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

No. NSD 914/2020

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

TRANSPORT WORKERS' UNION OF AUSTRALIA AND OTHERS (ACCORDING TO SCHEDULE 1)

Plaintiffs

and

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 DEFENDANTS NAMED IN SCHEDULE 1

Defendants

PLAINTIFFS' SUBMISSIONS

Overview

1. On 21 August 2020, the Court made orders allowing the plaintiffs (**unions**) to represent their members who are employees of the second to forty-second defendants (**Virgin companies**) at forthcoming creditors' meetings.

2. The unions now apply for further orders to allow the administrators of the Virgin companies, when preparing the minutes of the meetings, not to include the names of the employees who are represented at the meetings.

3. The orders seek to ensure that the identity of those employees – and specifically the fact that they are union members – does not become publicly available by their inclusion in the minutes, which have not only to be lodged with ASIC (where they will be available to the public) but also made available for inspection by contributories and creditors of the Virgin companies.

4. Lists of union members are invariably kept confidential. Notwithstanding that Australian industrial law protects freedom of association and prohibits adverse action (including discrimination) on the basis of union membership, the prospect of adverse action remains prevalent. Further, information about union membership is protected by the *Privacy Act 1988* (Cth)..

5. Each of the unions is concerned to prevent publication of the identity of their members who are employees of the Virgin companies. The maintenance of privacy about union membership is particularly important during an uncertain economic environment such as the present and where there is a prospect of change of ownership of the Virgin companies and their businesses.

6. Accordingly, the unions seek orders relieving the administrators from the requirement to include, in the minutes of the creditors meetings, the identity of employees who are represented by the unions under the orders that the Court made in August.

Procedural history

7. The application is brought by an interlocutory process filed on 2 September 2020, supported by an affidavit made the same day by the plaintiffs' solicitor, James Higgins of Gordon Legal.

8. The administrators have been served with the application, as has ASIC. These submissions have also been provided to the administrators and to ASIC.

Legislative provisions and relevant principles

9. In reviewing the relevant statutory provisions and principles, it is convenient to begin with those concerning minutes of creditors meetings.

(a) Minutes of creditors' meetings

10. Division 75 of the Insolvency Practice Rules (Corporations) is concerned with meetings. Subdivision C is concerned with procedures at meetings. Rule 75-145 is concerned with the preparation, content and lodgement with ASIC, and availability to creditors or contributories of minutes of creditors' meetings.[1]

11. It relevantly provides:

> **75-145 Minutes of meetings of creditors**
>
> (1) The person presiding at the meeting must, within the period specified in subsection (2):
>
> (a) cause minutes of the proceedings to be drawn up and entered in a record kept for the purpose; and
>
> (b) sign the minutes after they have been entered in the record; and
>
> (c) lodge with ASIC in the approved form a copy of the minutes, certified by him or her to be a true copy.
>
> …
>
> (4) A record of the persons present in person, by proxy or by attorney at a meeting must be prepared and kept as part of the minutes of proceedings prepared under subsection (1).
>
> (5) The external administrator, after a meeting of creditors, must cause the minutes and the record of persons present at the meeting to be made available for inspection by creditors or contributories at the principal place at which the external administrator practises.

(b) Union membership and protection of information about union membership

12. The application is based on concerns about freedom of association and the protection of personal information, specifically, the employees' membership of the unions.

13. The *Fair Work Act 2009* (Cth) seeks to protect freedom of association. Section 3(e) of the Act, for instance, which sets out the objects of the Act, identifies that it seeks to enable "fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination".

14. Part 3-1 of the Act contains protections for employees, including freedom of association and involvement in industrial activities. Section 346 prohibits "adverse action" (including discrimination against an employee) against a person because the person (or is not) "an officer or member of an industrial association" or has (or has not) "engaged in industrial activity". A person "engages in industrial activity" if (amongst other things) the person becomes or does not become, or remains or ceases to be, an officer or member of an

1 Prior to the reforms introduced by the Insolvency Law Reform Act 2016, the relevant provision were contained in Regulation 5.6.27 of the *Corporations Regulations 2001*.

industrial association: section 347(a).[2] In *Barclay v The Board of Bendigo*, Gray and Bromberg JJ said:[3]

> The objects of Pt 3-1 refer specifically to the aim of protecting freedom of association. When regard is had to the way in which the content of freedom of association is identified by those objects, it is clear that Parliament intended that a broad approach be taken to the concept of freedom of association. The freedom is not simply a freedom to join an association without adverse consequences, but is a freedom to be represented by the association and to participate in its activities. As the principal object of the Fair Work Act itself emphasises, the recognition of the right to freedom of association and the right to be represented is designed to enable fairness and representation at work: see s 3(e) and the Explanatory Memorandum to the Bill which introduced the Fair Work Act at para 1333.

15. Information about union membership is protected under the *Privacy Act 1988*. It protects "personal information", that is, "information or an opinion about an identified individual, or an individual who is reasonably identifiable".[4] Section 6 defines "sensitive information" to include information about an individual's "membership of a trade union".

16. Australian Privacy Principle 3.3 is concerned with the collection of "sensitive information "about an individual, while Principle 6 is concerned with the use of disclosure of personal information, including sensitive information, without the consent of the relevant persons.

(c) Section 447A of the Corporations Act
Section 90–15 of the Insolvency Practice Schedule

17. Section 447A of the *Corporations Act 2001* (Cth) provides that the court may "*make such orders as the things appropriate about how this Part [Part 5.3A] is to operate in relation to a particular company*". The section has been interpreted broadly,[5] and can be used to alter not only procedural requirements under Part 5.3A but also to change the substantial operation of the Part.

18. Section 90–15 of the Insolvency Practice Schedule is also very broad. It allows the Court to "make such orders as it thinks fit in relation to the external administration of a company".

19. It is not necessary to rehearse the principles attendant on the exercise of the powers under sections 447A and 90-15. The administration of the Virgin companies provides ample illustration of the exercise of the powers. Already, the Court has made several orders where in the operation of Part 5.3 A, including the requirements of the Insolvency Practice Rules, in relation to the Virgin companies. As part of that process, the Court has made orders under those provisions providing for certain documents and information to be kept confidential.

Background

20. It is not necessary to detail the relevant background, which is set out in the Court's reasons for making the orders on 21 August 2020: *Transport Workers' Union of Australia, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* [2020] FCA 1218.

2 See also section 350(1), which prohibits inducements to take "membership action" (a person "takes membership action" if the person becomes, does not become, remains or ceases to be, an officer or member of an industrial association: section 350(3)) and section 772(1) which prevents an employer from terminating an employee's employment for one or more prescribed reasons, which include "trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours": section 772(1)(b).

3 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, [14]

4 Definition of "personal information" in *Privacy Act 1988*, section 6.

5 See generally *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270

21. The second meetings of creditors of the Virgin companies are scheduled to be held on **4 September 2020**.

22. The present application is brought to protect the identity of the union members who will, by reason of those orders, be represented at the meetings by their respective unions. The need for protection comes about as follows.

23. As part of the process for conducting in the meetings, the administrators need to know which employees are members of the respective unions. Therefore, the unions will provide the administrators with confidential lists of their members. The administrators will use that information to identify which employees will be represented at the meetings by the union representatives (which will be important, for instance, in determining the outcome of resolutions put to the meeting). That information will be included on the "Halo" system.

24. The difficulty arises from the requirement under rule 75-145 of the Insolvency Practice Rules concerning the content of the minutes of the meetings.

25. Under that rule, the person presiding at the meeting (usually, one of the administrators), must cause minutes of the proceedings of the meeting to be drawn up and entered in a record: rule 75–145(1)(a). The minutes must be lodged with ASIC: rule 75–145(1)(c). As part of the minutes, a record must be prepared and kept of "the persons present in person, by proxy or by attorney" at the meeting: rule 75–145(4). The administrators must cause the minutes and the record of persons present to be made available for inspection by creditors or contributories: rule 75–145(5).

26. The orders made on 21 August 2020 have the effect of appointing, as the attorneys of the employees who come within the scope of the orders, the union representatives identified in Appendix A to that order. Accordingly, each of those employees will be "present… by attorney" for the purposes of rule 70-145(4). That rule requires those employees to be recorded in a record. Because the record will also record the relevant attorneys, where those attorneys are the persons identified in appendix A to the order, it will be a relatively simple task to identify employees who are union members.

27. As Mr Higgins explains in his affidavit, adverse action, including discrimination, against union members remains prevalent within the Australian industrial landscape.[6] As he explains, lists of union members are invariably kept confidential.[7] Further, unions have obligations to their members, including under the Privacy Act and their own privacy policies, to maintain the privacy of members.[8] In the limited time since the orders of 21 August 2020 were made, it has not been possible for each union to seek permission from each individual union member to identify them as a union member under the process contemplated by the order.[9]

28. Each of the unions is concerned to prevent the publication of lists of its members in any public forum and, because union membership is inherently personal information, to protect it.[10] Further, as Mr Higgins explains, the unions and the ACTU are concerned that the maintenance of privacy about union membership is particularly important during an uncertain economic environment such as the present.[11]

6 Higgins affidavit, [11]
7 Higgins affidavit, [9]
8 *Ibid*
9 Higgins affidavit, [12]
10 Higgins affidavit, [10]
11 Higgins affidavit, [11]

Applying the principles

29. The Court should make the orders sought by the unions.

30. The unions do not dispute that it is important that accurate minutes of the creditors' meetings be prepared and kept. Such minutes constitute not only a record of the proceedings but may also be important evidence in any legal proceedings concerning the meetings or their outcome.[12]

31. But it is difficult to see why the minutes of the forthcoming creditors' meetings need include the names of all those employee creditors who are represented by their unions.

32. Insofar as those employees are concerned, it is their attorneys under the orders, that is, the union representatives, who will participate in the meeting, for instance, speaking during debates, asking questions from the floor, and casting votes. All that can be recorded in the minutes, as can the outcome of any resolution, including the votes for and against any resolution (by number and value[13]). It is difficult to see why the identity of individual creditors on whose behalf votes are cast needs to be recorded.

33. Anyway, the identity of individual employees and the amount of their claims (and therefore the value of their votes), will be recorded in the "Halo" system. If the question of the specific identity of creditors on whose behalf votes were cast on a particular resolution becomes important (for instance, in a proceeding challenging the resolution), the information can be extracted from that system.

34. There is a real prospect that for the reasons given above, employee creditors who are members of unions may face discrimination if that fact becomes known. Concerns in that regard are heightened in the present circumstances, where there is not only an uncertain economic environment but also a prospect that ownership of the Virgin companies and/or their businesses will change as a result of votes cast at the creditors' meetings. Importantly, unless the orders are made, the employees will have the fact of their union membership exposed without their express consent and without the opportunity of taking steps to prevent that from occurring.

35. Further, where recording the identity of particular creditors will disclose their union membership but is not likely to be an important feature of the relevant minutes – and will be available from other sources anyway, should the need arise – it is preferable that that information not be recorded. Accordingly, orders are necessary excusing the administrators from complying with the relevant requirement of the Insolvency Practice Rules.

36. This application has been served on the administrators who, the unions understand, support it. It has also been served on ASIC. The unions understand that the "interested parties" the Court identified prior to the hearing of the union's previous application have also been informed of this application.

37. The orders sought by the unions will reserve liberty for any affected person to apply to vary them. Given that the relevant minutes and need to be lodged 10 business days after

12 See, for instance *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, where the High Court said that minutes (there of a meeting of a company's directors) "were a formal and near contemporaneous record (adopted by the board as an accurate record) of the proceedings at the meeting. The minutes were evidence of what they represented" (at [138]). In *Weeden v Rambaldi* (2013) 92 ACSR 661, the Full Federal Court (Gray , Middleton and Dodds-Streeton JJ) considered the High Court's discussion of minutes in *Hellicar*. *Weeden* concerned the minutes of a creditors' meeting in a bankruptcy

13 See Insolvency Practice Rules, rule 75-115

the end of the meeting (that is, by Monday, 21 September 2020), there will be time for the Court to hear from any affected person who wants to vary the orders.

Orders sought

38. A form of the orders sought by the unions has been provided to the Court.

DATED: 2 SEPTEMBER 2020

C T MOLLER

VICKI BELL

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Gordon Legal
Solicitors for the plaintiffs