

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 13/05/2020 9:34:54 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

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: 13/05/2020 9:35:11 AM 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

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. I make this affidavit in relation to the Interlocutory Application filed on behalf of the Plaintiffs on 11 May 2020 (**Interlocutory Application**).
4. Exhibited to me at the time of making this affidavit is a bundle of documents, to which I make reference in this affidavit marked "**KSA-1**" (**Exhibit KSA-1**). A reference to a Tab in this affidavit is to a tab in Exhibit KSA-1, unless otherwise stated.

SERVICE OF THE INTERLOCUTORY PROCESS

Aircraft Lessors

5. On 11 May 2020, Mukhtader Mohammed, Director, Deloitte sent an email to Graeme Tucker, Partner, Clayton Utz attaching two excel spreadsheets having document names "*Financiers tracker*" and "*Virgin - Lessor Tracker*", which Mr Tucker then forwarded to me. I am informed by Mr Mohammed and verily believe that the contact details of all aircraft lessors and aircraft financiers known to the First Plaintiffs are contained in:
 - (a) sheet titled "*FL Mail Merge*" in the "*Financiers tracker*" document (**Financier Tracker**); and
 - (b) sheet titled "*Email Address Summary*" in the "*Virgin - Lessor Tracker*" document (**Lessor Tracker**).

Copies of the extracted Financier Tracker and Lessor Tracker are located at **Tabs 1 and 2**, respectively of **Exhibit KSA-1**.
6. On Monday, 11 May 2020, I sent an email to each of the email addresses contained in the Financier Tracker and the Lessor Tracker titled "*In the matter of Virgin Australia Holdings Ltd (Administrators Appointed) ACN 100 686 226 & ORS - Federal Court of Australia Proceeding Number NSD 464 of 2020 (Proceeding)*". Each of the emails:
 - (a) notified the recipients that the Proceeding is listed for Hearing via Microsoft Teams (video-conference) in the Federal Court of Australia at 10.15am on Wednesday, 13 May 2020 before the Honourable Justice Middleton (**Hearing**);
 - (b) attached copies of the following documents:
 - i. interlocutory process filed in the Proceeding on 11 May 2020 (**Interlocutory Process**);
 - ii. sealed affidavit of Vaughan Neil Strawbridge filed in the Proceeding on 11 May 2020;
 - iii. Exhibit "VNS-2", being a bundle of documents exhibited to the affidavit of Vaughan Neil Strawbridge filed in the Proceeding on 11 May 2020;
 - iv. sealed supplementary affidavit of Vaughan Neil Strawbridge filed in the Proceeding on 11 May 2020; and

- v. Exhibit "VNS-3", being a bundle of documents exhibited to the supplementary affidavit of Vaughan Neil Strawbridge filed in the Proceeding on 11 May 2020; and
- (c) provided details of the Microsoft Teams Meeting Conference ID for the Hearing.

Copies of each of the emails I caused to be sent (without attachments), which are in identical terms, are located at **Tab 3 of Exhibit KSA-1**.

- 7. I confirm that as at the date of this affidavit, I did not receive any bounce-back emails from the emails sent to the addresses in the Financier Tracker or the Lessor Tracker, which are located at **Tabs 1 and 2 of Exhibit KSA-1**.

Rio Tinto

- 8. I am informed by Matthew Donnelly, Partner, Deloitte Touche Tohmatsu (of which Deloitte Financial Advisory Pty Ltd is a wholly owned subsidiary) (**Deloitte**) and verily believe to be true that on 12 May 2020 at approximately 12pm, Mr Donnelly sent an email to, among others, Roger McNeill and Michael Tomasz of Rio Tinto Services Limited (**Rio Tinto**) and Nick Anson, Partner, MinterEllison titled "*Rio/VARA*" (**Rio/VARA Email**). The email:
 - (a) stated that the First Plaintiffs sought to limit their liability for trading to the assets of the Virgin companies in administration to avoid liability accruing to them personally;
 - (b) stated that as foreshadowed, orders are being sought to perfect this position in relation to the "Rio agreement" and "across the board"; and
 - (c) forwarded an email I caused to be sent to Michael Clarkson, Deloitte containing the same information and attachments as described at paragraph 6(a) to 6(c) above.

A true copy of the email chain containing the email from Mr Donnelly to Messrs McNeill, Tomasz and Anson is located at **Tab 4 of Exhibit KSA-1**.

ACCC

- 9. I am informed by Kirsten Webb, Partner, Clayton Utz and verily believe to be true that on 12 May 2020, Ms Webb sent an email to Rami Greiss, Nicolas Heys and Latrina Eckermann, each employed by the Australian Competition and Consumer Commission (**ACCC**), titled "*In the matter of Virgin Australia Holdings Ltd (Administrators Appointed) ACN 100 686 226 & ORS - Federal Court of Australia Proceeding Number NSD 464 of 2020 (Proceeding)*". The email:
 - (a) contained the same information and attachments as described at paragraph 6(a) to 6(c) above; and
 - (b) identified that paragraphs 16 and 17 and Schedule 2 of the Interlocutory Process (and the supporting affidavits) address Conditional Credits.

A true copy of the email Ms Webb caused to be sent (without attachments) is located at **Tab 5 of Exhibit KSA-1**.

ASIC

10. I am informed by David Lombe, Special Principal, Deloitte and verily believe to be true that on 12 May 2020, Mr Lombe sent emails to Thea Eszemy, Carl Sibilia, Yvan Dang, each employed by the Australian Securities and Investments Commission (**ASIC**), titled "*Application Materials*":

- (a) at approximately 9:13am, attaching the documents described at paragraph 6(b) above; and
- (b) at approximately 2:45pm, setting out the information described at paragraph 6(a) and 6(c) above.

A true copy of the email chain containing the emails from Mr Lombe to ASIC is located at **Tab 6** of **Exhibit KSA-1**.

Fair Entitlements Guarantee

11. I am informed by Lombe and verily believe to be true that on 12 May 2020, Mr Lombe, sent emails to Henry Carr and Janine Cole, each employed by the Australian Government Attorney-General's Department (**Attorney-General's Department**), titled "*Application Materials*":

- (a) at approximately 9:16am, attaching the documents described at paragraph 6(b) above; and
- (b) at approximately 2:49pm, setting out the information described at paragraph 6(a) and 6(c) above.

A true copy of the email chain containing the emails from Mr Lombe to the Attorney-General's Department is located at **Tab 7** of **Exhibit KSA-1**.

COMMUNICATIONS WITH PARTIES**Minter Ellison**

12. On 12 May 2020:

- (a) at 1.00pm, I was copied into an email from Mr Nick Anson, Partner, Minter Ellison to Matt Donnelly, Partner, Deloitte, acting on behalf of Rio Tinto Services Limited seeking to amend paragraph 13(b) of the interlocutory process as underlined and to read as follow:

"notwithstanding that the liabilities in subparagraph (a) are debts incurred by the First Plaintiffs in the performance and exercise of their functions as joint and several administrators of the Twentieth Plaintiff, the First Plaintiffs will not be personally liable to repay such debts or satisfy such liabilities to the extent that the proceeds of any applicable insurance policy held by or for the benefit of the First Plaintiffs or the Twentieth Plaintiff, or the assets of the Twentieth Plaintiff, are in aggregate insufficient to satisfy the debt and liabilities incurred by the First Plaintiffs arising out of, or in connection with, the Rio Tinto Agreement."

- (b) at 6.16pm, I sent an email to Mr Anson, confirming that we will bring his email to the Court's attention and seek that the order be made as detailed in his of 1.00pm.

A true copy of the email chain between, among others, Messrs Donnelly, McNeill, Tomasz, Anson and myself is located at **Tab 4** of **Exhibit KSA-1** of this affidavit.

Norton Rose Fulbright

13. On 12 May 2020:

(a) at 2.17pm, I received an email from Mr Noel McCoy, Partner, Norton Rose Fulbright, acting on behalf of Perth Aircraft Leasing and Aviation Capital Group, noting among other things, that:

- i. they will be unable to obtain their clients instructions prior to the hearing; and
- ii. an adjournment of the application, in so far as it related to clause 14(a)(i) for a period of one week.

(b) at 2.35pm, I sent an email to Mr McCoy, providing among other things, that an order is sought to provide an interested party to have liberty to apply to vary or discharge the orders on 1 business days' notice.

(c) at 3.42pm, I received a further email from Safiyya Khan, Senior Associate, Norton Rose Fulbright (**Khan Email**), seeking us to:

"clarify whether the position with respect to the limitation of liability provisions outlined to us in the email we received yesterday (and as discussed on our call this morning) is being withdrawn or if the intention is still to seek orders that the administrators' personal liability is limited on the terms contained in the Rider at tomorrow's hearing."

(d) at 6.21pm, I sent an email to Ms Khan providing that:

"As described in the IP and the Affidavit, we are seeking an order that it be an agreement on the terms of, or substantially in accordance with the Aircraft Protocol circulated on 1 May 2020.

This does not mean that it needs to remain the same just substantially in the same form. I also note that the order will only apply if your client enters into the agreement, not if they don't. The purpose of the order is to alleviate the need to attend Court every time an agreement is entered into in order to limit the administrators personal liability. The form of limitation of liability to ultimately be included in the Aircraft Protocol will be one that is consistent with the orders, rather than the version included in the circulation of 1 May 2020."

(e) at 11.18pm, I received a further email from Mr McCoy, noting among other things, that:

- i. Mr McCoy and his client are seeking to clarify the scope of the orders limiting the administrators liability relative to any standstill agreement with the lessors;
- ii. Mr McCoy and his client understand the administrators position to be that:

- 1. *"the administrators' application seeks protection from personal liability in respect of an agreement on the terms of, or substantially in accordance with the Aircraft Protocol circulated on 1 May 2020 (being the version that will be put before the Court) but it is expected that the actual terms of the Aircraft Protocol to be entered into with lessors, at least the form of words limiting*

liability (being the subject matter of the orders) will be different to the version of the Aircraft Protocol before the Court"; and

2. *"at the same time, the administrators have provided a revised form of limitation of liability wording that is substantially different to the wording contained in the Aircraft Protocol circulated on 1 May 2020 and is intended to be included in the actual terms of the Aircraft Protocol to be entered into with lessors but this form of revised wording is not being put before the Court on the application".*

14. On 13 May 2020 at 9.22am, I sent an email to Mr McCoy, providing that:
 - (a) *"The form of words for the limitation of liability clause is to reflect the form of the orders proposed in the interlocutory application;*
 - (b) *As I understand it, the Aircraft Protocol with your clients are being discussed and we have not received any comments from your clients on the current Aircraft Protocol other than letters to reflect your high level concerns. The form of the limitation of liability clause will reflect the orders proposed."*
15. A copy of the email chain containing the email correspondence between, among others, myself, Mr McCoy and Ms Khan referred to in paragraphs 13 and 14 is located at **Tab 8 of Exhibit KSA-1**.
16. I otherwise note that I was not copied into the email that Ms Khan is referring to in the Khan Email and I was not in attendance or aware of the call referred to by Ms Khan.
17. I am informed by Graeme Tucker, Partner, Clayton Utz and verily believe to be true that the call and email referred to in the Khan Email refers to:
 - (a) an email sent by Kate Casellas, Special Counsel, Clayton Utz at 9.20pm on Monday 11 May 2020, of which Mr Tucker was copied into, that attached a draft new limitation of liability provision that is intended to reflect the orders; and
 - (b) a call between among others, Mr Tucker, Ms Casellas, Mr McCoy and Ms Khan at 10.00am (AEST) on Tuesday 12 May 2020 which discussed, among other things that:
 - i. the limitation of liability contained in the draft protocol dated 1 May 2020 is not the version which is being proceeded with;
 - ii. the version of the limitation of liability clause to be included in the Aircraft Protocol is to reflect any orders made;
 - iii. the limitation of liability clause to be included in the Aircraft Protocol specifically relates to obligations under the Aircraft Protocol and is not intended to limit liabilities under the leases entered into between the relevant Virgin Companies and counterparty, which is intended to be achieved through the Aircraft Protocol;
 - iv. no order is currently being requested to limit liability under the current leases; and

- v. the Aircraft Protocol is a document intended to be negotiated between the Administrators and the lessors or financiers.

King & Wood Mallesons

18. On 12 May 2020 at approximately 7.48pm, I received an email from Natalie Tatasciore, Partner, King & Wood Mallesons, acting on behalf of the Commonwealth of Australia, attaching a letter of the same date, which provides (**KWM Letter**):
- (a) that the Commonwealth of Australia may wish to be heard by the Court on paragraphs 14, 18-20 and 22;
 - (b) whether the voluntary administrators intend to seek orders in the form proposed orders 14,18-20 and 22 tomorrow, or whether they intend to seek orders in this form at some later date; and
 - (c) if the administrators are intending to seek orders in this form tomorrow, whether the voluntary administrators will agree to have this portion of the interlocutory process stood over for a short period to enable the Commonwealth to consider its position, including its position on whether or not it wishes to be heard on the orders.

A true copy of the email from Ms Tatasciore attaching the KWM Letter is located at **Tab 9 of Exhibit KSA-1**.

19. On 12 May 2020 at approximately 7:21pm, I sent an email to Ms Tatasciore confirming receipt of her email and stating, among other things, that the KWM Letter would be tendered in Court on 13 May 2020.
20. On 12 May 2020 at approximately 9:22pm, Ms Tatasciore sent a further to me to confirm that King & Wood Mallesons would appear at the Hearing.
21. A copy of the email chain containing the above correspondence between, among others, myself and King & Wood Mallesons is located at **Tab 10 of Exhibit KSA-1**.

HWL Ebsworth

22. On 13 May 2020:
- (a) at approximately 8.33am, Mr Sackar forwarded to me a voicemail left from Mr Wayne Jenvey, Partner, HWL Ebsworth Lawyers, acting on behalf of the Australian Taxation Office (ATO).
 - (b) at approximately 8.35am, I called Mr Jenvey,
 - i. Mr Jenvey informed me that:
 - 1. he was acting on behalf of the ATO;
 - 2. his client needed further time to consider the proposed orders 19, 20 and 22 sought by the Administrators, in particular, the order relating to JobKeeper;
 - 3. the ATO presently did not object or oppose the orders;

- 4. was not concerned with the administrative type orders or orders in relation to Tiger 1;
- 5. sought that the matter be stood over for one week; and
- 6. have briefed Carolyn Conway to appear at the hearing of the Interlocutory Application.

ii. I informed Mr Jenvey that it was the Administrators intention to proceed with the Interlocutory Application this morning.

No Other Communications

23. I have not received any other communication from any other interested party of the Second to Thirty-Ninth Plaintiffs (and the proposed Fortieth Plaintiff) served with the Interlocutory Application in accordance with this Affidavit concerning the Interlocutory Application or the relief sought by the Interlocutory Application.

Sworn by the deponent
at Sydney
in New South Wales
on 13 May 2020
Before me:

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Signature of deponent

.....
Signature of witness
Madeline McCloy, Solicitor

SCHEDULE 1

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**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