NOTICE OF FILING

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Details of Filing

Document Lodged:	Submissions
File Number:	NSD464/2020
File Title:	APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS
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Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED)

FEG SUBMISSIONS

1. These submissions are filed on behalf of the Commonwealth of Australia, acting through the Attorney-General's Department.

2. The Attorney-General's Department has responsibility for administering the Commonwealth's Fair Entitlements Guarantee Scheme. If the companies in administration were to proceed to liquidation, the amount that may be paid by the scheme to eligible employees in the Virgin group would likely be substantial. The administrators have estimated that employee entitlements that would crystalise on the liquidation of the group is approximately $450m. The Commonwealth will be subrogated to the priority rights of employees in relation to any amount paid in satisfaction of employee entitlements in that event.

3. For this reason, the administrators have rightly recognised that the Commonwealth, through its FEG Scheme, will be a primary party impacted by the administrators continuing to trade if the group ultimately fails.

4. The Commonwealth's submissions are restricted to paragraph 15 in the minute of proposed orders provided by the administrators to the Court on 13 May 2020. That order provides that the administrators will not be personally liable for a very wide range of liabilities incurred in relation to various types of possible 'future' agreements to the extent that the assets of the particular Virgin company that is counterparty to the relevant agreement are insufficient to satisfy the debts owed by the company. The agreements are defined in partially inclusive terms[1] as the 'Applicable Agreements'.

5. That order would effectively remove the personal liability imposed on the administrators by s 443A of the Corporations Act in relation to practically any agreement the administrators may enter into during the trade-on of the Virgin group.

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[1] For example, category (a)(iii) is defined as 'procurement contracts, including' a range of types of contracts for the supply of goods and services.

6. Section 443A of the Corporations Act relevantly provides:

> The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:
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> (a) services rendered; or
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> (b) goods bought; or
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> (c) property hired, leased, used or occupied; or
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> (d) the repayment of money borrowed; or
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> (e) interest in respect of money borrowed; or
>
> (f) borrowing costs

7. That section is a central feature of the legislative scheme governing external administration. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 1, Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ said at [51]-[52]:

> Although an administrator has power to conduct the business of the company during administration (s 437A(l)) the administrator is personally liable under s 443A for debts he or she incurs in doing so. The administrator then has a right of indemnity against the company's assets (ss 443D, 443E), ranking in priority to unsecured debts and, generally speaking, debts secured by a floating charge (s 443E(l)). The administrator has a lien over the company's property to secure that right (s 443F). But if an administrator forms the view that the company is and is likely to remain insolvent, it is unlikely that a decision would - or ought - be taken to continue trading. Personal liability of the administrator for the debts incurred would be the price of unsuccessful trading by an insolvent company. If the employer companies are indeed insolvent and if there be no prospect of supplying their employees' labour to a stevedore under a profitable contract, the administrators are not likely to incur debts in carrying on trading, without a third party indemnity.
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> An administrator has the power to carry on trading though the company is insolvent, the personal liability of the administrator being the protection given by the Corporations Law to the company's creditors.

8. The protection granted to creditors who deal with a company in administration has several purposes. One is to encourage third parties to deal with the company during the administration whilst the company's affairs are reviewed. There is nothing in Pt 5.3A or elsewhere in the Corporations Act that obliges those who have dealt with the company prior to the administration to continue to do so during the administration. The Harmer Report summarised the purpose of the provision (pp 44-45 of the Report):

> One of the criticisms made in relation to official management and, in some cases, to schemes of arrangement is that there is little or no assurance that persons who engage in business with a company that is under either type of administration will be paid any debt resulting from that business. Although a person who becomes a creditor as a result of a transaction during such an administration may have a priority right to payment, there are instances where that right has proved worthless. Where it is appropriate that a company under administration should continue to trade, it is desirable to encourage that trade. Prospective creditors therefore need to have a reasonable assurance of payment. This section provides that assurance by requiring the administrator to be personally liable. The administrator has a choice. The business of the company need not be continued or supplies of goods or services can be obtained for cash, if the business is continued. However, the main protection for an administrator against any personal liability is the provision of an indemnity for such liability out of the assets of the company.

9. In *Re Cook Cove Pty Ltd (admin apptd)* and Boyd Cook Cove Finance Corp Pty Ltd (admin apptd) (2009) 27 ACLC 953, Austin J said at [37]:

> One can envisage cases in which it would not be appropriate to make an order limiting the normal liability of an administrator under Pt 5.3A for post-appointment debts: for example, where the administrator proposes to enter into many business transactions in the course of carrying on the company's business, contracting with suppliers and service providers for relatively small amounts in circumstances where those with whom the administrator contracts would not be aware of the court's order and would be entitled to assume that the normal liability provisions of Pt 5.3A were applicable. But the decided cases are of a different kind.

10. The present administrators have proposed that each counterparty to each Applicable Agreement will be informed of the court's order, and the agreements will provide that the administrators' liability will be limited to the extent to which the relevant Virgin company is able to pay amounts owing.[2]

11. Another purpose of the imposition of personal liability on administrators is to discourage continued trading in circumstances where liquidation is inevitable, or where those with a stake in the survival of the company, such as substantial shareholders, are not prepared to indemnify the administrators for debts incurred during the administration, and where continuing to trade is not otherwise warranted.

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[2] Proposed minute of order, para 15; first Strawbridge affidavit 11 May 2020, [106], [110].

12. The Court has power to make an order under s 447A that has the effect of limiting the personal liability of an administrator imposed by s 443A.[3] It has exercised that power in previous cases, including in this administration.[4]

13. Typically, administrators have been relieved of personal liability (beyond the extent to which the company's assets are sufficient to meet the debt) in relation to a specific contract (such as a funding agreement). On occasion, the power has been exercised in relation to a specific class of contracts, such as leases, or particular types of construction contracts. It should be noted that this power has not previously been exercised on the scale that is sought in this case. The present administration may contend and the Court may consider whether it may be justified in the current unique circumstances involving the voluntary administration of an airline operating in what is effectively a duopoly market during a pandemic.

14. Conversely, the Corporations Act 2001 provides a comprehensive regime for the conduct of voluntary administrations, including the rights and obligations of voluntary administrators during what is generally intended to be a short process. This includes the general proposition that voluntary administrators are personally liable for any debts that they incur during the voluntary administration period.

15. Caution should be exercised by the Court before the usual statutory framework is altered in a fundamental way. The particular focus, of course, is on whether it is appropriate to do so in the circumstances of the particular administration and in the interests of creditors.

16. Given the circumstances surrounding the Virgin administration, the Commonwealth does not oppose the order sought.

14 May 2020

JONATHON MOORE

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3 *Mentha, in the matter of Griffin Coal Mining Company Pty Ltd (administrators appointed)* [2010] FCA 1469; 82 ACSR 142 at [29].

4 *Strawbridge, Re of Virgin Australia Holdings Ltd (Admins Apptd)* [2020] FCA 571.