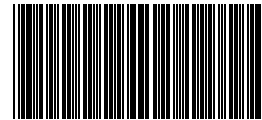




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Written Submissions

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Corporations List
Registry	Supreme Court Sydney
Case number	2021/00084223

TITLE OF PROCEEDINGS

First Plaintiff	The Trustee for Project Volar Creditors' Trust ABN 41124353207
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FILING DETAILS

Filed for	The Trustee for Project Volar Creditors' Trust, Plaintiff 1
Legal representative	Timothy James Sackar
Legal representative reference	
Telephone	(02) 9353 4114

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Plaintiffs' Outline of Submissions.pdf)

[attach.]

**In the matter of the Project Volar Creditors' Trust established in the administration of
each of Virgin Australia Holdings Ltd & Ors**

Supreme Court of New South Wales Proceeding No. NSWSC 2021/84223

**Salvatore Algeri, Richard Hughes, John Greig and Vaughan
Strawbridge, in their capacity as joint and several trustees of the
Project Volar Creditors' Trust established in the administration
of each of Virgin Australia Holdings Ltd & Ors**

Plaintiffs

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A. INTRODUCTION

1. These are the submissions of Salvatore Algeri, John Greig and Richard Hughes (together, referred to as **the Trustees**) each in their capacity as the trustees of the Project Volar Creditors' Trust (**Creditors' Trust**), which was established in the administration of each of Virgin Australia Holdings Ltd (**VAH**) and various of its related bodies corporate (together, the **Virgin Companies**). Mr Strawbridge is still, as at the time of this application, also a trustee of the Creditors' Trust, although he has resigned as a partner of Deloitte. Mr Strawbridge is aware of this application and is supportive as confirmed in the affidavit of Richard Hughes.
2. The total funds constituted by Creditors' Trust are substantial, exceeding \$500 million. Moreover, there are a very large number of beneficiaries of the Creditors' Trust, totalling almost 13,000 (each of which or whom were creditors of one or more of the Virgin Companies).
3. The substantial corpus of the trust fund and the very large number of beneficiaries emerge from the fact that the Creditors' Trust reflects the outcome of the external administrations of the Virgin Companies. As was noted by Middleton J, in one of the various judgments in the course of the administrations, the business of the Virgin Companies is a very significant enterprise with substantial operations, complex affairs, considerable assets and a very large number and type of creditors: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* (2020) 144 ACSR 310; [2020] FCA 571 at [14].

4. In the course of the external administration of each of the Virgin Companies, and in response to the size of the administrations and the apprehended number of creditors, the administrators sought approval from the Federal Court of Australia that they would be justified in using particular software known as Halo (**Halo** or **the Halo Platform**) to assist in the administration process, including to communicate with creditors, to manage the lodgement of proofs of debt or claims, to adjudicate on proofs, and to permit creditors to vote on resolutions at or in advance of the second meeting of creditors of the Virgin Companies.
5. The orders sought by the administrators were made by the Federal Court on 11 August 2020 and 12 August 2020, in respect of which two separate reasons for judgment were delivered: see *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 6)* [2020] FCA 1172 (**Virgin (No 6)**) and *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 7)* [2020] FCA 1182 (**Virgin (No 7)**).
6. By Originating Process filed on 25 March 2021 (which is sought to be amended, with the Court's leave), the Trustees now seek substantially similar relief, pursuant to the *Trustee Act 1925* (NSW) (**Trustee Act**), with respect to the utilisation and application of the Halo Platform to the Creditors' Trust. This course will assist in streamlining the process of communicating with the beneficiaries of the trust, adjudicating on, admitting or rejecting the claims of the beneficiaries, and paying distributions to beneficiaries.
7. The Trustees also seek additional orders with respect to the practical administration of the Creditors' Trust (for example: storing bank details and other information supplied by the beneficiaries; adopting a particular process for payments to beneficiaries to a bank account in a foreign denominated currency; and extending the times for adjudication of debts or claims and distributions to made to the beneficiaries).
8. The beneficiaries of the Creditors' Trust and the Australian Securities and Investments Commission (**ASIC**) have been given notice of the application and, at the date of these submissions, there is no indication that any party wishes to be heard on the application.

B. FACTUAL BACKGROUND

B.1 The external administrations of the Virgin Companies

9. The course of the external administrations of the Virgin Companies is set out in detail in the affidavit of Richard John Hughes affirmed 25 March 2021 (**Hughes Affidavit**) and in various judgments of the Federal Court.¹ The salient matters are summarised below.
10. On 20 April 2020, Messrs Algeri, Greig, Hughes and Strawbridge were appointed as the joint and several voluntary administrators (**Administrators**) of each of the Virgin Companies (with the exception of Tiger International Number 1 Pty Ltd, VAH Newco No. 2 Pty Ltd and VB Investco Pty Ltd²) by resolution of the directors of each of the relevant Virgin Companies pursuant to section 436A of the *Corporations Act 2001 (Cth)* (**Corporations Act**): Hughes Affidavit at [9].
11. On their appointment, the Administrators identified that the Virgin Companies had approximately 10,247 known creditors in total (including 9,020 employees) and owed approximately \$7,145,400,000 to unrelated third-party creditors, including but not limited to secured and unsecured aircraft financiers, unsecured bondholders, trade creditors and employees: Hughes Affidavit at [11]. The creditor body for the Virgin Companies was extremely large and complex with different creditor groups having different rights and priorities under the provisions of the Corporations Act and specific agreements entered into with Virgin Companies: Hughes Affidavit at [14].

¹ *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* (2020) 144 ACSR 310; [2020] FCA 571; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* (2020) 144 ACSR 347; [2020] FCA 717; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 3)* [2020] FCA 726; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 5)* [2020] FCA 986; *Virgin (No 6)*; *Virgin (No 7)*; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 8)* [2020] FCA 1344; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 9)* (2020) 148 ACSR 648; [2020] FCA 1652; *Hughes, in the matter of Vah Newco No. 2 Pty Ltd (in liq)* [2020] FCA 1121; *Hughes, in the matter of Vah Newco No. 2 Pty Ltd (in liq) (No 2)* [2020] FCA 1436; *Transport Workers' Union of Australia, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* [2020] FCA 1218; *Transport Workers' Union of Australia, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* [2020] FCA 1284; *Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (administrators appointed)* [2020] FCA 1269; *VB Leaseco Pty Ltd (administrators appointed) v Wells Fargo Trust Company, National Association (trustee)* (2020) 384 ALR 378; [2020] FCAFC 168.

² On 28 April 2020, the Administrators were appointed as joint and several administrators of Tiger International Number 1 Pty Ltd. On 3 August 2020, the Administrators were appointed as joint and several administrators of each of VAH Newco No. 2 Pty Ltd and VB Investco Pty Ltd.

12. As set out in the Hughes Affidavit at [17], the Administrators expressed the opinion that the Virgin Companies were insolvent on 22 March 2020 (and possibly as early as 18 March 2020), because:
 - (a) the Virgin Companies suffered substantial reductions to capacity and projected revenue due to the 18 March 2020 and 22 March 2020 travel restrictions announced by the Commonwealth and various State Governments in response to the COVID-19 pandemic;
 - (b) the Virgin Companies were unable to access further debt or equity funding, in particular from the Commonwealth Government or from the major shareholders of the parent company, VAH, being Etihad Airways, Singapore Airlines Ltd, Nanshan Group, HNA Group and Virgin Group Ltd; and
 - (c) as a consequence, the Virgin Companies were unable to continue to meet their known liabilities as they fell due.
13. Due to the size of the administrations of the Virgin Companies and the number of creditors, the Administrators sought orders from the Court permitting them to use the Halo Platform to assist the administration process, including to communicate with creditors, to manage the lodgement and adjudication of proofs of debt or claims, and to permit creditors to vote on resolutions at, or in advance of, the concurrent second meeting of creditors of the Virgin Companies (**Second Meetings**). The applications primarily sought orders that the Administrators were justified in requiring persons who claimed to be creditors of the Virgin Companies (other than certain bondholders) to register on the Halo Platform and to permit the Administrators to adjudicate on the claims of the creditors based only on the material provided in Virgin Companies' books and records or documents and information made available to them through the Halo Platform (thereby essentially using the Halo Platform as an exclusive means of dealing with creditors in the administrations): Hughes Affidavit at [23].
14. One of the creditors of the Virgin Companies, appeared before the Court on the application and made submissions about the provision of information to creditors if that material was not otherwise available on Halo: Hughes Affidavit at [24]; aspects of that creditor's submissions were accepted by the Court and were reflected in the orders

made in *Virgin (No 6)* and *Virgin (No 7)* (and the current orders sought are consistent with those orders).

15. Between April and June 2020, the Administrators commenced a competitive and comprehensive process for the sale of the business and assets of the Virgin Companies: Hughes Affidavit at [25]. This culminated in a sale of the business and assets to BC Hart Aggregator, L.P, an entity associated with Bain Capital (**Bain Capital**), structured in a way that had a dual-completion mechanism,: either through deeds of company arrangement proposed by Bain Capital (**Bain DOCAs**) or, alternatively, by way of an asset sale agreement.
16. As set out in the Hughes Affidavit at [29], prior to the Second Meetings, Bain Capital advanced a proposal for deeds of company arrangement (**Bain DOCA Proposal**) involving, in summary, that:
 - (a) Bain Capital would assume control of the business of the Virgin Companies and continue to trade the Virgin Companies as a going concern;
 - (b) all continuing employees of the Virgin Companies would be paid in the normal course of their employment (with their existing entitlements remaining unaffected);
 - (c) employees whose employment with the Virgin Companies would not continue would have their entitlements paid out in full;
 - (d) certain customers whose flights were cancelled due to the COVID-19 pandemic would be provided with a new credit available to be used on a future flight offered by the Virgin Companies;
 - (e) certain liabilities of the Virgin Companies would essentially be assumed by Bain Capital insofar as they would not be released under the deeds of company arrangement;
 - (f) Bain would make a cash contribution into a proposed creditors' trust to be used to meet the liabilities of the Virgin Companies that were not assumed by Bain Capital and which would be extinguished and released; and

- (g) the shares in VAH would be transferred to Bain Capital or its nominee for no consideration.
17. The Administrators recommended that the creditors of the Virgin Companies vote in favour of the Bain DOCA Proposal: Hughes Affidavit at [30]-[31]; and the Bain DOCA Proposal was overwhelmingly endorsed and passed by a resolution of the creditors of the Virgin Companies at the Second Meetings held on 4 September 2020: Hughes Affidavit at [34]-[37].
18. Consequently, on 25 September 2020, the Bain DOCAs (ten in total) were entered into and the Administrators became the administrators of those deeds of company arrangement (**Deed Administrators**): Hughes Affidavit at [39].
19. On 17 November 2020, the Bain DOCAs completed and, as a consequence:
- (a) the external administration of the Virgin Companies came to an end;
 - (b) a Trust Deed, titled “Project Volar Creditors’ Trust Deed” (**Trust Deed**), was executed by the Deed Administrators, the Trustees, the Virgin Companies and Bain Capital (see Exhibit RJH-1 at pp. 2344-2393 (Tab 65));
 - (c) a trust fund was established (**Trust Fund**) to meet the claims of unsecured creditors (including secured creditors to the extent of any deficiency in the value of their security) of the Virgin Companies (other than specific excluded claims that were not released under the Bain DOCAs and for which the Virgin Companies remained liable following their emergence from external administration);
 - (d) all the shares in VAH were transferred to Bain Capital’s nominee; and
 - (e) all “Claims” under each of the Bain DOCAs (that is, other than the excluded claims) were released and converted to claims in the Creditors’ Trust to be met out of Trust Fund in accordance with the Trust Deed,
- (see Hughes Affidavit at [43]-[44]).
20. As noted in the Hughes Affidavit at [45], pursuant to the terms of the Trust Deed, the Trust Fund comprises three separate ‘pools’ of money, each with different eligibility criteria designed to meet claims of different creditors of the Virgin Companies:

- (a) Pool A, which is available for all creditors (other than critical suppliers), in the amount of \$575 million minus the aggregate of certain funding advanced by Bain Capital prior to the completion of the Bain DOCAs, certain liability for pre-paid flights, and the amounts in Pool B and Pool C (see below);
 - (b) Pool B, which is available for certain specific creditors of the Bain DOCAs, in the amount of \$10 million; and
 - (c) Pool C, which is available for suppliers who or which have been deemed to be critical to the continuing operation of the business of the Virgin Companies, in the amount of \$94,110,384.
21. The terms of the Trust Deed incorporate large parts of the Subdivisions A, B, C and E of Division 6 of Part 5.6 of Chapter 5 of the Corporations Act and Part 5.6 of Chapter 5 of the Corporations Regulations 2001 (Cth) (**Corporations Regulations**) (with certain modifications), such that the process of distribution of the Trust Fund is not dissimilar to what would occur in the course of a winding up.³ The key terms of the Trust Deed relating to the Trustees' powers and discretions, determination of claims, conduct of meetings, variation of the Trust Deed, notices and communications with creditors are set out in the Hughes Affidavit at [46].
22. Subject to the determination of this application, the Trustees are seeking forthwith to commence the process of making a distribution to beneficiaries from Pool C of the Trust Fund (as those beneficiaries are considered to be critical suppliers to, and counterparties of, the Virgin Companies necessary for the ongoing trading of the business): Hughes Affidavit at [53].

³ That said, in *Re Beville Pty Limited* [2011] NSWSC 1378, Barrett J (as his Honour then was) observed at [33] that:

One concluding comment is warranted. The trustees of a settlement of the kind under discussion cannot necessarily proceed on the footing that, just because the same words are used (or imported), the processes the trust deed lays down are simply a transplanted version of statutory processes that apply to a winding up and that it is simply a matter of following the same procedures under a different enabling instrument. Their duties as trustees may create a need to consider matters that would otherwise not arise for consideration. In *Whitmore v Turquand* (1860) 1 J & H 444; 70 ER 821 (affirmed (1861) De G F & J 107; 45 ER 819), for example, Page Wood V-C, dealing with a trust for the benefit of creditors and the correct approach to provisions for the establishment of creditors' debts and rights to participate, referred to the duty of a court of equity to prefer substance over form and sometimes to "act in contradiction to the strict words of instruments of this kind"; see also the like observations of the Vice-Chancellor in the earlier case of *Raworth v Parker* (1855) 2 K&J 163; 69 ER 736.

B.2 The Halo Platform

23. The Halo Platform is a software system for managing creditor claims and documents: Affidavit of David Michael Orr sworn 25 March 2021 (**Orr Affidavit**) at [9]. As noted in that paragraph of the Orr Affidavit, the Halo Platform was utilised in the administrations of the Virgin Companies to assist the administrators to:
- (a) facilitate communication with the large number of creditors;
 - (b) collect and manage the large number of proofs of debt or claim, proxy forms and supporting documentation lodged by creditors; and
 - (c) process and admit claims of creditors, nomination of proxies, and voting at or in advance of meetings of creditors.
24. As further explained in the Orr Affidavit at [13]-[17], Deloitte adapted the Halo Platform for use in the external administrations of the Virgin Companies; it operates as a user interface with an associated database; and it has a number of capabilities, including the ability to:
- (a) register users with a unique account;
 - (b) facilitate communication between each user and the administrators, via user accounts, including on a private and secure basis where necessary;
 - (c) permit users to upload documents (so as to lodge a debt or claim and supporting documentation);
 - (d) allow users to access information in relation to the adjudication of debts and claims;
 - (e) allow a “voting event” to be created, which provides a notification to users of their ability to vote and the list of resolutions on which they may vote; and
 - (f) collate and display in real time the results of voting on resolutions held by poll.
25. The Halo Platform is a secure system and complies with various security standards, so as to ensure that information provided by creditors or beneficiaries (including their bank account details) is maintained in a way that cannot be compromised so as to preserve the privacy of that information: Orr Affidavit at [52]-[56].

26. As set out in the Orr Affidavit at [14], the Trustees have made further adaptations to Halo with a view to assisting the orderly administration of the Creditors' Trust, including specifically to:
- (a) allow beneficiaries to access information and receive notifications in relation to the Trustees' adjudication of their proofs of debt and claims;
 - (b) permit communication between the beneficiaries and the Trustees in relation to the adjudication process, including indicating whether they accept or reject the Trustees' adjudication of their proofs of debt and claims; and
 - (c) record and securely store bank account information of the beneficiaries for the purposes of making a payment of distribution to beneficiaries.
27. During the course of the external administrations of the Virgin Companies, and pursuant to orders made by the Federal Court in *Virgin (No 6)* and *Virgin (No 7)*:
- (a) the creditors received a number of communications from the Administrators and their staff that they had been pre-registered as a user on the Halo Platform and otherwise requesting that creditors register and submit claims on Halo: Orr Affidavit at [20];
 - (b) the Administrators and their staff entered information pertaining to creditors, on their behalf, into the Halo Platform: Orr Affidavit at [24(a)];
 - (c) the Administrators and their staff communicated with creditors as to their debts or claims by utilisation of the Halo Platform: Orr Affidavit at [23(d)];
 - (d) the Administrators and their staff ascertained the identity, and admitted debts or claims, of creditors based only on the books and records of the Virgin Companies and the information entered on Halo by creditors: Orr Affidavit at [23(b)];
 - (e) the Administrators were only required to accept particulars of a debt or claim of creditors if lodged on Halo by a particular date in advance of the Second Meetings: Orr Affidavit at [23(c)] and [24(b)-(c)];
 - (f) 12,973 creditors, representing all known creditors of the Virgin Companies, lodged either a proof of debt through the Halo Platform for the purpose of voting at the Second Meetings: Orr Affidavit at [25].

28. In other words, Halo was often used as an exclusive channel by the Administrators to manage the claims of creditors of the Virgin Companies.
29. During the course of the administrations — in particular leading up to and at the Second Meetings — there were no material or substantive complaints received by the Administrators from any user regarding the operation of the Halo Platform: Orr Affidavit at [19]; Hughes Affidavit at [50(d)]. Furthermore, the Administrators were not aware of any instance where users of the Halo Platform experienced adverse issues with the use of the Halo Platform or whether there were any security breaches with the technology: Orr Affidavit at [18].
30. Importantly, all of the creditors of the Virgin Companies who may be beneficiaries of the Creditors' Trust (including former employees and creditors whose details were pre-registered by the Administrators or their staff during the external administration of the Virgin Companies pursuant to orders of the Federal Court) are presently registered on Halo: Orr Affidavit at [26]. That is, the Trustees are not aware of any potential beneficiary of the Creditors' Trust not presently registered on Halo: Orr Affidavit at [27]. In any event, if there are additional beneficiaries not presently registered, they can do so simply via the Halo webpage: Orr Affidavit at [29]. There are also "Frequently Asked Questions" and a help page available to potential beneficiaries of the Creditors' Trust to assist them to navigate this process: Orr Affidavit at [30]-[31].

B.3 The proposed regime for utilisation of Halo in the Creditors' Trust

31. Pursuant to the terms of the Trust Deed, the determination of the claims of beneficiaries of the Creditors' Trust, and payment to the beneficiaries in respect of the claims, largely adopt the procedure in the course of a winding up prescribed by the Corporations Act and the Corporations Regulations: Orr Affidavit at [33]-[34].
32. Because of the significant costs of managing the process of adjudicating the claims of the beneficiaries of the Creditors' Trust, the Trustees seek to establish a regime that essentially utilises the Halo Platform as an exclusive means by which to process and adjudicate on the claims of beneficiaries: Orr Affidavit at [34].
33. In particular, the regime that the Trustees propose to adopt is as follows (see Orr Affidavit at [35]-[44] and [57]-[62]):

- (a) issuing a circular to creditors to all Halo Platform users:
 - (i) giving notice of the Trustees' intention to declare any (interim or final) dividend (**Notice**);
 - (ii) calling for formal proofs of debt to be lodged by a specified date no less than 14 days after provision of the Notice (**POD Lodgement Date**);
 - (iii) providing a proposed timeline for the adjudication process and payment of any dividends; and
 - (iv) providing details on how to lodge or amend any previously lodged proofs of debt on the Halo Platform (including the ability to "convert" an informal proof of debt to a formal proof of debt);
- (b) lodging the Notice and the call for proofs of debt in The Australian newspaper;
- (c) requiring that beneficiaries lodge their proof of debt or claim on the Halo Platform, either:
 - (i) by generating a new claim on Halo; or
 - (ii) by formalising an existing proof of debt or claim on Halo lodged in the course of the administrations (which is treated as an informal proof pending its formalisation);
- (d) in the event that, by the POD Lodgement Date, a beneficiary does not convert his, her or its existing informal proof of debt (lodged in the course of the administrations) to a formal proof of debt or claim (for the purposes of the Creditors' Trust), any such informal proof of debt will automatically be formalised as a proof of debt after the POD Lodgement Date and the Trustees will then proceed to adjudicate that beneficiary's claim;
- (e) accepting formal proofs of debt or claim which are lodged by beneficiaries other than by Halo (for example, claims sent to the Trustees via email or post) up to the POD Lodgement Date, in which case the Trustees will manually enter this data into the Halo Platform and the relevant beneficiaries will then be sent a link to the Halo Platform via email asking them to confirm their registration (as occurred in the course of the external administrations);

- (f) imposing on beneficiaries a deadline of the POD Lodgement Date to lodge or amend any formal proof of debt;
- (g) requesting that beneficiaries provide bank account details for the payment of any dividend by entering that information on the Halo Platform, securing that information (and limiting the number of persons able to access it), and then paying dividends to beneficiaries via the nominated accounts;
- (h) de-duplicating possible double-claims;
- (i) adjudicating on the beneficiaries' claims having regard to:
 - (i) the proof of debt or claim lodged by the creditor in the administrations;
 - (ii) the previous amount in which such proof of debt or claim was admitted for voting purposes at the Second Meetings (and the Administrators' reasons for that decision);
 - (iii) all documents uploaded by the creditor to support the amounts claimed in their proof of debt or claim lodged for voting purposes for the Second Meetings;
 - (iv) any further documentation that has been lodged by the beneficiaries and/or changes have been made to any proof of debt or claim since the Second Meetings; and
 - (v) the books and records of the Virgin Companies to validate amounts claimed by creditors;
- (j) once a beneficiary's debt or claim is adjudicated, updating the beneficiary's account on the Halo Platform and notifying the beneficiary of the outcome by email (including with information as to how to appeal the outcome of the adjudication process); and
- (k) otherwise providing detail as to the process for appealing a rejection or partial admission of a beneficiary's claim.

B.4 The proposed regime for payment of claims in foreign currencies

34. Because of the nature of the business and operations of the Virgin Companies, a number of the beneficiaries of the Creditors' Trust have claims in a foreign currency or may

nominate a foreign currency denominated bank account to receive payment of dividends declared by the Trustees: Hughes Affidavit at [48(b)-(c)].

35. Pursuant to s 554C of the Corporations Act, and as applied by clause 7.3 of the Trust Deed, the Trustees are required to use the opening carded on demand airmail buying rate available at the Commonwealth Bank of Australia (**CBA Carded Rates**), as at the date of the appointment of the Administrators, for the calculation of claims of beneficiaries in a foreign currency: Hughes Affidavit at [48(b)]. However, CBA Carded Rates are not listed for all foreign currencies that apply to the claims of certain beneficiaries (such as the Fijian dollar or the Tongan Pa'anga) (see Exhibit RJH-1 at p. 2394) so the Trustees propose to use the historical conversation rates for those currencies maintained by the Reserve Bank of Australia or, in the absence of such information being available from the Reserve Bank of Australia, the historical conversation rates listed on the website www.xe.com (**XE Website**): Hughes Affidavit at [48(b)].
36. Finally, where dividends are payable to beneficiaries who have listed foreign currency bank accounts (that is, where those accounts are not Australian-dollar dominated accounts), the Trustees propose to identify the best available exchange rate available from different financial institutions on the day of proposed payment (noting that the exchange rate as at the day of payment of the dividend will likely differ from the exchange rate as at the date when the dividend is declared): Hughes Affidavit at [48(c)]. Otherwise, there will be a loss of value to those beneficiaries from using an inferior exchange rate.

C. PROPOSED JUDICIAL ADVICE AND CONFERRAL OF ADDITIONAL POWERS ON THE TRUSTEES [PRAYERS 2-4]

C.1 Principles

C.1.1 Section 63

37. Section 63 of the Trustee Act is relevantly in the following terms:

(1) A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.

(2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.

38. In *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 (*Macedonian Church*), the plurality of the High Court observed (at [56]-[59]) that, with respect to s 63 of the Trustee Act, there are no express words and no implications from the express words limiting the power to give advice or on the discretionary factors relevant to the giving of advice, but that the discretion is confined only by the subject-matter, scope and purpose of the legislation. The plurality also noted (at [64]) that the procedure operates as “an exception to the Court's ordinary function of deciding disputes between competing litigants” and affords a facility for providing “private advice” to trustees although the Court is not bound to give such advice.

39. Similarly, Kiefel J (as the Chief Justice then was) said at [196]:

The principal purpose of the section, and the opinion, advice or direction given under it, is the protection of the interests of the trust. Another purpose is the protection of a Trustee who is acting in that regard and upon advice. Securing the latter purpose may ensure the attainment of the principal purpose, by removing the concern of a Trustee about exposure beyond their usual indemnity.

40. These comments have been reiterated in decisions of this Court, noting that the purpose of the jurisdiction is to provide protection to a trustee (often because there is a conflict between beneficiaries or because there is a suggestion that there may be an alleged breach of trust if the trustee adopts a certain course of action). In *Re Estate Late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 at [23], Lindsay J made observations with respect to the purpose of s 63 of the Trustee Act, and stated:

Section 63 provides a flexible means (and not the only means) by which the Court's jurisdiction relating to trusts can be enlivened. That jurisdiction includes as one of its purposes the due administration of trusts, including the protection of trust property and, incidentally, protection of trustees who, on the other side of the ledger, are subject to obligations enforceable by the Court.

41. Moreover, trustees are encouraged to approach the Court for advice. As the plurality of the High Court noted in *Macedonian Church* at [36]:

The legislative scheme, then, is that it is desirable that trustees in doubt as to a course of action should not proceed with it and seek relief under s 85 afterwards, but rather seek s 63 advice first. That is because one of the things which a trustee invoking s 85 requires to be excused from its failure to seek s 63 advice.

42. Similarly, as Lord Oliver of Aylmerton said in *Marley v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198 at 201:

A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court.

43. Thus, s 63 of the Trustee Act has been described as beneficial legislation for the protection of trustees which should not be narrowly construed: *Re Perpetual Investment Management Limited* [2011] NSWSC 133 at [46]-[50]. It is sufficient if the matter warranting judicial advice arises out of a question respecting the management or administration of the trust property: *Re Australian Pipeline Ltd* (2006) 60 ACSR 625; [2006] NSWSC 1316 at [23]; *Camperdown Prime Pty Ltd* [2018] NSWSC 106 at [3].

44. As Ball J noted in *The Trust Company (Re Services) Limited (in its capacity as responsible entity and trustee of the Australian Wholesale Property Fund)* [2016] NSWSC 117 at [20], citing *Macedonian Church*:

The only jurisdictional bar that exists to advice being given under s 63 is that the applicant must point to 'the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument'.

45. That said, it is accepted that it is usually inappropriate for the Court to give judicial advice where the only matter concerns a commercial decision to be taken by a trustee: *Application by Perpetual Trust Services Limited* [2012] NSWSC 758 at [48]-[51].

46. Applications for judicial advice have not infrequently been made by trustees of a trust that has been formed for the purpose to making payments to creditors following an administration of a company where the administrators are subsequently appointed as

trustees of the trust (see, for example, *Re Creditors' Trust of Jackgreen (International) Pty Ltd* [2011] NSWSC 748; *Application of Solomons and Tayeh* [2012] NSWSC 923; *Re Bevillesta Creditors' Trust* [2013] NSWSC 162; *Jones v Hirst* [2013] NSWSC 163; *Re Creditors' Trust Deed established in the administration of Bevillesta Pty Ltd* [2013] NSWSC 1258).

C.1.2 Section 81

47. Section 81 of the Trustee Act is relevantly in the following terms:

(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court--

(a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit

...

(2) The provisions of subsection (1) shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, if any, creating the trust, or by law is expedient, to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the Court or the consent of the beneficiaries would be a breach of trust...

48. In *Arakella Pty Ltd v Paton* (2004) 60 NSWLR 334; [2004] NSWSC 13 (*Arakella*), Austin J described the proper approach to applications under the section as follows:

[81] Section 81(1) imposes two conditions upon the exercise by the Court of its statutory jurisdiction to make an order conferring power on trustees to enter into a transaction. They are:

- (i) the Court is of the opinion that the proposed transaction is expedient in the management or administration of any property vested in the trustees; and
- (ii) the transaction cannot be effected by reason of the absence of any power for that purpose vested in the trustees.

[82] In its terms, s 81 does not impose any other limitation upon the exercise of the Court's power. The Court may make any order it thinks fit, to confer upon the trustees, either generally or in any particular instance, the necessary power to implement the transaction.

49. It has been noted that the power conferred by s 81 is not intended to be restricted by any implications: *Riddle v Riddle* (1952) 85 CLR 202 (**Riddle**) at [214] (Dixon J, as his Honour then was) cited with approval by Austin J in *Arakella* at [78]-[80]. Similarly, Williams J in *Riddle*, at 220, noted that the provision "is couched in the widest possible terms". See also *Re Strang* (1941) 41 SR(NSW) 114.

50. In *Ku-ring-gai Municipal Council v Attorney-General* (1954) 55 SR (NSW) 65 at 74, the Full Court noted that all that is necessary to rely on the power conferred by s 81 is to establish that:

[A] question has arisen in the management or administration of property vested in a trustee and that the making of an order such as the section authorizes is expedient - that is, expedient in the management or administration of the property.

51. Similarly, in *Stein v Sybmore Holdings Pty Ltd* (2006) 64 ATR 325; [2006] NSWSC 1004 (**Stein**), Campbell J (as his Honour then was) noted, at [43], that it was necessary to establish that a question had arisen in the management or administration of property vested in a trustee. As Austin J explained in *Arakella* at [88]:

...The words "management or administration", in a context such as appears in s 81, refer to both the manner in which trust property is managed, administered, handled, directed or controlled and the actual carrying out of those functions. In *Re Downshire Settled Estates* [1953] Ch 218, 247, Evershed MR and Romer LJ said that "the application of both words is confined to the managerial supervision and control of trust property on behalf of beneficiaries". Those observations, made about s 57 of the Trustee Act 1925 (UK), were applied to s 81 of the New South Wales Act by Rath J in *Perpetual Trustee Limited v Godsall* [1979] 2 NSWLR 785, 791.

52. In *Riddle*, at 214, Dixon J described "expedient" as "a criterion of the widest flexible kind". In the context of s 81, expedient simply means expedient "in the interests of the beneficiaries" (*Riddle* at 214 per Dixon J) or "advantageous", "desirable" or "suitable to the circumstances of the case" (*Riddle* at 222 per Williams J) but, in every case, with

expediency tied to management or administration of trust property: *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753; [2014] NSWCA 367 at [92].

53. A “transaction” within the meaning of s 81(1) need not involve an outlay of money: *Re Dion* at [91]; and an order under s 81(1) is not confined to authorising a specific investment or a specific transaction in the management or administration of the trust property: *Cisera v Cisera Holdings Pty Ltd* (2018) 98 NSWLR 747; [2018] NSWCA 286 (*Cisera*) at [66]. For example, in *Re Bevillesta Creditors’ Trust* [2013] NSWSC 162, the Court permitted a beneficiary to lodge an appeal from a decision of the trustees to reject a proof of debt or claim after the time permitted by the terms of the trust deed.⁴ As Brereton J (as his Honour then was) observed in *Hancock v Rinehart* (2015) 106 ACSR 207; [2015] NSWSC 646 at [183]:

[W]hat the section authorises is an order conferring upon the trustee, either generally or in any particular instance, the necessary power for the purpose of effecting “the disposition or transaction”. The Court’s order does not amend the trust instrument, but confers the requisite power on the trustee despite the terms of the trust instrument.

54. Thus, in the present case, the power may be invoked to assist the Trustees to administer the assets of the trust in the interests of beneficiaries in a more practical manner than as necessarily provided for by the Trust Deed. As Williams J explained in *Riddle* at 223-224, in remarks apposite to the present circumstances:

Section 81 authorises the Court to step in whenever it is of opinion that sound practical business considerations make it expedient that trustees should have administrative powers in addition to or overriding the powers derived from the trust instrument or the general law...Section 81 recognizes that trust instruments and the general law may often prove inadequate to clothe trustees with the requisite powers to manage and administer trust estates over a period of years to the best

⁴ That said, the Court of Appeal in *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753; [2014] NSWCA 367 and *Cisera v Cisera Holdings Pty Ltd* (2018) 98 NSWLR 747; [2018] NSWCA 286 emphasised that an amendment to the trust deed has to have a sufficient connection to the management or administration of the trust property and that wholesale amendments or re-writing is not permissible merely because it will provide a financial benefit to the beneficiaries (although this appears to have led to the amendment of the *Trustee Act* by the inclusion, in s 86A, of a free-standing power to amend a trust deed).

advantage and authorizes the Court to supplement or override these powers so far as may be expedient.

C.2 The Court should make the orders sought under ss 63 and 81 of the Trustee Act

55. The primary task of trustees of a trust such as the Creditors' Trust, is to determine for whom the trust fund is held and in what amounts the participating creditors are entitled to the trust fund: *Application of Solomons and Tayeh* [2012] NSWSC 923 at [32].
56. In the case of the Creditors' Trust, the corpus of the trust fund is very large and the number of beneficiaries is very considerable. Given the need to manage the process for managing and adjudicating such a large number of claims efficiently and effectively, the Trustees seek the Court's guidance and advice as to the regime they seek to adopt in utilising the Halo Platform and dealing with claims payable in a foreign currency or to a bank account in another currency. As Mr Hughes, one of the Trustees, has explained in his affidavit at [50(e)], the provision of judicial advice will assist the Trustees and the beneficiaries to have comfort that the process for lodging and adjudicating claims has been sanctioned by the Court.
57. These matters are appropriate ones in which to make orders under ss 63 and 81 of the Trustee Act, because they are directed to the management and administration of the Trust Fund and the process for determining the amounts payable to beneficiaries of the Creditors' Trust. This is not a case where the Court often declines to give advice (for example, where there is a dispute between parties to a trust or where the respective rights of beneficiaries or their identity need to be resolved, which are more suitable to *inter partes* litigation).
58. By reason of the following general propositions (and before addressing the specific orders), it is appropriate to provide judicial advice to the Trustees and to confer on them the additional powers they seek.
59. *First*, mandating the use of the Halo Platform is a practical way of assisting the Trustees to manage the significant number of creditors in the Creditors' Trust. As Middleton J noted in *Virgin (No 6)* at [32], the Halo Platform provides a practical, user-friendly and secure process to manage a creditor pool of that size and it is appropriate that it be an exclusive means to manage the system in which claims be lodged and adjudicated.

60. *Secondly*, as noted above, each of the almost 13,000 identified creditors of the Virgin Companies (and beneficiaries of the Creditors' Trust) have already been registered as users on Halo.
61. *Thirdly*, the beneficiaries have already been provided with numerous communications regarding Halo (with appropriate assistance such as the Halo FAQs and the "Halo Help" form) and have a level of familiarity with it throughout the course of the external administrations of the Virgin Companies: Hughes Affidavit at [50(a)-(b)]. Further, there has been no complaint about the practical operation of the system.
62. *Fourthly*, it would be impractical and significantly time consuming and costly to require the Trustees: (a) to allow beneficiaries to lodge proofs of debt and claim; and (b) to communicate with beneficiaries, other than via the Halo Platform. Indeed, utilisation of the Halo Platform as an exclusive means of lodgement and adjudication of the claims of beneficiaries is likely to involve an estimated cost saving of \$3.8 million and a time saving of 8 weeks: Orr Affidavit at [47]-[51]. That will be a benefit that will accrue to the beneficiaries as a whole by reducing the costs of these processes: *Virgin (No 6)* at [35].
63. *Fifthly*, the Corporations Regulations (as applied to the Creditors' Trust) contemplate that notices can be given to or by creditors by electronic means (see reg 5.6.11A) and many cases have permitted external administrators to communicate with creditors solely in that fashion where email addresses are available and otherwise by publication on a website or by newspaper advertisement (see, for example, *Re BBY Limited* [2015] NSWSC 974 at [7]; *Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed)* [2018] FCA 1891 at [12]-[14]; *Jahani, in the matter of The Ralan Group Pty Ltd (administrators appointed)* [2019] FCA 1446 at [22]).
64. *Sixthly*, existing beneficiaries who have already lodged informal proofs of debt or claim in the course of the external administrations will not be disadvantaged because, as a final default mechanism in the absence of lodgement of a formal proof by any such beneficiary, these informal proofs will be converted into a formal proof in the Creditors' Trust on Halo.
65. *Seventhly*, it is not uncommon in large administrations for an external service provider to assist in verifying, adjudicating and processing claims. For example, in *Re BBY Limited (receivers and managers appointed) (in liquidation) (No 3)* [2018] NSWSC 1718 (**BBY**

(No 3)), Brereton J (as his Honour then was) acknowledged that the liquidators of BBY Ltd (which was a large stockbroking firm in liquidation) were justified in retaining Link Market Services and creating an online portal managed by Link Market Services as part of adopting a particular process for the verification and adjudication of claims of BBY clients: see [64], [74], [108]-[109]. As Middleton J observed in *Virgin (No 6)* at [38], although in *BBY (No 3)* the online portal was not the only mechanism and the stockbroker clients were permitted to proceed by hard copy documentation, the number of beneficiaries in the present case makes that impractical as an available option moving forward at all times. Further, the Trustees are not proposing to prevent beneficiaries from altogether lodging claims other than by Halo; rather they are proposing manually to input claims into Halo where those claims are provided to the Trustees by some other means prior to the POD Lodgement Date.

66. *Eighthly*, as to the imposition of the POD Lodgement Date, the Corporations Regulations (as applied to the Creditors' Trust) in any event contemplate that proofs of debt must be lodged by particular dates (see reg 5.6.48). As Middleton J noted in *Virgin (No 7)* at [39]:

r 75-225(2)(b)(vii) of the IPR envisages that the report to creditors may specify the date by which such proofs and proxies are to be submitted. The orders sought are in conformity with this principle, in that they require creditors to take these steps by lodging the claim or form, on the Halo Platform, by a particular date (and otherwise disregarding the proofs or proxies). Such a direction was provided by Brereton J (as his Honour then was) in *In the matter of SurfStitch Group Limited* [2018] NSWSC 164, where his Honour noted at [13]:

In my view, it is implicit in clause 2(g) [Corporations Regulation, reg 5.3A.03AB(2)(g), the then equivalent of section 75-225(2)(b)(vii) of the IPR] that proofs and proxies submitted after the specified time are not validly submitted and may be disregarded. While I do not consider it appropriate to engage s 447A to modify the operation of Part 5.3A in this respect, lest there be doubt I am prepared to advise the administrators, under (former) s 447D, that they would be justified in rejecting proofs and proxies received after the date and time so specified.

The position is *a fortiori* in the present case because reg 5.6.48 (as applied by clause 7.3 of the Trust Deed) provides, in that case, that the creditor is excluded from the benefit of a distribution made before admission of the proof of debt or claim.

67. *Ninthly*, Mr Hughes has deposed that he does not see any beneficiaries being prejudiced from the implementation of the regime proposed by the Trustees, other than potentially a very small class of persons who do not have an internet connection available to them (or are unable to use the internet): Hughes Affidavit at [51]. However, as Mr Hughes goes on to explain, even this prejudice is ameliorated by the fact that beneficiaries are already registered on Halo and, in any event, the Trust Deed permits communications to proceed exclusively by email (which in any event would require a beneficiary to have access to the internet).
68. *Tenthly*, the beneficiaries and ASIC have been served with the application: Affidavit of Cassandra Adams sworn 6 April 2020. At the time of preparing these submissions, no party has indicated any opposition to the orders or any desire to be heard on the application.
69. *Finally*, in the absence of any of the orders sought by the Originating Process, there would be a real question about whether the process for lodging and adjudicating claims could be conducted by making use of the Halo Platform in the manner proposed. The Trust Deed, including the clauses dealing specifically with the process for lodging and adjudicating claims, such as clause 7.3, does not in terms refer to the Halo Platform or electronic platforms generally.
70. Further, among other things, cl 18.2 of the Trust Deed limits the manner in which “[a] notice or other communication to a party under this Deed” (defined as a **Notice**) is to be given. The beneficiaries as a whole are not named parties to the Trust Deed (see page 1 of the Trust Deed). There must be a question as to whether communications with them must comply with clause 18.2. If clause 18.2 does apply to communications with beneficiaries, however, it could create difficulties for the use of the Halo Platform. That is because clause 18.2 permits communications by email but on its face would not permit communications via the Halo Platform. Further, clause 18.3 of the Trust Deed states that “Notices must not be given by electronic means of communication (other than email as permitted in clause 18.2)”.

71. Orders are sought by prayers 5 and 6 under s 81 of the Trustee Act to supplement the powers of the Trustees so as specifically to authorise the Trustees to conduct the process for lodging and adjudicating claims by making use of the Halo Platform. Nonetheless, even assuming such orders are made, the Trustees' preference is to seek judicial advice under s 63 and orders under s 81 so as to avoid any perception that there might be a question about whether any particular aspect of the process for lodging and adjudicating claims that is proposed to be adopted is authorised. Further, judicial advice is sought to make clear, in the context of a large, high-profile and complex administration and trusteeship, that the Trustees are not only authorised to conduct the process for lodging and adjudicating claims in the manner proposed, but that they would be justified in so doing.
72. Turning to the specific matters in which orders are sought, the rationale for these orders is described in detail in the Hughes Affidavit at [48], and is summarised below:
- (a) prayer 1A – in light of: (i) the lapsing of the *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (Cth) on 21 March 2021⁵; (ii) the remaining uncertainty caused by the COVID-19 pandemic; and (iii) the absence of any power in clause 9 of the Trust Deed explicitly permitting the Trustees to hold meetings of beneficiaries remotely (that is, only by telephone or audio-visual conference, rather than in person), this order should be made to clarify that meetings may be held in this manner, which is manifestly sensible given the large number of beneficiaries of the Creditors' Trust (and former prayer 2(a) is no longer sought);
 - (b) prayer 2(b) – this prayer seeks to give advice to the Trustees that they would be justified in requiring beneficiaries who intend to vote at any meeting or lodge any proof of debt or claim to register on Halo by the POD Lodgement Date – having regard to the above submissions as to the benefits of the Halo Platform, this order should be made;
 - (c) prayer 2(c) – this prayer seeks to give advice to the Trustees that they would be justified in utilising Halo to communicate with beneficiaries, including in respect

⁵ The *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021* (Cth), which proposed to extend the operation of these provisions, has not yet passed.

of the adjudication of proofs of debt or claim – again, having regard to the above submissions as to the benefits of the Halo Platform, this order should be made;

- (d) prayer 2(d) – this prayer seeks to give advice to the Trustees that they would be justified in giving any notice to beneficiaries by utilising Halo and otherwise by email (in cases where an email address is available to the Trustees), by post (in cases where an email address is unavailable or a non-delivery message is received with respect to an email communication); and also where applicable by publication on Deloitte’s website and in The Australian Newspaper –having regard to the large number of creditors and the submissions in [63] above, this order should be made;
- (e) prayer 2(d) – this prayer seeks to give advice to the Trustees that they would be justified in holding a meeting by electronic means only – as noted with respect to prayer 1A above, this is desirable in light of the COVID-19 pandemic to avoid a large number of beneficiaries seeking to gather in person at the place at which any meeting is to be held (see *Eagle, in the matter of Techfront Australia Pty Limited (administrators appointed)* [2020] FCA 542 at [35]-[37]; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* (2020) 144 ACSR 310; [2020] FCA 571 at [25] *Avita Medical Limited, in the matter of Avita Medical Limited* [2020] FCA 592 at [9]-[17]);
- (f) prayer 2(f) – this prayer seeks to give advice to the Trustees that they would be justified in requiring beneficiaries to lodge their votes on Halo at least two business days before a meeting of beneficiaries (with liberty to amend their votes following a discussion at any meeting in advance of an actual vote) – this order should be made to ensure that the Trustees can appropriately manage the process of voting by beneficiaries at any meeting;
- (g) prayers 2(g)-(h) and (j) – these prayers seek to give advice to the Trustees that they would be justified in requiring beneficiaries to lodge their proofs of debt or claim by the POD Lodgement Date (not permitting any amendment or replacement of a proof after that date without the written consent of the Trustees) and thereafter disregarding the proofs of debt or claim if not lodged by this date – having regard to the submissions in [66] above, this order should be made;

- (h) prayer 2(i) – this prayer seeks to give advice to the Trustees that they would be justified in converting a previously lodged informal proof of debt or claim into a formal proof of debt or claim (if no such formal proof is lodged by a beneficiary prior to the POD Lodgement Date) and inputting that information into Halo – having regard to the submissions in [64] above, this order should be made;
- (i) prayer 2(k) – this prayer seeks to give advice to the Trustees that they would be justified in collecting and storing bank account details of beneficiaries – this order should be made to ensure that the Trustees can collect information to assist them to make distributions from the Trust Fund to beneficiaries in the quickest and most efficient manner;
- (j) prayer 2(l) – this prayer seeks to give advice to the Trustees that they would be justified in using exchange rates listed by the Reserve Bank of Australia or on the XE Website for those beneficiaries whose debts or claims are in foreign currencies not listed on the CBA Carded Rates – having regard to the submissions in [35] above, this order should be made;
- (k) prayer 2(m) – this prayer seeks to give advice to the Trustees that they would be justified in proceeding on the basis that they obtain the best available exchange rate available to them for dividend payments to beneficiaries who or which have provided a bank account in a foreign denominated currency – having regard to the submissions in [36] above, this order should be made;
- (l) prayer 3 – this prayer seeks to confer on the Trustees the power to store material and information relevant to a beneficiary’s proof of debt or claim in an accessible form on Halo and to permit the Trustees to provide information relied on by them in adjudicating any beneficiary’s claim to that beneficiary (subject to any information or documentation confidential to third parties) – this order relates to the administration of the Creditors’ Trust and it should be made in circumstances where neither the Trust Deed nor the application Corporations Regulations (as applied to the Creditors’ Trust) explicitly empower the Trustees to take these steps but which obviously are sensible in assisting the Trustees to deal with beneficiaries in an open and transparent manner; and

D. VARIATION OF THE TRUST DEED [PRAYERS 4A, 4, 5 AND 6]

Non-availability of s 86A of the Trustee Act

73. Prayers 4, 5 and 6 of the Originating Process originally orders pursuant to s 86A of the Trustee Act. That section, in the context of the Trustee Act, is relatively new. It was introduced by the *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020* (NSW), Schedule 1.14 [4]. The Explanatory Memorandum stated that the purpose of introducing s 86A was to “bring NSW into line with other jurisdictions by allowing the Supreme Court to vary or revoke a trust where that is in the interests of the beneficiaries and fulfils the purpose of the trust”.

74. The Second Reading Speech (The Hon Mark Speakman, Hansard, Wednesday, 16 September 2020, p 3436) stated:

Schedule 1.14 [4] to the bill amends that Act to permit the court to approve an arrangement varying or revoking a trust where this is beneficial to the interests of the beneficiaries or to the fulfilment of the trust purpose. Section 81 of the Trustee Act currently empowers the court to make orders relating to the management and administration of trust property that can be seen to be expedient.

The Court of Appeal has held that section 81 does not authorise the court to make orders for the variation of trusts, which will be beneficial to the interests of the beneficiaries or to the fulfilment of the trust purpose but which are not concerned with the management or administration of the trust assets. This amendment will ensure that the court can approve arrangements to vary or revoke trusts in these circumstances. There are legitimate reasons for which a trustee may seek to modify the terms of a trust in order to discharge their duty to a beneficiary. [Settlors] often create trusts without consideration to future circumstances and there may be a need to amend the trust to accommodate those circumstances in a way that is consistent with the intention of the settl[o]r. This would bring New South Wales law into line with the law in the United Kingdom and in other Australian States.

75. The reference in the Second Reading Speech to a Court of Appeal decision appears to be a reference to *Re Dion* (referred to above), where it was held that a Trustee could not seek an order under s 81 conferring on the Trustee a general power to amend the terms of the Trust, or possibly *Cisera* (also referred to above), where it was held that s 81 did not confer an authority on the Court “to alter the trusts on which trust property was held which would have been beneficial to the interests of the beneficiaries, or to the fulfilment of the trust purpose, but which were not concerned with the management or administration of the trust assets”. In the latter case White JA (with whom Bathurst CJ and Beazley P agreed) suggested at [72] that an amendment to the Trustee Act would be appropriate to

fill the lacuna in power that had been identified and this may have been what inspired the introduction of s 86A.

76. Section 86A relevantly provides:

- (1) If property is held in trust under any instrument creating the trust, the Court may, if it thinks fit, by order approve any arrangement to—
 - (a) vary or revoke all or any of the trust, or
 - (b) enlarge the powers of the trustees for the purpose of managing or administering any of the property subject to the purpose of the trust.
- (2) An order under this section may be made by the Court only on behalf of—
 - (a) any person under the trust having an interest directly or indirectly, or vested or contingent, who by reason of being a minor or other incapacity is incapable of assenting, or
 - (b) any person who may become entitled, directly or indirectly, to an interest under the trust, and the entitlement is contingent on a future date or event that has not occurred at the time of application for an order under this section, or
 - (c) any unborn person, or
 - (d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined.
- (3) This section—
 - (a) extends to a trust created before the commencement of this section, and
 - (b) does not apply to trusts affecting property created by another Act, and
 - (c) does not limit the operation of section 81.

77. Clause 16.6 of the Trust Deed provides that the deed may be varied by resolution passed at a meeting of Trust Creditors or, in cl 16.6(b):

This Deed may be varied ... by the Court upon application of any of the Trust Creditors or the Trustees pursuant to the Trustee Act.

The Trustees have no unilateral power of variation. The expression “Trustee Act” in the Trust Deed is defined as the New South Wales Act. Clause 16.6(b) does not specify the type of application to the Court under the Trustee Act that is required in order to effect a variation of the Trust Deed.

78. Since the filing of the original Originating Process, the Trustees have determined that s 86A is not available to them to effect a variation of the Trust Deed as sought in prayers 4-6 of the Originating Process. The Trustees are not within any of the classes or person who are eligible to bring an application under s 86A as identified in sub-s (2).

79. It is then necessary to identify what type of application to the Court by the Trustees to vary the Trust Deed under the Trustee Act is contemplated by cl 16.6(b). *Re Dion* is authority that s 81 does not confer a power on the Court to vary *the trust instrument*, but rather to override or supplement its provisions in respect of a particular transaction or class of transactions. Barrett JA said at [96]-[97] (Beazley P and Gleeson JA agreeing, emphasis added):

...When the court, acting under s 81(1), confers on a trustee power to undertake a particular dealing (or dealings of a particular kind), "it must be taken to have done it as though the power which is being put into operation had been inserted in the trust instrument as an overriding power": *Re Mair* [1935] Ch 562 at 565 per Farwell J. The substantive power that the court gives comes into existence by virtue of the court's order. **It does not have its source in the terms of the trust. There is no addition to the content of the trust instrument. That content is supplemented and overridden "as though" some addition had been made to it. The terms of the trust are reshaped accordingly.**

Conferral of specific new powers pursuant to s 81(1) should not be by way of purported grant of authority to amend the trust instrument so that it provides for the new powers. **Rather, the court's order should directly confer (and be the sole and direct source of) the powers which then supplement and, as necessary, override the content of the trust instrument.** And, of course, the only specific powers that can be conferred in that direct way are those that fall within the s 81(1) description concerned with management and administration of trust property...

80. Section 81, therefore, does not confer a power on the Court to "vary" the terms of the Trust Deed and so would not appear to be the power contemplated by cl 16.6(b). The difficulty is that there is no other power in the Trustee Act which enables the Court to vary a trust instrument on application of the trustee, given that the newly introduced s 86A is limited in the manner identified above. One possibility is that s 16.6(b) should be understood as referring to an application for judicial advice under s 63 of the Trustee Act that the Trustees would be justified in varying the Trust Deed in a specified manner. However, that would require a departure from the literal meaning of cl 16.6(b), which speaks of the Court itself varying the Trust Deed.

81. In the circumstances, the Trustees have determined that the most prudent course is for prayers 4, 4A, 5 and 6 to be sought under s 81 on the basis that the Court is being asked to confer a power on the Trustees to administer the processing and adjudication of claims *as if* the relevant clauses of the Trust Deed contained the additional powers proposed to be conferred. The additional powers sought to be conferred are concerned

with the management or administration of the trust assets and thus within the terms of s 81 as found by the Court of Appeal in *Re Dion*. Further, as *Re Dion* makes clear, the effect of an order under s 81 may be to “override” the trust instrument. There is therefore no difficulty in conferring powers on the Trustees that are contrary to any express limitations in the Trust Deed.

Prayers 4A and 4

82. Prayer 4A seeks an order under s 81 of the Trustee Act to confer on the Trustees the power to require Trust Creditors to use the Halo Platform for voting or participating in meetings and lodging proofs of debt. Prayer 4 seeks to confer on the Trustees the power to have deem those beneficiaries registered on the Halo Platform as having nominated Halo as their form of receiving communications for the purposes of reg 5.6.11A of the Corporations Regulations.
83. Both prayers relate to the administration of the Creditors’ Trust and, in circumstances where the Trust Deed does not empower the Trustees to take this course, the orders should be made having regard to the above submissions as to the benefits of the Halo Platform.

Prayers 5 and 6

84. The general rationale for the orders sought in prayers 5 and 6 of the Originating Process is deposed to in Hughes Affidavit at [48(f)]. In short, the Trustees wish to seek Court approval to amend the Trust Deed to align its provisions with the proposed course to be adopted by the Trustees.
85. Prayer 5 seeks an order modifying (or more strictly, having regard to the foregoing discussion, conferring powers additional to) cl 7.3(b) of the Trust Deed, which applies various provisions from the Corporations Regulations as if references to the liquidator were references to the Trustees, references to winding up were references to the Trust Deed and with “such other modifications as are necessary to give effect to this Deed”. The additional powers in paragraphs (1)-(3) of prayer 5 concern further modifications to the Corporations Regulations which specifically authorise the use of the Halo Platform in the manner proposed by the Trustees.

86. Having regard to the advantages of the Halo Platform submitted above, and the doubts that might otherwise attend its use unless specifically authorised by the Trust Deed, the Court should exercise its discretion under s 81 of the Trustee Act to confer the additional powers referred to in paragraphs (1)-(3) of prayer 5.
87. The additional power in paragraph (4) of prayer 5 requires some further explanation, as it concerns the discount rate applicable for the purposes of s 554B of the Corporations Act, which applies by reason of reg 5.6.44 of the Corporations Regulations. Those provisions govern the percentage discount to be applied to debts that are admissible to proof but that, as at the relevant date, are not payable until an ascertained or ascertainable date in the future. As explained in the Hughes Affidavit at [48(f)(iii)], the Trustees wish to align the percentage discount more closely with the rates set by the Reserve Bank of Australia, given that interest rates have reduced substantially in recent years. The proposal is to reduce the percentage discount from 8% per year to 4% per year, calculated for the period from the declaration of the dividend to the time when the debt would be payable according to the terms on which it was contracted.
88. The order sought is evidently a just one and will prevent unfair prejudice to Trust Creditors who have future debts. It will make the discount that is applied to such debts reflect more closely the true use value of money over time. Accordingly, the Court should exercise its discretion in s 81 of the Trustee Act to confer an additional power on the Trustees in the form of paragraph (4) of prayer 5.
89. Prayer 6 seeks orders conferring additional powers to authorise the giving of Notices by or via the Halo Platform and was initially framed as a variation of cll 18.2 and 18.3 of the Trust Deed. As submitted at paragraph 70 above, there is a question whether cll 18.2 and 18.3 apply to communications by or on behalf of the Trustees with the beneficiaries. If they do not, prayer 6 may not be necessary, save to the extent that some of the Deed Companies, who are undoubted parties to the Trust Deed, are also beneficiaries. In any event, the effect of prayer 6 will be to ensure that if communications with beneficiaries are subject to clauses 18.2 and 18.3, communications via the Halo Platform will be permitted by reason of the additional powers. It is appropriate for the Trustees to take a conservative approach given the scale and complexity of the exercise of processing and adjudicating on claims. For this reason, and because of the benefits of the Halo

Platform referred to earlier in the submissions, the Court should also exercise its discretion to make the orders sought in prayer 6.

E. CONCLUSION

90. The Court should make orders in the form of the short minutes of order provided together with these submissions.

1 April 2021

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