

## NOTICE OF FILING

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### Details of Filing

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

Dated: 20/08/2020 2:30:27 PM AEST

Registrar

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No. NSD of 2020

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

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

**TRANSPORT WORKERS' UNION OF AUSTRALIA  
 AND OTHERS (AS SET OUT IN THE SCHEDULE)**

Plaintiffs

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

Defendants

**PLAINTIFFS' SUBMISSIONS**

**Overview**

1. This is an application by seven industrial associations (unions) whose members include employees of companies in the "Virgin group" of the companies. The application is for orders enabling representatives from the unions to represent their members at the forthcoming second meetings of the companies' creditors.
2. Such orders are orthodox in large administrations like the present. In past cases, the Court has emphasised its concern, whenever creditors' meetings are called, to overcome any inhibitions upon, or barriers to, creditors having their voices heard or votes cast, especially where there is a large body of creditors, such as employees.
3. The present circumstances exacerbate such concerns. The second meetings will determine the future not only of the Virgin companies but also the employees' jobs. But, because of the global COVID-19 pandemic, the administrators have had to implement special procedures for the

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conduct of the meetings, including the use of an electronic platform and tight “cut-off” dates for lodgement by creditors of meeting-related documents (such as proofs of debt or claim and proxies). Those procedures will affect, and may impede, the ability of union members to participate in the meetings.

4. By this application, the plaintiffs seek orders to ensure that their members have their voices heard and votes cast.

### **Procedural history**

5. The application was commenced by an originating process filed on 20 August 2020, supported by an affidavit made on 20 August 2020 by the plaintiffs’ solicitor, James Higgins of Gordon Legal.
6. The administrators of the Virgin companies are on notice of the application, which will also be served on ASIC.

### **Principles**

7. An application like the present was first made almost 20 years ago, in the Ansett administration. There, it was made concerning first meeting of creditors (under section 436E of the *Corporations Act 2001*). The difficulty was that the employees were dispersed throughout the country and, having regard to the very, very tight timetable which was imposed on the meeting, it was not feasible to implement the procedure which would enable the proxy provisions under the Corporations Regulations to be complied with.<sup>1</sup> Hence, unions applied for orders that employees of the companies “have the opportunity to make their views known ... through the various unions (which are applicants) of which most of them are members and whose interests have been represented by the unions in negotiating various industrial instruments or agreements which regulate their employment”.<sup>2</sup>
8. Justice Goldberg made orders under section 447A of the *Corporations Act*, providing that Part 5.3A would operate in relation to the companies such that employees who were members of specified unions had appointed specified officers as their proxies.<sup>3</sup> His Honour was “satisfied that it is appropriate to make the orders sought in relation to the proxy issue in order to carry into effect the spirit and intendment of Pt 5.3A of the Corporations Act and to ensure that the body of creditors have the opportunity to make their views known, and participate in the proceedings of the first meeting”.<sup>4</sup>
9. His Honour was initially concerned that he “might be putting some employees in the position of having the unions, who are in effect to be their proxy, cast votes on behalf of the employees

<sup>1</sup> *Re Ansett* at [2]

<sup>2</sup> *Re Ansett Australia Ltd (admin app); Rappas v Ansett Australia Ltd (admin app)* (2001) 39 ACSR 296 at [1] (Goldberg J)

<sup>3</sup> “I consider that I have the power to make the order sought under s 447A of the *Corporations Act 2001* (Cth) (the Corporations Act), having regard to the interpretation which has been placed on that section by the High Court in *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279–80; 172 ALR 28; 34 ACSR 250”: *Re Ansett* at [1]

<sup>4</sup> *Re Ansett* at [3]

without the employees having the opportunity to instruct the unions as to what they may wish to say or do at the meeting”. But he was satisfied that the issues that would arise at the meeting were such that it was appropriate that the proxies be deemed to be given to the unions.<sup>5</sup>

10. Justice Goldberg made a similar orders in the Pasminco administration.<sup>6</sup> That application concerned creditors’ meetings to consider proposed variations to deeds of company arrangement that the Pasminco companies had executed. The variations were of particular importance for the union members who were creditors in the Pasminco group, particularly insofar as protection of their unpaid entitlements was concerned.<sup>7</sup>

11. The difficulty, however, was that there was not sufficient time, between when the notices of meeting were sent and when proxies had to be lodged, for the unions to obtain proxies or powers of attorney from their members who were creditors to enable the unions to represent the members at the meeting. Having explained that, under Part 5.3A of the *Corporations Act*, creditors “have a significant and substantial role”, his Honour said that:<sup>8</sup>

... the court should be concerned to ensure that whenever meetings of creditors of companies subject to a deed of company arrangement are called that any inhibitions upon, or barriers to, creditors being able to have their voice heard or vote cast at such meeting be overcome. More particularly is this so where there is a large body of creditors, such as employees, each with claims modest by reference to the overall indebtedness of the companies subject to deeds of company arrangement, but substantial and significant for each employee.

12. Therefore, Goldberg J made orders similar to those he had made in *Re Ansett*.<sup>9</sup>

I am satisfied that in the present circumstances there are difficulties for a considerable number of members of the AWU and the AMWU in having their voice heard or their vote recorded at the meeting to be held on 28 March 2003. This is not of their own making but has been brought about by the diverse and in some cases remote locations in which they work, the difficulty in obtaining a signed proxy or power of attorney from them and the relatively short period of time which officials of the AWU and the AMWU have had to canvass the views of their members who are creditors of the Pasminco group and obtain proxies and powers of attorney from them.

13. More recently, Davies J applied *Re Ansett* and *Re Pasminco* and the principles outlined by Goldberg J, in making similar orders in the Arrium administration.<sup>10</sup>

<sup>5</sup> *Re Ansett* at [4]

<sup>6</sup> *In re Pasminco Pty Ltd (subject to deed of company arrangement); Colley v Pasminco Ltd* (2003) 45 ACSR 1

<sup>7</sup> *Re Pasminco* at [8]

<sup>8</sup> *Re Pasminco* at [9]

<sup>9</sup> *Re Pasminco* at [9]

<sup>10</sup> *Australian Workers’ Union v Arrium Limited (administrators appointed), in re Arrium Limited (administrators appointed)* [2016] FCA 381

## Background

14. Each of the plaintiffs is an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).<sup>11</sup> Each is affiliated with the Australian Council of Trade Unions (**ACTU**), with whom it has been liaising about the administrations of the Virgin companies.<sup>12</sup>
15. A substantial number of the Virgin employees are members of the plaintiffs. Their employment is covered by enterprise agreements made under the *Fair Work Act 2009*, to which the relevant Virgin companies, the employees and the plaintiffs are parties.<sup>13</sup>
16. Information provided by the administrators shows that, of 10,247 known creditors (excluding customers entitled to credits for flights cancelled due to the COVID-19 pandemic), 9,020 are employees, whose unpaid entitlements are worth approximately \$451 million.<sup>14</sup>
17. The plaintiffs have represented their members' interests since the administrations began. For instance, each has been a member of the committee of inspection, established by the Court's orders made on 24 April 2020.<sup>15</sup> Those orders also provided for the first meetings to be held remotely, by video-link or telephone, and provided a regime by which creditors could provide proxies.
18. The second meeting of the Virgin companies is scheduled to be held on **4 September 2020**.
19. Last week, the Court made for the conduct of the second meetings. For instance, on 11 August 2020, the Court made orders permitting the administrators to require creditors intending to vote to register on the "Halo platform", requiring use of that platform for submitting material to establish their entitlement to vote, and allowing the platform to be used to communicate with creditors about the administrations and creditors' proofs of debt or claim.<sup>16</sup> On 12 August 2020, the Court made orders for the second meetings, including orders prescribing cut-off dates for the lodgement of proofs of debt and proxy forms or powers of attorney via the Halo system and for the meetings to be held (using Microsoft Teams technology) as an event on the Halo platform.<sup>17</sup>
20. On 14 August 2020, representatives of the ACTU and the plaintiff's solicitor met with administrators and their solicitor, who explained the effect of the orders and the operation of the Halo platform, as follows:<sup>18</sup>
  - (a) All creditors would be required to register on the Halo platform by **20 August 2020**.

<sup>11</sup> Higgins affidavit, [5]

<sup>12</sup> Higgins affidavit, [6]

<sup>13</sup> Higgins affidavit, [21(b)]

<sup>14</sup> Higgins affidavit, [14]

<sup>15</sup> See *Re Strawbridge* (2020) 144 ACSR 310; Higgins affidavit, [5]

<sup>16</sup> *Re Strawbridge (No 6)* [2020] FCA 1172 (11 August 2020)

<sup>17</sup> *Re Strawbridge (No 7)* [2020] FCA 1182 (12 August 2020)

<sup>18</sup> Higgins affidavit, [20]

- (b) All proofs of debt and claims would need to be submitted on platform by **25 August 2020**, although the administrators had already caused the employee claims to be entered on the platform, using details contained in the books and records of the Virgin companies.
  - (c) The administrators envisages sending their report to creditors on or around **25 August 2020**, and Halo would be opened to allow creditors to appoint proxies.
  - (d) After **1 September 2020**, Halo would no longer accept appointments of proxies.
  - (e) Employee creditors who are members of unions but who do not register on the Halo platform and appoint a proxy by the prescribed deadlines would not be able to participate in the second meetings of creditors.
21. The plaintiffs are concerned that about the ability of their members to participate in, and have their interests represented at, the second meetings.<sup>19</sup> In particular:
- (a) their members are dispersed throughout the country, including in remote locations and in Victoria where “Stage 4” restrictions have been imposed in relation to the COVID-19 pandemic;<sup>20</sup>
  - (b) the relatively short timeframe before the second meetings may impede members’ ability to participate, in particular, to receive and understand the report and recommendations to be provided by the administrators and decide what action to take.<sup>21</sup> Normally, the plaintiffs would have the opportunity to meet and consult with members (including at their worksites) about those issues but, because of the effects of COVID-19, will not be able to;<sup>22</sup>
  - (c) these difficulties will be accentuated by the processes that the administrators have had to adopt for the second meetings,<sup>23</sup> especially:
    - (i) the use of electronic communications to send material and conduct the meetings, in circumstances where it is not clear that all union members have reliable access to electronic resources, including stable or reliable internet;
    - (ii) the effect of the “cut off dates” as envisaged by the process; and
    - (iii) the fact that the plaintiffs will not have the opportunity (as they would normally) to consult with members, especially at on-site meetings.

### Applying the principles

22. The Court should make the orders sought by the plaintiffs.
23. The resolutions passed at the second meetings will determine the fate of the Virgin companies.<sup>24</sup> Given their entitlements and the implications for their employment, employees – including union members – have an interest in the meeting and their outcome. Employees represent approximately 88% of Virgin creditors by number.

<sup>19</sup> Higgins affidavit, [21]

<sup>20</sup> Higgins affidavit, [21(c)]

<sup>21</sup> Higgins affidavit, [21(d)]

<sup>22</sup> Higgins affidavit, [21(f)(iii)]

<sup>23</sup> Higgins affidavit, [21(f)]

<sup>24</sup> *Corporations Act*, section 439C

24. As Goldberg J explained in *Re Pasmenco*, the Court should be concerned to ensure that any inhibitions upon, or barriers to, creditors being able to have their voice heard or vote cast at such meeting be overcome, particularly so where (as here) “there is a large body of creditors, such as employees, each with claims modest by reference to the overall indebtedness of the companies... but substantial and significant for each employee”.
25. Those issues are accentuated when the relevant meetings will consider issues – and pass resolutions – relevant to employees’ ongoing employment.
26. The circumstances in which the meetings have been convened, that is, in the midst of a historic global pandemic, and the steps that have been implemented to respond to it (that is, from the general public health perspective as well as the specific steps relating to the administrations and the meetings), mean that there may be difficulties in for a considerable number of the plaintiffs’ members in having their voices heard or their votes recorded. As in *Re Pasmenco*, the circumstances are not of the employees’ making.
27. As Mr Higgins has said:<sup>25</sup>

The effective representation of the interests of employee creditors’ at the second meetings of creditors is critical, particularly given their sheer number, the amount of money they are owed by way of entitlements, and the implications of the decisions made at the second creditors’ for their ongoing employment. But many of those employees are isolated and more vulnerable than usual because of the restrictions relating to the COVID-19 pandemic. Those restrictions also exacerbate the difficulties for them in participating in the second meetings.
28. The orders sought by the plaintiffs seek to ensure that their members are represented at the meetings. They do so by providing, as it were, a “fall back” position, under which members who do not (or cannot) lodge proxies or instruments of attorney themselves will be represented by a nominated official from the relevant union. That approach addresses the type of concern expressed by Goldberg J in *Re Ansett* of putting employees in a position of having unions cast votes on their behalf without the opportunity to provide instructions about what to say or do. That is, it will remain open for members to lodge their own documents, including their own proxies.
29. Further, the orders provide for the plaintiffs to notify their members of the orders, such that they will know of them and their effect during the period for lodgement of proofs and proxies, and will also be able to contact the relevant union. Finally, the orders reserve liberty for any affected person to make application to the Court.

<sup>25</sup> Higgins affidavit, [23]

**Orders sought**

30. A form of the orders sought by the plaintiffs is attached to these submissions. It is based on those made in the cases discussed above, but modified to allow for the orders the Court has already made for how the second meetings are to be conducted.

DATED: 20 AUGUST 2020

C T MOLLER



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Gordon Legal  
Solicitors for the plaintiffs