



**In the matter of Skywest Limited
[2004] ATP 10**

Catchwords:

Announcement of bid – bid class – content of bidder’s statement – defeating conditions – efficient market – equal opportunity to share in benefits – finance for bid – minimum bid price – supplementary bidder’s statement – undertakings to Panel

Corporations Act 2001 (Cth) Part 5B.2 and sections 601CD, 602, 617(2), 621(3), 626, 631(1), 633(1), 636, 657A, 657C, 657D, 657E and 675

Corporate Law Economic Reform Program Act 1999 (Cth)

Takeovers Panel Guidance Note 14: Financing Arrangements

ASIC Practice Note 59

ASIC Class Order 00/344

Taipan Resources NL (No 7) [2000] ATP 18

Pinnacle VRB Limited (No 4) [2001] ATP 7

Pinnacle VRB Limited (No 6) [2001] ATP 11

Normandy Mining Limited (No 6) [2001] ATP 32

ASC v Mt Burgess Mining Co (1994) 15 ACSR 714

Re VGM Holdings Ltd [1942] 1 All ER 224

These are our reasons for concluding the proceeding in relation to the affairs of Skywest Limited without making a declaration of unacceptable circumstances following the acceptance by us of undertakings from CaptiveVision Capital Limited and its preparation of a supplementary bidder’s statement.

THE PROCEEDING

1. These reasons relate to an application dated 7 May 2004 (the **Application**) by Skywest Limited (**Skywest**) under section 657C of the *Corporations Act 2001* (Cth) (the **Act**)¹, alleging unacceptable circumstances in relation to the off-market takeover bid by CaptiveVision Capital Limited (**CVC**) for all the fully paid ordinary shares in Skywest (the **Bid**).

THE PANEL & PROCESS

2. The President of the Panel appointed Alison Lansley (sitting President), Brett Heading (sitting Deputy President) and Carol Buys as the sitting Panel (the **Panel**) for the proceeding (the **Proceeding**) arising from the Application.
3. We adopted the Panel's published procedural rules for the purposes of the Proceeding.

¹ All statutory references are to the Act, unless otherwise indicated.

APPLICATION

Factual background leading up to the Application

The Parties

4. Skywest is an unlisted Australian public company with approximately 240 shareholders.
5. CVC is an unlisted public company incorporated in Singapore.

Chronology of events

6. On or about August 2003, Skywest issued approximately 27.8 million convertible notes (**Convertible Notes**) pursuant to a prospectus dated 23 June 2003 (which was supplemented by three supplementary prospectuses) for an issue price of \$0.15 per Convertible Note. Subscribers also received a free attaching option with an exercise price of \$0.20.
7. The rights and obligations attaching to the Convertible Notes were set out in a convertible note trust deed (**Note Trust Deed**) dated 1 August 2003. Under clause 5 of Schedule 1 to the Note Trust Deed, if a takeover bid is made for 50% or more of the Skywest shares and the bidder is successful in acquiring a relevant interest in 50% or more of the issued Skywest shares, then Skywest is required to give each holder of Convertible Notes a sale notice, and each holder must elect (within 5 business days of receiving the sale notice) to either convert or redeem the Convertible Notes. If no election is made within the 5 business day period, then Skywest is required to redeem the Convertible Notes in question.
8. Pursuant to the Convertible Notes offer, Skywest received a joint application from Advent Television Limited (**Advent**) and Overnight Nominees Pty Ltd (**Overnight**). Skywest issued 2,730,167 Convertible Notes to Advent and Overnight as joint holders.
9. During the course of December 2003, CVC acquired a total of 5,166,333 Skywest shares for either \$0.13 or \$0.14 per share.
10. CVC, Advent and Overnight executed a transfer form dated 20 February 2004 under which Advent and Overnight transferred 2,730,167 Convertible Notes to CVC for a stated total consideration of \$600,850.88 (or \$0.22 per Convertible Note).
11. CVC, Advent and Overnight executed a transfer form dated 20 February 2004 under which Advent and Overnight transferred 2,730,167 attaching options to CVC for a stated total consideration of \$109,247.73 (or \$0.04 per option).
12. On 6 March 2004, CVC issued a conversion notice to Skywest in relation to 1,000,000 Convertible Notes and Skywest issued 1,000,000 shares to CVC on conversion of those notes.
13. During the course of March 2004, CVC acquired a total of 3,105,000 Skywest shares. All but 5,000 of these shares were purchased for \$0.20 per share. The remaining 5,000 shares were purchased for \$0.15 per share.

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14. On 2 April 2004, CVC issued a conversion notice to Skywest in relation to its remaining 1,730,167 Convertible Notes and Skywest issued 1,730,167 shares to CVC on conversion of those notes.
15. As a result of the acquisitions and conversions referred to above, CVC held 11,001,500 shares in Skywest, or approximately 19.57% of the total issued share capital of Skywest as at 27 April 2004.

Bid and Bidder's Statement

16. CVC sent a letter to Skywest dated 6 April 2004 (**6 April Letter**) advising of its intention to make a takeover bid for all the fully paid ordinary shares in Skywest. The letter was marked private and confidential and stated that CVC was finalising the precise terms of the Bid, and reserved CVC's right not to proceed if certain conditions were not met. The 6 April Letter also stated that CVC was still considering the conditions to be attached to the Bid, and set out a list of defeating conditions likely to be included in the Bid.
17. Following receipt of the 6 April Letter, Skywest responded to CVC on 8 April 2004 advising that it was inclined to inform its shareholders of CVC's intentions and seeking clarification as to the circumstances in which CVC would make the Bid. Skywest did not receive a response to this letter.
18. Skywest sent a letter to its shareholders dated 12 April 2004 informing them, among other things, of the receipt of a letter announcing an intention to make a takeover offer for all the issued shares in the company, and advising that the announcement was highly conditional. This letter did not name CVC or disclose the terms of the proposed bid.
19. On 14 April 2004 Skywest sent a letter to CVC advising that it had received advice that it was a "disclosing entity" for the purposes of Chapter 6CA and that it had a statutory duty to make a disclosure to the Australian Securities and Investments Commission (**ASIC**) in connection with the takeover proposal. The letter again asked CVC to clarify the circumstances in which CVC would make its bid.
20. On 15 April 2004, Skywest lodged a disclosure notice (**Disclosure Notice**) with ASIC and issued a media release disclosing summarised details of CVC's letter, including the intention to make a takeover bid for all the fully paid ordinary shares in Skywest at an offer price of \$0.20 cash per share and indicating that CVC was still finalising the precise terms of the Bid.
21. Following the Disclosure Notice and media release, the parties exchanged further correspondence regarding their respective responsibilities and obligations in relation to public statements and press reports regarding the proposed bid.
22. On 27 April 2004, CVC lodged a bidder's statement with ASIC and sent a copy to Skywest (the **Bidder's Statement**). The Bidder's Statement set out the following terms of the Bid:
 - (a) the consideration offered was \$0.20 per fully paid ordinary share;
 - (b) the bid class the subject of the Bid was 100% of the fully paid ordinary shares in Skywest on issue as at 8.00pm (Perth time) on 27 April 2004;

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- (c) several defeating conditions attaching to the Bid set out in section 5.8, including the following:
- (b) *there is an interruption in continuity of the key operation or management of Skywest;*
 - (c) *there is an issue of new securities in any class in relation to Skywest other than the issue of Skywest Shares as a result of the exercise of any Option or Convertible Notes;*
 - (d) *there is a material adverse development in the litigation to which Skywest and Mr William Meeke are party (including a settlement of that litigation amounting to more than \$100,000);*
 - (e) *an event occurs which may damage or prejudices Skywest's air operator's certificate;*
 - (f) *an event occurs which may damage or prejudices Skywest's West Australian government licence;*
 - (g) *there is a deterioration in the exchange rate between the Singapore dollar and Australian dollar of greater than 5%;*
 - (h) *any of the conditions referred to in Section 6.2(c) [i.e. conditions relating to the provision of a debt facility and equity investment by Prime Partners Corporate Finance Pte Ltd] are not satisfied;*
 - ...
 - (l) *Skywest or a Subsidiary issues shares, or grants an option over its shares, or agrees to make such an issue or grant such an option other than the issue of Skywest Shares as a result of the exercise of any Option or Convertible Notes; and*
 - (m) *Skywest or a Subsidiary issues, or agrees to issue, convertible notes.*

23. Section 6 of the Bidder's Statement set out details regarding CVC's source of funds for the Bid.

Declaration and orders sought in the Application

The Application

24. Following an exchange of correspondence between Skywest and CVC regarding the Bidder's Statement, Skywest applied to us on 7 May 2004 for a declaration of unacceptable circumstances and interim and final orders in relation to the Bid.

Interim orders sought

25. Skywest sought interim orders under section 657E that, pending final determination of the Proceeding, CVC be restrained from dispatching the Bidder's Statement to the shareholders of Skywest in its current form, notwithstanding that section 633 would, in the absence of an order, have required the Bidder's Statement to be dispatched no later than 26 May 2004.
26. During the Proceeding, CVC sought and obtained from ASIC a modification under section 655A extending the statutory time limit under item 6 of sub-section 633(1) for dispatch of the Bidder's Statement to shareholders.

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Declarations sought

27. Skywest sought a declaration under section 657A that each of the following matters constituted unacceptable circumstances:
- (a) The definition of “bid class securities” in the Bidder’s Statement (the **Bid Class Issue**).
 - (b) The offer price of \$0.20 per share set out in the Bidder’s Statement (the **Minimum Price Issue**).
 - (c) The defeating conditions contained in sections 5.8(h) (the **Financing Condition**), 5.8(g) (the **Exchange Rate Condition**), 5.8(d) (the **Meeke Litigation Condition**), 5.8(b) (the **Interruption in Continuity Condition**), 5.8(d) and (l) (together the **No New Issue Condition**), 5.8(e) (the **AOC Condition**) and 5.8(f) (the **WA Licence Condition**) of the Bidder’s Statement.
 - (d) The statement in section 5.8 that each of the defeating conditions is solely for the benefit of CVC and can be waived by CVC in its discretion (the **Waiver Issue**).
 - (e) The circumstances surrounding the funding arrangements for the cash consideration of the bid set out in section 6 of the Bidder’s Statement (the **Funding Arrangements**).
 - (f) Section 4.1 of the Bidder’s Statement headed “CVC’s Intentions” (the **Intentions Issue**).
 - (g) The failure by CVC to describe in the Bidder’s Statement the impact or possible impact on CVC if holders of convertible securities convert those securities into shares either during or after the offer period (the **Convertible Securities Issue**).
 - (h) The failure of CVC to describe in the Bidders’ Statement the impact on both Skywest and CVC, of the operation of clause 5 of Schedule 1 to the Note Trust Deed in respect of the Convertible Notes (the **Convertible Notes Issue**).
 - (i) Section 4.5(b) of the Bidder’s Statement headed “Risks” (the **Undercapitalisation Issue**).
 - (j) Section 9.5 of the Bidder’s Statement headed “Handling Fee” (the **Handling Fee Issue**).
 - (k) The failure of CVC to be registered under Division 2 of Part 5B.2 (the **Foreign Registration Issue**).

Final orders sought

28. Skywest sought the following orders under section 657D:
- (a) That, in relation to the definition of the bid class securities, prior to dispatch of the Bidder’s Statement:
 - (i) CVC amend the Bidder’s Statement to include within the bid class securities any shares issued by Skywest upon conversion of the Convertible Notes or the exercise of options during the offer period; or
 - (ii) if the above order is not made, CVC amend the Bidder’s Statement to include within the bid class securities any shares issued by Skywest upon

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conversion of the Convertible Notes into shares following the issue by Skywest of a sale notice under clause 5 of Schedule 1 to the Note Trust Deed.

- (b) That, in relation to the offer price set out in the Bidder's Statement, CVC amends the Bidder's Statement prior to its dispatch to increase the offer price to \$0.22 for each fully paid Skywest ordinary share.
- (c) That, in relation to the Financing Condition:
 - (i) CVC amend the Bidder's Statement prior to its dispatch to exclude the Financing Condition; or
 - (ii) if the above order is not made, CVC amend the Bidder's Statement prior to its dispatch to:
 - (A) expressly exclude certain terms of section 6.2(c) from the Financing Condition or include undertakings from CVC that it will use its reasonable endeavours to satisfy the conditions and include a statement as to the likelihood of the conditions being satisfied; and
 - (B) provide more detailed information in relation to Prime Partners Corporate Finance Pte Ltd (**Prime**) and other lenders referred to in section 6.2(c).
- (d) That in relation to the Exchange Rate Condition:
 - (i) CVC amend the Bidder's Statement prior to its dispatch to exclude this condition; or
 - (ii) if the order above is not made, CVC amend the Bidder's Statement prior to its dispatch to disclose information to enable Skywest shareholders to determine the circumstances in which the Exchange Rate Condition will be triggered.
- (e) That in relation to the Meeke Litigation Condition, CVC amend the Bidder's Statement prior to its dispatch to disclose further information as to what will constitute a material adverse development in the Meeke litigation.
- (f) That in relation to the Interruption in Continuity Condition, CVC amend the Bidder's Statement prior to its dispatch to disclose further information in relation to:
 - (i) what constitutes an "interruption";
 - (ii) what constitutes "continuity";
 - (iii) what constitutes the "key operation ... of Skywest" for the purposes of this condition; and
 - (iv) what constitutes the "management of Skywest" for the purposes of the condition.
- (g) That in relation to the No New Issue Condition, CVC amend the Bidder's Statement prior to its dispatch to clarify the interrelationship between section 5.8(c) and 5.8(l).

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- (h) That in relation to the AOC Condition, CVC amend the Bidder's Statement prior to its dispatch to disclose further information as to what constitutes "damage" and/or "prejudice" to the Air Operator's Certificate.
- (i) That in relation to the WA Licence Condition, CVC amend the Bidder's Statement prior to its dispatch to:
 - (i) specify what WA government licence is referred to in this condition; and
 - (ii) disclose further information as to what constitutes "damage" and/or "prejudice" to the WA government licence.
- (j) That in relation to the Waiver Issue, CVC amend the Bidder's Statement prior to its dispatch to disclose those conditions in section 5.8 of the Bidder's Statement which can only be waived with the consent of the various financiers identified in section 6.2.
- (k) That in relation to the Funding Arrangements, CVC amend the Bidder's Statement prior to its dispatch to disclose:
 - (i) all of the facts, matters and circumstances which give CVC a reasonable basis to believe that funding will be available to pay all consideration which it might be required to pay to shareholders under the Offer;
 - (ii) the source of funds from which CVC proposes to meet its obligations under Division 2 and Division 3 of Chapter 6A in the event that CVC acquires a relevant interest in at least 90% of the bid class securities;
 - (iii) the identity and financial resources of each person (other than CVC) who is providing funding (whether by debt or equity) for the bid consideration;
 - (iv) the exchange rate by which CVC calculated the Australian dollar equivalent of the Singapore dollar funding commitments;
 - (v) the financial terms of the funding facilities including interest rate, repayment, covenants, events of default and security together with details concerning CVC's ability to meet these obligations, including information as to the extent to which CVC will be relying on funds from Skywest to make its interest payments; and
 - (vi) information as to the financial resources of CVC including its most recent audited balance sheet and profit and loss statement.
- (l) That in relation to the Intentions Issue, CVC amend the Bidder's Statement prior to its dispatch to disclose:
 - (i) what constitutes "effective control" for the purposes of section 4.1 of the Bidder's Statement; and
 - (ii) CVC's intentions if it acquires less than 50% of the bid class securities; and
 - (iii) CVC's intentions if it acquires more than 50% and less than 90% of the bid class securities; and
 - (iv) CVC's intentions in relation to the dividend policy for Skywest if CVC acquires more than 50% of the bid class securities.

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- (m) That in relation to the Convertible Securities Issue, CVC amend the Bidder's Statement prior to its dispatch to disclose the impact on CVC if it acquires more than 50% of the bid class securities but is subsequently diluted to below this percentage by reason of the conversion of Convertible Notes and/or the exercise of options and, in particular, if CVC is relying on cash from Skywest to fund its debt obligations, the impact on CVC's ability to fund its debt obligations if CVC is diluted to below 50%.
- (n) That in relation to the Convertible Notes Issue, CVC amend the Bidder's Statement prior to its dispatch to disclose the impact on each of CVC and Skywest of the operation of clause 5 of Schedule 1 to the Note Trust Deed and, in particular, the impact on each of CVC and Skywest should all or a majority of the Convertible Notes be required to be redeemed.
- (o) That in relation to the Undercapitalisation Issue, CVC amend the Bidder's Statement prior to its dispatch to disclose how it intends to ensure that there is further capitalisation available to Skywest.
- (p) That in relation to the Handling Fee Issue, CVC amend the Bidder's Statement prior to its dispatch to cap the maximum amount of the broker handling fee which CVC may elect to pay at 0.75% of the consideration payable to an accepting shareholder and to an amount of \$750 for any single acceptance.
- (q) That in relation to the Foreign Registration Issue, CVC be restrained from dispatching the Bidder's Statement until CVC has been registered under Division 2 of Part 5B.2.
- (r) That CVC pays the costs incurred by Skywest incidental to the preparation of the Application and the conduct of the Proceeding.
- (s) Such further or other orders as we considered appropriate.

Discussions between the parties

- 29. Following receipt of the Application, we decided to conduct the Proceeding and accepted an undertaking from CVC that it would not dispatch the Bidder's Statement to Skywest shareholders without giving us and Skywest two business days prior notice of its intention to do so.
- 30. We encouraged CVC and Skywest to continue to negotiate between themselves to resolve as many of the issues arising from the Application as possible. To assist them, we issued our brief dated 12 May 2004 (the **Brief**) identifying the issues we regarded as important. The Brief allowed approximately a week for negotiations before submissions were required, but allowed either of Skywest or CVC to bring that timetable forward by notice to us, ASIC and each other if negotiations broke down.
- 31. These negotiations led to CVC offering to address some of Skywest's concerns regarding the defeating conditions and disclosures in the Bidder's Statement. Specifically, the discussions led to the following outcomes, which we found acceptable:
 - (a) CVC revised the Financing Condition so that it only related to due diligence and documentation conditions attaching to the facilities being made available to

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it by Prime. Following receipt of our views in relation to the general acceptability of the Funding Arrangements (discussed at [80] to [83] below), CVC agreed to delete the Financing Condition altogether.

- (b) CVC deleted the Exchange Rate Condition.
- (c) CVC amended the No New Issue Condition to clarify the perceived overlap between sections 5.8(c) and 5.8(l) by deleting section 5.8(c).
- (d) CVC amended the AOC Condition and the WA Licence Condition to clarify the circumstances in which those conditions may be triggered.
- (e) In relation to the Waiver Issue, CVC revised the language in section 5.8 to make it clear that the Financing Conditions could not be waived by CVC in its discretion. Following receipt of our views in relation to the general acceptability of the Funding Arrangements (discussed at [80] to [83] below), CVC agreed to delete the Financing Condition altogether and therefore the proposed amendment regarding the waivers was no longer required.
- (f) In relation to the Convertible Notes Issue and the Convertible Securities Issue, CVC included additional disclosure in sections 6.2 and 6.3 of the Bidder's Statement regarding the impact on its Funding Arrangements of any future dilution of CVC's holding in Skywest due to the issue of new shares on conversion of Convertible Notes or the exercise of options, and its intentions if clause 5 of Schedule 1 to the Note Trust Deed is triggered and Skywest is called on to redeem any or all of the Convertible Notes.
- (g) In relation to the Handling Fee Issue, CVC deleted all reference to handling fees from the Bidder's Statement.

32. However, the parties were unable to resolve all of the issues under the Application. We considered the unresolved issues.

RESOLUTION OF POINTS OFFERED BY CVC

33. The negotiations between CVC and Skywest also involved CVC offering resolution of certain of the issues raised in the Application concerning the Meeke Litigation Condition and the Interruption in Continuity Condition. Although these issues were not finally resolved by agreement between CVC and Skywest, these offers were a starting point for our resolution of them.

Meeke Litigation Condition

34. CVC offered to revise the Meeke Litigation Condition in order to clarify the circumstances in which that condition would be triggered by replacing the reference to a "material adverse development" in the litigation with a specific reference to the payment of \$100,000 or more as a result of the litigation.
35. In a letter sent to parties on 25 May 2004 (the **Panel Letter**), we advised CVC that additional clarification was required regarding the relevant commencement date for applying the \$100,000 threshold. CVC agreed to amend the Meeke Litigation Condition to clarify the timeframe to which the \$100,000 amount related.

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Interruption in Continuity Condition

36. CVC offered to revise the Interruption in Continuity Condition to make the triggering elements of this condition more specific.
37. The first limb of the revised condition related to changes to the conduct of airline routes or route frequencies by Skywest. Skywest indicated in its submissions that this limb of the revised condition may, on its face, be triggered by normal seasonal changes to flight schedules. In accordance with our suggestion made in the Panel Letter, CVC agreed to further amend the first limb of this condition so that it related to material changes in Skywest's **capacity** to conduct any of the routes or route frequencies.
38. The second limb of the revised Interruption in Continuity Condition related to the occurrence of adverse events which would be likely to have a negative impact on Skywest's operating revenues or operating profits or net assets of at least 10%. Skywest objected to this second limb on the basis that it was a different and more extensive condition than was contemplated in the 6 April Letter.
39. For the reasons set out at [47] to [54], we do not consider that the 6 April Letter was a "public proposal" for the purpose of subsection 631(1). Therefore, we do not consider that CVC was restricted by the statements in the 6 April Letter when determining the Bid's defeating conditions in the Bidder's Statement.

DISCUSSION OF REMAINING ISSUES

Bid Class Issue

40. Subsection 631(1) states that, if a person publicly proposes to make a takeover bid:

the terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.
41. Skywest alleged that the definition of the bid class in the Bidder's Statement (i.e. the shares on issue on 27 April 2004) did not comply with subsection 631(1), on the basis that the 6 April Letter constituted a "public proposal" for the purposes of that section, and in the 6 April Letter, CVC stated an intention to bid for "all of the issued fully paid ordinary shares in Skywest", with no indication that the bid class would be limited to shares on issue at a particular date.
42. Skywest argued that CVC's failure to extend the Bid to shares issued during the offer period as contemplated by subsection 617(2) rendered the terms of the Bid substantially less favourable than those contained in the 6 April Letter. Skywest alleged that CVC created an expectation (through the 6 April Letter) that the Bid would be made in relation to all ordinary shares, including shares coming into existence during the Bid period, and that there was no need for holders of Convertible Notes promptly to convert those notes into shares in order to participate in the benefits of the Bid.
43. In addition, Skywest argued that the failure to include shares issued on conversion of the Convertible Notes or on exercise of the options during the offer period in the bid class was contrary to the purposes of Chapter 6 and in particular the purpose set out in paragraph 602(c).

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44. Skywest stated that if all of the Convertible Notes and options on issue as at the date of the Bidder's Statement were converted or exercised, the newly issued shares would represent approximately 53% of Skywest's total share capital.
45. Skywest submitted that the policy objective under section 602 would be properly served if a bidder was required to extend the benefits available under a bid to a class of persons who are entitled to become holders of bid class securities in the following circumstances:
 - (a) the "class of persons" is readily identifiable;
 - (b) that class comprises a significant component of the target's security holders on a fully diluted basis;
 - (c) the circumstances in which that class is entitled to become holders of shares are readily identifiable on the public record and are beyond the control of members of the class (for example, where they are triggered by the bidder's conduct);
 - (d) that class will have the value of their interest seriously diminished if they are not given an opportunity to share in the benefits accruing under the takeover; and
 - (e) that class does not have the option of remaining in that class once the circumstances referred to in (c) above occur.
46. We do not agree with Skywest's submissions regarding the Bid Class Issue.
47. *ASIC Practice Note 59: Announcing and withdrawing takeover bids (PN 59)* (at [59.16] to [59.22]) sets out the circumstances in which ASIC considers that a "public proposal" is made for the purposes of subsection 631(1). PN 59 states that one element, that the announcement be made by the prospective offeror, is satisfied if the announcement is published as the ordinary result of having been communicated privately. For example, where the communication is given to a target that is a disclosing entity and the communication is sufficiently definite to constitute a notice of an intention to make a takeover bid. However, PN 59 also clarifies (at [59.19(a)]) that this element of the test will not be satisfied by a confidential communication to a director of a possible target in the course of discussions which may lead to a bid being made, when the communication is not sufficiently definite.
48. Subsection 675(2) requires an unlisted disclosing entity (such as Skywest) which learns of price-sensitive information which is not generally available to lodge with ASIC a document containing the information.
49. The contents of the Disclosure Notice are plainly price-sensitive and were not generally available until it was lodged.
50. However, in our view, to the extent that the Disclosure Notice went beyond the limited content of Skywest's 12 April 2004 letter, its contents were not information, but speculation. Based on the 6 April Letter, CVC was not committed to bidding, and it was not clear at that stage whether it could or would bid at all (particularly given that its funding was not settled) or on what terms it would bid, if it did.
51. We do not consider the fact that the 6 April Letter was expressed to be confidential has any relevance to Skywest's right and obligation to release the announcement on 15 April 2004. However, the facts that, under the 6 April Letter:

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- (a) CVC's intention to bid had not been settled;
- (b) the funding and terms of the bid had not been settled; and
- (c) CVC expressly reserved its right to adjust the conditions attaching to the bid, should it decide to bid,

did affect Skywest's right and obligation to release the announcement. Using the concepts in PN 59, we do not consider these matters to have been sufficiently definite to warrant disclosure.

- 52. The 6 April Letter differs from the circumstances in *ASC v Mt Burgess Mining Co Ltd* (1994) 15 ACSR 714, which related to a letter sent to a proposed target. In that case, the letter in question did not refer to any conditions, or indicate anything but a firm intention to bid. It was thus incumbent on the company, being subject to the ASX Listing Rules, to release the letter to the stock market.
- 53. Skywest submitted that it did not disclose the 6 April Letter in its entirety, but rather provided "reasonable details" of the offer, because the board of Skywest felt constrained from lodging by the confidentiality condition attached to the 6 April Letter. We consider this to be inconsistent with Skywest's alleged basis for publishing the proposal: i.e. that it was sufficiently definite to be treated as firm, in which circumstances we would have expected Skywest to disclose its full contents.
- 54. If CVC can be said to have made a public proposal, we consider that the relevant announcement would be Skywest's Disclosure Notice, on the basis that CVC allowed the statements in that Disclosure Notice to stand uncontradicted for almost 2 weeks.
- 55. However, even if we were to consider that the 6 April Letter constituted a public proposal, we agree with submissions from CVC and ASIC that the statements in the 6 April Letter do not create a reasonable expectation that an offer would be made for new shares issued during the bid period. Therefore, we do not consider that the proper exercise by CVC of its discretion under subsection 617(2) to restrict the Bid to securities on issue as at a specified date constitutes a failure to comply with subsection 631(1).
- 56. The Panel has previously noted that a situation may arise:
*where a class of persons who are entitled to become holders of bid class securities should be entitled to share in the benefits accruing to holders of the bid class under a takeover bid.*²
- 57. We do not see anything in the circumstances of Skywest or the Bid which fetters CVC's right to exercise the discretion extended to it under subsection 617(2).
- 58. Skywest also submitted that CVC's definition of the bid class had the effect of applying a maximum acceptance condition on the bid in contravention of subsection 626(1), because the Bid only relates to approximately 47% of Skywest's issued capital on a fully diluted basis.
- 59. We do not accept this submission. We agree with ASIC's submission that section 626 operates subject to subsection 617(2). If it were otherwise, section 626 would remove the bidder's clear right under subsection 617(2) in all instances to determine the bid

² *Taipan Resources NL (No 7)* [2000] ATP 18, at [37].

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class. This would mean that bidders would always be required to extend bids to securities that, during the bid period, are issued or transformed so that they have the same incidents as securities in the bid class, due to a conversion or exercise of rights attached to existing securities. This, however, is clearly not the legislative intention underlying the Chapter 6 regime.

Minimum Price Issue

60. Subsection 621(3) states that:

The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.

61. Skywest argued in its submissions that the “maximum consideration” provided by CVC in the 4 months before the Bid was \$0.22, for two alternative reasons.

See through value

62. Firstly, Skywest submitted that where a bidder acquires convertible securities prior to a bid and converts those securities into bid class securities in temporal proximity to the bid itself, the acquisition of the convertible security should be treated as if it were a purchase of the underlying security. That is, the relevant price for the purposes of subsection 621(3) should be the price paid for the convertible security, together with the exercise or conversion price. On this basis, Skywest alleged that the purchase price of \$0.22 per Convertible Note set out in the transfer form executed by CVC, Overnight and Advent on 20 February 2004 is the appropriate “maximum consideration” for the purposes of subsection 621(3).

63. We do not accept Skywest’s argument in relation to the “see through” value of the acquisition of the Convertible Notes. The policy underpinning subsection 602(c) requires equality of opportunity between holders of bid class securities; it does not extend to requiring equality of opportunity between different classes of securities, such that holders of Skywest shares should be able to receive equal consideration to that received by Convertible Note holders. The Convertible Notes represent different rights to those attaching to ordinary shares, including the right to receive regular interest payments.

64. We note that Chapter 6, particularly as revised by the *Corporate Law Economic Reform Program Act 1999* (Cth), deals extensively with the place of convertible securities in takeover bids. There is no indication in the provisions of Chapter 6 or the Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill* that purchases of convertible securities should be assimilated to purchases of bid class shares for the purpose of section 621.

65. Skywest drew our attention to the comments made by the Panel in *Normandy Mining Limited (No 6)* [2001] ATP 32 at [13]:

We agree that unacceptable circumstances would arise if a bidder avoided the policy of section 621 of the Act by a stratagem such as AngloGold describes. For example, a bidder might acquire an option over a springboard parcel for \$1 per share, with an exercise price of a further \$1 per share, and then bid for the whole of the target company

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at \$1 per share in purported compliance with section 621. In that imaginary case, the bid would need to be at not less than \$2 per share.

66. The reference to a “springboard parcel” in these comments makes it clear in our view that this example related to an option taken over existing shares. It does not support the view that subsection 621(3) extends to payments made to holders of convertible securities which, on conversion or exercise, entitle the holder to new securities. In that scenario, the consideration on conversion or exercise is given to the issuing company, rather than holders of the bid class. Therefore the issue of inequality of opportunity among holders of bid class securities does not arise.
67. In its submissions, CVC asserted that the transfer form dated 20 February 2004, under which Advent and Overnight transferred 2,730,167 Convertible Notes to CVC, “gave effect to the transfer from nominee to beneficial owner” and hence was not a purchase for the purposes of subsection 621(3). CVC made this assertion on the following basis:
- (a) Advent was (and is) a major shareholder of CVC, holding approximately 78% of CVC’s share capital according to the Bidder’s Statement.
 - (b) Overnight was the nominee of the broker used by CVC in relation to the Convertible Note offer. Advent had a history with Overnight and the broker.
 - (c) The application for the Convertible Notes was made by Advent as nominee for CVC. CVC’s understanding was that the reference to Advent on the application form was due to Advent being the designated client account for Overnight. CVC was the beneficial owner of the Convertible Notes at all times and was responsible for payment of the application monies.
 - (d) The transfer form executed on 20 February 2004 gave effect to the change of the registered owner, not beneficial ownership.
 - (e) No consideration was actually paid under the transfer form. The consideration set out on the transfer form was arbitrarily nominated by CVC as \$0.22, with \$0.02 attributed to the yield component, and \$0.20 attributed to the value of the share into which the Convertible Note may convert.
68. We would not have been satisfied that the transfer on 20 February 2004 represented a transfer of securities from a bare trustee to its beneficiary without further evidence from CVC. However, we did not consider that further information was necessary, because whether or not the acquisition was a bare trust transaction, rather than a purchase, was not critical to determining this issue.

Non-cash consideration

69. In the event that we did not agree that the acquisition of the Convertible Notes on 20 February 2004 was a relevant transaction for the purposes of section 621(3), Skywest submitted, in the alternative, that the process of conversion of the Convertible Notes into shares on 6 March 2004 and 2 April 2004 (either on its own or when viewed as one transaction with the acquisition of the Convertible Notes) satisfied the test in subsection 621(3).
70. Skywest submitted that:

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- (a) in the conversion process, CVC provided consideration by surrendering the rights it had under the terms of the Convertible Notes, and that this constituted “non-cash” consideration for the purposes of paragraph 621(4)(b);
- (b) the value of this non-cash consideration was \$0.22, being the arms length value derived from the consideration paid by CVC for each Convertible Note under the transfer dated 20 February 2004;
- (c) the conversion occurred under an “agreement” as required by subsection 621(3), the relevant agreement being the Note Trust Deed, or in the alternative, the conversion constituted a “purchase” for the purpose of subsection 621(3); and
- (d) giving subsection 621(3) a narrow interpretation would enable a bidder to deliver differential benefits to holders of convertible securities than would be offered to holders of bid class securities.

71. We do not accept Skywest’s submission that the conversion of the Convertible Notes and corresponding issue of new shares to CVC constituted a “purchase”. We note and accept the long-standing principle set out in *Re VGM Holdings Ltd* [1942] 1 All ER 224, in which the English Court of Appeal held that the word “purchase” in the financial assistance provision of the *UK Companies Act 1929* did not include the acquisition of shares by subscription or allotment.
72. We are then left with Skywest’s assertion that the reference to an “agreement” in section 621(3) is intended to be read broadly and without limitation, so that it may apply to an agreement involving the issue of new shares. We consider that neither the letter nor the policy of subsection 621(3) applies to agreements other than agreements to purchase securities in the bid class.
73. If section 621 were intended to apply to any price given for bid class securities by the bidder (or an associate) in the relevant period, then all of the words “under any purchase or agreement” are unnecessary, and the section would read perfectly well without them.
74. The forerunners of subsection 621(3)³ referred to purchases and agreements to purchase, whereas subsection 621(3) omits the reference to “purchase” after “agreement”. We cannot, however, find any evidence of a policy initiative to widen section 621 from its predecessors so that it applies to subscription agreements as well as agreements to purchase. We expect that one reason that the words “to purchase” after “agreement” were removed was due to the Corporate Law Simplification Program, which rewrote all of Chapter 6 to shorten and simplify the chapter and its provisions. In this instance, we prefer the analysis that the objective of the amendment was to change the words while preserving their effect.
75. A CASAC report before Parliament when section 621 took its present form referred to the principle of equality of opportunity between shareholders and argued that but for section 621:

³ Subsection 17(6) and later paragraph 16(2)(g) of the *Companies (Acquisition of Shares) Act 1981* and subsections 641(1) and 676(1) of the *Corporations Law*.

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*some shareholders could obtain considerable premiums for selling their target company shares in the pre-bid period, compared with the price offered to offeree shareholders. This might create a perception of inequitable treatment among shareholders. Institutions might also be placed under pressure to enter into pre-bid share deals on terms that would not be available to offeree shareholders under the bid.*⁴

76. This report implies that section 621 is intended to promote the policy of 602(c), that shareholders should have equal opportunities to participate in the benefits accruing to shareholders under the bid (rather than equality of opportunity between different classes of securities).
77. We agree with ASIC's submission that this policy objective would not be furthered by interpreting subsection 621(3) as extending to forms of agreements involving the issue of new securities, because (as discussed at [66] above) in those circumstances the consideration paid in respect of the issue of shares will be paid to the company, rather than to any individual shareholder. As such, all shareholders will indirectly participate in any associated premium or benefit (in the example of CVC's receipt of Skywest shares on conversion, the shared benefit is the surrendering of the rights attaching to the converted notes, including the right to receive interest payments and redemption of the face value of the notes).
78. We note ASIC's submission that unacceptable circumstances may arise if a bidder acquires convertible securities at a significant premium relative to the consideration being offered in respect of the underlying security under the takeover bid (having regard to the differing terms and rights of the two classes of securities) and exercises the securities to build up a pre-bid stake. We agree with ASIC's view that the Application did not make this out in the case of CVC's Bid.
79. Skywest also submitted that the interests of an efficient, competitive and informed market require that a bidder who, in the 4 months prior to announcing a bid, acquires securities which may convert into the bid class, must disclose the details of those acquisitions. For the reasons outlined above, we do not consider that the acquisition of convertible securities in such a manner affects the price that a bidder may offer for the bid class under subsection 621(3). It follows that the details of such acquisitions are not necessarily relevant to the target shareholders' decision whether to accept the bid or not. We are therefore reluctant in this case to impose a disclosure obligation similar to that in paragraph 636(1)(h) in relation to securities which may convert into the bid class. However, we note that prices paid for convertible securities may need to be disclosed where those securities are a close surrogate for the underlying bid class securities, or where there is a high correlation between the prices of the convertible securities and the underlying bid class securities. This might arise, for example, where the convertible securities are close to their maturity and are "in the money".

Funding Arrangements

80. During the negotiations that followed the making of the Application, CVC offered to provide revised disclosure in relation to its Funding Arrangements in sections 6.2

⁴ Companies and Securities Advisory Committee Recommendations for reform of ss 621(4) and 623(2) & (3) of the Corporate Law Economic Reform Program Bill 1998, December 1998, at page 4.

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and 6.3 of the Bidder's Statement. The revised disclosure indicated some material changes in the sources of funding that were likely to be used by CVC in the Bid and addressed several of the concerns raised in the Application by:

- (a) providing additional information regarding the individuals and private companies providing CVC with funds through equity investments. CVC also stated that all documentation had been signed in relation to those equity investments, that each of these investors was a sophisticated investor with cash resources allocated to the investment and that CVC had conducted due diligence investigations on those private companies and individuals who were not CVC directors or associates;
- (b) clarifying the terms of the equity investment and debt facility to be provided by Prime. The revised disclosure set out two remaining financing conditions, being:
 - (i) a condition relating to the finalisation of documentation attaching to the debt facility provided by Prime (the **Documentation Condition**); and
 - (ii) a condition relating to satisfactory due diligence on CVC by Prime in relation to Prime's proposed equity investment (the **Due Diligence Condition**);
- (c) disclosing the terms of a mezzanine debt facility which remained subject to conditions and was available to CVC as an alternative source of funding for the Bid, as well as to assist with funding by Skywest of redemption of Convertible Notes if necessary;
- (d) explaining the exchange rates used to calculate the Australian dollar value of that part of CVC's financing which was denominated in Singapore or US dollars;
- (e) confirming that CVC expects to be able to fund all of its interest payment obligations without reliance on any dividends or returns from its investment in Skywest;
- (f) confirming that "minimum acceptance" conditions attaching to some of CVC's financing related to the shares on issue as at 27 April 2004, meaning that these conditions would not be affected by any future dilution of CVC's holding resulting from new issues of Skywest shares.

81. Although CVC's revised disclosure in relation to the Funding Arrangements was a substantial improvement on the initial disclosure in the Bidder's Statement, we were concerned that, having regard to the Panel's *Guidance Note 14: Funding Arrangements (GN 14)*, the Funding Arrangements described in the revised disclosure were still not adequate to give CVC reasonable grounds to expect that it had sufficient funding arrangements in place to satisfy full acceptance of the Bid if it became unconditional.
82. In the Panel Letter, we set out a number of actions that CVC could undertake in order to alleviate our concerns as to whether or not it had a Reasonable Basis (as that term is defined in GN 14). These actions included:

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- (a) accepting the letter of offer in relation to the Prime debt facility, to ensure that there was a binding commitment on the part of the lender in relation to that facility (see GN 14 at [14.23]-[14.24]);
 - (b) endeavouring to satisfy both the Documentation Condition and Due Diligence Condition prior to dispatching the Bidder's Statement to Skywest shareholders (see GN 14 at [14.21]). In seeking the satisfaction of the Due Diligence Condition, we noted that the due diligence was to be undertaken on CVC and considered that given the relatively straightforward nature of CVC's operations and investments (having regard to the disclosures made in the Bidder's Statement), this condition should not have been very difficult to satisfy;
 - (c) disclosing in the Bidder's Statement the identity of the lender of the mezzanine debt facility (see GN 14 at [14.4]);
 - (d) disclosing in the Bidder's Statement details of the net asset position of the ultimate lender behind the Prime debt facility (see GN 14 at [14.4]); and
 - (e) providing confirmation that, although the mezzanine debt facility may be available for use in relation to the redemption of Convertible Notes, CVC did not intend to have Skywest exercise its unilateral right under the Note Trust Deed to redeem the Convertible Notes (see GN 14 at [14.14]-[14.16]).
83. CVC agreed to undertake all of the actions sought under the Panel Letter and amend the disclosure regarding the Funding Arrangements accordingly.

Intentions Issue

84. Skywest submitted that CVC had failed to describe its intentions in the event that it acquired effective control of Skywest, but less than 90% of the shares in the bid class, in sufficient detail in section 4.1 of the Bidder's Statement. Skywest objected in particular to the use of the undefined term "effective control".
85. We do not consider that the use of the term "effective control" is misleading or confusing for Skywest shareholders. The issue of whether CVC controls Skywest following the Bid will depend on a number of variables, not merely on the percentage holding that CVC retains following the Bid. For example, CVC may be in a position to determine the outcome of decisions about the Skywest's financial and operating policies with significantly less than 50% of the issued share capital, if there are no other substantial holders on Skywest's share register after the Bid.
86. The Bid does not have any conditions that relate to CVC obtaining "effective control" of Skywest, so it is not necessary for this term to be defined for shareholders to properly understand when the offer made to them may become unconditional. Section 4 of the Bidder's Statement sets out CVC's intentions if it is in a position to control Skywest following the Bid in a manner that we consider is consistent with the disclosure requirements set out in paragraph 636(1)(c).

Convertible Securities Issue

87. Skywest submitted that the following statement made in section 4.6 of the Bidder's Statement was unacceptable:

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CVC does not believe it is likely that the Offer will result in CVC obtaining 90% of Skywest's fully paid ordinary shares at the end of the Offer Period.

88. Skywest argued that CVC should be required to disclose the basis on which it formed this belief.
89. We consider it reasonable for CVC to form the view that they would not obtain 90% of the ordinary shares, having regard to the number of Convertible Notes and options on issue and the terms of the Note Trust Deed. Further, we note that notwithstanding its belief, CVC went on to state that it was confident that it would be able to arrange finance if it was obliged to proceed to compulsory acquisition of convertible securities in accordance with section 663A. We do not consider the statement made by CVC in relation to its belief to be unacceptable or inconsistent with the policy of Chapter 6.

Undercapitalisation Issue

90. Skywest submitted that the following statement in section 4.5(b) of the Bidder's Statement was unacceptable:

CVC believes that Skywest is substantially undercapitalised. There is a risk to the operations of Skywest given the relatively small amount of working capital available to it. CVC intends to ensure that there is further capitalisation available to the company.

91. Skywest submitted that, given CVC's statements elsewhere in the Bidder's Statement indicating that it was opposed to Skywest issuing new shares to raise capital, CVC should provide further information as to how CVC intended to ensure that further capitalisation is available to Skywest.
92. CVC stated in its submissions that the comments in section 4.5(b) were made in the context of considering the appropriateness of Skywest's capital structure and were not intended to be interpreted as referring to the need to issue more shares.
93. In the Panel Letter, we advised CVC that in light of their submissions, the statement in 4.5(b) did appear unclear and potentially confusing. CVC agreed to amend the disclosure in section 4.5(b) in order to elaborate on CVC's plan to assist Skywest to secure "a properly structured corporate debt and equity finance package to the order of \$16m-\$21m".

Foreign Registration Issue

94. Subsection 601CD(1) states that:

a foreign company must not carry on business in this jurisdiction unless:

(a) it is registered under [Division 2 of Part 5B.2]; or

(b) it has applied to be so registered and the application has not been dealt with.

95. Skywest submitted that the failure of CVC to be registered under Division 2 of Part 5B.2 constituted both a breach of section 601CD and unacceptable circumstances. Skywest's submission was based on the assertion that the acquisition of shares in an Australian public company pursuant to an off-market takeover bid constitutes carrying on a business in Australia.

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96. We are not convinced that conducting an off-market takeover bid does constitute “carrying on a business” for the purposes of section 601CD. It is not, however, necessary for us to decide this issue, for the reasons set out below.
97. We do not consider that the failure of a bidder to be registered under Division 2 of Part 5B.2 is, of itself, sufficient to create unacceptable circumstances. In reaching this conclusion, we considered and agreed with the comments of the Panel in *Pinnacle VRB Limited (No 4)* [2001] ATP 7, at [83] and the approach of the Review Panel to this issue in *Pinnacle VRB Limited (No 6)* [2001] ATP 11. If the failure of a foreign bidder to register contributed to the impression that the bid in question was illusory, then unacceptable circumstances may exist. We do not consider this to be the case in relation to CVC’s Bid.
98. CVC offered to include additional disclosure in the Bidder’s Statement bringing to Skywest shareholders’ attention the fact that CVC was not registered as a foreign company under the Act. In the Panel Letter, we confirmed that it was appropriate for CVC to include that disclosure, having regard to the approach taken by the Review Panel in *Pinnacle 6*⁵.

DECISION

Undertakings and Replacement Bidder’s Statement

99. We accepted undertakings from CVC to finalise its financing arrangements and to prepare a supplementary Bidder’s Statement dealing with all of the issues raised in the Panel Letter. CVC’s undertakings are set out in Annexure A to these reasons. CVC was required to provide a draft of the supplementary Bidder’s Statement to us for review. We invited comments on the supplementary Bidder’s Statement from the other parties to the Proceeding.
100. We confirmed that CVC could lodge the supplementary Bidder’s Statement with ASIC and give a copy to Skywest, on the basis that it gave effect to CVC’s undertakings. In accepting the supplementary Bidder’s Statement as complying with CVC’s undertakings, we did not endorse it in any other way.
101. Following a request by us, Skywest granted its consent under ASIC Class Order 00/344 to allow CVC to dispatch a replacement Bidder’s Statement, incorporating all the changes set out in the supplementary Bidder’s Statement, to Skywest shareholders.
102. Given the manner in which CVC sought to address the issues raised in the Application, and when combined with CVC’s undertakings and the revised disclosures made in the supplementary Bidder’s Statement, we concluded the Proceeding on the basis that it was not necessary or appropriate to make a declaration and that no order was required.

Legal representation and costs

103. We consented to the parties being legally represented by their commercial lawyers in the Proceeding.

⁵ Set out at [17(d)].

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104. As we made no declaration of unacceptable circumstances we would be unable to order that any person pay costs and so did not consider the issue.

Alison Lansley

President of the Sitting Panel

Decision dated 1 June 2004

Reasons published 15 June 2004

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Annexure A - Undertakings provided by CVC during the Proceeding

I, **ROBERT JEFFRIES CHATFIELD**, Director of CaptiveVision Capital Limited ("the Company") hereby undertake on behalf of the Company that the Company will:

- (i) make the amendments to the Bidder's Statement required or accepted by the Takeovers Panel in its letter dated 25 May 2004; and
- (ii) lodge and serve a supplementary Bidder's Statement in accordance with Section 647 of the Corporations Act 2001 (Cth) reflecting the amendments referred to in paragraph (i) above.

Dated this 28th day of May, 2004

Signed:

Robert Jeffries Chatfield

Director