NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 19/08/2020 11:30:50 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:	Submissions
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

Dated: 19/08/2020 11:31:46 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.

IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS (NSD 464/2020)

OUTLINE OF SUBMISSIONS
OF THE BONDHOLDER REPRESENTATIVE GROUP
in relation to the application listed for hearing before Middleton J on 17 August 2020

1. 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 (collectively the Bond Holder Representative Group "**BHRG**") each act on behalf bondholders owed, in aggregate, in excess of $200,000,000 in bond debt by the Virgin Companies.

2. The BHRG wishes to be heard in relation to the Interlocutory Application filed in these proceedings on 11 August 2020 (the **Application**) by Broad Peak Investment Advisers Pty Ltd and Tor Investment Management (Hong Kong) Ltd (together the **Applicants**).

3. The BHRG is concerned that the effect of the present disagreement between the Administrators and the Applicants is that creditors will be required to vote on a proposal at or ahead of the second meeting on 4 September 2020 (the **Second Meeting**) without complete information, or without reasonable time to consider the information, or that they will be corralled towards a single proposal by the Administrators where a superior proposal may exist. They wish to ensure that sufficient information is presented to all creditors by the Administrators in a timely manner and that the mechanism for voting is sufficiently flexible to ensure their clients are able to cast a meaningful vote.

4. On 14 August 2020 the BHRG's solicitors wrote to the Administrators setting out the BHRG's concerns in detail (Merrick [5][1]; KM2). The Administrators have not allayed the BHRG's concerns and have confirmed that several of those concerns will be the subject of debate at the hearing on 17 August 2020 (the **Hearing**) (Merrick [6]-[9]). The BHRG therefore wishes to be heard at the Hearing in relation to the narrow set of concerns outlined in Ms Merrick's affidavit and these submissions.

5. Yesterday, the BHRG received the submissions and evidence on which the Administrators and the Bain interests will rely at the Hearing. The BHRG have not yet received the Applicants' submissions. The BHRG may wish to supplement these submissions orally based on a careful reading of those materials once they are received.

[1] Affidavit of Katherine Alison Merrick, sworn 16 August 2020 (**Merrick**), together with annexures KM1 – KM4.

Relevant Principles

6. The decision as to whether a company in administration should execute a DOCA, and which DOCA it should execute, belongs to the creditors and not the administrators: *In the matter of TEN Network Holdings Limited (Admins Appt) (Recs and Mgrs Apptd) and Ors* [2017] NSWSC 1247 (***Ten***). In that case, Black J observed (at [38]):

> "*it is the creditors and not the administrators who decide whether the relevant company should execute a deed of company arrangement specified in the resolution before that meeting (even if it differs from any proposed deed that accompanied any notice of meeting) or alternatively that the administration should end or that the company should be wound up. The creditors and not the administrator have the power to make that decision, because s 439C of the Act so provides, although the administrator has a casting vote if the majority of creditors by number and value reach a different result*."

7. The Administrators are obliged to provide to creditors details of a proposed deed together with "*such other information known to the administrator as will enable the creditors to make an informed decision*" about, inter alia, "*whether… it would be in the creditors' interests for the company to execute a deed of company arrangement*": s75- 225(3)(b)(i), (vii) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPRC**) (a matter also emphasised in *Ten* at [43]). In providing that information the Administrator must communicate in such a way as to ensure creditors' effective understanding of the processes, and their rights and obligations: *Ten*, [47].

8. If the Administrators cannot provide the requisite level of detail prior to the conclusion of the convening period, they ought to seek a further extension rather than omit the information: *Re Pan Pharmaceuticals Ltd* (2003) 46 ACSR 77, [41] (Lindgren J).

9. There have been a small number of cases in the context of administrators seeking directions from the Court in which it has been accepted that the power of disposal of the company's business by its administrators pursuant to s 437A of the Act might exclude a decision of creditors at the second meeting: *Keystone Group Holdings Pty Ltd (recs and mgrs. appointed) (admins appointed)* [2016] NSWSC 1604 (*Keystone*) at [1], [2], [15] and *Re Eisa Ltd* (2000) 35 ACSR 394 at 394 (***Eisa***). However, those cases turned on their particular facts, specifically, the urgent need to complete a deal: *Keystone* at [1], [2], [15], the history of the administration, including previously implemented and amended DOCAs: *Keystone* [16], that liquidation or business collapse was the likely counterfactual: *Keystone* [16] and Eisa at 396, [8], that the major creditors endorsed the proposal and there were no dissentient creditors: *Eisa* at 395, [5] and that there was no real prospect that any other creditor would provide a legitimate alternate funding proposal: *Eisa* at 396, [5].

The Alternate DOCA Proposal

10. It would be antithetical to the purposes of s 75-225 IPRC for the Administrators not to provide information about any legitimate DOCA to the creditors at the Second Meeting. Indeed, it may be the very comparison between DOCAs and the Administrators' observations on them that enables the creditor to determine which DOCA (if any) is in the voting creditor's best interests.

11. Presently, the only information available to the creditors about the Applicants' DOCA is what is contained at pages 18-24 of annexure CJC-1 to the affidavit of Cameron John Cheetham affirmed 11 August 2020. The Administrators have not yet expressed views on the merits of the proposed DOCA to the creditors. If the Administrators consider that the Applicants' DOCA is "unfeasible" (Administrators' Submissions [49]ff) then they ought to explain that to the creditors in ample time ahead of the Second Meeting. That view is not of itself a reason not to present the proposal to creditors.

12. Of course, if the Applicant's DOCA is truly incapable of implementation because of the deal that the Administrators have committed to with the Bain interests, then perhaps that is a reason for the Applicants to abandon it. That is necessarily a matter for the Applicants. However, if the Applicants do not abandon it, it should be put to the creditors by the Administrators with sufficient information to enable them to form a view as to whether to vote for it.

Voting

13. The BHRG understands that creditors will be permitted to vote from the time the Administrators' give notice of the Second Meeting until the conclusion of the Second Meeting (Merrick [15], KM4), that they may be required to cast their vote before the Second Meeting (Merrick [15]); and that they will not be permitted to change their vote once it has been cast (Merrick [16]; KM4).

14. The BHRG are concerned that if any additional proposal or further information is put to creditors at the Second Meeting, the BHRG will not have sufficient time to advise their clients prior to voting being closed (Merrick [13]). Specifically:

    a. all representatives have large client pools (many with several hundred clients) with whom they will need to communicate about proposals put at the Second Meeting. Some representatives will vote on behalf of their clients while others will advise their clients and the clients will cast their own vote. No member of the BHRG will be in a position to obtain their client's instructions and vote by the currently proposed deadline if new information is revealed at the Second Meeting (Merrick [12]).

b. even if the Administrators were to provide details of the Applicants' DOCA in the s439A Report on 25 August 2020, the BHRG are extremely concerned about their ability to effectively advise their clients before 4 September 2020, given the size of their respective client pools (Merrick [12]). Some representatives will need to advise their clients one-on-one in relation to the available proposals (Merrick [12(d)]). Other representatives are concerned about their professional duties and whether they will have sufficient time to come to terms with what could be a complex proposal and to advise on it in that timeframe (Merrick [12(c)]; [14]).

c. all representatives are concerned that 'pre-voting' will lock their clients into a position and that they will not be able to amend their vote should any new information arise at the Second Meeting (Merrick [17]).

Anthony McGrath SC
amcgrath@alineachambers.com.au | 02 9165 1403

Karen Petch
petch@newchambers.com.au | 02 9151 2053

Counsel for the Bondholder Representative Group
16 August 2020