



In the matter of Skywest Limited 02  
[2004] ATP 11

**Catchwords:**

*Conditional takeover bid – effects of acceptance of offer – voting rights – bidder obtaining and exercising voting rights for acceptance shares despite offer being conditional – accepting shareholders restrained from voting – bidder requisitioning general meeting to consider resolutions proposed by bidder – undertaking offered by bidder to target – withdrawal of application*

*Corporations Act 2001 (Cth), sections 249D, 602 and 650G*

**We were not required to make a decision in relation to the application by Skywest Limited under sections 657A and 657D for a declaration of unacceptable circumstances and final orders. We consented to the application being withdrawn following negotiations between Skywest and CVC resulting in CVC providing an undertaking to Skywest which substantially provided Skywest with the relief sought in the application.**

**THE PROCEEDING**

1. These reasons relate to an application (the **Application**) by Skywest Limited (**Skywest**) under sections 657A and 657D of the *Corporations Act 2001 (Cth)* (the **Act**)<sup>1</sup>, dated 11 June 2004, in relation to the affairs of Skywest which is the target of a takeover bid announced by CaptiveVision Capital Limited (**CVC**).

**THE PANEL & PROCESS**

2. The President of the Panel appointed Brett Heading (sitting President), Braddon Jolley (sitting Deputy President) and Carol Buys as the sitting Panel (the **Panel**) for the Application.
3. After receiving the Application, we were informed that the parties were in discussions to settle the issues raised in the Application. Accordingly, the Panel decided to postpone making its decision whether to commence proceedings until the parties had clearly reached an impasse.
4. On 22 June 2004, Skywest wrote a letter to us seeking our consent to withdraw the Application on the basis that there had been negotiations between Skywest and CVC resulting in an undertaking from CVC which substantially provided Skywest with the relief sought from the Panel in the Application.

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<sup>1</sup> All statutory references are to the Act, unless otherwise indicated.

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#### FACTUAL BACKGROUND

##### Parties

5. Skywest is an unlisted Australian public company with approximately 240 shareholders. Skywest operates in the regional aviation industry in Western Australia.
6. CVC is an unlisted public company incorporated in Singapore. CVC's business is investing, financing and investment holding. The ultimate majority ownership of CVC is held by Australian citizens.

##### Chronology of Events

7. On 28 May 2004, CVC issued Skywest with a notice under section 249D requisitioning a general meeting of the shareholders of Skywest to consider five proposed resolutions (the **Requisition**). Upon receiving legal advice, the board of Skywest resolved that two of the proposed resolutions were valid. Subsequently, on 4 June, Skywest issued a notice of meeting convening a general meeting of the shareholders to be held on 28 June 2004 at which the two proposed resolutions were to be considered.
8. The two proposed resolutions concerned, in general terms, the removal of a director and that the total directors' fees, salaries, emoluments and the like payable to the directors for the 2003-2004 financial year be limited to the cumulative total amount of not more than \$160,000.
9. Following from the proceedings in *Skywest Limited 01*<sup>2</sup>, CVC dispatched a replacement bidder's statement (the **Bidder's Statement**) to Skywest shareholders on 1 June 2004. The offer was subject to a number of defeating conditions, details of which are discussed in *Skywest Limited 01*.
10. The Bidder's Statement did not disclose anything in relation to the Requisition.
11. Section 5.6 of the Bidder's Statement set out the effect of acceptance of CVC's bid. Paragraphs 5.6(g) and (h) provided:

*“By signing and returning an Acceptance Form in accordance with Section 5.5, you will or will be deemed to have:*

- (g) *irrevocably appointed CVC and each of its directors jointly and severally as your true and lawful exclusive attorney in your name and on your behalf, with effect from the date of any contract resulting from your acceptance of the Offer to do all things that you could lawfully do in relation to your Skywest Shares or in exercise of any Right derived from the holding of your Skywest Shares including, without limitation, the rights to:*

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<sup>2</sup> [2004] ATP 10

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- (i) *attend and vote in respect of your Skywest Shares at any and all meetings of Skywest;*
- (ii) *requisition or join with other Skywest Shareholders in requisitioning and/or convening a meeting of the members of Skywest;*
- (iii) *demand a poll for any vote to be taken at any meeting of Skywest Shareholders;*
- (iv) *propose or second any resolutions to be considered at any and all meetings of Skywest Shareholders;*
- (v) *execute all forms, transfers, assignments, notices, documents, assurances, instruments (including instruments appointing a director of CVC as a proxy in respect of all of your Skywest Shares and a transfer form for your Skywest Shares), proxies, consents, agreements and resolutions relating to your Skywest Shares that may be necessary or desirable to convey your Skywest Shares and Rights to CVC; and*
- (vi) *request Skywest to register in the name of CVC or its nominees your Skywest Shares which you hold on any register of Skywest, and have agreed that in exercising the powers conferred by that power of attorney, the attorney shall be entitled to act in the interests of CVC as the beneficial owner and intended registered holder of your Skywest Shares in respect of which you have accepted this Offer and to have further agreed to do all such acts, matters and things that CVC may require to give effect to the matters the subject of this Section 5.6(g) (including the execution of a written form of proxy to the same effect as Section 5.6(g)(v) which complies in all respects with the requirements for the constitution of Skywest) if requested by CVC ...*
- (h) *agreed not to attend or vote in person at any general meeting of Skywest or to exercise or to purport to exercise any of the powers conferred on CVC or its nominee in Section 5.6(g) ..."*

## THE APPLICATION

12. In the Application, Skywest alleged that each of the following constituted unacceptable circumstances:
- (a) the fact that paragraphs 5.6(g) and (h) of the Bidder's Statement gave CVC various rights over shares which were the subject of acceptance by shareholders (**Acceptance Shares**) to the exclusion of accepting shareholders notwithstanding that the offer remained subject to defeating conditions; and
  - (b) the fact that CVC did not disclose in the Bidder's Statement that it had issued the section 249D Requisition.

## Orders sought by Skywest

13. Skywest requested that we make final orders that:

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- (a) in relation to paragraph 5.6(g) of the Bidder's Statement, CVC be restrained from exercising any voting rights attaching to shares the subject of any acceptances received from holders of bid class securities during the offer period unless and until the offer is declared free from defeating conditions;
- (b) in relation to paragraph 5.6(h) of the Bidder's Statement, CVC be required to issue a notice to all shareholders as soon as possible in terms approved by the Panel informing them that, unless and until the offer is declared free from defeating conditions, they are entitled to attend and vote at general meetings, including the meeting to be held on 28 June 2004; and
- (c) such other orders as the Panel considers appropriate.

### DECISION

14. The Panel notes that the Application raises the issue whether it would give rise to unacceptable circumstances for a bidder to cast the votes attached to the shares for which it had received acceptances in circumstances where:
  - (a) the bid and the contracts resulting from those acceptances were still subject to defeating conditions;
  - (b) the bidder had not disclosed in its bidder's statement that it had requisitioned a meeting and that it might vote those shares on resolutions which it had requisitioned;
  - (c) some of the resolutions were not necessary to satisfy defeating conditions of the bid or to prevent possible frustration of the bid; and
  - (d) the bidder had not prominently disclosed in its bidder's statement the early operation of the proxy and power of attorney provisions.

We also note that there are no Panel decisions on this issue.

15. We decided to consent to the Application being withdrawn by Skywest. Our consent is based on the agreement between Skywest and CVC that:
  - CVC undertake to Skywest that it will not seek to exercise either voting rights or powers of attorney attaching to Acceptance Shares (and will not seek to restrict an accepting shareholder from exercising those votes) without first declaring the offers free of all defeating conditions;
  - Skywest seek to withdraw the Application to the Panel; and

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- Any communication to be made by Skywest on this issue to be approved by CVC in advance (such approval not to be unreasonably withheld).

This agreement (and its performance by CVC and Skywest) removed the possibility of the circumstances having an unacceptable effect.

Accordingly, it was appropriate for Skywest to seek, and for us to grant, consent to Skywest withdrawing its application.

16. The Panel supports the conciliatory approach of the parties and commends their efforts in resolving the issues before the Panel made its decision whether to commence proceedings.

**Brett Heading**

**President of the Sitting Panel**

**Decision dated 23 June 2004**

**Reasons published 02 July 2004**