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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD464/2020
File Title:	APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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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' OUTLINE OF SUBMISSIONS ON INTERLOCUTORY PROCESS FILED ON 11 MAY 2020

A. INTRODUCTION AND OVERVIEW

1. These are the 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 Plaintiff, Virgin Australia Holdings Ltd (Administrators Appointed) (**Virgin**), and the Third to Thirty-Ninth Plaintiffs and the prospective Fortieth Plaintiff, which are various subsidiaries of Virgin (together, **the Virgin Subsidiaries**), with respect to the Interlocutory Process filed on 11 May 2020. Virgin and the Virgin Subsidiaries are, together, referred to as the **Virgin Companies**.

2. In support of the interlocutory application, the First Plaintiffs rely upon the affidavit of Vaughan Neil Strawbridge sworn on 11 May 2020 (the **Second Strawbridge Affidavit**), and the further affidavit of Vaughan Neil Strawbridge sworn on 11 May 2020 (the **Supplementary Strawbridge Affidavit**). Reliance is also placed upon the affidavit of Vaughan Neil Strawbridge dated 23 April 2020 (the **First Strawbridge Affidavit**), which was relied upon in the first court application in this proceeding on 24 April 2020 (the **Initial Application**).

3. Virgin is a public company whose shares are listed on the Australian Securities Exchange. On 20 April 2020, the Administrators were appointed as joint and several administrators of each of Virgin and the Virgin Subsidiaries other than the prospective Fortieth Plaintiff, Tiger International No. 1 Pty Ltd (Administrators Appointed) (**Tiger**

1). On 28 April 2020, the Administrators were appointed as joint and several administrators of Tiger 1.

4. There are certain other companies within the Virgin group of companies (**Virgin Group**) (most notably, those associated with the Velocity Frequent Flyer Loyalty Program) that are not in any form of external administration. This application does not concern those entities.

5. On 24 April 2020, following the **Initial Application**, the Court made orders (the **24 April Orders**), which essentially:

   (a) provided administrative-type relief to the Plaintiffs to permit them to hold meetings of creditors by video-link or telephone, to send notices to creditors electronically where email addresses were available to the Administrators, and for the formation of a single committee of inspection for the Second to Thirty-Ninth Plaintiffs; and

   (b) granted the Administrators a 4-week extension of the time in section 443B of the *Corporations Act 2001* (Cth) (**Corporations Act**) for the Administrators to give notice to lessors of property leased, used or occupied by the Second to Thirty-Ninth Plaintiffs as to whether to retain or give up possession of that property (together with a corresponding extension of the period in which the Administrators were not personally liable for obligations under those leases).

6. On 29 April 2020, the Court published reasons for judgment in respect of the 24 April Orders: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* [2020] FCA 571 (the **First Judgment**).

7. The Virgin Companies are, together, a very large commercial enterprise that carries on a very substantial aviation business. The administrations of the Virgin Companies are complex, involving both the operation of the business (where possible, due to constraints occasioned by the COVID-19) and an ongoing effort to sell the business as a going concern, or recapitalise it through a proposal for a deed of company arrangement (**DOCA**).

8. This application primarily seeks the following relief:

   (a) in respect of Tiger 1:

(i) curative orders having regard to the fact that the notice to creditors for the first meeting of creditors (held on 11 May 2020) was sent to creditors less than the 5 business days required by section 436E(3) of the Corporations Act;

(ii) similar administrative-type orders to those sought in the Initial Application, including to hold meetings of creditors by video-link or telephone and to send notices to creditors electronically where email addresses were available to the Administrators; and

(iii) orders varying the 24 April Orders so that the existing committee of inspection also encompasses Tiger 1;

(b) orders extending the period for the convening of the second meeting of creditors of each of the Virgin Companies, for about 3 months, to 18 August 2020 (**the Convening Period**);

(c) orders permitting the second meeting of the creditors of each of the Virgin Companies (**Second Meetings**) to be convened at any time within the Convening Period;

(d) orders limiting the Administrators' personal liability with respect to obligations entered into after their appointment including with respect to:

(i) specific charter flights provided to a particular customer, Rio Tinto Services Limited (**Rio Tinto**);

(ii) future arrangements to be entered into by the Administrators in connection with the operation of the Virgin Companies' business;

(iii) the Commonwealth's JobKeeper programme (**JobKeeper**); and

(iv) inter-company loans between various entities within the Virgin Companies;

(e) directions that the Administrators would be justified in offering a conditional credit to customers of the Virgin Companies who have been unable to take flights booked with the Virgin Companies because those flights were cancelled in response to the COVID-19 pandemic (**Conditional Credits Proposal**) (and an

associated limitation of the Administrators' personal liability in connection with the Conditional Credits Proposal);

(f) orders modifying the requirement in section 438B(2) that the directors of each of the Virgin Companies provide a report as to the company's activities and property, and instead requiring that a single report be prepared for Virgin and various of the Virgin Subsidiaries (with the directors of the other Virgin Companies preparing reports in the usual manner);

(g) orders that the members of the committee of inspection be given leave to derive a profit or advantage from the external administration of each of the Virgin Companies (so as, for example, to permit the Administrators to cause the Virgin Companies to enter into arrangements to permit ongoing trading with members of the committee during the administration period); and

(h) dispensing with the requirement that the Administrators open and operate a separate bank account for each of the Virgin Companies.

B. FACTUAL BACKGROUND

9. The factual background is set out in the First Strawbridge Affidavit at [12]-[25], the Second Strawbridge Affidavit at [9]-[13] (which deals with all matters on the current application other than Conditional Credit Proposal), and the Supplementary Strawbridge Affidavit at [8]-[15] (which addresses the Conditional Credit Proposal).

B.1 The Virgin Companies

10. The Virgin Companies are part of a corporate group comprised of companies incorporated and operating in Australia, New Zealand and Singapore (the **Virgin Group**). The Virgin Group operates a domestic and international passenger and cargo airline business, offering a variety of aviation products and services to the Australian aviation market, including corporate, government, leisure, low cost, regional and charter travellers and air freight customers (collectively, **the Business**): First Strawbridge Affidavit at [13]. It offers airline passenger services under both of the well-known "Virgin" and "Tiger" brands and, prior to the Administrators' appointment, employed approximately 10,000 employees nationally, and operated a

fleet of 144 aircraft: First Strawbridge Affidavit at [13]-[14]; Second Strawbridge Affidavit at [13].

11. The Administrators have currently identified that the Virgin Companies have approximately 12,808 known creditors in total (other than bondholders). The creditors identified thus far comprise the following: First Strawbridge Affidavit at [48]; Second Strawbridge Affidavit at [29]:

    (a) 26 lenders under secured corporate debt and aircraft financing facilities, who are together owed approximately $2,283,639,303;

    (b) unsecured noteholders (referred to as bondholders in the First Strawbridge Affidavit) who are together owed approximately $1,988,250,000;

    (c) 1,070 trade creditors, who are together owed approximately $166,704,085.69;

    (d) 50 aircraft lessors, who are together owed approximately $1,883,914,848;

    (e) 81 landlords, who are together owed approximately $71,209,929; and

    (f) 9,020 employees, who are together owed approximately $450,777,961.

12. The COVID-19 pandemic has led to a substantial downturn in the operations and revenue of the Virgin Companies. Between 18 March 2020 and 5 April 2020, various steps were taken by Commonwealth, State and Territory Governments that placed severe restrictions on overseas and inter-state travel; and similar restrictions were adopted worldwide to reduce the spread of COVID-19: First Strawbridge Affidavit at [18]-[20].

13. These actions have resulted in a significant reduction in the demand for international and domestic air travel, which is a significant part of the business operations of the Virgin Companies. The COVID-19 pandemic has had a considerable adverse effect on the revenues of the Virgin Companies: First Strawbridge Affidavit at [23].

14. Since their appointment, the Administrators have sought to continue to trade the Virgin Companies on a "business as usual" basis, albeit that, due to the travel restrictions arising from COVID-19:

    (a) the airline is not operating any international passenger routes and only limited domestic passenger routes (about 128 flights per week);

(b) the business is not being operated at full capacity; and

(c) it is likely that the Virgin Companies will continue to generate losses throughout the administration period whilst these restrictions are in place:

First Strawbridge Affidavit at [15], [25]; Second Strawbridge Affidavit at [77].

15. As the First Judgment noted at [14], the Virgin Companies comprise a very significant enterprise with substantial operations, complex affairs, considerable assets and a very large number and type of creditors; accordingly, the administrations are likely to be sophisticated and complex.

B.2 Progress of the administrations

16. Since the Initial Application and the 24 April Orders, the Administrators have continued to progress the administration of the Virgin Companies in the manner set out in paragraph [44] of the Second Strawbridge Affidavit, including: carrying out preliminary investigations into the financial position of the Virgin Companies and security held by creditors in relation to the assets and property of the Virgin Companies; undertaking a preliminary review of the assets and liabilities of the Virgin Companies; and dealing with various stakeholders such as creditors, lessors, directors, key staff, unions, shareholders and Government bodies and representatives at both the Commonwealth and State level.

17. On 30 April 2020, the Administrators held the first meeting of creditors of each of the Companies other than Tiger 1 (**First Meeting**).

18. The First Meeting was conducted, successfully, by electronic means: Second Strawbridge Affidavit at [15]-[19].

19. At the First Meeting:

(a) there were 898 creditors and 673 observers in attendance;

(b) creditors could submit questions via the live question and answer function within the Microsoft Teams Live Events virtual platform (**Live Q&A Function**); and

(c) 137 questions were asked through the Live Q&A Function (with any questions asked in the Live Q&A Function that were not answered by the Chairperson were either answered by the Administrators FAQs on their website).

20. Following the First Meeting, on 5 May 2020, a circular to creditors was issued with a proposal as to the members of the Committee of Inspection (**Proposed Committee of Inspection**) to be formed in accordance with the 24 April Orders (**COI Proposal**). In accordance with the COI Proposal, the Proposed Committee of Inspection is to comprise the following members:

    (a) 4 representatives of bondholder creditors;

    (b) 11 representatives of employee creditors;

    (c) 1 representative of other creditors;

    (d) 6 representatives of secured creditors;

    (e) 1 statutory representative;

    (f) 6 representatives of trade creditors; and

    (g) 1 statutory observer.

21. Creditors have until 12 May 2020 to vote on the COI Proposal. As at 11 May 2020, 99.47% of 4,541 votes that have been returned thus far have voted in favour of the Proposed Committee of Inspection. Thus, it is overwhelmingly likely that the members of the Proposed Committee of Inspection will be deemed to be the members of the committee by close of business on 12 May 2020 (**Committee of Inspection**).

22. On 28 April 2020, Tiger 1, which is part of the 'International Flying Rights Group' of the Virgin Group, went into administration. Tiger 1 is an otherwise dormant entity (in that it does not carry out any business or operations). However, it is a guarantor in respect of various USD and AUD notes issued by Virgin Australia (and therefore has a contingent liability to the noteholders). Besides the noteholders, the only external creditor of Tiger 1 is the Deputy Commissioner of Taxation (the value of whose debt is uncertain): Second Strawbridge Affidavit at [29]. Thus, the external creditors of Tiger 1 are also creditors of certain other Virgin Companies.

23. The first meeting of creditors of Tiger 1 was held on 11 May 2020 (**Tiger 1 First Meeting**). As with the First Meeting, it was successfully conducted by electronic means: Second Strawbridge Affidavit at [36]-[38].

B.3 Sales process

24. In terms of the selling the Business, the Administrators have undertaken the following tasks:

    (a) commencing a short competitive process in respect of the recapitalisation of the Business and/or acquisition of the assets of the Virgin Companies including entering into non-disclosure agreements following receipt of expressions of interest (**Sale Process**);

    (b) engaging advisers Houlihan Lokey and Morgan Stanley to progress the Sale Process;

    (c) instructing Houlihan Lokey to:

        (i) issue a flyer and non-disclosure agreement to interested parties on and from 21 April 2020 seeking binding offers to recapitalise or acquire the assets of Virgin Australia (**Flyer**);

        (ii) prepare an Information Memorandum and establish a secure data room containing documents regarding the Business and the financial position of the Virgin Companies (**Data Room**); and

        (iii) contact all known interested parties and potential buyers; and

    (d) liaising with Houlihan Lokey and Morgan Stanley on the commencement of discussions with a number of interested parties: Second Strawbridge Affidavit at [44(e)].

25. As at 11 May 2020, a total of 19 commercial parties had been granted access to the Data Room: Second Strawbridge Affidavit at [47].

26. The Sale Process' indicative timeline is as follows:

    (a) the Flyer and non-disclosure agreements were provided to parties on and from 21 April 2020;

(b) on and from 27 April 2020, the Information Memorandum was distributed to parties that had entered into a non-disclosure agreement and the Data Room was opened;

(c) non-binding indicative offers are due to be provided on 15 May 2020;

(d) binding offers are due to be provided on 12 June 2020;

(e) a binding implementation deed is proposed to be entered into by 21 June 2020, subject to any regulatory approvals that might be required;

(f) the terms of any deed of company arrangement (**DOCA**) are to be progressed leading up to the second meeting of creditors, to be in held in early August; and

(g) if applicable, a DOCA is to be executed shortly thereafter.

27. The Administrators are focused on seeking to achieve a successful outcome from the Sale Process, as a maximisation of the price paid for the business (through a DOCA or otherwise) is likely to provide the best result for creditors of the Virgin Companies.

C. TIGER 1 – MEETINGS BY ELECTRONIC MEANS, NOTICE BY EMAIL AND INCORPORATION INTO COMMITTEE OF INSPECTION

28. This matter is addressed in the Interlocutory Process at prayers 2-10 and in the Second Strawbridge Affidavit at [25]-[43].

29. As set out above, Tiger 1 appointed the Administrators as joint and several administrators to that entity on 28 April 2020. Accordingly, the Initial Application did not address Tiger 1 and the 24 April Orders do not presently apply to Tiger 1.

C.1 Joinder: Prayer 2 of the Interlocutory Process

30. Rule 9.05(1)(b)(iii) of the *Federal Court Rules 2011* (Cth) (which applies by reason of rule 1.3(2)(a) of the *Federal Court (Corporations) Rules 2000* (Cth)), permits the Court to join a person to existing proceedings if the person proposed to be joined "should be joined as a party in order to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings".

31. Tiger 1 should be joined to these proceedings as it is part of the group of Virgin Companies now in external administration and common issues have and will continue to arise in the course of the various administrations.

C.2 Curing insufficient notice of first meeting: Prayer 3 of the Interlocutory Process

32. The Tiger 1 First Meeting was convened on 30 April 2020 and was held on 11 May 2020.

33. Notice of the Tiger 1 First Meeting was given to the Australian Taxation Office (on behalf of the Deputy Commissioner of Taxation) (**ATO**) on 30 April 2020: Second Strawbridge Affidavit at [31]. However, notice to the noteholders was not given until 7 May 2020 (which is less than the 5 business days required by section 436E(3) of the Corporations Act).

34. Section 1322(4) of the Corporations Act is a remedial provision that is able to be used to cure a notice period that is less than that prescribed by the statute. The powers under that section are to be exercised liberally, so as not unreasonably to stifle corporate and financial activity merely on technical grounds: *Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd* (2001) 166 FLR 144 [2001] NSWCA 427 at [74]; *Re Insurance Australia Group Ltd* (2003) 128 FCR 581; [2003] FCA 581 at [27]; *Re Wave Capital Ltd* (2003) 21 ACLC 1995; [2003] FCA 969 at [30].

35. Subject to the requirements of section 1322(6), the section confers an unfettered discretion on the Court: *Re National Roads and Motorists Association Ltd* [2003] FCAFC 206 at [21]. Orders can be made under the section:

    (a) with retrospective effect: *Re Wood Parsons Pty Ltd (in liq)* (2002) 43 ACSR 257; [2002] NSWSC 1058 at [52]; *Re Golden Gate Petroleum Ltd* (2010) 77 ACSR 17; [2010] FCA 40 at [42]; and

    (b) where there is a real question as to whether a contravention of a provision would even lead to invalidity, so as to avoid any uncertainty with respect to the matter: *Re Milgerd Nominees Pty Ltd* [2019] NSWSC 311 at [13].

36. In the present case, section 1322(4)(a) may be used to confirm that the holding of (and passage of resolutions at) the Tiger 1 First Meeting, is not invalidated by the notice of the meeting being provided to creditors being less than the prescribed statutory period.

37. As noted above, Tiger 1 does not trade or carry out any business but it was placed into administration because it is a guarantor of the notes issued by Virgin Australia to the

noteholders: Second Strawbridge Affidavit at [28]. As a result, its creditors were already provided with details as to the administrations generally when the notice of the first meeting of creditors of the other Virgin Companies was issued and sent to creditors. Those creditors of Tiger 1 were also, of course, able to attend the First Meeting on 30 April 2020.

38. Further, at the Tiger 1 First Meeting, no creditor raised any issue as to the inadequacy of any notice of the meeting: Second Strawbridge Affidavit at [38(c)].

39. In the circumstances, the abbreviated nature of the notice issued to creditors:

    (a) was a procedural matter for the purposes of section 1322(6)(a)(i): *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 194 FLR 322; [2005] NSWSC 1005 at [103]; *Lean v Banning Holdings Pty Ltd* (2017) 35 ACLC 17-058; [2017] WASC 353 at [36]-[38];[1] and

    (b) caused no substantial injustice to any person (nor is likely to cause substantial injustice): *Elderslie Finance Corp Ltd v Australian Securities Commission* (1993) 11 ACLC 787 at 790; *Re CIC Insurance Ltd* [2015] NSWSC 1518 at [30].

C.3 Holding meetings by electronic means: Prayers 6 and 7 of the Interlocutory Process

40. In the First Judgment, Middleton J noted, at J[25], that there was no practical impediment to meetings of creditors being held by electronic means and it is appropriate (if not necessary) that this occur. The same observation applies with equal force to meetings of creditors of Tiger 1.

41. In addition, the First Meeting was conducted successfully using electronic technology with creditors attending the meeting and participating without being physically present in the same location as the Administrators or one another: Second Strawbridge Affidavit at [36]-[37].

42. On 5 May 2020, the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) instrument was issued. It sought to confirm that meetings of creditors can be held by electronic means only (with creditors taken to attend and participate at the

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[1] It is therefore unnecessary to consider whether the other elements of subsection 6(a) are satisfied: *Re Colorbus Pty Ltd (in liq)* (2004) 187 FLR 234; [2004] VSC 486. However, there cannot be any doubt that

meeting where they do so without being physically present in the same location). However, that instrument does not expressly state that creditors' meetings may proceed without permitting creditors to attend the meeting at the location where the Administrators are physically present. Further, the instrument is repealed within 6 months of its promulgation: section 9.

43. For those reasons, the Plaintiffs seek orders for Tiger 1 to the following effect, and in the same form as those made in the 24 April Orders with respect to the other Virgin Companies:

    (a) confirming that the meetings of creditors of Tiger 1 (including the Tiger 1 First Meeting) may be held exclusively by electronic means; and

    (b) requiring that, in respect of any creditor who wishes to participate in, and vote on, resolutions that are put to creditors at a meeting (to the extent that this may occur at meetings subsequent to the Tiger 1 First Meeting), special proxies must be provided to the Administrators no later than the second last business day before the meeting is held (although giving liberty to any creditor providing such a proxy to withdraw those voting instructions in advance of the resolution being passed).

C.4 Electronic notice to creditors: Prayers 4 and 5 of the Interlocutory Process

44. In the First Judgment, Middleton J observed, at J[27]-[29], by reference to the authorities, that it is now common-place for orders to be made, including at a very early point in an administration, permitting external administrators to give notices to creditors by email and other electronic publication.

45. Because each of the noteholders is a creditor of Tiger 1, there are also a substantial number of creditors of that entity. As with the other Virgin Companies, notice to be given to creditors of Tiger 1 by email and publication on Deloitte's website fulfils the objective of notifying as many creditors as quickly and cheaply as possible.

46. Section 5(1)(f) of the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) appears to provide that notices of meetings may be provided by electronic

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the Administrators were acting honestly (see subsection 6(a)(ii)) and that it is just and equitable that the order be made (see subsection 6(a)(iii)).

means such as email. However, the instrument does not, in its terms, apply to notices other than meetings and, as noted, has a horizon of validity of 6 months.

47. Accordingly, orders should be made permitting electronic notices to be given to creditors of Tiger 1 on a similar basis to the 24 April Orders with respect to the other Virgin Companies.

C.5 Incorporation into existing Committee of Inspection: Prayers 8-10 of the Interlocutory Process

48. In Order 6(b) of the 24 April Orders, the Court ordered that there was to be a single committee of inspection for the Second to Thirty-Ninth Plaintiffs. At that point, Tiger 1 had yet to appoint administrators.

49. In the First Reasons, Middleton J, at J[34(1)] & [38(1)], accepted Mr Strawbridge's evidence that, for administrations as large-scale and complex as those of the Virgin Companies, it would be appropriate and prudent for a committee of inspection to be formed and the Court concluded that it was in the best interests of creditors that a single committee be formed.

50. At the Tiger 1 First Meeting, the Administrators did not provide the creditors with an option to propose and vote on a resolution that a committee of inspection for Tiger 1 be formed; nor did any creditor at the Tiger 1 First Meeting request that a committee be formed: Second Strawbridge Affidavit at [41].

51. Given that the external creditors of Tiger 1 are also creditors of other Virgin Companies, there is no reason why a separate committee of inspection should be formed. Also, the existing Committee of Inspection is expected to have 4 members who are noteholders (and may therefore be seen as representative of noteholder creditors): Second Strawbridge Affidavit at [43].

52. In the Administrators' opinion, having the existing Committee of Inspection operate to include all of the Virgin Companies (that is, including Tiger 1) will streamline the administrations and save costs by reducing the need to run duplicative processes: Second Strawbridge Affidavit at [42]. Such a result can be achieved straightforwardly by varying order 6(b) of the 24 April Orders to include Tiger 1.

53. Finally, in circumstances where:

    (a) the COI Proposal has been issued to creditors;

    (b) the creditors have had an opportunity to vote on the identity of members who are proposed to be on the committee of inspection;

    (c) the proposed members come from a cross-section of the different categories of creditors of the Virgin Companies, including noteholders; and

    (d) the votes on the COI Proposal are overwhelmingly in favour,

    the Court should make an additional order confirming that no further proposal needs to be issued to creditors and that the members of the Committee of Inspection are those selected by the process set out in orders 6(c)-(e) of the 24 April Orders.

D. EXTENSION OF THE CONVENING PERIOD

54. This matter is addressed in the Interlocutory Process at prayers 11-12 and in the Second Strawbridge Affidavit at [50]-[74].

D.1 Existing timing

55. Pursuant to section 439A(5) of the Corporations Act, the convening period for the second meeting of creditors of:

    (a) each of the Virgin Companies (other than Tiger 1), is scheduled to end on 18 May 2020, requiring each of the second meeting of creditors to be held on or before 25 May 2020; and

    (b) Tiger 1, is scheduled to end on 26 May 2020, requiring the second meeting to be held on or before 2 June 2020: Second Strawbridge Affidavit at [50].

56. As noted above, the Administrators are presently undertaking a process for either the sale of the assets and business of the Virgin Companies as a going concern or a DOCA proposal that involves a recapitalisation of the Virgin Companies and continued trading of the Business. That process will not have competed by May 2020, when the future of the Virgin Companies will have to be decided by the creditors. It is in that context that the Administrators seek an extension of the Convening Period, for each of the Virgin Companies, to 18 August 2020.

57. The specific reasons why such an extension should be granted are set out in detail in Section D.3 below.

D.2 Legal principles

58. The circumstances in which the Court will extend a convening period are well established. In making such an order, the Court must reach an appropriate balance between an expectation that the administration will be relatively speedy and summary, and the countervailing factor that undue speed should not be allowed to prejudice sensible and constructive actions directed to maximising a return for creditors: *Mann v Abruzzi Sports Club Ltd* (1994) 12 ACSR 611; *Re Diamond Press Australia Pty Ltd* [2001] NSWSC 313 at [10].

59. The approach to be adopted was recently set out by Thawley J in *Farnsworth v About Life Pty Limited (Administrator Appointed), in the matter of About Life Pty Limited* [2019] FCA 11 at [3]-[8], where his Honour endorsed the comments of Austin J in *Re Riviera Group Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2009] NSWSC 585 at [13] as to the categories of cases in which an extension is granted including, relevantly:

    (a) where the size and scope of the business in administration is substantial (citing *Lombe, Re Babcock & Brown Ltd (Administrators Appointed)* [2009] FCA 349; *Worrell; Re Storm Financial Ltd (Receivers and Managers Appointed)* [2009] FCA 70; and *ABC Learning Centres Ltd, in the matter of ABC Learning Centres Ltd; application by Walker (No 5)* [2008] FCA 1947);

    (b) where the extension will allow sale of the business as a going concern, citing *Lombe Re Australian Discount Retail Pty Ltd* [2009] NSWSC 110; *Stewart, in the matter of Kleins Franchising Pty Ltd (Administrators Appointed) (ACN 007 348 236)* [2008] FCA 721; *Uni-Aire Security Pty Ltd (Administrators Appointed) ACN 085 430 619, in the matter of Uni-Aire Security Pty Ltd (Administrators Appointed) ACN 085 430 619* [2006] FCA 1423; and

    (c) more generally, where additional time is likely to enhance the return for unsecured creditors: *Deputy Commissioner of Taxation v Scottsdale Homes No 3 Pty Ltd (No 2)* [2009] FCA 190; *Fitzgerald, in the matter of Primebroker Securities Limited (Administrator Appointed) (Receivers and Managers Appointed)* [2008] FCA 1247; *Ex*

parte Vouris; in the matter of Marrickville Bowling and Recreation Club Ltd (under Administration) [2008] FCA 622.

60. An extension of the administration period to facilitate either (or both) of: (a) the sale of the business of the company as a going concern, so as to maximise the value of the company's assets; or (b) the progression and assessment of a deed of company arrangement proposal that may provide a better return to creditors than a winding up, are well-recognised examples of situations where the Court has extended the convening period: *Re Mentha, in the matter of Hans Continental Smallgoods Pty Ltd (admin apptd)* [2008] FCA 1933; *Re Riviera Group* (2009) 72 ACSR 352; *Re Silvia, in the matter of Austcorp Group Ltd (Administrators Appointed)* [2009] FCA 636; and *Re Kavia Holdings Pty Ltd (admin apptd)* [2013] NSWSC 737.

61. In *Mighty River International Limited v Hughes* (2018) 359 ALR 181 at 201-202, [73], Nettle and Gordon JJ (in dissent, but not relevantly in this respect) referred to a number of cases including *Re Riviera* (above) and concluded:

> …Generally speaking, courts have been disposed to grant substantial extensions in cases where the administration has been complicated by, for example, the size and scope of the business, substantial offshore activities, large numbers of employees with complex entitlements, complex corporate structures and intercompany loans, and complex recovery proceedings, and, more generally, where the additional time is likely to enhance the return to unsecured creditors. Provided the evidentiary case for extension has been properly prepared, there has been no evidence of material prejudice to those affected by the moratorium imposed by the administration, and the administrator's estimate of time has had a reasonable basis, the courts have tended to grant extensions for the periods sought by administrators...

62. Finally, the administrator's own opinion as to the need for an extension will be given weight in an application of this kind: *Re Owen, RiverCity Motorway Pty (Ltd (admins apptd) (recs & mgrs apptd) v Madden (No 4)* (2012) 92 ACSR 255 at [26] (Logan J); *Re Belmont Sportsmans Club Co-Operative Ltd (admins apptd)* [2015] NSWSC 543 at [9] (Black J); *Jahani, in the matter of Northern Energy Corporation Ltd (Administrators Appointed) (No 2)* [2019] FCA 382 at [67] (Farrell J); *Bumbak (Administrator), in the matter of Duro Felguera Australia Pty Limited (Administrators Appointed)* [2020] FCA 422 at [32] (Gleeson J).

D.3 Appropriate case for an extension of the convening period

63. The Court should extend the convening period in the present case for the following reasons.

64. *First*, the Virgin Companies are substantial commercial entities with large-scale business operations and a number of different stakeholders such as lessors, trade creditors, noteholders, employees, unions and customers. The administrations are complex.

65. *Secondly*, there is an ongoing sale and recapitalisation process in place with a number of different interested parties (19 of which currently have access to the materials in the Data Room), the timetable for which extends over the next few weeks and months. Given the size of the assets and operations of the Virgin Companies, the need to allow potential bidders to complete due diligence, and the need to provide for time for the Administrators to select potential bidders and negotiate as to the terms of any arrangement, that is a process which cannot be completed in the current convening period.

66. There is a prospect that the Sale Process will culminate in a sale of the business as a going concern or a recapitalisation through a deed of company arrangement. A successful sale or recapitalisation of the business will be of potential benefit to:

    (a) specific creditors such as employees (as there may be continuity of employment if the business is able to continue trading with a new owner), lessors (as the business is likely to need at least certain of the existing property and equipment leased by the Virgin Companies), and trade creditors (who may be able and prepared to maintain a trading relationship with the Business): Second Strawbridge Affidavit at [59], [67]; and

    (b) creditors generally, by enhancing the return for the general body of unsecured creditors by permitting the assets and business of the Virgin Companies to be realised in the greatest possible sum (either through a sale of the business or a restructure through a deed of company arrangement): Second Strawbridge Affidavit at [59], [67].

67. The extension of the Convening Period will provide sufficient time to complete the Sale Process and permit any possible deed of company arrangement to be presented to creditors.

68. *Thirdly*, the extension is also to be understood having regard to the time needed for the Administrators to investigate properly the Virgin Companies' affairs and then report meaningfully to creditors so that they can make a fully informed decision as to the future of the Companies: Second Strawbridge Affidavit at [59]; *Re Foodora Australia Pty Ltd (Administrators Appointed)* [2018] NSWSC 1426 (Black J); *Eagle, in the matter of Techfront Australia Pty Limited (administrators appointed) (No 2)* [2020] FCA 618 at [31(2)] (Farrell J).

69. *Fourthly*, if the second meeting of creditors of each of the Virgin Companies were required to be held without an extension of the Convening Period, as matters presently stand the Administrators would likely recommend that the Virgin Companies be placed into liquidation (as there is no DOCA proposal and the Administrators' view is that the Virgin Companies are insolvent). That is not in the interests of creditors. Permitting the Sale Process to conclude (if successful) is likely to produce a better price for the sale of the Business than a sale through liquidation and is also likely to preserve existing relationships with employees, creditors and other stakeholders: Second Strawbridge Affidavit at [59].

70. *Fifthly*, the 3 month extension sought is relatively brief in the context of a business of the size of the Virgin Companies. In *Re Harrisons Pharmacy Pty Limited (Administrators Appointed) (Receivers and Managers Appointed)* [2013] FCA 458 at [44], Farrell J noted the trend towards applications for more lengthy convening periods and referred to 6 month extensions being granted in a series of cases such as *Re Chemeq Ltd (Administrators Appointed) (Receivers and Managers Appointed), ex parte McMaster* [2007] WASC 154; *Re an application by Horne & Vrsecky* [2010] VSC 657; *Strawbridge (Administrator) v Retail Holdings Pty Ltd (Administrators Appointed), In the Matter of Retail Adventures Holdings Pty Ltd (Administrators Appointed)* [2013] FCA 151.

71. Since that decision, there have been further applications where extensions of 6 months or more have been sought, including: *Owen v Madden (No 5)* [2013] FCA 1443 (further 7 month extension); *Mentha, in the matter of Arrium Limited (administrators appointed)*

(2006) 113 ACSR 302 (about 8 month extension) and *Dickerson (Administrator), in the matter of McWilliam's Wines Group Ltd (Administrators Appointed)* [2020] FCA 57 (about 6 month extension).

72. Furthermore, the Administrators may convene the second meetings at an earlier date if that is possible: Second Strawbridge Affidavit at [68].

73. *Sixthly*, it is also to be recognised that the Administrators have faced delays in the course of the administrations by reason of the COVID-19 pandemic: First Strawbridge Affidavit at [16]-[25]. As Gleeson J remarked in *Bumbak (Administrator), in the matter of Duro Felguera Australia Pty Limited (Administrators Appointed)* [2020] FCA 422 at [35(4)]: "It is reasonable to assume that the current circumstances of the COVID-19 pandemic will affect the timely progress of the administration to some extent."

74. *Seventhly*, there is unlikely to be any substantial prejudice to creditors from a continuation of the administrations. In particular, employees are being paid in accordance with their terms of employment, the stay on legal proceedings will affect few, if any, cases presently on foot, and there remains the prospect of ongoing trading of the Business during the administrations for the benefit of trade creditors: Second Strawbridge Affidavit at [62], [67].

75. *Eighthly*, the proposed extension was raised by the Administrators at the First Meeting and the Tiger 1 First Meeting and none of the creditors expressed any opposition at those meetings: Second Strawbridge Affidavit at [63]-[64].

76. *Ninthly*, the Commonwealth Attorney-General's Department, administering the Fair Entitlements Guarantee Scheme (**FEG**), has not expressed opposition to the application: Second Strawbridge Affidavit at [66].

77. For those reasons, Mr Strawbridge, an experienced insolvency practitioner, has deposed that the Administrators consider that the extension of the Convening Period is in the best interests of the creditors of the Virgin Companies as a whole: Second Strawbridge Affidavit at [62], [67].

78. Finally, the Administrators seek an order in accordance with *Re Daisytek Australia Pty Ltd* (2003) 45 ACSR 446; [2003] FCA 575 at [10]-[18] permitting them to hold the second meetings at any time during the extended Convening Period. That is desirable to

provide flexibility to the Administrators and not prolong the administrations if that is unnecessary: *Silvia, in the matter of Austcorp Group Limited (Administrators Appointed)* [2009] FCA 636 at [18].

E. LIMITATION OF LIABILITY

79. This matter is addressed in the Interlocutory Process at prayers 13-15 and 18-19 and in the Second Strawbridge Affidavit at [75]-[120] and in the Supplementary Strawbridge Affidavit at [22]-[23].

E.1 Legal principles

80. The effect of section 443A of the Corporations Act is to impose on administrators personal liability for liabilities incurred by a company after their appointment as administrators.

81. Section 447A can be utilised to limit this personal liability of administrators.

82. The principles that apply in an application of this type were summarised by Sloss J in *Re Unlockd Ltd (administrators apptd)* [2018] VSC 345 at [60]-[64]:

> In the leading case of *Secatore, in the matter of Fletcher Jones and Staff Pty Ltd (admins apptd)* [2011] FCA 1493 (***Secatore***), Gordon J stated (at [23]):
>
>> Section 447A(1) of the Act empowers the Court, in an appropriate case, to modify the operation of s 443A to exclude personal liability on the part of a voluntary administrator, and to provide that a loan taken by the company via the voluntary administrator is repayable on a limited recourse basis. Orders in similar terms have frequently been made in circumstances where the Court is satisfied that an administrator has entered into a loan agreement or other arrangement to enable the company's business to continue to trade for the benefit of the company's creditors: see, for example, *Re Ansett Australia Ltd (No 1)* at [49]; *Re Spyglass Management Group Pty Ltd (admin apptd)* (2004) 51 ACSR 432 at [6]; *Sims; Re Huon Corporation Pty Ltd (admins apptd)* (2006) 58 ACSR 620 at [12]; *Re Malanos* [2007] NSWSC 865 at [13].
>
> In such circumstances, courts have held that it is not to be expected that the voluntary administrators should expose themselves to substantial personal liabilities: see e.g. *Re Renex Holdings (Dandenong) 1 Pty Ltd* [2015] NSWSC 2003, [13] (Black J); *Preston, in the matter of Hughes Drilling Limited* [2016]

FCA 1175 (***Hughes Drilling***), [18] (Yates J). See also *Korda, in the matter of Ten Network Holdings Ltd* [2017] FCA 1144, [43]-[44] (Markovic J).

In *Secatore*, Gordon J also observed (at [29]) that if orders are made relieving administrators from personal liability in respect of borrowings, it will permit them to make commercial decisions about the ongoing operations by focussing on what is in the best interests of the creditors 'uninfluenced by concerns of personal liability.'

In *Re Great Southern Infrastructure Pty Ltd [2009] WASC 161 (**Great Southern**)* at [13], Sanderson M observed that:

> The material consideration on such an application is whether the proposed arrangements are in the interests of the company's creditors and consistent with the objectives of Pt 5.3A of the Act. To put that proposition positively — the question is whether the court is satisfied the proposed arrangements are for the benefit of the company's creditors. To put it negatively — the question is whether the court is satisfied the company's creditors are not disadvantaged or prejudiced by the proposed arrangement. These principles have been confirmed in a large number of cases.

In *Re Mentha (in their capacities as joint and several administrators of the Griffin Coal Mining Company Pty Ltd (admins apptd)* (2010) 82 ACSR 142; [2010] FCA 1469, Gilmour J summarized the principles governing the granting of an application for orders under s 447A to vary the liability of administrators under s 443A as follows (at [30]):

> (a) the proposed arrangements are in the interests of the company's creditors and consistent with the objectives of Part 5.3A of the Corporations Act: *Re Great Southern* at [13].
>
> (b) typically the arrangements proposed are to enable the company's business to continue to trade for the benefit of the company's creditors: *Re Malanos* at [9] and *Re View* at [17].
>
> (c) the creditors of the company are not prejudiced or disadvantaged by the types of orders sought and stand to benefit from the administrators entering into the arrangement: *Re View* at [18], and also *Re Application of Fincorp Group Holdings Pty Ltd* [2007] NSWSC 628 at [17].
>
> (d) notice has been given to those who may be affected by the order: *Re Great Southern* at [12].

83. Orders are commonly sought limiting an administrator's personal liability where a company borrows funds from an external financier to fund the ongoing trading of the business during the administration: *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 1144 at [42].

84. However, other cases furnish examples of liability being limited under other agreements:

    (a) *Re Cook Cove Pty Ltd (Admins Appt)* [2009] NSWSC 620: orders were made to limit the administrators' potentially significant personal liability with respect to various post-appointment construction-related contracts;

    (b) *Griffin Coal* (above): the administrators' personal liability was excluded with respect to obligations continuing after the administration in respect of grants of new mining leases, licences, exploration licences and prospecting licences, including liability for rent; and

    (c) *Mentha, in the matter of Arrium Limited (administrators appointed)* [2016] FCA 972: there was a limitation of personal liability with respect to contracts in connection with the installation of iron ore beneficiation plants.

85. As Gordon J (as her Honour then was) noted in the passage in *Secatore* extracted at [82] above, personal liability can be excluded with respect to any arrangement where that enables the company's business to continue to trade for the benefit of the company's creditors.

86. Section 447A can also be used to avoid liability *before* it is imposed: *Silvia v FEA Carbon Pty Ltd* (2010) 185 FCR 301; [2010] FCA 515 at [14]; and the power is to be exercised where it promotes the objects of Part 5.3A of the Corporations Act as identified in section 435A.

E.2 Appropriate case for a limitation of the Administrators' personal liability

87. The Administrators seek to limit their personal liability to the assets of the Virgin Company or Virgin Companies that relevantly incur(s) any obligations in the administration period with respect to the following arrangements:

    (a) a contract between the Twentieth Plaintiff, Virgin Australia Regional Airlines Pty Ltd (Administrators Appointed) (**VARA**) and Rio Tinto with respect to charter

flights adopted by the Administrators since their appointment (**Rio Tinto Agreement**);

(b) future core contracts with counter-parties necessary to allow the business of the Virgin Companies to operate (**Future Specified Agreements**);

(c) possible obligations to the ATO with respect to applications in connection with the JobKeeper programme (**JobKeeper**); and

(d) inter-company loans between different Virgin Companies.

Rio Tinto Agreement

88. With respect to the Rio Tinto Agreement, Rio Tinto has agreed to terms limiting the Administrators' liability to the extent to which the Administrators are entitled to be indemnified for that liability out of the assets of VARA or under any applicable insurance policy, and providing that it may not recover any shortfall from the Administrators personally (if the assets of VARA and the proceeds of any insurance coverage are insufficient to satisfy any liability to Rio Tinto in full): Second Strawbridge Affidavit at [101].

89. Only Rio Tinto could arguably be prejudiced by a limitation of the Administrators' personal liability in connection with this agreement; however, it has agreed to that course by including a provision to that effect in the agreement itself.

90. Rio Tinto has been notified of the present application: Second Strawbridge Affidavit at [134(b)].

Future Core Agreements

91. As at the date of the Administrators' appointment, the Virgin Companies had approximately 1,330 agreements in place with approximately 500 unique suppliers: Second Strawbridge Affidavit at [75]. The core agreements to maintain the operation of the business are set out at [76] of the Second Strawbridge Affidavit and encompass (**Applicable Agreements**):

(a) aircraft finance leases and aircraft operating leases (**Aircraft Leases**);

(b) alliance agreements;

(c) procurement contracts, including:

(i) in-flight services agreements;

(ii) ground handling agreements;

(iii) operational systems agreements;

(iv) fuel agreements;

(v) maintenance and parts agreements;

(vi) IT agreements;

(d) trade mark licence agreements;

(e) airport agreements;

(f) cargo agreements;

(g) charter agreements;

(h) corporate sales agreements;

(i) industry/agency agreements;

(j) Insurance arrangements; and

(k) Training Agreements.

92. The business of the Virgin Companies has been adversely affected by the COVID-19 pandemic. However, as circumstances change, the Administrators may seek to operate the business of the Virgin Companies to a greater capacity and, if that occurs, they will enter into negotiations with other counter-parties in respect of the Applicable Agreements and, if adopted, the Administrators' potential personal liability under those arrangements would steadily increase: Second Strawbridge Affidavit at [77]-[80].

93. The Administrators have already commenced negotiations with aircraft lessors under the Aircraft Leases and have issued an Aircraft Protocols document in which dealings with the aircraft lessors have sought to be streamlined: Second Strawbridge Affidavit at [67(c)] , [90].

94. The Administrators wish to enter into arrangements with contractual counter-parties if there remains an opportunity to continue carrying on and expanding the scope of the business of the Aircraft Companies.

95. Importantly, though, if the Administrators are exposed to the risk of personal liability under those arrangements, then it is unlikely that they will adopt the Applicable Agreements (including it being unlikely that they would utilise the aircraft that are leased by the Virgin Companies under the Aircraft Leases) with the consequence that goods and services provided under the Applicable Agreements will not be required or rendered: Second Strawbridge Affidavit at [108].

96. The Administrators are of the view that arrangements that facilitate the ongoing trading of the Business and the entry into arrangements with counter-parties are consistent with the objective of selling or recapitalising the Business as a going concern in the best interests of all creditors. The practicalities, costs and time associated with sourcing new counter-parties and negotiating new agreements are such that, if the Applicable Agreements are not retained in the operation of the Business, then the cost and time associated with a new owner entering into new arrangements with counter-parties at a future date would make the sale of the Business as a going concern impractical: Second Strawbridge Affidavit at [96].

97. Furthermore, ongoing trading will provide additional revenue to counter-parties that they may not receive if the Administrators do not adopt these arrangements during the administration period: Second Strawbridge Affidavit at [109].

98. In *Griffin Coal* (above), orders excluding the administrators' personal liability for these agreements were made on the basis that such orders were consistent with:

    (a) the policy rationale of s 443A of the Corporations Act, which is to encourage suppliers, customers and employees to continue to deal with a company in administration during the administration period, by, in effect, ensuring that they will be paid; and

    (b) the objectives of the voluntary administration process as a whole, being that the business of the company will continue to trade or, if this is not possible, that the returns to stakeholders will be greater than in an immediate winding up: section 435A Corporations Act.

99. Similarly, the comment of Markovic J in *Crawford, in the matter of North Queensland Heavy Haulage Services Pty Ltd (Administrators Appointed)* [2017] FCA 635 at [13]—that

such orders are consistent with the objective of Part 5.3A of the Act to encourage suppliers, customers and employees to continue to deal with a company in administration—applies with equal measure in the present case.

100. The only ostensible prejudice from the Court making such orders is to specific counter-parties who are not then able to rely on the personal liability of the Administrators. But as the relevant counter-factual is that the arrangements with those counter-parties would not likely proceed in any event, this appearance of prejudice falls away: see, by analogy, *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 472 at [53]-[54].

101. In any event, the Court's principal imperative is to consider what is in the best interests of creditors ***as a whole***, particularly in the circumstances of the current uncertainty that arises from the COVID-19 pandemic: *CBCH Group* (above) at [57].

102. Three final matters can be noticed:

   (a) First, there is no obligation for creditors to enter into any Applicable Arrangements – so it will be a matter for each potential counterparty as to whether they are willing to limit their recourse to the indemnity from company assets.

   (b) Secondly, and relatedly, the Administrators will include notification of the orders limiting their liability in any agreements subsequently entered into during the administration period, so that any contractual counter-party is aware that the Administrators will not have personal liability for obligations under those agreements (and preserving to that counter-party the opportunity to apply to the Court to vary the orders if they so wish): Second Strawbridge Affidavit [99], [110], Interlocutory Process prayer 15.

   (c) Thirdly, the making of a general forward looking order with respect to the Applicable Agreements provides an efficient and cost effective way in which the Administrators can retain and continue to utilise the goods and services that are provided to the Virgin Companies without having to make multiple applications to the Court: Second Strawbridge Affidavit at [97].

103. The Aircraft Lessors have been notified of this application: Second Strawbridge Affidavit at [134(a)].

JobKeeper

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)].

Intercompany loans

108. With respect to the Virgin Companies, the Administrators have opened separate administration bank accounts for two entities: the Tenth Plaintiff, Virgin Australia Airlines Pty Ltd (Administrators Appointed) (**VAA**) and VARA: Second Strawbridge Affidavit at [118].

109. The funding and expenses of the Virgin Companies since the appointment of the Administrators have been cleared through the bank accounts opened in the names of VAA and VARA: Second Strawbridge Affidavit at [119]. Where one or other of the Virgin Companies other than VAA or VARA pays or receives money, that is paid from or into the account in the name of VAA or VARA and intercompany loan account entries are recorded in the financial records of the applicable Virgin Companies and those of the Administrators to ensure that the accounts are properly reconciled: Second Strawbridge Affidavit at [74].

110. That practice may be regarded as the Administrators causing the Virgin Companies to borrow money from VAA and/or VARA, for which the Administrators would ordinarily be personally liable pursuant to s 443A(1)(d) of the Corporations Act: *McKinnon, in the matter of Specialised Concrete Pumping Victoria Pty Ltd (Administrators Appointed)* [2016] FCA 325 at [23].

111. While there is a potential prejudice to creditors if the inter-company debts are unable to be repaid from the assets of companies other than VAA and VARA, that will only arise in the scenario that a DOCA proposal or a winding up does not involve a pooling of assets and extinguishing of inter-company debts.

112. Further, an unfairness would arise were the Administrators to take on personal liability for inter-company loans merely as a function of the way in which the Virgin Companies had structured their affairs.

113. Finally, limiting the liability of the Administrators for inter-company loans where that facilitates the ongoing trading of the business of the companies in administration is consistent with the objectives in section 435A of the Corporations Act: *Specialised Concrete Pumping* (above) at [29]; *Re Nexus Energy Ltd* [2014] NSWSC 1041; and see Second Strawbridge Affidavit [119].

F. CONDITIONAL CREDIT PROPOSAL

114. This matter is addressed in the Interlocutory Process at prayers 16 and 17 and in the Supplementary Strawbridge Affidavit.

115. The Administrators propose to provide conditional credits to customers who have not received a refund (or other compensation) in respect of a Virgin or Tiger flight that was cancelled before the Virgin Companies entered into voluntary administration.

116. Prayer 16 of the Interlocutory Process seeks a direction under s 90-15 of the *Insolvency Practice Schedule (Corporations) 2016*, which is Schedule 2 to the Corporations Act (**IPSC**) that the Administrators would be justified in offering such conditional credits. Prayer 17 seeks an order under 447A of the Corporations Act, to the effect that the Administrators would not be personally liable for the debts and liabilities incurred by the Administrators arising out of, or in connection with, the issuance of the conditional credits.

117. The Administrators' conditional credits proposal is set out in Schedule 3 to the Interlocutory Process (the **Conditional Credits Proposal**). That proposal is reflected in a Policy which is exhibited as Tab 11 of Exhibit VNS-3 to the Supplementary Strawbridge Affidavit.

118. The essential features of the Conditional Credits Proposal are as follows:

    (a) Conditional credits will be issued to customers who purchased:

        i. a ticket for a flight operated by Virgin Australia Airlines Pty Ltd (**Virgin Australia**), Virgin Australia Regional Airlines Pty Ltd (**Virgin Regional**), Tiger Airways Australia Pty Ltd or Virgin Australia International Airlines Pty Ltd (each a **Virgin Australia Group Entity**); or

        ii. a holiday package from Virgin Australia;

    where the flight or holiday was cancelled (other than by the customer), or where the customer cancelled their ticket or holiday in circumstances entitling the customer to a refund or credit, and where no refund, credit or other compensation has been provided to the customer.

(b) The conditional credits would be redeemable only against domestic flights operated by Virgin Australia Airlines Pty Ltd (**Virgin Australia**) and Virgin Australia Regional Airlines Pty Ltd (**Virgin Regional**).

(c) The conditional credits would only be redeemable for a limited period of time and until the earlier of: (i) a restructuring or recapitalisation of the Virgin Australia Group Entity that issues the credit (unless the right to redeem such credits, or their equivalent, is expressly preserved and extended as part of that restructuring or recapitalisation); or (i) the liquidation of the Virgin Australia Group Entity that issues the credit.

(d) A customer will only "use" a conditional credit once the flight booked with the credit has been provided or, where a credit has been used to book a flight, if the customer does not turn up for the booked flight or cancels otherwise that in accordance with the applicable terms and conditions. Where a conditional credit has been "used" in this sense, the customer would no longer be entitled to a refund or credit arising from the original cancellation.

(e) Where a customer either elects not to receive a conditional credit, or receives such a credit but fails to use it before the restructuring, recapitalisation or liquidation of the relevant Virgin Australia Group Entity, the customer would retain the customer's general law and statutory rights against that entity in accordance with the original cancellation.

119. As Mr Strawbridge explains in his Supplementary Affidavit, the rationale for the Administrators offering conditional credits is to preserve, to the extent possible, the goodwill associated with the Virgin Companies. While the travel industry has been badly impacted by the COVID-19 pandemic, the Virgin Companies are at a competitive disadvantage at present given their inability to offer customers refunds or credits for flights cancelled prior to the companies entering into voluntary administration. Mr Strawbridge's evidence is that the Administrators believe that this may negatively affect the prospects of any sale of the Virgin Companies. If a large number of customers lose money in connection with the Virgin Companies' administration, those and other customers may be less willing to fly with the Virgin Companies (or their successors) in the future. Conversely, if the Virgin Companies are

able to offer credits to customers now, the position of the Virgin Companies will not significantly differ from other travel businesses who have had to cancel flights and other services during the COVID-19 pandemic: Supplementary Strawbridge Affidavit at [18].

120. In assessing the merits of the Conditional Credits Proposal, it is necessary to have regard to the present circumstances of customers who are entitled to, but have not received, refunds in respect of flights and holidays cancelled before the Virgin Companies entered voluntary administration. At present, those customers are, at best, contingent unsecured creditors or unsecured creditors of one of the Virgin Companies and, as such, are unlikely to receive a 100% return if the Virgin Companies are restructured or if those companies go into liquidation: Supplementary Strawbridge Affidavit at [15]. In these circumstances, a conditional credit offers the customer the prospect of improving their position by realising the full value of the lost fare on a future domestic flight operated by Virgin Australia or Virgin Regional, should those companies resume commercial flights during the administration: Supplementary Strawbridge Affidavit at [21].

121. Candidly, there is no guarantee that it will be possible or practical for Virgin Australia and Virgin Regional to resume such flights in this period. This is made clear in paragraph 5 of the Conditional Credits Proposal itself, which states that it may not be possible or practical for Virgin Australia and Virgin Regional to resume commercial flights during the period of administration. If that does not occur, the conditional credits would not be useable during this time but the credits would still have some utility as there would be at least a prospect that the credit scheme would be extended following any restructuring or recapitalisation of the Virgin Companies. As Mr Strawbridge explains, there is good reason to think that any successor or successors to the Virgin Companies would be keen to preserve, as much as possible, the goodwill associated with the Virgin Companies and one way of doing so would be to extend the effect of the conditional credit scheme: Supplementary Strawbridge Affidavit at [20(b)].

122. As things presently stand, it appears that the worst case scenario for customers under the conditional credit scheme would be if Virgin Australia and Virgin Regional do not

resume domestic flights during the course of the administration and the scheme is not extended beyond the administration. Even in this scenario, however, it is the intention of the Conditional Credits Proposal that customers who have pre-administration entitlements to receive a refund or credit from a Virgin Australia Group Entity would be no worse off than they are today: they would retain their pre-administration contractual or statutory rights to a refund and would stand as unsecured creditors of the relevant Virgin Australia Group Entity. This reflects the fact that the Conditional Credits Proposal seeks to offer the prospect that customers will improve their position relative to the status quo, but does not involve any risk that they will be worse off.

123. In short, the Conditional Credit Proposal offers the prospect of a better outcome for customers and, in doing so, preserves the goodwill associated with the Virgin Companies. This, in turn, maximises value of the Virgin Companies pending any sale, which is to the ultimate benefit of all creditors. In these circumstances, and having regard to the fact that the proposal does not appear apt to disadvantage any creditor, the Court should make a direction under s 90-15 of the IPSC that the Administrators would be justified in issuing conditional credits to customers of the Virgin Companies in accordance with the Conditional Credits Proposal.

124. If the Court makes directions in accordance with prayer 16 of the Interlocutory Process, it is also appropriate that the Court make the orders sought in prayer 17. This would relieve the Administrators of personal liability for the debts and liabilities incurred by the Administrators arising out of, or in connection with, the issuance of the conditional credits. That is so for two reasons: one principled, the other pragmatic.

125. The *principled reason* is that the Conditional Credits Proposal is not intended to convert a pre-administration entitlement to a refund or credit against the Virgin Companies into a right enforceable against the Administrators. A customer who fails successfully to use a conditional credit where, for example, they use the credit to book a flight that is subsequently cancelled by the airline, should not be entitled to a refund from the Administrators. That is because such a customer would practically be no worse off than he or she is at present as an unsecured creditor of the Virgin Companies. Any disappointment the customer experiences in connection with the conditional credit would, in substance, be as a result of the failure of the conditional credit scheme to

improve that customer's position relative to the status quo, but the customer would not have suffered any disadvantage as a result of the conditional credit scheme. The Administrators should not risk personal liability in seeking only to improve the lot of these customers and the prospect of a successful sale of the business.

126. The *pragmatic reason* is that the Administrators are unwilling to offer conditional credits without protection from personal liability. That being so, there is no prospect that conditional credits will be offered to customers in the absence of the orders sought in prayer 17 of the Interlocutory Process: Supplementary Strawbridge Affidavit at [22]-[23].

G. REPORT AS TO COMPANY

127. This matter is addressed in the Interlocutory Process at prayer [20] and in the Second Strawbridge Affidavit at [121]-[128].

128. Section 438B(2) of the Corporations Act provides that directors of a company are required to give to the administrator a report about the company's business, property, affairs and financial circumstances (**ROCAP**), within 5 business days after the administration of a company begins or such longer period as the administrators allow. The Administrators have extended the period for the ROCAPs to be provided by the directors of the various Virgin Companies, to 21 May 2020: Second Strawbridge Affidavit at [126].

129. The Business of the Virgin Companies overlaps between different entities. Virgin Australia and a number of the Virgin Subsidiaries (the Third, Seventh, Eighth, Ninth, Tenth, Thirteenth, Nineteenth, Twentieth, Twenty-First, Twenty-Second, Twenty-Third, and Thirty-Fourth Plaintiffs) (together, **Deed of Cross Guarantee Companies**) are each party to a deed of cross guarantee and prepare financial reports on a consolidated basis for the purposes of yearly reporting: Second Strawbridge Affidavit at [121]-[123].

130. The Administrators have expressed the view that the provision of a single ROCAP for the Deed of Cross Guarantee Companies will be more informative than the Administrators receiving a separate report for each individual one of the Deed of Cross Guarantee Companies: Second Strawbridge Affidavit at [125].

131. The preparation of a single such ROCAP will be a simpler and more straightforward exercise for the directors of the Deed of Cross Guarantee Companies (who would otherwise have to prepare multiple reports in respect those entities).

132. The Administrators therefore seek an order that one ROCAP be prepared for the Deed of Cross Guarantee Companies as a whole and otherwise dispensing with a requirement of the directors of the other Deed of Cross Guarantee Companies to prepare a ROCAP. (The position for non-Deed of Cross Guarantee Companies will remain unchanged and the directors of those companies will still be required to provide a ROCAP for each separate company.)

133. There is power under section 447A to make such an order. The powers under that provision are not entirely without limit, but they are ample: *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270; *BE Australia WD Pty Ltd (subject to a Deed of Co Arrangement) v Sutton* (2011) 82 NSWLR 336. The order modifies the operation of section 438B(2), such that there is a sufficient nexus as how Part 5.3A of the Corporations is to operate in relation to the Virgin Companies.

H. LEAVE TO MEMBERS OF COMMITTEE OF INSPECTION

134. This matter is addressed in the Interlocutory Process at prayer 21 and in the Second Strawbridge Affidavit at [127]-[132].

135. Section 80-55 of the IPSC, prohibits, without the approval of the creditors or the leave of the Court, a member of the committee of inspection deriving a profit or advantage from the company. The section operates broadly and the words "profit or advantage" capture a transaction "for or on account of" the company.

136. The statutory predecessors to that provision were section 551 of the Corporations Act and section 435 of the *Companies Code 1982* (NSW) (and its equivalents). Those provisions applied when the company was being wound up and the proscriptive obligations imposed on committee members were consistent with the principle that members of committees of inspection are regarded as occupying fiduciary positions relative to the creditors, such that the section was directed to avoiding a conflict

between interest and duty: *Re FT Hawkins & Co Ltd* [1952] Ch 881 at 884; *Re DH International Pty Ltd (in liq) (No 2)* [2017] NSWSC 871 at [30], [34].[2]

137. However, the 2017 amendments to the Corporations Act, by the repeal of section 551 and the insertion of section 80-55 of the IPSC, have brought about a change to the practical operation of that provision. Previously, it operated only where the company was in liquidation; it now applies to an "external administration", which includes where the company is under administration (see section 5-15 of the IPSC).

138. In an administration, the business of a company may continue to be traded; whereas, in a winding up, a company's business comes to an end as part of the realisation of all its assets. Thus, in the case of a winding up, there would not be the potential for ongoing dealings between the company and its creditors. But the position is often different in the case of an administration, where the business is continuing to trade.

139. In those circumstances, unless the Court grants leave, the effect of the section may curtail the ability of the Administrators to trade the business of the Virgin Companies by preventing the Virgin Companies, without leave of the Court or the creditors, from continuing to contract with any counter-party who is a member of the Committee of Inspection.

140. Indeed, the current evidence is that it is likely, or at least possible, that some of the members of the Committee of Inspection (such as the Aircraft Lessors) will be counterparties as part of ongoing arrangements during the administrations (and / or parties to any agreement reached in connection with a sale of the business of the Virgin Companies (through a DOCA or otherwise)): Second Strawbridge Affidavit at [130]. That possibility is increased given that there are proposed to be 34 different members of the Committee of Inspection.

141. In the absence of an order granting leave to the members of the Committee of Inspection to transact with the Virgin Companies during the administrations, the Administrators' flexibility to carry on the Business may be hampered.

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[2] The cases have typically involved a proposed payment, by way of a gift or remuneration, to a member or members of a committee that have provided particular endeavour during a bankruptcy or company liquidation: *Re Security Directors Pty Limited* (1997) 139 FLR 317; *Re Genoa Resources and Investment Limited (in liq)* [2005] NSWSC 1145. That is of limited assistance in the present case.

142. The Administrators, who are experienced insolvency practitioners, have expressed the opinion that it is in the best interests of the creditors of each of the Virgin Companies generally, that such leave be granted: Second Strawbridge Affidavit at [132].

143. Finally, an additional protection is afforded to creditors or other interested parties who may apply to vary or set aside the orders: Interlocutory Process prayer 24. This preserves parties' rights and provides another check on any transaction entered into between the Virgin Companies and any member of the Committee of Inspection during the administration period.

I. COMMON BANK ACCOUNTS

144. This matter is addressed in the Interlocutory Process at prayer 22 and in the Second Strawbridge Affidavit at [71]-[74].

145. Division 65 of the IPSC deals with bank accounts required to be operated in an external administration.

146. Section 65-5(1) of the IPSC provides that an external administrator of a company must pay all money received by the external administrator on behalf of, or in relation to, the company into an administration account (as defined by section 60-10) for the company within five business days after receipt. Section 65-15 requires an administrator not to pay other monies into an administration account. Section 65-25 prohibits an administrator from paying money out of an administration account other than for purposes related to the administration of that company (or otherwise in accordance with the Corporations Act or an order of the Court).

147. As noted above, the Administrators have opened separate "administration bank accounts" for VAA and VARA, with funding and expenses of the Virgin Companies being cleared through the bank accounts opened in the names of VAA and VARA (with corresponding inter-company loan account entries being made): Second Strawbridge Affidavit at [72].

148. Given that there are now 39 companies within in the Virgin Group that are in external administration, opening a separate bank for each entity would increase cost and bring added complexity to the administration: Second Strawbridge Affidavit at [73].

Further, some of the Virgin Companies are dormant entities and did not actively trade prior to the Administrators' appointment such that that step might be unnecessary.

149. In circumstances where accounting entries are made to record transactions between the Virgin Companies, there is no utility in requiring the Administrators to open a separate bank account for each of the Virgin Companies.

150. In *Ten Network* (above), Markovic J noted at [91]-[94] that section 65-45 of the IPSC provides a plenary power, equivalent to section 447A with respect to Part 5.3A of the Corporations Act, to make orders modifying the arrangements with respect to the operation of administration accounts.

151. Here, as in *Ten Network*, each of the Virgin Companies forms part of the same group of companies; further, any DOCA proposal or a winding up of the Virgin Companies is likely to involve a pooling of the companies' assets and an extinguishment of inter-company loans. Finally, the Administrators are maintaining records of post-administration dealings between the Virgin Companies.

152. In light of those matters, the cost of opening and maintaining separate bank accounts for each of the Virgin Companies would be disproportionate given that, prior to the administration, most of the Virgin Companies did not have separate dealings with external creditors in any event.

153. Accordingly, the Court should make orders under section 65-45 dispensing with the requirements for administration accounts to be opened and operated for the Virgin Companies other than VAA and VARA.

J. CONCLUSION

154. The Court should make orders in the form of the short minutes of order in the form that will be provided in advance of the hearing of the Interlocutory Process.

12 May 2020

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