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Details of Filing

Document Lodged:	Outline of Submissions
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File Title:	APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS
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A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 20/05/2020 9:52:16 AM AEST

Registrar

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In the matters of Virgin Australia Holdings Ltd (Administrators Appointed) & Ors

Federal Court of Australia Proceeding No. NSD 464 of 2020

Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes, in their capacity
as joint and several voluntary administrators of each of Virgin Australia Holdings Ltd
(Administrators Appointed) and the Third to Thirty-Ninth Plaintiffs

First Plaintiffs

& Ors

**FIRST PLAINTIFFS' FURTHER OUTLINE OF SUBMISSIONS ON PARAGRAPH 18 OF
THE INTERLOCUTORY PROCESS FILED ON 11 MAY 2020**

A. INTRODUCTION

1. These are the further submissions of the First Plaintiffs, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (together, **the Administrators**), in their capacity as administrators of each of the Second to Fortieth Plaintiffs (together, **the Virgin Companies**), with respect to the relief sought in paragraph 18 of the Interlocutory Process filed on 11 May 2020 (**Interlocutory Process**) concerning the proposed limitation of the Administrators' personal liability for any possible repayments under the JobKeeper scheme.
2. Since the hearing on 13 and 15 May 2020, further correspondence has been exchanged between the legal representatives of the First Plaintiffs and the Commissioner of Taxation and the parties have been able to reach an agreed position on the form of proposed order, a copy of which accompanies these submissions.
3. These submissions supplement the First Plaintiffs' submissions dated 12 May 2020 (**Primary Submissions**). The parts of the Primary Submissions directed to the JobKeeper issue have been extracted in full in paragraph 34 below, for ease of reference.

B. LIMITATION OF LIABILITY FOR JOBKEEPER LIABILITIES: PARAGRAPH 18 OF THE INTERLOCUTORY PROCESS

B.1 Overview

4. The Administrators seek to exclude any personal liability that they may have with respect to any possible repayment of monies advanced by the Commonwealth of Australia under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (JobKeeper Act)* and *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (JobKeeper Rules)* (together, **the JobKeeper Legislation**).
5. These matters are dealt with in paragraphs [112]-[117] of the Second Strawbridge Affidavit, paragraph 2 of the affidavit of Vaughan Neil Strawbridge sworn 15 May 2020 (**Fourth Strawbridge Affidavit**) and the affidavit of Elizma Bolt dated 19 May 2020 (**Bolt Affidavit**).

B.2 The JobKeeper Legislation

6. The JobKeeper Legislation — principally comprising the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (Cth) (JobKeeper Act)* and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) (JobKeeper Rules)* — establishes a regime through which the Commonwealth Government makes payments to businesses to assist those businesses and their employees during the COVID-19 pandemic.
7. The essential features of that regime for present purposes are as follows:
 - (a) an employer entity is generally eligible to receive JobKeeper payments if it carried on business in Australia as at 1 March 2020 and satisfies the specified decline in turnover test applicable to that entity (which compares the employer's turnover in a given period in 2020 with a relevant comparison period in 2019): JobKeeper Rules, Rules 7(1), 8(1), 8(7);
 - (b) where an employer entity satisfies the requirements in (a), it is entitled to receive a payment for each of its eligible employees who, in the relevant fortnight, received salary, wages, commissions, bonuses and certain other allowances and contributions from the employer of \$1,500 or more: JobKeeper Rules, Rules 6(1), 10;

- (c) the amount of the JobKeeper payment which an employer entity receives in respect of each such employee is \$1,500 per fortnight: JobKeeper Rules, Rule 13;
- (d) JobKeeper payments are effected through the Commissioner of Taxation. Where the Commissioner is satisfied that an employer entity is entitled to a JobKeeper payment for a fortnight, the Commissioner must pay the payment to the entity: JobKeeper Rules, Rule 14(1). Necessarily, this means that the JobKeeper payment is paid to employers in arrears (i.e., it is only made by the Commissioner *after* the employer has made the requisite payments (or other contributions) of at least \$1,500 to the employee in respect of the relevant fortnight);
- (e) the JobKeeper payments are payable only in respect of the period commencing on 30 March 2020 and ending on 27 September 2020: JobKeeper Rules, Rule 6(5);
- (f) payment of a JobKeeper payment by the Commissioner does not have the effect of entitling the entity to that payment if the entity was not otherwise entitled to that payment under the scheme: JobKeeper Rules, Rule 14(4);
- (g) if the Commissioner pays an amount by way of JobKeeper payment and either, the employer entity was not entitled to the payment or the Commissioner paid more than that to which the employer was entitled, the employer entity is liable to repay the overpayment to the Commonwealth: JobKeeper Act, s 9. Interest is payable on any unpaid amount: JobKeeper Act, s 10;
- (h) section 11 of the JobKeeper Act provides for joint and several liability in respect of any overpayment amount in certain circumstances. For example, s 11(1) of the JobKeeper Act would allow the Commissioner to be satisfied that an employee should be joint and severally liable with the employer where the relevant overpayment resulted from the employer's reasonable reliance on a false or misleading statement made without reasonable care by the employee. Section 11(2) of the JobKeeper Act operates to similar effect in cases of fraud. Notably, however, even in these cases, the entity receiving the JobKeeper payment from the Commissioner (i.e., the employer) remains liable to the Commonwealth for the amount of any overpayment, even if it acted honestly, reasonably and without knowledge of any falsity or fraud.

8. Having regard to s 443A of the Corporations Act, an administrator who chooses to keep employees on during the COVID-19 pandemic and takes the benefit of the JobKeeper scheme, is exposed to the risk of incurring personal liability in connection with that scheme in various ways. That is because, as noted above, s 9 of the JobKeeper Act makes the relevant employing entity strictly liable for any overpayments under the scheme, regardless of how they arose, with interest payable on such amounts under s 10. Arguably, as set out further below in section B.4 below, liabilities arising under those provisions during the course of an administration would be amounts for which an administrator is personally liable under s 443A.
9. Administrators face particular risks in this regard given that they necessarily inherit the pre-administration systems and records of the relevant employing entity. Inaccuracies in those systems may affect JobKeeper eligibility. For example, “long term casual employees” are eligible employees for purposes of the JobKeeper scheme, but that requires the employee to have been employed on a “regular and systematic basis” for the preceding 12 months: JobKeeper Rules, Rule 9(2)(b)(ii) and (5). If a casual employee were wrongly classified as a “long term casual employee” because of errors in the company’s records, that could result in overpayments under the scheme and hence a liability to repay under the JobKeeper Act. Administrators have no practical ability to protect themselves from such liabilities (other than not making any application for JobKeeper payments at all, and possibly making employees redundant, which would of course be to the detriment of employees).
10. Similarly, administrators are not well-placed to guard against unintentionally false or fraudulent representations by third parties as to their eligibility for the purposes of the JobKeeper scheme. Where the Commissioner makes overpayments under the scheme based on such false or fraudulent statements, the third party may become jointly and severally liable for any overpayment by operation of s 11 of the JobKeeper Act, but the employing entity nevertheless remains liable. The effect of s 443A of the Corporations Act may be that the same is true of the administrators of the employing entity notwithstanding that, again, the administrators have limited means of protecting themselves from such liability.

B.3 The manner in which the JobKeeper scheme is being administered by the Administrators

11. Ms Bolt gives evidence of the careful steps that the Administrators, Ms Bolt and her colleagues at Deloitte have taken to ensure that the Virgin Companies, and their employees, comply with their obligations in connection with the JobKeeper scheme.
12. As Ms Bolt explains, the Administrators has liaised with the Virgin Companies' Management Team to determine the eligibility of both those companies and their employees under the scheme: Bolt Affidavit at [7]-[8]. The initial information used to assess these eligibility questions was supplied by the Virgin Companies' Management Team: Bolt Affidavit at [8]-[10]. Deloitte then separately conducted a review of that information for itself: Bolt Affidavit at [11].
13. In assessing the eligibility of the relevant Virgin Companies under the scheme, Deloitte did not "audit or verify" the underlying data supplied by the Management Team, but equally did not accept the accuracy of those data without question. Ms Bolt explains that Deloitte did test the reasonableness of the GST positions adopted by the Management Team in calculating the turnover projections for the relevant Virgin Companies and found them to be reasonable: Bolt Affidavit at [12].
14. Deloitte's review of the underlying information included a review of the Virgin Companies' information as to employee eligibility, with Ms Bolt and her team carrying out their own eligibility assessments: Bolt Affidavit at [15]-[18].
15. The Court can conclude that the Administrators (and their colleagues at Deloitte) have acted diligently in seeking to confirm the eligibility of both the Virgin Companies and their employees under the JobKeeper scheme. They have not accepted at face value the information supplied by the Management Team and have taken steps to verify the accuracy of the data. It remains the case, however, that the Administrators and Deloitte are necessarily reliant to a large degree on the accuracy of the Virgin Companies' underlying records.
16. As Ms Bolt explains, the relevant Virgin Companies have made payments to a substantial number of employees in connection with the JobKeeper scheme. There are over 8,000 such employees in respect of whom such claims have been made and, in the

first two fortnights, almost \$25 million has been claimed: Second Strawbridge Affidavit at [114]. These are all amounts **prepaid** to employees and in respect of which JobKeeper payments to the companies are expected: Bolt Affidavit at [19]-[22].

B.4 The Administrators' personal liability, to the extent it arises, should be excluded

Potential imposition of personal liability

17. While a company is under administration, administrators have control of the business of the company and may perform any function or exercise any power that the officers of the company could exercise if the company was not in administration: s 437A of the *Corporations Act 2001* (Cth) (**Corporations Act**). Further, administrators are to be taken as acting as agents for the company: s 437B of the *Corporations Act*.
18. Administrators of a company under administration are officers of the company (see the definition in s 9) and act in a fiduciary relationship to the company: *Re Krejci* (2006) 58 ACSR 403; *Correa v Whittingham* (2013) 278 FLR 310; [2013] NSWCA 263 at [148].
19. That said, s 443A imposes personal liability on administrators of a company for certain debts incurred by the company during the period in which the company is under administration in the exercise of their functions and powers as administrators. The section applies to debts incurred by an administrator where he or she is taken to be acting as the company's agent under s 437B: *Australian Liquor, Hospitality & Miscellaneous Workers' Union v Terranora Lakes Country Club Ltd* (1996) 19 ACSR 687 at 688; *Energy & Resource Conservation Co Ltd (In Liq) v Abigroup Contractors Pty Ltd* (1997) 41 NSWLR 169 at 171.
20. The particular debts incurred in respect of which personal liability is imposed on administrators are set out in s 443A(1) (in its present form) as follows:
 - (a) services rendered;
 - (b) goods bought;
 - (c) property hired, leased, used or occupied, including property consisting of goods that is subject to a lease that gives rise to a PPSA security interest in the goods;
 - (d) the repayment of money borrowed;

(e) interest in respect of money borrowed; or

(f) borrowing costs,

and administrators are not otherwise personally liable for the company's debts: s 443C of the Corporations Act.

21. There is a question about whether, by causing the Virgin Companies (or the relevant Virgin Companies that are employer entities) to apply for JobKeeper payments, the Administrators are:
 - (a) "incurring a debt", for the purposes of the chapeau to s 443A(1); and
 - (b) "for services rendered", for the purposes of s 443A(1)(a) (it being accepted that any repayment obligation is unlikely to fall within the other limbs of the subsection).
22. As to the *first* issue, a company incurs a debt when, by act or omission, it is rendered liable for a debt, even one imposed by a statute: *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290 at 314, 317; *Commissioner of State Taxation v Pollock* (1994) 12 ACLC 28 at 41-42. A debt may include a contingent debt: *Hawkins v Bank of China* (1992) 26 NSWLR 562, including in the context of section 443A: *Park, in the matter of Surfstitch Group Ltd (Administrators Appointed)* [2017] FCA 1244 at [14]-[16].
23. Thus, in the circumstances that may arise, if it becomes the case that the Virgin Companies are obliged to repay money (including interest) to the Commissioner of Taxation as prescribed by ss 9 and 10 of the JobKeeper Act, then a debt will be incurred to the Commonwealth. Such a debt is contingently incurred when the application is made for the JobKeeper payment (or, alternatively, when the payment is received from the ATO), which is, of course, at a time during the ongoing administration of the Virgin Companies. Accordingly, in that scenario, the Administrators will relevantly be incurring a debt for the purposes of s 443A.
24. As to the *second* issue, the question is whether an obligation to repay monies to the Commissioner of Taxation (in connection with a statutory scheme such as JobKeeper) constitutes the rendering of services. This has not been the subject of judicial consideration.

25. However, the authorities that have considered s 443A(1)(a) indicate that the phrase “services rendered” in the subsection is not to be construed narrowly: *Re WorkCover Queensland* [2000] 1 Qd R 107. In that case, Muir J rejected the submission that the phrase was limited to “work done” by a servant and, at 111, expressed the following conclusion (in a passage that was expressly cited with approval by Byrne J in *AGL Victoria Pty Ltd v Lockwood* (2003) 10 VR 596 at [59]):

Just as there is no attempt to impose any qualification or limitation in respect of types of goods bought or circumstances in which they have been bought, the subsection does not purport to qualify or restrict the description “services rendered”. I cannot detect anything in the language or context of s. 443A(1) which suggests that it should be construed in a restrictive way. The meaning of “services rendered”, grouped as it is with other general dealings of a commercial nature encompasses, at least, work done for the company which could be regarded as the “rendering of a service” in the ordinary sense of that expression.

26. In that case, WorkCover Queensland argued that the administrator was liable for WorkCover insurance premiums in respect of employees whose employment was continued during the administration. Muir J concluded that the debt arose before the administration commenced, so that s 443A did not apply. Importantly, however, his Honour intimated that a premium payable *after* the administration was on foot involved the provision of a service and was therefore a debt in respect of which an administrator may be personally liable to pay.
27. Other cases that have considered whether a liability falls within s 443A(1)(a) are readily distinguishable.
28. In *Re Ansett Australia (No 1)* (2002) 115 FCR 376, it was held by Goldberg J, at [45], that monies to be borrowed from the Commonwealth to meet employees’ entitlements did not constitute “services rendered” within the meaning of s 443A(1)(a). (At that time, the Corporations Act did not include paragraphs (d)-(f) in s 443A(1), and so, in that case, the Court relied on s 447A to deem the advance of money from the Commonwealth as a debt falling within s 443A so that the liability to repay the Commonwealth was a priority debt in the winding up of the company in accordance with s 443E.)

29. In *Re Pasmenco Limited (Administrators Appointed)* (2002) 120 FCR 326 at [56], Goldberg J concluded that it was not correct, in the abstract, to conclude that, where an administrator of a company under administration consents to the commencement or continuation of a proceeding (or the Court gives leave to do so), and an order for the payment of a claimant's legal costs is made against the company (or the administrator agrees to pay the claimant's legal costs), then those costs fall within the term "services rendered" for the purposes of subsection 443A(1)(a). His Honour did not discount the possibility that it was possible that such a liability fell within the scope of the subsection, but noted that it would depend on the particular claim.
30. In *Sims, in the matter of Huon Corporation Pty Limited (Administrators Appointed)* (2006) 58 ACSR 620 at [10], Gyles J reached the conclusion that a post-administration contract that provided for the company to increase its prices but give a potential price rebate to certain customers did not amount to the rendering of services within subsection 443(1)(a).
31. The factual considerations in each of *Ansett (No 1)*, *Pasmenco* and *Huon* are very different to the present case. *Ansett (No 1)* concerned the provision of a loan. *Pasmenco* concerned an exposure to another party's legal costs. *Huon* concerned an arrangement for the pricing of the company's products.
32. In contrast to those cases, the process of applying, receiving and forwarding JobKeeper payments, when considered as a whole, involves the provision of a service by the ATO.
33. Ultimately, however, it is not necessary for the Court to reach a concluded view on that issue. That is because the order sought is framed in such a way as to exclude the Administrators' personal liability for any repayments due to the Commissioner of taxation in connection with the JobKeeper Legislation, only to the extent that such liability arises. However, the Court can be satisfied that a real issue as to potential liability arises.

Exclusion of personal liability

34. To the extent that such personal liability may arise, that liability should be excluded for the reasons that follow, as contained in both the Primary Submissions on this issue (which are extracted below) and in further submissions set out thereafter:

[104] The Administrators have made efforts to cause certain of the Virgin Companies to apply for payments from the Commonwealth Government under JobKeeper: Second Strawbridge Affidavit at [112]-[115]. These payments are passed directly onto employees of those Virgin Companies.

[105] However, the Administrators are concerned that there may be a possibility that the Virgin Companies may become liable to repay money to the ATO if any JobKeeper payments were incorrectly claimed: Second Strawbridge Affidavit at [116]-[117]. This justifiable concern arises from:

- (a) the untested nature of the JobKeeper programme;
- (b) the short period of time in which to make applications for JobKeeper payments; and
- (c) the Administrators relying substantially on information contained in the books and records of the Virgin Companies for the purpose of applying for JobKeeper payments without having had sufficient time to confirm the accuracy of those records (given the magnitude of the business operated by the Virgin Companies).

[106] If any such liability were to arise, it should not be recoverable from the Administrators personally (just as if a company that is not in external administration had a liability to repay JobKeeper payments, the directors of that company would not have personal liability for those repayments).

[107] These orders facilitate the payment of ongoing JobKeeper subsidies to employees of the Virgin Companies. In the absence of those ongoing subsidies, employee creditors stand to suffer great hardship. Accordingly, a limitation of personal liability in relation to the JobKeeper scheme is consistent with the object of Part 5.3A: *Re Ansett Australia (No 1)* (2002) 115 FCR 376; [2001] FCA 1806 at

[49]. Again, the ATO have been notified of this application: Second Strawbridge Affidavit at [134(e)].

35. In addition to those submissions, there are further reasons to limit the Administrators' personal liability.
36. *First*, under the JobKeeper legislation, the Administrators remain potentially liable to repay amounts, plus interest, for an indeterminate period of time after receipt of the payments by the relevant Virgin Companies. That means that, to the extent that they are personally liable for such debts, their exposure may continue beyond the administration of each of the Virgin Companies.
37. *Secondly*, to the extent that the Administrators may be personally exposed to such potential liability, they would be entitled to retain the proceeds of the sale or positive restructure of the assets and business of the Virgin Companies, as security over which they have a lien for their right of indemnity out of the companies' assets under section 443D of the Corporations Act (or pursuant to equitable principles). In other words, while the possibility of personal liability remains, there may be a corresponding delay in making a distribution (or further distribution) to participating creditors of the Virgin Companies under a prospective deed of company arrangement proposal (for example): Bolt Affidavit at [25].
38. *Thirdly*, as also noted above, the Virgin Companies are not, in substance, the recipients of the JobKeeper payments. Rather, these monies are paid (in fact, pre-paid) to the applicable employees. Even if they were entitled to do so, the Administrators could not themselves be expected to seek to recover, from the applicable employees, amounts incorrectly paid under the JobKeeper scheme. Accordingly, it would be unjust for personal liability to be imposed on the Administrators in that circumstance.
39. *Fourthly*, the removal of personal liability does not immunise the Administrators from their obligations generally as administrators. As set out above, they remain officers of the companies with all the attendant obligations under, for example, ss 180-181 of the Corporations Act. They remain obliged to act in good faith and for a proper purpose. Accordingly, there is no reason to consider that the Administrators will be released from liability if they do not act honestly and in good faith.

40. *Fifthly*, and in any event, the form of the order now sought makes it clear that the exclusion of personal liability does not arise if there is a failure to act in good faith and without negligence (reflecting the words of s 443D(aa) of the Corporations Act). Further, there is also an express exception for the provisions of the JobKeeper Legislation that concern fraud.
41. *Sixthly*, while s 443BA of the Corporations Act imposes personal liability upon administrators for certain taxation debts of the company under administration (such as withholding tax under Pay As You Go arrangements), these liabilities are prospective and knowable to administrators as and when they arise. In contrast, a contingent liability may be incurred under the JobKeeper scheme at the time that payments are made by the ATO, even if the Administrators are not aware that such liability arises, with the time for repayment of the applicable debt being many months later.
42. *Seventhly*, it is significant that the Commissioner of Taxation does not oppose the orders in the modified form now sought.

C. CONCLUSION

43. The Court should make the further proposed orders in the form now sought by the Administrators.

20 May 2020

Ruth C A Higgins SC

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