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Details of Filing

Document Lodged:	Outline of Submissions
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File Title:	APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS
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A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 29/07/2020 3:24:12 PM AEST

Registrar

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In the matters of Virgin Australia Holdings Ltd (Administrators Appointed) & Ors

Federal Court of Australia Proceeding No. NSD 464 of 2020

Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes, in their capacity
as joint and several voluntary administrators of each of Virgin Australia Holdings Ltd
(Administrators Appointed) and the Third to Fortieth Plaintiffs

First Plaintiffs

& Ors

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A. INTRODUCTION

1. These are the submissions of the Plaintiffs, including the First Plaintiffs, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (together, **the Administrators**) in their capacity as:

- (a) administrators of each of the Second to Fortieth Plaintiffs; and
- (b) the proposed administrators of each of VAH Newco No 2 Pty Ltd (in liquidation) and VB Investco Pty Ltd (in liquidation),

(together, **the Virgin Companies**), with respect to the Interlocutory Process filed on 28 July 2020.

2. The business of the Virgin Companies is a very significant enterprise with substantial operations, complex affairs, considerable assets and a very large number and type of creditors; accordingly, the administrations are likely to be sophisticated and complex: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* (2020) 144 ACSR 310; [2020] FCA 571 at [14].

3. As set out in the affidavit of David Michael Orr sworn 29 July 2020 (**Orr Affidavit**) at [13], the Virgin Companies' creditor profile, on a consolidated basis as at the date of the Administrators' appointment, is broadly as follows:

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

- (b) unsecured bondholders, who are owed approximately \$1,988,250,000;
 - (c) trade creditors, who are owed approximately \$166,704,086;
 - (d) aircraft lessors, who are owed approximately \$1,883,914,848;
 - (e) landlords, who are owed approximately \$71,209,929; and
 - (f) employees, who are owed approximately \$450,777,961.
4. The Court has previously noted that the Administrators had identified that the Virgin Companies have approximately 10,247 known creditors in total (other than bondholders) with an expectation that that number could increase to 12,000 creditors (other than bondholders): *Virgin No 1* at [8].
 5. Since then, the Administrators have identified another category of creditors, being customers whose flights were cancelled by Virgin Companies as a result of the COVID-19 pandemic (**Customers**): Orr Affidavit at [14]. Although the Customers have been offered a conditional credit (see *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* (2020) 144 ACSR 347; [2020] FCA 717 at [157]-[166]), those Customers who have not requested such a credit (or who have not used the credit) will be treated by the Administrators as creditors of the relevant Virgin Companies: Orr Affidavit at [14]. There may be hundreds of thousands of such creditors: Orr Affidavit at [15], most of whose claims will be relatively small.
 6. Accordingly, it is readily apparent that there are an extraordinarily large number of creditors or potential creditors who may: lodge proofs of debt or claims in the administration of the Virgin Companies; attend and participate at the second meetings of creditors (**Second Meetings**); and vote at the Second Meetings.
 7. In response to the size of the administrations and the apprehended number of creditors, the Administrators have sought to use particular software known as Halo (**Halo or the Halo Platform**) to assist in the administration process, including to communicate with creditors, to manage the lodgement of proofs of debt or claims and, in due course, to adjudicate on proofs and permit creditors to vote on resolutions at or in advance of the Second Meetings.

8. Accordingly, this application primarily seeks orders that the Administrators are justified in requiring persons who claim to be creditors of the companies (other than bondholders of USD denominated bonds) to register on Halo and to permit the Administrators to adjudicate on the claims of creditors based only on the material provided in the Virgin Companies' books and records or available to them through the Halo Platform.

B. THE HALO PLATFORM

9. The Halo Platform is a proprietary digital claims management platform that was originally developed by Deloitte to assist organisations to manage whistle-blower disclosures. The software has been provided to and utilised by some of Australia's largest corporate businesses and Government departments and instrumentalities: Orr Affidavit at [10].
10. As further explained in the Orr Affidavit at [10]-[11], Deloitte has adapted the Halo Platform for use in the external administrations of the Virgin Companies; it operates as a user interface with an associated database; and it has a number of capabilities, including the ability to:
 - (a) register creditors with a unique account;
 - (b) facilitate communication between each creditor and the Administrators, via user accounts, including on a private and secure basis where necessary;
 - (c) permit users to upload documents (so as lodge a debt or claim and supporting documentation);
 - (d) allow users to access information in relation to the adjudication of debts and claims by the Administrators;
 - (e) enable creditors to nominate proxies; and
 - (f) allow a "voting event" to be created, which provides a notification to creditors of their ability to vote and the list of resolutions on which they may vote.
11. The Halo Platform is a secure system and complies with various security standards, so as to ensure that the information provided by creditors is maintained in a way that

cannot be compromised so as to preserve the privacy of that information: Orr Affidavit at [33]-[37].

12. As at 24 July 2020, 10,945 creditors had registered with the Halo Platform (including employees and creditors whose details were pre-registered based on the books and records of the Virgin Companies): Orr Affidavit at [17]-[18]. Creditors who were registered by the Administrators have received a communication notifying them of their pre-registration and requesting that they confirm their email and create a password: Orr Affidavit at [18].
13. It can be seen therefore that (apart from Customers), most of the known creditors of the Virgin Companies have now been registered as a user on the Halo Platform.
14. That is the case following a number of communications from the Administrators to creditors (by email, by publication on Deloitte's website and, in the case of employees, through the internal communication platform of the Virgin Companies) during the course of the administration. This correspondence advised the creditors that the Halo Platform is to serve as the Administrators' primary tool for communicating with creditors and managing claims during the administration of the Virgin Companies and requested that creditors register on Halo: Orr Affidavit at [38]; Exhibit DMO-1 at Tabs 5-9.
15. The communications with creditors have included:
 - (a) an explanation as to how creditors can register on the Halo Platform and access their individual Halo user accounts;
 - (b) the provision of a link to frequently asked questions about Halo (**Halo FAQs**) (see Orr Affidavit at [20]); and
 - (c) the provision of a link to a "Halo Help" form, through which creditors are able to submit a query to the Administrators (see Orr Affidavit at [22]).
16. As set out in the Orr Affidavit at [23], the Administrators also propose to communicate with creditors about Halo by establishing:
 - (a) in the case of creditors generally, a "web chat support function" on the Virgin Australia website, which will enable creditors to click on an option to chat with a

Virgin or Deloitte employee who is trained in using the Halo Platform (and which will permit the relevant Virgin or Deloitte employee to send through copies of the Halo FAQs); and

- (b) in the case of Customers specifically, an interactive voice response on Virgin Companies' general enquiry telephone number with a prompt to guide them to the Virgin Australia website (with details about the Halo Platform, as noted above in (a)), which will otherwise permit the Customer to speak to a customer service representative who can respond to queries about Halo.
17. Other than in the case of certain bondholders of USD denominated bonds (**USD Noteholders**), creditors are currently able to lodge proofs of debt through the Halo Platform and they have done so thus far in the course of the administration (and will be encouraged to continue to do so): Orr Affidavit at [24]-[25]. The Administrators have also manually entered, in Halo, proofs of debt or claims lodged by creditors by post or email to the Administrators: Orr Affidavit at [25]. However, as set out below, because of the significant costs of managing the process, the Administrators seek to establish a regime that in due course the creditors will be required to lodge their proofs of debt or claims via the Halo Platform (and not by other means).
18. USD Noteholders will not be required to register or lodge their proofs of debt on the Halo Platform because the votes of the USD Noteholders are to be taken pursuant to a Master Ballot and Beneficial Ballot process administered by Participants of the Depository Trustee Company in the United States of America and the outcome of that process will be relayed to the Administrators in advance of the Second Meetings: Orr Affidavit at [26].
19. Once a proof of debt has been lodged on the Halo Platform, it will be adjudicated by the Administrators only for voting purposes at the Second Meetings. There is evidence in the Orr Affidavit at [27]-[30] as to the proposed timing of the adjudication process; however, that is proposed to be the subject of a further application by the Administrators and does not affect the orders sought by the Interlocutory Process filed on 29 July 2020.

C. PROPOSED MODIFICATION OF THE INSOLVENCY PRACTICE RULES AND ASSOCIATED DIRECTIONS

C.1 Principles

20. Section 90-15 of the *Insolvency Practice Schedule (Corporations) 2016 (IPSC)* (being Schedule 2 to the *Corporations Act 2001 (Cth) (Act)*) confers power to make orders modifying the operation of the IPSC and the *Insolvency Practice Rules (Corporations) 2016 (Cth) (IPR)* and, generally, to give directions to external administrators.
21. In *Re Hawden Property Group Pty Ltd (in liq)* (2018) 125 ACSR 355; [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).

22. In *Hutson (liquidator), in the matter of WDS Limited (in liq) (Receivers and Managers Appointed)* (2020) 143 ACSR 273; [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].

23. The power to give directions to an administrator under former (now repealed) s 447D(1) of the Act now falls within the purview of the statutory power in s 90-15 of the IPSC: *Reidy, In the Matter of eChoice Limited (Admin Apptd)* [2017] FCA 1582 at [27] (Yates J); *EL-Saafin v Franek (No 2)* [2018] VSC 683 at [110] (Lyons J).
24. 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; [2002] FCA 90 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 prohibitory 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'...

25. The proposed application of the Halo Platform to the administration process is a matter of procedure, which is an appropriate subject matter on which directions may be given by the Court under s 90-15 of the IPS: *El-Saafin* (above) at [113]; *Re Equiticorp Australia Ltd (in liq)* [2020] NSWSC 143 at [45] (Gleeson JA, sitting at first instance).

C.2 The orders should be made to permit the Administrators to require creditors to use the Halo Platform in the administrations of the Virgin Companies

26. The orders primarily seek directions under s 90-15 of the IPSC that the Administrators are justified in:

- (a) requiring that any person who intends to vote at the Second Meetings (other than the USD Noteholders) register on the Halo Platform [Prayer 1];
- (b) ascertaining who is a creditor of any of the Virgin Companies for voting purposes at the Second Meetings (other than the USD Noteholders) based only on the books and records of the Virgin Companies and the material provided by persons or otherwise entered in the Halo Platform [Prayer 2]; and
- (c) utilising the Halo Platform to communicate with persons who have registered on the Halo Platform in respect of: (i) notification and provision of information; and (ii) adjudication of the proof or particulars of debt or claim lodged on the Halo Platform [Prayer 5].

27. An order is also sought under s 90-15 of the IPSC that the IPR is to operate such that the requirements of a person to lodge particulars of a debt or claim, provide a proxy, and / or provide a power of attorney may only be satisfied by the person submitting relevant information electronically using the Halo Platform [Prayer 3].

28. For the reasons that follow, such orders should be made.

29. *First*, mandating the use of the Halo Platform is a practical way of assisting the Administrators to manage the extraordinarily large number of creditors in the administrations. In circumstances where Customers may also seek to lodge claims or proofs in the administrations, the Administrators are faced with a situation where there may be hundreds of thousands of creditors in total. In order to manage a creditor pool

of that size, the Halo Platform provides a practical, user-friendly and secure process and it is appropriate that it be the exclusive system in which creditors' claims be lodged and adjudicated.

30. *Secondly*, a large number of the total creditors (other than Customers) are already registered on the Halo Platform (10,945 creditors as at the time of Mr Orr's affidavit).
31. *Thirdly*, the Administrators have provided numerous communications to creditors regarding Halo (with appropriate assistance such as the Halo FAQs and the "Halo Help" form) and also intend to establish a "web chat support function" and telephone service to respond to enquiries and to assist creditors to register and lodge claims on Halo.
32. *Fourthly*, it would be impractical, significantly time consuming and unduly costly to require the Administrators to permit creditors to lodge claims other than on the Halo Platform. Mr Orr estimates a cost saving of over \$3 million will be obtained from implementing Halo as the exclusive means by which to manage dealings with the adjudication of creditors' claims and the voting process: Orr Affidavit at [32]. That will be a benefit that will accrue to the creditors as a whole by reducing the costs of the administrations.
33. *Fifthly*, the Halo Platform is likely to be used by the Administrators (subject to appropriate orders of the Court) as the mechanism by which votes for the purposes of the Second Meetings are recorded. Such an electronic platform will be necessary in the light of the current COVID-19 pandemic which will preclude the possibility of a physical meeting.
34. *Sixthly*, creditors who have thus far not lodged claims on Halo will not be disadvantaged as the Administrators have manually inputted this information into Halo.
35. *Seventhly*, it is not uncommon in large administrations for an external service provider to assist in verifying, adjudicating and processing claims. For example, in *Re BBY Limited (receivers and managers appointed) (in liquidation) (No 3)* [2018] NSWSC 1718, Brereton J (as his Honour then was) acknowledged that the liquidators of BBY Ltd (which was a large stockbroking firm in liquidation) would be justified in retaining Link Market Services and creating an online portal managed by Link Market Services as part

of adopting a particular process for the verification and adjudication of claims of BBY clients: see [64], [74], [108]-[109].¹

36. In the current case, the Administrators are not seeking to outsource that process altogether to a third party. Rather, they are simply seeking to implement a regime whereby the Halo software provides an exclusive basis for managing the process.
37. *Finally*, the creditors of each of the Virgin Companies and the Australian Securities and Investments Commission (**ASIC**) have been served with the application on the morning of 29 July 2020. As a further protective measure, the Administrators also seek orders that notice of the orders be provided to all creditors and ASIC within 1 business day and that any person who claims to be affected by the orders has liberty to apply to the Court to discharge or set aside the orders.

D. CONCLUSION

38. The Court should make orders in the form of the short minutes of order provided together with these submissions.

29 July 2020

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¹ In that case, the online portal was not the only mechanism and clients who were unable to access the internet were permitted to proceed by hard copy documentation: *Re BBY* at [64(1)]. However, for the reasons explained above, the size of the creditor pool in the current administrations makes that impractical as an available option moving forward at all times up to the Second Meetings.