



In the matter of Skywest Limited 03(R)
[2004] ATP [20]

Catchwords:

relationship between bidder and target's chief financial officer – bidder obtaining non-public and material information from target's chief financial officer – information obtained by bidder not disclosed in bidder's statement – materiality of information – interim orders – declaration of unacceptable circumstances – costs order – orders unwinding pre-bid acquisitions – order restricting disposal of shares – misleading report of Panel's decision – review application

*Corporations Act 2001 (Cth), sections 602, 636, 643, 657D, 657E, 657EA and 734
Australian Securities and Investments Commission Act 2001 (Cth), section 199*

Takeovers Panel Guidance Note: "Costs Orders"

Skywest Limited 03 [2004] ATP 17

These are the Panel's reasons for making a declaration of unacceptable circumstances and orders requiring, amongst other things, additional disclosure in an off-market takeover bid for ordinary shares in Skywest Limited. The decision is a result of an application by CaptiveVision Capital Ltd for review of the Panel's decision in the Skywest 03 proceedings. The proceedings in both cases concern the circumstances in which the bidder, CVC, obtained certain, non-public information concerning Skywest which it then failed to disclose in its bidder's statement.

THE PROCEEDINGS

1. These reasons relate to an application dated 3 August 2004 (the **Application**) by CaptiveVision Capital Ltd (**CVC**) under section 657EA of the Corporations Act 2001 (Cth) (**Act**),¹ for review of the decision and orders of the [Skywest 03](#) Panel, dated 30 July 2004. The Skywest 03 Panel made a declaration of unacceptable circumstances in relation to the off-market takeover bid by CVC (**Bid**) for all the fully paid ordinary shares in Skywest Limited (**Skywest**). The Skywest 03 Panel also made orders preventing the Bid and unwinding previous acceptances.
2. CVC had advised the Skywest 03 Panel of its intention to seek review of the Skywest 03 decision, after the Skywest 03 Panel had advised parties in its proceedings of its proposed decision and orders. On that basis, the Skywest 03 Panel suspended some of its orders and extended its interim orders retaining the status quo until the Skywest 03R Panel (**Review Panel**) could consider the Application.

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

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APPLICATION

3. In its application for review, CVC requested that the Review Panel change the declaration of unacceptable circumstances made by the Skywest 03 Panel and undertake a fresh consideration of the orders that might need to be made following from any amendment to the declaration. CVC also sought interim orders maintaining the status quo during the review.
4. The following information has been compiled from the applications and submissions in these and previous proceedings between the same parties concerning the Bid. More detailed information is available in the reasons for decision in the [Skywest 03](#) proceedings.

The parties and others

5. Skywest is an unlisted Australian public company with approximately 240 shareholders.
6. CVC and its 78% parent, Advent Television Ltd (**Advent**) are unlisted public companies incorporated in Singapore.
7. CVC gave its bidder's statement to Skywest on 27 April 2004 and dispatched the bidder's statement to Skywest shareholders on 1 June 2004 (after the Skywest 01 proceedings).
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, having previously been CFO and a director of CVC.
10. Mr Scott Henderson (**Mr Henderson**) has been, through the relevant period, the managing director of Skywest.

Skywest 03 Decision

11. The Skywest 03 Panel decided that CVC had received information from Mr Lovelady concerning the affairs of Skywest (the **Information** - see paragraphs 18 and 30 below for a description of the information which it has been established that Mr Lovelady gave to CVC). The Information had not been provided to shareholders in Skywest and was not included in CVC's bidder's statement nor Skywest's target's statement. The Skywest 03 Panel considered that at least some of the Information was:
 - a. material to a decision by a Skywest shareholder whether to accept an offer under the Bid; or alternatively,
 - b. information which such a holder would reasonably require in order to make an informed assessment whether to accept such an offer.

On that basis the Skywest 03 Panel made a declaration of unacceptable circumstances.

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12. The Skywest 03 Panel specifically referred to two items of the Information in its decision. They were:
 - a. **Forecast Information:** an estimate of Skywest's profit for FY 2005, given by Mr Lovelady to Mr Chatfield on 5 October 2003; and
 - b. **IPO Information:** estimates, sent on 30 June 2003, 26 November 2003 and 2 December 2003, of the listing price and other details of an initial public offering of its shares (**IPO**) that Skywest was considering.
13. The Skywest 03 Panel found that there was 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 could ascertain all of that information. The Skywest 03 Panel was also faced with what appeared to be a refusal by CVC to cooperate in clarifying what information had been given to it. The Skywest 03 Panel decided that because it could not determine what information had been given to CVC it could not make orders which it had reasonable confidence would remedy the information difference between CVC and Skywest shareholders.
14. Consequently, the Skywest 03 Panel made orders:
 - a. stopping the Bid;
 - b. unwinding all acceptances so far received; and
 - c. giving the vendors of some Skywest securities, who, prior to the Bid, had sold Skywest securities to CVC while CVC had some of the Information, the right to unwind those sales.

CVC's Review Application

15. In its review application CVC's primary argument was that the two pieces of information that the Skywest 03 Panel found to be material (the Forecast Information and the IPO Information, together the **IPO and Forecast Information**) were not price sensitive.
16. It argued, in relation to the various items of information that had concerned the Skywest 03 Panel:
 - a. **Forecast Information**
 - i. the relevant information should not be characterised as a management profit forecast;
 - ii. the statement made by the CFO was made in the context of a hypothetical transaction that never took place;
 - iii. neither CVC nor its associate Advent relied on the information in preparing its own projections;
 - iv. the information could not be said to be "price sensitive" having regard to the manner and circumstances in which it was communicated; and
 - v. there was no suggestion that the information was accurate (and given subsequent non- Bid related events, including the profit

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downgrade, there are serious grounds to question the accuracy of the information).

- b. **IPO Information**
 - i. there was no reason to suspect that any IPO was realistically achievable (or imminent) at any relevant time;
 - ii. even Skywest's Chairman conceded in April 2004 that any IPO was far from "locked in"; and
 - iii. the information could not be said to be "price sensitive" and CVC's delayed buying pattern (which fact Skywest did not dispute) corroborated the submission.
- c. **Failing to disclose the IPO and Forecast Information in CVC's bidder's statement**

CVC argued that if the IPO and Forecast Information were not price sensitive it had no obligation to disclose them.
- d. **Relationship of Lovelady to CVC and continued disclosure to CVC**
 - i. if the IPO and Forecast Information were not price sensitive Mr Lovelady's disclosure was not improper; and
 - ii. CVC's relationship with Skywest (including the Skywest CEO) made disclosure of the IPO and Forecast Information to CVC reasonable and appropriate.

Factual background leading up to the Application

Chatfield – Lovelady relationship

17. Mr Chatfield and Mr Lovelady have a longstanding personal and professional relationship:
 - a. Mr Lovelady was the CFO of Advent and a director of CVC, before he became CFO of Skywest.
 - b. Mr Chatfield and Mr Lovelady have previously worked together as the chief executive officer and CFO of an Australian listed public company, Data & Commerce Ltd.
18. Having been appointed Skywest's CFO, Mr Lovelady did not immediately sever his relationships with Advent and CVC.
 - a. It appears that he continued to be a director of CVC until about 23 July 2003.
 - b. 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.
 - c. Until December 2003, Mr Lovelady received monthly payments of \$2000 from Advent or other entities associated with Mr Chatfield².

² CVC asserts that the payment was in relation to an entirely separate transaction which had no relation to Skywest or CVC's bid for Skywest. However, Skywest disputes this and asserts that the evidence is that the payments were expressly for Mr Lovelady's continued support while he was CFO of Skywest.

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- d. In April 2004, Mr Chatfield wrote to an aircraft financier advising that it was highly likely that Mr Lovelady would be returned to the CVC board³.
 - e. On 9 June 2004, Mr Chatfield and Mr Lovelady appeared to collaborate on a draft document from CVC to Skywest shareholders in support of the CVC bid entitled “What the Directors Forgot to Tell You.”
 - f. On 10 June 2004 Mr Lovelady appeared to advise Mr Chatfield of the Skywest profit downgrade. This appears to have been a week before Mr Lovelady advised the Skywest board of the profit downgrade.
19. When the Bid was foreshadowed by CVC sending Skywest a letter on 6 April 2004, 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. However, he advised Skywest 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

20. Before August 2003, Advent/CVC had no interest in Skywest securities. After that time, it made a number of acquisitions or entered into agreements to acquire Skywest securities. These are set out paragraph 14 of the Skywest 03 Reasons.

Skywest's proposal to list on ASX

21. It is clear from the submissions in these and earlier proceedings that Skywest has, for some time, been considering listing on ASX. Skywest has stated in these proceedings that it now 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. It appears that at the time of preparing its target's statement 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 concerning Skywest's anticipated financial performance for the 2004/2005 financial year.

³ CVC has stated in its supplementary bidder's statement dated 20 September 2004, that it had subsequently declined to appoint Mr Lovelady to the CVC board in April 2004.

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Profit Downgrade

23. On 17 June 2004, Mr Henderson 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). On 21 June 2004 Skywest issued a significant profit downgrade for the financial year ended 30 June 2004. - Whereas in a prospectus which it issued on 23 June 2003, Skywest had forecast a net profit of \$2.4 million, Skywest announced that it anticipated that it is 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 (**Target's Statement**). Skywest has since published a supplementary target's statement in response to the Review Panel's final orders. In that supplementary target's statement Skywest provided a revised forecast for the financial year ending 30 June 2005.

PricewaterhouseCoopers

25. The Target's Statement included a report by 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 the uncertainties before it (such as those introduced by the Profit Downgrade) made it difficult for PwC to consider that those forecasts had a reasonable basis.

Mr Lovelady's termination

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. 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 returned his Skywest laptop computer. Skywest terminated Mr Lovelady's employment on 30 June 2004.

Investigation of Mr Lovelady's e-mails for the Skywest 03 proceedings

27. The Skywest 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 and CVC, its related companies, directors and advisers. Approximately 450 e-mails passed 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 (that is, approximately nine e-mails per week). CVC submitted, and the Review Panel accepts, that there was a range of transactions and relationships occurring between Skywest and

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CVC during this period, and that therefore a significant number of these emails were perfectly proper and to be expected.

28. 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 but from Skywest's own back-up facilities. Others were not retrieved (at least in time to be used in the Skywest 03 Proceedings) but their transmission is recorded in Skywest's logs of e-mail traffic.
29. Accordingly, a serious concern for the Skywest 03 Panel was that neither it nor Skywest were able to consider all of the correspondence exchanged between Mr Lovelady and CVC, Mr Chatfield and their affiliates and advisers during the relevant period.

Information given by Mr Lovelady to CVC

30. The material provided in the Skywest 03 Proceedings showed that Mr Lovelady provided Mr Chatfield and CVC with, at least, the following information:
 - a. 30 June 2003 - Mr Lovelady believed that:
 - the minimum price of Shares on listing could be \$0.30 per Share and would probably be \$0.45 per Share;
 - Skywest would experience "very good growth" and "have some good outcomes" in the period 1 July 2003 to 31 December 2003; and
 - 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 proposed 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. 5 October 2003 - in response to a request from Mr Chatfield, that Mr Lovelady estimated that:
 - the projected profit for Skywest in the financial year 2004-2005 would be at least \$4.5 million and a significant influence on that profit would be the financing of Skywest's proposed acquisitions of new aeroplanes;
 - the effect of the proposed aeroplane financing might be in the order of \$1.5 million; and

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the earnings before interest, tax, depreciation and amortisation of Skywest for that financial year would involve an increase of \$2 million over the current year;

- 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;
 - j. 16 June 2004 - Skywest's actual results for May 2004 and forecast earnings for the year ending 30 June 2004.⁴
31. On 22 September and 17 November 2003, Mr Chatfield sent to Mr Lovelady emails with 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.

CVC and Skywest's other relationships

32. The material also revealed that Mr Henderson had retained CVC to assist Skywest in attempting to finance its acquisitions of new aircraft⁵ 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.
33. Against that, however, Skywest had proposed⁶ in November 2003 that if CVC wished to have access to Skywest information to conduct due diligence it would

⁴ That is, before Skywest was given this material.

⁵ 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.

⁶ Skywest asserts that CVC had initially approached Skywest with a view to CVC making a possible takeover bid for Skywest, and that the "proposal" was in fact the conditions which it had told CVC

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need to be 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.

34. Clearly 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). However, it is difficult to conclude that Skywest authorised the disclosures by Mr Lovelady.

Declaration and orders sought in the Application

35. On 6 July (and extended on 27 July) the Skywest 03 Panel had made interim orders, to the effect of those sought by Skywest i.e. that during the course of the Skywest 03 Proceedings:
- a. CVC not waive any condition attaching to the Bid;
 - b. CVC not withdraw the Bid;
 - c. CVC not make any contact with Skywest shareholders in connection with the Bid;
 - d. no acceptance received by CVC in connection with the Bid be capable of giving rise to a binding agreement;
 - e. the Bid not expire.
36. CVC asked in its review application that the interim orders made by the Skywest 03 Panel continue to apply, pending final determination by the Review Panel. The Review Panel agreed and made interim orders on 5 August. Those interim orders are at Annexure A to these reasons. They included some of the Skywest 03 Panel interim orders and some of the Skywest 03 Panel final orders.

DISCUSSION

37. The issue concerning the extent of the information provided by Mr Lovelady to Mr Chatfield, which could not be determined with any certainty by the Skywest 03 Panel, had been settled to the Review Panel's satisfaction (acknowledging that the vagaries of forensic electronic information capturing meant that no-one would ever be able to be completely sure what the full content of the Information had been). In addition, disregarding the scope issue, the parties did not disagree about the content of the known elements of the Information. See Annexure C for a description of the information gathering issues which faced the Skywest 03 Panel and the Review Panel.
38. Therefore, the primary issue before the Review Panel was whether or not the Information was material to a Skywest shareholder's decision whether or not to accept the CVC Bid. That broke down into two sub-issues. The first was whether the Information had been material at the time of the CVC bidder's statement. The second was whether any parts of the Information remained

that CVC would have to meet if CVC wished to conduct due diligence to progress its takeover proposal for Skywest .

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material given the profit downgrade, the subsequent disclosure of elements or descriptions of the Information in the intervening period and the passage of time.

39. Finally, if it found any parts of the Information to be still material, the Review Panel had to decide whether it could make orders for the benefit of the Skywest shareholders which would correct the informational deficiencies and allow the CVC Bid to proceed.

The relevant information

40. Following the Skywest 03 Panel decision and the form of the Review Application, the review proceedings related only to:
 - a. two items of Information (the Forecast Information and the IPO Information);
 - b. their materiality;
 - c. the issue of disclosure of those items of Information; and
 - d. the nature and disclosure of Mr Lovelady's relationship with CVC.

The Forecast Information

41. One of the primary pieces of information disclosed by Mr Lovelady to CVC was his current⁷ estimate (in essence, a forecast) of Skywest's profit for its 2005 financial year. The Review Panel agreed with the Skywest 03 Panel that it was reasonable to believe that at the time of CVC making its bid, the Forecast Information was material, and should have been disclosed.
42. Since the time of that disclosure much has happened to Skywest, its operations and its operating environment. The Review Panel considered it likely that the 2005 profit forecast given to CVC was materially out of date.
43. However, the Review Panel considered that some information about Skywest's internal projections for its performance in 2005 having been disclosed (at least to CVC) and particularly through the Skywest 03 proceedings, it was appropriate for the Directors of Skywest to make some statement to Skywest shareholders concerning their view of Skywest's prospects in the near future.
44. The Review Panel acknowledged the difficulties facing directors of a company such as Skywest in turbulent times. Therefore, any forward looking statement by Skywest directors that the Review Panel required to be disclosed would need to be appropriately cautioned and the necessary uncertainties explained in terms of the assumptions used and the risks associated with the forward looking statement. However, the Review Panel considered that Skywest shareholders needed such information under the circumstances of the proceedings and the partial disclosures that they had caused. Therefore it ordered Skywest to disclose in a supplementary target's statement its

⁷ As at 5 October 2003.

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expectations as to its financial performance during the financial year ending 30 June 2005 and its financial position on 30 June 2005.

The IPO Information

45. The other primary piece of information given to CVC was a document (and a number of further emails) discussing Skywest's consideration in early 2004 of conducting an IPO. It was agreed within both the Skywest 03 and the Review Panel proceedings that Skywest had previously made public mention of the possibilities, at some stage, of it making an IPO.
46. The Review Panel considered that at the time of CVC making its bid, the fact that Skywest was endeavouring to pursue an IPO was material and should have been disclosed by CVC. The Review Panel agreed with the Skywest 03 Panel that it constituted unacceptable circumstances for CVC not to have disclosed in its bidder's statement the fact that it knew Skywest was actively pursuing an IPO.
47. The Review Panel acknowledged that the information regarding the potential IPO was out of date. However, as with the Forecast Information, the Review Panel considered that Skywest should disclose to its shareholders appropriate information about its plans for an IPO (if any, and subject to any necessary ASIC consent).
48. Therefore, the Review Panel ordered Skywest, in its supplementary target's statement, to disclose the status of its plans to issue shares and become a listed company.

The Lovelady – CVC Relationship

49. The Review Panel considered that the content and volume of information passed from Mr Lovelady to CVC, the nature of Mr Lovelady's relationship with CVC while he was an officer of Skywest and the discussions between Mr Lovelady and Mr Chatfield, were extremely unusual and aspects of these were inappropriate.
50. The Review Panel considered that the extent of the Information and the behaviour of Mr Lovelady and CVC officers while Mr Lovelady was an officer of Skywest was material information for the Skywest shareholders in assessing the CVC offer. It therefore considered it appropriate to order CVC to describe them in its supplementary bidder's statement.

Remedying the information deficiency

51. The Review Panel agreed with the Skywest 03 Panel that, as mentioned at paragraph [12] above, it is probable that other information was passed by Mr Lovelady to CVC by phone or in emails which nobody has been able to recover. Without rejecting the evidence of officers of CVC that they are now aware of no such unaccounted information, the Review Panel notes that it may have passed into the body of information they had about Skywest, and its origin has been

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forgotten. The possession of such information, to the extent that it had not become stale, would give CVC an advantage over shareholders in Skywest to whom that information had not been provided.

52. The Review Panel agreed with the Skywest 03 Panel that it cannot say what the extent of that advantage may be. That information would be, however, information about Skywest, and Skywest is able to remedy any such information inequality. The orders requiring Skywest to provide appropriate information about its expected results for FY 2005 and about its IPO plans, should make any such information obsolete and remove any lingering advantage that CVC may still derive from having received it.

Halting the Bid

53. Significant time has passed since CVC's bidder's statement was published, and Skywest has itself published significant further information about its performance and prospects. The Review Panel considers that the passage of time, and Skywest's own further disclosures have rendered much of the Information no longer material or price sensitive. The Review Panel considers that Skywest shareholders should not be deprived of the opportunity to consider the CVC Bid, if they are given appropriate supplementary information. This is consistent with the Skywest 03 Panel's view of the appropriate course of action if it had been able to be reasonably confident that it knew the extent of the Information passed to CVC.
54. The Review Panel was not persuaded by Skywest's submissions that CVC should be prevented from continuing its bid. Given that the Review Panel considered it had a reasonable basis for assessing what supplementary disclosure was required, preventing CVC from continuing its bid was no longer appropriate. In doing so, the Review Panel noted that it was for other regulatory bodies to consider and determine whether or not any regulatory action is appropriate in respect of the conduct of CVC and Mr Lovelady.

Skywest 03(R) and Skywest 03 Decisions

55. The Review Panel considers its decision is consistent with the decision and policy considerations of the Skywest 03 Panel. The Review Panel agrees with the Skywest 03 Panel's decision considering the scope of information which was made available to the Skywest 03 Panel at the time the Skywest 03 Panel made its decision.
56. The Skywest 03 Panel first sought to formulate orders that might have allowed the Bid to proceed, as it was reluctant to deny Skywest shareholders an opportunity to consider the merits of the Bid for themselves. However, the Skywest 03 Panel could not be satisfied that it could make a complete assessment of the scope and content of the information which Mr Lovelady provided to CVC throughout the period of his engagement by Skywest and which should have been disclosed to shareholders.
57. In particular, the Skywest 03 Panel was concerned that CVC declined an offer by Skywest to exchange documents retrieved from their respective computer

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systems, did not provide any further evidence of correspondence between it and Mr Lovelady at any time during the initial proceeding and did not take advantage in its submissions of the opportunity that the Panel afforded to it to address this issue. Accordingly, the Skywest 03 Panel could not be certain that the unacceptable circumstances identified by it could be remedied by ordering additional disclosure by CVC. On this basis, the Skywest 03 Panel was unable to formulate orders of the kind that might allow the Bid to proceed.

58. As set out in the Panel's Guidance Note 2 "Reviewing Decisions", review proceedings are *de novo* considerations on the merits of the facts as they stand at the time the Review Panel makes its decision and are not limited to the facts found by the Skywest 03 Panel. In accordance with this policy, the Review Panel considered the factual circumstances as at the time of its proceedings. It considered that the factual circumstances had sufficiently changed to warrant new orders being made that allowed the Bid to proceed. These circumstances included:
- a. the investigations conducted on behalf of Skywest, CVC and Advent in relation to the email communication between any employee of Skywest to each of CVC and Advent (and each of their officers and advisers);
 - b. the exchange between the parties of all emails retrieved as a result of the investigations into the email communication; and
 - c. various signed statements being provided to the Review Panel by the CFO and directors of CVC in accordance with section 199 of the *Australian Securities and Investments Commission Act 2001* (Cth).
59. In considering the orders which it should make to remedy the unacceptable circumstances, the Review Panel considered whether the Bid could be allowed to proceed 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. Having the benefit of the additional information provided by the parties in the review proceeding, the Review Panel was satisfied that the Bid could proceed and that the interests of shareholders affected by the unacceptable circumstances would be adequately protected following the dispatch of the supplementary statements by CVC and Skywest.

Current acceptances and previous acquisitions

60. The Review Panel agreed with the Skywest 03 Panel that acceptances into the CVC Bid made in an uninformed market should be open to withdrawal at the choice of the Skywest shareholders. Similarly, persons who sold Skywest securities to CVC while CVC was in possession of some or all of the Information should have the right to rescind those sale contracts if they choose.

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The Review Panel therefore made similar orders to those made by the Skywest 03 Panel in relation to these issues.⁸

CVC Media Release

61. The Review Panel advised parties of its likely decision on 27 August 2004. It provided a draft declaration, draft orders and a draft of the media release which the Review Panel published on 1 September 2004. The Review Panel advised the parties that the contents of the advice were confidential until the Review Panel published its decision.
62. On 1 September 2004, after the Review Panel had published its decision, both Skywest and CVC published media releases announcing the Review Panel's decision. The Panel considers it understandable that parties in contested situations wish to put a Panel decision in the best possible light for their commercial objectives. However, the Panel objects to any attempt by parties to change or misrepresent the nature or basis of a Panel decision.
63. The CVC media release of 1 September 2004 clearly crossed the line between acceptably casting a decision in a party's most favourable light and misrepresenting a decision. Not only did CVC fail to mention the declaration of unacceptable circumstances made in the application, it attempted to misrepresent most of the issues it canvassed in the media release.
64. Consequently, the Review Panel published its own corrective media release on 10 September 2004 correcting the problems in CVC's media release: [TP 04/82](#).

Costs

65. The Review Panel confirmed the decision of the Skywest 03 Panel to make a costs order against CVC in relation to the Skywest 03 proceedings.
66. The Review Panel ordered that CVC pay Skywest's costs in the Skywest 03 proceedings on a party-party basis (i.e. the costs actually, necessarily, properly and reasonably incurred in the course of the proceedings before the Panel). The Review Panel ordered that those cost should include at least some of the costs incurred by Skywest in retaining Ernst & Young to provide its independent forensic IT investigation in relation to the initial Skywest 03 proceedings⁹ (in other words, the same costs order made by the Skywest 03 Panel).
67. In addition, in relation to the Skywest 03(R) proceedings, the Review Panel ordered that CVC pay the costs incurred by Skywest in retaining Ernst & Young to provide its independent forensic IT investigation in relation to the Skywest 03(R) proceedings.

⁸ Those orders were later varied in response to fresh evidence to the effect that two people who had sold Skywest shares to CVC before the bid had been in possession of less information about Skywest than it had appeared to the Review Panel, and had previously appeared to the Skywest 03 Panel, as mentioned in paragraph 75 of the reasons for decision in *Skywest 03*.

⁹ The costs relating to Ernst & Young which were included were those incurred by Skywest in engaging Ernst & Young in relation to both the Skywest 03 proceedings from 18 June 2004 until and including 8 July 2004 and in the Skywest 03R proceedings from 3 August 2004 until and including 23 August 2004.

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68. The Review Panel acknowledges that the costs order may appear to fall outside the guidance set out in the Panel’s Guidance Note 9 “Costs Orders” which envisages a narrow set of circumstances in which costs orders will normally be made. However, the Review Panel agrees with the Skywest 03 Panel that the circumstances with which Skywest was confronted in the Skywest 03 and Skywest 03(R) proceedings were quite unusual and that the need for Skywest to engage in the type of investigation that it undertook was as a result of CVC engaging in inappropriate behaviour. On that basis, the costs orders are warranted.

The Panel & Process

69. The President of the Panel appointed Simon McKeon (sitting President), Meredith Hellicar (sitting Deputy President) and Teresa Handicott as the sitting Panel for the proceedings arising from the Application.
70. The Review Panel adopted the Panel's published procedural rules for purposes of the Proceedings.¹⁰
71. The Review Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.
72. Having made its declaration and orders, the Review Panel required the parties to provide drafts of their respective supplementary bidder’s statement and supplementary target’s statement for review by the Review Panel and the Panel Executive. The Review Panel provided its comments to the parties on their respective documents and once they were settled to the Review Panel’s initial satisfaction the parties were required to give a copy of the document to the other for 24 hours to review. The Review Panel considered the comments received from the other parties and then settled final versions of the two documents for publications. The dispersed nature of the CVC board and the work required for Skywest to settle the information it could provide to its shareholders in light of the current issues before it, meant that this process took almost two weeks.

DECISION

Declaration

73. The Review Panel declared the circumstances set out in Annexure B to be unacceptable circumstances.

Orders

74. The Review Panel made the interim orders set out in Annexure A and the final orders set out in Annexure B. An order varying those orders is mentioned in footnote 3 and set out at Annexure C.

¹⁰ The Panel published new Rules for Proceedings under section 195 of the *Australian Securities and Investments Commission Act 2001 (Cth)* on 18 June 2004.

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Simon McKeon

President of the Sitting Panel

Decision dated 31 August 2004

Reasons published [*#insert date of publication of reasons*]



Annexure A

**Corporations Act
Section 657E
Interim Orders**

In the matter of Skywest Limited 03(R)

On 30 July 2004, the sitting Panel (the **Initial Panel**) in the Skywest Limited 03 proceeding decided to make a declaration of unacceptable circumstances and final orders (the **Initial Orders**) in relation to an off-market takeover bid (the **Bid**) for ordinary shares in Skywest Limited (**Skywest**) by CaptiveVision Capital Limited (**CVC**). On 3 August 2004, CVC applied to the Panel for a review of the declaration and the Initial Orders made by the Initial Panel.

Pursuant to section 657E of the *Corporations Act 2001* (Cth) (the **Act**)¹¹ the Panel HEREBY ORDERS that:

1. In these interim orders:
 - (a) **Cessation Date** means 1 September 2004;
 - (b) **Purchase Contract** means each contract of purchase of Skywest Securities to which CVC is a party as purchaser entered into after 1 December 2003 (other than takeover contracts relating to the Bid); and
 - (c) **Skywest Securities** means ordinary shares in Skywest or other securities issued by Skywest.
2. The operation of Order 1 of the Initial Orders is suspended until the Cessation Date.
3. CVC immediately extend the offer period under the Bid until no earlier than 5:00 pm Perth time on 31 August 2004, and dispatch the necessary notices in accordance with section 650D.
4. CVC must not declare the offers under the Bid, or takeover contracts relating to the Bid, free from any defeating condition.
5. In respect of all Skywest Securities held by CVC which were the subject of Purchase Contracts, 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) 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

¹¹ All statutory references are to the Act, unless otherwise indicated.

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- (b) 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
 - (c) Skywest must disregard any purported exercise by or on behalf of CVC of any voting rights attaching to those Skywest Securities or other securities.
6. Subject to Order 7, 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:
- (a) CVC;
 - (b) Advent Television Ltd (**Advent**);
 - (c) any person or entity that has been within 2 months before this interim order, or is now or who becomes, either:
 - (i) an entity that controls CVC or Advent or both of them; or
 - (ii) a director of CVC or Advent or an entity within subparagraph (i) or two or more of them; or
 - (d) an entity controlled by one or more persons within one or more of paragraphs (a), (b) and (c).
7. An entity referred to in Order 6 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 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;
 - (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 Order 6 so that it ceases to apply; and
 - (ii) receiving written approval from the Panel that Order 6 is varied so that it ceases to apply.
8. Neither CVC nor Skywest (either directly or through any agent or adviser on their behalf):
- (a) send any written communication (other than the notification required in Order 3 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
 - (b) otherwise initiate any contact (by telephone or otherwise) with any shareholder of Skywest in connection to the Bid.

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9. These interim orders remain in effect until the first to occur of:
 - (a) further order by the Panel;
 - (b) the Cessation Date; and
 - (c) the conclusion of this proceeding.

For clarity, the interim orders dated 6 July 2004 made by the Initial Panel cease to have any effect.

Simon McKeon

President of the Sitting Panel

Dated 5 August 2004

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Annexure B

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

In the matter of SKYWEST LIMITED 03(R):

PURSUANT to section 657EA, the Panel revokes the declaration of unacceptable circumstances and the orders made on 30 July 2004 in the matter of Skywest Limited 03 and makes the following declaration and orders.

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 obtained and possessed certain information concerning the affairs of Skywest (the **Information**) from the chief financial officer of Skywest (the **CFO**) during the period in which CVC acquired its pre-bid stake and when it lodged its bidder's statement;
- C. The Information included:
 - (a) management accounts for parts of the financial year ended 30 June 2004;
 - (b) details of the banking arrangements entered into by Skywest;
 - (c) the CFO's estimated projected profit and earnings before interest and tax, depreciation and amortisation for Skywest for the financial year ending 30 June 2005;
 - (d) the CFO's opinion, based on advice received from stockbrokers, as to the value of Skywest Shares on a proposed listing of Skywest; and
 - (e) the price at which Skywest proposed to offer shares under a prospectus and the structure of the proposed offer;
- D. Some of the Information was material:
 - (a) to a decision by a Skywest shareholder whether to sell their Skywest Shares to CVC during the acquisition by CVC of its pre-bid stake; and

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- (b) to a decision by a Skywest shareholder 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 Information had not previously been provided to Skywest shareholders and was not included in the bidder's statement issued by CVC or the target's statement issued by Skywest in relation to the Bid; and
- F. The bidder's statement failed to disclose information concerning the relationship between the CFO with CVC and Advent, the extent of the information and the circumstances of the assistance provided by the CFO to CVC (and its advisers) in connection with the acquisition of CVC's pre-bid stake and the Bid,

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

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

- (a) CVC must prepare and dispatch in accordance with sections 643, 645 and 647 of the Corporations Act and Order (f) a supplementary bidder's statement in relation to the Bid, in which it discloses that:
 - (i) CVC has obtained the Information which has not previously 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, including details of the nature and extent of the relationship between the CFO and CVC and Advent, how the Information was provided to CVC and over what period of time;
 - (ii) the Information included:
 - a. management accounts for parts of the financial year ended 30 June 2004;
 - b. details of the banking arrangements entered into by Skywest;
 - c. the CFO's estimated projected profit and earnings before interest and tax, depreciation and amortisation for Skywest for the financial year ending 30 June 2005;
 - d. the CFO's opinion, based on advice received from stockbrokers, as to the value of Skywest Shares on a proposed listing of Skywest; and
 - e. the price at which Skywest proposed to offer shares under a prospectus and the structure of the proposed offer;
 - (iii) 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

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which such a holder would reasonably require in order to make an informed assessment whether to accept such an offer;

- (iv) it is probable that other information concerning the affairs of Skywest was provided to CVC shortly before or during the Bid in such a way that none of CVC, Skywest and the Panel can now ascertain all of that information; and
 - (v) each person who has accepted an offer under the Bid has until the end of the offer period under the Bid a right to withdraw that acceptance which is equivalent to the right conferred by section 650E of the Corporations Act, where it applies. This information must be disclosed prominently on the cover of the supplementary bidder's statement.
- (b) Skywest must prepare and dispatch in accordance with sections 644, 645 and 647 of the Corporations Act and Order (f) a supplementary target's statement in relation to the Bid, in which it discloses:
- (i) subject to obtaining any necessary exemption from ASIC, the present status of its proposals to issue shares under a prospectus and become a listed entity; and
 - (ii) its expectation as to its financial performance during the financial year ending on 30 June 2005 and as to its financial position on 30 June 2005. This forecast is not necessarily required to contain numerical estimates, should contain all and only the details for which Skywest believes it has a reasonable basis, and should be accompanied by a statement of any risks and contingencies thought appropriate by Skywest.
- (c) If its supplementary bidder's statement mentioned in Order (a) is dispatched to offerees under the Bid after 16 September 2004, CVC must, at the same time as it dispatches the supplementary bidder's statement, extend the offer period under the Bid to end no earlier than 14 days after that day.
- (d) CVC must ensure that each person who has accepted an offer under the Bid (an **accepting offeree**) has for at least one month after the date of dispatch of the supplementary bidder's statement a right to withdraw that acceptance which is equivalent to the right conferred by section 650E of the Corporations Act, where it applies. CVC may not declare offers under the Bid free of a defeating condition if that declaration deprives any accepting offeree of that right or cuts short the period for which the right exists.
- (e) 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:
- CVC must send to each Vendor in accordance with Order (f) a notice which:

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- (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;

the notice must be accompanied by a copy of each of:

- (A) CVC's bidder's statement in relation to the Bid (together with any supplementary bidder's statement);
- (B) Skywest's target's statement in relation to the Bid (together with any supplementary target's statement); and
- (C) the Panel's Media Release announcing the making of this Declaration and these Orders;

When it has complied with sub-paragraph (ii), CVC must immediately give notice to the Panel, each party and ASIC that it has sent all the Notices and accompanying documents to all the Vendors;

CVC must give the Panel, each party and ASIC a copy of each purported Cancellation Notice and any accompanying documents received by it before the 30th business day after it has given notice under sub-paragraph (iii);

CVC must execute the instruments of transfer re-transferring to each Vendor who gives a valid Cancellation Notice the relevant Skywest Securities; and

CVC must pay any stamp duty on any instrument of transfer executed under sub-paragraph (v) and present the stamped transfers to Skywest for registration.

- (f) The supplementary bidder's statement mentioned in Order (a) and the notice required by order (e) must be submitted to the Panel in draft by 5.00 p.m (AEST) on Friday 03 September 2004. The supplementary target's statement mentioned in Order (b) must be submitted to the Panel in draft by 5.00 p.m (AEST) on Friday 10 September 2004. The Panel may require the relevant party to amend the draft, and then to submit it to each other party and ASIC for one business day to enable them to make comments which the Panel will take into account before approving the draft as complying with the relevant Order. The relevant document must be lodged with ASIC and dispatched to all offerees, whether or not they have accepted, within 2 business days after the Panel approves the draft.

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- (g) CVC must pay Skywest the following amounts:
 - (i) the costs and expenses of Skywest (on a party-party basis, in accordance with the Federal Court scale) arising out of, or connected with the Skywest 03 proceeding (that is, the proceeding at first instance, not including this review proceeding); and
 - (ii) the costs incurred by Skywest in engaging Ernst & Young in relation to both the Skywest 03 proceeding from 18 June 2004 until and including 8 July 2004 and this review proceeding from 3 August 2004 until and including 23 August 2004.
- (h) If CVC and Skywest do not agree on the amount of costs and expenses under Order (g), the following procedure is to be used:
 - (A) Skywest must provide CVC with an itemised bill of its costs in relation to this proceeding;
 - (B) if CVC objects to the amount claimed by Skywest, Skywest must provide 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).
- (i) Any party may apply in accordance with Procedural Rule 9.5 and Part 6 of the Procedural Rules for an order consequential or ancillary to these orders, or varying these orders.

Simon McKeon
President of the Sitting Panel
Dated 31 August 2004



Skywest Limited 03(R) – Variation of Final Orders

**Corporations Act
Section 657D
Variation of Final Orders**

In the matter of Skywest Limited 03(R)

Pursuant to section 657D(3) of the *Corporations Act* 2001 and pursuant to a declaration (the **Declaration**) of unacceptable circumstances made by the President of the sitting Panel on 31 August 2004, the Takeovers Panel HEREBY ORDERS that the orders (the **Orders**) made by the President of the Sitting Panel on 31 August 2004 in the matter of Skywest Limited 03(R) be varied in accordance with the following:

Insert the following additional Orders after paragraph (e):

(ea) *Notwithstanding anything in Order (e) above, the contract of purchase of 2,083,333 Skywest Shares to which CVC is a party as purchaser and Grape Expectations Enterprises Pty Ltd (**Grape Expectations**) is a party as vendor (the **Purchase Contract**) is void and without any need for a transfer, the legal title to and beneficial ownership in the 2,083,333 Skywest shares re-vests in Grape Expectations. To give effect to this Order:*

(i) Grape Expectations must send CVC, at the following address:

*Captive Vision Capital Ltd
c/- Marshall Michael Corporate Consultants
Stefan Saw - Director
Level 2
76 Kings Park Rd
Perth WA 6005,*

a cheque for the amount of the consideration received by Grape Expectations under the Purchase Contract not later than 2 business days after the date of this Order and CVC must immediately notify Skywest once this cheque has been received;

(ii) Skywest must register a transmission of the 2,083,333 Skywest Shares to Grape Expectations within 1 business day of receiving notification from CVC of the receipt of the cheque in accordance with subparagraph (i); and

(iii) Skywest must treat Grape Expectations as being the registered holder of the 2,083,333 Skywest Shares as at the record date used to

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determine entitlements under the rights offer which is set out in the prospectus dated 30 September 2004 (the **Prospectus**) and in doing so, Skywest must:

- (1) send Grape Expectations a copy of the Prospectus and an application form so that it can participate in the offer in respect of the 2,083,333 re-vested Skywest Shares;
- (2) process any application form returned by Grape Expectations in the manner specified in the Prospectus; and
- (3) ensure that any offer made to CVC under the Prospectus does not include a right to participate in respect of the 2,083,333 Skywest Shares re-vested in Grape Expectations.

(eb) *Notwithstanding anything in Order (e) above, the contract of purchase of 199,667 Skywest Shares to which CVC is a party as purchaser and Graeme John Shenton (Mr Shenton) is a party as vendor (the **Purchase Contract**) is void and without any need for a transfer, the legal title to and beneficial ownership in the 199,667 Skywest shares re-vests in Mr Shenton. To give effect to this Order:*

- (i) Mr Shenton must send CVC, at the following address:

*Captive Vision Capital Ltd
c/- Marshall Michael Corporate Consultants
Stefan Saw - Director
Level 2
76 Kings Park Rd
Perth WA 6005,*

a cheque for the amount of the consideration received by Mr Shenton under the Purchase Contract not later than 2 business days after the date of this Order and CVC must immediately notify Skywest once this cheque has been received;

- (ii) Skywest must register a transmission of the 199,667 Skywest Shares to Mr Shenton within 1 business day of receiving notification from CVC of the receipt of the cheque in accordance with sub-paragraph (i); and
- (iii) Skywest must treat Mr Shenton as being the registered holder of the 199,667 Skywest Shares as at the record date used to determine entitlements under the rights offer which is set out in the prospectus dated 30 September 2004 (the **Prospectus**) and in doing so, Skywest must:

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- (1) send Mr Shenton a copy of the Prospectus and an application form so that it can participate in the offer in respect of the 199,667 re-vested Skywest Shares;
- (2) process any application form returned by Mr Shenton in the manner specified in the Prospectus; and
- (3) ensure that any offer made to CVC under the Prospectus does not include a right to participate in respect of the 199,667 Skywest Shares re-vested in Mr Shenton.

Dated 12 October 2004

Simon McKeon
President of the Sitting Panel

Takeovers Panel

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Annexure D

The Review Panel's Information

75. In the Skywest 03 proceedings, Skywest had offered CVC an opportunity to exchange all information and communications that they knew of which had passed from Mr Lovelady to Mr Chatfield. However, that opportunity was not taken up by CVC at the time. CVC submitted in its application to the Review Panel that it had not taken up the opportunity in the previous proceedings because the time offered by Skywest to achieve the exchange had been impossibly short (CVC asserts that it was less than one business day). It now offered to cooperate. The Review Panel acknowledges that the time proposed by Skywest for exchange of information in the Skywest 03 proceedings had been short (as are many times in Panel proceedings), but neither CVC nor its advisers made any attempt to inform either Skywest or the Skywest 03 Panel of its concerns about time, or to seek additional time. CVC formed its own views as to the bona fides of the offer and merely declined to exchange the information.
76. The Review Panel commenced its proceedings with the entire information body of the Skywest 03 proceedings as its start. With CVC's offer to cooperate in exchanging available information, the Review Panel directed all parties to do that as the first step, and for submissions in response to the Review Panel's brief to follow after parties had had time to consider information that had been provided in the exchange. Initially the Review Panel had proposed that that exchange take place over three business days. However, the parties advised that the search of their records and computer systems and back-ups would take over a week. The Review Panel agreed to extend the time period for the exchange accordingly.
77. As explained above, much of the information flow between Mr Lovelady and Mr Chatfield had been via a large number of emails over an extended period of time while Mr Lovelady was Chief Financial Officer of Skywest. Skywest submitted in the Skywest 03 proceedings that it was difficult for it to make its case properly because it did not know, and was unable to determine, the full extent and content of those communications. Most of the emails had been sent from Mr Lovelady's laptop computer, rather than the Skywest main network. The attachments to some emails had had been hidden by a disguise and encryption software system. Many of the emails had been deleted, many were recoverable only from back-up records, archives and by forensic analysis of computer hard drives. Many were found only in part and many were never found. These were the reasons Skywest had wanted to see what records CVC had of the communications.
78. CVC had declined to exchange information with Skywest in the Skywest 03 proceedings. It had also declined an opportunity that the Skywest 03 Panel gave it to affirm that the Skywest 03 Panel had copies of all material information concerning Skywest that CVC had received from Mr Lovelady. CVC submitted in its application for review that if it had properly understood

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the Skywest 03 Panel's offer, it would have accepted it and provided the statement. However, it did not do so, and the Skywest 03 Panel made its decision in part based on not having been given that affirmation.

79. In the review application, both parties commissioned independent experts to examine the hard drives and back up records of various laptop and server computers. The experts were asked to look for and report on, all email communications from officers of Skywest to CVC, Advent, and any of CVC or Advent's officers and advisers. The parties exchanged records of, and copies where available, of those emails.
80. Once that review and exchange had taken place, and the Review Panel had received submissions from the parties based on the exchanged information, the Review Panel considered that it had a reasonably sufficient basis to assess the information which CVC had had when it made its bid. It therefore considered that it was in a position, which the Skywest 03 Panel had not been in, to determine what supplementary disclosure it required to allow the CVC Bid to proceed.