Federal Court of Australia

Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 7) [2020] FCA 1182

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| File number: |  |
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| Judgment of: | **MIDDLETON J** |
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| Date of judgment: | 12 August 2020 |
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| Date of publication of reasons: | 18 August 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for joinder of parties to proceedings –application for extension of convening period for second meeting of creditors – application to allowing administrators to require creditors to lodge documents using certain software by particular dates – applications allowed |
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| Legislation: | *Corporations Act 2001* (Cth)*Insolvency Practice Rules 2016* (Cth)  |
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| Cases cited: | *ABC Learning Centres Limited, in the matter of ABC Learning Centres Limited; application by Walker (No 8)* [2009] FCA 994 *Billingsley (Administrator), in the matter of B K Chemists Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 1059*Chamberlain, in the matter of South Wagga Sports and Bowling Club Ltd (Administrator Appointed)* [2009] FCA 25 *El-Saafin v Franek (No 2)* [2018] VSC 683*Gothard, in the matter of Sherwin Iron Ltd (Administrators Appointed) (Receivers and Managers Appointed) (No 2)* [2015] FCA 401 *Hughes, in the matter of Vah Newco No. 2 Pty Ltd (in liq)* [2020] FCA 1121*Hutson (liquidator), in the matter of WDS Limited (in liq) (Receivers and Managers Appointed)* [2020] FCA 299 *In the matter of Acquire Learning Pty Ltd (ACN 168 523 279) (administrators appointed), Acquire Learning & Careers Pty Ltd (ACN 159 509 323) (administrators appointed) and Acquire Retail Pty Ltd (ACN 167 927 693) (administrators appointed)* [2017] VSC 572*In the matter of Equiticorp Australia Ltd (in liq) and Ors* [2020] NSWSC 143*In the matter of Harrisons Pharmacy Pty Limited (Administrators Appointed) (Recs and Mngrs Apptd)* [2013] FCA 1102*In the matter of Hawden Property Group Pty Ltd (in liq) (ACN 003 528 345)* [2018] NSWSC 481*In the matter of SurfStitch Group Limited* [2018] NSWSC 164*Kaso, in the matter of Speedpanel Australia Ltd (Administrators Appointed) (No 2)* [2017] FCA 862*Krejci, in the matter of Union Standard International Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 1111*Lombe re Australian Discount Retail Pty Ltd* [2009] NSWSC 110*Mentha, in the matter of The Griffin Coal Mining Company Pty Ltd (administrators appointed) (No 2)* [2010] FCA 499 *Owen, in the matter of RiverCity Motorway Pty Limited (Administrators Appointed) (Receivers and Managers Appointed) v Madden (No 5)* [2013] FCA 1443*Re Ansett Australia Limited and Korda (No 3)* (2002) 115 FCR 409 *Reidy, In the Matter of eChoice Limited (Administrators Appointed)* [2017] FCA 1582 *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 4)* [2020] FCA 671*Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* [2020] FCA 717 |
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| Date of hearing: | 11 August 2020 |
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| Counsel for the Plaintiffs: | Dr R C A Higgins SC with Mr D R Sulan and Mr D Krochmalik |
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| Solicitor for the Plaintiffs: | Clayton Utz |
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| Counsel for interested person: | Mr I Jackman SC with Mr P Kulevski  |
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| Solicitor for interested person: | Corrs Chambers Westgarth |

ORDERS

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|  | NSD 464 of 2020 |
| IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS |
| BETWEEN: | 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)First PlaintiffVIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226Second PlaintiffVIRGIN AUSTRALIA INTERNATIONAL OPERATIONS PTY LTD (ADMINISTRATORS APPOINTED) ACN 155 859 608 (and others named in the Schedule)Third Plaintiff |

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| order made by: | MIDDLETON J |
| DATE OF ORDER: | 12 August 2020 |

THE COURT DECLARES THAT:

1. The Halo Platform (as defined in the affidavit of David Michael Orr sworn 29 July 2020) is a suitable technology for the purposes of sections 5(1)(a) and 5(1)(f) of the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) (‘**Coronavirus Determination**’).

THE COURT ORDERS THAT:

1. The Interlocutory Process filed on 7 August 2020 be made returnable at 2.15pm on 11 August 2020.
2. Pursuant to rule 9.05 of the Federal Court Rules 2011 (Cth), each of VAH Newco No. 2 Pty Ltd (in liquidation) (Administrators Appointed) ACN 160 881 354 (**VAH Newco 2**) and VB Investco Pty Ltd (in liquidation) (Administrators Appointed) ACN 101 961 095 (**VB Investco**) be joined to this proceeding as the Forty-First Plaintiff and the Forty-Second Plaintiff respectively.
3. The Orders made on 11 August 2020 in respect of the Interlocutory Process filed on 29 July 2020 in the proceedings be deemed to apply to the Forty-First and Forty-Second Plaintiffs in the proceedings, as if they were a party to the proceeding at the time the Orders were made.
4. Pursuant to section 90-15 of the *Insolvency Practice Schedule (Corporations)* (**IPSC**), to the extent not permitted specifically by sections 75-30, 75-35 and 75-75 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPR**) and the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth) (**Coronavirus Determination**), the First Plaintiffs in their capacity as joint and several administrators of each of VAH Newco 2 and VB Investco are justified in holding meetings of creditors during the administration of each of VAH Newco 2 and VB Investco by telephone or audio-visual conference only at the place of the First Plaintiffs’ offices (without creditors of VAH Newco 2 and VB Investco being able to attend physically at that place), with such details of the arrangements for using the telephone or audio-visual conference facilities to be specified in each of the notices issued to creditors.
5. Pursuant to section 447A(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), Part 5.3A of the Corporations Act is to operate in relation to each of the Second to Fortieth Plaintiffs as if section 439A(6) provided that the period for convening the second meeting of creditors of each of the Second to Fortieth Plaintiffs, be extended (from 18 August 2020) to 31 August 2020.
6. Pursuant to section 447A(1) of the Corporations Act, Part 5.3A of the Corporations Act is to operate in relation to each of the First to Fortieth Plaintiffs and the proposed Forty First and Forty Second Plaintiffs (**Virgin Companies**) such that, notwithstanding section 439A(2) of the Corporations Act, the second meeting of the creditors of each of the Virgin Companies (**Second Meetings**) required under section 439A of the Corporations Act may be convened at any time before, or within, five (5) business days after, the end of the convening period as extended by paragraph 6 above (provided that the First Plaintiffs give notice of the meetings to eligible creditors of each of the Virgin Companies (including the persons claiming to be creditors of the Virgin Companies) at least five (5) business days before the meeting).
7. Pursuant to section 90-15 of the IPSC, the First Plaintiffs in their capacity as the joint and several administrators of each of the Virgin Companies (the **Administrators**) would be justified in permitting only those persons who have lodged particulars of a debt or claim in the administration of one or more of the Virgin Companies, in accordance with Order 4 of the Orders made 11 August 2020 in respect of the Interlocutory Process filed 29 July 2020 in the proceedings, and by no later than at 5.00pm on the fifth business day before the Second Meetings are held (**POD Lodgement Date**), to participate and vote at the Second Meetings.
8. Pursuant to section 90-15 of the IPSC, in respect of any particulars of a debt or claim submitted by a person to the Administrators in respect of the Virgin Companies:
	1. prior to the POD Lodgement Date, the Administrators are justified in entering the information provided by the person into the Halo Platform and registering the relevant creditor's details on the Halo Platform; and
	2. after the expiry of the POD Lodgement Date, the Administrators are justified in disregarding any such debt or claim.
9. Pursuant to section 90-15 of the IPSC, the IPR operate in relation to the Virgin Companies such that persons (or their proxy or attorney) may not at any time after the POD Lodgement Date, without the express written consent of the Administrators, amend or replace any proof of debt lodged on the Halo Platform.
10. Order 5 of the orders made by the Court on 24 April 2020 and Order 7 of the orders made by the Court on 13 May 2020 be vacated.
11. Pursuant to section 90-15 of the IPSC, to the extent not permitted specifically by section 75-35(2)(b) of the IPR and the Coronavirus Determination, the creditors of the Virgin Companies who wish to participate or vote on resolutions at the Second Meetings (other than persons not voting by proxy or attorney), must lodge with Administrators:
	1. a specific proxy form containing the information in section 75-35(2)(b)(i)-(iii) of the IPR; and / or
	2. an appointment of power of attorney containing the information in section 75-35(2)(b)(i)-(iii) of the IPR,

in accordance with Order 4 of the Orders made 11 August 2020 in respect of the Interlocutory Process filed 29 July 2020 in the proceedings, and by no later than at 5.00pm on the third business day before the Second Meetings are held (Proxy Lodgement Date).

1. Pursuant to section 90-15 of the IPSC, the Administrators would be justified in permitting only those persons who have lodged in the administration of one or more of the Virgin Companies a specific proxy form and / or an appointment of power of attorney, in accordance with paragraph 12 above, to participate and vote by proxy or attorney at the Second Meetings.
2. Pursuant to section 90-15 of the IPSC, the requirements of sections 75-25 and 75-35(2) of the IPR will be satisfied in relation to the Virgin Companies by the Administrators including a link to an electronic appointment of proxy or attorney form to be completed and submitted on the Halo Platform in the notice to be issued to creditors pursuant to section 75-225 of the IPR.
3. Pursuant to section 90-15 of the IPSC, in respect of any appointment of proxy or attorney forms submitted by a person to the Administrators in respect of the Virgin Companies:
	1. prior to the Proxy Lodgement Date, the Administrators are justified in entering the proxy or attorney details provided by the person into the Halo Platform and registering the relevant creditor's details on the Halo Platform; and
	2. after the expiry of the Proxy Lodgement Date, the Administrators are justified in disregarding any such proposed nomination of proxy or attorney.
4. Pursuant to section 90-15 of the IPSC, the IPR operate in relation to the Virgin Companies such that:
	1. to the extent not required specifically by section 5(1)(c) of the Coronavirus Determination, all resolutions put to a vote at the Second Meetings will be decided by a poll as if requested by the person presiding at the Second Meetings pursuant to section 75-110(1) of the IPR; and
	2. for the purposes of section 75-110(5) of the IPR, each poll is to be taken by tallying votes cast on the Halo Platform.
5. Pursuant to section 90-15 of the IPSC, the requirements of 75-30 and 75-75 of the IPR and section 5 of the Coronavirus Determination may be satisfied, in the case of the Virgin Companies, by the creation of an "event" on the Halo Platform and the Administrators holding the Second Meetings via Microsoft Teams technology.
6. Pursuant to section 90-15 of the IPSC, the Administrators would be justified in counting all votes lodged through the Halo Platform on any poll taken during the Second Meetings, regardless of whether it can be shown that those creditors (or their proxy or attorney) were present at the meeting.
7. The Administrators take all reasonable steps to cause notice of the Court's orders to be given, within one (1) business day of the making of the orders, to:
	1. creditors (including persons or entities claiming to be creditors) of the Virgin Companies, in the following manner:
		1. where the creditor is a registered user on the Halo Platform, by publishing a notice via the Halo Platform;
		2. where the creditor is not a registered user on the Halo Platform but the Administrators have an email address for a creditor, by notifying each such creditor, via email, of the making of the orders and providing a link to a website where the creditor may download the orders and the Interlocutory Process;
		3. where a creditor is not a registered user on the Halo Platform and the Administrators do not have an email address for a creditor but have a postal address for that creditor (or have received notification of non-delivery of a notice sent by email in accordance with paragraph (a)(ii) above), by notifying each such creditor, via post, of the making of the orders and providing a link to a website where the creditor may download the orders and the Interlocutory Process;
		4. where a creditor is not a registered user on the Halo Platform and the Administrators do not have an email address for a creditor but have an email address for a trustee, custodian or other agent who represents or may act on behalf of that creditor, by notifying each such trustee, custodian or other agent, via email, of the making of the orders and providing a link to a website where the trustee, custodian, other agent or creditor may download the orders and the Interlocutory Process; and
		5. by placing scanned, sealed copies of the Interlocutory Process and the orders on the website maintained by the Administrators at https://www2.deloitte.com/au/en/pages/finance/articles/virgin-australiaholdings-limited-subsidiaries.html; and
	2. the Australian Securities and Investments Commission.
8. Any person who can demonstrate a sufficient interest have liberty to apply to vary or discharge the declaration in paragraph 1 and any orders made pursuant to paragraphs 4 to 18 above, on three (3) business day’s written notice to the Plaintiffs and to the Associate to Justice Middleton.
9. The Plaintiffs have liberty to apply on one (1) business day’s written notice to the Court in relation to any variation or discharge of the Court's orders.
10. The Plaintiffs' costs of the application be treated as costs in the administrations of each of the Virgin Companies, jointly and severally.
11. The hearing of the Plaintiffs' Interlocutory Process dated 7 August 2020 be adjourned until 11.15am on Monday, 17 August 2020.
12. The Court’s orders be entered forthwith.

**THE COURT NOTES THAT:**

1. Orders 8 to 18 do not apply to those creditors (or the debt or claim made by or on behalf of such creditors) who are USD Noteholders (as defined in Order 5 of the Orders made 11 August 2020 in respect of the Plaintiffs' Interlocutory Process dated 29 July 2020).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MIDDLETON J:

# INTRODUCTION:

1. On 12 August 2020 I made a number of orders on the application of the Plaintiffs in this proceeding. These are the reasons for those orders.
2. The Plaintiffs, including the First Plaintiffs, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (together, the ‘**Administrators**’) in their capacity as:
3. administrators of each of the Second to Fortieth Plaintiffs; and
4. the administrators of each of VAH Newco No 2 Pty Ltd (in liquidation) (Administrators Appointed) (‘**VAH Newco 2**’) and VB Investco Pty Ltd (in liquidation) (Administrators Appointed) (‘**VB Investco**’), the proposed Forty-First Plaintiff and Forty-Second Plaintiff respectively,

(together, the ‘**Virgin Companies**’), make an application to the Court by Interlocutory Process filed on 6 August 2020.

1. In support of their application, the Plaintiffs rely upon the affidavits of:
2. David Michael Orr sworn 29 July 2020 and 6 August 2020;
3. Vaughan Neil Strawbridge sworn 7 August 2020; and
4. Kassandra Suzann Adams sworn 7 August 2020.
5. The application seeks, in summary:
6. the joinder to the proceedings of VAH Newco 2 and VB Investco;
7. a further brief extension of the period in which the Administrators are to convene the second meetings of creditors of each of the Virgin Companies (the ‘**Convening Period**’) for the purposes of s 439A(5)(b) of the *Corporations Act 2001* (Cth) (the ‘**Corporations Act**’); and
8. orders with respect to the Halo Platform, including:
	1. to prescribe the dates by which creditors of the Virgin Companies must lodge proofs of debt or claim, proxies, or attorney forms on the Halo Platform; and
	2. to clarify that the Halo Platform may be used for voting purposes.

# JOINDER OF VAH NEWCO 2 AND VB INVESTCO

1. On 26 April 2019, Mr Hughes (one of the Administrators) was appointed as the liquidator of each of VAH Newco 2 and VB Investco pursuant to s 491(1) of the Corporations Act.
2. As explained in Mr Strawbridge’s evidence, on 30 July 2020, pursuant to orders made in Federal Court of Australia proceedings number NSD 818 of 2020 (the ‘**MVL Proceedings**’):
3. leave was granted for the Administrators to be appointed as joint and several administrators of each of VAH Newco 2 and VB Investco; and
4. the winding up of each of VAH Newco 2 and VB Investco was stayed until further order.
5. As noted in the reasons for judgment in the MVL Proceedings (*Hughes, in the matter of Vah Newco No. 2 Pty Ltd (in liq)* [2020] FCA 1121 at [18]-[20]), each of VAH Newco 2 and VB Investco:
6. have large (albeit likely contingent) liabilities to creditors, who are also creditors of a number of the other Virgin Companies; and
7. may be included as part of any deed of company arrangement proposal being advanced by BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd, entities associated with Bain Capital Private Equity LP and Bain Capital Credit LP (together, ‘**Bain Capital**’).
8. On 3 August 2020, in accordance with the orders made in the MVL Proceedings, the Administrators were appointed as joint and several administrators of each of VAH Newco 2 and VB Investco pursuant to s 436B of the Corporations Act. The Administrators’ intention is to hold the second meeting of creditors of VAH Newco 2 and VB Investco simultaneously with the second meeting of creditors of the other Virgin Companies (together, the **Second Meetings**).
9. In that regard, it was submitted that each of VAH Newco 2 and VB Investco ought to be joined to these proceedings as these entities will be subject to the proposed orders sought with respect to the Halo Platform and any other orders that may be sought in the proceedings in any future applications concerning the Virgin Companies as a whole.
10. I observed in *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* [2020] FCA 717 (‘***Virgin No 2***’) at [33]-[34], with respect to the earlier joinder of another of the Virgin Companies, that:

*Rule 9.05(1)(b)(iii) of the Rules (which applies by reason of r 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’.*

*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.*

1. For the same reasons, each of VAH Newco 2 and VB Investco should be joined to the proceedings.

# FURTHER EXTENSION OF THE CONVENING PERIOD

1. The Court has power to make orders under s 447A(1) of the Corporations Act to extend, on a subsequent occasion, the convening period for the second meeting of creditors of a company: *Lombe re Australian Discount Retail Pty Ltd* [2009] NSWSC 110 at [32]; *Chamberlain, in the matter of South Wagga Sports and Bowling Club Ltd (Administrator Appointed)* [2009] FCA 25 (‘***South Wagga Sports and Bowling Club***’); *ABC Learning Centres Limited, in the matter of ABC Learning Centres Limited; application by Walker (No 8)* [2009] FCA 994 at [53].
2. There are many occasions in which Courts have granted further extensions of the convening period (that is, after an initial extension): eg, *Mentha, in the matter of The Griffin Coal Mining Company Pty Ltd (administrators appointed) (No 2)* [2010] FCA 499 at [36]; *In the matter of Harrisons Pharmacy Pty Limited (Administrators Appointed) (Recs and Mngrs Apptd)* [2013] FCA 1102; *Owen, in the matter of RiverCity Motorway Pty Limited (Administrators Appointed) (Receivers and Managers Appointed) v Madden (No 5)* [2013] FCA 1443; *Gothard, in the matter of Sherwin Iron Ltd (Administrators Appointed) (Receivers and Managers Appointed) (No 2)* [2015] FCA 401 at [33]; *In the matter of Acquire Learning Pty Ltd (ACN 168 523 279) (administrators appointed), Acquire Learning & Careers Pty Ltd (ACN 159 509 323) (administrators appointed) and Acquire Retail Pty Ltd (ACN 167 927 693) (administrators appointed)* [2017] VSC 572 (‘***Acquire Learning***’); *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 4)* [2020] FCA 671 (‘***CBCH Group***’); *Billingsley (Administrator), in the matter of B K Chemists Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 1059.
3. The principles that apply when considering a further extension are the same as those that apply for any extension of the convening period: *South Wagga Sports and Bowling Club* at [9]; *Acquire Learning* at [12]; *Kaso, in the matter of Speedpanel Australia Ltd (Administrators Appointed) (No 2)* [2017] FCA 862 at [19]; *CBCH Group* at [25]. These principles are summarised in *Virgin No 2* at [64]-[68].
4. For the reasons that follow, I will make the orders sought to further extend the Convening Period.
5. First, the extension is only for a brief period of 13 days from 18 August 2020 (the present expiry date) to 31 August 2020 (the date now sought).
6. Secondly, the administration of the Virgin Companies has been complex and the report to creditors in advance of the Second Meeting, pursuant to r 75-225 of the *Insolvency Practice Rules 2016* (Cth) (the ‘**IPR**’), will be detailed. Consequently, the Administrators wish to ensure that the report to creditors accurately and comprehensively summarises the affairs of the Virgin Companies and the sale process which culminated in the sale and implementation deed concluded between the Virgin Companies and Bain Capital.
7. Thirdly, the extension will permit the Administrators to issue their report to creditors eight business days ahead of the Second Meeting (which is greater than the statutory minimum of five business days likely to be provided in the absence of an extension). This will provide the creditors with more time to consider the contents of the report and make an informed decision, at the Second Meeting, on the future of the Virgin Companies.
8. Fourthly, the extension sought will address, in large part, the timing concerns raised by the solicitors for Bank of New York Mellon, the trustee named in the indenture for the USD denominated bonds, and facilitate the timing of voting by the USD Noteholders (which is administered through the Depositary Trustee Company process in the United States).
9. Fifthly, given the interaction of the dates by which the Administrators seek to require creditors to lodge, on the Halo Platform, both their proofs of debt or claims and their proxy or attorney forms (as to which, see below), the provision of the report to creditors with more notice in advance of the Second Meetings will provide creditors with greater time, following receipt of the report, to lodge proofs of debt and proxy forms.
10. Sixthly, following the entry into the transaction with Bain Capital, discussions have been ongoing between Bain Capital and its representatives and a range of contractual counterparties and stakeholders, as part of the proposed completion of the transaction. The relatively short extension of the Convening Period sought would assist in enabling these negotiations to be finalised in advance of the Second Meetings.
11. Seventhly, the Committee of Inspection has been notified of the proposed extension sought and no member of that Committee has expressed any disagreement.
12. Eighthly, the Noteholder Consultative Committee (the ‘**NCC**’) has been notified of the proposed extension sought and no member of the NCC has expressed any disagreement.
13. Ninthly, there is not likely to be any prejudice to creditors from a further brief extension as Bain Capital has assumed economic risk for the business conducted by the Virgin Companies on and from 1 July 2020 and is funding the ongoing trading of the business. Accordingly, the net assets realised before that date for the benefit of creditors have been preserved, and a modest extension of the convening period will not expose the Virgin Companies to any additional financial risk and are funded to meet all trading liabilities.

# PROPOSED MODIFICATION OF THE INSOLVENCY PRACTICE RULES AND ASSOCIATED FURTHER DIRECTIONS WITH REGARD TO THE HALO PLATFORM

1. Section 90-15 of the Insolvency Practice Schedule (Corporations) 2016 (the ‘**IPSC**’) (being Sch 2 to the Corporations Act) confers power to make orders modifying the operation of the IPSC and the IPR and, generally, to give directions to external administrators.
2. In *In the matter of Hawden Property Group Pty Ltd (in liq) (ACN 003 528 345)* [2018] NSWSC 481 at [8], Gleeson JA (sitting at first instance) noted that:

*In* Walley, In the Matter of Poles & Underground Pty Ltd (Admin Apptd) *[2017] FCA 486 at [41], Gleeson J remarked that the question of whether to exercise the power in s 90-15 was “to be answered by reference to the principles applied to the exercise of the discretions previously contained in s 479(3) and s 511 of the Act”. That may be accepted insofar as the external administrator seeks the directions of the Court, but the power under s 90-15 to “make such orders as it thinks fit in relation to the external administration of a company” (s 90-15(1)) including “an order determining any question arising in the external administration of a company” (s 90-15(3)(a)), is wider and accommodates the determination of substantive rights. Of course, the Court would not do so without affording potentially affected parties an opportunity to be heard:* Meadow Springs Fairway Resort Ltd (in liq) v Balance Securities Ltd *[2007] FCA 1443, at [49]-[51] (French J, referring to* Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd *(1994) 49 FCR 334 at 352 (Northrop J));* Re Willmott Forests Ltd (No 2) *[2012] VSC 125; (2012) 88 ACSR 18 at [45]-[46] (Davies J*); In the Matter of ICS Real Estate Pty Ltd (in liq) *[2014] NSWSC 479 at [25] (Brereton J).*

1. In *Hutson (liquidator), in the matter of WDS Limited (in liq) (Receivers and Managers Appointed)* [2020] FCA 299 at [66], Markovic J made similar observations:

*The Court’s power to make orders under s 90-15(1) is unconstrained:* Deputy Commissioner of Taxation v Italian Prestige Jewellery Pty Ltd (in liq) *(2018) 129 ACSR 115; [2018] FCA 983 at [36]. The subsection “contains no express words of limitation” and is “intended to facilitate the performance of a liquidator’s functions”:* Re Octaviar Ltd (in liq) *[2019] QSC 235 at [10].*

1. The power to give directions to an administrator under repealed s 447D(1) of the Act is now conferred by s 90-15 of the IPSC: *Reidy, In the Matter of eChoice Limited (Administrators Appointed)* [2017] FCA 1582 at [27]; *El-Saafin v Franek (No 2)* [2018] VSC 683 (‘***El-Saafin***’) at [110].
2. The function of an application for directions is to give an administrator advice as to the proper course of action to take in the administration. As Goldberg J explained in *Re Ansett Australia Limited and Korda (No 3)* (2002) 115 FCR 409 at [44]:

*When liquidators and administrators seek directions from the Court in relation to any decision they have made, or propose to make, or in relation to any conduct they have undertaken, or propose to undertake, they are not seeking to determine rights and liabilities arising out of particular transactions, but are rather seeking protection against claims that they have acted unreasonably or inappropriately or in breach of their duty in making the decision or undertaking the conduct. They can obtain that protection if they make full and fair disclosure of all relevant facts and circumstances to the Court. In* Re G B Nathan & Co Pty Ltd *(1991) 24 NSWLR 674, McLelland J said at 679-680:*

The historical antecedents of s 479(3) ..., the terms of that subsection and the provisions of s 479 as a whole combine to lead to the conclusion that the only proper subject of a liquidator’s application for directions is the manner in which the liquidator should act in carrying out his functions as such, and that the only binding effect of, or arising from, a direction given in pursuance of such an application (other than rendering the liquidator liable to appropriate sanctions if a direction in mandatory or prohibitrary form is disobeyed) is that the liquidator, if he has made full and fair disclosure to the court of the material facts, will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributory or to the company in respect of anything done by him in accordance with the direction.

*Modern Australian authority confirms the view that s 479(3) ‘does not enable the court to make binding orders in the nature of judgments’ and that the function of a liquidator’s application for directions ‘is to give him advice as to his proper course of action in the liquidation; it is not to determine the rights and liabilities arising from the company’s transactions before the liquidation’…*

1. The applicable principles were most recently summarised by Stewart J in *Krejci, in the matter of Union Standard International Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 1111 as follows, at [7]-[11]:

*A court is empowered by s 90-15(1) of the Insolvency Practice Schedule to “make such orders as it thinks fit in relation to the external administration of a company”. The power conferred by s 90-15(1) is “very broad”:* Kelly (in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 8) *[2020] FCA 533; 144 ACSR 292 at [51] (Gleeson J). It includes a power to make orders determining any question arising in the external administration of a company: s 90-15(3)(a). An administrator of a company may apply for such an order: s 90-20(1)(d), read with s 9 of the Act (paragraph (d) of the definition of “officer”).*

*The court’s power under s 90-15(1) includes a power to give directions about a matter arising in connection with the performance or exercise of an administrator’s functions or powers:* Reidy, in the matter of eChoice Ltd (Administrators Appointed) *[2017] FCA 1582 at [26]-[27] (Yates J). In this respect, s 90-15(1) confers a power to give directions that was previously conferred by ss 447D(1) and 479(3) of the Act concerning administrators and liquidators, respectively: see* Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth *[2019] HCA 20; 93 ALJR 807 at [166] (Gordon J); Reidy at [27] (Yates J); and* Kelly (liquidator), in the matter of Australian Institute of Professional Education Pty Ltd (in liq) *[2018] FCA 780 at [30] (Gleeson J). The principles governing directions to administrators and those governing directions to liquidators are relevantly analogous:* Re Ansett Australia Ltd (No 3) *[2002] FCA 90; 115 FCR 409 at [43] (Goldberg J).*

*The function of a judicial direction of this kind is not to determine rights and liabilities arising out of a particular transaction, but to confer a level of protection on the administrator. An administrator who acts in accordance with a judicial direction, having made full and fair disclosure to the court of the material facts, has “protection against claims that they have acted unreasonably or inappropriately or in breach of their duty in making the decision or undertaking the conduct” proposed: Ansett at [44].*

*A court may give a direction on an issue of “substance or procedure” or “of power, propriety or reasonableness”:* Ansett *at [65]. Although a court will not give a direction on a decision that is purely commercial, a direction may be provided where there is a “particular legal issue raised for consideration or attack on the propriety or reasonableness of the decision in respect of which the directions are sought”:* Ansett *at [65]. As Black J observed in In the matter of* RCR Tomlinson Ltd (administrators appointed) *[2018] NSWSC 1859, a decision may have a “commercial character” but nonetheless be amenable to judicial direction. His Honour said (at [14]) of the application before him (which sought a direction as to whether a company should borrow loan funds):*

The Court has been prepared to give directions of this kind, where the decision is a complex one, and where it has to be made, as here, under circumstances of time pressure, in respect of a very large corporate group, and by balancing different interests. The Court’s preparedness to grant such a direction in those circumstances reflects the intrinsic unfairness of leaving a voluntary administrator to be at risk of liability, in respect of a complex decision of that kind, where any decision that is made, including making no decision, will have inevitable risks for some or all of the affected constituencies.

*Because the effect of a direction under s 90-15 is to exonerate the liquidator or administrator if full disclosure is made, it will usually necessitate consideration by the court of the liquidator’s or administrator’s reasons and decision making process: see* Re ONE.TEL Ltd *[2014] NSWSC 457; 99 ACSR 247 at [36] per Brereton J (referring to former s 511 of the Act).*

1. The proposed application of the Halo Platform to the administrations (including the adjudication of proofs of debt or claims and the voting process), and the prescription of dates by which proofs of debt and proxies must be lodged, are matters of procedure. This is an appropriate subject matter on which directions may be given by the Court under s 90-15 of the IPSC: *El-Saafin* at [113]; *In the matter of Equiticorp Australia Ltd (in liq) and Ors* [2020] NSWSC 143 at [45] (Gleeson JA, sitting at first instance).
2. Details of the Halo Platform are identified in Mr Orr’s evidence (which I accept) and were summarised in the Administrators’ written submissions dated 29 July 2020.
3. An earlier application sought orders that the Administrators would be justified in:
4. requiring creditors to register on the Halo Platform;
5. utilising the Halo Platform to communicate with creditors as to proofs of debt and the adjudication process; and
6. ascertaining who is a creditor of any of the Virgin Companies for voting purposes at the Second Meetings based on the material provided by persons or otherwise entered in the Halo Platform.
7. This further application concerning the Halo Platform seeks orders that:
8. the Administrators would be justified in:
	1. permitting only those persons who have lodged, on the Halo Platform, particulars of a debt or claim in the administrations, by 5.00pm on the fifth business day before the Second Meetings are held (the ‘**POD Lodgement Date**’), to participate and vote at the Second Meetings;
	2. otherwise disregarding a debt or claim not lodged on Halo by the POD Lodgement Date;
9. the IPR operate such that creditors who wish to participate or vote on resolutions at the Second Meetings (other than persons not voting by proxy or attorney), must lodge, on the Halo Platform, a specific proxy form and an appointment of power of attorney by 5.00pm on the third business day before the Second Meetings are held (the ‘**Proxy Lodgement Date**’);
10. the Administrators would be justified in:
	1. permitting only those persons who have lodged, on the Halo Platform, a specific proxy form and an appointment of power of attorney by the Proxy Lodgements Date, to participate and vote by proxy or attorney at the Second Meetings;
	2. entering the proxy or attorney details submitted by a person to the Administrators into the Halo Platform and registering the relevant creditor’s details on the Halo Platform;
	3. otherwise disregarding specific proxy form and an appointment of power of attorney not lodged on Halo by the Proxy Lodgement Date;
11. the requirements of rr 75-25 and 75-35(2) of the IPR will be satisfied by the Administrators including a link, in their report, to an electronic appointment of proxy or attorney form on the Halo Platform;
12. a poll is to be taken at the Second Meetings by tallying votes lodged on the Halo Platform (as being suitable technology to take such a poll); and
13. the Second Meetings be held by Microsoft Teams technology and the creation of an event on the Halo Platform.
14. The evidentiary basis for these orders is set out in Mr Orr’s evidence.
15. For the reasons that follow, I am of the view that the orders sought should be made.
16. First, the Halo Platform is a practical way of assisting the Administrators to manage the very large number of creditors in the administrations.
17. Secondly, in circumstances where customers whose flights were cancelled due to the COVID-19 pandemic may also seek to lodge claims or proofs in the administrations, the Administrators could confront a situation of hundreds of thousands of creditors in total. In order to manage a creditor pool of that size, it is necessary to impose cut-off dates by which both proofs and proxy, and attorney forms must be lodged (otherwise the Administrators may be unable to cope with a significant number of proofs or proxies lodged immediately prior to the Second Meetings).
18. In that regard, r 75-225(2)(b)(vii) of the IPR envisages that the report to creditors may specify the date by which such proofs and proxies are to be submitted. The orders sought are in conformity with this principle, in that they require creditors to take these steps by lodging the claim or form, on the Halo Platform, by a particular date (and otherwise disregarding the proofs or proxies). Such a direction was provided by Brereton J (as his Honour then was) in *In the matter of SurfStitch Group Limited* [2018] NSWSC 164, where his Honour noted at [13]:

*In my view, it is implicit in clause 2(g) [Corporations Regulation, reg 5.3A.03AB(2)(g), the then equivalent of section 75-225(2)(b)(vii) of the IPR] that proofs and proxies submitted after the specified time are not validly submitted and may be disregarded. While I do not consider it appropriate to engage s 447A to modify the operation of Part 5.3A in this respect, lest there be doubt I am prepared to advise the administrators, under (former) s 447D, that they would be justified in rejecting proofs and proxies received after the date and time so specified.*

1. Thirdly, the proposed POD Lodgement Date and Proxy Lodgement Date provide sufficient time for the creditors to lodge requisite forms on Halo after receipt of the report to creditors (which is envisaged to be issued eight business days before the Second Meetings (assuming that the Convening Period is further extended)). In the case of the POD Lodgement Date, creditors will have three business days from receipt of the report to lodge their proofs of debt or claims (which will enable them to register as a creditor). In the case of the Proxy Lodgement Date, creditors will have five business days from receipt of the report to lodge their proxy or attorney forms (which will enable them to vote on their preferred resolutions).
2. Finally, the evidence establishes that the combination of Microsoft Teams technology and the Halo Platform permits the Second Meetings to be adequately conducted and carried on by audio-visual means. Such electronic platforms are necessary in the light of the current COVID-19 pandemic which will preclude the possibility of a physical meeting.

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| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Middleton. |

Associate:

Dated: 18 August 2020

SCHEDULE OF PARTIES

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|  | NSD 464 of 2020 |
| Plaintiffs |  |
| Fourth Plaintiff: | VIRGIN AUSTRALIA INTERNATIONAL HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) ACN 155 860 021 |
| Fifth Plaintiff: | VIRGIN AUSTRALIA INTERNATIONAL AIRLINES PTY LTD (ADMINISTRATORS APPOINTED) ACN 125 580 823 |
| Sixth Plaintiff: | VIRGIN AUSTRALIA AIRLINES (SE ASIA) PTY LTD (ADMINISTRATORS APPOINTED) ACN 097 892 389 |
| Seventh Plaintiff: | VIRGIN AUSTRALIA AIRLINES HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) ACN 093 924 675 |
| Eighth Plaintiff: | VAH NEWCO NO.1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 160 881 345 |
| Ninth Plaintiff: | TIGER AIRWAYS AUSTRALIA PTY LIMITED (ADMINISTRATORS APPOINTED) ACN 124 369 008 |
| Tenth Plaintiff: | VIRGIN AUSTRALIA AIRLINES PTY LTD (ADMINISTRATORS APPOINTED) ACN 090 670 965 |
| Eleventh Plaintiff: | VA BORROWER 2019 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 633 241 059 |
| Twelfth Plaintiff: | VA BORROWER 2019 NO. 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 637 371 343 |
| Thirteenth Plaintiff: | VIRGIN TECH PTY LTD (ADMINISTRATORS APPOINTED) ACN 101 808 879 |
| Fourteenth Plaintiff: | SHORT HAUL 2018 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 622 014 831 |
| Fifteenth Plaintiff: | SHORT HAUL 2017 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 617 644 390 |
| Sixteenth Plaintiff: | SHORT HAUL 2017 NO. 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 617 644 443 |
| Seventeenth Plaintiff: | SHORT HAUL 2017 NO. 3 PTY LTD (ADMINISTRATORS APPOINTED) ACN 622 014 813 |
| Eighteenth Plaintiff: | VBNC5 PTY LTD (ADMINISTRATORS APPOINTED) ACN 119 691 502 |
| Nineteenth Plaintiff: | A.C.N. 098 904 262 PTY LTD (ADMINISTRATORS APPOINTED) ACN 098 904 262 |
| Twentieth Plaintiff: | VIRGIN AUSTRALIA REGIONAL AIRLINES PTY LTD (ADMINISTRATORS APPOINTED) ACN 008 997 662 |
| Twenty-first Plaintiff: | VIRGIN AUSTRALIA HOLIDAYS PTY LTD (ADMINISTRATORS APPOINTED) ACN 118 552 159 |
| Twenty-second Plaintiff: | VB VENTURES PTY LTD (ADMINISTRATORS APPOINTED) ACN 125 139 004 |
| Twenty-third Plaintiff: | VIRGIN AUSTRALIA CARGO PTY LTD (ADMINISTRATORS APPOINTED) ACN 600 667 838 |
| Twenty-fourth Plaintiff: | VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 |
| Twenty-fifth Plaintiff: | VA HOLD CO PTY LTD (ADMINISTRATORS APPOINTED) ACN 165 507 157 |
| Twenty-sixth Plaintiff: | VA LEASE CO PTY LTD (ADMINISTRATORS APPOINTED) ACN 165 507 291 |
| Twenty-seventh Plaintiff: | VIRGIN AUSTRALIA 2013-1 ISSUER CO PTY LTD (ADMINISTRATORS APPOINTED) ACN 165 507 326 |
| Twenty-eighth Plaintiff: | 737 2012 NO.1 PTY. LTD (ADMINISTRATORS APPOINTED) ACN 154 201 859 |
| Twenty-ninth Plaintiff: | 737 2012 NO. 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 154 225 064 |
| Thirtieth Plaintiff: | SHORT HAUL 2016 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 612 766 328 |
| Thirty-first Plaintiff: | SHORT HAUL 2016 NO. 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 612 796 077 |
| Thirty-second Plaintiff: | SHORT HAUL 2014 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 600 809 612 |
| Thirty-third Plaintiff: | SHORT HAUL 2014 NO. 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 600 878 199 |
| Thirty-fourth Plaintiff: | VA REGIONAL LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 127 491 605 |
| Thirty-fifth Plaintiff: | VB 800 2009 PTY LTD (ADMINISTRATORS APPOINTED) ACN 135 488 934 |
| Thirty-sixth Plaintiff: | VB LEASECO NO 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 142 533 319 |
| Thirty-seventh Plaintiff: | VB LH 2008 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 280 354 |
| Thirty-eighth Plaintiff: | VB LH 2008 NO. 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 288 805 |
| Thirty-ninth Plaintiff: | VB PDP 2010-11 PTY LTD (ADMINISTRATORS APPOINTED) ACN 140 818 266 |