clearing House system impermissibly conflicted with, or attempted to by-pass, the insolvency laws by subjecting the property of British Eagle (the debt owed to it by Air France) to the claims of the Clearing House. His Lordship came to that argument

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7 *British Eagle International Air Lines v Compagnie Nationale Air France* [1973] 1 Lloyd's Rep 414.

8 *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1974] 1 Lloyd's Rep 429.

9 [1974] 1 Lloyd's Rep 429 at 434.

having first decided that there was property of British Eagle in the form of a debt (or an innominate form of liability not materially different from a debt) owed by Air France. Upon that premise, his Lordship concluded that the Clearing House procedures attempted to achieve a distribution of British Eagle's property which ran counter to the principles of the insolvency legislation. The procedures, he said, provided for a distribution of the property of the insolvent company different from that prescribed by law. This was contrary to public policy and the rules of general liquidation must prevail; not the rules of some special "mini liquidation"[10].

16 The purpose of the amendment made to reg 9(a) was to remove the premise upon which the reasoning of the majority in the House of Lords proceeded (that, at the time of its insolvency, British Eagle owned property in the form of a debt owed to it by Air France), and to restore the contractual position found at first instance, and in the Court of Appeal, and accepted by the minority in the House of Lords. If there never was any property of British Eagle in the form of a debt owed to it by Air France, then there was no attempt to dispose of or deal with such property in a manner inconsistent with the insolvency laws.

17 A matter of commercial practicality may be noted. A clearing house system has many convenient features, some of which are too obvious to require elaboration. The members of IATA include airline operators in a wide variety of forms of ownership, including government ownership, and those operators are based in localities with different legal systems. It is not difficult to understand why operators might agree to a system that was not merely a method of enforcing legal rights against other operators but was intended to create rights of a different kind. If, properly construed, an agreement between operators meant that they had no property in the form of legal rights against other operators, and no liabilities in the form of debts owed to other operators, then it is difficult to identify any principle of public policy that would make it impossible to give effect to that agreement. This is a matter to which it will be necessary to return.

18 A matter of drafting practicality also should be noted. In setting out to achieve a contractual result of the kind that IATA says was achieved by the amendment to reg 9(a), it was necessary to find some way of describing that which the Clearing House system was to clear. It is, therefore, hardly surprising that the Regulations make reference to claims arising from the issuing of passenger tickets. Whatever was being subjected to the Clearing House procedure had to be identified for the purpose of that procedure. The transactions on which the procedure operated involved the provision of services for reward. The procedure was to regulate payment for those services. The rights or

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10 *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 at 780-781; [1975] 2 All ER 390 at 411.

entitlements upon which the procedure operated had to be identified. The general scheme of reg 9 was to refer to "clearance" of "transactions", and to "claims" for clearance. According to reg 12, a claim for a transaction arose upon the performance of the services rendered.

19 Nettle JA observed that Art 8.1 of the Agreement provided for each issuing airline to pay each carrying airline the transportation charges applicable. This, he said, created an obligation and correlative right properly described as a debt. However, the agreement for payment in Art 8.1 was expressed to be an agreement to pay in accordance with the Regulations unless otherwise agreed by the issuing airline and the carrying airline. The capacity to opt out of the Clearing House system by agreement between an issuing airline and a carrying airline, and the qualification in reg 9(a) referring to protested and disputed items, indicated that it was contemplated that the ordinary operation of the system would not cover all transactions. That is not inconsistent with the construction of reg 9(a) for which IATA contends. Nettle JA accepted that if reg 9(a) stood alone, it would be hard to resist IATA's argument. Its terms, he said, imply the annihilation of a debt and its replacement with rights as against the Clearing House alone. IATA points out, however, that the matter is not left to implication; and there is not an anterior debt that is annihilated. Subject to the qualification mentioned, the regulation states that no liability shall accrue as between the airlines, and that in lieu thereof members have rights and liabilities against or in favour of the Clearing House.

20 Regulation 9(b), to which Nettle JA referred, refers to an amount of a claim being "attached, garnished or otherwise seized". This, his Honour said, assumes the existence of a debt, at least until clearance. Maxwell P pointed out that, in *British Eagle*, all the members of the House of Lords rejected the argument that reg 9(b) demonstrated that there were debts owing between members. The provision is necessary to deal with the case where a creditor of a carrier, perhaps not knowing that transactions were subject to the clearance system, went to court upon an assumption that debts were owing between airlines. Provision for temporary suspension of the system in such a case is not inconsistent with reg 9(a).

21 As to reg 12, its legal effect in a particular jurisdiction may vary according to the laws, including the laws concerning set-off, of that jurisdiction. It is a deeming provision, and part of the need for such deeming arises from the terms of reg 9(a). Without such a provision, transactions the subject of claims might not have the mutuality required for set-off. The form of setting-off for which the system provides is, in the case of a particular member, the setting off of the total of the debit claims notified against that member against the credit claims notified by that member.

22 The Agreement contains a number of provisions consistent with the meaning for which Ansett contends. The task, however, is to decide the meaning

of the Agreement, read as a whole, including reg 9(a) in its present form. There is no repugnancy between reg 9(a) and the rest of the Agreement, or any particular part of the Agreement. The division of opinion among the English judges who considered the Agreement in its unamended form at least shows that the other provisions are not necessarily inconsistent with the result for which IATA contends. What, then, is the legal significance of the fact, evident from the history of the Agreement and acknowledged on both sides, that reg 9(a) takes its present form as a result of an amendment made by IATA and the member airlines in response to the *British Eagle* decision? As noted earlier, that aspect of the historical context throws light on the purpose and object of the Agreement. It is information that assists in the ascertainment of the meaning of reg 9(a) and it confirms that such meaning is the ordinary meaning conveyed by the text of that regulation[11]. This is a modest use of contextual matter, but it is all that is necessary for present purposes. Regulation 9(a) means what it says. It cannot be ignored. It is not repugnant to some overriding provision. It is consistent with the other provisions. It makes commercial sense. It should be given effect according to its terms.

23 On the true construction of the Agreement, in the case of the transactions the subject of the monthly clearances in question, the property of Ansett did not include debts owed to it by other airline operators and the liabilities of Ansett did not include debts owed by it to other airline operators. The relevant property of Ansett was "the contractual right to have a clearance in respect of all services which had been rendered on the contractual terms and the right to receive payment from IATA if on clearance a credit in favour of the company resulted."[12]

Public policy

24 Upon the construction of the Agreement accepted above, as the joint reasons explain, the DOCA did not operate to defeat the claim of IATA or to support the claim of Ansett.

25 The decision of the House of Lords in *British Eagle*, and of the Victorian Court of Appeal in the present case, and at least the primary argument of Ansett in this Court, concerning the effect of Ansett's insolvency, proceeded upon the premise that the Agreement (or, in the case of *British Eagle*, the Agreement in an earlier form) meant something different. The premise was that, upon the true

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11 Compare, in the context of statutory interpretation, *Acts Interpretation Act* 1901 (Cth), s 15AB(1)(a).

12 *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 at 765 per Lord Morris of Borth-y-Gest; [1975] 2 All ER 390 at 396.

construction of the Agreement, the members of the Clearing House stand as to claims to be cleared in relation to each other as debtors and creditors and that this relationship inures until the debt is cleared in accordance with the Clearing House procedures or otherwise settled. On that approach, reg 9(a) is no more than a stipulation that the rights and liabilities arising between members are not to be enforceable except in accordance with the Regulations. Given the premise on which the argument proceeds, the agreement that simple contract debts are to be satisfied, and may only be satisfied, in a particular way is an attempt to contract out of the insolvency laws and is contrary to public policy[13]. The premise having been rejected, that argument falls away.

26 In opening the appeals to this Court, senior counsel for IATA, seeking to define the issues, said that "[i]f the construction question is resolved in IATA's favour, then, on the way in which Ansett seeks to present its public policy argument, the public policy for which it contends is not engaged and that is the end of the matter." That is certainly how Mandie J at first instance, and Maxwell P in dissent in the Court of Appeal, saw the case. The majority in the Court of Appeal, having resolved the construction question against IATA, did not consider whether a public policy issue would have arisen on the alternative construction. Even so, some of the submissions for Ansett in this Court appeared to embrace a wider proposition than that for which the decision in *British Eagle* stands. The effect of the proposition appears to be that, even if the majority in *British Eagle* had construed the Agreement (as it then stood) in the same way as the minority (and Templeman J and the Court of Appeal), the Agreement (or some unspecified part of the Agreement) would have been regarded as an ineffective attempt to contract out of the insolvency laws. On that approach, it becomes important to identify what exactly is said to be against public policy, and what the consequences of such a conclusion might be. If it were said, for example, that the whole Agreement is contrary to public policy, then that might have consequences for which nobody contends. If it were said that part of the Agreement is contrary to public policy, then it would be necessary to identify that part.

27 There is a logical difficulty with the argument. If one construes the Agreement to mean that debts and property rights arise between member airline operators upon the performance of services, and a provision that such rights and liabilities are not enforceable otherwise than through the Clearing House system is treated as contrary to public policy and void, then there remains something on which the insolvency laws (to use Mandie J's word when recording Ansett's concession) may "bite". If, however, the alternative construction is accepted, as

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13 *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 at 780-781; [1975] 2 All ER 390 at 411; *Horne v Chester and Fein Property Developments Pty Ltd* [1987] VR 913 at 919.

it should be, a problem arises. Public policy may render a contractual provision invalid; but it cannot create a contract to which the parties have never agreed. It is one thing to treat the Clearing House system as a mere procedural convenience which operates smoothly enough so long as all participants are solvent but which can have no lawful work to do in the event of supervening insolvency, when the parties are thrown back upon their basic contractual rights and obligations. What if the parties have agreed that there shall be no such rights and obligations as between themselves? They cannot be forced to become debtors and creditors when they have agreed that they would not be so. The argument involves an impermissible attempt to use public policy to create rights and liabilities, and to create for the parties a new agreement different from the agreement they have made.

28 The airline operators have agreed between themselves and with IATA upon the legal basis on which they will provide services of the kind covered by the Agreement. Public policy does not enable a court to re-write their contract, and bind them to a different agreement. Ansett's public policy argument appears to depend upon an assumption that, notwithstanding their agreement, the "real" or "underlying" legal relationship between the airline operators is that of debtors and creditors, and that this legal relationship is ineradicable. Yet, on the true construction of the Agreement, that is not the basis upon which the operators agreed to provide the services in question. As Lord Morris pointed out in *British Eagle*[14], the Agreement contained no provision that was designed to come into effect or bring about a change in the event of insolvency, and there is no ground to surmise or assert that a different agreement would have been made but for an attempt to evade insolvency laws. It is one thing to say (as was held in *British Eagle* and in the Victorian Court of Appeal) that the airline operators, if they were debtors and creditors of each other, could not lawfully agree that those debts and rights of property would escape the effects of the insolvency laws. It is another thing altogether to say that, although the airline operators agreed that they would not enter into relationships of debtors and creditors, the law will impose that relationship upon them, contrary to their agreement.

29 Insofar as Ansett's public policy argument goes beyond what was decided in *British Eagle* and is said to apply even if the Agreement has the meaning for which IATA contends, it should be rejected.

Conclusion

30 I agree that the appeals should be allowed and that consequential orders should be made as proposed by Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

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14 [1975] 1 WLR 758 at 769-770; [1975] 2 All ER 390 at 401.

31 GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. Since 2000 the corporate respondent to these appeals has been styled Ansett Australia Holdings Limited ("Ansett"), following a change of name from Ansett Transport Industries Limited. In 1951 Ansett became a member of the Clearing House which had been established in 1946 as a department of the appellant, the International Air Transport Association ("IATA"). This litigation arises from events in 2001-2002 associated with the collapse of the business of Ansett and the impact this had upon the operations of the Clearing House and the dealings between Ansett and the Clearing House.

The Clearing House system

32 The operations of the Clearing House and of the Regulations ("the Regulations") pursuant to which they have been conducted from time to time will require further consideration later in these reasons. The basic *modus operandi* may now be stated as follows.

33 International airline operators regularly sell and issue tickets to passengers for journeys wholly or partly by carriage over the routes of other airlines, carry baggage of such passengers, and issue air waybills for the transport of goods over the routes of other airlines. The operations of the Clearing House avoid the necessity for the airlines to make and receive between themselves numerous payments in respect of such operations.

34 Debits and credits in accounts of the participating airlines with IATA are netted out at the end of every month. Those airlines with a net credit balance receive a payment from the Clearing House, whilst those with a net debit balance are obliged to pay it to the Clearing House. Payments are not made between the participating airlines themselves.

35 There is a further aspect of this system which was emphasised in the submissions for Ansett and which should be noted here. This is that the netting-off system is not limited to the set-off of mutual dealings between any two airlines. For example, while mutual dealings between Ansett and, say, British Airways would be listed and set off, the netting-off system would also include (by way of "multilateral" set-off) claims against Ansett by a third airline which was subject to no claim by Ansett for mutual set-off. The claim by the third airline would be met from a pool of funds provided from the dealings between Ansett on the one hand and British Airways and other such airlines on the other hand.

36 The operation of the Clearing House system as it stood over 30 years ago was considered by the House of Lords in *British Eagle International Air Lines Ltd v Compagnie Nationale Air France*[15]. There, the appellant ("British Eagle") had gone into a creditors' winding-up. British Eagle asserted a claim to payment of moneys by the respondent ("Air France"). By majority (Lords Diplock, Cross of Chelsea and Edmund-Davies; Lords Morris of Borth-y-Gest and Simon of Glaisdale dissenting) the House of Lords rejected the contention of Air France that the only claim of the liquidators of British Eagle lay against the Clearing House and was subject to the netting-off system. The effect of the decision was that in the liquidation of British Eagle the Clearing House system was ineffective to capture for netting-off under its provisions an asset of British Eagle (the money claim against Air France) which was available for distribution between the general creditors of British Eagle under the *pari passu* system of distribution mandated by s 302 of the *Companies Act* 1948 (UK).

37 Several points of distinction should be noted between the situation in the present case and that in *British Eagle*. First, no claim is made here between particular airlines. It is IATA itself which asserts it is a creditor of Ansett. Ansett denies the efficacy of the Clearing House arrangements to produce such a claim in favour of IATA and against Ansett. Secondly, the terms of the Regulations have been changed since the decision in *British Eagle*. Thirdly, the present case arises not in a liquidation but in an administration conducted under Pt 5.3A (ss 435A-451D) of the *Corporations Act* 2001 (Cth) ("the Corporations Act").

38 Nevertheless it will be necessary to return to *British Eagle*. The present parties disagreed both as to what that case decided and as to the application of its reasoning to the facts of this case.

Administration under Pt 5.3A of the Corporations Act

39 Further reference should now be made to Pt 5.3A. In *Brash Holdings Ltd v Katile Pty Ltd*[16], Brooking, J D Phillips and Hansen JJ observed:

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15 [1975] 1 WLR 758; [1975] 2 All ER 390. The House of Lords reversed the decision of the Court of Appeal (Russell, Cairns and Stamp LJJ), [1974] 1 Lloyd's Rep 429, which had dismissed an appeal from the decision of Templeman J, [1973] 1 Lloyd's Rep 414.

16 [1996] 1 VR 24 at 28-29. See also *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 37-38 [47]-[51].

> "Part 5.3A was introduced to provide a means whereby a company which is or may be insolvent may be subjected to control by an administrator to the exclusion of its normal officers for a strictly limited period during which the administrator is charged to investigate the affairs of the company in order to ascertain which of three courses should thereafter be adopted: a deed of company arrangement to be executed by the company, winding up, or simply the cessation of the administration without either of the foregoing. The scheme of Pt 5.3A is that at the end of the strictly limited period of administration, the creditors themselves will decide which of these three possible steps should be taken and in the meantime there is a moratorium on actions or proceedings against the company."

40 There were three significant stages in the operation of Pt 5.3A with respect to the affairs of Ansett. They were as follows. First, on 12 September 2001, and pursuant to s 436A, Ansett appointed three persons as administrators of the company. (They were replaced as administrators by the second respondents to the first appeal in this Court later in that month.) Thereafter, clearances were made by IATA in respect of Ansett for the months from August 2001 up to December 2001. The clearance for August showed a debit balance due by Ansett to the Clearing House of $US359,208, that for September a credit balance of $US10,169,045, and those for October and November debit balances of $US5,954,559 and $US2,707,912 respectively. As a result of the December clearance Ansett was treated as having consumed the whole of the September credit and was shown by IATA as having overall a debit balance. This was not paid to IATA and on 5 March 2002 Ansett was suspended from membership of IATA. There were no clearances by IATA for January and succeeding months. Ansett's membership of IATA was terminated on 2 June 2002.

41 Secondly, on 27 March 2002 a meeting of the creditors of Ansett, convened by the second respondents under s 439A, resolved pursuant to par (a) of s 439C that Ansett execute a Deed of Company Arrangement ("the Deed").

42 Thirdly, on 2 May 2002 the Deed was executed as provided in s 444B. Thereupon, and by force of ss 444D and 444G, the Deed bound Ansett, its officers and members, the administrators, and certain creditors of Ansett. This class of creditors included those with claims against Ansett where the circumstances giving rise to the claims occurred on or before 12 September 2001. Authorities including *Hoath v Comcen Pty Ltd*[17] indicate that these claims must

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17 (2005) 53 ACSR 708 at 711-712 [17].

also still have been current on 2 May 2002, the date of execution of the Deed. Further, and this follows from the construction given s 444D in *Brash Holdings*[18], the claims are those which would have been admissible to proof under s 553 in a winding-up of Ansett if the circumstances giving rise to the claims had occurred before 12 September 2001.

43 Some reference now should be made to certain provisions of the Deed. Clause 4.2 imposed a moratorium upon those bound by the Deed and having a claim against Ansett. They were barred from, among other things, taking any action to seek to recover any part of their claim other than pursuant to the Deed. This provision reflected the terms of s 444E. The moratorium continued while the Deed was in force and related back (by operation of cl 2.2 and s 444C) to 27 March 2002. Clause 14 provided:

> "The rules and mechanisms to be applied to proofs of debt and the ascertainment of Claims shall be similar to the rules and mechanisms for such things prescribed by the [Corporations Act] in the context of the liquidation of a company, amended or adjusted as appropriate to make the process as cost effective as possible."

This had the effect of incorporating the general provision made in s 553C respecting mutual dealings and set-off in the case of insolvent companies. Clause 18 of the Deed then laid out an order of priority for the distribution of proceeds.

The position taken by Ansett

44 Ansett and the administrators submit that the effect of Pt 5.3A of the Corporations Act and the provisions of the Deed is that the Deed operated upon the property of Ansett which existed on 12 September 2001 and whatever claims of other airlines against Ansett existed at that time need to be proved in accordance with the requirements of the Deed; the conduct by IATA of the multilateral set-off Clearing House arrangements did not and could not achieve any other result. In correspondence between the solicitors for the parties, the administrators contended that the Regulations and Clearing House arrangements did not apply to Ansett's credits and debits which had not been cleared before 12 September 2001, that these credits and debits were to be dealt with only in

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18 [1996] 1 VR 24.

accordance with the Deed and that this outcome was supported by what had been decided in *British Eagle*.

45 Consistently with that position and after execution of the Deed on 2 May 2002, the administrators made demands upon 13 airlines, members of the Clearing House, for payment directly to the administrators of net indebtedness allegedly due and owing to Ansett for the clearance months beginning August 2001 and ending March 2002. The total sum so demanded exceeded $US11 million. Further action by Ansett on these demands was suspended, pending the outcome of the present litigation.

The litigation

46 Two proceedings were instituted in the Supreme Court of Victoria, one by IATA challenging certain decisions of Messrs Korda and Mentha as Deed Administrators of Ansett and the other by Ansett against IATA seeking declarations about the application of the Regulations. The proceedings were heard together and it is generally not necessary to distinguish between them. At first instance, IATA sought and obtained from Mandie J declaratory relief[19]. This established several propositions. One was that, notwithstanding the appointment of the administrators to Ansett on 12 September 2001, the Clearing House arrangements continued to apply with contractual force between IATA, Ansett and the other members of the Clearing House. Another was that in respect of monthly clearances for August-December which were effected by IATA after 12 September 2001, IATA was a creditor of Ansett. The amount claimed by IATA from Ansett under these clearances was $US4,370,989.

47 However, Ansett and the administrators brought successful appeals to the Court of Appeal[20]. By majority (Nettle JA and Bongiorno A-JA; Maxwell P dissenting) the Court of Appeal substituted declaratory relief to the opposite effect of that granted by Mandie J. In particular it declared that IATA was not a creditor of Ansett in respect of the transactions the subject of the Clearing House clearances for the months of August 2001 to December 2001.

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19 *International Air Transport Association v Ansett Australia Holdings Ltd* (2005) 53 ACSR 501; 23 ACLC 1161.

20 *Ansett Australia Holdings Ltd v International Air Transport Association* (2006) 60 ACSR 468; 24 ACLC 1381.

48 The majority of the Court of Appeal considered that in respect of each claim where clearance had not occurred before the appointment of the administrators on 12 September 2001, the netting-off system did not apply and Ansett stood thereafter in the relationship of debtor of the carrying airlines or of creditor of the issuing airlines.

49 On the other hand, Maxwell P (like Mandie J) considered that on 12 September 2001 the relevant rights and obligations of Ansett were (as to procedure) the right to have each claim made to and cleared by IATA, and (as to substance) the contingent right or obligation, upon clearance being effected, to receive the balance from IATA or to pay it to IATA as the case might be. Implicit in this reasoning is that in the administration under Pt 5.3A, as in an insolvent liquidation, whilst claims are to be treated equally, the determination of that equality is left (special statutory provisions apart) to the operation of the general law. Here the terms of the Clearing House arrangements produced, before 12 September 2001, rights and obligations of the character described above. The supervening administration did not change their nature or content. The administrators took those rights and obligations as they found them[21].

50 Special leave was granted to IATA to appeal to this Court in each matter, on terms that the costs orders made by the Court of Appeal not be disturbed and that IATA undertake to pay the reasonable costs in this Court of the respondents.

51 For the reasons which follow, the appeals to this Court by IATA should succeed and the conclusions of Mandie J and of Maxwell P be accepted.

The Clearing House arrangements

52 It will be apparent that the first task is to consider the relevant terms of the governing documents. At all material times IATA provided for four forms of standard agreements, known as Multilateral Interline Traffic Agreements. These appeals concern two of them, the Multilateral Interline Traffic Agreement – Passenger, and the Multilateral Interline Traffic Agreement – Cargo. The provisions of these agreements are relevantly identical and it will be sufficient to refer to the first of them ("the Passenger Agreement").

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21 cf *In re Smith, Knight, & Co; Ex parte Ashbury* (1868) LR 5 Eq 223 at 226.

53 The task of construction is to be approached in the manner described as follows by Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[22]:

> "This Court, in *Pacific Carriers Ltd v BNP Paribas*[23], has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction[24]."

54 Article 8 of the Passenger Agreement is headed "Interline Billing and Settlement". Article 8.1 states:

> "Each issuing airline agrees to pay to each carrying airline the transportation charges applicable to the transportation performed by such carrying airline and any additional transportation or non-transportation charges collected by the issuing airline for the payment of which the carrying airline is responsible *in accordance with applicable regulations and current clearance procedures of the IATA Clearing House, unless otherwise agreed by the issuing airline and the carrying airline*." (emphasis added)

Article 8.2.3 provides with respect to services rendered by a party to the Passenger Agreement that "the right to payment hereunder" arises at the time those services are rendered; but it also says that this is "[e]xcept as may

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22 (2004) 219 CLR 165 at 179 [40].

23 (2004) 218 CLR 451.

24 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22].

otherwise be provided in other agreements, rules or regulations". Articles 8.2.1 and 8.2.2 are important in this respect. They state:

> "8.2.1 Billing of amounts payable pursuant to the Agreement *shall be in accordance with the rules contained in the IATA Revenue Accounting Manual as amended from time to time*.
>
> 8.2.2 Unless otherwise agreed settlements of amounts payable pursuant to this Agreement between parties that are members of the IATA Clearing House *shall be in accordance with the Manual of Regulations and Procedures of the IATA Clearing House*." (emphasis added)

These provisions have the object and effect of giving primacy to the Regulations in any analysis of the rights and obligations flowing from the Passenger Agreement.

55 The relevant edition of the Regulations is the 13th edition of January 1999. The term "clearance" as used therein is defined in reg 1 as bearing the following meaning:

> "The ascertainment each month of the balances due to members by the Clearing House and the balances due by members to the Clearing House *after set-off* of all *claims* duly notified to the Clearing House in accordance with these Regulations." (emphasis added)

The term used is "claims" not "debts", and reference to "set-off" must be read with reg 12. The first sentence of that regulation reads:

> "All transactions within the scope of clearance are hereby deemed mutual debts of the parties involved."

This confirms that multilateral dealings that otherwise are not "mutual" in the usual sense are within the scope of the definition of "clearance".

56 Regulation 9 states that admission to membership of the Clearing House shall constitute a contract between each member and every other member and IATA to the effect thereinafter stated. It has been common ground that reg 9 was

recast from the former reg 18 as it stood at the time *British Eagle* was decided[25]. Paragraphs (a) and (c) of reg 9 are of particular importance. Paragraph (a) states:

> "With respect to transactions between members of the Clearing House which are subject to clearance through the Clearing House as provided in Regulations 10 and 11 and subject to the provisions of the Regulations regarding protested and disputed items, *no liability for payment and no right of action to recover payment shall accrue between members of the Clearing House. In lieu thereof members shall have liabilities to the Clearing House for balances due by them resulting from a clearance or rights of action against the Clearing House for balances in their favour resulting from a clearance and collected by the Clearing House from debtor members in such clearance*". (emphasis added)

57 Paragraph (c) states:

> "The effecting of a clearance and payment of the balances due to or by the Clearing House in accordance with these Regulations and current clearance procedures shall constitute a satisfaction and discharge of every claim dealt with in such clearance. *IATA shall be entitled to recover any balances due to the Clearing House by legal action.*" (emphasis added)

58 Reference also should be made to regs 38 and 39. Regulation 38 deals with the entitlement of the Clearing House to recovery and states:

> "Notwithstanding anything to the contrary herein, *the right of the Clearing House* to collect claims hereunder is created at the earlier of (a) the time payment is made for services upon which the claim is based or (b) the time such services are rendered by a party hereto or its agent. It is the intent of the members that funds collected by an issuing airline pursuant to accounts for clearance and services provided by a carrying airline pursuant to interline agreements shall be used *for discharge of respective obligations of such airlines to the IATA Clearing House.*" (emphasis added)

Regulation 39 describes the nature of the liability of the Clearing House as follows:

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25 The text of the former reg 18 is set out, [1975] 1 WLR 758 at 773-774; [1975] 2 All ER 390 at 405.

> "The liability of the Clearing House to any member arising from any clearance is subject to payment of the balances due by debtor members in the clearance and is limited to any balance in favour of creditor members as the result of the clearance together with the net balance of any sum standing to the credit of such member on Standing Deposit Account after deducting all amounts *due from such member to the Clearing House* under these Regulations." (emphasis added)

59 Of reg 39, Maxwell P said that it indicated that the Clearing House was not obliged to pay to a creditor member a credit balance until the debtor members in the relevant clearance had paid their debit balances. His Honour said[26]:

> "That the Clearing House does not bear the commercial risk of default is hardly surprising. Its function is to effect a monthly clearance of claims made by members against each other. It is not a bank. It has no funds of its own. ... The Clearing House's immunity from risk is consistent with its function, and in no way inconsistent with its having debtor/credit relationships with its members. After all, a secured creditor does not bear the commercial risk of a default by the debtor, but is no less a creditor for that."

60 The Regulations, in particular reg 9, support the submission of IATA that under the Clearing House arrangements no liability to effect payment arises between airlines and that the only debt or credit which arises is that between IATA and the member airline in relation to the final, single balance of all items entered for the relevant clearance. This is the consequence of the bargain struck by airlines such as Ansett when they became parties to the relevant multilateral agreements. That construction of the Clearing House arrangements should be accepted.

61 Nettle JA (with whom Bongiorno A-JA agreed) said[27]:

> "If reg 9(a) stood alone, it would be hard to resist [IATA's] argument. Its terms do imply the annihilation of the debt and its replacement with rights as against the clearing house alone. But, for the reasons already stated, the provision must be read in context and, in

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26 (2006) 60 ACSR 468 at 475 [29]; 24 ACLC 1381 at 1386.

27 (2006) 60 ACSR 468 at 493 [95]; 24 ACLC 1381 at 1399.

particular, having regard to the other paragraphs of reg 9. The first and perhaps most important of those for present purposes is reg 9(b)."

62 Before turning to reg 9(b) something should be said respecting the second sentence in the above passage. Upon the construction accepted above in these reasons, it is not a matter of "the annihilation" of any otherwise subsisting debt due and owing by one airline to another and the "replacement" of that debt with rights exclusively against IATA. Certainly the contractual arrangements between the respective airlines and IATA for the operation of the Clearing House system gave rise to procedural and substantive rights and obligations of the nature identified earlier in these reasons. However, those substantive rights and obligations, as between airlines, did not have the character or quality associated with the relationship of debtor and creditor as ordinarily understood.

63 The primary operation of reg 9(b) is to constitute for the Clearing House an irrevocable authority to clear "any claim (debit or credit) for clearance". What follows is a proviso whereby in certain circumstances the Manager of the Clearing House may "suspend" all clearance between certain members and during that period of suspension the parties are "absolved" from their respective obligations to settle only through the Clearing House. The circumstances which enliven the power of suspension are the receipt by the Clearing House of notification that the amount of a claim which has been notified for clearance has been attached, garnished or otherwise seized by issue of a court order.

64 Nettle JA concluded[28] that reg 9(b) is premised upon an assumption of the existence of a debt between the issuing and the carrying airline which remains in existence until it has been cleared. However, in this Court counsel for IATA made several responses to that proposition, and these should be accepted.

65 First, the Regulations are to be read with an appreciation that the airlines concerned will conduct operations in many nation states and that these can be expected to have varying legal systems. Secondly, the airlines may be expected to incur in the course of their trading operations liabilities to a range of third parties, not themselves airlines. Thirdly, the proviso to reg 9(b) allows for the situation where such a third party obtains a court order which has the effect of attaching or garnishing or otherwise fixing upon, as an asset of the defendant airline, a claim which is subject to the Clearing House regime. Hence the occasion for suspension spoken of in reg 9(b) until normal clearance may be

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28 (2006) 60 ACSR 468 at 493 [96]; 24 ACLC 1381 at 1399.

reinstituted. It follows that the presence of the proviso to reg 9(b) does not conflict with reg 9(a) to the point where the manifest intention stated in reg 9(a) cannot be given its stated effect.

66 Nettle JA also emphasised[29] the treatment in reg 12 of the transactions within the scope of clearance as "deemed mutual debts of the parties involved". This regulation has its place in the structure of the Regulations indicated earlier in these reasons. It also is to be read with reg 49(i). This regulation deals with suspension from membership of members in default of their obligations and sub-reg (i) then provides:

> "Notwithstanding anything to the contrary in these Regulations, a suspension shall not affect the Clearing House's right to set-off *claims* in accordance with the Regulations and current clearance procedures." (emphasis added)

67 Nettle JA referred[30] to two decisions of the Privy Council on appeal respectively from the Supreme Court of South Australia and the Supreme Court of New South Wales where the outcome depended upon the distinction between an employee and an independent contractor. In the first, *Australian Mutual Provident Society v Allan*[31], the written contract was between the appellant insurer and one of its representatives. In *Narich Pty Ltd v Commissioner of Pay-roll Tax*[32], the written contract was between a franchisee of Weight Watchers International Inc and a "lecturer" who was to conduct classes for customers of the franchisee. In each case the contract contained a statement denying the relationship of employer and employee and asserting a relationship of independent contractor.

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29 (2006) 60 ACSR 468 at 494 [101]; 24 ACLC 1381 at 1400.

30 (2006) 60 ACSR 468 at 498 [118]; 24 ACLC 1381 at 1403.

31 (1978) 52 ALJR 407; 18 ALR 385.

32 [1983] 2 NSWLR 597; (1984) 58 ALJR 30.

68 Provisions of this character have been said in this Court to be "more likely to arouse misgivings as to what the practical situation of the agent may be in fact than to prevent a relation of master and servant being formed"[33].

69 In the Privy Council cases, upon an analysis of the whole of the relevant documents, it was held that the nature of the legal relationship was not dictated by the particular provisions denying the master-servant relationship. This result was reached in settings far removed from that in which the present appeals are placed. Further, for the reasons given above, other provisions of the Regulations do not contradict the operation of reg 9(a), so as to deny it effect according to its terms.

70 Accordingly, the Clearing House arrangements operated in the manner for which IATA contends. It follows that the declaratory relief which IATA obtained at first instance was properly granted unless some reason founded in notions of repugnancy between the Clearing House arrangements and the statutory regime established by Pt 5.3A or of public policy requires another outcome.

A rule of public policy?

71 Ansett submitted that if the Regulations are to be construed in the way for which IATA contended (and as has been accepted in these reasons) a rule of "public policy" is engaged. The consequence of that engagement, as Ansett would have it, appeared to be to render the Regulations ineffective or void in the administration under Pt 5.3A, at least insofar as they otherwise operated to render IATA the creditor of Ansett in the claimed amount of $US4,370,989. Although not plainly articulated as such, what Ansett sought to invoke was that body of principle concerned with the relationship between contract and statute where the policy of the law renders contractual arrangements ineffective or void even in the absence of breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text.

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33 *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151. See also *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 45-46 [58].

72 Of the refusal of the courts as a matter of public policy to regard contracts as enforceable in such cases, in *Fitzgerald v F J Leonhardt Pty Ltd*[34], McHugh and Gummow JJ said that this refusal:

> "stems not from express or implied legislative prohibition but from the policy of the law, commonly called public policy[35]. Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable[36]."

The rule of public policy for which Ansett contends was said to be recognised in *British Eagle* and to be a rule "requiring equal treatment of creditors within the same class". The effect of engaging that rule was said to be that "Australian courts should refuse to give effect to contractual provisions which purport to circumvent or dislocate the order of priorities which is set out in a [Deed of Company Arrangement] and given statutory force and effect" by Pt 5.3A of the Corporations Act.

73 It is important to begin by recognising that the argument was not one about the construction of any relevant provision of the Corporations Act (whether one of the provisions of Pt 5.3A or some other provision). It was not an argument for the purposive construction of any provision in which a policy or purpose underpinning insolvency provisions by the Act was said to inform the reach given to particular avoiding provisions.

74 An example of the application of reasoning of that nature may be the decision in *Ex parte Mackay*[37]. There, X and Y agreed that if Y became bankrupt the security held by X for the indebtedness of Y should increase from a lien over one half to one over the whole of certain royalties to which Y was entitled. This

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34 (1997) 189 CLR 215 at 227. See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 59-60 [18]-[20].

35 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 429-430, 432-433; *Nelson v Nelson* (1995) 184 CLR 538 at 551-552, 593, 611.

36 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 434.

37 (1873) LR 8 Ch App 643.

arrangement failed insofar as the quantum of security was increased upon bankruptcy of the debtor. The property of the bankrupt, the right to one half of the royalties, was not to be dealt with except under the provisions of the bankruptcy statute[38].

75 However, in the present case the argument of Ansett proceeded from the premise that no provision of the Corporations Act has the effect which it was submitted that the asserted rule of public policy had. Ansett submitted that the Court should nonetheless recognise and apply an overarching rule of public policy that would supplement the express provisions of the Act. These submissions should be rejected.

76 Ansett traced the origin of the asserted rule of public policy to Lord Cross's speech in *British Eagle*. There, his Lordship said[39]:

> "But what the respondents are saying here is that the parties to the 'clearing house' arrangements by agreeing that simple contract debts are to be satisfied in a particular way have succeeded in 'contracting out' of the provisions contained in section 302 for the payment of unsecured debts 'pari passu.' In such a context it is to my mind irrelevant that the parties to the 'clearing house' arrangements had good business reasons for entering into them and did not direct their minds to the question how the arrangements might be affected by the insolvency of one or more of the parties. Such a 'contracting out' must, to my mind, be contrary to public policy. The question is, in essence, whether what was called in argument the 'mini liquidation' flowing from the clearing house arrangements is to yield to or to prevail over the general liquidation. I cannot doubt that on principle the rules of the general liquidation should prevail."

There appear to be two strands of thought in this passage. One is that the Clearing House arrangements as they then stood so operated as to give British Eagle an asset, the money claim against Air France, and that in the face of the mandatory operation of s 302 of the *Companies Act* 1948 (UK), this asset could not be captured for the netting-off system. This conclusion would flow from the operation of s 302 and would be analogous to the situation in *Ex parte Mackay*

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38 See now *Bankruptcy Act* 1966 (Cth), s 301(1)(b), which renders void a provision such as that considered in *Ex parte Mackay*.

39 [1975] 1 WLR 758 at 780-781; [1975] 2 All ER 390 at 411.

discussed above. No recourse to "public policy" would be called for. The second strand of thought is apparent in the references to "mini liquidation", "contracting out" and "public policy". But the critical point is that there was "property" of British Eagle to which s 302 applied and a contractual provision negating that outcome could not prevail against the terms of the statute. Hence it perhaps is not surprising that Lord Cross did not spell out the content of any relevant public policy.

77 Subsequently, however, in *Horne v Chester and Fein Property Developments Pty Ltd*, the rule was expressed[40] as being that, "in insolvency law, the *whole* of the debtor's estate should be available for distribution to *all* creditors, and that no one creditor or group of creditors can lawfully contract in such a manner as to defeat other creditors not parties to the contract" (emphasis added). And Ansett submitted that this formulation of the rule captures the essence of a public policy said to have been recognised and applied[41] as a "fundamental tenet of insolvency law generally" in various common law jurisdictions.

78 It is not necessary to examine in any detail the several cases in which the rule is said to have been recognised and applied. Many can be understood as depending upon the proper application of a generally expressed provision in the relevant statute requiring that all debts proved in an insolvency rank equally and, if the property of the insolvent is insufficient to meet them in full, they are to be paid proportionately[42]. Others, including *British Eagle*, turned upon what was the "property" of the company that was to be applied in satisfaction of its

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40 [1987] VR 913 at 919.

41 *Horne v Chester and Fein Property Developments Pty Ltd* [1987] VR 913 at 917, 919; *United States Trust Co of New York v Australia and New Zealand Banking Group Ltd* (1995) 37 NSWLR 131 at 141, 143; *Attorney-General v McMillan & Lockwood Ltd* [1991] 1 NZLR 53 at 60-62; *Canada Deposit Insurance Corp v Canadian Commercial Bank* [1992] 3 SCR 558 at 577; *Re Air Canada [Priority determination of perpetual subordinated debt]* (2004) 2 CBR (5th) 4; *B Mullan & Sons Contractors Ltd v Ross* [1996] NI 618 at 624-625; *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR 384 at 407; *Re Lam Fung* [2003] HKCFI 773 at [49]. But cf *In re Maxwell Communications Corporation Plc* [1993] 1 WLR 1402; [1994] 1 All ER 737.

42 See, for example, *Corporations Act* 2001 (Cth) ("the Corporations Act"), s 555.

liabilities[43]. Instead, it is essential to begin from the elementary proposition that insolvency law is statutory and primacy must be given to the relevant statutory text[44].

79 Whether the *whole* of the debtor's estate is available for distribution to *all* creditors, and whether *all* creditors are to participate *equally* in the distribution of that estate, are questions that depend entirely upon what the relevant statute provides. What is advanced as a rule of public policy assumes that there can be both an affirmative and a negative answer to each of those questions. To the extent that the rule of public policy depends upon there being universal and invariable rules that the *whole* estate is available to *all* creditors and *all* creditors are entitled to participate *equally*, the rule of public policy depends upon an affirmative answer to both of the identified questions. Yet by asserting that the public policy achieves what the statute otherwise does not achieve, the rule assumes that the questions identified have been answered in the negative. This contradiction suggests that the rule that is asserted is unsound.

80 To demonstrate that the rule is unsound it is necessary to say something further about the provisions of Pt 5.3A of the Corporations Act that provide for the administration of a company's affairs with a view to its executing a Deed of Company Arrangement, and provide for such deeds.

81 Division 6 of Pt 5.3A (ss 440A-440J) makes several provisions for protection of the company's property during administration. So, for example, a charge on the company's property cannot be enforced without the administrator's consent or the leave of the court[45]; an owner or lessor cannot recover property used or occupied by the company except with the administrator's consent or the leave of the court[46]; enforcement processes are generally suspended[47]. But no less important than these and other specific provisions intended to protect the company's property during administration are the provisions of s 437D.

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43 *Companies Act* 1948 (UK), s 302; cf the Corporations Act, s 478.

44 *Sons of Gwalia Ltd v Margaretic* (2007) 81 ALJR 525; 232 ALR 232; *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56.

45 s 440B.

46 s 440C.

47 s 440F.

Section 437D provides, in effect, that, during administration, only the administrator can deal with the company's property. The section does that by providing, in sub-s (2), that a transaction or dealing affecting the property of the company is void unless (a) the administrator entered into it on the company's behalf, or (b) the administrator consented to it, in writing, before it was entered into, or (c) it was entered into under an order of the court.

82 At once it is apparent that any rule expressed as requiring that *all* of an insolvent company's property be made available for distribution among its creditors must accommodate the possibility that, during an administration, the administrator has dealt with, or made some transaction affecting, the property of the company. And if the administration is brought to an end by the making of a Deed of Company Arrangement, the property that is then available to the company will be whatever property the company *then* has (after any transactions or dealings affecting property of the company that the administrator has made).

83 Ansett did not assert in the proceedings below that s 437D(2) avoided any transaction or dealing affecting any relevant property of the company. It did not assert that anything that IATA had done *after* Ansett's administration had commenced (with the appointment of administrators) constituted a transaction with, or a dealing affecting, Ansett's property avoided by operation of s 437D(2) or otherwise. In particular, Ansett did not allege that any of the clearances completed before suspension of Ansett's membership of the Clearing House on 5 March 2002 was avoided; Ansett did not allege that the Clearing House's application of the amount found to be due to Ansett in the clearance for September 2001, completed after the administration began, was avoided.

84 As noted earlier in these reasons, Ansett emphasised that the setting-off provided by the Clearing House system was not limited to set-off of mutual debts between any two airlines. As a result, one airline having no mutual dealings with Ansett may receive 100 cents in the dollar for its claim from the pool of funds provided from the dealings between Ansett and other airlines. It was this result to which Ansett pointed as a departure from the rules of equal participation said to constitute, or at least to be reflected in, the asserted rule of public policy.

85 Ansett sought to locate the application of the rule of public policy in the operation of the Deed. Ansett submitted that the Regulations purported to circumvent or dislocate the order of priorities set out in the Deed. There is, so the argument proceeded, "no justifiable reason for allowing creditors to contract out of a [Deed of Company Arrangement] that is given statutory force and effect by [Pt] 5.3A in such a manner as to defeat other creditors not parties to the contract".

86 References to circumventing or dislocating the order of priorities, and to contracting out of the Deed, call for examination first of what the Deed provided and then a comparison between the operation of the Deed and the agreement (here the Regulations) which it is said has had the effects described.

87 The principal provisions of the Deed have been described earlier in these reasons. The critical restrictions imposed on persons bound by the Deed were set out in cl 4.2. That clause provided, so far as now relevant, that:

> "During the Deed Period, without the Deed Administrator's prior written consent, a Deed Creditor shall not in relation to its Claim:
>
> ...
>
> 4.2.5 take any action whatsoever to seek to recover any part of its Claim other than pursuant to the Deed".

The "Deed Period" fixed the duration of this prohibition. It was defined as the period beginning on the "Effective Date" (the date on which the Deed was executed – 2 May 2002) and ending on the Termination Date (the date on which the Deed was terminated by resolution of the creditors or court order, or a date fixed by reference to the payment of all of the Deed Creditors' Entitlements). The prohibition was directed against recovery of any part of a Deed Creditor's "Claim".

88 "Claim" was defined in the Deed as "a debt payable by, and all claims against, the Company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred on or before the Appointment Date". The "Appointment Date" was defined (in effect) as the date of appointment of administrators to the company.

89 Other than stating a different date as the date on or before which the circumstances giving rise to a debt or claim must arise, the definition of "Claims" contained in the Deed followed the terms of the provision of the Corporations Act (s 553(1)) which identifies the debts and claims admissible to proof against a company in winding-up. And because the definition of Claims fastened upon the Appointment Date as the date on or before which the circumstances giving rise to the Claim must arise, Ansett submitted that the evident intention of the Deed was to regulate the satisfaction of those claims, and to do so in a manner analogous to the regulation of claims against a company in liquidation.

90 That this was the intention of the Deed was reinforced, so Ansett submitted, by the requirements of cll 14 and 18 of the Deed. As noted earlier, cl 14 provided that the rules and mechanisms to be applied to proofs of debt and the ascertainment of Claims "shall be similar to the rules and mechanisms for such things prescribed by the Act in the context of the liquidation of a company" amended or adjusted as needs be. Clause 18 regulated the way in which Claims were to be met and made provisions regulating the priority of payment which were substantially the same as those made by s 556 of the Corporations Act. After priority debts were met, each Deed Creditor was to be paid sums from realisation of the company's assets that were available for distribution to Deed Creditors and those sums were to be paid "on a pro rata basis" (cl 18.2.5). The Deed provided (cl 18.6.2) that no Deed Creditor was entitled to receive more than its entitlement and that, if it did, the Deed Creditor was bound to repay the excess.

91 The engagement of all of these provisions of the Deed, however, hinged about the identification of who is a "Deed Creditor". The Deed defined that as "any person who *has* a Claim" (including various specified classes of persons). And the whole presupposition for the Deed was that it regulated claims by those who, at the date of the Deed, asserted a claim against Ansett. That claim had to be one that met the temporal requirement that "the circumstances giving rise to [it] occurred on or before the Appointment Date" but the Deed sought to regulate satisfaction of only those claims that were then or thereafter to be pursued.

92 What Ansett complained of, in the present litigation, was that airlines who had provided services to or on behalf of Ansett did *not* propound any claim under the Deed. IATA did, but only for a net balance remaining after there had been that process of setting-off of amounts described earlier. And by that process an airline to which Ansett had not provided services may have obtained, as a result of the Clearing House system, satisfaction in full for its claim against Ansett. It was this operation of the Clearing House system that was said to contravene public policy; it was this operation of the Regulations that was said to amount to contracting out of the Deed.

93 The asserted rule of public policy finds no footing in the relevant provisions of the Corporations Act. Those provisions take effect according to their terms and are not to be supplemented or varied by the superimposition of a rule of the kind alleged.

Contracting out or repugnancy?

94 Neither is there any contracting out of the Deed, or any repugnancy between the Regulations and the Deed. The Deed regulates Claims of Deed Creditors. IATA alleges that it has a Claim and that it is a Deed Creditor; individual airlines do not. As noted earlier, the Clearing House arrangements produced rights and obligations of the character described above. No liability to effect payment arises between airlines; the only debts which arise are those between IATA and the member airline in relation to the balance of all items entered for the relevant clearance. The supervening administration did not change the nature or content of those rights and obligations and the administrators took those rights and obligations as they found them. In so far as those rights were to be identified as property of the company, the Corporations Act provides for the preservation (subject to exceptions) of the property of a company in administration. But the Corporations Act recognises that there may be dealings with that property before a Deed of Company Arrangement is made. And if there are, the Deed will operate with respect to whatever then is the property of the company.

95 In the end, the argument which alleges that there has been a contracting out of the operation of the Deed depends upon the proposition that after either the commencement of the administration or the execution of the Deed, the rights and obligations of Ansett were different from those the company had previously had. Unless that prior step is taken (and it should not be) there was no contracting out of the operation of the Deed and there is no repugnancy between the Deed and the Clearing House arrangements.

Orders

96 For these reasons, each appeal should be allowed. In Matter No M51 of 2007, paragraphs 1 and 2 of the orders of the Court of Appeal made on 16 November 2006 (except in so far as those orders varied the orders in respect of the costs of proceedings at first instance) should be set aside. In place of the orders set aside there should be an order that the appeal to that Court is otherwise dismissed. In Matter No M52 of 2007, paragraphs 1 and 2 of the orders of the Court of Appeal made on 16 November 2006 (except in so far as those orders varied the orders in respect of the costs of proceedings at first instance) should be set aside. In place of the orders set aside there should be an order that the appeal to that Court is otherwise dismissed. In accordance with the conditions on which special leave to appeal was granted, paragraph 3 of each of the orders of the Court of Appeal (ordering IATA to pay the costs of the appeal to that Court by

Ansett and the Deed Administrators) should not be disturbed and there should be an order in each appeal that IATA pay the respondents' costs in this Court.

97 KIRBY J. These appeals come from the Court of Appeal of the Supreme Court of Victoria[48]. That Court, by majority (Nettle JA, Bongiorno AJA concurring; Maxwell P dissenting), reversed the conclusions and orders of the primary judge in the Supreme Court (Mandie J)[49]. The judges below being divided and the issues being difficult and important, this Court granted special leave to appeal. I have been greatly assisted by the reasons of the judges of the Supreme Court. Those reasons have helped to sharpen the differences which this Court must now resolve.

98 The differences arise out of the intersection of contractual arrangements entered into by airlines in the international air carriage industry and provisions of a public law of the Commonwealth of Australia concerned with a new method of administering an insolvent company under a deed of company arrangement.

99 The new provisions governing corporate insolvency appear in the *Corporations Act* 2001 (Cth) ("the Corporations Act"), Pt 5.3A. Before its financial collapse in 2001-2002, the company in question, Ansett Australia Holdings Limited (formerly Ansett Transport Industries Limited) ("Ansett"), was a major Australian airline. It was a long-time member of the International Air Transport Association ("IATA"). IATA was initially created as an unincorporated association, with its headquarters in the city of London. It was established following the Convention on International Civil Aviation in 1944[50]. IATA was later incorporated by an Act of the Canadian Parliament[51]. By that constituting Act, IATA has, as one of its statutory objects[52]:

> "to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service".

100 To facilitate collaboration, IATA established a clearing house facility for the "netting" of credits and liabilities between participating airlines ("the Clearing House"). The service so afforded is obviously of great value and

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48 *Ansett Australia Holdings Ltd v International Air Transport Association* (2006) 60 ACSR 468; 24 ACLC 1381.

49 *International Air Transport Association v Ansett Australia Holdings Ltd* (2005) 53 ACSR 501; 23 ACLC 1161.

50 Done at Chicago, 7 December 1944; 1957 ATS 5. Ansett became a founding Associate Member of IATA in October 1945.

51 *An Act to Incorporate International Air Transport Association*, Statutes of Canada 1945, Ch 51 (assented to 18 December 1945) ("IATA Statute").

52 IATA Statute, s 3(b).

advantage to all participants. Given the huge expansion of international civil aviation since 1945, with the vastly increased carriage of passengers and cargo, it is difficult to imagine that the efficiencies of multi-carrier transportation throughout the world could have been established, or could be maintained, without some such international facility for the mutual settlement of debits and credits between airlines. Even with contemporary information technology, the settlement of such obligations, individually and bilaterally, would be inefficient and inconvenient. Moreover, the arrangement for mutual set-offs and for the resulting net payments diminishes, as between the participating airlines, the aggregate costs, including the costs of foreign currency transactions that would otherwise be incurred.

101 No party to these appeals questioned the benefits of IATA and the Clearing House to airlines and, through them, to their passengers and cargo shippers. No party doubted that financial imperatives, convenience and utility would ensure that the Clearing House would remain in place for solvent airlines whatever this Court decided. The controversy presented to this Court was rather what was to happen, in accordance with Australian law, when a participating Australian airline became insolvent and, under the Corporations Act, its creditors agreed to enter into a deed of company arrangement so as to provide for the discharge of the liabilities of that airline.

102 The appeals thus present questions concerning:

(1) the meaning and effect of the Clearing House arrangements which Ansett entered with IATA, and whether those arrangements are consistent with relevant provisions of the Corporations Act and the deed of company arrangement executed by Ansett on 2 May 2002 ("the Deed"); and

(2) if a direct inconsistency between the Clearing House arrangements, so construed, on the one hand, and the Corporations Act and the Deed, on the other, is not established, whether the general policy of the Corporations Act governing the equitable discharge of Ansett's obligations to its debtors and creditors prevails over Ansett's earlier contractual arrangements.

103 On these questions there are obviously arguments both ways, as the reasons below demonstrate. A conclusion favourable to IATA would have the immediate attraction of minimising the impact on the operations of the Clearing House of the municipal law of this country. However, alike with the majority of the Court of Appeal, I consider that the private contractual arrangements made by Ansett with IATA and other carriers must yield to the requirements of the Deed and the provisions of, and policy evident in, the insolvency provisions of the Corporations Act applicable to this case.

104 The result is that, in my view, IATA's appeals fail. Any relief from that outcome should await the adoption of a relevant international treaty given effect by local law; the enactment by the Australian Parliament of modifications to Pt 5.3A of the Corporations Act; or the passage of a federal law to cover all such cases of international "netting", including the Clearing House[53].

The facts, legislation and common ground

105 *The background facts*: The background facts are stated in the reasons of Gummow, Hayne, Heydon, Crennan and Kiefel JJ ("the joint reasons")[54]. Those reasons explain how Ansett became a participant in the Clearing House in 1951; how it experienced serious financial difficulties resulting in its collapse in 2001-2002; how it appointed administrators under s 436A of the Corporations Act on 12 September 2001; and how, following a resolution of its creditors in March 2002, it entered into the Deed on 2 May 2002 pursuant to s 444B of the Corporations Act.

106 Upon the non-payment by Ansett of the notified clearance balances, IATA suspended Ansett from membership of the Clearing House on 5 March 2002. Subsequently, on 2 June 2002, Ansett's membership was terminated. In due course, IATA made a claim under the Deed for a net debit owing pursuant to the Clearing House arrangements of $US4,370,989[55]. For their part, the administrators of Ansett (the second respondents to the first appeal in this Court) ("the Administrators") promptly made claims on 13 airlines totalling more than $US11 million. Those claims were made in respect of the "debts" allegedly owed by those airlines to Ansett. The relevant debts were said to have come into existence before 12 September 2001 and were notified to the Clearing House before Ansett's suspension from that facility in March 2002. For Ansett and the Administrators, this was a simple matter of the operation upon private arrangements with IATA and its members of Australia's insolvency law, as provided by the relevant provisions of the Corporations Act to which the Deed conformed and gave effect.

107 The course of the proceedings, and the different outcomes at first instance and on appeal, are summarised in the reasons of Gleeson CJ[56] and the joint reasons[57]. Inevitably, these descriptions do not do full credit to the more detailed

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53 cf *Payment Systems and Netting Act* 1998 (Cth). See below at [113].

54 Joint reasons at [31]-[36], [40]-[42].

55 Joint reasons at [46].

56 Reasons of Gleeson CJ at [1]-[6].

57 Joint reasons at [46]-[50].

analysis of the issues provided by the judges below, which I have taken into account.

108 The standard interline agreements with IATA which Ansett executed to govern its participation in the Clearing House ("the Agreement") are described in the joint reasons[58], as are the Clearing House Regulations ("the Regulations") which are incorporated in the Agreement by the provision that the settlement of amounts payable as between members of the Clearing House is to be made in accordance with the Manual of Regulations and Procedures[59]. It has been assumed that the Regulations form part of the contract between IATA and participating members, including (whilst it was a member) Ansett[60]. I am content to accept that assumption.

109 It will be necessary, in these reasons, to refer to, and elaborate, some additional regulations. However, the main battle lines are sufficiently drawn, both as to the meaning of the Agreement and Regulations and their operation on the obligations (to use a neutral term) of Ansett to other airlines and on the obligations of other airlines to Ansett arising from their respective participation in the Clearing House, and as to the supervening impact on those obligations of the insolvency provisions of the Corporations Act and the Deed.

110 *The legislation and arguments*: The written and oral submissions advanced by Ansett before this Court cannot be read as confined to a reliance only on the "public policy" of the statute, enlivened by the successive appointments of administrators, the resolution of creditors and the execution of the Deed already described. Counsel for Ansett made it clear that, so far as Ansett was concerned, the relevant inconsistency with Australian insolvency law upon which Ansett relied was presented on a dual basis. First, if the construction of the Agreement and Regulations contended for by Ansett was accepted, a direct inconsistency with nominated statutory provisions would arise. Counsel particularly identified ss 553C and 437D[61]. Inconsistency with the operation of s 444D upon the Deed was also nominated as "fundamental"[62].

111 Secondly, to the extent that any contractual provisions had a contrary operation, Ansett also relied on a more general argument of incompatibility

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58 Joint reasons at [52]-[54].

59 (2006) 60 ACSR 468 at 492 [91]; 24 ACLC 1381 at 1399.

60 (2006) 60 ACSR 468 at 470 [1]; 24 ACLC 1381 at 1382.

61 [2007] HCATrans 515 at 2030-2038, 2050-2060.

62 [2007] HCATrans 515 at 2090-2095.

between any such *private* contractual arrangements, embodied in the Agreement and Regulations, and the *public policy* inherent in the form of statutory insolvency for which the Deed and the Corporations Act provided.

112 *The common ground*: To some extent, there was common ground in these appeals between the parties. Thus, IATA did not point to any provision of international law that sustained and provided, in a way binding on Australia or anyone else, an exemption from municipal law governing insolvency of corporate airlines, designed specifically to protect the offsetting arrangements within the Clearing House. Perhaps there should be such international treaty arrangements incorporated into domestic law. However, past attention by this Court to the state of international law as it concerns the civil aviation industry demonstrates the imperfections of treaty law in this field[63]. The absence of relevant treaty provisions to cover this case is therefore scarcely surprising.

113 Nor could IATA point to any specific provision, either of the Corporations Act or of other Australian insolvency law, to uphold the Agreement and Regulations in the event of insolvency of an Australian airline. Whilst enactments such as the *Payment Systems and Netting Act* 1998 (Cth) ("the Netting Act") expressly provide for payment and settlement systems and netting contracts in relation to foreign currency, trade and commerce, banking, insurance and telecommunications, it was not suggested that that Act, or any other Australian statutory provision, addressed the present problem. To the contrary, the existence of the Netting Act demonstrates the large ambit of federal legislative power that might be invoked to support such legislation[64]. Despite such power, no relevant law has been enacted by the Australian Parliament affecting IATA's netting arrangements. IATA is therefore thrown back upon common law principles so far as these are not inconsistent with the applicable insolvency provisions of the Corporations Act.

114 Finally, as Nettle JA noted at the close of his reasons, all parties in these appeals put to one side questions of private international law as they might affect the arguments of principle which this Court was asked to resolve. Issues concerning the proper law of the obligations said to be owed by, or owing to, Ansett were not addressed because the appeals were "expressly argued on the basis that there is no evidence as to the proper law of the Ansett interline agreements and no reason to suppose that it is any different to the law in force in Victoria"[65]. It is appropriate for this Court to adopt the same approach.

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63 *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 230-234 [128]-[143].

64 See Netting Act, s 5, definition of "Commonwealth constitutional reach".

65 (2006) 60 ACSR 468 at 506 [158]; 24 ACLC 1381 at 1409.

Ansett's obligations under the Agreement and Regulations

115 *The first issue*: The first issue raised by the appeals is thus whether, on a proper construction of the Agreement and Regulations, members of the Clearing House, such as Ansett, stood in the relationship of debtors and creditors pending the clearance of their claims. This issue must be resolved by reference to the Agreement and Regulations in force at the date of appointment of administrators, namely 12 September 2001. Amendments made since that date have to be disregarded[66].

116 *IATA's case*: IATA's argument on this first issue was accepted by the primary judge[67]. His Honour concluded that there was no relevant property of Ansett, being a debt or other chose in action, of which the non-airline creditors were deprived by virtue of the Clearing House arrangements.

117 In the Court of Appeal, this view was favoured by Maxwell P[68]. His Honour held that the Regulations, and particularly reg 9(a), were effective in declaring that no liability for payment and no right of action to recover payment should accrue between the "issuer and the carrier" to recover payment in, or in respect of, any clearance transaction. Instead, reg 9(a) gave each of the IATA members "rights against, and liabilities to, the clearing house in respect of balances resulting from the clearance of transactions".

118 Maxwell P declared that the clearance procedure set out in the Regulations was conceptually simple and legally efficacious[69]. In effect, it accomplished the IATA objectives that Templeman J had explained, at trial, in *British Eagle International Air Lines v Compagnie Nationale Air France*[70], when considering an earlier version of the Regulations:

> "It must be remembered that every airline who is a member of the clearing house is bound by this agreement. Every member knows that when he performs services for somebody else the items for those services are to

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66 An affidavit filed by IATA in the special leave hearing showed that the Regulations have been amended since these proceedings began. The applicable rules are found in the thirteenth edition of the Manual of Regulations and Procedures (1999).

67 (2005) 53 ACSR 501 at 515 [46]; 23 ACLC 1161 at 1173.

68 (2006) 60 ACSR 468 at 471 [8]; 24 ACLC 1381 at 1383.

69 (2006) 60 ACSR 468 at 471 [9]; 24 ACLC 1381 at 1383.

70 [1973] 1 Lloyd's Rep 414 at 429.

> appear in an account which he sends in at the end of the month, and every member knows that what he will be entitled to (if anything) is a sum payable by IATA, and no one else; he is entitled to put and bound to allow everything through the clearing house, even after he has ceased to be a member, for the requisite period of six months, and in my judgment the contract is consistent firstly with there never being a debt from Air France to British Eagle; secondly, it is consistent with the view that Air France say to British Eagle: 'We did not contract to pay you in cash for the services which you performed for us. We and all the other airlines contracted with you that, in return for those services, there should be satisfaction by virtue of all the services which are performed by us for you, and you are only entitled to any equalising balance, and that not from us but from IATA. Our debt, if you can call it a debt, has been more than satisfied by the services which the 75 other airlines performed on your behalf during a time when you were not, so far as the world knew, insolvent.'"

119 *The British Eagle decision*: The decision of Templeman J was upheld on appeal by the English Court of Appeal[71]. Russell LJ, giving the reasons of that Court, concluded[72]:

> "British Eagle having contracted with every other member of the clearing house and with IATA not to enforce its net claim for services against, for example, Air France otherwise than through the clearing house, it could not while a member do so. Nor, in our judgment, is the liquidator of British Eagle in any better position in respect of the claim now made against Air France … [T]he question here is whether the claim asserted against Air France is property of British Eagle.
>
> In our judgment it is not: British Eagle has long since deprived itself of any such property by agreeing to the clearing house system."

120 When, in *British Eagle*, a further appeal was brought to the House of Lords, their Lordships, by majority[73], reversed the earlier judicial conclusions and orders. Essentially, they did so on the basis that the *private* contractual

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71 *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1974] 1 Lloyd's Rep 429.

72 [1974] 1 Lloyd's Rep 429 at 433-434.

73 *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758; [1975] 2 All ER 390 per Lord Diplock, Lord Cross of Chelsea and Lord Edmund-Davies; Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale dissenting.

arrangements by which British Eagle had bound itself to IATA and other IATA members before insolvency could not prevail over, or effect a contracting out of, the rules for the general liquidation of a company provided by the *public* law of the United Kingdom[74].

121 *English decisional authority*: There was discussion in the courts below as to the proper approach of an Australian court to the foregoing holding of the House of Lords in *British Eagle*. The primary judge referred to an earlier case in the Supreme Court of Victoria, bearing some similarities to the present, in which Southwell J had concluded that he should treat himself as bound to follow an indistinguishable decision of the House of Lords, unless this Court had otherwise decided[75]. The primary judge in the present proceedings then stated that he would regard himself as bound to apply *British Eagle* "if it were indistinguishable on the facts"[76].

122 In the Court of Appeal in the present appeals, Nettle JA said that an intermediate appellate court in Australia "should ordinarily follow a relevant decision of the House of Lords unless clearly convinced it is wrong"[77]. His Honour recognised that the decision was not legally binding in this country.

123 With respect to the learned judges who expressed these opinions, they represent a mistaken approach to the application of English decisional authority in contemporary Australia. In effect, they evidence a leftover from legal thinking of an earlier time[78]. The House of Lords was never part of the judicial hierarchy of the Commonwealth of Australia. As a matter of constitutional principle, decisions and reasoning of the House of Lords are not, therefore, to be accorded a status different from those of any other final national court of a foreign country. Self-evidently, they afford a most valuable source of comparative law, deserving of respect in an Australian court, including this Court. They do so because of the distinction of the judges, the history and tradition shared with Australia and the usual persuasiveness of the reasoning. However, the weight to be given to the judicial opinions of the House of Lords is entirely dependent on the cogency of

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74 Namely *Companies Act* 1948 (UK), s 302.

75 *Horne v Chester and Fein Property Developments Pty Ltd* [1987] VR 913 at 916, cited in *International Air Transport Association v Ansett Australia Holdings Ltd* (2005) 53 ACSR 501 at 514 [42]; 23 ACLC 1161 at 1172.

76 (2005) 53 ACSR 501 at 514 [42]; 23 ACLC 1161 at 1172.

77 (2006) 60 ACSR 468 at 498-499 [123]; 24 ACLC 1381 at 1403.

78 cf *Skelton v Collins* (1966) 115 CLR 94 at 104 per Kitto J, 135 per Windeyer J; cf at 122 per Taylor J, 139 per Owen J.

such reasoning, as assessed by Australian judges, who alone enjoy the constitutional legitimacy and power to determine the particular case that is before an Australian court. Some judges of this Court accorded a special status to decisions of the House of Lords when appeals still lay to the Privy Council, often comprising the same judicial personnel. At that time it was perhaps prudent and understandable to do so. However, that time has passed.

124 If, in these appeals, the decision of the House of Lords in *British Eagle* deserved particular attention, it was because the decision concerned the predecessors to the present Agreement and Regulations. Those provisions are relevant to the decisions of courts in many countries. Consequently, so far as possible, common approaches to their interpretation are desirable[79]. The same would be so if the decision in question had been that of the Cour de Cassation of France or the Supreme Court of Appeal of South Africa.

125 Moreover, following *British Eagle*, IATA proceeded to amend its Regulations in an attempt to overcome the difficulty which the House of Lords had there identified. The question presented by the first issue in these appeals is whether, despite such amendment, the legal difficulty remains. The majority of the Court of Appeal concluded that it did; the primary judge and Maxwell P reached the opposite conclusion. This Court must resolve that difference. It must do so by its own reasoning, without legal presuppositions of correctness attributed to the status of conclusions of the courts of other countries.

126 *The applicable Regulations*: The critical regulation, upon which IATA relied to make good its first submission, is reg 9(a). As was recognised by the Court of Appeal, reg 9 was amended following the decision in *British Eagle*. The amendment was clearly aimed at strengthening the provisions of the Regulations and to make explicit what had already been implicit in the terms of the former reg 18[80]. The current terms of reg 9(a) and (c) are set out in the joint reasons, together with reference to regs 1, 12, 38 and 39[81]. I will not repeat those provisions but incorporate them by reference.

127 Certain matters of approach to the task of interpretation should be noted. First, it is obviously important to read the Regulations as a whole so as to carry into effect (to the extent that it is lawful) the language and purpose of the

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79 *Povey* (2005) 223 CLR 189 at 230 [128].

80 Set out by Lord Morris in *British Eagle* [1975] 1 WLR 758 at 764; [1975] 2 All ER 390 at 395-396.

81 Joint reasons at [55]-[58].

Agreement[82]. As well, it should be noted that it is the objective effect of the agreement and not any subjective purpose of the parties which determines the contract's meaning at law[83]. Nettle JA was correct to adopt this approach. To the extent that, in substance, the joint reasons in this Court suggest, in effect and reasoning, that the search is for what the parties to a contract subjectively intended, it represents a departure from well-settled principles of contract law in Australia[84].

128 I approach the resolution of the issue conscious of the importance of the development of international air transport with its manifest benefits for world trade, the interconnection of peoples, human convenience and peace. I would not be vigilant to defeat the effectiveness of the Agreement or Regulations as they contribute to the success and effectiveness of the Clearing House. It cannot be suggested that the Clearing House was established with a specific intention of undermining the municipal laws that virtually all countries have enacted for the equitable ranking of the claims of creditors in the event of corporate insolvency. In this sense, there is no need in these appeals to be concerned about deliberate evasion of domestic insolvency laws or fraud by IATA and the Clearing House members. All such concerns can be safely put aside.

129 In the Court of Appeal, Nettle JA too accepted that, if reg 9(a) stood alone, "it would be hard to resist [IATA's] argument" concerning the meaning and effect of the Regulations. He accepted that the terms of reg 9(a) implied (as he put it) the "annihilation of the debt and its replacement with rights as against the clearing house alone"[85]. Nevertheless, reading the Agreement and Regulations as a whole, Nettle JA concluded that they did not have the effect in law for which IATA argued.

130 In this Court, IATA criticised the criterion for effectiveness that his Honour posited ("annihilation of the debt"). For my own part, I am not in the slightest concerned by the use of the word "annihilated", which was repeated by Nettle JA in the course of his reasons[86]. I regard "annihilated" (concededly a strong word) as no more than a vivid way of saying that the underlying debts,

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82 (2006) 60 ACSR 468 at 493 [99]; 24 ACLC 1381 at 1400.

83 See generally Carter, Peden and Tolhurst, *Contract Law in Australia*, 5th ed (2007) at 240-242 [12.02]-[12.03]; cf reasons of Gleeson CJ at [7]; joint reasons at [67]-[69].

84 See also *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22].

85 (2006) 60 ACSR 468 at 493 [95]; 24 ACLC 1381 at 1399.

86 See eg (2006) 60 ACSR 468 at 498 [119]; 24 ACLC 1381 at 1403.

that would otherwise exist on the part of an issuing airline to the carrying airline, were wholly extinguished as a matter of law. It would be a sorry day if judges were frightened into the use of colourless language in order to avoid appellate censure and correction.

131 *Ansett's arguments*: Ansett endorsed the analysis of Nettle JA. It argued that regs 9(b), 22, 23 and 49 of the Regulations demonstrated that Nettle JA's detailed examination[87] was correct, so that a debt or other chose in action continued to exist between the issuing and carrying airlines and was thus susceptible to enlivening the ordinary application of the insolvency requirements of the Deed and the related provisions of Pt 5.3A of the Corporations Act once the insolvency of Ansett intervened.

132 I will not repeat the entirety of the analysis of the Agreement and Regulations contained in the opinion of Nettle JA. I accept it. It involves no legal error authorising the intervention of this Court. It is sufficient for me to identify, and emphasise, some of the main points made by his Honour.

133 First, Nettle JA pointed out that reg 9(a) provides for a prohibition on enforcement of the initial debt otherwise than by way of adjustment through the Clearing House, except in specified circumstances where clearance is not available. Construed in this way, the obligation in cl 8.1 of the Agreement that "[e]ach issuing airline … pay … the transportation charges applicable to the transportation performed by [each] carrying airline" in accordance with the Regulations does not negate the original legal obligation to pay such charges[88]. On the contrary, it provides for what is to happen in consequence of that obligation. It stipulates the manner and place in which the payment for the consequent charge is to be made or settled, ie in the Clearing House. The *factum* enlivening the obligation remains, clearly enough, the "transportation charges"[89]. It was this analysis of the Agreement and Regulations that led Nettle JA to conclude that transactions between the issuing and carrying airlines gave rise to debts between them which were not extinguished. In my view, this is the natural, realistic and commonsense interpretation of the transactions concerned having regard to the terms of the Agreement and Regulations.

134 Secondly, Nettle JA considered that reg 12 was "a further indication that debts which arise under the [Agreement] remain in existence until satisfied by

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87 (2006) 60 ACSR 468 at 491-498 [87]-[120]; 24 ACLC 1381 at 1398-1403.

88 (2006) 60 ACSR 468 at 492 [90]; 24 ACLC 1381 at 1398.

89 (2006) 60 ACSR 468 at 494 [101]; 24 ACLC 1381 at 1400.

clearance"[90]. As his Honour noted, reg 12 was added following the decision in *British Eagle*[91]. It provided:

> "All transactions within the scope of clearance are hereby deemed mutual debts of the parties involved. Unless otherwise agreed to by the parties, a claim for such transaction shall arise upon the performance of the services rendered therefor."

135 Nettle JA concluded that, by characterising the precise amounts as "mutual debts", reg 12 confirms "that such amounts are debts which are to be set off one against another to produce the monthly balance"[92]. That is, they remain debts. He rejected IATA's submission that reg 12 created a "fictional state of indebtedness for the purposes of clearance"[93] where, otherwise, there would not be any debts in existence. Against the background of the realities of the arrangement between the airlines participating in the Clearing House, it would take more than appears in the Agreement or the Regulations to induce me to accept the legal fiction which IATA propounded. The word "debt" is clear enough. It means what it says. The law should be hesitant to embrace fictions. Especially so where, as here, other elements of the arrangements between the parties contradict the suggested fiction and argue against embracing it.

136 Thirdly, Nettle JA noted the long history of "mutual debts" in legislation governing bankruptcy and insolvency[94]. For his Honour, the critical consideration was that parties cannot choose to make legislative provisions referring to mutual debts, mutual credits or other mutual dealings apply to transactions that do not, in fact and in law, answer to these descriptions. Nettle JA considered that reg 12 postulated the initial existence and provisional continuation of obligations that were in fact and law "debts"[95]. Indeed, his

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90 (2006) 60 ACSR 468 at 494 [101]; 24 ACLC 1381 at 1400.

91 (2006) 60 ACSR 468 at 494 [103]; 24 ACLC 1381 at 1400.

92 (2006) 60 ACSR 468 at 494 [101]; 24 ACLC 1381 at 1400.

93 (2006) 60 ACSR 468 at 494 [102]; 24 ACLC 1381 at 1400.

94 Notably since the *Bankruptcy Statute* 1825 (UK) 6 Geo 4 c 16. See *Bankruptcy Act* 1869 (UK), s 39 considered in *Peat v Jones* (1881) 8 QBD 147 at 149; see also *Bankruptcy Act* 1966 (Cth), s 86(1) considered in *Day & Dent Constructions Pty Ltd v North Australian Properties Pty Ltd* (1982) 150 CLR 85; *Bankrupt Act* 1849 (UK), s 171 considered in *Naoroji v Chartered Bank of India* (1868) LR 3 CP 444 at 452.

95 (2006) 60 ACSR 468 at 496 [109]; 24 ACLC 1381 at 1401-1402.

Honour regarded reg 12 as "a recognition of the 'indisputable conclusion' that claims the subject of clearance are debts, and that they remain such until extinguished by clearance"[96]. I agree with this analysis and conclusion. The very language of the Regulations represents a declaration of intention that the obligations as between carrying and issuing airlines were, and remained, "debts". If uncleared at the time of the commencement of a statutory insolvency, such "debts" therefore, without more, attract the provisions of the law governing insolvency as it applied to then outstanding "debts". In Australia, in the circumstances of the new arrangements under Pt 5.3A of the Corporations Act, they attract the equitable priorities as between the creditors of an insolvent company established by the Deed[97].

137 Fourthly, the foregoing analysis derives additional reinforcement from the fact that, absent novation, the multilateral netting arrangements envisaged in the Agreement and Regulations inevitably involved non-mutual set-offs. Under the Regulations, there was no novation to IATA of debts originally incurred between the issuing and carrying airlines. Had there been a legal novation, IATA would act as a central counter-party. It would then have entered a series of new bilateral netting transactions with its members, but as a principal[98]. Under the Agreement and Regulations, IATA was not, and never became, a creditor of the issuing airline in respect of the individual transactions. Nor did IATA bear the risk of default in payment by the issuing airline. Its role was no more than that of a clearing agent, or conduit, for the claims of the airlines concerned. To have assumed the role of principal would have attracted substantial consequences in the law of insolvency, insurance, taxation and otherwise.

138 Fifthly, an appreciation of the true legal role of IATA reinforces the conclusion that, as between the participating airlines, the Agreement and Regulations gave rise to what were in substance continuing simple contractual debts. Such debts were maintained between the issuing and carrying airlines, although they were debts to be enforced (absent any complication such as supervening insolvency) through the Clearing House rather than bilaterally. In support of this interpretation of the arrangements between Ansett and IATA

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96 (2006) 60 ACSR 468 at 496 [111]; 24 ACLC 1381 at 1402.

97 In the Deed as originally executed, that order was set out in cl 18.2. After the "pooling" of Ansett's assets with those of certain other entities, the Deed was varied on 31 August 2006 so that, *inter alia*, cl 18.2 was deleted, and the order of priority was reproduced in a separate deed of company arrangement for the pooled entity.

98 See eg Australian Securities Exchange, Australian Clearing House Clearing Rules, rule 12.2.

members, Ansett referred to, and relied on, the analysis of Mr P R Wood in his text *English and International Set-Off*[99]:

> "So long as all participants are solvent, these [multilateral netting] schemes should be effective if approved by all parties involved. … But the non-mutual set-offs collapse if a relevant party becomes an insolvent by reason of the fact that the absence of mutuality generally involves a divestment of an asset of the insolvent."

139 To avoid that consequence, which follows from the contractual provisions and the general law, specific legislation to validate the multilateral set-offs would be required[100]. Although Australian legislation exists for certain multilateral set-offs, as I have said it does not apply to those set-offs achieved in the IATA Clearing House.

140 Sixthly, still further support for the conclusion expressed by Nettle JA may be found in the terms of the Agreement and Regulations providing that the debt between airlines may, in certain (exceptional) circumstances, be enforced directly as between them. One such instance was where clearance through the Clearing House ceased to be available. The relevant regulations are regs 9(b), 22, 23 and 49 (supplemented by the rejection procedure set out in Ch A10 of the IATA Revenue Accounting Manual).

141 The unavailability of clearance will not, or may not, be known when the carriage transaction takes place as between the respective issuing and carrying airlines. From this it follows that an obligation to pay must likewise arise as between the issuing airline and the carrying airline at the time of the carriage. So much appears to be confirmed by the language of cl 8.2.3 of the Agreement. That sub-clause states (with emphasis added):

> "Except as may otherwise be provided in other agreements, rules or regulations, the right to payment hereunder arises *at the time such services are rendered* by a party hereto or its agent."

142 Seventhly, reg 9(a) of the Regulations, which was the linchpin of IATA's submissions, must obviously be read consistently with the other regulations mentioned above. Without novation, the underlying obligation as between the issuing and carrying airlines must continue to exist, notwithstanding the Clearing House facility. This is so because of the contingent need for *direct* enforcement by the carrying airline against the issuing airline when specified events occur. Those events include suspension of the issuing airline envisaged under reg 9(b)

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99 (1989) at 190-191.

100 eg Netting Act, s 10.

or reg 49, exclusion of a protested claim from clearance under reg 23 and exclusion of a rejected claim from clearance under Ch A10 of the Revenue Accounting Manual.

143 Under regs 22 and 23, a claim will be excluded from clearance unless the protest is unanimously rejected by the adjudicating body. Alternatively, it might be excluded by the Clearing House manager as a matter of discretion under reg 22(e)(ii). In his reasons, Maxwell P attempted to explain this inconsistency with the postulate of extinguishment of the initial debt. He did so by arguing that mutual clearance applied only in respect of "valid claims"[101]. With respect, this attempt to define the problem out of existence, in order to overcome the obvious tension apparent on the face of the Regulations, is not convincing. Nowhere in the Regulations does the expression "valid claims" appear. Under the Regulations, claims may be excluded from clearance without any determination of whether or not they are "valid"[102]. The definitional transmogrification of the claim (and the legal "debt" that it relies upon), like the other legal fictions propounded by IATA, is unconvincing and highly artificial.

144 Eighthly, Nettle JA placed particular emphasis on the assumption of the existence and continuance of a "debt" that is inherent in the provisions of reg 9(b) of the Regulations[103]. The joint reasons find IATA's response to Ansett's argument, based on that sub-regulation, convincing[104]. With respect, I do not. It would make no sense to conclude that claims arising during a period of suspension that are "attached, garnished or otherwise seized by issue of an order of Court" could be enforced in the ordinary way but that unresolved claims predating the period of suspension, that are likewise thereafter attached, garnished or seized, did not give rise to any debt or chose in action.

145 *Conclusion: debts subsist*: The result is that the better view of the "claims" (or "items" as IATA refers to them in the Regulations) is that, until cleared, they are – and remain – "debts" as between the issuing and carrying airlines. Despite the attempt of IATA in argument to erase that character from them, and despite the revised form of reg 9(a) inferentially altered for that purpose after *British Eagle*, the Agreement and Regulations maintained the legal character of the resulting obligations as debts.

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101 (2006) 60 ACSR 468 at 474-475 [23]-[24]; 24 ACLC 1381 at 1385.

102 See eg regs 22(e), 23, 49 and the Revenue Accounting Manual, Ch A10 establishing a procedure for "rebilling".

103 (2006) 60 ACSR 468 at 493 [96]; 24 ACLC 1381 at 1399.

104 Joint reasons at [64]-[65].

146 This is not a surprising conclusion given the economically valuable obligation discharged by the carrying airline for the issuing airline and the absence of legal novation or assignment of the debt arising out of the act of carriage, performed by the carrying airline for the issuing airline. Their mutual arrangements with other participating airlines in the Clearing House could best be viewed as constituting what they obviously were in substance. This was the provision of a convenient and mutually beneficial mechanism for the discharge of mutual debts *inter se* and for set-offs as between the aggregate debits and credits owed to each other and to other airlines participating in the Clearing House. Without novation and the assignment of the debt for all purposes to IATA (carrying risks and obligations which IATA understandably was not willing itself to assume), or a locally effective international treaty or validating legislation, the Agreement and Regulations did not extinguish the initial debt.

147 Of course, I accept that there are arguments both ways on this issue, as there always are when a court such as this is asked to give meaning to a written text. There are also certain reasons of convenience and utility for adopting IATA's submissions concerning the effectiveness of its documentation to extinguish the underlying debts between the issuing and the carrying airlines. Nevertheless, the preferable construction of those documents and of the Manual of Regulations and Procedures, read as a whole, confirms the conclusion reached by the majority in the Court of Appeal. In their essential character for legal purposes, the claims (or "items") the subject of clearance began as, and remained, debts.

148 On this construction of the Agreement and Regulations, the orders sought by IATA are inconsistent with the relevant provisions of the Corporations Act and the Deed. By s 444A(4)(b) of the Corporations Act, one of the matters that must be specified in such a deed is the property that is to be available to pay the claims of the company's creditors. By s 444A(4)(h), the deed must state the order in which the proceeds of realising such property are to be distributed among creditors bound by the deed. By s 444D(1) it is provided that, once executed, such a deed binds all creditors of the company so far as concerns claims arising on or before the day specified in the deed under s 444A(4)(i). The result of these provisions is that, upon the execution of a deed of company arrangement under Pt 5.3A of the Corporations Act (such as the present Deed), the deed orders and controls the manner in which the administrators must realise the property of the company to be distributed amongst the creditors bound by the deed[105]. Pursuant to the Corporations Act, the deed is given statutory force and effect.

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105 (2006) 60 ACSR 468 at 505-506 [157]; 24 ACLC 1381 at 1408-1409. See also *G M & A M Pearce and Co Pty Ltd v RGM Australia Pty Ltd* [1998] 4 VR 888 at 893-894. As to the terms of the Deed, see above these reasons at [136].

149 The orders sought by IATA in these proceedings thus contemplate a disposal of Ansett's property otherwise than in accordance with the Deed. When the present Deed was executed, cl 1.4.1 provided that, if there were any inconsistency between the provisions of the Deed and any other obligations binding on Ansett, the provisions of the Deed would prevail. A direct inconsistency being established, the Court of Appeal was correct to give effect to the Deed.

150 This conclusion is sufficient to decide these appeals in favour of Ansett and the Administrators[106]. However, because a majority of this Court has accepted the contrary conclusion on the issue of the construction of the Agreement and Regulations and because Ansett's remaining submissions afford an additional and distinct foundation for a conclusion in its favour, I will respond to the other way in which Ansett argues that the appeals should be dismissed.

Effect on Agreement and Regulations of statutory insolvency

151 *The second issue*: The second issue raised by the appeals is whether, assuming that (contrary to my view) the Agreement and Regulations, by their terms, extinguish any initial debt between Ansett and other participating airlines, any such agreed extinguishment survives the supervening insolvency of Ansett. Specifically, can such private contractual arrangements stand as legally effective, once insolvency supervenes, to defeat the statutory regime that would otherwise govern the ranking of the claims of creditors and dealings with the corporation's property? Must the private agreement by Ansett, when solvent, to extinguish the original debt as between itself and issuing airlines, yield to the legal obligations imposed by the Corporations Act and the Deed, and to the public policy there reflected, for the equitable discharge of all of the obligations of Ansett to its several creditors?

152 *The correct starting point*: Much of the analysis of this issue in the courts below was taken up in a detailed consideration of the ongoing applicability in Australia of the public policy considerations identified by the majority of the House of Lords in *British Eagle*. According to their Lordships in that case, the Agreement and Regulations, as they then stood, amounted to a legally impermissible attempt, in effect, to contract out of the requirements established by United Kingdom public law for the administration of a potentially insolvent company.

153 Ansett submitted that any such attempt, repeated in its case, should be classified by an Australian court as contrary to the public policy evident in the

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106 (2006) 60 ACSR 468 at 498 [122]; 24 ACLC 1381 at 1403.

Corporations Act and in the Deed. Ansett argued that the attempted circumvention of the statutory requirements rendered the attempt legally invalid. It did so in respect of all uncleared claims dealt with in the Clearing House after the commencement of Ansett's insolvency. In respect of such claims, and before the termination of Ansett's membership of the Clearing House, the airlines which had rendered services to Ansett during the period were not entitled to the benefit of the Clearing House mutualities. Putting it bluntly, like all other unsecured creditors of Ansett, such airlines were obliged to prove in the administration of the insolvent company[107]. Similarly, the uncleared claims Ansett had against other airlines were debts owed to Ansett that became part of the Deed assets.

154 For reasons that I have already foreshadowed, the analysis in the courts below started in the wrong place. The decision of the House of Lords in *British Eagle* was neither legally binding nor necessarily determinative of the law to be applied in an Australian court. Nor was it to be followed unless "clearly wrong". In this respect, Australian judges should shake off old habits of thinking[108]. Insofar as the decision in *British Eagle* was relevant and persuasive in an Australian court, its utility in these proceedings was, in any case, limited.

155 The House of Lords was closely divided in *British Eagle*. There were strong opinions on each side of the ledger. Relevant provisions of the Regulations have been altered since 1975. The issue at stake, before an Australian court, was necessarily the operation of Australian legislation, whose constitutional validity was unchallenged[109]. It was this legislation which the Administrators, on behalf of Ansett, invoked defensively. This presents yet another habit of thinking that Australian judges must learn to throw off. Where valid legislation speaks and is relevant, the proper starting point for analysis is the legislation[110]. It is not judicial *dicta*. Still less is it *dicta* of judges, however distinguished, of a foreign court[111].

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107 *British Eagle* [1975] 1 WLR 758 at 771 per Lord Diplock, 780 per Lord Cross, 781 per Lord Edmund-Davies; Lords Morris at 769 and Simon at 771 contra; [1975] 2 All ER 390 at 403, 410-411, 411, 401-402, 403.

108 See *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56 at [96], [130]; *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60 at [138]-[141].

109 Constitution, s 51(xvii). See also s 51(i), (xx), (xxix).

110 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 198 [85] and cases there cited.

111 An example of the correct approach to the use of foreign judicial authority appears in the reasons of May and Thackray JJ for the Full Court of the Family Court of Australia in *Wenceslas v Director-General, Department of Community Services* (2007) 211 FLR 357 at 377 [108]: "[W]hilst judgments of the superior courts in

(Footnote continues on next page)

156 These are fundamentals of legal reasoning. They inhere in observance by the courts of this country of the rule of law. It is the duty of this Court to insist upon them and to apply them consistently. They are not overwhelmed by perceptions of convenience. To say this is not to evidence legal parochialism. To that charge I plead not guilty. It is no more than constitutional duty binding on every Australian judge.

157 Instead of taking so many pains to try to identify what the House of Lords postulated as the requirement of United Kingdom corporate insolvency law, and the policy of that law, in 1975, the judges below (and the parties before this Court) should have focussed their attention, first and principally, on the provisions of, and legislative policy inherent in, the applicable Australian statute law. Relevantly, this was Pt 5.3A of the Corporations Act, including as it provided for the execution of deeds of company arrangement such as that executed by Ansett.

158 *Provisions of Pt 5.3A*: Part 5.3A of the Corporations Act introduces a somewhat new and distinctive system of administration of corporations in insolvency[112]. The introduction of the Part followed proposals made by the Australian Law Reform Commission[113]. As in other contemporaneous legislation, the objects of the new Part included the partial out-sourcing of functions formerly performed by public officials. Thus, the Part involves the more active participation of creditors in determining the consequences that flow from a recognition of possible insolvency.

159 Nevertheless, it would be a mistake to treat Pt 5.3A as disjoined from Australia's earlier enacted provisions governing corporate insolvency. The statutory machinery has changed; but the fundamental objects remain the same. Relevantly, they include ensuring to all creditors and debtors of a corporation, in circumstances of actual or potential insolvency, equitable treatment in accordance with law and the proper ranking of their entitlements and obligations

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New Zealand have much persuasive value, they are of no greater persuasive force than the judgments of superior courts of other signatory countries."

112 Joint reasons at [39] citing *Brash Holdings Ltd v Katile Pty Ltd* [1996] 1 VR 24 at 28-29.

113 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988) ("Harmer Report"), vol 1 at 5-6 [8], 28-29 [53]-[54]; cf Explanatory Memorandum to Corporate Law Reform Bill 1992 (Cth) at 9.

inter se. In this respect, Pt 5.3A still reflects the basic principles of insolvency law explained in *Palmer's Company Law*[114]:

> "The first [rule] is that the legislation lays down a mandatory code of procedure to be administered in a proper and orderly way and this is a matter in which the commercial community generally has an interest. In other words it is not simply a matter of private right. Secondly, to allow contracting out would be unfair and possibly a fraud on the general body of ordinary creditors."

160 The maintenance of the foregoing objectives in respect of the administration of an insolvent company in accordance with Pt 5.3A is made plain by the language of s 435A of the Corporations Act. That section, in stating the objects of Pt 5.3A as including "to provide for the business, property and affairs of an insolvent company", places the provisions of the Part, including those concerning deeds of company arrangement, squarely within the context of corporate insolvency law.

161 The execution of a deed of company arrangement is one of the normal outcomes of an administration of an insolvent corporation under Pt 5.3A. Such a deed is executed both by the company and the administrator[115]. It follows that the combination of Pt 5.3A of the Corporations Act, together with the contents of a deed entered into in accordance with that Part, is equivalent to a collective statutory regime for the distribution of the property of the corporation in a way that is relevantly identical to the more traditional provisions governing corporate insolvency found, for example, in Pts 5.5 and 5.6 of the Corporations Act. Thus, Ansett became as much subject to the provisions for creditor equity *inter se* as British Eagle was to the United Kingdom legislation considered by the House of Lords in *British Eagle*.

162 *The relevant public policy*: IATA contested the invocation of the public policy considerations mentioned by the House of Lords in *British Eagle*. Specifically, IATA pointed both to the differences that had been introduced into the Regulations since *British Eagle* was decided and to the distinctive features of the form of company administration in insolvency introduced by Pt 5.3A of the Corporations Act.

163 Neither of these arguments is persuasive. The claim for Ansett did not represent an illicit attempt by the Administrators to enlarge the consequences of the Deed and the requirements of Pt 5.3A of the Corporations Act pursuant to

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114 vol 3 at [15.419] (footnotes omitted).

115 Corporations Act, s 444B.

which the Deed was executed. Instead, the public policy invoked by the Administrators was precisely the consideration that weighed with the majority of the House of Lords in *British Eagle*. It was perfectly simple. Once an insolvency regime provided by a valid public law was engaged, earlier attempts by a corporation, before its insolvency, to provide by contract in a way that would defeat that law, cannot be sustained. They amount, in effect, to an invalid effort by *private* agreement to override the *public* policy of the Australian Parliament. Such law and policy envisages that, where insolvency of a corporation supervenes, the regime established by, or under, statute will prevail. Any affected prior private arrangements of the parties must give way.

164 *Support for the public policy*: The public policy applicable to the present case is exactly the same as that stated by Lord Cross of Chelsea, giving the reasons of the majority in the House of Lords in *British Eagle*[116]:

> "[W]hat the respondents are saying here is that the parties to the 'clearing house' arrangements by agreeing that simple contract debts are to be satisfied in a particular way have succeeded in 'contracting out' of the provisions contained in section 302 [of the *Companies Act* 1948 (UK)] for the payment of unsecured debts 'pari passu'. In such a context it is to my mind irrelevant that the parties to the 'clearing house' arrangements had good business reasons for entering into them and did not direct their minds to the question how the arrangements might be affected by the insolvency of one or more of the parties. Such a 'contracting out' must, to my mind, be contrary to public policy."

165 In *In re Maxwell Communications Corporation Plc*[117], Vinelott J recognised that this principle was "reflected in but not derived from section 302 or its predecessor".

166 Similarly, in *Money Markets International Stockbrokers Ltd (in liq) v London Stock Exchange Ltd*[118], Neuberger J insisted upon adherence to the principle that:

> "on insolvency, the insolvent's assets are to be available for distribution amongst its creditors in accordance with primary and delegated legislation, in this country the Insolvency Act 1986 and the Insolvency Rules 1986".

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116 [1975] 1 WLR 758 at 780; [1975] 2 All ER 390 at 411.

117 [1993] 1 WLR 1402 at 1416; [1994] 1 All ER 737 at 750.

118 [2002] 1 WLR 1150 at 1160 [37]; [2001] 4 All ER 223 at 234.

167 A similar approach is taken by courts in the United States of America. For example, in *In re 203 North LaSalle Street Partnership*[119], the United States Bankruptcy Court observed:

> "It is generally understood that prebankruptcy agreements do not override contrary provisions of the Bankruptcy Code. Thus, in *Klingman v Levinson*[120], the court noted that the Bankruptcy Code generally provides for the discharge of an individual's debts, and that it would be contrary to public policy to allow a debtor 'to contract away the right to a discharge.' See also *Hayhoe v Cole (In re Cole)*[121] (collecting decisions refusing to enforce prepetition waivers of 'bankruptcy benefits' other than discharge). Indeed, since bankruptcy is designed to produce a system of reorganization and distribution different from what would obtain under nonbankruptcy law, it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply."

168 Some of the arguments in this Court sought to derive from the House of Lords decision in *British Eagle* a public policy principle that was strictly confined to the protection of the *pari passu* settlement of creditor claims. However, this would be altogether too narrow a reading of what their Lordships in the majority were concerned to uphold, what other courts considering similar problems have asserted and what this Court should likewise defend. In his examination of the *pari passu* principle, Mr R J Mokal has remarked[122]:

> "[O]ne may not bargain for immunity from the collective bankruptcy regime (except as provided by the law) … What cannot be contracted out of (in an unacceptable way) is not the *pari passu* principle, but *the whole collective system* for the winding-up of insolvent estates … [It is] forbidden for a creditor to leave his assigned place in the queue and step ahead of others".

169 This is, in effect, what Ansett attempted to do in advance by the contractual arrangements it made with the other airlines that were utilising the Clearing House. Whether this was effective or ineffective to extinguish the initial debt occasioned by the provision of services by the carrying airline for the

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119 246 BR 325 at 331 (Bkrtcy ND Ill 2000).

120 831 F 2d 1292 at 1296 n 3 (7th Cir 1987).

121 226 BR 647 at 652 n 7 (9th Cir BAP 1998).

122 "Priority as Pathology: The *Pari Passu* Myth", (2001) *Cambridge Law Journal* 581 at 597 (emphasis added).

issuing airline, once insolvency supervened it became necessary to re-examine the private contractual arrangements to see if they could stand with the fundamental purposes of administration of the affected corporation in insolvency, pursuant to the scheme established by Pt 5.3A of the Corporations Act.

170 In answering that last question, I remind myself of the fundamental words of Bowen LJ written more than a century ago in *Ex parte Milner*[123]:

> "[T]he creditors who take part in the scheme act upon the faith and understanding that they are all coming in upon terms of equality, and if a deed is prepared to carry out this equal distribution, every creditor who executes it does so on the faith that there is no private bargain with any of the other creditors which will destroy this equality."

171 The cardinal principle that sustains this conclusion is quite similar to that which this Court upheld in *Akai Pty Ltd v People's Insurance Co Ltd*[124]. That was a case where a contract of insurance with an Australian company contained a clause, inserted by the insurer (a Singapore company), providing for disputes to be referred to the courts of England. Allowing the appeal, this Court concluded that it was essential for an Australian court, whose jurisdiction was invoked, to measure any such contractual stipulation against the requirements of the applicable Australian public law. In that case the relevant law was the *Insurance Contracts Act* 1984 (Cth). In *Akai*, the majority in this Court observed[125]:

> "The grant of a stay would involve the [Australian] court so exercising its discretion as to stay its process in favour of an action in a court where the statute would not be enforced. This stay would be granted on the basis that in so doing a contractual obligation would be implemented. But the policy of the Act, evinced by s 8, is against the use of private engagements to circumvent its remedial provisions. To grant a stay in the present case would be to prefer the private engagement to the binding effect … of the law of the Parliament. This indicates a strong reason against the exercise of the discretion in favour of a stay. The policy of the law and of the Constitution militates against a stay.
>
> In the event, it is unnecessary to decide the case solely upon this basis. That is because the Act itself provides, in s 52, a direct answer. … The section operates to render void a provision of the Policy which would … have the effect of excluding, restricting or modifying … the operation

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123 (1885) 15 QBD 605 at 616.

124 (1996) 188 CLR 418.

125 (1996) 188 CLR 418 at 447 per Toohey, Gaudron and Gummow JJ.

of the Act. The phrase 'the operation of this Act' includes the operation, to the advantage of Akai, of s 54. In the Court of Appeal, Kirby P so held in his dissenting judgment[126], and we agree."

172 *Conclusion: contracting out unsuccessful*: The reasoning in *Akai* applies to the present case. This is so although there is not here an express statutory prohibition on contracting out of the provisions of Pt 5.3A of the Corporations Act as existed under the *Insurance Contracts Act*. Doubtless this was so because the scheme of that Part of the Corporations Act is to commit to a majority of creditors the decision, in the first instance, of whether or not to execute a deed of company arrangement. Once that has occurred, the familiar principles of insolvency law take effect. These include the normal consequences for the protection of the company itself and its creditors *inter se* against those who, in Mr Mokal's words, try to "leave [their] assigned place in the queue and step ahead of others".

173 *Inconvenience and policy*: I appreciate that the outcome that I favour, alike with the majority of the Court of Appeal, would inconvenience IATA and its members, just as the outcome in *British Eagle* would doubtless have done.

174 On the other hand, the Clearing House secures for participating airlines a distinctive priority, amounting to a preferential discharge *at full price* of unsecured obligations owed by an insolvent airline to other airlines. If effective, this would protect recipients of such payments at the cost of the equity defended by the priorities otherwise contemplated by the insolvency provisions of the Corporations Act and established by the Deed.

175 No doubt unpaid airline pilots, employees, small contractors and other unsecured creditors would have their own views about the comparable merits of their respective claims upon the property of Ansett and the competing claims of large corporate airlines. They might well regard such airlines as much better able to absorb and defray the losses caused, exceptionally, by the financial collapse of an air carrier. This Court is not concerned to weigh the competing merits of the claims of the several creditors. Its only obligation is to give effect to the requirements of the applicable Australian law.

176 Where, as I would hold, the private contractual arrangements between Ansett, other airlines and IATA before the insolvency conflict with the provisions and fundamental purposes of the public law on corporate insolvency, it is the latter that must prevail. The Clearing House will continue to govern, with efficiency and mutual benefit, the overwhelming number of transactions

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126 *Akai Pty Ltd v People's Insurance Co Ltd* (1995) 126 FLR 204 at 215-216 (NSWCA), misreported in (1996) 188 CLR 418 as (1995) 126 FLR 204 at 225.

between participating solvent airlines. If greater protection for participants in the Clearing House is required, it may be possible to achieve it by different contractual stipulations, involving for example novation of the original debt[127]. More likely, any such greater protection would require statutory provisions of a specific or general kind or international treaty arrangements given legal effect by municipal law.

177 It is basic to the success of the equitable distribution of property amongst creditors, which lies at the heart of the statutory system on insolvency, that particular creditors may not, by their own private contractual dealings, bargain between themselves so that, if insolvency occurs, they will effectively be immune from the discipline of the statutory ranking. If that could be done by private contract, as IATA argued here, the operation and policy of the administration of a company in insolvency under statute would be seriously threatened. Effectively, it would be rendered optional. Individual creditors by their contractual arrangements could circumvent the statutory provisions and the important social and economic policy they reflect. I deprecate departures from the fundamental principles of insolvency and bankruptcy law which it is the duty of this Court, so far as it can, to uphold.

178 In a choice between private contract and public statute, this Court's clear obligation under the Australian Constitution is to give effect to the statute. This is what the majority of the Court of Appeal did. They were correct to do so. Their orders should not be disturbed by this Court.

179 All airlines, and IATA itself, when they reflect upon it, would fully understand Mr Mokal's metaphor that creditors of an insolvent company must not "be allowed to leave [their] assigned place in the queue and step ahead of others". Airlines have to deal all the time with passengers and shippers who try to jump the queue. Such conduct is not acceptable at airports or in airline offices. Nor, without clear and express legal authority, is it acceptable in courts of law or elsewhere, once the provisions of insolvency law have been engaged and apply. There was no such legal authority here. The individual creditors must therefore be told to return and take their proper place in the queue.

Orders

180 The appeals to this Court should be dismissed with costs.

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127 See the General Regulations of the London Clearing House described in Goode, *Principles of Corporate Insolvency Law*, 3rd ed (2005) at 219.

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