

# Virgin Australia - Lessor Q&A

Set out below is a series of questions and answers in relation to the key issues arising out of the Aircraft Protocols. It is intended to assist the Lessors and Financiers to understand the principles which underpin the Aircraft Protocols.

## Matters relating to liability of the Administrators and the Lessees

1. *Why is 26 May 2020 a critical date for the Aircraft Protocols?*

On 24 April 2020 various orders were made by Justice Middleton in relation to the Administration, including that pursuant to sections 443B(8) and 447A(1) of the Corporations Act, the Administrators' personal liability for leased property under sections 443A(1)(c) and 443B(2) of the Corporations Act begins on 26 May 2020. Therefore, while the Administrators are currently not personally liable for any property leased, used or occupied by the Virgin Group (which includes all leased aircraft), unless the Aircraft Protocols are entered into by 26 May 2020, the Administrators will become personally liable from that time. The revised Aircraft Protocols will make it clear that the Administrators will have no liability for the obligations of the Virgin Group companies under the leases, and that the liability of the Administrators under the Aircraft Protocols will be limited to the assets of the relevant Lessee from which they are actually indemnified.

2. *What happens if the Aircraft Protocols are not signed by 26 May 2020?*

If the Administrators form the view that the Aircraft Protocols will not be signed by 26 May 2020, then they will need to make an application to the Court to extend the time period under section 443B of the Corporations Act or potentially to not adopt those Aircraft that are not yet the subject of an Aircraft Protocol.

Having regard to the significant debts and obligations that would be imposed by continuing to use the leased aircraft, and the impact of the COVID-19 travel restrictions on the revenue of the Virgin Group, the Administrators are not able to take on personal liability for liabilities that arise in relation to those debts and obligations, even if recourse to the Administrators is limited to the assets of the relevant members of the Virgin Group.

Therefore, if an Aircraft Protocol is not signed, or an order to extend the time period under section 443B of the Corporations Act is not obtained, the Administrators will not utilise the relevant aircraft, such aircraft will remain grounded and the Administrators may be forced to notify you that under section 443B(3) of the Corporations Act that they will not be adopting the relevant aircraft.

3. *What happens to rentals accruing on the underlying lease agreements if the Aircraft Protocols are not signed?*

The liabilities for those rentals continue to accrue as liabilities of the relevant Virgin Group companies. However, as noted above, if the Aircraft Protocols are not signed the Administrators are not able to take on personal liability for liabilities that arise in relation to those debts and obligations, even if recourse to the Administrators is limited to the assets of the relevant members of the Virgin Group. In the circumstances, unless the Administrators were to obtain orders further extending the time periods under section 443B they may be forced to issue notices under section 443B(3) for the affected Aircraft and accordingly it is unlikely that the relevant aircraft would form part of the assets to be included as part of the sale and recapitalisation process.

4. *Can you explain to me the issues around Administrators' liability for rentals and other payment obligations?*

There are approximately 117 leased aircraft and engines in the Virgin Group fleet, providing an aggregate monthly rental liability of around \$40 million. Due to the COVID-19 travel restrictions, only approximately 50 of the aircraft are operational. Of those, only approximately 27 of the aircraft are generating revenue. The remaining aircraft are grounded in long-term parking. Virgin currently generates approximately \$25m in gross revenue from Aircraft use per month. This revenue is before associated direct costs including fuel, wages, landing charges, navigation charges and air services fees.

Given that the liabilities in respect of the leased aircraft far exceed any net revenue being generated, the Administrators are not able to take on personal liabilities for those liabilities, or to have them accrue as liabilities in the Administration.

5. *What are the Administrators requesting in relation to accrued rentals on the underlying lease agreements, and why is this request being made?*

The Administrators are requesting that accrued rentals on the underlying lease agreements are not liabilities of the Administrators. This is because due to the COVID-19 travel restrictions, there is insufficient revenue being generated to meet the rental obligations under the lease agreements.

While the legal effect is a matter for you to receive advice on from your lawyers, the document is not intended to prevent the rentals accruing as a liability of the Lessee, although they will not be a liability of the Administrators.

6. *How do the court orders obtained on 13 May 2020 and 15 May 2020 affect you?*

The court orders obtained on 13 May 2020 and 15 May 2020 covered a number of different matters affecting the administration. Two were of relevance to Lessors:

#### Extension of Convening Period

An order was obtained pursuant to section 439A(6) of the Corporations Act that the convening period defined in section 439A(5)(b) of the Corporations Act be extended until 18 August 2020. This was to reflect the current view of the Administrators that the continuing trading of the Virgin Group business as a going concern during the administration period with a view to a sale of the business and assets of the companies may result in a better return to creditors. The view is that the extension of the period will enable the sale process to be finalised. The extension of the convening period was also required more generally due to the size and complexity of the Virgin Group and the administration process.

#### Limitation of Administrators' Liability

An order was obtained pursuant to section 447A(1) that liabilities of the Administrators incurred with respect to any obligations arising out of, or in connection with, any Aircraft Protocol are in the nature of debts incurred by the Administrators in the performance and exercise of their functions as joint and several administrators of the Virgin Companies. Further, that the Administrators will not be personally liable to repay such debts or satisfy such liabilities to the extent that the assets of the particular Virgin Company party to the Aircraft Protocol are insufficient to satisfy the debt and liabilities incurred by the Administrators arising out of, or in connection with, the Aircraft Protocol. Similar orders were obtained in relation to a range of agreements the Administrators are entering into as part of the Administration.

It is intended that the Aircraft Protocol will contain a limitation of liability clause that reflects any order made by the court. The order would not affect a lessor or financier until the relevant Aircraft Protocol had been signed and does not extend the time periods under section 443B.

7. *Why are we asking for a standstill in light of the stay afforded to the Administrators under section 440B?*

The standstill is required by the Administrators to ensure that they are able to maintain and preserve the assets of the Virgin Group without risk that any Lessor or Finance Party will seek to take action and enforce any rights it may have in connection with defaults under the lease agreements. While section 440B of the Corporations Act provides some comfort to the Administrators in certain of the leasing structures utilised by the Virgin Group, it is not applicable to all of the associated financing arrangements and there may be other actions that the Lessors or Finance Parties can take which will impact on the ability of the Administrators to stabilise the fleet available to the Virgin Group. It is not intended to prevent presentation of letters of credit or bank guarantees and this will be made clear in future drafts of the Aircraft Protocol.

8. *Are we seeking to switch off the ongoing liability of the Lessee for rentals?*

No. What is being proposed is that rentals will not be a liability of the Administrators. We expect that payment of any rental liabilities (together with any other accrued costs and replacement of bank guarantees or letters of credit) will be a matter which will be discussed with the successful bidder and an agreement sought to be reached with that successful bidder as to the payment terms.

9. *Why does the Aircraft Protocol need to apply instead of the leases for the period of the Administration, as between the Administrators and you?*

Having regard to the COVID-19 travel restrictions and the material impact that is having on the revenue of the Virgin Group, the Administrators have very carefully considered what obligations in connection with the aircraft that they are able to meet during the period of the Administration. The Administrators in particular have carefully considered and worked closely with the Virgin engineering team to ensure that these obligations include matters which are critical to the Lessors, including insurance and maintenance. However, as a result of the grounding of a significant part of the fleet and the ongoing COVID-19 travel restrictions, the Administrators are not able to perform all obligations under the leases. For that reason they are seeking to enter into the Aircraft Protocol and have those obligations apply instead of those contained in the leases.

The rationale for this approach is that the Administrators are focussed on preserving and maintaining the assets of the Virgin Group to allow for a recapitalisation and sale process to take place.

## **Repossession**

10. *Why does a Cape Town Date of 19 June 2020 not work and why have we asked for 31 August 2020?*

It is important for the recapitalisation and sale process that the Administrators are afforded the opportunity to preserve and maintain the assets of the Virgin Group. While the Administrators and potential purchasers are working on an accelerated basis for the sale process, the recapitalisation and sale process will not have concluded by 19 June 2020. As such, the Administrators require an extended period during which the Lessors will not exercise their rights under the Cape Town Convention. If requested, the Administrators

will consider other proposals that include a series of milestones, but ultimately it is important to the sale process that the fleet remain available to the purchaser.

11. *What protection do you have if we extend the Cape Town Date to 31 August 2020?*

As a practical matter the Administrators would not look to retain aircraft not required in the fleet for longer than necessary, as there is a material cost in undertaking the obligations in the draft Aircraft Protocols. Upon certain defaults by the Administrators or the Administrators giving a notice under section 443B(3) of the Corporations Act in respect of the relevant aircraft, you could repossess your Aircraft despite the extended period.

12. *What are the benefits to you of extending the Cape Town Date?*

Preserving and maintaining the assets of the Virgin Group, including retention of leased aircraft, will assist with the recapitalisation and sale process. It is expected that this approach will enhance the prospect of ongoing use of the relevant aircraft following the recapitalisation and sale process, and will facilitate Lessors and Finance Parties being part of the negotiations with the successful bidder. This is particularly important for Lessors and Finance Parties in the current uncertain market for aircraft.

13. *What is expected to occur around 19 June 2020 and how does this affect repossession?*

19 June 2020 is the date that Lessors who have rights under the Cape Town Convention would be entitled to take possession of their aircraft.

If no agreement is reached to extend that period, then the relevant Lessors and Finance Parties would be entitled to take possession of their aircraft, which may materially impact the recapitalisation and sale process.

The Administrators are expecting to have final bids by or around that date, and a sudden repossession of the Aircraft may result in those bids being withdrawn.

14. *Under the Cape Town Convention the Administrators must preserve the aircraft during the waiting period. Will that be covered if the Cape Town Date is extended until 31 August 2020?*

The Administrators will comply with all of the usage, maintenance and insurance obligations contained in the Aircraft Protocol during the period of the Administration.

15. *What will happen if we do not adopt the contract for your aircraft?*

If we do not adopt your aircraft, then this would have the effect of the Lessee repudiating the relevant lease agreement and the Lessor would be entitled to terminate the relevant lease agreement. The aircraft or engine will not be used by the Lessee in operations after the date you are notified that it will not be adopted. Whether previously operational or parked, at the time of the relevant notice the location of the aircraft or engine will be confirmed to the Lessor by the Administrator in the notice. The relevant Virgin Group operating entity will remove itself as the registered operator of the aircraft with CASA (CASA Form 032), and the aircraft will be removed from the relevant Air Operator's Certificate (CASA Form 853), thereby cancelling operator responsibility for maintenance and airworthiness. Any outstanding claims under the lease agreement would then be unsecured claims in the administration.

## **Next Steps once Aircraft Protocols signed**

16. *What are next steps in the Voluntary Administration once the Aircraft Protocols are signed?*

As you are aware, a sale process has been commenced. It is expected that non-binding indicative offers will be provided in mid-May with binding offers due mid-June. Any deed of company arrangement will be progressed leading up to the second meeting of creditors in early August.

The time periods may of course slip and the Administrators would seek some flexibility around these time periods. We expect that once a preferred bidder is selected then there will be a process for Lessors and the preferred bidder to engage in respect of the lease arrangements.

17. *Will different bidder proposals be shared with Lessors?*

No. The identity of, and details of the offer made by, the various bidders will not be shared with the Lessors, nor will any short-list of bidders be shared with the Lessors. This is to maintain the integrity of the sale process. We expect that only the identity of the preferred bidder will be advised, and it will be the preferred bidder that the Lessors may then engage with.

18. *When will I be told if my aircraft is needed by the new owners?*

In the Aircraft Protocol we have undertaken to use reasonable endeavours to identify as soon as practicable whether any aircraft is surplus to business requirements, and to notify the Lessor and Finance Parties as soon as reasonably practicable after such a determination is made. It may be the case that this occurs in multiple phases, in order to provide maximum optionality to the new owner as the administration and recapitalisation process unfolds. We expect that the new owner will be developing a plan for the size and shape of the fleet during the sale process.

19. *How do I engage with the preferred bidder and when will this happen?*

We will continually update the Lessor group on the progress of the sale process. Once a preferred bidder is selected, we will provide an update and further details on the process of engaging with that preferred bidder in connection with the lease arrangements.

20. *Will I negotiate a new lease agreement and/or financing arrangements bilaterally with the preferred bidder?*

While it is the intention that any lease agreement in place will continue after the recapitalisation and sale process is completed, as part of any negotiation with the preferred bidder in connection with any Lessor rights following the end of the standstill period, it may be that amendments are agreed.

21. *Will I be made whole by the new owner for unpaid amounts?*

Any rights (including rights for payment of unpaid amounts) in connection with any lease agreement that continues after the recapitalisation and sale process is completed will continue, and so an agreement will need to be reached with the new owner in connection with the payment of those unpaid amounts.

22. *What happens to my aircraft if there is no preferred bidder?*

In the event that no preferred bidder is selected or no binding implementation deed is entered into, the Administrators will need to explore other ways to discharge their duties to the creditors. This might include liquidating the companies and disclaiming all aircraft.

23. *How much notice will I be given by the new owners if my aircraft is not required?*

As noted above, in the Aircraft Protocol we have undertaken to use reasonable endeavours to identify as soon as practicable whether any aircraft is surplus to business requirements, and to notify the Lessor and Finance Parties as soon as reasonably practicable after such a determination is made. It is difficult to advise with any certainty at this stage the precise timetable for such notice being given by the new owner, however given the potential liabilities associated with the lease agreements and the importance of the fleet, we expect that the new owner will be finalising its plans in parallel with the finalisation of the binding implementation deed.

24. *Are the Administrators going to provide more records (including historic records) and why have these not yet been provided?*

As you will appreciate it has been a big task to collate and upload relevant documents relating to all aircraft. The Administrators have focussed on providing critical information requested. It is intended that the signed Aircraft Protocols will include a timeframe for providing historic information.

25. *Can I repossess my aircraft if I don't want to be part of the new owner's business?*

Yes, unless the new owner causes the Virgin Group to make good all ongoing defaults including unpaid rentals.

### **Metal related matters**

26. *What is the current status of the fleet generally?*

Of the around 117 leased aircraft and engines in the Virgin Group fleet, only approximately 50 of the aircraft are operational. Of those, only approximately 27 of the aircraft are generating revenue. The remaining aircraft are grounded in long-term parking.

27. *Why do we think our approach to Adequate Protection Payments is appropriate, and have we modified this approach having regard to the comments received from various Lessors and Finance Parties?*

The Adequate Protection Payments mechanism which has been proposed has been carefully considered and developed by the Administrators in conjunction with the Virgin management. It seeks to recognise and compensate Lessors for the use of their aircraft in a manner which is appropriate given the revenue restrictions of the Virgin Group in the COVID-19 environment. We confirm that the mechanism sought to address concerns which had been raised by Lessors and Finance Parties and so those concerns have been taken into consideration.

28. *Why is it only preservation / reserve type payments for use of an aircraft that are being made during the Administration?*

Given COVID-19 travel restrictions and the significant impact on revenue due to the grounding of a majority of the Virgin fleet, normal course rental payments are not able to be paid during the Administration and so the Administrators have sought to have those normal course rental payments deferred. The payments to be made under the Adequate Protection Payments seek to compensate the relevant Lessor for the use of the aircraft in a manner reflecting the current circumstances and travel environment.

29. *Why can the Administrators not undertake to return my engines to my airframe during the administration?*

For the reasons outlined above there is not sufficient funding available to the Administrators to undertake capital-intensive activities such as an engine swap program.

Further, the use of the engines throughout the fleet is reflective of usual operating practice which we expect would continue following the recapitalisation and sale process.

30. *What is the intended process to return my engine to my airframe?*

The Administrators are not intending to return any engines to airframes at this time, for the reasons outlined above. If an aircraft is not adopted by the Administrators, then the correct engine would be made available for repossession.

31. *Why will the Administrators not perform heavy maintenance?*

For the reasons outlined above there is not sufficient funding available to the Administrators to undertake capital-intensive activities such as heavy maintenance.

32. *Does this mean that maintenance won't be performed in accordance with my lease agreement?*

Heavy maintenance that would otherwise be due to be performed during the Administration will be deferred until after the recapitalisation and sale process is completed but other maintenance will take place in accordance with the terms of the Aircraft Protocol.

33. *Why can we not agree in the protocol to comply with all the metal related undertakings in the underlying lease and loan documents, and why have we sought to refer to certain specific undertakings?*

At the time that the Administrators were appointed to the Virgin Group there were already significant COVID-19 travel restrictions in place which have continued during the Administration. As a result of this, the majority of the Virgin fleet was grounded and in long-term parking at the commencement of the administration, and this continues. The Administrators need to ensure that the obligations that they assume during the Administration are able to be satisfied, having regard both to the COVID-19 travel restrictions and also the constrained revenue. Therefore, they have proposed a consistent set of undertakings relating to the aircraft across all Aircraft Protocols. These undertakings have been developed in conjunction with the Virgin engineering team to ensure that all critical concerns of the Lessors and Finance Parties are addressed where possible.

As has been previously advised, it is the same Virgin team that is responsible for your aircraft now as the team that was responsible for your aircraft prior to the appointment of the Administrators and the Administrators have not sought to change the manner in which that team operates.

34. *Why can we not undertake to comply with some of the requests that have been made of us in relation to the ongoing usage of aircraft?*

As above, due to the COVID-19 travel restrictions and the constrained revenue position, the Administrators are not able to comply with all requests in respect of ongoing usage of the aircraft. The Aircraft currently in use are part of the scheduling and planning relating to the flight services that continue to be provided to the Virgin Group's customers and accordingly decision relating to the use or non-use of aircraft need to be made by the operations teams of the group.

35. *Can we continue to remarket aircraft during the Administration?*

Yes, but ultimately if an aircraft was agreed by you and the buyer to be retained in the group, or if all defaults were ultimately cured by the Virgin Group then that aircraft would not be available to another user.

36. *If I have the opportunity to remarket my aircraft, will I be prevented from taking my aircraft?*

Yes. If you have entered into an Aircraft Protocol, you will not be entitled to repossess your aircraft other than in accordance with the circumstances where it is permitted under the terms of the Aircraft Protocol.

37. *What will happen if there are liens over my assets?*

We intend to work with any Lessor to procure the withdrawal of any lien over any aircraft that is not permitted by the lease agreements. We note that the Administrators are already working with counterparties to seek the removal of liens which have been asserted and which the Administrators do not consider to be valid and enforceable liens. For aircraft subject to the Cape Town Convention you still have the protections of the convention in relation to third party liens.