



In the matter of Skywest Limited 03  
[2004] ATP 17

**Catchwords:**

*Conditional takeover bid – relationship between bidder and target’s chief financial officer – bidder obtaining non-public and material information from target’s chief financial officer – communication of information by chief financial officer unauthorised by target – uncertain extent of communications between chief financial officer and bidder – effect of communications on acquisition of bidder’s pre-bid stake – reliance by bidder on obtained information – information obtained by bidder not disclosed in bidder’s statement – effect of profit downgrade announcement by target – misleading statements in bidder’s statement – effect of confidentiality obligations on disclosure in bidder’s statement – informed market – treatment of alleged insider trading and directors duties issues by Panel – disclosure as a remedy – interim orders – Panel making declaration of unacceptable circumstances – costs order – order stopping takeover bid – order restricting future takeover bid by bidder – orders unwinding pre-bid acquisitions – order restricting disposal of shares – breach of Panel’s media canvassing and confidentiality rules – review application*

*Corporations Act 2001 (Cth), sections 602, 636, 643, 657D, 657E, 657EA and 734*

*Australian Securities and Investments Act 2001 (Cth) section 199*

*Takeovers Panel Guidance Note: “Correction of Takeover Documents”*

*Takeovers Panel Guidance Note: “Costs Orders”*

*Skywest Limited 01 [2004] ATP 10*

*Pinnacle VRB Limited (No. 8) [2001] ATP 17; 39 ACSR 55; 19 ACLC 1252*

*Advance Property Trust [2000] ATP 7*

*Mildura Co-operative Fruit Company Ltd [2004] ATP 5*

*Austen & Butta Ltd v Shell Australia Ltd (1992) 10 ACSR; 10 ACLC 735*

*Cultus Petroleum NL v OMV Australia Pty Ltd (1999) 32 ACSR 1; 17 ACLC 935*

*Queensland Coal Pty Ltd v Arco Resources Ltd (1997) BC 9805420*

*ICAL Ltd v County Natwest Securities Australia Ltd (1988) 13 ACLR 129*

*AMP Shopping Centre Trust 02 [2003] ATP 24*

**These are our reasons for making a declaration of unacceptable circumstances and orders preventing an off-market takeover bid for ordinary shares in Skywest Limited continuing. The decision is a result of an application brought by Skywest Limited concerning the circumstances in which the bidder, CaptiveVision Capital Ltd obtained and possessed certain information about Skywest Limited during the acquisition of its pre-bid stake and which it then failed to disclose in its bidder's statement.**

## THE PROCEEDING

1. These reasons relate to an application dated 5 July 2004 (the **Application**) by Skywest Limited (**Skywest**) under section 657C of the *Corporations Act 2001* (Cth) (the **Act**),<sup>1</sup> alleging unacceptable circumstances in relation to the off-market takeover bid by

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

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CaptiveVision Capital Ltd (CVC) for all the fully paid ordinary shares in Skywest (the **Bid**).

## 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 proceeding arising from the Application (the **Proceeding**).
3. We adopted the Panel's published procedural rules for purposes of the Proceeding.<sup>2</sup>
4. We consented to the parties being legally represented by their commercial lawyers in the Proceeding.

## APPLICATION

### Factual background leading up to the Application

5. The following information has been compiled from the Application and the applications in the previous proceedings between the same parties concerning the Bid,<sup>3</sup> submissions and rebuttal submissions of the parties in this Proceeding and those previous proceedings, correspondence between the parties and the Panel in the Proceeding and those previous proceedings, documents lodged with the Australian Securities and Investments Commission (**ASIC**) and media articles concerning the Bid.

### *The parties and others*

6. Skywest is an unlisted Australian public company with approximately 240 shareholders. It has on issue fully paid ordinary shares (the **Shares**), convertible notes which convert into Shares (the **Convertible Notes**) and options to subscribe for Shares at \$0.20 and \$0.30 each (the **Options**). The Convertible Notes and Options were issued by Skywest under a prospectus issued on 23 June 2003 (which was affected by three supplementary prospectuses) (the **Prospectus**). The Bid relates only to the Shares on issue on 27 April 2003 and not those subsequently issued, including as a result of the exercise of the Convertible Notes or Options.
7. CVC is an unlisted public company incorporated in Singapore. At all relevant times it has been a subsidiary of Advent Television Ltd (**Advent**) which is also an unlisted public company incorporated in Singapore. In 2003, CVC appears to have been a wholly-owned subsidiary of Advent and as at 27 April 2004, Advent held 84% of the shares in CVC, according to CVC's bidder's statement in relation to the Bid.
8. Mr Jeff Chatfield (**Mr Chatfield**) is the controlling shareholder in Advent and a director of both Advent and CVC.
9. Mr Craig Lovelady (**Mr Lovelady**) became the chief financial officer (**CFO**) of Skywest on 18 June 2003.

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<sup>2</sup> The Panel published new Rules for Proceedings under section 195 of the *Australian Securities and Investments Commission Act 2001* (Cth) on 18 June 2004.

<sup>3</sup> *Skywest Ltd* [2004] ATP 10 (*Skywest 01*) and *Skywest Ltd* 02 [2004] ATP 11.

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10. It appears that Mr Chatfield and Mr Lovelady have a longstanding personal and professional relationship. Mr Lovelady was the CFO of Advent and a director of CVC, at least in the period before he became CFO of Skywest. When Advent was a major shareholder in an Australian listed public company, Data & Commerce Ltd, Mr Chatfield and Mr Lovelady were respectively the chief executive officer and CFO of that company.
11. Having been appointed Skywest's CFO, Mr Lovelady did not immediately sever his relationships with Advent and CVC. It appears that he continued to be a director of CVC until about 23 July 2003. In an information memorandum prepared by Advent in November 2003 for a proposed private offer of securities in Singapore, he was described by Advent as CFO of Advent.
12. From July 2003 until December 2003 (in other words, during times that Mr Lovelady was CFO of Skywest), Mr Lovelady received monthly payments of \$2000 from Advent or other entities associated with Mr Chatfield.
13. When the Bid was foreshadowed by CVC sending Skywest a letter on 6 April 2003, Mr Lovelady disclosed to a due diligence committee of Skywest established in relation to the Bid that he was an "associate" of CVC, that he had been a director of CVC and ceased to hold office on or about 23 July 2003 but that he had no material personal interest in relation to CVC or its shareholders or otherwise in connection with the Bid.

#### *Transactions by Advent/CVC in Skywest securities*

14. Before August 2003, Advent/CVC had no interest in Skywest securities. After that time, it made the following acquisitions or entered into agreements to acquire Skywest securities (the **Pre-Bid Stake**):
  - (a) in August 2003, Advent applied for and was issued 2,730,167 Convertible Notes and 2,730,167 Options under the Prospectus;
  - (b) on 6 October 2003, CVC entered into an option agreement with Mr Michael Calneggia (**Mr Calneggia**) and interests associated with him for the purchase of 5,033,000 Shares at \$0.135 per Share - Mr Calneggia was until about March 2003 a director of Skywest;
  - (c) the option set out in (b) above was exercised by CVC on 31 October 2003 with settlement of the purchase occurring on 5 December 2003;<sup>4</sup>
  - (d) on 2 December 2003, CVC purchased 133,333 Shares for \$0.13 per Share;<sup>5</sup>
  - (e) in February 2004, the Convertible Notes and Options previously held in the name of Advent were transferred into the name of CVC;
  - (f) on 6 March 2004, CVC gave Skywest a conversion notice in relation to 1,000,000 Convertible Notes and Skywest issued 1,000,000 Shares to CVC on conversion of those Convertible Notes;

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<sup>4</sup> The actual consideration paid by CVC for the 5,033,000 Skywest shares under the option agreement was \$0.135 (for 2,750,000 shares) and \$0.14 (for the remaining 2,283,000 shares).

<sup>5</sup> While the Bidder's Statement identified that CVC purchased these shares on 2 December 2003, CVC advised us that the agreement for the purchase of these shares was entered into on 19 November 2003.

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- (g) during March 2004, CVC purchased 3,100,000 Shares for \$0.20 per Share and a further 5000 shares for \$0.15 per Share; and
  - (h) on 2 April 2004, CVC gave Skywest a conversion notice in relation to its remaining 1,730,167 Convertible Notes and Skywest issued 1,730,167 Shares to CVC on conversion of those Convertible Notes.
15. As a result of these transactions, CVC held 11,001,500 shares in Skywest, or approximately 19.57% of the Shares as at 27 April 2004. At that date CVC also held 2,730,167 Options.
  16. On 27 April 2004, CVC lodged a bidder's statement with ASIC and gave a copy of that statement to Skywest.
  17. After negotiations between the parties and the conduct of proceedings in *Skywest 01*, CVC issued a supplementary bidder's statement and pursuant to ASIC Class Order 00/344, lodged and gave Skywest a replacement bidder's statement.
  18. On 1 June 2004, CVC sent the replacement bidder's statement (the **Bidder's Statement**) to Skywest shareholders.
  19. In addition to acquisitions of Shares as a result of acceptances of the Bid, CVC has also acquired the following Convertible Notes and Options after 1 June 2004:
    - (a) 7 June 2004 - 1,333,334 Options for \$40,000.00;
    - (b) 9 June 2004 - 666,667 Convertible Notes for \$120,000.00;
    - (c) 9 June 2004 - 666,667 Options for \$20,000.00;
    - (d) 9 July 2004 - 266,667 Convertible Notes for \$48,000.06; and
    - (e) 9 July 2004 - 266,667 Options for \$2,666.67.

*Skywest's target's statement is prepared*

20. Following receipt of CVC's letter of 6 April 2004,<sup>6</sup> Skywest's board (the **Board**) established a due diligence committee to assist the Board in responding to the Bid, including by assisting in preparing its target's statement.
21. It is common ground between the parties that Skywest intends as soon as practicable to list on ASX. One criticism of Skywest raised by CVC in the Bidder's Statement is that it has not achieved this goal sooner.
22. Whatever the truth or relevance of the issues as to timing of the proposed listing, it appears that Skywest's plans were sufficiently advanced that its directors had a clear view as to the likely price at which any issue of further Shares needed for the purposes of the listing would occur. This is clear because on 9 June 2004 Skywest applied for, and on 17 June 2004 it received from ASIC a conditional exemption from section 734 allowing Skywest to include in its target's statement information concerning the proposed prospectus relating to the listing including the proposed range of prices at which that issue of Shares would be made. It also appears that, at about that time, the Board anticipated that Skywest's target's statement would include some prospective financial information relating to the directors' expectations

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<sup>6</sup> This was considered and discussed by the Panel in *Skywest 01*.

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concerning Skywest's anticipated financial performance for the 2004-2005 financial year.

23. On 17 June 2004, Mr Scott Henderson (**Mr Henderson**), the managing director of Skywest, received from Skywest management the management accounts for May 2004 which included a forecast of the likely result to 30 June 2004 (taking account of actual results to 31 May 2004). This material was circulated by Mr Henderson to all Skywest directors on 17 June 2004 and the Board met on 18 June 2004 to discuss that material. On the following business day (Monday 21 June 2004), Skywest issued a significant profit downgrade for the financial year ended 30 June 2004 - whereas the Prospectus had forecast a net profit of \$2.4 million, Skywest announced that it anticipated that its likely profit for the relevant period would be \$700,000 (the **Profit Downgrade**).
24. In light of the Profit Downgrade, Skywest discussed with ASIC the extent to which it would be appropriate for Skywest to rely on the exemption from section 734. As a result, although it refers to the listing of Skywest, no information as to the likely price was included in the target's statement issued by Skywest on 24 June 2004 (the **Target's Statement**).
25. The Target's Statement included a report by the PricewaterhouseCoopers (**PwC**) assessing whether the Bid was fair and reasonable to Skywest shareholders. In valuing Skywest shares, PwC did not rely on management forecasts for future periods on the basis that uncertainties (including over passenger numbers on new services) made it difficult for them to consider that those forecasts had a reasonable basis.

#### *Mr Lovelady takes leave of absence*

26. As a result of its consideration of the Profit Downgrade and the May 2004 results, the Board decided that Mr Lovelady should take leave of absence on full pay pending an investigation into the reasons for the Profit Downgrade and why it was not foreseen sooner. In making this decision, the Board took account of reports received from shareholders that CVC's advisers had told the shareholders that Skywest would not meet its 2004 forecast. At that time, Mr Lovelady delivered to Skywest the laptop computer provided to him by Skywest. Skywest terminated Mr Lovelady's employment on 30 June 2004.

#### *Investigation of Mr Lovelady's e-mails*

27. The Board retained Ernst & Young (**EY**) to conduct an independent forensic IT review to collate all of the e-mails sent to and from Skywest employees (including Mr Lovelady) and CVC, its related companies, directors and advisers.
28. We have received detailed evidence of EY's investigations which has not, in substance, been controverted by CVC. The investigation indicated that the number of e-mails between Mr Lovelady and CVC, Mr Chatfield, Advent and their advisers during the period from Mr Lovelady's appointment as Skywest's CFO until he took leave was in the order of 450 (that is, approximately nine e-mails per week).
29. Mr Lovelady had deleted significant numbers of e-mails from his laptop computer, so that many of the relevant e-mails were retrieved not from that laptop computer

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but from Skywest's own back-up facilities. Others were not retrieved (at least in time to be used in the Proceeding) but their transmission is recorded in Skywest's logs of e-mail traffic.

30. On 15 June 2004, Mr Lovelady had downloaded to his laptop computer encryption software called "Invisible Secrets" enabling material in electronic form to be included in other electronic materials which would then be sent by e-mail without alerting a person of the true content. For example, a document created in a word processing or spreadsheet program could be incorporated into a second document which was created in another kind of program (for example, a web page or a photograph). The second document would continue to open and function using the software with which it had been created, but the first document could be separated from it and opened using the relevant decryption software.
31. The Application attached some of the e-mails which had been encrypted using this process and retrieved by EY. As discussed below, we are concerned that there were some items of information which may have been relevant to the Proceeding in the e-mails which have not been recovered. We addressed this issue by asking questions in a brief concerning those items of information identified by us as relevant in the material attached to the Application. Skywest offered CVC the possibility of a mutual exchange of all materials retrieved from their respective computer systems on which each party proposed to rely. CVC declined to participate in that exchange. It did not provide any further evidence of the correspondence between Mr Lovelady and CVC, Mr Chatfield, their affiliates and advisers.
32. Accordingly, a serious concern for us is that neither we nor Skywest have been able to consider all of the correspondence exchanged between Mr Lovelady and CVC, Mr Chatfield and their affiliates and advisers during the relevant period.
33. The scope of the relevant communications is not only shown by the scale of the e-mail traffic retrieved by EY from Skywest's computers. It also appears from the number of telephone calls and SMS messages sent from Mr Lovelady's mobile telephone provided by Skywest to Mr Chatfield's mobile telephone. Again, the full scope of this communication is not available to the Panel. However, some idea of its extent is that between 15 May 2004 and 3 June 2004, Mr Lovelady made 59 telephone calls and sent 23 SMS messages to Mr Chatfield's mobile telephone. Finally, we did not have access to any other forms of communication between Mr Lovelady and CVC and its affiliates, although the evidence shows that Mr Lovelady had a private e-mail account and we assume that Mr Lovelady had a private telephone and could also send documents in hard copy.

#### *Information provided by Mr Lovelady to CVC*

34. The material provided in the Application and submissions and rebuttal submissions from the parties in the Proceeding show that Mr Lovelady provided Mr Chatfield and CVC with the following information:
  - (a) 30 June 2003 - Mr Lovelady believed that:
    - (i) the minimum price of Shares on listing could be \$0.30 per Share and would probably be \$0.45 per Share;

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- (ii) Skywest would experience "very good growth" and "have some good outcomes" in the period 1 July 2003 to 31 December 2003; and
- (iii) earnings for Skywest for the 2003-2004 financial year were forecast so that an acquisition of Shares through a subscription for Convertible Notes under the Prospectus for a price of \$0.15 per Convertible Note implied a price/earnings ratio of 3.3.

On the basis of this information, Mr Lovelady set out for Mr Chatfield an acquisition strategy of 19% of Skywest through an acquisition of Convertible Notes under the Prospectus with the value based on the listing of Skywest.

- (b) 15 September 2003 – a Board minute containing the essential terms of the loan facility between Skywest and its bank including the principal amount, interest rate, term, repayments (including monthly cash requirements), security and the purpose of the loan facility;
- (c) 22 September 2003 - Skywest's management accounts for August 2003;
- (d) 15 October 2003 - in response to a request from Mr Chatfield, that Mr Lovelady estimated that:
  - (i) the projected profit for Skywest in the 2004-2005 financial year would be between \$4.5 million and \$6 million, and that the projected profit would be influenced by the financing of Skywest's proposed acquisitions of new aeroplanes; and
  - (ii) the earnings before interest and tax, depreciation and amortisation of Skywest for that financial year would be \$2 million above the projected profit;
- (e) 30 October 2003 - Skywest's management accounts for September 2003;
- (f) 31 October 2003 - Skywest's consolidated results for the quarter ending 30 September 2003 together with Skywest's quarterly report to the trustee for the Convertible Notes (which indicated the performance of Skywest against its forecast for this quarter and explained that performance including that profit performance had been approximately 13% better than the forecast);
- (g) 26 November 2003 - Mr Lovelady's opinion as Skywest's CFO of the listing price of the Shares; namely, between \$0.30 and \$0.40 per Share;
- (h) 1 December 2003 - that Skywest's directors would oppose a takeover by CVC;
- (i) 2 December 2003 - that stockbrokers with whom Mr Lovelady was dealing estimated the Share price on listing on ASX to be between \$0.30 and \$0.40, as opposed to Mr Chatfield's reports of brokers stating that this price would be about \$0.25; and
- (j) 16 June 2004 - Skywest's actual results for May 2004 and forecast earnings for the year ending 30 June 2004.<sup>7</sup>

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<sup>7</sup> That is, before Mr Henderson was given this material – see [23].

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35. Also, on 9 June 2004, Mr Lovelady sent to Mr Chatfield and CVC's advisers a draft communication intended to be sent to Skywest shareholders entitled "*What the [Skywest] Directors Forgot to Tell You.*" The investigations into Mr Lovelady's laptop computer showed that this document was created or at least amended by Mr Lovelady. CVC did not send the document to Skywest shareholders.
36. In addition, there were emails from Mr Chatfield to Mr Lovelady on 22 September and 17 November 2003, to which were attached different drafts of an information memorandum for a proposed private offering of securities in Advent. The emails do not reveal why Mr Chatfield sent Mr Lovelady the drafts, but each draft describes Mr Lovelady as CFO of Advent and mentions Advent's investment in Skywest, as discussed at [53(b)].
37. The material also revealed that Mr Henderson had retained CVC to assist Skywest in attempting to finance its acquisitions of new aircraft<sup>8</sup> and had provided some information to CVC/Advent concerning Skywest. CVC has maintained that Mr Henderson encouraged CVC to consider and make a takeover bid, including by authorising the disclosures of information by Mr Lovelady. This was denied by Mr Henderson and Skywest and is inconsistent with Mr Lovelady's e-mail of 1 December 2003.
38. Against that, however, Skywest had proposed in November 2003 that CVC have access to Skywest information to conduct due diligence on the basis of a confidentiality arrangement secured by a security bond. CVC refused that opportunity apparently because of the requirement for a security bond. We have no information concerning the amount of the security bond or the terms on, or period for, which it would be required. However, in the case of entities which do not have significant assets in Australia or a recognised and long-standing international reputation, it is not unusual for such a bond to be at least requested as an opening position by an Australian company in Skywest's situation.
39. We draw no conclusion from these matters except to observe that Skywest had quite some information concerning CVC's interest in it (although that may not be significantly more than was appropriate for a significant holder of securities) and that it is difficult to conclude that Mr Henderson authorised the disclosures by Mr Lovelady.

### Declaration and orders sought in the Application

#### *Declaration of unacceptable circumstances*

40. The Application sought a declaration under section 657A that each of the following were unacceptable circumstances:
  - (a) that, at the time at which CVC acquired the Pre-Bid Stake and also the time at which CVC lodged the Bidder's Statement, CVC was in possession of confidential and price sensitive information in relation to the affairs of Skywest;

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<sup>8</sup> A mandate to arrange aircraft leases was given in August 2003 and appears to have been still current in April 2004. Correspondence relating to that mandate indicated that CVC was to arrange finance for the exercise of options to purchase the leased aircraft.



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- (b) that the CFO of Skywest, in breach of his fiduciary and statutory duties as an officer of Skywest and without the knowledge or approval of the Board, colluded with CVC in preparing and executing the Bid; and
- (c) that CVC misled the Panel in the *Skywest 01* proceeding.

#### *Interim orders sought*

41. Skywest sought interim orders under section 657E, pending final determination by the Panel of the Proceeding, that the Bid be suspended and, in particular, that:
- (a) CVC not waive any condition attaching to the Bid;
  - (b) CVC not withdraw the Bid;
  - (c) CVC (itself or through any agent or adviser on its behalf) not write to or otherwise make any contact with (in writing, by telephone or otherwise) any shareholder of Skywest in connection with the Bid;
  - (d) no acceptance received by CVC in connection with the Bid, whether before or after the date of the interim orders, is capable of giving rise to a binding agreement for the sale of the relevant shares; and
  - (e) the Bid cannot expire,
- until and subject to further orders from Panel.
42. In response to the Application, on 7 July 2004, the Panel announced that it made interim orders in the form of Annexure A.

#### *Final orders sought*

43. The Application sought final orders under section 657D that:
- (a) the Bid and all contracts formed by acceptances under it be set aside;
  - (b) to the extent that CVC acquired shares prior to the Bid while in possession of inside information, those shares be vested in ASIC for sale;
  - (c) CVC pay the costs incurred by Skywest incidental to the preparation of the Application and the conduct of the Proceeding; and
  - (d) such further or other orders as the Panel may decide.

## DISCUSSION

### General Approach

44. Skywest formulated the Application in terms of three issues: an insider trading issue, an issue of breach of duty by Mr Lovelady and an issue relating to misleading statements by CVC in previous Panel proceedings. In each case, the formulation of the issues in this way did not assist us to form our view of the circumstances.
45. Whether the conduct complained of constituted a breach of Mr Lovelady's statutory and common law duties to Skywest, or the insider trading provisions of Part 7.10 Division 3 by CVC or of section 199 of the *Australian Securities and Investments Commission Act 2001* (Cth) by CVC, is not of particular importance to the Panel. We consider that those matters can be enforced by applications to other judicial and non-

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judicial bodies. The comments of the Review Panel in *Pinnacle VRB Ltd (No. 8)* in relation to the relationship between breach of directors duties and the Panel's function are in point:

“As a Panel, our functions are limited to applying the updated, enacted Eggleston principles set out in section 602 as essential elements in a wider public interest discretion. We are not empowered to enforce compliance with the law or to set aside contracts on equitable grounds or for non-compliance with Chapter 2D or 2E of the Corporations Law. We do not have the powers which a court of law has to perform any of those functions (including for example, the powers to order discovery between parties and to punish for contempt, like a court); parties and witnesses do not have the protections which they would have in court proceedings.

...

The commercial community is seeking in the Panel, not for a second-rate court, but for a first-rate commercial Panel.”<sup>9</sup>

46. Those observations apply with equal force to other matters which may constitute contraventions of provisions of the Act or other legislation other than the provisions of Chapters 6, 6A, 6B and 6C (**takeovers code**). Those provisions are specifically matters where contraventions may be considered by the Panel to be unacceptable in and of themselves.
47. Of course, conduct which may contravene provisions of the Act other than the takeovers code, or of other statutes or of the general law, may also be conduct which we may regard as unacceptable because of its effect on either control, or potential control, of a company (including its effect on transactions relating to control the company) or the acquisition, or potential acquisition, of a substantial interest in the company. For example, the Panel is not concerned with the enforcement of the insider trading provisions themselves. However, it is likely that facts relevant to establishing that the insider trading provisions have been contravened may also indicate the existence of unacceptable circumstances: the insider trading provisions are designed to ensure that dealing in securities occurs in an informed market and this is one of the policies to which the Panel is obliged to have regard. The Panel made this point in *Advance Property Trust*:

“The case put forward by [the applicant] included most of the elements of the offence of insider trading under section 1002G of the Corporations Law. No insider trading proceedings have been instituted in relation to [the circumstances set out in the Application]. We have no jurisdiction in relation to insider trading, and it was submitted that we should accordingly decline to involve ourselves with [those circumstances] at all.

We do not agree. One of our functions is to grant declarations and orders in relation to some fact situations which involve contraventions of Chapter 6, 6A, 6B or 6C, for which there exist criminal and civil remedies.<sup>10</sup> A Panel declaration or order may be the only remedy available during a bid: private parties may not bring civil actions in relation to a bid, during the bid, whether under Chapter 6, the rest of the Corporations Law or some other law.<sup>11</sup>

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<sup>9</sup> *Pinnacle VRB Limited (No. 8)* [2001] ATP 17, 39 ACSR 55, 19 ACLC 1252 at [52] and [55].

<sup>10</sup> Subsection 657A(1).

<sup>11</sup> Section 659B.

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If a set of facts gives rise to unacceptable circumstances, we are obliged to make such declarations and orders as are justified under Part 6.10, even though the same set of facts might subsequently give rise to court proceedings for a contravention of the Corporations Law or some other law.”<sup>12</sup>

#### The relevant information

48. In formulating the brief, we were concerned to ascertain whether circumstances had arisen which either indicated that acquisitions of substantial interests or transactions relating to control had occurred, were occurring or were threatened to occur at times when relevant information had been withheld from the market. To some extent this coincides with the factual basis of what Skywest described as the insider trading issue. However, other aspects of that issue did not need to be considered by us. In this regard there appeared to be six items of information which Mr Lovelady told CVC which may have constituted information of which shareholders should have been told in the Bidder’s Statement. In essence, these were the matters set out in [34(a), (b), (d), (f), (g) and (i)] and this was the information to which we directed attention in our brief.
49. Following the parties’ submissions and rebuttal submissions in response to our brief, we concluded that the only matters which should have been included in the Bidder’s Statement from the information provided by Mr Lovelady to CVC which is before us were:
- (a) information concerning management profit forecasts for the 2004-2005 financial year (the **Forecast Information**); and
  - (b) information concerning Mr Lovelady’s views concerning the issue price for shares under Skywest’s proposed initial public offer (the **IPO Information**).
- Other relevant information which should have been included in the Bidder’s Statement may have been in the materials which we infer that Mr Lovelady provided to CVC but which are not before us because Skywest was unable to put them before us and CVC chose not to do so.
50. In addition, we concluded that the following information was material to shareholders and would have been required in order to ensure that the disclosure of the Forecast Information and the IPO Information (the **Omitted Information**) was made in the proper context:
- (a) information concerning the relationship of Mr Lovelady with CVC, Advent and Mr Chatfield; and
  - (b) the extent of the information, and the circumstances of the assistance, that Mr Lovelady had given CVC, Advent and Mr Chatfield in connection with the acquisition of the Pre-Bid Stake and the Bid.
51. As a consequence of these findings, we also found that the failure to disclose this material in the Bidder’s Statement was not only an omission of material information but also rendered other statements in the Bidder’s Statement misleading – for example, the statements in the Bidder’s Statement concerning the generosity of

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<sup>12</sup> [2000] ATP 7, 36 ACSR 181, 18 ACLC 777 at [38]-[40].

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CVC's Bid became misleading when considered in the light of the Omitted Information.

52. Having considered the effect of the Omitted Information in relation to the Bid itself, we also considered its effect in relation to the acquisitions described in [14] and [19]. A concern in this regard is that the counterparties to the contracts under which CVC made those acquisitions were not aware of the Omitted Information. In the case of an unlisted entity (even one which is subject to the continuous disclosure obligations of Chapter 6CA, as is the case for Skywest), it is not a realistic assumption for parties to proceed on the basis that disclosure by the company means that all buyers and sellers are equally informed. Although we accept that there may be some informational disparity in circumstances which are not unacceptable, the fact that CVC knew the Omitted Information (which was at all times non-public and material for a buyer or seller of Skywest securities to know) when it was dealing with others constituted unacceptable circumstances. This applies not only to the acquisitions leading to the accumulation of the Pre-Bid Stake, but also to acquisitions of Convertible Notes and Options during the bid period such as those detailed in [19].
53. We consider that, contrary to the submissions by CVC that the Omitted Information was speculative, "off-the-cuff" material, there was evidence that CVC/Advent had not regarded it as such at the time it received that information:
  - (a) CVC/Advent had taken account of the IPO Information in formulating and implementing (for significant expenditure) a strategy of acquiring a significant stake in Skywest through subscription for the Convertible Notes;<sup>13</sup> and
  - (b) Advent (three of whose directors are also directors of CVC) had formed the view that it was reasonable to disclose a level of profit consistent with the Profit Information in preparing an information memorandum for a proposed offer of securities to be issued by Advent and stated in that document that it had a reasonable basis for the disclosure of that information.<sup>14</sup> This is still true if the views of Mr Lovelady were used only as a cross-check on information derived from other (more or less authoritative) sources and processes.
54. The views of the CFO of Skywest as to the likely price at which Skywest shares would be offered under the IPO and the likely profitability of Skywest in the next financial year were clearly matters of considerable importance. CVC's failure to disclose them, although they were known to CVC, clearly undermined both the goal that the market for the shares in Skywest be informed and the goal that shareholders and directors of Skywest have the information to enable them to assess the merits of

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<sup>13</sup> We note that the information memorandum referred to in [53(b)] indicates that the relevant securities were acquired by Advent, although in *Skywest 01* CVC said that the securities had been always owned beneficially by CVC. In a letter sent to the Panel on 28 July 2004, Advent asserted that its role in relation to CVC in connection with this investment was as financier. Without accepting this submission, which is inconsistent with the statements in the draft information memorandum, we do not consider that these distinctions are presently of any importance.

<sup>14</sup> In a letter which Advent sent to the Panel on 28 July 2004, it stated that the information memorandum was not issued and was given to Advent's auditors. In relation to this, we observe that the existence of the information memorandum and the kind of inference that could be drawn from it was clear from the Application, that Advent prepared a document that said these things and that Mr Lovelady was at least consulted about its preparation.

## Takeovers Panel

### Reasons for Decision – Skywest Limited 03

a proposal under which CVC would obtain a substantial interest in Skywest. This applies both at the time that CVC purchased Shares as part of the accumulation of the Pre-Bid Stake and at the time it issued the Bidder's Statement.

55. The relevance and importance of both of these pieces of information is highlighted by the fact that Skywest proposed to include each of them in its Target's Statement until it was in effect precluded from doing so by the Profit Downgrade. One effect of the Profit Downgrade was that Skywest determined, following discussions with ASIC, that it was inappropriate to include the previously foreshadowed IPO price or the Profit Information to be included in its Target's Statement, although those items had previously appeared to Skywest to be reasonably-based information.
56. The likely future value of the Shares and the likely future profitability of Skywest were two important factors which Skywest shareholders should have known before being asked to assess the proposal put forward by CVC. This is reinforced by the consideration that CVC referred to other indicators of value relating to the Skywest shares in its Bidder's Statement, attempting to indicate that the offer price under the bid of \$0.20 per share was generous.

#### Effect of asserted confidentiality

57. It was not established to our satisfaction that the information which CVC had received was conveyed in circumstances where CVC should have realised that it had a duty of non-disclosure to Skywest. In making that observation, we specifically decline to make any finding of fact on this issue. Rather, we have proceeded on the basis that CVC possessed the Omitted Information and that, if required to fulfil its disclosure obligations under sections 636 and 643, there would have been no insuperable fetter on its disclosing it.
58. We consider that where a bidder has non-public information which falls within the disclosure obligations of sections 636 and 643 but which may be the subject of legal rights of others that may restrict its inclusion in a bidder's statement or supplementary bidder's statement, the bidder should approach the person with the relevant right for consent to include the information in that document. Where the target is the person who must be approached, we consider that, at least if the target would be required to include the information in its target's statement, or other information whose disclosure would not cause substantial commercial harm to the target, a failure to consent may in itself be an unacceptable circumstance. For the target to refuse consent in that situation would be likely to impair the information on which the market and shareholders need to rely in considering the takeover bid.<sup>15</sup>
59. We are thus entitled to assume that, had the Bid proceeded properly:
  - (a) CVC would have requested Skywest to permit the inclusion of the Omitted Information in the Bidder's Statement;
  - (b) Skywest (which subsequently decided at a time when it did not know that CVC had the Omitted Information or its source, that the relevant Information would

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<sup>15</sup> In this regard, the position is similar to the issue concerning obtaining consents under section 638(5) considered in *Mildura Co-operative Fruit Company Ltd* [2004] ATP 5 at [44]-[48] and to that considered in relation to an information condition in *Goodman Fielder Ltd* [2003] ATP 1, 44 ACSR 254 at [69].

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be included in the Target's Statement and only did not do so because of the Profit Downgrade) would have given its consent; and

- (c) the Profit Downgrade may later have led to the omission or qualification of the Omitted Information, depending on timing.

In this regard, we disregard the anticipated refusal of consent put forward by Skywest in submissions to us because it was in the context of a proposed supplementary bidder's statement which was thought by Skywest likely to be deficient in any event.

- 60. Proceeding on this basis, which was the assumption most favourable to CVC, means that we do not have to reach a conclusion concerning the difficult issue of the circumstances in which a person holding information subject to non-disclosure obligations is able to include that information in a bidder's statement (or other equivalent document).<sup>16</sup> We observe that, on the one hand an excessively strict enforcement of the obligations of confidentiality means that, by conveying a minor piece of disclosable confidential information, a target could attempt to prevent a bidder from being able to prepare a bidder's statement while on the other hand too cavalier an approach by the Panel might seriously undermine the value of important company information. We consider that the process outlined in [58] would in most cases lead to the most appropriate adjustment of the parties' rights and obligations, while ensuring that the information principles in section 602 are promoted.

#### The effect of the Profit Downgrade

- 61. What effect does the Profit Downgrade have? Does it so undermine the continued reliability of the Omitted Information that the Omitted Information should not be disclosed because it is no longer reliable? Finally, does that mean that there are no longer any unacceptable circumstances existing?
- 62. We consider that the situation that should have applied was that:
  - (a) the Omitted Information should have been included in the Bidder's Statement;
  - (b) the Bidder's Statement should have contained different discussions of the generosity of the Bid;
  - (c) the Bidder's Statement should also have detailed the relationship between Mr Lovelady and CVC and its directors and the nature and extent of the communications between Mr Lovelady and CVC and its directors and advisers; and
  - (d) the Target's Statement, or if it had been issued before 18 June 2004, a supplementary target's statement, would then have informed Skywest shareholders of the Profit Downgrade and that as a consequence the IPO Information and the Profit Information had ceased to be current and reliable.

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<sup>16</sup> This matter was considered in two decisions of the New South Wales Supreme Court and one decision of the Queensland Court of Appeal which were discussed by the parties in submissions to us: *Austen & Butta Ltd v Shell Australia Ltd* (1992) 10 ACSR 563, 10 ACLC 735; *Cultus Petroleum NL v OMV Australia Pty Ltd* (1999) 32 ACSR 1, 17 ACLC 935 and *Queensland Coal Pty Ltd v Arco Resources Ltd* (1997) BC9805420.

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63. The current situation is a continuation of that unacceptable position in that, without significant additional explanatory material being provided, it is not possible to create the kind of informed market that would have existed through this bid had CVC performed its disclosure obligations in accordance the requirements of the Act.

#### **The uncertain extent of the level of disclosure**

64. A further concern arises from CVC declining:
- (a) Skywest's offer to exchange all documents retrieved from their respective computer systems on which they proposed to rely in the Proceeding;
  - (b) to provide any further evidence of the correspondence between Mr Lovelady and CVC, Mr Chatfield, their affiliates and advisers in their submissions; and
  - (c) to comment in any way in its submissions on the Panel's indication that no order allowing the Bid to proceed would be made before the directors of CVC and Mr Lovelady had provided the Panel with signed statements stating that, having made full enquiries of each other and the other officers of CVC, there was no information known to them that was communicated (orally or in writing) by Mr Lovelady to the officers of CVC (apart from the information which had already been identified in the Proceeding and any additional information provided with the statement) which should be included in the Bidder's Statement to comply with section 636.
65. This means that we do not have a complete measure of all the information which Mr Lovelady provided CVC throughout the period from his engagement by Skywest until his dismissal. Without that understanding, we cannot be satisfied that:
- (a) we know the full extent to which CVC failed to make adequate disclosure in its Bidder's Statement;
  - (b) the extent to which the market and Skywest shareholders are lacking important and material information; and
  - (c) the extent to which the Bidder's Statement would have required supplementation to render it adequate.

#### **Considerations affecting orders**

##### *General approach*

66. Section 657D confers on the Panel power to make final orders where it has made a declaration under section 657A. Without being exhaustive, the following points should be noted:
- (a) the power is extremely broad as regards the kind of order which may be made. The only limitations as to the kind of order that the Panel may make are that it must not be an order that a person comply with a requirement of the takeovers code and that the Panel must not be satisfied that the order will cause unfair prejudice to any person; but
  - (b) the intended effect for which the order may be made (leaving aside costs orders and elaborating and consequential orders) must be either to:
    - (i) protect the interests of those affected by unacceptable circumstances; or

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- (ii) enable a bid to proceed in the way in which it would have proceeded had the unacceptable circumstances not occurred.

67. In most cases, the Panel seeks to ensure that both these aspects are fulfilled when it makes orders. In most circumstances, ensuring that the bid proceeds in the manner in which it would have had the unacceptable circumstances not occurred in effect also will ensure that the interests of those affected by the unacceptable circumstances are protected. Accordingly, in most cases where the unacceptable circumstances found consist of failures to make proper disclosure, the twin purpose/effects can be advanced best by orders which require further disclosure. Consequential orders may be required to undo any mischief created by the previous failure in disclosure or any advantage which a person may take of the situation created by the failure.<sup>17</sup>

*Is disclosure sufficient?*

68. Accordingly, when considering the kind of orders which we might make, our first response to the unacceptable circumstances that we found, which are in essence that there was a failure by CVC to make required disclosure in the Bidder's Statement and that, accordingly, there were misleading statements in the Bidder's Statement, was to consider whether the Bid could be "put back on track" by orders which related to further disclosure and whether, if this were done, the interests of those affected by those unacceptable circumstances would be protected.
69. The issue confronting us in relation to attempting to proceed in this way, however, was the matter raised in [64]. That is, CVC's response to Skywest's invitation to exchange relevant documents (in effect, a form of agreed limited discovery) and its failure to respond to the invitation made to it by us in the brief relating to orders to define precisely the scope of the information provided to CVC by Mr Lovelady which should have been included in the Bidder's Statement mean that the Panel only knows that the Bidder's Statement is deficient in its failure to disclose the Omitted Information and the consequential ways discussed in [49] and [50]. However, the unacceptability that we find in this case includes the fact that we cannot determine the extent of the information provided to CVC by Mr Lovelady and whether any more of it ought to have been disclosed. Accordingly, as a result of CVC's own failure to assist us to determine the extent of the failure to disclose, we could not determine the nature and extent of disclosure required to ensure that the Bid proceeded in the way in which it would have had the unacceptable circumstances not occurred.
70. The situation with which we are confronted is almost the same as that which confronted Bryson J in *ICAL Ltd v County Natwest Securities Australia Ltd* in which His Honour said:

"In this case a correcting statement could not be simple. It would be very important to avoid any appearance that the court had lent its own authority to a correcting statement. A correcting statement would not be a proper measure unless it were fairly certain to the court that its contents were correct and also complete; there is no realistic possibility of further correction. In the present case it would be very difficult for me to reach a view in which any particular statement could be regarded as a complete

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<sup>17</sup> See the discussion in Guidance Note 16: "Correction of Takeover Documents", especially at [16.11]-[16.13].



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statement of the material matters. An offeror has a clear duty under the Code to formulate the Part C statement in accordance with law and the court cannot engage in any process of extracting a minimum of information out of an offeror who originally proffered less. There will, I would think, be many cases in which the offeror must stand or fall with his own original Part C statement. I am not prepared to allow the Part C statement to be circulated with any correcting statement."<sup>18</sup>

71. The Panel has also dealt with the situation where disclosure failures have been the basis of a finding of unacceptable circumstances and yet further disclosure would not have been a sufficient remedy, for example in *AMP Shopping Centre Trust 02*.<sup>19</sup>

#### *Alternative orders – stopping the Bid*

72. Accordingly, having decided that we could not be confident that a regime of orders founded on further disclosure would deal with the unacceptable circumstances we had found, we considered what other orders could and protect the interests of the persons affected by those unacceptable circumstances. CVC pressed us with the consideration that an order stopping the Bid would deny Skywest shareholders the opportunity to dispose of their Shares at a price which, whatever the situation may have been on 27 April 2004 or 1 June 2004 has become, by reason of the Profit Downgrade, generous to them.
73. We recognise the force of these considerations. However, the information principle embodied in section 602 is fundamental to Chapter 6. If that cannot be satisfied, then there is no way in which the interests of shareholders can be advanced and protected while allowing a bid to proceed. We could not allow a bid to continue where we are not satisfied that the information principle was being fulfilled. Accordingly, we consider that our order must prevent the Bid continuing and cancel any takeover contracts arising from acceptances of the Bid.

#### *Unwinding the other acquisitions*

74. Slightly different considerations apply in the case of CVC's acquisition of the Pre-Bid Stake. Unlike the Bid's takeover contracts, these contracts have been performed. To order that they be cancelled in effect would require innocent counterparties to return the consideration received in return for securities which they presumably no longer wanted. However, the failure of CVC to ensure that the relevant information was available to the counterparties to these contracts is part of the unacceptable circumstances that we have identified. It is appropriate, therefore, that the counterparties affected by this informational imbalance be given the chance to make their own decisions as to whether they wish to cancel the contracts to which they were parties. Our orders provided for a regime allowing this to occur.
75. The order conferring the right to cancel Pre-Bid Stake acquisition contracts does not apply to certain of those contracts:
- (a) the purchase of Shares from Mr Calneggia is excluded, because the order only relates to contracts made after 1 December 2003 and Mr Calneggia's purchase contract with CVC was made either when the Option was granted or at latest

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<sup>18</sup> (1988) 13 ACLR 129 at 162

<sup>19</sup> [2003] ATP 24, 45 ACSR 524 at [50].

## Takeovers Panel

### Reasons for Decision – Skywest Limited 03

when the Option was exercised. We are satisfied that this is appropriate on the basis of a statement from Mr Calneggia which made it clear to us that Mr Calneggia had effective informational parity with CVC at all relevant times;

- (b) having considered Mr Calneggia's case, we also considered that it was appropriate to allow CVC to provide further factual material to us concerning other Pre-Bid Stake acquisitions which would, in effect, show that the counterparties in that situation also did not suffer the identified informational inequality; and
- (c) acquisitions by the exercise by CVC of rights to subscribe for Shares attached to securities issued by Skywest which CVC or Advent had directly acquired by subscription are also excluded, because they did not raise issues of informational inequality.

76. However, where the relevant securities conferring a right of conversion into Shares were not acquired by the subscription by CVC or Advent but by a purchase by CVC from a third party, that contract of purchase is subject to the right of cancellation at the election of the counterparty.
77. Similarly, the contracts of purchase of Skywest securities which were not Shares after the making of the Bid (as detailed in [19]) are also, in our view, affected by the same informational deficiency that we have considered to be unacceptable and, accordingly, are also subject to this right to elect to cancel.
78. Finally on this aspect of the orders, we note that the order is general in its description of the relevant purchase contracts and does not refer only to those purchase contracts of which we have been informed. Accordingly, all contracts, whether or not made known to us, which fall within the class described in the order are subject to this right of election in the counterparty to cancel.
79. As the relevant unacceptability relates to the potential for informational inequality affecting the original contract, we are also concerned that conferring the right to elect to cancel that contract might be illusory if the nature of the informational deficiency was not known to the person given that right of election. Accordingly, without suggesting that it provides a perfect solution to the informational defects affecting this matter, we consider that sufficient relevant information will be provided to those parties by requiring CVC to give them copies of:
- (a) the Bidder's Statement;
  - (b) the Target's Statement; and
  - (c) the Panel's media release concerning its decision (TP04/69).

The Panel's media release provides a brief summary of the nature of the informational deficiencies which we have found existed and will assist those persons to decide whether or not to exercise their rights to cancel the relevant contracts.

#### *Suspension of benefits of ownership/standstill*

80. We consider that there are two further aspects of the state of unsatisfactory information requiring our intervention. Until the possibility of any information provided to CVC by Mr Lovelady remaining current and material has been removed,

## Takeovers Panel

### Reasons for Decision – Skywest Limited 03

there is a potential informational inequality. We should curtail CVC's ability to enjoy the benefits of ownership of the securities it retains after other orders take effect and its ability to acquire further Shares or Skywest securities. Accordingly, until either a sufficient time has elapsed to make it likely that the information provided by Mr Lovelady has become stale (which we estimate to be 1 March 2005) or it becomes obsolete by earlier disclosure by Skywest (such as by the issue of a prospectus or other disclosure document or its next audited or audit reviewed accounts), we have ordered that:

- (a) CVC not dispose of any Shares or other Skywest securities, except in limited circumstances such as a recommended takeover bid;
- (b) Skywest not recognise the vote cast in respect of those Shares or other Skywest securities; and
- (c) CVC (or defined affiliates) not make a subsequent takeover bid unless it enters into an agreement with Skywest to make a recommended bid and consent is obtained from the Panel.

#### *Variation and suspension of the order*

81. We recognise that these orders may prevent the inoffensive exercise by CVC of its rights in respect of these Shares and securities in otherwise legitimate transactions. However, the Panel has the power to vary or suspend the operation of the orders that we have made and the parties may request such a variation or suspension. If such a situation arises while these orders have effect, we encourage the parties to approach the Panel with a view to the Panel making an appropriate variation or suspension to deal with the particular circumstances.

#### *Costs*

82. We have also ordered that CVC pay Skywest's cost on a party-party basis, including at least some of the costs incurred by Skywest in retaining EY to provide its independent forensic IT investigation. The Panel's Guidance Note 9: "Costs Orders" (GN 9) only envisages a narrow set of circumstances in which a costs order will be made in an initial proceeding (in effect that the party has not been businesslike, professional and respectful, or has in effect been vexatious or mischievous, in the way it has conducted itself in the proceedings). We accept that none of those descriptions apply to CVC in relation to the Proceeding. However, the circumstances with which Skywest was confronted in this Proceeding were, we are obliged to say, quite unusual. The need to engage in the kind of investigation that Skywest was obliged to undertake is fortunately rare but was, in our estimation, the result of CVC participating in an inappropriate course of behaviour. In circumstances where Skywest had only offered CVC limited and controlled access to its information, CVC participated in conduct under which it received substantial material from Mr Lovelady, at the very least without the knowledge of the Board.
83. This was a case which the Panel, in the light of its experience at the time GN 9 was released, did not contemplate. Like all policy, GN 9 must be adapted to new and unanticipated situations. However, we consider that there has been, in effect, a failure by CVC to conduct itself in a professional and businesslike fashion generally and that the current circumstances warrant the making of such a costs order.

## Takeovers Panel

### Reasons for Decision – Skywest Limited 03

#### *Review pending*

84. When we had reached the view that circumstances before us appeared to be unacceptable, we wrote to the parties on 14 July 2004 informing them of this and inviting them to make submissions on orders. We consider that this kind of letter is not the making of a decision to declare the circumstances to be unacceptable which would both enliven the right to seek review under section 657EA and start the time limit under section 657EA(3). However, CVC took a different view and lodged an application for review of a decision of the Panel.
85. We have treated that application as a pending application for review and, in light of that, we have also ordered that certain orders we have made be suspended in their operation for four business days (being the time required for either party to make such an application for review and for the review panel to consider what, if any, interim orders it may wish to make).

#### **Media canvassing**

86. At various stages in the Proceeding, CVC has complained about stories appearing in the media concerning the Bid and referring to the Proceeding and, more recently, concerning the behaviour of Mr Henderson in providing information to a journalist concerning the Proceeding. In relation to the earlier complaints, we considered that the relevant stories contained no information which could not have derived from the Panel's own media releases concerning the Proceeding and other public sources. Accordingly, we could not discern that there had been any contravention of the Panel's procedural rules or of the undertakings given by the parties pursuant to those rules.
87. The last complaint, however, appears to involve not only a contravention of the rule concerning media canvassing (Procedural Rule 12) but also of the rule requiring parties to respect and maintain the confidentiality of communications between the Panel and the parties (Procedural Rule 8). Mr Henderson has provided a statement to the effect that he disclosed some of the contents of our 14 July letter to the journalist in question.
88. Although we have taken no further action, principally because no story appeared in the media as a result of Mr Henderson's conduct, we wish to record formally our displeasure at that conduct and our warning that the confidentiality of material provided in and through Panel proceedings is essential to the efficient conduct of these proceedings and that we will not tolerate such behaviour in future. In this regard, naivety, carelessness, ignorance or stupidity is not an excuse.

#### **ASIC**

89. We were informed by ASIC on 9 July 2004 that following an examination of the information provided to it (including the Application), ASIC had decided to commence its own investigation. Accordingly, ASIC notified us that it did not wish to become a party to the Proceeding or make submissions, although it requested (and was provided with) the submissions of the parties in the Proceeding.

## **DECISION**

### **Declaration**

90. We have declared the circumstances listed in Annexure B to be unacceptable circumstances.

### **Orders**

91. We have made the orders set out in Annexure B.

**Brett Heading**

**President of the Sitting Panel**

**Decision dated 30 July 2004**

**Reasons published 17 August 2004**

## Takeovers Panel

### Reasons for Decision – Skywest Limited 03

#### Annexure A

### Corporations Act Section 657E Interim Orders

#### In the matter of Skywest Limited 03

Pursuant to section 657E of the *Corporations Act 2001* (Cth) (the **Act**)<sup>20</sup> the President of the Sitting Panel HEREBY ORDERS that, in relation to the off-market takeover bid (the **Bid**) by CaptiveVision Capital Limited (CVC) for all the fully paid ordinary shares in Skywest Limited (**Skywest**), the terms of which are set out in a replacement bidder's statement which was dispatched to Skywest shareholders on 1 June 2004 (the **Bidder's Statement**):

- (i) CVC immediately extend the offer period under the Bid until 5pm Perth time on 6 August 2004 in accordance with section 650C;
- (ii) CVC, as soon as practicable, provide to the Panel a copy of a draft notice to be sent to Skywest and all Skywest shareholders, whether or not they have accepted the Bid, of the extension referred to in (i) above and advise of the new date for giving the notice of the status of conditions, in accordance with subsection 630(2);
- (iii) CVC not, without the prior written approval of the Panel, declare the Bid free from any defeating condition attaching to the Bid set out in section 5.8 of the Bidder's Statement under subsection 650F(1), other than any condition that has already been the subject of such a declaration on or before 5 July 2004;
- (iv) Neither CVC nor Skywest (either directly or through any agent or adviser on their behalf):
  - 1) send any written communication (other than the notification specified in (ii) above) to any shareholder of Skywest in connection with the Bid without providing the Panel and other parties to this proceeding with a copy of the proposed communication at least one clear business day prior to dispatch; and
  - 2) otherwise initiate any contact (by telephone or otherwise) with any shareholder of Skywest in connection to the Bid; and
- (v) CVC not, without the prior written approval of the Panel, seek the consent of ASIC to withdraw unaccepted offers under the Bid under section 652B.

These interim orders remain in effect until the first to occur of:

- (a) further order by the Takeovers Panel;
- (b) 6 August 2004; and
- (c) the conclusion of these proceedings.

**Brett Heading**  
**President of the Sitting Panel**  
**Dated 6 July 2004**

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<sup>20</sup> All statutory references are to the Act, unless otherwise indicated.

## Takeovers Panel

### Reasons for Decision – Skywest Limited 03

#### Annexure B

#### DECLARATION AND ORDERS

TAKEOVERS PANEL  
CORPORATIONS ACT 2001  
SECTIONS 657A and 657C  
DECLARATION and ORDERS

In the matter of SKYWEST LIMITED 03:

WHEREAS:

- A. CaptiveVision Capital Ltd (CVC) (a company incorporated in Singapore, which is a subsidiary of Advent Television Ltd (**Advent**)) has made a takeover bid (the **Bid**) for all of the ordinary shares (**Skywest Shares**) in Skywest Limited (**Skywest**), an unlisted public company with more than 50 shareholders;
- B. CVC has received information concerning the affairs of Skywest (the **Information**) which has not been provided to shareholders in Skywest and which was not included in the bidder's statement issued by CVC or the target's statement issued by Skywest in relation to the Bid;
- C. the Information included:
- management accounts for parts of the financial year ending 30 June 2004,
  - details of the banking arrangements entered into by Skywest,
  - management profit forecasts for the financial year ending 30 June 2005, and
  - the price at which Skywest proposed to offer shares under a prospectus;
- D. some of the Information was material to a decision by a shareholder in Skywest whether to accept an offer under the Bid, or was information which such a holder would reasonably require in order to make an informed assessment whether to accept such an offer;
- E. the Panel finds that there is a probability that other information concerning the affairs of Skywest was provided to CVC shortly before or during the Bid in such a way that neither Skywest nor the Panel can now ascertain all of that information,

PURSUANT to section 657A of the Corporations Act, the Takeovers Panel HEREBY DECLARES that the circumstances described above are unacceptable circumstances in relation to the affairs of Skywest because of the effect of those circumstances on the Bid.

AND PURSUANT to section 657D of the Corporations Act, the Panel HEREBY ORDERS that:

1. Subject to Order 2:
  - (a) all takeover contracts relating to the Bid are cancelled;

## Takeovers Panel

### Reasons for Decision – Skywest Limited 03

- (b) all acceptances and purported acceptances of the Bid are void and of no effect;
- (c) CVC must not extend the offer period of the Bid;
- (d) CVC must not declare the offers under the Bid, or takeover contracts relating to the Bid, free from any defeating condition;
- (e) except where paragraph (f) applies, each contract of purchase of Skywest Shares or other securities issued by Skywest (**Skywest Securities**) to which CVC is a party as purchaser entered into after 1 December 2003 (other than takeover contracts relating to the Bid) (each, a **Purchase Contract**) is voidable at the instance of the vendor under that Purchase Contract (each, a **Vendor**), and to give effect to this Order:
  - (i) CVC must give the Panel within 2 business days after this Order comes into operation, a proposed form of notice to Vendors which:
    - (A) identifies the Purchase Contract and the Skywest Securities the subject of that Purchase Contract; and
    - (B) informs the Vendor that the Vendor has the right by reason of this Order to give notice to CVC, accompanied by a cheque for the amount of the consideration received by the Vendor under the Purchase Contract and an instrument of transfer to the vendor of the relevant Skywest Securities, to cancel the Purchase Contract (**Cancellation Notice**) but only if that notice is given to CVC at an address in Australia specified in the notice not later than 1 month after the Vendor receives the notice;
  - (ii) CVC must make any amendments required by the Panel to the form;
  - (iii) Not less than two business days after the Panel has stated to CVC that it has no further comments to make on the form, CVC must send to each Vendor the form (as amended to comply with the requirements of the Panel under sub-paragraph (ii)) (**Notice**) accompanied by a copy of:
    - (A) CVC's bidder's statement (together with any supplementary bidder's statement);
    - (B) Skywest's target's statement (together with any supplementary target's statement); and
    - (C) the Panel's Media Release announcing the making of this Declaration and these Orders;
  - (iv) When it has complied with sub-paragraph (iii), CVC must immediately give notice to the Panel and the parties that it has sent all the Notices and accompanying documents to all the Vendors;
  - (v) CVC must give the Panel and each party a copy of each purported Cancellation Notice and any accompanying documents received by it before the 30<sup>th</sup> business day after it has given notice under sub-paragraph (iv);



## Takeovers Panel

### Reasons for Decision – Skywest Limited 03

- (vi) CVC must execute the instruments of transfer re-transferring to each Vendor who gives a valid Cancellation Notice the relevant Skywest Securities; and
  - (vii) CVC must pay any stamp duty on any instrument of transfer executed under sub-paragraph (vi) and present the stamped transfers to Skywest for registration;
- (f) Paragraph (e) does not apply to any contract of purchase where the Panel notifies CVC that, on the basis of the evidence presented to it by CVC and Skywest, it is satisfied that the vendor under that contract was:
- (i) on, or at any time in the period of 2 months before, the date of the contract, a director of Skywest;
  - (ii) a spouse, de facto spouse, parent or child of a person within sub-paragraph (i);
  - (iii) an entity controlled by one or more persons within either or both of sub-paragraphs (i) and (ii); or
  - (iv) on the date of the contract, an entity that controlled CVC or an entity controlled by the same entity as an entity that controlled CVC;
- (g) Until the earliest of:
- (i) 1 March 2005;
  - (ii) the date that Skywest lodges with ASIC its reports under Part 2M.3 Division 2 for the half-year which will end on 31 December 2004; and
  - (iii) the date Skywest next lodges a disclosure document in relation to an offer of its securities,

in respect of all Skywest Securities held by CVC which were the subject of Purchase Contracts to which paragraph (e) applies:

- (iv) CVC must not dispose of those Skywest Securities or, if any of those Skywest Securities are convertible securities, any other securities issued or arising as a consequence of the exercise of the rights of those Skywest Securities or any unit of them except:
  - (A) in accordance with paragraph (e);
  - (B) by accepting a takeover bid for those Skywest Securities or other securities where the majority of Skywest directors recommend that holders accept that bid; or
  - (C) where the Panel gives notice to CVC that, on the basis of the evidence presented to it by CVC and Skywest, it is satisfied that it is appropriate to allow CVC to dispose of a particular Skywest Security, other security or unit in a particular manner; and
- (v) Skywest must disregard any purported exercise by or on behalf of CVC of any voting rights attaching to those Skywest Securities or other securities;

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- (h) Subject to paragraph (i), none of the following, alone or with other persons, may make or publicly propose to make a takeover bid in relation to any class of securities issued by Skywest during the period specified in paragraph (g):
- (i) CVC;
  - (ii) Advent;
  - (iii) Any person or entity that has been within 2 months before this Order, or is now or who becomes, either:
    - (A) an entity that controls CVC or Advent or both of them; or
    - (B) a director of CVC or Advent or an entity within clause (A) or two or more of them; or
  - (iv) an entity controlled by one or more persons within one or more of subparagraphs (i), (ii) and (iii);
- (i) An entity referred to in paragraphs (h)(i)-(iv) may, alone or with other persons, make or publicly propose to make a takeover bid in relation to any class of securities issued by Skywest during the period specified in paragraph (g) where the entity and Skywest enters into a binding agreement under which:
- (A) the entity agrees to make or publicly proposes to make a takeover bid during the period specified in paragraph (g);
  - (B) the board of Skywest agrees to recommend that Skywest shareholders accept the bid to be made by the entity; and
  - (C) the agreement is conditional upon Skywest and the entity:
    - (i) jointly applying to the Panel requesting that the Panel varies paragraph (h) of Order 1 so that it ceases to apply; and
    - (ii) receiving written approval from the Panel that paragraph (h) of Order 1 is varied so that it ceases to apply;
- (j) CVC must:
- (i) pay the reasonable costs and expenses of Skywest arising out of, or connected with, this proceeding as agreed between CVC and Skywest; or
  - (ii) failing such agreement, pay the party-party costs of Skywest in relation to this proceeding using the Federal Court scale and the costs incurred by Skywest in engaging Ernst & Young in relation to this proceeding from 18 June 2004 until and including 8 July 2004, using the following procedure:
    - (A) Skywest must provide CVC with an itemised bill of costs in relation to this proceeding;
    - (B) if CVC objects to the amount claimed by Skywest, Skywest must provide

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either:

- (i) a bill of costs in taxable form, or
- (ii) the itemised bill of costs and to make their file available,

to an independent cost consultant, approved by the Panel Executive;

- (C) the independent cost consultant will then assess the costs to be paid by CVC in respect of Skywest;
- (D) if the independent cost consultant determines that the costs proposed by Skywest are to be reduced by 10% or more, the costs of employing the independent cost consultant to assess costs are deducted from the costs payable to Skywest. Otherwise, those costs are to be part of the costs paid by CVC; and
- (E) CVC must not transfer or dispose of any shares (or any unit of them) which it holds in Skywest and Skywest must not register a transfer of those shares until the Panel receives confirmation from Skywest that it has received payment of its costs from CVC (with such confirmation to be provided by Skywest to the Panel immediately after it has received payment of its costs).

2. Either the sitting Panel, or any Panel conducting a review under section 657EA in relation to the proceeding in which the sitting Panel made this Order, may (either on its own motion or following a request from one of the parties (in which case Rules 8 and 9.5 of the Panel's Rules for Proceedings apply to the making of the request)) by notice to the parties vary or suspend the operation (either for a specified period or until a further order) of Order 1 or any paragraph, sub-paragraph, clause or sub-clause of Order 1.
3. Pursuant to Order 2, the sitting Panel suspends the operation of paragraphs (a), (b), (c), (e), (f) and (j) of Order 1 until the fourth business day after the date on which the sitting Panel announces the making of this Order. The purpose of this suspension is to enable any review Panel to consider what interim orders it may wish to make to preserve matters during the consideration of that review.

**Brett Heading**  
**President of the Sitting Panel**  
**Dated 30 July 2004**