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 PARAGRAPHS 14-15, 18, AND 20-22 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 paragraphs 14, 15, 18, 20, 21 and 22 of the Interlocutory Process filed on 11 May 2020 (**Interlocutory Process**).

2. Since the hearing on 13 May 2020, further correspondence has been exchanged between the First Plaintiffs' solicitors and solicitors for certain other interested parties including the Deputy Commissioner of Taxation, the Commonwealth of Australia represented by the Attorney-General's Department (administering the Fair Entitlements Guarantee Scheme) (**FEG**), and particular creditors of certain of the Virgin Companies. These are set out in the affidavit of Kassandra Suzann Adams dated 15 May 2020 (**Adams Affidavit**).

3. These submissions supplement the First Plaintiffs' submissions dated 12 May 2020 (**Primary Submissions**). The parts of the Primary Submissions directed to these issues have been extracted in full in these submissions, for ease of reference.

4. Accompanying these submissions is a form of revised minutes of order that set out the orders sought by the First Plaintiffs with respect to the remaining issues for determination (**Proposed Orders**).

B. LIMITATION OF LIABILITY

B.1 JobKeeper liabilities: Paragraph 18 of the Interlocutory Process; Proposed Order 1

5. The Plaintiffs have agreed with the Deputy Commissioner of Taxation to stand over this aspect of the Interlocutory Process to Wednesday 20 May 2020 (if that is suitable to the Court) with a view to seeking to achieve an agreed position between the parties, or otherwise having the matter heard on that date.

6. The Deputy Commissioner of Taxation has no opposition to the balance of the orders sought in the Interlocutory Process: see email from HWL Ebsworth Lawyers on 14 May 2020 (agreeing to communication being sent to the Associate to Middleton J) at p. 49 of the Adams Affidavit (Annexure K).

B.2 Liabilities under Applicable Agreements: Paragraphs 14-15 of the Interlocutory Process; Proposed Orders 2-4

7. Proposed Orders 2-4 deal with the limitation of liability for future contracts that may be entered into by the Administrators on behalf of the Virgin Companies during the administration period.

8. These matters are dealt with in paragraphs [75]-[111] of the Second Strawbridge Affidavit. The Primary Submissions on this issue are extracted below, with further submissions following thereafter:

> [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**):
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> (a) aircraft finance leases and aircraft operating leases (**Aircraft Leases**);
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> (b) alliance agreements;
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> (c) procurement contracts, including:
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> (i) in-flight services agreements;
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> (ii) ground handling agreements;
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> (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 [*scil* – Agreements] – 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].

9. These orders have been formulated in response to two extraordinary circumstances: *first*, the administration of one of only two national airlines operating in Australia; and *secondly*, the COVID-19 pandemic, which has imposed severe and ongoing restrictions on aviation travel both internationally and domestically. In that sense, the orders sought are *sui generis* and a response to the peculiar challenges faced by the current administrations of the affected companies.

10. The extent to which the operations of the Virgin Companies may be able to be expanded (so that, for example, more flights may be offered to customers) depends largely on matters beyond the control of the Administrators, such as Commonwealth and State Governments lessening travel restrictions and permitting gatherings of larger groups of people: Second Strawbridge Affidavit at [78]-[80].

11. The Administrators may have to move quickly to expand the current trading of the Business in response to any such developments and, in that regard, require flexibility to allow them to enter into future agreements with counter-parties in the knowledge that their personal liability under such agreements is limited. The alternative, which would involve separate negotiations with each relevant counter-party and the need to approach the Court on multiple occasions as each large-scale agreement is entered into by the Administrators, is apt to be inefficient, expensive and disadvantageous to the administration of the Virgin Companies.

12. Importantly, and as confirmed in the correspondence with the solicitors for Adelaide Airport Limited on 14 May 2020, these orders are directed **only to future agreements** that may be entered by the Administrators on behalf of the Virgin Companies: Adams Affidavit at pp. 24-27 (Annexures D and E).

13. A notable aspect of the order sought is its temporal aspect: the Administrators are seeking, in advance of entering into the relevant contracts, to limit their personal liability for debts incurred under those contracts; rather than the alternative course of negotiating such an arrangement with each applicable counter-party and then approaching the Court to ratify that limitation.

14. As noted in the Primary Submissions at [102(b)], counter-parties will have the protection of being expressly informed of the order limiting the Administrators'

personal liability and have liberty to approach the Court to seek to vary the order if so advised.

15. Since the last hearing, the Administrators have proposed a further order (Order 4 of the Proposed Orders) to provide an additional layer of oversight of the contracts that may be entered into during the course of the administration. This order involves providing to the Committee of Inspection details of all Applicable Agreements that are entered into and the estimated value of the debts to be incurred under those agreements. A regime of this kind renders transparent, to the Committee of Inspection, the kinds of liabilities that the Administrators may cause the Virgin Companies to incur during the administration period.

16. Order 4 of the Proposed Orders also directly accommodates a concern expressed in the communication made on behalf of FEG by its solicitors, King & Wood Mallesons, dated 14 May 2020 (**KWM Letter**): Adams Affidavit at p. 28 (Annexure F), as noted in subsequent emails between the parties' solicitors: Adams Affidavit at p. 31 (Annexure G). In that regard, the Commonwealth's submissions confirm that, given the circumstances surrounding the Virgin administration, it does not oppose Orders 2 - 4 of the Proposed Orders: FEG Submissions at [16].

B.3 Liabilities for inter-company loans: Paragraph 19 of the Interlocutory Process; Proposed Order 5

17. Proposed Order 5 deals with the limitation of liability for inter-company loans between the Virgin Companies during the administration period.

18. These matters are dealt with in paragraphs [71]-[74] and [118]-[120] of the Second Strawbridge Affidavit. The Primary Submissions on this issue are extracted and set out below, with further submissions following thereafter:

> [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].
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> [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].

19. The KWM Letter has expressed a potential concern about the debts of certain of the Virgin Companies — which are the employer entities — being used to meet debts of other Virgin Companies. FEG's concern only arises if the Virgin Companies are wound up and, as noted above in the Primary Submissions, if there is no pooling of assets and extinguishing of inter-company debts in the various liquidations.

20. However, that possibility is not a reason to limit the Administrators' personal liability in circumstances where the issue arises because of the way in which the financial

affairs of the Virgin Companies were structured prior the Administrators' appointment.

21. In any event, as set out in the KWM Letter, FEG does not oppose an order limiting the Administrators' liability for inter-company loans, so long as the Administrators record journal entries for inter-company debts between the Virgin Companies that are incurred for the remainder of the administration period.

22. Mr Strawbridge has given evidence that the Administrators have thus far made such accounting entries: Second Strawbridge Affidavit [119]; and, as confirmed in the solicitors' correspondence, the Administrators agree to continue to do so for the remainder of the administration period: Adams Affidavit at p. 31 (Annexure G).

C. REPORT ON COMPANY ACTIVITIES AND PROPERTY: PARAGRAPH 20 OF THE INTERLOCUTORY PROCESS; PROPOSED ORDER 6

23. Proposed Order 6 deals with the proposed report about the company's business, property, affairs and financial circumstances to be provided to the Administrators for each of the Virgin Companies.

24. These matters are dealt with in paragraphs [121]-[126] of the Second Strawbridge Affidavit. The Primary Submissions on this issue are extracted and set out below, with further submissions following thereafter:

> [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].
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> [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.

25. In the KWM Letter, FEG requested that information about the financial position of each of the employing entities of the Virgin Companies (as at the date of the Administrators' appointment) be provided, so that FEG has information about the quantum of circulating assets available to each of those companies. The nature of the material to be provided by the Administrators was refined in the solicitors' correspondence, and the Administrators have agreed to provide the Commonwealth with certain financial information for each of the employing entities. That course

appears to have alleviated any concern that FEG has in respect of this order: Adams Affidavit at p. 31 (Annexure G).

D. LEAVE TO MEMBERS OF THE COMMITTEE OF INSPECTION TO DERIVE A PROFIT: PARAGRAPH 21 OF THE INTERLOCUTORY PROCESS; PROPOSED ORDERS 7-9

26. Proposed Orders 7-9 deal with the grant of leave to members of the single Committee of Inspection formed for the Virgin Companies (**Committee of Inspection**) to derive a profit or advantage during the administration of each of the Virgin Companies.

27. These matters are dealt with in paragraphs [127]-[132] of the Second Strawbridge Affidavit. The Primary Submissions on this issue are extracted and set out below, with further submissions following thereafter:

> [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.
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> [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].
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> [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.

[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.

28. The purpose for the order sought in paragraph 21 of the Interlocutory Process was to permit the Administrators to cause the Virgin Companies to enter into arms-length transactions during the administration with creditors who may be members of the Committee of Inspection.

29. The Administrators appreciate that, as noted by the Court at the hearing on 13 May 2020, the order sought has the potential to operate with great amplitude. To address that concern, the Administrators have proposed that two additional orders be made in the form of Proposed Orders 8 and 9.

30. These orders respectively:

    (a) narrow the scope of the leave to be granted to provide that no gift or remuneration may be provided to any member of the Committee of Inspection by reason of their membership of the committee; and

    (b) require the Administrators to provide, both to the Committee of Inspection and to all creditors (in their report in advance of the second meeting of creditors), a list of all agreements entered into during the administration period with any of the members of the Committee of Inspection or their related entities.

31. The additional orders provide a further level of oversight on any dealings that may be entered into with members of the Committee of Inspection.

32. Finally, it is significant that no interested party has raised any objection to the relief sought with respect to the Committee of Inspection.

E. COMMON BANK ACCOUNT: PARAGRAPH 22 OF THE INTERLOCUTORY PROCESS; PROPOSED ORDER 10

33. Proposed Order 10 deals with the application for the Administrators to maintain a common bank account rather than requiring a separate administration bank account for each of the Virgin Companies.

34. These matters are dealt with in paragraphs [71]-[74] of the Second Strawbridge Affidavit. The Primary Submissions on this issue are extracted and set out below, with further submissions following thereafter:

[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.

35. FEG's position as to Proposed Order 6 (concerning the ROCAPs) also applies to this order regarding the operation of a common bank account. On the basis that the Administrators have agreed to provide financial information about each of the employing entities of the Virgin Companies, FEG does not oppose an order in this form: Adams Affidavit at p. 31 (Annexure G)

F. CONCLUSION

36. The Court should make orders in the form of the Proposed Orders.

15 May 2020

Ruth C A Higgins SC

Daniel Krochmalik

Counsel for the First Plaintiffs