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Details of Filing

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IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LIMITED (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS

FEDERAL COURT OF AUSTRALIA PROCEEDINGS NSD464/2020

Submissions of Broad Peak Investment Advisers Pte Ltd and Tor Investment Management (Hong Kong) Ltd in support of the Interlocutory Application filed 6 July 2020

A. INTRODUCTION

1. Broad Peak Investment Advisers Pte Ltd (for and on behalf of Broad Peak Master Fund II Limited and Broad Peak Asia Credit Opportunities Holdings Pte Ltd) and Tor Investment Management (Hong Kong) Ltd (the **Applicants**) hold approximately $300 million of unsecured notes issued by Virgin Australia Holdings Limited (administrators appointed) (**VAH**). Consistent with their statutory right under Part 5.3A of the *Corporations Act 2001* (Cth) (**Corporations Act**), the Applicants have been developing a deed of company arrangement (**DOCA**) for VAH and the other entities within the corporate group (together, the **Virgin Companies**) which they seek to propose at the second meeting of creditors.

2. However, by reason of the conduct of the Administrators of VAH, the Applicants have been denied access to a range of information necessary to develop the proposed DOCA. Moreover, there is reason to believe that that information – which includes the terms of the Sale and Implementation Deed (**SID**) executed with Bain Capital Private Equity LP, Bain Capital Credit LP and their affiliates and related entities (**Bain**) – discloses that all other creditors are precluded from proposing an alternative DOCA at the second creditors' meeting.

3. This denial of access to information has now been entrenched by, amongst other orders, a suppression and non-publication order under s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) made on 2 July 2020 on an *ex parte* basis, without notice to the Applicants and seemingly without disclosure to the Court of the Applicants' involvement in the bidding process and valid requests for disclosure of the terms of the SID under s 70-45 of the Insolvency Practice Schedule (**IPS**). Not only is the Applicants' ability to develop their alternative proposed DOCA significantly hindered by this order, but more fundamentally, the Applicants' attempt to invoke the statutory jurisdiction of the Australian Government Takeovers Panel (the **Panel**) by their application filed on 2 July 2020 will be significantly hampered should the order in its current terms remain on foot.

4. Accordingly, by Interlocutory Process filed on 6 July 2020 (**IP**), the Applicants seek the following substantive orders:

(a) an order pursuant to r 39.05 of the *Federal Court Rules 2011* (Cth) (**FCR**), s 23 of the FCA Act and/or the Court's implied powers varying Order 2 of the Court's orders made on 2 July 2020 (**Orders**) such that the following persons may be added to those persons from whom the documents the subject of Order 2 are not to be kept confidential:

(i) the Applicants and their legal representatives;

(ii) the Panel; and

(iii) any party or interested person and their legal representatives in relation to the Applicants' application to the Panel filed 2 July 2020 (**Panel Application**);[1]

(b) an order pursuant to FCR, r 39.05, FCA Act, s 23 and/or the Court's implied powers varying Order 7 of the Orders to grant liberty to the Applicants to apply in relation to any variation or discharge of the Orders:

(i) at any time on one business day's notice; or

(ii) alternatively, at any time prior to 5 pm on the later of 31 July 2020 or 5 business days after the conclusion of the proceedings for determination of the Panel Application;[2] and

(c) an order pursuant to FCR, r 39.05, FCA Act, s 23 and/or the Court's implied powers varying Order 8 of the Orders to require the Plaintiff (the **Administrators**) to give the Applicants notice of any application to vary or discharge the Orders on 1 business day's notice.[3]

5. The Applicants rely upon the affidavit of Michael Russell Catchpoole affirmed 6 July 2020 (**Catchpoole Affidavit**) and the supplementary affidavit of Michael Russell Catchpoole affirmed 9 July 2020 in support of the IP (**Second Catchpoole Affidavit**).

B. BACKGROUND

6. As holders of unsecured notes issued by VAH, the Applicants have been engaging with the Administrators since VAH entered into voluntary administration to develop an alternative DOCA to be proposed at the second meeting of creditors.[4] That DOCA would involve, amongst other things, the provision of interim funding to permit the Virgin Companies to continue to operate, the conversion of existing noteholders' and certain other unsecured creditors' debts into equity worth approximately 69 cents in the dollar with an option for creditors to sell their shares for cash, and a 100 cent in the dollar return to certain essential or ongoing creditors (the **Noteholders' Offer**).[5]

[1] IP at [6].
[2] IP at [4].
[3] IP at [5].
[4] Catchpoole Affidavit at [5]-[6].
[5] Catchpoole Affidavit at [9]-[10].

7. The Administrators have been aware of the proposed terms of the Noteholders' Offer since 24 June 2020.[6]

8. The Noteholders' Offer was developed by the Applicants following a number of representations made by the Administrators that:

   (a) the Administrators would provide the Applicants with feedback on all offers to enable the Applicants to prepare a better offer (that representation having been conveyed on 8 June 2020), which created an expectation that an unconditional proposal could be developed by 30 June 2020 if the level of creditor recovery was limited;[7] and

   (b) although the Administrators preferred a binding DOCA proposal which offered cash collateral as a dividend to employee and unsecured creditors (with collateral provided on a timetable in accordance with the other bids), that preference would not prevent the Applicants from submitting an additional and alternative DOCA proposal provided that it resulted in a better return to all creditors (that representation having been conveyed on 9 June 2020).[8]

9. However, the Applicants were told for the first time on 20 June 2020 that no feedback on their proposal would be provided.[9] Similarly, on 23 June 2020, the Applicants were told for the first time that the Noteholders would be required to submit an unconditional proposal, supported by the payment of $625 million secured in favour of the Administrators.[10]

10. After the Noteholders' Offer was formally submitted, the Applicants' legal representatives sought permission for the Applicants to deal with the five remaining conditions in its proposal and assurances from the Administrators that they would not enter into any:[11]

    (a) agreement that does not contain a term requiring the Administrators to take steps with respect to a bona fide competing proposal which would be expected to lead to a superior outcome for the Virgin Companies;

    (b) arrangement, understanding or other process that would prevent the Applicants from putting an alternative DOCA at the second meeting of creditors; and

    (c) any asset sale without 3 business days' notice to the Applicants.

11. In response, the Administrators' solicitors indicated that they had executed the SID,[12] and the Applicants were subsequently informed that they would not be permitted to propose an

[6] Catchpoole Affidavit at [25].
[7] Catchpoole Affidavit at [18].
[8] Catchpoole Affidavit at [19]; Exhibit MRC-1 at pages 269 to 272.
[9] Catchpoole Affidavit at [21].
[10] Catchpoole Affidavit at [24].
[11] Catchpoole Affidavit at [27]; Exhibit MRC-1 at pages 296 to 311.
[12] Catchpoole Affidavit at [28]; Exhibit MRC-1 at page 312.

alternative DOCA by reason of the Administrators having executed the SID with Bain.[13] The Administrators have not confirmed any of the terms of the SID, including whether a term to the effect of the "superior proposal exception"[14] has been included in the SID.

12. The Applicants have now twice requested disclosure of the SID, including on the day prior to the Orders being made and pursuant to s 70-45 of the IPS.[15] That notwithstanding, the Administrators procured the Orders from the Court on 2 July 2020 without apparently disclosing to the Court the foregoing communications and requests from the Applicants,[16] nor the fact that those requests were properly made under the IPS. Similarly, the Administrators did not notify the Applicants that the Orders were being sought so that the Applicants could, if required, be heard with respect to the Orders.[17] Even in the face of the Applicants' IP which seeks to facilitate disclosure of the SID through the Panel, the Administrators remained steadfast in their position that the sale process to Bain remain confidential, insisting that much, if not all, of the hearing of the IP be dealt with in the absence of the public[18].

13. The Applicants have also filed an application with the Panel[19] for relief facilitating the finalisation of an alternative DOCA to be put to the creditors at the second meeting of creditors, consistent with the Applicants' statutory right under Part 5.3A of the Corporations Act to do so and the rights protected by Chapter 6.

14. The Applicants note that the Respondents and Bain have submitted to the Takeovers Panel[20] that the effect of this limited relief would be to precipitate the liquidation of VAH by undoing or delaying the implementation of the terms of the SID. No basis for this assertion has been identified to date. Those submissions are unconnected with the nature of the relief sought or the consequences of an alternative proposal being put to the Second Meeting of Creditors as stipulated by Part 5.3A.

15. It is not the intention of Applicants or the effect of the any relief sought to supplant the commercial judgement of the Administrators or usurp the jurisdiction of the Court. Rather, the purpose of the IP – along with the Panel Application – is to preserve the right and ability of all creditors to adopt the proposal which would ensure the best return and secure the future viability of the Virgin Companies, consistent with the objects and purpose of Part 5.3A.[21] The Administrators may of course promote the SID with Bain as their preferred proposal in contest with the Noteholders' Offer, or have entered into contractual arrangements that inform the scope of any alternative proposal but their preference for one proposal does not justify the exclusion of all other proposals from consideration by the creditors, particularly when the alternative here would result in a

[13] Catchpoole Affidavit at [29].
[14] Equivalent to the term identified at paragraph 10(a) above.
[15] Catchpoole Affidavit at [32].
[16] Catchpoole Affidavit at [35].
[17] Catchpoole Affidavit at [34].
[18] Second Catchpoole affidavit at [4] and Annexure MRC-2 at pages 4-8.
[19] Catchpoole Affidavit at [4]; Exhibit MRC-1 at pages 17 to 41.
[20] Exhibit MRC-3 at respectively pages 234 to 237 and 238 to 245].
[21] Corporations Act, s 453A. See also *Viscariello v Macks* (2014) 103 ACSR 542 at [52] (Kourakis CJ).

substantially improved outcome for the large pool of unsecured creditors. Section 439C(a) expressly authorises the creditors to approve a DOCA which is different from the one which accompanied the notice of meeting.

C. VARIATION TO ORDER 2

C.1. The Court's power to vary Order 2

16. The effect of the variation to Order 2 would be to remove the prohibition upon disclosure of the documents contained in the affidavit of Mr Strawbridge, the Administrators' submissions and the exhibit to Mr Strawbridge's affidavit to the Applicants, their legal representatives, the Panel and any other interested party involved in the proceedings before the Panel.

17. The Court's power to vary an order after it has been entered is found primarily in FCR, r 39.05. In the context of these proceedings, two bases for the invocation of the Court's power are available. For the purpose of r 39.05(a), the Orders were made on an *ex parte* basis. It is plain from the matters outlined in Section B above that the Applicants are persons directly interested in, and affected by, the Orders, having regard to their involvement in negotiations with the Administrators as to their proposal of an alternative DOCA with respect to the Virgin Companies, their request of the Administrators (only one day prior to the Orders being made) for access to the SID to facilitate the finalisation of that proposal, and the implications that Order 2 may have for the relief sought by the Applicants' Panel Application. Where s 37AH(2)(e) of the FCA Act gives rise to an entitlement in any person with a sufficient interest to be heard on the question of whether a suppression or non-publication order should be made, and where the Applicants, as interested persons, were not given the opportunity to appear at the hearing of the Administrators' application for the Orders, the Court's jurisdiction is clearly enlivened under FCR, r 39.05(a). That reasoning equally confirms the Applicants' standing to seek the orders in the IP.[22]

18. To the extent that there is any doubt as to the Applicants' entitlement to be heard on this matter as a party who was not given the opportunity to appear in the first instance, the interlocutory nature of the Orders provides an alternative path to engage the Court's jurisdiction under FCR, r 39.05(c).

C.2. A variation of Order 2 is warranted in the circumstances of this case

19. The variation to Order 2 sought by the Applicants should be made for 3 reasons.

20. *First*, the circumstances precipitating the making of the Orders and in which the Orders were made present an archetypal case in which the exercise of the discretion under r 39.05 would be warranted in order to promote the interests of justice. The Court's jurisdiction to make a suppression or non-publication order requires consideration to be had to the primary objective of

[22] *Hancock liquidator of South Townsville Developments Pty Ltd (in liq) (No 2)* [2019] FCA 622 at [9] (Griffiths J); *Deloughery v Weston* (2010) 79 ACSR 180.

the administration of justice, being to safeguard the public interest in open justice.[23] The notion of the administration of justice is, however, multi-faceted, and entails an obligation upon the Court to endeavour to effectively achieve the object for which it was appointed, being to do justice between the parties.[24] Accordingly, while an order under s 37AF may plainly be made where the openness of court proceedings would undermine the attainment of justice in a particular case or discourage its attainment more broadly,[25] it ought not be made – or indeed should be varied or discharged – where the administration of justice is jeopardised by its maintenance.

21. In this case, the way in which Order 2 was procured by the Administrators, its impact upon the statutory rights of the Applicants and its ramifications for the attainment of relief pursuant to the statutory jurisdiction of the Panel are all factors which demonstrate the incoherence of Order 2 with the administration of justice in the circumstances of the Virgin Companies' administration.

22. The Administrators' application was made to the Court on an *ex parte* basis, without notice to the Applicants and, as best as can be ascertained on the publicly-available information, apparently involved no disclosure of the matters outlined at Section B above to the Court. This was despite the fact that:

    (a) the Administrators were well aware of the fact that a form of the Noteholders' Offer had been prepared and provided to the Administrators for consideration upon the faith of various representations made to the Applicants that they would be permitted to propose an alternative DOCA irrespective of the steps otherwise taken by the Administrators prior to the second meeting of creditors;

    (b) the Administrators were similarly aware of the fact that the Applicants had sought access to the SID on at least two occasions so that they could consider the requirements to discharge the security interests granted to Bain's affiliates and evaluate whether the SID precluded the second meeting of creditors from resolving to accept the Noteholders' Offer with any necessary modifications to account for Bain's provision of interim funding;

    (c) the Administrators were also aware – and, indeed, had eventually disclosed to the Applicants – that the effect of the SID was to preclude the Applicants from putting the Noteholders' Offer to the creditors at the second creditors' meeting, in contravention of their statutory rights as creditors under Part 5.3A of the Corporations Act; and

    (d) having regard to the Administrators' knowledge as outlined above, it must have been apparent that Order 2 would stultify the Applicants' requests for information, the purposes for which access to the SID was required and ultimately the Applicants' development of an

[23] FCA Act, s 37AE. See also *Hogan v Hinch* (2011) 243 CLR 506 at [21] (French CJ).
[24] *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129 at 133 (Bowen CJ); *Rinehart v Welker* (2011) 93 NSWLR 311 at [39] (Bathurst CJ and McColl JA).
[25] *John Fairfax Group Pty Ltd (receivers and managers appointed) v Local Court (NSW)* (1991) 26 NSWLR 131 at 141 (Kirby P); *Rinehart v Welker* (2011) 93 NSWLR 311 at [36] (Bathurst CJ and McColl JA).

alternative DOCA proposal. For that reason, it ought to have been clear that the Applicants would have had an active interest in the making of the Orders and therefore ought to have been given an opportunity to be heard in accordance with s 37AH(2) of the FCA Act.

23. The way in which the Orders were procured attains specific pertinence when one has regard to the fact that the Applicants' request for disclosure was properly made under s 70-45 of the IPS prior to Order 2 being made and that, apparently without disclosing that request to the Court, the Administrators obtained the order and subsequently relied heavily upon it as a basis for the contention that it was not reasonable (within the meaning of s 75-45(2)(c) of the IPS) to comply with the Applicants' request for information.[26] Obtaining a suppression and non-publication order after apparently withholding facts directly relevant to the Court's assessment of whether the order or its scope was indeed in the interests of the administration of justice, only to use that order to bootstrap an ongoing denial of information otherwise required to permit the Applicants to pursue their statutory right to propose an alternative DOCA, cannot be consistent with the interests of justice.

24. Similarly, despite the fact that an administrator seeking to execute an agreement for the sale of the company's assets before the second meeting of creditors where sufficient cash is on hand to complete the administration period[27] would typically approach the Court for a declaration that such a course is appropriate,[28] no such application was made.

25. *Second*, permitting a variation so that the relief sought can be made practically available to the Applicants without disclosure to the public at large must be seen as consonant with, rather than contrary to, the interests of justice. As outlined above, on the same day that the Orders were made, the Applicants had also filed an application with the Panel seeking relief which would entail the disclosure of the SID and other information the subject of Order 2. In circumstances where the Administrators have persistently refused access to information regarding the SID which is required by the Applicants in order to develop a viable alternative DOCA, the Panel Application is calculated to vindicate the Applicants' statutory rights to propose a DOCA at the second meeting under Part 5.3A of the Corporations Act.

26. The importance of the ability of creditors to propose competing DOCAs at the second meeting is recognised in the express language of s 439C(a). Indeed, the voluntary administration process has long been regarded as a simplification and deregulation of the scheme of arrangement procedure which preceded the introduction of Part 5.3A,[29] but which maintained the primacy of the principle that effect is to be given to the will of the majority of creditors who vote at the relevant

[26] Catchpoole Affidavit at [33]; Exhibit MRC-1 at pages 323-331.
[27] Exhibit MRC-1 at pages 273-282.
[28] *Re Ansett Australia Ltd and Mentha* (2001) 39 ACSR 335; *Re Ansett Australia Ltd (No 1)* (2002) 115 FCR 376 at [42] (Goldberg J); *Killer, Re North Coast Wood Panels Pty Ltd (admins apptd)* [2011] FCA 776; *Re Reidy (in their capacity as administrators of eCHOICE Ltd) (admins apptd)* [2017] FCA 1582 at [30]-[35] (Yates J).
[29] *Deputy Commissioner of Taxation v Pddam Pty Ltd* (1996) 19 ACSR 498 at 500-1 (Heerey J).

meeting.[30] In the context of this case, the availability of alternative proposals is of particular significance given that, despite the Administrators' justification as to the need for an asset sale due to the Virgin Companies' lack of funds, the cashflow statement as at 19 June 2020 does not confirm such a deficiency.[31]

27. However, as Order 2 *prima facie* precludes disclosure of the SID to the Applicants, there is a real risk that Order 2 would operate to render the Applicants' pending proceedings before the Panel nugatory by dissuading the Panel from granting relief which would be inconsistent with the terms of Order 2. This is particularly so having regard to the administrative, non-judicial nature of the Panel's powers,[32] the exercise of which must be in accordance with law and, therefore, consistent with any restrictions imposed by the Orders. Given that Order 2 may operate to frustrate the Applicants' statutory right to propose an alternative DOCA to that envisaged by the SID and similarly undermine the efficacy of the limited mechanisms available to protect the exercise of that right, including the Applicants within the scope of persons to whom disclosure is permitted under Order 2 cannot be seen as undermining the interests of justice.

28. *Finally*, the variation sought will not detract from any putative concern as to the commercially confidential nature of the documents the subject of Order 2. The effect of the variation would not be to authorise or require disclosure of the SID. Rather, the order as varied would be such that the Administrators – and, indeed, the Panel – would not be restrained as a matter of law from providing or requiring disclosure of the SID and other confidential transactional information to the Applicants. Moreover, to the extent that the documents may be used and accessed by the Panel, those proceedings are subject to procedural rules which respect the confidential information provided to it,[33] and parties to proceedings before the Panel must give a confidentiality undertaking with respect to confidential information obtained in the course of the proceedings.[34] Accordingly, the variation contemplated is appropriately calculated to balance the Administrators' interests in ensuring the confidentiality of sensitive commercial information associated with the SID and the anticipated transaction with Bain against the Applicants' rights to pursue the legal avenues available to ensure the exercise of their rights under Part 5.3A and the completion of the administration consistent with the principles of Chapter 6 of the Corporations Act.

D. VARIATION TO ORDERS 7 AND 8

29. The Applicants also seek a variation to Orders 7 and 8. Those orders provide respectively that:

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[30] *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509 at [31] (French CJ, Gummow, Hayne and Kiefel JJ).
[31] Exhibit MRC-1 at pages 273-282.
[32] *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542.
[33] See Guidance Note 5: Specific Remedies – Information Deficiencies at [30]-[34].
[34] Takeovers Panel, Process Information.

(a) any person who can demonstrate a sufficient interest has liberty to apply to the Court within 5 business days' notice having been provided of the making of the Orders to vary or discharge any of Orders 1 to 5; and

(b) the Administrators have liberty to apply on 1 business day's written notice to the Court in relation to any proposed variation or discharge of the Orders.

30. The variation to Order 7 envisages an extension of the time for a person who can demonstrate a sufficient interest to apply to vary or discharge Orders 1 to 5, such that the Applicants can apply at any time on 1 business day's notice or, alternatively, by the later of:

(a) 31 July 2020; or

(b) the date being 5 business day after the conclusion of any proceedings before the Panel in relation to the Applicants' Panel Application.

31. The variation of Order 8 would provide that any application by the Administrators to vary or discharge the Orders is to be made on 1 business day's notice to the Court *and* the Applicants.

32. The variations to Order 7 are sought as a matter of necessity having regard to the pending proceedings before the Panel. There are real prospects that, should the Panel Application be resolved favourably to the Applicants, a reconsideration of the various Orders made on 2 July 2020 would be required, particularly with respect to the relief granted under s 588FM of the Corporations Act.[35] The existence and nature of the Applicants' interests in the Orders cannot therefore be properly assessed until the proceedings pertaining to the Panel Application have come to an end. An extension of time in this regard will ensure the preservation of the Applicants' potential interest in the terms of the Orders.

33. Similarly, the variation to Order 8 to ensure that notice is given to the Applicants is required given that, to the extent that the Orders are varied or discharged, such steps may have implications for the proceedings before the Panel or the way in which the Applicants seek to press the Noteholders' Offer prior to or at the second meeting of creditors.

34. Should the Court accept that a variation to Order 2 is appropriate in the circumstances, the additional variations sought to Orders 7 and 8 ought to be seen as following naturally from that conclusion so as not to frustrate the purpose and potential relief which may ultimately be obtained from the Panel.

[35] Catchpoole Affidavit at [38].

E. CONCLUSION

35. The Applicants accordingly seek that the Court makes orders in accordance with the prayers for relief in the IP, and that the Administrators pay the Applicants' costs of the IP.

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