

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)  
File Number: NSD464/2020  
File Title: APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 16/08/2020 10:52:50 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59  
Rule 29.02(1)

### Affidavit

No. NSD 464 of 2020

Federal Court of Australia  
District Registry: New South Wales  
Division: Commercial and Corporations List

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

**VAUGHAN STRAWBRIDGE, SALVATORE ALGERI, JOHN GREIG AND RICHARD HUGHES, IN THEIR CAPACITY AS JOINT AND SEVERAL VOLUNTARY ADMINISTRATORS OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) AND THE THIRD TO FORTY-SECOND PLAINTIFFS NAMED IN SCHEDULE 1**

First Plaintiffs

AND OTHERS NAMED IN THE SCHEDULE

Plaintiffs

Affidavit of:     Kassandra Suzann Adams  
Address:         Level 15, 1 Bligh Street, Sydney, New South Wales  
Occupation:     Solicitor  
Date:            16 August 2020

Document number	Details	Paragraph	Page
1	Affidavit of Kassandra Suzann Adams sworn on 16 August 2020	All	1-7
3	Annexure A, letter from Gadens to Clayton Utz dated 14 August 2020	4	8-10
4	Annexure B, letter from Clayton Utz to Gadens dated 14 August 2020	6	11-13
5	Annexure C, email chain between Clayton Utz and Gadens dated 15 August 2020	7	14-15
6	Annexure D, letter from Corrs Chambers Westgarth ( <b>Corrs</b> ) to Clayton Utz dated 13 August 2020 ( <b>Corrs Voting Letter</b> )	8	16-20

Document number	Details	Paragraph	Page
7	Annexure E, letter from Clayton Utz to Corrs dated 14 August 2020 (in response to the Corrs Voting Letter)	12	21-22
8	Annexure F, letter from Corrs to Clayton Utz dated 13 August 2020 ( <b>Corrs Lessor Conferral Letter</b> )	9	23-25
9	Annexure G, letter from Clayton Utz to Corrs dated 14 August 2020 (in response to the Corrs Lessor Conferral Letter)	12	26
10	Annexure H, letter from Corrs to Clayton Utz dated 10 August 2020 ( <b>Corrs 10 August Letter</b> )	10	27-35
11	Annexure I, letter from Corrs to Clayton Utz dated 13 August 2020 ( <b>Corrs 13 August Letter</b> )	11	36-38
12	Annexure J, letter from Clayton Utz to Corrs dated 14 August 2020 (in response to the Corrs 13 August Letter)	12	39-40

I, Cassandra Suzann Adams, solicitor of Clayton Utz, Level 15, 1 Blich Street, Sydney NSW 2000 swear:

1. I am a solicitor employed by Clayton Utz, solicitors for the Plaintiffs. I have the day to day carriage of this matter under the supervision of Timothy Sackar, a partner of Clayton Utz.
2. I make this affidavit from my own knowledge and belief, except where otherwise stated in which case I have stated the source of my knowledge.
3. This is the Affidavit is made in relation to the BPT Application.

#### **Correspondence from Gadens Lawyers**

4. On 14 August 2020, I received an email letter from Ms Kathy Merrick, Partner, Gadens Lawyers (**Ms Merrick**) acting on behalf of Alexander Funds Management Pty Ltd, Morgans Financial Limited, Crestone Wealth Management Limited, Masons Stevens Limited, Escala Partners Pty Ltd, Yarra Funds Management Limited, Realm Pty Ltd and Cameron Harrison Private Pty Ltd, sent a letter to Clayton Utz in relation to the administration of the Virgin Companies (**Gadens Letter**). At **Annexure A** of this affidavit is a copy of the Gadens Letter.
5. Ms Merrick acknowledged in the Gadens Letter that some of the issues raised in the letter would be ventilated at the hearing in the proceedings to be held on Monday, 17 August

2020 (**Hearing**) and confirmed her instructions were to appear at the Hearing on behalf of her clients.

6. On 15 August 2020, I caused to be sent to Ms Merrick an email letter from Clayton Utz in response to the Gadens Letter, a copy of which is at **Annexure B**.
7. On 15 August 2020:
  - (a) at approximately 4:46pm, I received an email from Ms Merrick in relation to the letter from Clayton Utz to Gadens dated 15 August 2020; and
  - (b) at approximately 5:32pm, I responded to Ms Merrick's email.

At **Annexure C** of this affidavit is a copy of the email chain between Clayton Utz and Gadens.

### **Correspondence from Corrs Chambers Westgarth**

#### ***Corrs Voting Letter***

8. On 13 August 2020 at 1.33pm, I was copied into an email from Matt Whitbread, Senior Associate, Corrs Chambers Westgarth (**Mr Whitbread**) attaching a letter to Clayton Utz in relation to the voting regime in place for the Second Meetings (**Corrs Voting Letter**). At **Annexure D** of this affidavit is a copy of the Corrs Voting Letter.

#### ***Corrs Lessor Conferral Letter***

9. On 13 August 2020 at 1.39pm, I was copied into an email from Mr Whitbread attaching a letter to Clayton Utz in relation to Broad Peak and Tor conducting further due diligence of the Virgin Companies, including in relation to future arrangements with lessor counterparties (**Corrs Lessor Conferral Letter**). At **Annexure F** of this affidavit is a copy of the Corrs Lessor Conferral Letter.

#### ***Corrs letters in relation to the appointment of a facilitator***

10. On 10 August at 3.24pm, I was copied into an email from Mr Whitbread attaching a letter to Clayton Utz in relation to the appointment of a facilitator (**Corrs 10 August Letter**). At **Annexure H** of this affidavit is a copy of the Corrs 10 August Letter.
11. On 13 August 2020 at 1.45pm, I was copied into a further email from Mr Whitbread attaching a further letter in relation to the matters raised in the Corrs 10 August Letter (**Corrs 13 August Letter**). At **Annexure I** of this affidavit is a copy of the Corrs 13 August Letters.

### **Clayton Utz Responses**

12. On 14 August 2020 at 7.00pm, I was copied into an email sent by Jillian Robertson, Special Counsel, Clayton Utz attaching a response to:
- (a) the Corrs Voting Letter, a copy of which is at **Annexure E**.
  - (b) the Corrs Lessor Conferral Letter, a copy of which is at **Annexure G**.
  - (c) the Corrs 13 August Letter, a copy of which is at **Annexure J**.

**Swearing of this affidavit**

13. I have not been able to swear this affidavit in proper form at the time that I have signed it due to the measures I have taken to minimise the spread of COVID-19.
14. I have been informed by Madeleine Louise McCloy, as the proposed witness to this affidavit, and believe, that the relaxation of formality with respect to the unsworn nature of this affidavit does not diminish the need for me to satisfy myself that the contents of this affidavit are true and correct. I have satisfied myself that that is the case.
15. I will formally swear this affidavit when circumstances allow and will instruct Clayton Utz to file the sworn version with the Court.

Sworn by the deponent )  
 at Sydney )  
 in New South Wales )  
 on 16 August 2020 )  
 Before me: )

.....  
 Signature of Kassandra Suzann Adams

.....  
 Signature of witness  
 Madeleine Louise McCloy, solicitor

**SCHEDULE 1**

Federal Court of Australia  
 District Registry: New South Wales  
 Division: General

No. NSD 464 of 2020

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

**Plaintiffs**

- First Plaintiffs: Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes, in their capacity as joint and several voluntary administrators of the Second to Thirty-ninth Plaintiffs
- Second Plaintiff: Virgin Australia Holdings Ltd (Administrators Appointed) ACN 100 686 226
- Third Plaintiff: Virgin Australia International Operations Pty Ltd (Administrators Appointed) ACN 155 859 608
- 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
Fortieth Plaintiff:	Tiger International Number 1 Pty Ltd (Administrators Appointed) ACN 606 131 944
Forty-first Plaintiff:	VAH Newco No. 2 Pty Ltd (In Liquidation) (Administrators Appointed) ACN 160 881 354
Forty-second Plaintiff:	VB Investco Pty Ltd (In Liquidation) (Administrators Appointed) ACN 101 961 095



**McCloy, Madeleine**

Sworn on \_\_\_\_\_ Before me \_\_\_\_\_

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

**From:** Kathy Merrick <Kathy.Merrick@gadens.com>  
**Sent:** Friday, 14 August 2020 3:09 PM  
**To:** Sackar, Timothy <tsackar@claytonutz.com>; Adams, Kassandra <kaadams@claytonutz.com>  
**Cc:** Cassie O'Bryan <Cassie.OBryan@gadens.com>  
**Subject:** Virgin Australia Holdings Limited and subsidiaries (the Virgin Companies)

Dear Colleagues

Please see letter attached.

Regards  
Kathy

**Kathy Merrick** | Partner | [gadens](#)  
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Our reference  
 Direct line +61 3 9252 7769  
 Email cassie.obryan@gadens.com  
 Partner Kathy Merrick

Gadens Lawyers  
 ABN 29 991 935 627

Level 20  
 MLC Centre  
 19 Martin Place  
 Sydney NSW 2000  
 Australia

14 August 2020

Ms Cassandra Adams  
 Clayton Utz  
 Level 15, 1 Bligh St  
 Sydney NSW 2000

PO Box H332  
 Australia Square NSW 1215

DX 303 Sydney

**VIA EMAIL: kaadams@claytonutz.com**

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 F +61 2 9163 3000

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Dear Ms Adams,

**Virgin Australia Holdings Limited and subsidiaries (the Virgin Companies)  
 Federal Court of Australia Proceedings NSD 464 of 2020 (Proceedings)**

We are instructed by Alexander Funds Management Pty Ltd, Morgans Financial Limited, Crestone Wealth Management Limited, Mason Stevens Limited, Escala Partners Pty Ltd, Yarra Funds Management Limited, Realm Pty Ltd, and Cameron Harrison Private Pty Ltd, who each represent bondholders collectively owed in excess of \$200,000,000 by the Virgin Companies.

We have now received the update to creditors dated 14 August 2020 circulated by the Administrators earlier today (the **Circular**). We have also obtained a copy of the Interlocutory Application filed in the proceedings on 11 August 2020 (**Application**) by Broad Peak Investment Advisers Pte Ltd and Tor Investment Management (Hong Kong) Ltd (together the **Applicants**) and the affidavit in support of Cameron Cheetham affirmed 11 August 2020 together with its exhibit.

Our clients are concerned principally about two matters, *first* whether the Administrators will allow any alternative Deed of Company Arrangement (**DOCA**) proposals to be presented to creditors ahead of the second meeting of creditors to be held on 4 September 2020 (the **Second Meeting**) for the purposes of enabling creditors to consider and vote on those alternative proposals at the Second Meeting; and *second*, the voting mechanics for the Second Meeting.

***Alternate DOCA proposals***

We refer to the media release issued by the Administrators on or around 7 August 2020 and in particular the following statements that appear in that release:

"Given the binding nature of the agreements [with Bain Capital], no further offers can be considered. ...

A Bain Capital deed of company arrangement will be put to the second meeting of creditors...

While details of the sale to Bain Capital have remained confidential, full details will be disclosed in the Administrators' report to creditors, and that will be issued prior to the second meeting, providing sufficient information for creditors to make an informed decision....

While it is open to any party to submit an alternative proposal, it cannot be considered by the Administrators, or recommended to creditors, given the binding agreement already in place."

In light of these statements, the Circular and the material filed in support of the Application, it is not entirely clear to our clients what the Administrators' intended approach will be in respect of any DOCA proposals that the Administrators may receive other than the Bain proposal. It is apparent from the Application and the evidence filed in support of it that the Applicants wish to advance an alternate DOCA to be considered by creditors at the Second Meeting.

Section 3.3 of the Circular says that “*Bain Capital’s DOCA proposals will be considered and voted upon by creditors at the [Second Meeting]*”. That statement appears to us to suggest that Bain Capital may present more than one DOCA proposal and, when read in light of the media release also gives rise to the inference that the Administrators will not receive, consider or opine on alternate DOCA proposals ahead of the Second Meeting. It is not clear how an alternate DOCA could be put to the creditors prior to the Second Meeting if the Administrators did not include such a proposal in the materials to be circulated to creditors ahead of the Second Meeting.

Our client is concerned that if the Administrators do not include a proposal for an alternative DOCA in the materials that they circulate prior to the Second Meeting and, if they do not opine on the proposal, then even if an alternative proposal could be put by the proposing creditor at the Second Meeting (and it is not clear to us, logistically, how that could happen), the creditors will not have sufficient information available to them to make an informed choice about which (if any) of the DOCA proposals best promote that creditor’s interests.

As such, our clients wish to understand, as a matter of some urgency, whether or not the Administrators:

- a. will receive alternate DOCA proposals
- b. will consider alternate DOCA proposals
- c. will include alternate DOCA proposals in the materials circulated to creditors ahead of the Second Meeting and if so what materials will be circulated and how far in advance of the Second meeting will they be circulated
- d. will provide creditors with detail about each DOCA proposal to enable creditors to make an informed decision
- e. will provide an opinion with reasons in respect of each of the options; and
- f. will provide an opinion on which option the Administrators believe is in the best interests of creditors.

### **Voting**

We also request that you provide us with details as to how the voting is intended to take place utilising the DTC and Halo systems. In particular, please can you tell us:

- a. what form the ballot papers will take. For example, will the ballot papers give creditors the option to vote on an alternate DOCA. If not, how do the Administrators propose to give creditors the opportunity to vote on any alternate DOCA?
- b. what steps will the Administrators take to preserve the opportunity for creditors to debate any alternate DOCA proposal and for creditors to ask questions of those who propose an alternate DOCA?
- c. what steps will the Administrators take to ensure that those creditors who pre-vote will be able to reconsider their position should any new information/proposals be put either prior to or during the Second Meeting, but following the opening of voting?
- d. whether the Administrators will maintain their position set out in the infographic attached at tab 4 to the affidavit of Mr David Orr sworn in the Proceedings on 29 July 2020, namely that
  - i. a vote may not be changed once cast, even if that vote is a 'pre-vote'; and
  - ii. that voting will be closed 'live' within the Second Meeting?

We understand that some of these issues will be ventilated at the hearing of the Application on Monday 17 August 2020. We request that you provide us with a response to each of the above questions as a matter of urgency, and in any event by no later than 12 midday on 15 August 2020 so that we may consider your responses and take proper instructions from our clients. Subject to receipt of your responses, our instructions are to appear in Court on Monday and raise the above concerns with the Court.

Yours faithfully



**Kathy Merrick**  
Partner

## McCloy, Madeleine

---

**From:** Adams, Cassandra  
**Sent:** Saturday, 15 August 2020 3:52 PM  
**To:** Kathy Merrick  
**Cc:** Cassie O'Bryan; McCoy, Orla; Sackar, Timothy  
**Subject:** RE: Virgin Australia Holdings Limited and subsidiaries (the Virgin Companies) [CU-Legal.FID3017446]  
**Attachments:** 336648115\_3.pdf This and the following 2 pages is Annexure B referred to in the affidavit of Cassandra Suzann Adams dated 16 August 2020

Dear Kathy,

Sworn on \_\_\_\_\_

Please see attached letter of today.

Before me \_\_\_\_\_

Kind regards,

**Kassandra Adams, Senior Associate**  
**Clayton Utz**

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**From:** Kathy Merrick <Kathy.Merrick@gadens.com>  
**Sent:** Friday, 14 August 2020 3:09 PM  
**To:** Sackar, Timothy <tsackar@claytonutz.com>; Adams, Cassandra <kaadams@claytonutz.com>  
**Cc:** Cassie O'Bryan <Cassie.OBryan@gadens.com>  
**Subject:** Virgin Australia Holdings Limited and subsidiaries (the Virgin Companies)

Dear Colleagues

Please see letter attached.

Regards  
Kathy

**Kathy Merrick** | Partner | [gadens](#)  
kathy.merrick@gadens.com | T +61 2 9163 3013 | F +61 2 9163 3000 | M +61 407214611  
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**Confidential****Email**

15 August 2020

Ms Kathy Merrick  
Partner  
Gadens Lawyers  
Level 20  
MLC Centre  
19 Martin Place  
Sydney NSW 2000  
Australia

**Kathy.Merrick@gadens.com**

Dear Ms Merrick

**Virgin Australia Holdings Limited ACN 100 686 226 (VAH) and certain of its subsidiaries (all Administrators Appointed) (together, the Companies)**

We refer to your letter dated 14 August 2020.

We set out our comments in relation to the matters raised in your letter below. Terms defined in your letter have the same meaning in this letter unless otherwise defined.

**Alternative DOCA Proposals**

We confirm that the administrators of the Companies (**Administrators**) have exercised their power of sale by entering into a transaction with BC Hart Aggregator L.P and BC Hart Aggregator (Australia) Pty Ltd (**Bain**) for the sale of the business and assets of the Companies (**Bain Transaction**).

The Bain Transaction contemplates (but does not require) the possibility of a completion of the sale by way of a deed of company arrangement proposed by Bain (**Bain DOCA**).

While it remains theoretically open to others to submit an alternative DOCA proposal to be considered by the Administrators, it would not be possible for that alternative proposal (to the extent it involves the business, assets or property of the Virgin Companies) either to be approved by creditors at the second meetings of creditors of the Companies (**Second Meetings**) or otherwise to be fulfilled, unless steps were taken by the alternative DOCA proponent to unwind the existing sale to Bain. That is because if the Bain DOCA is not approved, the Administrators are contractually bound by the terms of the transaction entered into with Bain to adjourn the Second Meetings and proceed to complete the transaction pursuant to the terms of an asset sale agreed between the Administrators and Bain.

These matters are explained further in evidence and submissions that the Administrators have prepared in advance of the Application, to be heard in the Federal Court on Monday, 17 August 2020 at 11.15am (**Hearing**). It is possible that that material may be available before Monday on the website of the Federal Court at <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/virgin-australia>.

The Administrators are required to provide the report to creditors of the Companies at least 5 business days before the meeting pursuant to s 75-225 of the *Insolvency Practice Rules (Corporations) 2016* (**Report**). Pursuant to s 75-225, the Report will detail any DOCA proposals that have been received and will include the Administrators' recommendation to creditors for the future of the Companies.

Ms Kathy Merrick, Gadens Lawyers

15 August 2020

**Voting**

In relation to your questions regarding voting at the Second Meetings, we note that the form of the ballot papers to be issued to creditors is being progressed by the Administrators and will be finalised for inclusion on the Halo platform following the release of the Report. As you have noted in your letter, certain issues in relation to this process are the subject of the Hearing.

Creditors' will have an opportunity to participate in the Second Meetings, which will be held via the Microsoft Teams platform by using the question and answer facility provided through that platform. We note that certain procedural matters related to voting were the subject of orders made by the Federal Court on 11 August 2020. We **enclose** a copy of those orders for your clients' reference. On the issue of amending votes lodged through the Halo platform in advance of the Second Meetings, we note that this matter is proposed to be dealt with by the Court at the Hearing on Monday.

Yours sincerely



**Timothy Sackar, Partner**  
+61 2 9353 4114  
tsackar@claytonutz.com

**Orla McCoy, Partner**  
+61 2 9353 4240  
omccoy@claytonutz.com

Our ref 20556/13236/81005835

**McCloy, Madeleine** Sworn on \_\_\_\_\_ Before me \_\_\_\_\_

---

**From:** Adams, Kassandra  
**Sent:** Saturday, 15 August 2020 5:32 PM  
**To:** Kathy Merrick  
**Cc:** Cassie O'Bryan; McCoy, Orla; Sackar, Timothy  
**Subject:** RE: Virgin Australia Holdings Limited and subsidiaries (the Virgin Companies) [CU-Legal.FID3017446]

Dear Kathy,

All communications with the voluntary administrators and their solicitors is on a confidential basis, unless otherwise stated.

As you will be aware, the application being heard on Monday, 17 August 2020, is an application brought by Broad Peak Investment Advisers Pte. Ltd (for and on behalf of Broad Peak Master Fund II Ltd and Broad Peak Asia Credit Opportunities Holdings Pte. Ltd) and Tor Investment Management (Hong Kong) Ltd (**Applicants**), being represented by Corrs Chambers Westgarth.

We do not consider that it is inappropriate to direct interested parties to the Federal Court website to obtain copies of the Court materials. We have a range of interested persons enquiring as to the Court documents, and directing parties to the Federal Court website is how we have been responding to such enquiries. This is consistent with the Honourable Justice Middleton's comments.

We would suggest that you make contact with the solicitors for the Applicants.

Kind regards,

**Kassandra Adams, Senior Associate**

**Clayton Utz**

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[kaadams@claytonutz.com](mailto:kaadams@claytonutz.com) | [www.claytonutz.com](http://www.claytonutz.com)

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**From:** Kathy Merrick <[Kathy.Merrick@gadens.com](mailto:Kathy.Merrick@gadens.com)>

**Sent:** Saturday, 15 August 2020 4:46 PM

**To:** Adams, Kassandra <[kaadams@claytonutz.com](mailto:kaadams@claytonutz.com)>

**Cc:** Cassie O'Bryan <[Cassie.OBryan@gadens.com](mailto:Cassie.OBryan@gadens.com)>; McCoy, Orla <[omccoy@claytonutz.com](mailto:omccoy@claytonutz.com)>; Sackar, Timothy <[tsackar@claytonutz.com](mailto:tsackar@claytonutz.com)>

**Subject:** RE: Virgin Australia Holdings Limited and subsidiaries (the Virgin Companies) [CU-Legal.FID3017446]

Dear Colleagues

Thank you for your letter.

Noting that we are required to file any affidavit and submissions by midday tomorrow, would you please provide us with copies of your evidence and submissions as a priority. Having regard to the timetable we are all working to, it is unsatisfactory to simply point us to the Court portal and suggest we obtain the materials from there.

Would you kindly also explain the 'confidential' annotation on your letter?

Regards  
Kathy

**Kathy Merrick | Partner | [gadens](http://gadens.com)**

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---

**From:** Adams, Cassandra <[kaadams@claytonutz.com](mailto:kaadams@claytonutz.com)>  
**Sent:** Saturday, August 15, 2020 3:52 PM  
**To:** Kathy Merrick <[Kathy.Merrick@gadens.com](mailto:Kathy.Merrick@gadens.com)>  
**Cc:** Cassie O'Bryan <[Cassie.OBryan@gadens.com](mailto:Cassie.OBryan@gadens.com)>; McCoy, Orla <[omccoy@claytonutz.com](mailto:omccoy@claytonutz.com)>; Sackar, Timothy <[tsackar@claytonutz.com](mailto:tsackar@claytonutz.com)>  
**Subject:** RE: Virgin Australia Holdings Limited and subsidiaries (the Virgin Companies) [CU-Legal.FID3017446]

Dear Kathy,

Please see attached letter of today.

Kind regards,

**Kassandra Adams, Senior Associate  
Clayton Utz**

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4200 | F +612 8220 6700 | M +61 435014318 |  
[kaadams@claytonutz.com](mailto:kaadams@claytonutz.com) | [www.claytonutz.com](http://www.claytonutz.com)  
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---

**From:** Kathy Merrick <[Kathy.Merrick@gadens.com](mailto:Kathy.Merrick@gadens.com)>  
**Sent:** Friday, 14 August 2020 3:09 PM  
**To:** Sackar, Timothy <[tsackar@claytonutz.com](mailto:tsackar@claytonutz.com)>; Adams, Cassandra <[kaadams@claytonutz.com](mailto:kaadams@claytonutz.com)>  
**Cc:** Cassie O'Bryan <[Cassie.OBryan@gadens.com](mailto:Cassie.OBryan@gadens.com)>  
**Subject:** Virgin Australia Holdings Limited and subsidiaries (the Virgin Companies)

Dear Colleagues

Please see letter attached.

Regards  
Kathy

**Kathy Merrick | Partner | [gadens](http://gadens.com)**

[kathy.merrick@gadens.com](mailto:kathy.merrick@gadens.com) | T +61 2 9163 3013 | F +61 2 9163 3000 | M +61 407214611  
Level 20, MLC Centre, 19 Martin Place, Sydney, NSW, Australia 2000

**[Adelaide](#) | [Brisbane](#) | [Melbourne](#) | [Perth](#) | [Sydney](#)**

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## McCloy, Madeleine

---

**From:** Matt Whitbread <matt.whitbread@corrs.com.au>  
**Sent:** Thursday, 13 August 2020 1:33 PM  
**To:** McCoy, Orla  
**Cc:** Sackar, Timothy; Glavac, Mikhail; Gardner, Tom; Project Volar; Cameron Cheetham; Michael Catchpoole; Melissa Liu; Jessica Every; Mollie O'Connor; Andrew Edington  
**Subject:** NSD464 of 2020 - In the Matter of Virgin Australia Holdings Ltd (Administrators Appointed) [CU-Legal.FID3017446]  
**Attachments:** 3465-6019-9440-v1 - Letter to Clayton Utz enclosing voting flowchart - 1....pdf

Dear Orla

This and the following 4 pages is Annexure D referred to in the affidavit of Kassandra Suzann Adams dated 16 August 2020

Please see attached correspondence.

Sworn on \_\_\_\_\_

Best regards,

Before me \_\_\_\_\_

**Matt Whitbread** | Senior Associate  
**Corrs Chambers Westgarth**  
t +61 2 9210 6093 m +61 410 588 321 e matt.whitbread@corrs.com.au  
[corrs.com.au](http://corrs.com.au)

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13 August 2020

**By email:** [omccoy@claytonutz.com](mailto:omccoy@claytonutz.com)

Orla McCoy  
Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000

**Contact**  
Michael Catchpoole (02) 9210 6288  
Email: [Michael.catchpoole@corrs.com.au](mailto:Michael.catchpoole@corrs.com.au)

**Partner**  
Cameron Cheetham

**By email:** [tsackar@claytonutz.com](mailto:tsackar@claytonutz.com)

Tim Sackar  
Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000

Dear Colleagues

**In the matter of Virgin Australia Holdings Limited  
(Administrators Appointed) & Ors  
Federal Court of Australia (NSD 464 of 2020)**

- 1 We refer to our letter dated 10 August 2020, your email response dated 11 August 2020 and the Orders made by Justice Middleton on 11 August 2020 (**Orders**) putting in place a regime for the conduct of voting at the meeting of creditors (**Voting Regime**).
- 2 Noting that:
  - a. your clients have sought to modify the ordinary voting process;
  - b. Virgin reportedly has tens of thousands of creditors who are located in various jurisdictions and have different levels of sophistication and knowledge; and
  - c. public health orders dictate that meetings be conducted virtually, it is important that the voting procedure be fair and transparent.
- 3 A failure to put in place a fair and transparent voting regime gives rise to a substantial risk that any DOCA will be set aside.
- 4 Recognising the need for flexibility, and the Administrators' commercial judgment, our clients propose that the Court make directions justifying the use of an amended voting regime.
- 5 The essential features of this scheme are that:

- a. proposed DOCAs are put forward with enough information and supporting documents to allow an informed decision;
  - b. ahead of voting, there is an opportunity for debate and questions; and
  - c. balloting take place across a sufficient timeframe for less sophisticated creditors to exercise the process.
- 6 We enclose a flowchart of a proposed balloting regime that achieves the objects in paragraph 5 above.
- 7 The proposed amendments to the Voting Regime are self-explanatory and we consider that they:
  - a. provide an adequate mechanism for DOCA proponents to disseminate relevant information to creditors regarding their respective proposals ahead of creditors being asked to vote on those proposals, thereby enabling creditors to cast their ballots when they are fully informed;
  - b. ensure that all creditors are provided with the same and sufficient information at the time of casting their votes;
  - c. provide a forum for the creditors to debate the resolutions and proposals to be put to the creditors' meetings, ensuring that the democratic function of the insolvency regime is substantively satisfied;
  - d. ensure that all creditors are afforded sufficient time to consider the report to creditors in what is a large and complex administration and cast their votes on an informed basis; and
  - e. still accommodate the logistical difficulties faced by the Administrators related to COVID-19 and the size and complexity of the administration.
- 8 These amendments also address the issues with the existing arrangements relating to:
  - a. voting opening without all proposals being put forward;
  - b. the difficulty associated with the Administrators being required to summarise proposals he cannot consider;
  - c. the Voting Regime's tight timeframes treating different classes of creditor differently. The Voting Regime envisages that the report to creditors is to be issued on or about 25 August 2020 and the online voting is, for most creditors, going to be made available at the same time. However, the Voting Regime presently envisages the USD noteholders casting votes which will be collated by the USD trustees pursuant to a Master Ballot and which would be able to be cast even before the report to creditors is released. Accordingly, our clients consider that there must be a mechanism to ensure that both the ballot papers and information provided to USD noteholders corresponds with those provided to other creditors; and

13 August 2020

Clayton Utz

**In the matter of Virgin Australia Holdings Limited  
(Administrators Appointed) & Ors  
Federal Court of Australia (NSD 464 of 2020)**

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- d. the timeframe presently envisaged for voting to be open provides insufficient time for retail bondholders (including holders of ASX-listed retail notes) to conduct the necessary instruction process required for the relevant trustees or coordinators to be able to cast votes on behalf of those bondholders (including when taking into account relevant notice periods required under various trust deeds and the like).
- 9 We would welcome the opportunity to discuss our clients' proposed amendments to the Voting Regime with you and your clients. Please confirm by **midday on Friday, 14 August 2020**:
- a. whether your clients are agreeable to our clients' proposed amendments to the Voting Regime; and
- b. if not, whether your clients are agreeable to meeting with our clients' and the parties' solicitors to endeavour to reach agreement on amendments to the Voting Regime that address our clients' concerns and mitigate the risk of the outcome of the meetings being challenged and set aside.

Our clients' rights are reserved.

Yours faithfully

**Corrs Chambers Westgarth**



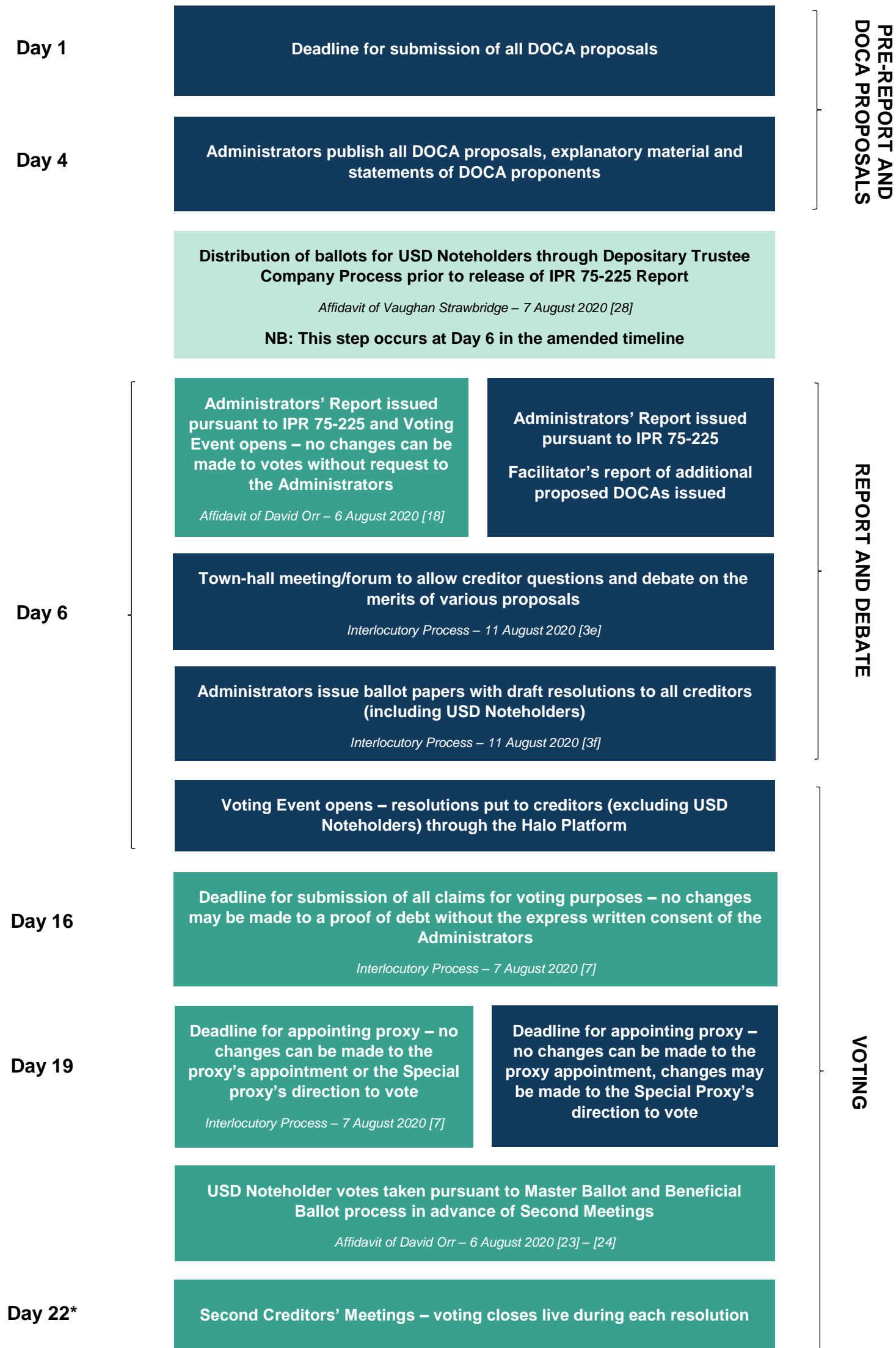
**Cameron Cheetham**

Partner

**attachments**

# Timeline to Second Creditors' Meetings

- Administrators' existing regime
- Suggested additions/amendments



\*ASX Listed Note Trustee requires 15 business days' notice to convene meeting

**McCloy, Madeleine**

Sworn on \_\_\_\_\_ Before me \_\_\_\_\_

---

**From:** Robertson, Jillian  
**Sent:** Friday, 14 August 2020 7:00 PM  
**To:** Matt Whitbread  
**Cc:** Cameron Cheetham; Michael Catchpoole; Melissa Liu; Jessica Every; Mollie O'Connor; Andrew Edington; Sackar, Timothy; McCoy, Orla; Project Volar; Glavac, Mikhail; Gardner, Tom  
**Subject:** RE: Virgin Australia Holdings Limited (Administrators Appointed) [CU-Legal.FID3017446]  
**Attachments:** Letter to Corrs (14 August 2020) (re conferral with lessors).pdf; Letter to Corrs (14 August 2020) (re Flowchart).pdf; Letter to Corrs (14 August 2020) (re Facilitator).pdf

Dear Matt,

Please see attached three letters responding to each of your letters received yesterday.

Kind regards

Jillian

**Jillian Robertson, Special Counsel**

**Clayton Utz**

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4919 | F +612 8220 6700 | M +61 450568647 |

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**From:** Robertson, Jillian  
**Sent:** Friday, 14 August 2020 2:42 PM  
**To:** 'Matt Whitbread' <matt.whitbread@corrs.com.au>  
**Cc:** Cameron Cheetham <cameron.cheetham@corrs.com.au>; Michael Catchpoole <michael.catchpoole@corrs.com.au>; Melissa Liu <melissa.liu@corrs.com.au>; Jessica Every <jessica.every@corrs.com.au>; Mollie O'Connor <Mollie.OConnor@corrs.com.au>; Andrew Edington <andrew.edington@corrs.com.au>; Sackar, Timothy <tsackar@claytonutz.com>; McCoy, Orla <omccoy@claytonutz.com>; Project Volar <Volar@claytonutz.com>; Glavac, Mikhail <mglavac@claytonutz.com>; Gardner, Tom <tgardner@claytonutz.com>  
**Subject:** Virgin Australia Holdings Limited (Administrators Appointed) [CU-Legal.FID3017446]

Dear Matt,

Thank you for your three letters received yesterday.

We will circulate responses to each of these letters shortly.

Kind regards

Jillian

**Jillian Robertson, Special Counsel**

**Clayton Utz**

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Mr Cameron Cheetham  
Partner  
Corrs Chambers Westgarth  
8-12 Chifley Square  
Sydney NSW 2000

cameron.cheetham@corrs.com.au

14 August 2020

Dear Cameron,

**In the matter of Virgin Australia Holdings Limited (Administrators Appointed) & Ors  
Federal Court of Australia NSD 464 of 2020**

We refer to your letter dated 13 August 2020, which we received by email at 1:33pm on that date.

Thank you for your feedback with respect to the timetable for voting at the second meetings of creditors of Virgin Australia Holdings Limited (Administrators Appointed) and its subsidiaries (**Virgin Group**). The issues raised in your letter have been considered by the voluntary administrators of the Virgin Group (**Administrators**) in proposing the timetable approved by the Court pursuant to Orders made by Justice Middleton on 12 August 2020.

The Administrators have exercised their power of sale to BC Hart Aggregator L.P and BC Hart Aggregator (Australia) Pty Ltd (**Bain**). The fact that the Virgin Group's business has been sold has already been confirmed to you and your clients in previous correspondence, including our letter to you dated 26 June 2020, a letter from the Administrators to your clients dated 22 July 2020 and an email from the Administrators to your clients dated 24 July 2020.

In any event, in the ordinary course of an administration, the administrators have power to make decisions as a matter of business judgment in relation to the future of the business in the interests of all creditors. The case in this instance is no different.

Further, the statutory timing for the voluntary administration process under the *Corporations Act 2001* (Cth) is very confined (even with the extensions that have been granted) and creditors' internal constitutional or contractual decision making time frames cannot always be accommodated.

The Administrators are happy to engage with creditors on their questions. In that regard, we note that your clients are members of the Noteholder Consultative Committee where matters concerning voting and the second creditors' meeting have been discussed on a number of occasions, including as recently as 6 August 2020. We also note that neither of your clients' earlier (rejected) DOCA proposals contemplated extensions of the convening period, funding for that purpose, or modification of voting or ballot requirements to accommodate alternate proposals.

Yours sincerely



**Timothy Sackar, Partner**  
+61 2 9353 4114  
tsackar@claytonutz.com

**Orla McCoy, Partner**  
+61 2 9353 4240  
omccoy@claytonutz.com

## McCloy, Madeleine

---

**From:** Matt Whitbread <matt.whitbread@corrs.com.au>  
**Sent:** Thursday, 13 August 2020 1:39 PM  
**To:** McCoy, Orla  
**Cc:** Sackar, Timothy; Glavac, Mikhail; Gardner, Tom; Project Volar; Cameron Cheetham; Michael Catchpoole; Melissa Liu; Jessica Every; Mollie O'Connor; Andrew Edington  
**Subject:** NSD464 of 2020 - In the Matter of Virgin Australia Holdings Ltd (Administrators Appointed) [CU-Legal.FID3017446]  
**Attachments:** 3436-9188-5328-v1 - Letter to Clayton Utz re conferral with lessors - 13....pdf

Dear Orla

Please see attached correspondence.

Best regards,

**Matt Whitbread** | Senior Associate  
**Corrs Chambers Westgarth**  
t +61 2 9210 6093 m +61 410 588 321 e matt.whitbread@corrs.com.au  
[corrs.com.au](http://corrs.com.au)

This and the following page is Annexure F referred to in the affidavit of Kassandra Suzann Adams dated 16 August 2020

Sworn on \_\_\_\_\_

Before me \_\_\_\_\_

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13 August 2020

**By email:** [omccoy@claytonutz.com](mailto:omccoy@claytonutz.com)  
Orla M. McCoy  
Clayton Utz  
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Sydney NSW 2000

**Contact**  
Michael Catchpoole (02) 9210 6288  
Email: [michael.catchpoole@corrs.com.au](mailto:michael.catchpoole@corrs.com.au)

**Partner**  
Cameron Cheetham

**By email:** [tsackar@claytonutz.com](mailto:tsackar@claytonutz.com)  
Tim Sackar  
Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000

Dear Colleagues

## **Virgin Australia Holdings Limited (Administrators Appointed) (Virgin)**

- 1 We refer to our client's proposal for a Deed of Company Arrangement with respect to Virgin and its subsidiaries submitted on 22 July 2020 (**DOCA**).
- 2 Our clients wish to present as unconditional a DOCA proposal as possible to creditors for their consideration.
- 3 One aspect of the conditionality contained in our clients' DOCA is in relation to confirming the basis on which certain counter-parties will continue to deal with Virgin following the completion of the Administration. The question of the terms on which counter-parties will deal with Virgin is subject to the need to obtain confirmations. The sooner these confirmations are obtained, the sooner that balloting can fairly commence.
- 4 Our clients wish to undertake, using their own resources, confirmatory diligence in relation to:
  - a. the terms on which existing aircraft lessors may continue existing arrangements with Virgin following the administration;
  - b. the terms on which the existing letters of credit and merchant facilities might continue to be provided to Virgin following completion of the administration;
  - c. the terms on which existing loans will continue to be available from the Velocity Trustee to Virgin following completion of the administration; and

13 August 2020

Clayton Utz

**Virgin Australia Holdings Limited (Administrators  
Appointed)**

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- d. whether QIC's offer of a \$200m financing is still available and the terms on which this financing might be available (and in this regard, please let us know if the administrators maintain any objection to approaching QIC).
- 5 There is no issue of the use of Virgins' confidential information with respect to the proposed conferrals.
- 6 While we appreciate that the Administrators are concerned that providing assistance in obtaining these confirmations may place them in breach of undisclosed contractual obligations owed to associates of Bain Capital, our clients are not asking for assistance in relation to the issues listed above. Our clients are simply seeking an indication that your clients do not oppose these steps being undertaken by our clients.
- 7 Accordingly, we invite your clients to confirm that they have no objection to our clients making these enquiries. While there are other conditions outstanding, the conditions referred to above can be dealt with directly by our clients without any resources being deployed by the Administrators.
- 8 To the extent that there remains a concern that the Administrators are obliged to object or actively resist the development of our clients' DOCA proposal, then it seems the Administrators have placed themselves in a position of difficulty in the discharge of their office. It also raises a question as to why no "fiduciary-out" was included, but why, in addition to that, the Administrators would contractually agree to take steps to try and stifle the development of alternative DOCA proposals. The imposition of a term requiring proposals to be effectively stifled will have consequences in the event of any challenge to a Bain sponsored DOCA.
- 9 One simple way in which the Administrators can and should alleviate themselves of any difficulty is by consenting to the appointment of a facilitator. The appointment of a facilitator would also deal with any concerns the Administrators have in confirming the current trading position of Virgin and its projected cashflow.
- 10 We would appreciate your response by **12pm on 14 August 2020**.

Yours faithfully

**Corrs Chambers Westgarth**



**Cameron Cheetham**

Partner

Sworn on \_\_\_\_\_

Before me \_\_\_\_\_

Mr Cameron Cheetham  
Partner  
Corrs Chambers Westgarth  
8-12 Chifley Square  
Sydney NSW 2000

cameron.cheetham@corrs.com.au

14 August 2020

Dear Cameron,

**Virgin Australia Holdings Limited ACN 100 686 226 (VAH) and certain of its subsidiaries (all Administrators Appointed) (together, the Companies)**

We refer to your letter dated 13 August 2020 (**Letter**) in relation to your clients DOCA proposal (as defined in the Letter), and in particular the actions set out in paragraph 4 of the Letter that your clients wish to undertake (**Requests**).

As confirmed in our letter to you dated 26 June 2020 and also in our clients' letter to your clients dated 22 July 2020, our clients have entered into a binding and final transaction with Bain Capital pursuant to which they have exercised their power of sale under section 437A of the *Corporations Act 2001* (Cth) (**Corporations Act**) by agreeing to cause the Companies to sell the Virgin business to Bain Capital (**Transaction**). Our clients entered into the Transaction following a comprehensive sale process which your clients participated in. We note that our clients have certain obligations under the relevant Transaction documents that prohibit them from allowing your clients to undertake the actions raised by the Requests. The appointment of a facilitator will not change this position in any respect.

Additionally, we note that the actions contemplated by the Requests would be in breach of clause 7.1 of the Confidentiality Agreement dated 25 May 2020 between your clients and VAH.

As you are aware, our clients have discretion to exercise the powers conferred on them by section 437A of the Corporations Act (amongst others), and indeed the responsibility to exercise such discretion, in circumstances where to do so would be in the best interests of the Companies and their creditors. Our clients have exercised their power of sale by entering into the Transaction because the Transaction is, in their view, the most favourable transaction available for the benefit of the Companies and their creditors. For the avoidance of doubt, we note that your clients' proposal that was submitted on 24 June 2020, was considered by our clients prior to them entering into the Transaction and as you have rightly confirmed the terms of your clients DOCA proposal submitted on 22 July 2020 have not materially changed from the terms of the earlier proposal.

For the reasons stated above, our clients do not consent to the Requests or agree to your clients undertaking any of the actions set out in the Requests.

Yours sincerely



**Timothy Sackar, Partner**  
+61 2 9353 4114  
tsackar@claytonutz.com

**Orla McCoy, Partner**  
+61 2 9353 4240  
omccoy@claytonutz.com

## McCloy, Madeleine

---

**From:** Andrew Edington <andrew.edington@corrs.com.au>  
**Sent:** Monday, 10 August 2020 3:24 PM  
**To:** McCoy, Orla  
**Cc:** Sackar, Timothy; Glavac, Mikhail; Gardner, Tom; Project Volar; Cameron Cheetham; Michael Catchpoole; Matt Whitbread; Melissa Liu; Jessica Every; Mollie O'Connor  
**Subject:** RE: NSD464 of 2020 - In the Matter of Virgin Australia Holdings Ltd (Administrators Appointed) [CU-Legal.FID3017446]  
**Attachments:** 3441-5915-4960-v6 - Letter to Clayton Utz - Meeting and Voting.pdf

Dear Orla,

Thank you for your email below. Please see attached correspondence.

Regards,

**Andrew Edington** | Senior Associate  
**Corrs Chambers Westgarth**  
t +61 2 9210 6758 e [andrew.edington@corrs.com.au](mailto:andrew.edington@corrs.com.au)  
[corrs.com.au](http://corrs.com.au)

This and the following 8 pages is Annexure H referred to in the affidavit of Kassandra Suzann Adams dated 16 August 2020

Sworn on \_\_\_\_\_

Before me \_\_\_\_\_

---

**From:** McCoy, Orla [mailto:[omccoy@claytonutz.com](mailto:omccoy@claytonutz.com)]  
**Sent:** Friday, 7 August 2020 12:53 PM  
**To:** Andrew Edington <andrew.edington@corrs.com.au>  
**Cc:** Cameron Cheetham <cameron.cheetham@corrs.com.au>; Michael Catchpoole <michael.catchpoole@corrs.com.au>; Sackar, Timothy <tsackar@claytonutz.com>; Glavac, Mikhail <mglavac@claytonutz.com>; Gardner, Tom <tgardner@claytonutz.com>; Project Volar <Volar@claytonutz.com>  
**Subject:** NSD464 of 2020 - In the Matter of Virgin Australia Holdings Ltd (Administrators Appointed) [CU-Legal.FID3017446]

Dear Andrew

Please see **attached** (as a courtesy) copies of the following documents filed in proceedings NSD464/2020 in respect of an application for an extension of the convening period and other relief, listed for hearing at 2.15pm next Tuesday, which were sent to your clients, BroadPeak and Tor, by Deloitte this morning via the Halo platform. A copy of the cover email which your clients will have received is also attached.

1. interlocutory process filed 7 August 2020; and
2. affidavit of David Michael Orr filed 6 August 2020;
3. affidavit of Vaughan Neil Strawbridge together with Exhibit VNS-5 filed 7 August 2020.

Kind regards

**Orla M. McCoy, Partner**  
**Clayton Utz**

Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4240 | F +612 8220 6700

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CC/MC/BROA28017-9155187

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10 August 2020

**By email:** [omccoy@claytonutz.com](mailto:omccoy@claytonutz.com)  
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**Contact**  
Michael Catchpoole (02) 9210 6288  
Email: [Michael.catchpoole@corrs.com.au](mailto:Michael.catchpoole@corrs.com.au)

**Partner**  
Cameron Cheetham

**By email:** [tsackar@claytonutz.com](mailto:tsackar@claytonutz.com)  
Tim Sackar  
Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000

Dear Colleagues

**In the matter of Virgin Australia Holdings Limited  
(Administrators Appointed) & Ors  
Federal Court of Australia (NSD 464 of 2020)**

- 1 Thank you for giving us notice of the Administrators' most recent application in these proceedings.
- 2 Our clients remain committed to putting an alternative DOCA proposal to creditors for their consideration and take an active interest in the conduct of this proceeding.
- 3 On review of your clients' application, we think it is necessary to raise with you:
  - a. arrangements for voting on competing proposals by ballot and consequential amendments to meeting procedure, which practically protect the democratic process of the administration as referred to by the Court; and
  - b. consequent on the implementation of a balloting process, solving certain remaining practical difficulties in your clients' dealing with alternative Deed of Company Arrangement (**DOCA**) ahead of publication of the ballots.
- 4 As the Court stated in its Reasons for Judgment on 15 July 2020 at [14]:

*"... [T]he Administrators' preference for one proposal does not justify the exclusion of all other proposals from consideration by the creditors. It is to be recalled that s 439C(a) of the Corporations Act expressly authorises the creditors to approve a DOCA which is different from the one which accompanied the notice of meeting."*

- 5 Our clients consider that a failure to deal with issues in relation to the conduct of the meeting of creditors give rise to a substantial prospect that the meeting of creditors will need to be adjourned, or that any DOCA passed at that meeting will be liable to be set aside by the Court.
- 6 Given these consequences, we are confident that your clients will fully support exploring ways in which the process leading up to the determination of the meeting of creditors can be made as robust as possible taking into account the stated need to conduct voting via an electronic platform.
- 7 In circumstances where our clients have outlined their proposal contains reasonable conditionality and have provided evidence of their financial capacity, there is no reason why our clients' proposal cannot and should not be put on a basis where it is adopted by creditors at the meeting. Whether creditors accept or reject that proposal is ultimately a matter for creditors, and our clients' interest is in being able to fairly put a proposal to the meeting.

#### **Arrangements for voting**

- 8 Section 439A of the *Corporations Act 2001* (Cth) (**Corporations Act**) sets out that creditors will vote to decide the future of the company at the meeting of creditors. Creditors are not compelled to vote for any DOCA proposed by Bain in the face of an alternative proposal that they may prefer.
- 9 In effect, by the scheme of Part 5.3A, creditors make a democratic decision about which path they chose to take, subject to possible Court supervision and oversight.
- 10 As Justice Middleton stated on 10 July 2020 to your counsel:

*"HIS HONOUR: I don't have a problem with anything you've just said, but let's get back, though, to the issue of what Mr Jackman's clients are able to do. They're able to put forward a new DOCA – that's the first step – if they want to.*

*DR HIGGINS: Yes.*

*HIS HONOUR: To do that at the second creditors' meeting in August or to be able to vote one way or the other, Mr Jackman's clients have to be given sufficient information for them to know what options are available on the table.*

*DR HIGGINS: Yes, your Honour.*

*HIS HONOUR: And they can bring their own option or they can watch and see what other options there are to vote on. So all that's, I think, uncontroversial. All you're*

*DR HIGGINS: That is so."*

- 11 In the present circumstances, electronic balloting may be the most expedient way to conduct the meeting. However, the detail of the procedure to be adopted is critical

to protecting the democratic process laid out in the Corporations Act as practically expressed by His Honour above.

12 In relation to the regime proposed by your client it is apparent that a number of aspects of ordinary meeting procedure may be unavailable or compromised by the pre-voting regime and other orders sought, including the specific aspects of meeting procedure mentioned by Justice Middleton on 10 July 2020 as providing substance. For instance, the proposed regime does not provide a mechanic that would allow the following aspects:

- a. At the meeting of creditors, any creditor is free to propose a motion or to amend a motion. To the extent to which motions are put and moved from the floor, they then may be decided by a poll conducted by the administrator sitting as chairperson of the meeting.
- b. If, for instance, at the meeting of creditors, a proposal was put to pay creditors twice what was proposed on certain conditions, creditors could move for an adjournment on the floor of the meeting to facilitate an exploration of those conditions. Equally, creditors could determine to reject that proposal and place the company in liquidation or to amend the terms of the Bain proposal in any manner that creditors see fit.
- c. Creditors' ability to address the meeting and discuss amongst themselves as to why a specific proposal should be preferred ahead of the conduct of the ballot or to move resolutions in relation to the order of voting. By the terms of the Insolvency Practice Rules (75-70) an opportunity must be provided for debate on proposed resolutions ahead of the conduct of any poll.

13 Each of these aspects of the meetings are core to the proper conduct of the meeting and require modification to function properly in the context of electronic balloting.

14 It appears to our clients necessary that modifications for electronic balloting are required to cater for:

- a. any competing proposals or amendments to be put on the ballot papers in a procedurally fair way; and
- b. arrangements need to be made in advance of the balloting process for the dissemination and finalisation of proposals.

15 First, it seems to us to be beyond doubt that if pre-voting is permitted, it should be done on the basis that all proposals are set out on the electronic ballot. While we have assumed that your clients intend to include our clients proposal on the ballot papers there are a number of other matters that require consideration.

16 Ordinarily, resolutions are moved in a particular order at the meeting of creditors. In the case of electronic voting, this will be impossible. Consequentially, it would be appropriate for the ballot to set out cascading options. One example would be as follows:

(Resolution 1)

Do you support a DOCA:  yes  no  abstain

Which DOCA do you wish to support:

- i. Proposal 1  yes  no  abstain
- ii. Proposal 2  yes  no  abstain
- iii. Proposal 3  yes  no  abstain.

- 17 Assuming your clients have no difficulty with balloting, there must also be some arrangements that anchor what is to be put to creditors for voting so that ballots can be cast in a meaningful way. In order for that process to happen, there must be a deadline ahead of voting by which proposals are:
- a. submitted in as good a form as possible (we suggest the deadline be 3 business days before the issuing of ballot papers); and
  - b. published and any amendments proposed or submitted (which we suggest take place in the 3 business days between submission of proposals and the publication of ballot papers).
- 18 Further, given that it may not be possible (or fair) to canvass for votes on the floor of the meeting, arrangements must be put in place for DOCA proponents to disseminate material promoting and explaining their proposal ahead of the commencement of voting.
- 19 While the Administrators are duty bound to fairly summarise and compare proposals (although, in this case, there may be certain difficulties with this given the Bain SID touched upon below), the democratic process of the meeting requires there to be an opportunity to address creditors, take questions and make reasoned amendments in response to feedback. While this may necessarily need to be a structured and limited opportunity given the scale of this administration, it still requires some practical outlet.
- 20 We would suggest it is appropriate that arrangements be put in place for DOCA proponents to publish explanatory material and statements via the Administrators to all creditors (to avoid unsolicited email communications and to ensure that all campaigning is conducted in a transparent and fair manner). Further, given that the Act stipulates an opportunity for debate is to be given, it would be sensible to conduct an electronic town-hall meeting or similar forums ahead of the opening of polling in order to give creditors a chance to ask questions and debate the merits of various proposals.
- 21 Finally, while it is a matter for the administrators, an explanation of the following should be made available to the creditors:
- a. what arrangements will be put in place in relation to the inspection of proofs of debt and proxies; and



b. whether, in view of the public statements made to the effect that Bain is negotiating with “stakeholders” on a bilateral basis, what arrangements will be made to take into account any collateral or additional benefits provided by any DOCA proponent outside the context of the DOCA.

22 Please confirm by **12pm on Tuesday 11 June 2020** that your client in principle supports arrangements of the kind described above. We are happy to work with you to finalise appropriate modifications to the orders sought in relation to the conduct of the meeting.

### **Finalisation of proposal**

23 We note that our clients have now received repeated indications, that, by the terms of the Bain Sale and Implementation Deed (**Bain SID**), the Administrators consider themselves bound not to take any steps that might practically facilitate the development of unconditional alternative DOCA proposals.

24 By the terms of the Administrators email of 24 July 2020, it seems that the obligations imposed on the Administrators by the Bain SID include personal obligations not to assist in the development of alternative DOCA proposals. The extent of the fetter and the consequences of any breach of that fetter is a matter of speculation for our clients.

25 On Friday 7 August 2020, the Administrators issued a further statement that the terms of the Bain SID will also prevent *any* consideration of a DOCA:

*“While it is open to any party to submit an alternative proposal, it cannot be considered by the Administrators, or recommended to creditors, given the binding agreement already in place.”*

26 Where the Administrators consider themselves bound not to even consider our clients’ proposal, it is difficult for a fair minded observer to conclude that the Administrators would be able to provide a fair summary or recommendation in relation to our clients’ proposal or to adjourn the meeting to deal with any remaining conditionality. Necessarily, the process of summation involves consideration.

27 Additional problems may arise in so far as the Administrators may consider that providing assistance or accommodation to our clients in relation to the procedure to be adopted at the meeting of creditors places themselves personally in breach of obligations assumed under the Bain SID.

28 As your clients are well aware, in order to propose injecting \$800m of new money into the companies on an unconditional basis, it is necessary for any investor to complete their diligence.

29 Practically, it is of minimal assistance to creditors for proposals to be put forward which are not informed by the financial requirements of the Companies and have concluded discussion with key stakeholders and ordinarily, the Administrators would, in good faith consider an adjournment of the meeting of creditors if an economically superior proposal was available for creditors. If the Administrators can

only say no to information requests, then in a very real sense the meeting of creditors will be deprived of meaningful choice.

- 30 Following the hearing on 10 July 2020, it was hoped that a sensible approach to sharing information would be taken, in everybody's interests, as expressed by His Honour in the following passage (T12.23-13.15):

*HIS HONOUR: I'm not suggesting that. I did turn my mind ... – I'm not going to do this now, so you don't need to give me a submission on it. I did turn my mind to whether or not, having regard to where the battle is now between Mr Jackman's clients and yourself and Mr Izzo's clients, whether or not there should be some facilitator so that the air could be cleared and people could clear – find out what's going on in that sort of way so to alleviate people's concerns. But I've decided I won't order that now because I think I can dispose of this application today based upon what I had before me. But I'm just indicating it's in everybody's interests for as much communication to alleviate people's concerns, but more importantly, to gather all the information and all the options that will be available for the second creditors' meeting. And that's the important thing.*

- 31 It has previously been assumed that the Administrators would be free to exercise discretion appropriately. On the last hearing date, 30 July 2020, in answering a self-represented bondholder's concerns, his Honour explained that the effect of orders that Administrators would be "justified" in taking a particular course depended on the Administrators having underlying discretion to deal with each creditor appropriately (T5.42-6.9):

*HIS HONOUR: ... Could I just explain to you when I said mandatory, should I just explain to you that the order is to the effect that the administrators are justified in using a particular system. So it's the court's imprimatur to say that if you do it this way, you will not get into trouble because the court is giving you the go ahead to use this system. **But they have the discretion** in which to use whatever information they want to use or **to deal with you in a way that is outside that if that is the appropriate way in which to treat ... so that's a matter for the administrators.** So even adding your word "may" doesn't really add much because **they can look after you in the way you want if they think that's the appropriate and best way to do it.** Dr Higgins will correct me if anything I've said is wrong but that seems to me the approach that could be taken and perhaps should be taken.*

*DR HIGGINS: That's correct, your Honour. (Emphases added)*

- 32 The success of this approach depends fundamentally on the Administrators, being free to exercise discretion appropriately in the interests of creditors rather than having given up discretion by contract with Bain Capital.

- 33 Our clients expect that the Administrators would, in normal circumstances provide assistance and information to a genuine DOCA proponent. The Administrators'

statement on Friday makes plain that the Administrators are not free to exercise their discretion so because they consider themselves bound by the Bain SID not to assist.

- 34 The practical effect is that however justified a request for information, or no matter how essential that is to putting a DOCA proposal forward, it appears that the Administrators are required to say no, or concerned that if they do agree, they are exposing themselves to a breach of the Bain SID.
- 35 It seems that the Administrators have been bound by the Bain SID to use all their powers to limit creditors' rights to receive, consider and vote on a DOCA from our clients, including by seeking to prevent any engagement with third party stakeholders and confirmatory due diligence that would remove any "conditionality".
- 36 Our clients are left in a position of being required to litigate in circumstances where that should never be required or necessary. Further and no doubt in answer to that litigation, the Administrators would maintain that relief should not be granted by reason of the terms of the Bain SID (which we do not know and cannot address).
- 37 Most fundamentally, the Bain SID does not and cannot obviate the statutory rights of creditors. In the event of a serious irregularity in relation to the conduct of the Administration, including procedural unfairness, there is a strong prospect that the Court would set aside any DOCA procured in circumstances where creditors have been held out of a genuine choice. The consequences of the invalidation of any DOCA (including the Bain DOCA favoured by the Administrators which does not yet exist) would involve the Companies automatically entering into liquidation.
- 38 In circumstances where the Administrators have themselves stated that co-operation with our clients would breach the terms of the Bain SID, our clients consider it is now appropriate to revisit Justice Middleton's suggestion that a facilitator be appointed to avoid potentially large-scale and avoidable litigation.
- 39 Our clients accordingly propose that a facilitator be appointed with powers in office limited to:
- a. conferring with the Administrators and our clients in relation to access to company information and stakeholders in relation to the confirmatory diligence and information requests made by our clients or any other DOCA proponents and making such recommendations to the Administrators, and taking such other action or giving such approval, as the facilitator thinks fit in relation to the provision of that information and timely access;
  - b. preparing a limited report for inclusion in the report required to be given to creditors of the Virgin group pursuant to s 439A of the Act in relation to any DOCA proposals received; and
  - c. reporting to the Court on or before 22 August 2020 in relation to the matters above, including as to any recommendations made by the facilitator or other matters.

10 August 2020

Clayton Utz

**In the matter of Virgin Australia Holdings Limited  
(Administrators Appointed) & Ors  
Federal Court of Australia (NSD 464 of 2020)**

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- 40 We would propose that such orders be made under s.447A of the Corporations Act and that an ancillary order providing access to information, documents and Court assistance to the facilitator be made on the same basis as in *Korda, in the matter of Ten Network Holdings Ltd* [2017] FCA 914.
- 41 We say that the appointment of a facilitator is appropriate because:
- a. the Administrators have an obligation not to engage with or assist our clients that could be overcome by the appointment of a facilitator who could constructively engage on these issues with the Administrator and potentially eliminate or limit the need for any adjournment of the meeting of creditors or further litigation;
  - b. the Administrators are ostensibly not in a position to be seen to be fairly dealing with aspects of our clients proposal and as such the facilitator is able to alleviate that concern;
  - c. the appointment of a facilitator may have the effect of avoiding circumstances coming into existence that would almost inevitably lead to the DOCA being set aside; and
  - d. the appointment of a facilitator does not disrupt or hinder the completion of the Administration process and leaves the Administrators in charge of the administration.
- 42 We consider that it would be in the interests of your clients and the Companies to consent to the limited appointment outlined above. Please let us know if your client consents to the appointment of a facilitator by **12pm on Tuesday 11 August 2020**.

Yours faithfully

**Corrs Chambers Westgarth**



**Cameron Cheetham**

Partner

## McCloy, Madeleine

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**From:** Matt Whitbread <matt.whitbread@corrs.com.au>  
**Sent:** Thursday, 13 August 2020 1:45 PM  
**To:** McCoy, Orla  
**Cc:** Sackar, Timothy; Glavac, Mikhail; Gardner, Tom; Project Volar; Cameron Cheetham; Michael Catchpoole; Melissa Liu; Jessica Every; Mollie O'Connor; Andrew Edington  
**Subject:** RE: NSD464 of 2020 - In the Matter of Virgin Australia Holdings Ltd (Administrators Appointed) [CU-Legal.FID3017446]  
**Attachments:** 3447-9924-7120-v1 - Letter to Clayton Utz re ballot and facilitator - 13....pdf

Dear Orla

This and the following 2 pages are Annexure I referred to in the affidavit of Kassandra Suzann Adams dated 16 August 2020

Please see attached correspondence.

Sworn on \_\_\_\_\_

Best regards,

Before me \_\_\_\_\_

**Matt Whitbread** | Senior Associate  
**Corrs Chambers Westgarth**  
t +61 2 9210 6093 m +61 410 588 321 e matt.whitbread@corrs.com.au  
[corrs.com.au](http://corrs.com.au)

---

**From:** Matt Whitbread  
**Sent:** Thursday, 13 August 2020 1:33 PM  
**To:** McCoy, Orla <omccoy@claytonutz.com>  
**Cc:** Sackar, Timothy <tsackar@claytonutz.com>; Glavac, Mikhail <mglavac@claytonutz.com>; Gardner, Tom <tgardner@claytonutz.com>; Project Volar <Volar@claytonutz.com>; Cameron Cheetham <cameron.cheetham@corrs.com.au>; Michael Catchpoole <michael.catchpoole@corrs.com.au>; Melissa Liu <melissa.liu@corrs.com.au>; Jessica Every <jessica.every@corrs.com.au>; Mollie O'Connor <mollie.oconnor@corrs.com.au>; Andrew Edington <andrew.edington@corrs.com.au>  
**Subject:** NSD464 of 2020 - In the Matter of Virgin Australia Holdings Ltd (Administrators Appointed) [CU-Legal.FID3017446]

Dear Orla

Please see attached correspondence.

Best regards,

**Matt Whitbread** | Senior Associate  
**Corrs Chambers Westgarth**  
t +61 2 9210 6093 m +61 410 588 321 e matt.whitbread@corrs.com.au  
[corrs.com.au](http://corrs.com.au)

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CC/MW/BROA28017-9155187

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13 August 2020

**By email:** [omccoy@claytonutz.com](mailto:omccoy@claytonutz.com)

Orla McCoy  
Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000

**Contact**  
Matt Whitbread (02) 9210 6093  
Email: [matt.whitbread@corrs.com.au](mailto:matt.whitbread@corrs.com.au)

**Partner**  
Cameron Cheetham

**By email:** [tsackar@claytonutz.com](mailto:tsackar@claytonutz.com)

Timothy Sackar  
Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000

Dear Colleagues

## **Virgin Australia Holdings Limited (Administrators Appointed) (Virgin)**

- 1 We refer to our clients' Interlocutory Application filed 11 August 2020 and our letter of 10 August 2020 to which we have not received your reply as yet.
- 2 In an effort to narrow the matters in dispute between the parties ahead of next Monday's hearing we invite your clients to indicate their attitude towards:
  - a. whether they agree that our clients' proposal should be included on the balloting material distributed to creditors in advance of the meeting of creditors; and
  - b. that without prejudice to whatever your clients may say about why no facilitator is required in this case, that Mr Joe Hayes of Wexted Advisory would be an acceptable facilitator if the Court was minded to make an appointment.
- 3 We look forward to hearing from you by **12pm on 14 August 2020**.

13 August 2020

Clayton Utz

**Virgin Australia Holdings Limited (Administrators  
Appointed)**

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Yours faithfully

**Corrs Chambers Westgarth**

A handwritten signature in black ink, appearing to read 'C Cheetham', with a long horizontal stroke extending to the right.

**Cameron Cheetham**

Partner

Sworn on \_\_\_\_\_

Before me \_\_\_\_\_

Mr Cameron Cheetham  
Partner  
Corrs Chambers Westgarth  
8-12 Chifley Square  
Sydney NSW 2000

cameron.cheetham@corrs.com.au

14 August 2020

Dear Cameron,

**Virgin Australia Holdings Limited ACN 100 686 226 (VAH) and certain of its subsidiaries (all Administrators Appointed) (together, the Companies)**

We refer to:

- (a) your letter to us dated 13 August 2020 in relation to your clients' Interlocutory Application filed 11 August 2020 (**Corrs Letter**);
- (b) our letter to you dated today's date (**CU Letter**); and
- (c) the Confidentiality Agreement dated 25 May 2020 between your clients and VAH (**Confidentiality Agreement**).

Our clients do not consent to the appointment of a facilitator. The matter will be the subject of argument before the Court on Monday.

As to your suggestion that Mr Joe Hayes may be a suitable facilitator, one of the reasons that our clients oppose the appointment of a facilitator is that the role of a facilitator in a voluntary administration is unorthodox and the scope of his duties to the companies, creditors, the Administrators and the Court unidentified. It is not apparent to our clients what function the facilitator would or could perform in circumstances where the assets your clients seek to include in any DOCA proposal have been sold. Without knowing what function the facilitator is intended to perform, what powers and duties are intended to be vested in the facilitator and what obligations the facilitator will owe to the companies, its creditors and our clients, our clients express no views as to whether Mr Hayes would be appropriate for the role.

As you know, our clients are concerned to ensure that your clients comply with their obligations under the Confidentiality Agreement. We remind you that approaching Mr Hayes and disclosing Confidential Information (as defined in the Confidentiality Agreement) without seeking the consent of our clients would be a breach of the Confidentiality Agreement.

We note that we have not responded to paragraph 2(a) of the Corrs Letter in this letter and instead refer you to our further letter to you dated today's date in this regard.



Mr Cameron Cheetham, Corrs Chambers Westgarth

14 August 2020

Our clients continue to reserve all rights arising under or in connection with the Confidentiality Agreement, including for any damage or losses suffered by our clients and the Companies as a consequence of any breaches of the Confidentiality Agreement.

Yours sincerely



**Timothy Sackar, Partner**  
+61 2 9353 4114  
tsackar@claytonutz.com

**Orla McCoy, Partner**  
+61 2 9353 4240  
omccoy@claytonutz.com