Australian Government
Takeovers Panel

Reasons for Decision
Virgin Australia Holdings Limited (Administrators Appointed) 02 [2020] ATP 12

Catchwords:

Withdrawal of application – consent to withdraw an application – company under administration – jurisdiction of the Panel – disclosure – confidentiality – Court order – efficient, competitive and informed market – lock-up device – coercion

Corporations Act 2001 (Cth), sections 435A, 436A, 444G, 602(a), 602(b)(iii), 606, 657A, 671B and Part 5.3A

Guidance Note 7 – Lock-up devices

Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4) [2020] FCA 927

Quantum Graphite Limited (subject to Deed of Company Arrangement) [2018] ATP 1, Regal Resources Limited [2016] ATP 17, Freshtel Holdings Limited [2016] ATP 15, McAleese Limited [2016] ATP 13, Billabong International Ltd [2013] ATP 9, Multiplex Prime Property Fund 01 and 02 [2009] ATP 18, Financial Resources Limited [2007] ATP 27, Kaefer Technologies Limited 02 [2004] ATP 16, Pasminco Ltd (Administrators Appointed) [2002] ATP 6

Procedural Rules 3.4.1

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

INTRODUCTION

1. The Panel, Michael Borsky QC, Richard Hunt (sitting President) and Bill Koeck, consented to a request from Broad Peak Investment Advisers Pte. Ltd. (for and on behalf of Broad Peak Master Fund II Limited and Broad Peak Asia Credit Opportunities Holdings Pte. Ltd) and Tor Investment Management (Hong Kong) Ltd to withdraw their application in relation to the affairs of Virgin Australia Holdings Limited (Administrators Appointed). The application concerned, among other things, whether certain circumstances regarding the recapitalisation process conducted by the Administrators were unacceptable and had the effect of precluding an alternative deed of company arrangement being presented to creditors at the second creditors' meeting. The Panel considered that it was not against the public interest to consent to the withdrawal request.

2. In these reasons, the following definitions apply.

Administrators	Vaughan Neil Strawbridge, Richard John Hughes, Salvatore Algeri and John Greig of Deloitte in their capacity as joint and several administrators of Virgin
Alternative Proposal	has the meaning given in paragraph 13
Applicants	Broad Peak Investment Advisers Pte. Ltd. (for and on behalf of Broad Peak Master Fund II Limited and Broad Peak Asia

	Credit Opportunities Holdings Pte. Ltd) and Tor Investment Management (Hong Kong) Ltd
Bain	the Bain Purchasers, Bain Capital Private Equity LP, Bain Capital Credit LP and their related entities
Bain Purchasers	BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd
Confidentiality Agreement	has the meaning given in paragraph 9
Confidentiality Orders	has the meaning given in paragraph 17
Cyrus Capital	Cyrus Capital Partners, L.P.
Deloitte	Deloitte Financial Advisory Pty Ltd
DOCA	has the meaning given in paragraph 14
Interlocutory Application	has the meaning given in paragraph 25
SID	has the meaning given in paragraph 14
Virgin	Virgin Australia Holdings Limited (Administrators Appointed)
Virgin Parties	Virgin, the Administrators and Deloitte

FACTS

3. Virgin is an ASX listed company (ASX code: VAH) the securities of which were suspended from quotation on 16 April 2020. It owns and operates the commercial airlines Virgin Australia, Virgin Australia International Airlines, Virgin Australia Regional Airlines and Tigerair Australia.

4. On 20 April 2020, Virgin and a number of its subsidiaries went into voluntary administration and Virgin appointed the Administrators as the administrators of Virgin and a number of its subsidiaries pursuant to section 436A.[1]

5. On 21 April 2020, the Administrators announced their appointment and intention to undertake a process to recapitalise the Virgin business to bring it out of administration as soon as possible.

6. On 30 April 2020, Virgin announced that the Administrators had moved quickly in their plan to restructure and refinance the business and seek interested parties for a sale. In that announcement, Mr Vaughan Strawbridge (the lead Administrator) stated that the current timetable for receipt of indicative offers was mid-May with binding offers required by June.

[1] Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

7. On 15 May 2020, Faraday Associates Pty Ltd, as financial adviser to an ad hoc committee of noteholders led by the Applicants submitted an "Expression of Interest" letter with respect to the recapitalisation of Virgin. The Applicants each manage, represent or advise certain funds that are existing substantial noteholders of Virgin, which are large, unsecured creditors in the administration.

8. On 18 May 2020, in an announcement released by Virgin, the Administrators announced that they had shortlisted a small number of parties to be invited into the next stage of the sale process.

9. On 26 May 2020, the Applicants entered into a confidentiality agreement with Virgin (the **Confidentiality Agreement**) which, among other things, regulates access to certain confidential information related to Virgin and its subsidiaries, as well as access to a virtual data room established and maintained by Virgin and its advisers in connection with the sale process.

10. On 31 May 2020, the Applicants submitted a non-binding indicative offer for the recapitalisation of, and the provision of interim funding to, Virgin.

11. On 2 June 2020, in an announcement released by Virgin, the Administrators announced that they had short-listed two preferred bidders (Bain and Cyrus Capital) from the five non-binding indicative proposals that they had received on Friday, 29 May 2020.

12. On 9 June 2020, the Administrators advised the Applicants that they could consider submitting a backup recapitalisation plan should it be needed after the Administrators' review of the binding bids (from the short-listed bidders).

13. On 24 June 2020, the Applicants submitted an alternative proposal for the recapitalisation of Virgin, which also provided for the provision of interim funding (the **Alternative Proposal**). The Alternative Proposal provided for, among other things, the recapitalisation of Virgin by way of a debt-for-equity swap, whereby the noteholders would have advanced funds to Virgin and acquired up to 100% of the shares in Virgin. The Alternative Proposal was conditional upon, among other things, the Applicants being granted permission by the Administrators to engage in discussions with various stakeholder groups and the outcome of those discussions being to the reasonable satisfaction of the Applicants.

14. On 26 June 2020, in an announcement released by Virgin, the Administrators announced that they had received binding proposals from each of Bain and Cyrus Capital on Monday, 22 June 2020 and also received several proposals from other interested parties, including a proposal from the representatives of an ad hoc group of bondholders of Virgin on 24 June 2020. Having considered those bids, the Administrators confirmed that they had entered into a Sale and Implementation Deed with Bain (**SID**) which would result in the sale and recapitalisation of the businesses of Virgin and its subsidiaries by way of a deed of company arrangement (**DOCA**) pursuant to Part 5.3A. Neither the SID nor the terms of the SID were disclosed. The announcement also stated that "*No return to shareholders is anticipated*".

15. The DOCA is expected to be voted upon by Virgin's creditors at a second creditors' meeting scheduled to be held sometime in August 2020.

16. In an announcement released by Virgin on 30 June 2020, the Administrators declared as at 29 June 2020 that they *"do not expect there will be sufficient recoveries to repay creditors in full"* and that they *"have reasonable grounds to believe that there is no likelihood that shareholders of VAH will receive any distribution for their shares"*.

17. On 2 July 2020, after the Applicants had requested a copy of the SID on 1 July 2020, the Administrators sought on an *ex parte* basis and obtained orders under sections 37AF(1)(b)(i) and (ii) of the *Federal Court of Australia Act 1976* (Cth) which had the effect that, until further order but otherwise no later than 30 June 2021, the SID and other transaction documents be kept confidential and be prohibited from disclosure (the **Confidentiality Orders**).[2]

APPLICATION

Declaration sought

18. By application dated 3 July 2020, received by the Panel executive around 10:35pm, the Applicants sought a declaration of unacceptable circumstances.

19. The Applicants submitted that the Administrators failed to meaningfully engage with the Applicants and restricted the Applicants' ability to complete due diligence by denying access to key stakeholders.

20. The Applicants submitted, among other things, that the circumstances were unacceptable:

    (a) having regard to the cumulative anti-competitive effect of the Confidentiality Agreement and the SID, as well as the conduct of the Administrators, the intention and effect of which was to preclude an alternative DOCA being presented to Virgin's creditors at the second creditors' meeting and

    (b) because they constituted a breach of sections 602 and 671B.[3]

Interim orders sought

21. The Applicants sought interim orders, pending determination of the application, that the Applicants' and their advisors' access to the virtual data room be restored and the Administrators and Bain provide access to the terms of the Bain proposal, including a copy of the SID.

Final orders sought

22. The Applicants sought final orders to the effect that the Administrators provide the Applicants with access to all information and stakeholders that the Administrators made available to other bidders for the purpose of the Applicants finalising the

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[2] *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927

[3] The Applicants submitted that *"in the absence of access to the relevant documents, by entering into the SID, there is a real possibility that Bain Capital has acquired a substantial holding in VAH and, therefore, was required to disclose this fact (together with a copy of the SID) to the ASX in accordance with s 671B"*

Alternative Proposal, including granting relief from complying with certain provisions of the Confidentiality Agreement. The Applicants also sought a final order that Bain submit a substantial holding notice in accordance with section 671B.

DISCUSSION

Preliminary and other submissions

23. We received preliminary submissions on behalf of the Virgin Parties and the Bain Purchasers both submitting that the Panel should decline to conduct proceedings.

24. We also received several submissions from non-party interested stakeholders of Virgin. These submissions were provided to us after seeking each stakeholder's consent and providing the parties with the opportunity to make submissions in response.

Interlocutory Application to vary the Confidentiality Orders

25. On Tuesday, 7 July 2020, prior to our first meeting, the Applicants applied on an interlocutory basis to the Federal Court to vary the Confidentiality Orders so that the SID could be disclosed to the Applicants, the Panel and any parties or interested persons to the Panel proceedings (the **Interlocutory Application**).

26. In their preliminary submission, the Bain Purchasers submitted that the Panel should not re-litigate the Court process or make any orders which undermine the terms of the Confidentiality Orders. In response to this being a reason why the Panel should not conduct proceedings, the Applicants submitted that:

    … it would be a denial of natural justice for Bain or the Administrators to rely on the existence of Confidentiality Orders obtained in the absence of the Applicants, and in circumstances where they have asked for the hearing of the Interlocutory Application to be deferred until later this week...

    The Federal Court has listed the Interlocutory Application for determination at 10:15am on Friday (at the Administrators suggestion that the matter be listed on Thursday or Friday this week, as opposed to the earlier time [of any time Wednesday] suggested by the Applicants…

27. At our first meeting on Wednesday, 8 July 2020, we were made aware of the Interlocutory Application and the time for the hearing. After considering the application and the preliminary submissions from the Virgin Parties and the Bain Purchasers, we formed a preliminary view that we were minded not to conduct proceedings subject to considering:

    (a) the outcome of the Interlocutory Application and, if the Applicants were successful on that application, our review of the SID

    (b) a preliminary submission from another entity involved in the Virgin recapitalisation process (which was received by the Panel executive after the commencement of our meeting on Wednesday, 8 July 2020 but before its completion) and any other non-party interested stakeholder submissions received and

(c) correspondence between the parties on the Interlocutory Application and submissions in response.

28. In our view, it would have been inappropriate for us to pre-empt or interfere with the Court process. Accordingly, we decided to meet again immediately after the Court hearing on Friday, 10 July 2020.

29. The Court dismissed the Interlocutory Application. Shortly thereafter, the Applicants requested our consent to withdraw their application[4] on the basis of the outcome of the hearing.

Consent to withdraw application

30. No objections were received on the withdrawal request. After considering previous Panel decisions in relation to such requests,[5] we granted consent to the withdrawal. We announced that grant of consent immediately on 10 July, noting that our reasons would be provided in due course.

31. In our view, it was not against the public interest to consent to the Applicants withdrawing their application, particularly in light of the preliminary views we had formed and which we discuss briefly below.

Appropriate forum to consider the matter

32. We considered various submissions from the parties as to whether the Panel is the appropriate forum to consider the matters raised by the application.

33. We reviewed the history of Panel decisions in relation to the affairs of companies in administration or otherwise in financial distress.

34. In the case of *Pasminco Ltd (Administrators Appointed)*,[6] the Panel (by majority) set aside a decision by ASIC under section 655A not to grant relief from section 606 in relation to a deed of company administration. Without the relief, in order to proceed with the proposal, shareholder approval would have been required under item 7 of section 611 or under a scheme of arrangement under Part 5.1. The majority stated: *"We consider that control of Pasminco has passed to the Administrators to deal with on behalf of the Creditors, and that it is no longer appropriate for the takeovers provisions to apply to the issue of shares under the reconstruction outlined to this Panel."*[7] They accepted the administrators' submissions that no equity value remained in the shares held by the existing Pasminco shareholders. They considered any residual value that existing Pasminco shareholders would receive under the restructuring[8] would be entirely in the nature of a windfall and there was no need for the existing shareholders to consider whether the value being given was fair.[9]

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[4] Under Procedural Rule 3.4.1
[5] See, for example, *Freshtel Holdings Limited* [2016] ATP 15 at [30]-[31]
[6] [2002] ATP 06
[7] At [130]
[8] Under the deed of company arrangement, the existing shareholders were to retain their existing shares on a heavily diluted basis in order to maintain the spread required for listing on ASX
[9] See [2002] ATP 06 at [98] and [132]

35. The Bain Purchasers submitted that in *Pasminco* the Panel had "*accepted that the administrators' duties under Part 5.3A to conduct the affairs of an insolvent company to maximise the chances of the company and its business continuing in existence take precedence over Chapter 6 rights of shareholders*".

36. We note, however, that the majority in *Pasminco* stated that their decision was not intended to be a watershed, did not think it would be tantamount to law reform by setting a precedent that future Panels would feel bound to follow, and expected ASIC and future Panels to decide whether it is appropriate to give exemptions on the basis of the specific facts in individual future cases.[10] They also noted the decision was easier for them "*given that in many of the other ways of reconstruction, that all parties agree are open to the Administrators, shareholders would receive no value at all*".[11]

37. The Virgin Parties similarly submitted that the circumstances alleged by the Applicants relate to matters concerning the administration conducted under Part 5.3A and are not circumstances which fall within the purview of Chapter 6 relating to control transactions, referring to the following passage from *Kaefer Technologies Limited 02*:[12]

    The Panel's jurisdiction does not extend to regulating the affairs of companies in administration or conduct of company administrators under Part 5.3A. Any alleged impropriety in the conduct of a company administration is a matter for ASIC and/or the courts. Such an action may be brought by ASIC, in its discretion, or by disaffected shareholders or creditors.

38. The Virgin Parties and the Bain Purchasers also cited *Kaefer Technologies Limited 02* as providing a possible scenario in which the Panel may consider intervening in an administration, namely "*if the administration was a device to allow parties to attain a goal relating to control through voting power without a bid, scheme of arrangement, substantial acquisition or other transaction involving shareholder participation.*"[13] Both parties submitted that the administration here was not a 'device'. The Applicants never made this allegation in their application and there was no material before us to suggest that the administration in this case was a 'device'.

39. In our view, there is nothing in the Corporations Act that prohibits the Panel from conducting proceedings on an application in relation to the affairs of a company in administration. That said, proceedings will generally be unlikely to be conducted where a company is in administration, and no equity value remains in its shares. The exercise of discretion to conduct proceedings depends on whether we consider there is any reasonable prospect that we would declare the specific circumstances before us to be unacceptable circumstances taking into account relevant public interest

[10] At [17]
[11] At [133]
[12] [2004] ATP 16 at [7(b)]
[13] At [7(c)]

considerations.[14] As recently stated by the Panel in *Quantum Graphite Limited (subject to Deed of Company Arrangement)*:[15]

We were mindful that the purposes of Chapter 6 may have limited relevance where a company is insolvent and no equity value remains in the shares.[16] We were also concerned not to inappropriately obstruct action by the administrator to bring the company back to solvent operation.[17] However, as was noted in Pasminco Ltd (Administrators Appointed), there is no exception from section 606 for deeds of company arrangement and calls for an exception were rejected by CASAC in its 1998 report.[18] No change was made in that respect when Parliament "fine-tuned" Part 5.3A in 2007.[19] It follows that the requirements of Chapter 6 must not be ignored.

Whether to conduct proceedings

40. The Panel in *Quantum Graphite* stated: "*It may be that the Panel will not often conduct proceedings on an application concerning the affairs of a company that is subject to a deed of company arrangement. We decided to conduct proceedings in this case…*".[20] It stated that it did so because, among other things, the application contained credible allegations of potentially serious unacceptable circumstances on matters squarely within the Panel's jurisdiction and it was not clear to the Panel that Quantum shares had no value.[21] Despite continued concerns, the Panel decided, on balance, that making a declaration under section 657A would be against the public interest, having regard to, among other things, the object of Part 5.3A, potential prejudice if the deed of company arrangement did not proceed and the potential advantages if it did.[22]

41. The Virgin Parties submitted that the application misunderstood the current transaction which "*is not a transaction where there is a competitive market for bidders for equity securities in the same sense*" (referring to section 657A). They submitted that, with no residual value in the equity of Virgin, it is not a transaction in which the interests of shareholders are primarily concerned. Instead, they submitted that in an administration the interests of creditors primarily drive the processes laid down in Part 5.3A.[23]

42. The Applicants submitted that the Bain proposal and the Alternative Proposal would involve the acquisition of securities and a potential change of control with respect to Virgin if either proposal was approved at the second creditors' meeting.

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[14] Section 657A(2)
[15] [2018] ATP 1 at [14]
[16] *Pasminco Ltd (Administrators Appointed)* [2002] ATP 6 at [130]-[131]
[17] *Financial Resources Limited* [2007] ATP 27 at [45]
[18] [2002] ATP 6 at [81]-[88]. See Legal Committee of The Companies and Securities Advisory Committee, *Corporate Voluntary Administration* 1998 Chapter 9, recommendation 57
[19] *Corporations Amendment (Insolvency) Act 2007* (Cth). The Explanatory Memorandum does not discuss recommendation 57 but refers to and implements other recommendations in the 1998 CASAC report
[20] [2018] ATP 1 at [15]
[21] At [15]
[22] At [17]
[23] See, in particular, section 435A

43. One of the non-party submissions submitted that it was likely that under the SID, Bain would seek to acquire control of Virgin through the acquisition of all the shares of Virgin pursuant to section 444GA which would require ASIC relief from section 606.

44. Without access to the SID or even a summary of the terms of the SID, we were not in a position to determine if there were any aspects of the Bain proposal that squarely fit within our jurisdiction in section 657A (leaving aside the equity value issue) and it was not appropriate for us to pre-empt any ASIC relief, if required.

45. The Applicants submitted that it was not certain that no equity value remained in the shares held by the existing Virgin shareholders positing that there may be reconstruction outcomes, including possibly the Alternative Proposal,[24] that could offer residual value to existing Virgin shareholders.

46. On the material before us, we had no reason to doubt the Administrators' declaration that as at 29 June 2020 they did not expect sufficient recoveries to repay creditors in full and, on that basis, they *"have reasonable grounds to believe that there is no likelihood that shareholders of VAH will receive any distribution for their shares"*.

47. Whether any alternative proposal could provide existing shareholders with any residual value was speculative and even if it did, we would need to consider in such circumstances whether or not it was a 'windfall' in the *Pasminco* sense.[25]

48. The Applicants also submitted that the potential value of the shares in a debt for equity conversion (estimated to be approximately $1.5 to $2.0 billion) represented equity value. We were minded not to consider that the possible debt-to-equity swap represented equity value in the relevant sense.

49. In light of this, we were minded to consider that the purposes of Chapter 6 may have limited relevance to the circumstances at hand. For us to intervene would have required credible allegations of potentially serious unacceptable circumstances.

50. The Applicants submitted that unacceptable circumstances existed as a result of the cumulative and anti-competitive effect of both the Confidentiality Agreement and the SID, as well as the conduct of the Administrators, in particular:

    (a) under section 602(b)(iii), by virtue of the Administrators' failure to provide the Applicants with access to information and key stakeholders for the purposes of finalising and making a decision as to whether to present the Alternative Proposal to Virgin creditors at the second creditors' meeting, or

    (b) under section 602(a), by virtue of the Confidentiality Agreement in effect operating as a lock-up device by unreasonably restraining the Applicants from meeting with other key stakeholders.

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[24] The Alternative Proposal submitted to the Administrators on 24 June 2020 did not include a residual shareholding for existing Virgin shareholders, although the Applicants' expression of interest did

[25] See paragraph 34

51. The Applicants further submitted that:

The Panel has long recognised that "Chapter 6 is designed to prevent people getting control of companies by coercion, or rushed, uninformed or selective dealing".[26]

Further, in Billabong, the Panel stated, in the context of lock-up devices, that "[w]here a company is in financial distress it is likely that shareholders may feel commercial pressure to approve a transaction, however, the Panel has stated that it is a matter of degree as to whether the magnitude of the pressure applied by the specific terms of the transaction is unacceptable".[27] *This principle is of equal import to creditors in the context of voting on a deed of company arrangement and the Panel should be equally wary of conduct that is coercive.*

52. The Applicants submitted that efforts to deny Virgin creditors and shareholders access to relevant information concerning the terms of the Bain proposal for as long as possible prior to the second creditors' meeting made it more difficult for an alternative DOCA to emerge and constituted unacceptable coercion.

53. We considered it very difficult to assess these circumstances without access to the terms of the SID. The disclosure of the SID was a matter before the Court and the relief sought in the Interlocutory Application overlapped with an order sought by the Applicants in this application. In these circumstances, we would not ordinarily interfere with the Court process[28] and would not have done so here if the application had not been withdrawn.

54. At the time of consenting to the withdrawal request, we had not come to any final view on the Applicants' allegations.[29] In the case of a solvent company, the Applicants' allegations may have justified further enquiry. The safe-guards that we typically expect to apply to lock-up devices are there to maximise value.[30] We query in the case of an insolvent company that is cash constrained whether certainty of a transaction becomes more important. We were mindful of a submission from the Virgin Parties that: "*[i]f the implementation of the transaction with Bain Capital is delayed, or indeed if the transaction is terminated, the cash constraints on Virgin Australia would likely result in the liquidation of the group before the end of this month*".

55. As we were minded to accept the Administrators' declaration that they *"have reasonable grounds to believe that there is no likelihood that shareholders of VAH will receive any distribution for their shares"*,[31] the decision to make further enquiries (acknowledging the impediments to doing so given the Confidentiality Orders) needed to be weighed against the broader public interest concerns. It was our

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[26] For example, see *Pasminco Ltd (Administrators Appointed)* [2002] ATP 6 at [98], *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18 at [39] and *McAleese Limited* [2016] ATP 13 at [21]

[27] *Billabong International Ltd* [2013] ATP 9 at [44]

[28] *Regal Resources Limited* [2016] ATP 17 at [64]

[29] Including the allegation described in footnote 3

[30] See generally, Guidance Note 7 – Lock-up devices

[31] This position was supported by the cash flow analysis prepared by Deloitte and provided to the Applicants on 19 June 2020. The Applicants' proposals also anticipated that unsecured creditors would receive less than 100% in the dollar.

preliminary view that it would not be in the public interest to obstruct or delay Virgin's administration. We recognised the importance of speed and certainty of execution in successfully recapitalising Virgin, particularly given the negative effects of the pandemic on the airline industry and the complexity of Virgin's administration. Moreover, by Court processes (and the second creditors' meeting), the Applicants had – and indeed were availing themselves of – other avenues for pursuing their ends.

DECISION

56. For the reasons above, we therefore consented to the Applicants withdrawing their application and did not consider it to be against the public interest to do so. We had not made a decision under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth) whether to formally conduct proceedings in relation to the application, and do not need to do so in light of the withdrawal.

Richard Hunt
President of the sitting Panel
Decision dated 10 July 2020
Reasons given to parties 29 July 2020
Reasons published 31 July 2020

Advisers

Party	Advisers
Applicants	Corrs Chambers Westgarth
Virgin Parties	Clayton Utz
Bain	Herbert Smith Freehills