



In the matter of Skywest Limited 04  
[2004] ATP 26

**Catchwords:**

*acceptance under takeover bid – associates – collateral benefits – declaration of unacceptable circumstances – equal opportunity to share in benefits – offers for options – orders – telephone monitoring – variation of orders*

*Corporations Act 2001 (Cth), sections 12(2), 602(c), 621, 623, 648J, 648K, 657C, 657D and 657E*

*Takeovers Panel Guidance Note 9: “Costs Orders”*

*PowerTel Limited 03 [2003] ATP 28*

**These are our reasons for making a declaration of unacceptable circumstances and final orders in relation to offers to acquire options made during the off-market takeover bid by CaptiveVision Capital Limited for all of the issued shares in Skywest Limited.**

## THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) from Skywest Limited (**Skywest**) dated 11 October<sup>1</sup> under section 657C of the *Corporations Act 2001* (Cth) (the **Act**)<sup>2</sup> in relation to the off-market takeover bid by CaptiveVision Capital Limited (**CaptiveVision**) for all of the issued shares in Skywest (**Bid**).

## THE PANEL & PROCESS

2. The President of the Panel appointed Braddon Jolley (sitting President), Carol Buys (sitting Deputy President) and Brett Heading as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
3. The Panel's published procedural rules were adopted for the purposes of the Proceedings.
4. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

## APPLICATION

### Background

#### *Parties*

5. CaptiveVision is an unlisted public company incorporated in Singapore. Its business is investing, financing and investment holding. CaptiveVision's Australian corporate adviser in relation to the Bid is Marshall Michael Corporate Consultants. Mr Stefan Saw (**Mr Saw**) is an account director with Marshall Michael.
6. At the time of commencement of the Proceedings, Skywest was an unlisted Australian public company with approximately 240 shareholders. Skywest has

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<sup>1</sup> All dates referred to are dates in 2004, unless otherwise indicated.

<sup>2</sup> All statutory references are to the Act, unless otherwise indicated.

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subsequently been admitted to the Official List of Australian Stock Exchange Limited (ASX). Skywest operates in the regional aviation industry in Western Australia.

#### *Skywest securities*

7. In addition to ordinary shares, Skywest also has convertible notes and options over unissued shares on issue. The terms of the options currently on issue are:
  - (a) Options exercisable for 1 share at 30 cents expiring on 30 June 2005 (**2005 30 cent Options**); and
  - (b) Options exercisable for 1 share at 20 cents expiring on 31 January 2006 (**2006 20 cent Options**).

8. As at 13 September, Skywest had the following securities on issue<sup>3</sup>:

Ordinary Shares:	56,231,864
Convertible Notes:	25,074,843
2005 30 cent Options:	11,612,500
2006 20 cent Options:	27,798,343

9. As at 11 October there were 25 registered holders of the 2005 30 cent Options.

#### *Rights Issue*

10. Pursuant to a prospectus dated 30 September and a supplementary prospectus dated 13 October, Skywest undertook a non-renounceable rights issue to existing shareholders (**Rights Issue**) with an option for Skywest to make a supplementary offer. Under the terms of the Rights Issue, shareholders could subscribe for 1 new share (at an issue price of 21 cents per share) and 1 attaching 2006 20 cent Option (at an issue price of 1 cent per option) for every 3 existing shares held as at the record date. The record date for determining entitlements was 11 October 2004. The closing date for applications under the Rights Issue was 29 November.
11. In its 30 September prospectus, Skywest indicated that it expected the Rights Issue and supplementary offer to result in the issue of an additional 18.743 million shares and 27.493 million 2006 20 cent Options. Due to the exercise of convertible notes and 2006 20 cent Options prior to the record date for the Rights Issue, Skywest subsequently advised in its supplementary prospectus dated 13 October that the maximum number of new shares that could have been issued had risen to 23.484 million shares. Skywest stated part of the reason for undertaking the Rights Issue and supplementary offer was to satisfy the requirements for admission to the Official List of ASX. Following the successful completion of the Rights Issue, Skywest has had its ordinary shares and 2006 20 cent Options quoted for trading on ASX.

#### *Terms of the Bid and disclosure regarding option offers*

12. The consideration under the Bid was initially 20 cents for each Skywest share. On 7 October, CaptiveVision increased the consideration offered under the Bid from 20 cents to 23 cents.

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<sup>3</sup> Source: Skywest Rights Issue prospectus dated 30 September.

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13. The Bid consists of offers to acquire Skywest shares that were on issue on 27 April. CaptiveVision did not make any corresponding bids for any other Skywest securities. In its supplementary bidder's statement dated 20 September, under the heading "Post-Bid Intentions of CVC", CaptiveVision stated:

*CVC [ i.e. CaptiveVision] reserves its rights to consider a further bid or other form of offer for Options and/or other convertible securities. CVC's present intention is to make an offer (but not a takeover bid) for the [2006 20 cent Options] currently on issue in Skywest. ... CVC's immediate intention is to make an offer (but not a takeover bid) to Skywest options holders to acquire the [2006 20 cent Options] for 2 cents per Option.*

14. No mention was made of an intention to make offers for 2005 30 cent Options in CaptiveVision's supplementary bidder's statement. Based on the material provided to the Panel, CaptiveVision had discussions with several holders of 2005 30 cent Options regarding the acquisition of their options prior to the lodgement of its supplementary bidder's statement on 20 September. One of the issues of concern to the Panel was CaptiveVision's failure to disclose in its supplementary bidder's statement that it was contemplating making offers for 2005 30 cent Options as well as 2006 20 cent Options.

#### *Offers by CaptiveVision for 2005 30 cent Options*

15. Based on the material CaptiveVision provided to the Panel, CaptiveVision, either directly or through Mr Saw acting on CaptiveVision's instructions, made offers to acquire 2005 30 cent Options from the parties identified in Annexure A (the **2005 30 cent Option Offerees**). The material provided to the Panel indicated that some of these offers by CaptiveVision were more in the nature of invitations to treat, or were made in response to invitations to treat by the relevant 2005 Option holder, which required some further action by both the offeree and CaptiveVision before a contract could be formed. Other examples appeared to consist of offers either initiated by CaptiveVision or which are made in response to invitations to treat by the relevant 2005 Option holder and which were capable of acceptance by the relevant offeree. However, the Panel did not have details of all discussions and negotiations between CaptiveVision and the 2005 30 cent Option Offerees (see [25] below).
16. In relation to offers made to Savant Pty Ltd for a total of 1.66 million 2005 30 cent Options, the Panel received materials that were inconsistent as to the consideration offered: CaptiveVision's submissions and a statement by Mr Saw indicated that \$200,000 was being offered for a parcel of 833,333 2005 30 cent Options (or 24 cents per option). However, attached as annexures to Mr Saw's statement was a memorandum of understanding and two transfer forms stating the consideration as \$266,666 for the 1.66 million 2005 30 cent Options (or 16 cents per option) (each document was dated 5 October and appeared to have been executed by both parties, however, the transfer forms had been marked "void").
17. In its submissions to the Panel, CaptiveVision asserted that it intended to enter into the 2005 Option transactions with Savant on the mistaken basis that Savant held 15% of all Skywest options, rather than 15% of the 2005 30 cent Options. CaptiveVision asserted that it would not have completed the transaction with Savant if it had realised that Savant's options did not represent 15% of all Skywest options. As CaptiveVision's original bidder's statement contained details regarding the total

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number of Skywest options on issue, the Panel found the alleged mistaken basis for the transaction difficult to understand. However, if it was accepted that the offer of \$266,666 was for 15% of all Skywest options on issue (approximately 5.91 million options), the consideration offered for each 2005 30 cent Option would have been approximately 4.5 cents per option.

18. Each of the 2005 30 cent Option Offerees, except for Fedas Pty Ltd (**Fedas**), Rojex Mining Services Pty Ltd (**Rojex**) and Mr Mark Niutta, also held substantial parcels of Skywest shares.
19. Fedas is a company owned by Mr Miles Cattle. Fedas only held 10 Skywest shares. However, Mr Miles Cattle's brother, Mr Godwin Cattle, held 1 million ordinary shares prior to the Bid. CaptiveVision advised the Panel that Mr Godwin Cattle resides overseas and that at the time CaptiveVision was making offers for Mr Miles Cattle's options, Mr Miles Cattle was the only point of contact that CaptiveVision had for Mr Godwin Cattle. Mr Saw had conversations concerning CaptiveVision's offer for Mr Godwin Cattle's Skywest shares with Mr Miles Cattle in Australia who apparently relayed those conversations to Mr Godwin Cattle and Mr Godwin Cattle's responses back.
20. The Panel received a document from CaptiveVision indicating that Mr Miles Cattle was given limited authority on 3 October to act on behalf of Mr Godwin Cattle in relation to the sale of Mr Godwin Cattle's 1 million shares. Additional evidence provided with CaptiveVision's submissions indicates that Mr Saw dealt solely with Mr Miles Cattle in relation to the purchase of Mr Godwin Cattle's 1 million shares. Mr Saw stated that he understood that Mr Miles Cattle was "merely a go-between" for CaptiveVision and Mr Godwin Cattle. The Panel considered that this was inconsistent with the limited authority dated 3 October given to Mr Miles Cattle. After making its final orders, the Panel received further submissions from Fedas regarding its transactions with CaptiveVision (see [73]-[84] below).
21. Based on the materials provided to the Panel, Rojex appeared to have previously owned 208,333 Skywest shares, in respect of which it accepted the Bid prior to receiving an offer to buy its 2005 30 cent Options.
22. Based on the materials provided to the Panel, Mr Mark Niutta was not a shareholder in his own right, but acted as broker for a number of Skywest shareholders, including Savant and Maranka.
23. These offers for 2005 30 cent Options were made by private communication, either by telephone or written correspondence. CaptiveVision appears to have made offers as early as June (i.e. prior to the supplementary bidder's statement dated 20 September which disclosed CaptiveVision's intention to make offers for 2006 20 cent Options), and continued to make offers until shortly before Skywest's application to the Panel.
24. In addition to offers regarding the 2005 30 cent Options, CaptiveVision also made several offers to acquire 2006 20 cent Options. At least 3 of these offers resulted in completed transactions. The materials provided to the Panel also indicated that CaptiveVision notified individual Skywest security holders (most of whom appear to also have held Skywest shares) that it was prepared to acquire convertible notes.

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25. The Panel considered that it was impossible for it to be satisfied that the evidence provided by CaptiveVision included details of all offers made by or on behalf of CaptiveVision to acquire 2005 30 cent Options. The Panel's concerns arose primarily due to a statement provided by Mr Saw, which indicated that:
- (a) during the course of the Bid, Mr Saw had spoken with at least 70 Skywest shareholders (in over 200 phone calls);
  - (b) although mindful of the statutory requirements to record telephone calls made during a bid period and having a preferred practice of ringing shareholders from an office phone with a recording function, Mr Saw made telephone calls to Skywest shareholders from his home and mobile telephones which were not recorded;
  - (c) Mr Saw did not make written notes of conversations with Skywest security holders; and
  - (d) the volume of calls made to Skywest security holders, the passage of time, the absence of any written notes and Mr Saw's failure to record many of the conversations meant that Mr Saw was unable to provide the Panel with all relevant information regarding the offers made for 2005 30 cent Options.
26. CaptiveVision was asked to provide recordings of any discussions relating to an offer by or on behalf of CaptiveVision to acquire Skywest options. The Panel had an opportunity to review recordings of conversations between Mr Saw and several of the 2005 30 cent Option Offerees, as well as other Skywest security holders, although as Mr Saw's statement made clear, the recordings provided did not include all conversations between CaptiveVision and 2005 30 cent Option Offerees.

### Application

27. In the Application, Skywest alleged that unacceptable circumstances arose in relation to offers by CaptiveVision to acquire Skywest options over unissued shares in Skywest made to certain Skywest shareholders. Skywest alleged that those offers were made by CaptiveVision for consideration in excess of the "fair value" of the options, and that those offers constituted an inducement to those Skywest shareholders to accept the Bid, which inducement was not offered to all Skywest shareholders.
28. Skywest sought a declaration of unacceptable circumstances and interim orders requiring CaptiveVision to revoke any unaccepted offers for Skywest options and preventing CaptiveVision from processing any outstanding acceptances of such offers for Skywest options or any outstanding acceptances of the Bid from any Skywest shareholder who received an offer in respect of their options.
29. Skywest also sought the following final orders:
- (a) that the consideration payable by CaptiveVision under the Bid be increased to reflect the maximum excess in value offered over the "fair value" of the Skywest options to certain Skywest shareholders; or
  - (b) in the alternative, all contracts for the acquisition by CaptiveVision of Skywest options for a value in excess of "fair value" be cancelled and reversed, with

each vendor of such options to be given a right to withdraw any acceptance of the Bid.

30. The declaration and orders sought under the Application did not differentiate between 2005 30 cent Options and 2006 20 cent Options. However, the supporting material provided by Skywest with the Applications and its subsequent submissions to the Panel focused largely on transactions and valuation issues relating to the 2005 30 cent Options.

**Interim Orders**

31. The Panel considered the interim orders requested in the Application. On 13 October, CaptiveVision gave an undertaking to the Panel that it would do the following:
- (a) extend the offer period under the Bid until 1 November;
  - (b) revoke any outstanding or unaccepted offers for any Skywest options (both 2005 and 2006 20 cent Options); and
  - (c) not process any outstanding acceptances of any offers for any Skywest options.
32. The Panel accepted these undertakings from CaptiveVision. In addition, the Panel made interim orders directing CaptiveVision not to process any outstanding acceptances under the Bid from Skywest shareholders who, or whose known associates, received offers from CaptiveVision or its agents to acquire Skywest options.

**Action by CaptiveVision following Application**

33. In its submissions to the Panel, CaptiveVision stated all offers by or on behalf of it to acquire 2005 30 cent Options and 2006 20 cent Options had been revoked. CaptiveVision stated that this was done by letter to all recipients sent on 13 October and 14 October – i.e. after CaptiveVision had been made aware of the Panel’s decision to conduct proceedings on the Application. CaptiveVision stated that this action was taken to remedy any concerns that Skywest or the Panel may have had with the transactions. CaptiveVision stated that all of the offers made to the 2005 30 cent Option Offerees were included in the revoked offers, and that therefore there had been no completed purchases of 2005 30 cent Options. After making its decision, the Panel received submissions from Fedas which disputed CaptiveVision’s evidence that there were no existing contracts in relation to 2005 30 cent Options (see [73]-[84] below).

**DECISION & DISCUSSION**

**Applicable Law and Policy**

34. The question for the Panel was whether these events have led to the occurrence of unacceptable circumstances.
35. Subsection 602(c) sets out the following objective of Chapter 6:
- as far as practicable, the holders of the relevant class of voting shares or interest all have a reasonable and equal opportunity to participate in any benefits accruing to the holders under*

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*any proposal under which a person would acquire a substantial interest in the company, body or scheme.*

36. Section 623 is one of the means chosen by the legislature to put into effect the equal opportunity policy of subsection 602(c). Subsection 623(1) provides that:

*A bidder, or an associate, must not, during the offer period for a takeover bid, give, offer to give or agree to give a benefit to a person if:*

(a) *the benefit is likely to induce the person or an associate to:*

(i) *accept an offer under the bid; or*

(ii) *dispose of securities in the bid class; and*

(b) *the benefit is not offered to all holders of securities in the bid class under the bid.*

37. There are exclusions to section 623 set out in subsections 623(2) and (3). However these exclusions do not apply to the circumstances the subject of this Proceeding.

38. Circumstances may be unacceptable if they constitute a breach of section 623, but may be unacceptable even if the black letter provisions of the Act have been met.

#### **Offers by CaptiveVision**

39. After consideration of the materials provided to the Panel by the parties, the Panel decided that circumstances relating to the affairs of Skywest were unacceptable and that it was in the public interest to make a declaration of unacceptable circumstances.

40. The Panel considered that the offers made by CaptiveVision to the 2005 30 cent Option Offerees constituted benefits which were not offered to all Skywest shareholders and which were likely to induce the 2005 30 cent Option Offerees or their associates to accept CaptiveVision's offer under the Bid. The Panel considered that these offers by CaptiveVision were unacceptable because they:

(a) were inconsistent with the reasonable and equal opportunity principle set out in subsection 602(c); and

(b) at least in relation to some of the 2005 30 cent Option Offers, constituted a breach of section 623,

both of which are matters that the Panel considers to be extremely serious.

41. The unacceptable circumstances resulting from those offers were not remedied by CaptiveVision's subsequent actions in seeking to revoke the relevant offers. There remained on foot acceptances of the Bid by 2005 30 cent Option Offerees or their associates in relation to their Skywest shares which were tainted by the activity undertaken in breach of the Act.

#### **Collateral benefits**

##### *Value of 2005 30 cent Options*

42. In considering whether unacceptable circumstances had arisen due to the offers for 2005 30 cent Options made by CaptiveVision, the Panel noted the decision in

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*PowerTel Limited 03*<sup>4</sup>, in which the Panel supported a “net benefits” approach to looking at the commercial balance of advantages and detriments to the offeree shareholder (or associate) from a transaction which is sought to be impugned.

43. If the reasoning of the *PowerTel* decision were to be applied to the circumstances of CaptiveVision’s bid, for the 2005 30 cent Option Offerees to have received a net benefit, the consideration offered by CaptiveVision for those 2005 30 cent Options must have exceeded the fair value of the 2005 30 cent Options.
44. As indicated above, the material provided to the Panel regarding the terms of the offers made to 2005 30 cent Option Offerees, including the offered consideration, was unclear or incomplete, due to failures by Mr Saw to comply with telephone monitoring requirements under the Act and to uncertainties as to the details of some transactions such as the Savant Pty Ltd transactions. On the basis of the material provided, consideration offered by CaptiveVision for 2005 30 cent Options ranged from 2 cents to 4 cents per option, with one set of transactions (with Savant) appearing to involve an offer of 16 cents per option (although possibly intended to be for 4.5 cents per option).
45. In the parties’ submissions to the Panel, a range of evidence was presented regarding the fair value of the 2005 30 cent Options. The Application attached an indicative valuation report by PricewaterhouseCoopers (PWC) which valued the 2005 30 cent Options at 0.54 cents each, at the likely upper end of the range of fair market values. To counter arguments made by CaptiveVision regarding the underlying Skywest share price used in PWC’s valuation, Skywest provided a revised report to reflect the increased market price for Skywest shares. In its revised valuation, PWC assessed the upper bound of its range of indicative values for 2005 30 cent Options to be 0.75 cents each. The Panel accepted PWC’s analysis and valuations as being good estimates of the fair value of the 2005 30 cent Options.
46. With its submissions, CaptiveVision provided a report prepared by Mr Julian Sandt, described as CaptiveVision’s external adviser, which stated the fair value for 2005 30 cent Options was 5.11 cents each. The Panel noted that limited information was contained in Mr Sandt’s report regarding the assumptions and calculations used. The Panel also noted Skywest’s assertion that Mr Sandt is a shareholder of Advent Television Ltd, CaptiveVision’s parent company: this assertion was not denied by CaptiveVision.
47. CaptiveVision also provided a valuation from a corporate advisory firm, PKF for the 2005 30 cent Options. The PKF report presented a theoretical value for the 2005 options to be 1.59 cents each, which was adjusted to 1.27 cents each to take account of the non-marketability of the options.
48. The Panel recognises the difficulties inherent in valuing thinly traded options over unissued shares in an unlisted company. These difficulties are exacerbated during the presence of an ongoing takeover bid for the underlying shares.
49. Having considered the relevant materials provided to it through submissions, the Panel determined that the fair value for the 2005 30 cent Options was significantly

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<sup>4</sup> [2003] ATP 28, at 31 to 51.



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exceeded by the minimum consideration offered by CaptiveVision (i.e. 2 cents) to the 2005 30 cent Option Offerees.

50. On that basis, the Panel determined that CaptiveVision had offered a net benefit to the 2005 30 cent Option Offerees. The quantum of that benefit varied according to the consideration offered by CaptiveVision in each instance.

#### *2006 20 cent Options*

51. The Panel did not consider that the materials provided in the Application and the submissions received allowed it to determine that the offers by CaptiveVision in relation to 2006 20 cent Options constituted unacceptable circumstances. No evidence was provided as to the “fair value” of those 2006 20 cent Options, nor was there any clear assertion made that the offers in relation to 2006 20 cent Options were collateral benefits. However, given the fact that the revised offer price of 23 cents per share under the Bid was higher than the strike price of the 2006 20 cent Options and the 2006 20 cent Options had a longer life than the 2005 30 cent Options, the Panel did not have material concerns that the 2 to 3 cents per option offered for the 2006 20 cent Options was more than fair value.

#### *Inducement*

52. The Panel considered that the net benefits inherent in the offers made by CaptiveVision for the 2005 30 cent Options were likely to induce the 2005 30 cent Option Offerees, or their associates, to accept the Bid in respect of any Skywest shares also held by them.
53. In its submissions, CaptiveVision repeatedly stated that it was made clear in all its dealings with Skywest security holders that any offers made in respect of Skywest options or convertible notes were unrelated to, and independent of, CaptiveVision’s separate offer for Skywest shares under the Bid. These assertions were supported, to some degree, by the recorded conversations provided to the Panel, in which Mr Saw can be heard explaining that offers made in respect of options had to be “treated as entirely separate to the Bid”. The Panel could not be certain that the recorded conversations given to the Panel provided an accurate and complete picture of all communications with Skywest shareholders however, as CaptiveVision was unable to provide recordings of all conversations that took place due to the failures to comply with telephone monitoring provisions of the Act (described at [25] above). The Panel also noted that Mr Saw would have been aware that the conversations which were reviewed were being taped, although he did not inform the other conversation participants of this (see [98] below).
54. These assertions are also inconsistent with some elements of the material provided with CaptiveVision’s submissions. For example, both Ms Siobhán Cool’s (CaptiveVision’s company secretary) and Mr Saw’s statements indicated that in dealings with a holder of Skywest shares, options and convertible notes, Mr Saw gave the security holder the impression that in order to acquire that holder’s options and convertible notes, CaptiveVision “needed the shares as well”. Although Ms Cool stated that she corrected the holder’s misapprehension, it is clear that Mr Saw’s initial communication indicated an inter-relation between the two transactions.

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55. In any event, inter-conditionality between the offer of a benefit and acceptance of a bid is not required in order for there to be a contravention of section 623.
56. What is necessary is that the net benefit is likely to induce an acceptance. The Panel considered that the nature of the net benefit offered (in most cases, several times the likely fair value for 2005 30 cent Options) was sufficient to induce the 2005 30 cent Option Offerees to deal also with CaptiveVision in relation to their Skywest Shares, by accepting under the Bid.
57. In coming to this conclusion, the Panel took into account the manner in which the offers to acquire 2005 30 cent Options were made. The recorded conversations reviewed by the Panel showed, in several instances (but not all), that the prospect of a potential offer for options was raised by Mr Saw following discussions in which the relevant Skywest security holder expressed some reluctance or uncertainty to accept the Bid at the current offer price (at the time of most of the conversations reviewed, the price under the Bid was still 20 cents per share). This was also apparent from Mr Saw's statement, which indicated that after he told CaptiveVision's managing director, Mr Jeff Chatfield, that Savant considered the Bid price too low to sell its shares, Mr Saw was authorised to offer to acquire Savant's options. Mr Saw then advised Savant that the offer under the Bid could not be increased but that CaptiveVision would, as a separate transaction, be prepared to purchase Savant's options as well as their shares.
58. The Panel considered that presenting the option offers to Skywest security holders in such a manner maximised the likelihood that such an offer would also induce, and was likely intended by CaptiveVision to induce, those holders to accept the Bid.
59. The Panel considered that the offers regarding the 2005 30 cent Options were also likely to be seen as more attractive than offers for other Skywest securities, because unlike the 2006 20 cent Options, Skywest had not announced any intention to seek quotation of the 2005 30 cent Options following its Rights Issue and subsequent ASX listing.

### Declaration and Orders

60. The declaration and orders made by the Panel are set out in Annexure B. In general terms, the Panel has ordered that:
  - (a) all offers made by CaptiveVision during the Bid period to acquire 2005 30 cent Options be revoked;
  - (b) all contracts under which CaptiveVision has acquired 2005 30 cent Options during the Bid period are voided;
  - (c) all contracts arising from acceptances of the Bid by 2005 30 cent Option Offerees are voided, and that any relevant Skywest shares be re-vested in the 2005 30 cent Option Offerees and that those offerees return any consideration received to CaptiveVision, unless the relevant shareholder provided notice of its preference to have its acceptance affirmed;
  - (d) CaptiveVision not be entitled to participate in Skywest's Rights Issue in respect of any shares which are the subject of a void transaction;

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- (e) both CaptiveVision and Skywest take any further action necessary to give effect to the above orders including rectification of the share and option registers of Skywest;
- (f) Skywest notify in writing each of the 2005 30 cent Option Offerees of the Panel's decision and the orders made;
- (g) CaptiveVision must not enter into, or discuss, any relevant agreements in relation to, any offers to acquire or any tenders to sell 2005 30 cent Options, during the remainder of the Bid period and for a period of four months after the close of the Bid without the prior written approval of the Panel;
- (h) CaptiveVision extend the Bid, so that 2005 30 cent Option Offerees have sufficient time to consider whether or not to accept the Bid after receiving notification of the Panel's decision and the voiding of their acceptances under the Bid (assuming that they did not provide notice of their intention to affirm their original acceptance);
- (i) CaptiveVision, and its associates and agents, refrain from entering into any communications with Skywest security holders in relation to the Bid or offers for any other Skywest securities unless such communications are in writing; and
- (j) CaptiveVision pay Skywest's costs in the Proceedings (including the costs of PWC's advices).

#### First variation of orders

- 61. At the time that the Panel made its orders, it was recognised that there may be a potential difficulty in finalising a transaction where the accepting shareholder did not provide a notice affirming their acceptance of the Bid in relation to their Skywest shares, but at the same time failed to provide a cheque refunding any consideration they had received from CaptiveVision in respect of their acceptance. The Panel invited parties to seek a variation of the Panel's orders if those circumstances arose.
- 62. On 4 November, the Panel was advised that two shareholders to whom the Panel's orders related, Messrs Ron Guest and Godwin Cattle, had not provided either an affirmation notice or a cheque refunding the bid consideration within the timeframes prescribed in the Panel's orders.
- 63. On 5 November, CaptiveVision sought a variation of the Panel's orders with the effect that:
  - (a) both Messrs Guest and Cattle be given further time to provide either an affirmation notice or a cheque refunding the bid consideration; and
  - (b) if neither an affirmation notice nor a refunding cheque was provided within the extended timeframe, then in the interests of obtaining certainty the transactions arising from the acceptances be treated as valid.
- 64. The Panel was advised by Skywest that certainty was particularly important in the circumstances: the status of these transactions affected the number of new Skywest shares that CaptiveVision was entitled to subscribe for under the Rights Issue. At the time that CaptiveVision applied for the variation, Skywest was attempting to

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calculate the shortfall under its Rights Issue. This calculation was in turn affected by the final number of new shares applied for by CaptiveVision.

65. Skywest did not oppose the variation sought by CaptiveVision. The Panel made the variation of orders in the form set out in Annexure C.

#### **Voiding transactions rather than withdrawal right**

##### *2005 30 cent Options*

66. On the basis of the materials provided to the Panel, it appears that two of the 2005 30 cent Option Offerees, Rojex and Maranka, sold some or all of their Skywest shares into the Bid prior to receiving offers from CaptiveVision in respect of their options. However, for the reasons outlined above, the Panel was not satisfied that it had a clear and complete understanding of all communications made by CaptiveVision to Skywest security holders. For this reason, it could not be certain that CaptiveVision did not have any discussions with Rojex and Maranka regarding the possibility of acquiring options before those parties accepted the Bid. What the Panel could be certain of is that offers were made to those parties to acquire their options during the Bid period. In the circumstances, the Panel considered it appropriate to include those parties in its orders voiding contracts arising from 2005 30 cent Option Offerees accepting the Bid.

##### *Shares*

67. The Panel considered offering the 2005 30 cent Option Offerees and their associates withdrawal rights regarding any Bid acceptances, rather than having any contracts arising from such acceptances voided. However, in the Panel's view, any such acceptances were so tainted by the activities undertaken in apparent breach of section 623 that the appropriate course was to void those transactions. The Panel took the additional step of requiring CaptiveVision to extend its Bid, in order to ensure that any of the 2005 30 cent Option Offerees or their associates who still wished to accept the Bid were able to provide notification of their wish to affirm their previous acceptance or alternatively submit a new acceptance form.
68. Of the shareholders who had accepted the Bid and to whom the Panel's orders applied, all but Messrs Guest and Godwin Cattle provided notices affirming their previous acceptances.

##### *Associates*

69. The Panel considered that CaptiveVision's offers for 2005 30 cent Options at well in excess of fair value were made, by and large, only to persons who owned, or might be considered to be associated with persons who owned, significant parcels of Skywest shares. As discussed above, the Panel considered that these offers were inconsistent with the policy set out in section 602(c) and were likely to be in breach of section 623. To remedy the unacceptability of these offers, the Panel determined that transactions arising from acceptances of the Bid by not only the 2005 30 cent Option Offerees, but also their associates, should be voided.
70. After considering submissions from CaptiveVision and Skywest on the issue, the Panel decided that for the purposes of its orders, Mr Godwin Cattle and Fedas (the

company owned by his brother, Mr Miles Cattle) should be considered to have been associates of each other. As discussed above, Mr Miles Cattle was given authority on 3 October to act on behalf of Mr Godwin Cattle in relation to the sale of Mr Godwin Cattle's 1 million shares. In addition, CaptiveVision's evidence stated that Mr Saw dealt solely with Mr Miles Cattle in relation to the purchase of Mr Godwin Cattle's 1 million shares<sup>5</sup>.

71. In light of this, and despite arguments by CaptiveVision that the brothers should not be treated as associates (based largely on recordings of two conversations between Mr Miles Cattle and Mr Saw, one of which took place after the Application had been made by Skywest), the Panel was satisfied that CaptiveVision's offer for Mr Miles Cattle's 1.6 million 2005 30 cent Options was likely to (and possibly intended to) induce an acceptance in respect of Mr Godwin Cattle's 1 million Skywest shares. Therefore, in order to remedy the unacceptability inherent in the offer, the Panel decided that the transaction arising from Mr Godwin Cattle's acceptance of the Bid should be voided. Any prejudice to Mr Godwin Cattle arising from this decision was minimised by the fact that he was able to affirm his acceptance of the Bid in relation to his Skywest shares.
72. There was a similar issue as to whether Savant and Maranka should be considered associates of Mr Mark Niutta for the purpose of the Panel's decision, on the basis that Mr Niutta acted as broker for these entities. The conversations between Mr Niutta and Mr Saw gave a strong indication that Mr Saw was dealing with Mr Niutta with a view to securing acceptances of the Bid by Mr Niutta's clients and that Mr Niutta was in a position to make recommendations to his clients whether or not to accept the Bid. In this context, the Panel considered that the offer to Mr Niutta in relation to his 2005 30 cent Options (at 4 cents per option) was not an offer made independently of attempts to procure acceptances under the Bid by Mr Niutta's clients. On this basis, the Panel considered that any offer made to Mr Niutta by CaptiveVision in respect of his 2005 30 cent Options should be cancelled and revoked.

*Submissions from Fedas*

73. Subsequent to the Panel making its decision in the Proceeding, the Panel received a letter from Fedas (the company controlled by Mr Miles Cattle) advising that Fedas received no offer from CaptiveVision to purchase its 2005 30 cent Options, but rather that Fedas approached CaptiveVision and offered to sell its 2005 30 cent Options. Further, the letter indicated that Fedas' offer had been accepted by CaptiveVision, resulting in an enforceable contract between the parties.
74. The Panel advised Fedas that its letter was inconsistent with submissions received from CaptiveVision during the course of the Proceeding, which were supported by sworn statements and indicated that there were no existing contracts for the acquisition of 2005 30 cent Options. The Panel invited Fedas, as well as CaptiveVision and Skywest, to make submissions regarding the following issues:

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<sup>5</sup> This evidence was contested in Fedas' later submissions – see [79].

## Takeovers Panel

### Reasons for Decision – Skywest 04

- (a) whether there was an existing contract between Fedas and CaptiveVision for the sale of Fedas' 2005 30 cent Options, and whether any such contract had been effectively rescinded, prior to the Panel making its orders;
  - (b) whether there was any basis for the Panel to change its view regarding its inference that Fedas and Mr Godwin Cattle should be considered associates of each other; and
  - (c) if there was a contract between Fedas and CaptiveVision, would the Panel's orders unfairly prejudice Fedas.
75. Based on the submissions from Fedas and CaptiveVision, the Panel considered that there may have been an existing contract between Fedas and CaptiveVision for the sale of Fedas' 2005 30 cent Options at the time that the Panel made its orders on 27 October.
76. Fedas submitted that there was no evidence that either of Messrs Miles or Godwin Cattle was an associate of the other or that Mr Godwin Cattle was an associate of Fedas. Fedas' submissions made reference to the categories of association identified in subsection 12(2).
77. Whilst an association may have been required for there to have been a contravention of subsection 623(1), a contravention of that subsection (or any other provision of the Act) is not required for the Panel to find that a transaction constitutes unacceptable circumstances. In deciding whether or not circumstances are unacceptable, the Panel must have regard to, among other things, the purposes of Chapter 6 set out in section 602, including paragraph 602(c).
78. According to Mr Miles Cattle's deposition dated 7 December, he spoke with Mr Stefan Saw on 4 October and discussed two matters: he advised Mr Saw that his brother Mr Godwin Cattle was ready to sell his shares, and he offered to sell his own 2005 30 cent Options to CaptiveVision. Mr Miles Cattle maintained that the two transactions were completely separate. Mr Miles Cattle also acknowledged that he was given a written authority by Mr Godwin Cattle authorising Mr Miles Cattle to act on his brother's behalf to proceed with the sale of his brother's shares in Skywest. Mr Miles Cattle maintained that despite that authority he did not participate in negotiations regarding the sale of Mr Godwin Cattle's shares, although the Panel noted that a copy of the authority appears to have been provided to Mr Saw<sup>6</sup>.
79. Mr Miles Cattle's deposition states that he then attended the offices of Mr Saw on 7 October, at which time Mr Miles Cattle and Mr Saw executed a transfer form evidencing the agreement between Fedas and CaptiveVision for the sale of Fedas' options. After that transfer form had been signed evidencing the option agreement, Mr Saw had a telephone conversation with Mr Godwin Cattle to negotiate the sale of Mr Godwin Cattle's Skywest shares to CaptiveVision. Mr Miles Cattle's deposition indicated that he was present for this telephone conversation, although he stated that he took no part in the negotiation.
80. The Panel inferred from the circumstances described in Mr Miles Cattle's deposition, and the overall pattern and pricing variations of the transactions entered into by

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<sup>6</sup> The statement Mr Saw provided to the Panel annexed a copy of this authority.

## Takeovers Panel

### Reasons for Decision – Skywest 04

CaptiveVision in relation to Skywest shares and 2005 30 cent Options, that the sale of Mr Godwin Cattle's shares was less likely to have occurred if not for the agreement by CaptiveVision to purchase Fedas' 2005 30 cent Options at 2 cents per option. The Panel did not agree with Mr Miles Cattle's statement (or CaptiveVision's previous submissions) that the two transactions were entirely separate, and remained satisfied that CaptiveVision's offer for Mr Miles Cattle's 2005 30 cent Options was likely to (and possibly intended to) induce an acceptance in respect of Mr Godwin Cattle's Skywest shares.

81. Therefore, the Panel affirmed its decision that any agreement for the sale of Fedas' options to CaptiveVision should be voided pursuant to its orders on the basis that it was inconsistent with the policy behind paragraph 602(c).
82. The Panel did not consider that its orders unfairly prejudiced Fedas. Any existing contract between Fedas and CaptiveVision for the sale of Fedas' 2005 30 cent Options would be voided by the orders, meaning that Fedas would retain ownership of those 2005 30 cent Options and remain capable of selling those 2005 30 cent Options to another buyer.
83. To the extent that Fedas was unable to find a buyer willing to pay 2 cents per 2005 Option, the Panel considered that would support its conclusion that the price CaptiveVision was prepared to pay for the 2005 30 cent Options was above the fair value, and would not support any claim that Fedas had been unfairly prejudiced by the Panel's orders. Any potential excess price to be paid above fair value was precisely why the Panel was concerned about the transactions such as the one between Fedas and CaptiveVision.
84. Having noted Fedas' submissions regarding whether it or CaptiveVision had made the original offer in relation to the sale of the 2005 30 cent Options, the Panel decided to vary its orders to reflect that they applied to all contracts entered into by CaptiveVision during the offer period in respect 2005 30 cent Options, regardless of who had initiated the transaction. It does not matter whether such a contract arose due to an offer made by the bidder or an offer made by the optionholder: if the bidder's decision to accept the offer is likely to induce an acceptance under the bid, then the resulting contract is just as inconsistent with the policy of paragraph 602(c) as if the bidder had initiated the offer. This policy intention is reflected in the introductory words of subsection 623(1) that a bidder must not "*give, offer to give or agree to give a benefit*" in the relevant circumstances (emphasis added). The Panel made the variation of orders in the form set out in Annexure D.

#### **Voiding transactions rather than increasing Bid consideration**

85. The Panel considered Skywest's request for alternative orders that the consideration offered under the Bid for Skywest shares be increased by the amount of the collateral benefit offered to the 2005 30 cent Option Offerees (and therefore increased for all Skywest shares and shareholders). However, determining an amount by which CaptiveVision should be ordered to increase the consideration offered for each Skywest share was problematic given:

## Takeovers Panel

### Reasons for Decision – Skywest 04

- (a) the difficulties inherent in trying to pinpoint the fair value of the 2005 30 cent Options in order to calculate the exact amount of the collateral benefit offered in each case; and
  - (b) the fact that the amount of benefit per Skywest share depends on the price offered per option, the number of options held and the number of Skywest shares held by each Option Offeree.
86. Therefore, the Panel determined that the more appropriate means of remedying the unacceptable circumstances was to cancel the offending offers and void any transactions arising from or induced by, or likely to have been induced by, the offending offers.

#### **Voiding transactions rather than requiring a bid for all 2005 30 cent Options**

87. As another means of remedying the unacceptable circumstances arising from CaptiveVision's offers for 2005 30 cent Options, the Panel considered making orders requiring CaptiveVision to make a formal takeover bid for all the 2005 30 cent Options on issue. Such orders would have been made on the basis that the recipients of the offer be notified that the offer was entirely separate from, and could be accepted independently of, the Bid for Skywest shares.
88. In its submissions, CaptiveVision asserted that such orders would not be appropriate, as CaptiveVision would be prevented from exercising a significant proportion of the options under the Act, due to its present voting power in Skywest. The Panel found CaptiveVision's argument difficult to reconcile with its rationale for making the offers to the 2005 30 cent Option Offerees which it had given to the Panel in its earlier submissions, namely that it was concerned to minimise any impending dilution of its voting power by the issue of new Skywest securities under the Rights Issue or the exercise of convertible securities by other holders. In presenting this commercial rationale, CaptiveVision had acknowledged that it had known that it was subject to the same prohibitions under the Act against exercising those options as it would have been if it made a bid for all 2005 30 cent Options.
89. On balance, the Panel did not consider that an order requiring a bid for all 2005 30 cent Options would be appropriate in the circumstances, due to:
- (a) the difficulties inherent in determining the appropriate consideration to be offered by CaptiveVision under any such option bid (given the variation in consideration offered to the 2005 30 cent Option Offerees); and
  - (b) the fact that if such consideration still represented an over-value, then it was likely to also induce an acceptance under the Bid (notwithstanding that the offers would be, and would be held out to be, independent of one another) and that any Skywest shareholder who did not hold 2005 30 cent Options would not have an equal opportunity to participate in the benefits of that excess value offered above fair value for those 2005 30 cent Options.

#### **CaptiveVision required to communicate with Skywest shareholders in writing**

90. The Panel ordered that CaptiveVision only communicate with Skywest shareholders in writing for the remainder of the Bid period. The Panel considered that the evidence before it indicated that it could not be confident that CaptiveVision and its



## Takeovers Panel

### Reasons for Decision – Skywest 04

agents would comply with all of the relevant provisions of the Act and, if there are any future proceedings, that a future Panel will receive accurate and complete disclosure about the content of communications between CaptiveVision and Skywest shareholders. The Panel took this view in part because: CaptiveVision's agent made oral statements to Skywest shareholders that appeared reasonably likely to have breached section 623, CaptiveVision's agent appeared to consistently contravene the telephone taping requirements of the Act and CaptiveVision failed to exercise adequate control over its agent. Therefore, the Panel considered it important to minimise as much as possible any future oral communication of CaptiveVision with Skywest security holders, given the nature of the unacceptable circumstances.

91. In addition, to ensure that Skywest shareholders received the information required by the Panel, the Panel required Skywest to inform the 2005 30 cent Option Offerees of the Panel's decision, rather than CaptiveVision. The Panel reviewed the form of the notification prior to its dispatch to 2005 30 cent Option Offerees and their associates.

#### **No Dealing in 2005 30 cent Options until four months after the close of the CaptiveVision Bid**

92. The Panel was concerned by statements made by Mr Saw in his evidence that, in order to convince one Skywest shareholder that it could accept the CaptiveVision offer for its shares and also be paid for its options, he advised that CaptiveVision **would** deal in the options after the close of the Bid. The Panel was concerned that such statements about dealing in options after the Bid period represented an intentional attempt, at least on Mr Saw's behalf, to avoid the provisions of section 623. A restriction on dealing in 2005 30 cent Options ensured future compliance with the principles of section 602 that all Skywest shareholders have a reasonable and equal opportunity to benefit from CaptiveVision's proposals to acquire a substantial interest in Skywest. The period of four months was considered most suitable by analogy with the period chosen by the legislature in section 621. In that section, the legislature sets a period of four months to provide a period after which it may be commercially reasonable to believe that transactions prior to a takeover bid are not connected with a future takeover.

#### **Costs**

93. The Panel ordered that CaptiveVision pay Skywest's costs in the 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). Those costs included the costs incurred by Skywest in retaining PWC to provide its reports in relation to the value of the 2005 30 cent Options.
94. The Panel reviewed the Panel's Guidance Note 9 "Costs Orders" in considering Skywest's application for costs in proceedings at first instance. The Panel considered that the facts of the Proceeding warranted an order for costs at first instance, even though such orders are not common practice for the Panel. The facts before the Panel lead it to the view that CaptiveVision, through both its agent Mr Saw, and its senior officers on whose instructions Mr Saw was acting, appeared to have intentionally

## Takeovers Panel

### Reasons for Decision – Skywest 04

gone about a course of behaviour which predictably constituted unacceptable circumstances.

95. Despite having had four prior decisions of the Panel find fault or problem with circumstances brought about by CaptiveVision's actions, CaptiveVision proceeded on a course of action which the Panel considered even ordinary business people should have been able to see went against the principles of equality of opportunity under subsection 602(c) of the Act. CaptiveVision and its adviser Mr Saw cannot have been blind to the overvalue which CaptiveVision was offering for the 2005 30 cent Options. The Panel did not consider that the valuation material provided by CaptiveVision was sufficient to provide any retrospective justification for CaptiveVision's activity. CaptiveVision provided two reports regarding the valuation of the 2005 30 cent Options, discussed in more detail above. PKF valued the 2005 30 cent Options at 1.27 cents each, and the Panel believed the valuation prepared by Mr Sandt (who valued the 2005 30 cent Options at 5.11 cents) to be flawed in methodology and likely to have been prepared with the intention of serving CaptiveVision's interests in these Proceedings.
96. According to its submissions, CaptiveVision proceeded without taking external Australian legal advice about a very significant step in offering to acquire options from selected Skywest shareholders.
97. The evidence before the Panel left little scope for it to view CaptiveVision's actions as being other than reckless or deliberately in breach of the policy and the provisions of the takeovers chapter of the Corporations Act. On that basis, the costs orders made by the Panel were warranted.

#### Telephone Monitoring - Referral To ASIC

98. As is apparent from the order made requiring all future communications between CaptiveVision and Skywest security holders to be conducted by written correspondence only for the remainder of the offer period, the Panel was extremely concerned about the apparent breaches of section 648J (which requires all telephone conversations a bidder initiates, or invites, with target shareholders about a bid to be recorded) referred to in Mr Saw's statement. Having listened to the recorded conversations provided, the Panel was also concerned that none of the target shareholders were notified by Mr Saw that the call was being recorded, which is required by section 648K. Mr Saw appeared to have breached the requirements of the Act with every conversation: some conversations he did not tape, and in those conversations which he did tape he appears to have failed to advise the other party that he was taping the conversations.
99. The Panel has referred these matters, and other aspects of conduct in the Proceeding, to ASIC for further investigation and, if appropriate, enforcement action.

**Braddon Jolley**

**President of the Sitting Panel**

**Decision dated 27 October 2004**

**Reasons published 24 December 2004**

**Annexure A - 2005 30 cent Option Offerees**

<b>2005 Option Offeree</b>	<b>Date of first contact</b>	<b>No. of 2005 30 cent Options</b>	<b>Consideration offered</b>	<b>No. of Shares held</b>
Savant Pty Ltd	April-May 2004	833,333	\$133,000 (or 16c per option)	1,666,667
Savant Pty Ltd as Trustee for Gray Family Super Account	April-May 2004	833,333	\$133,000 (or 16c per option)	1,666,667
Fedas Pty Ltd	June 2004	1,666,667	2c per option	10 (see [19]-[20])
Rojex Mining Services Pty Ltd	6-13 October 2004	104,166	2c per option	Nil (see [21])
Maranka Pty Ltd	September-October 2004	291,667	2c per option	583,333
Tabland Pty Ltd	September 2004	104,167	4c per option	208,334
Ron Guest	September 2004	208,333	4c per option	416,667
FHC Wilson Pty Ltd	No direct contact	125,000	4c per option	250,000
Mark Niutta Family Account	March 2004	375,000	4c per option	Nil (see [22])
		<b>TOTAL: 4,541,666</b>		

## Annexure B - Declaration & Orders

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

In the matter of SKYWEST LIMITED 04:

WHEREAS:

- A. CaptiveVision Capital Ltd (**CaptiveVision**) (a company incorporated in Singapore) 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. in addition to Skywest Shares, Skywest's issued securities include options over unissued Skywest Shares which are exercisable at 30 cents and expire on 30 June 2005 (**2005 Options**);
- C. during the Bid, CaptiveVision made offers (the **2005 Option Offers**) to acquire 2005 Options from each of the persons listed in Schedule A (the **2005 Option Offerees**); and
- D. the consideration offered by CaptiveVision in relation to the 2005 Option Offers was a net benefit which was likely to induce the 2005 Option Offerees, or their associates, to accept an offer under the Bid in respect of Skywest Shares held by them;

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) CaptiveVision must extend the offer period under the Bid until at least 15 November 2004;
  - (b) All outstanding and unaccepted 2005 Option Offers are cancelled and revoked, if such offers have not already been effectively revoked as at the date of these orders;
  - (c) All transactions arising from 2005 Option Offers are void and of no effect and without any need for a transfer, the legal title to and beneficial ownership in the relevant 2005 Options re-vest in the relevant 2005 Option Offeree, and to give

## Takeovers Panel

### Reasons for Decision – Skywest 04

effect to this order;

- (i) Each 2005 Option Offeree who has received consideration from CaptiveVision for the sale of its 2005 Options must send CaptiveVision a cheque for the amount of the consideration received not later than 5 business days after receiving notice of these Orders and CaptiveVision must immediately notify Skywest once this cheque has been received;
  - (ii) Skywest must register a transmission of the relevant 2005 Options to the relevant 2005 Option Offeree within 1 business day of receiving notification from CaptiveVision of the receipt of the cheque in accordance with subparagraph (i);
- (d) subject to paragraph (e) below, all acceptances and purported acceptances of the Bid by each 2005 Option Offeree or its associates (together the **Accepting Offerees**) are void and of no effect and without any need for a transfer, the legal title to and beneficial ownership in the relevant Skywest Shares re-vest in the relevant Accepting Offeree, and to give effect to this order;
- (i) Each Accepting Offeree who has received consideration from CaptiveVision for the sale of its Skywest Shares under the Bid must send CaptiveVision a cheque for the amount of the consideration received not later than 5 business days after receiving notice of these Orders and CaptiveVision must immediately notify Skywest once this cheque has been received;
  - (ii) Skywest must register a transmission of the relevant Skywest Shares to the relevant Accepting Offeree within 1 business day of receiving notification from CaptiveVision of the receipt of the cheque in accordance with subparagraph (i);
- (e) an acceptance or purported acceptance of the Bid by an Accepting Offeree is not void, or voided, by these orders (and paragraph (d) above does not apply) if, by no later than 5 business days after notice of these orders is received by the 2005 Option Offerees in accordance with Order (f) (**Last Affirmation Date**), the Accepting Offeree affirms in writing, by a signed and dated instrument, that the Accepting Offeree does not wish their acceptance or purported acceptance to be voided by these Orders, and the Accepting Offeree gives that instrument of affirmation to Skywest within 2 business days of making it. Skywest must notify CaptiveVision within one business day of the receipt of such an affirmation. CaptiveVision need not give a notice under section 654C, in respect of its voting power in Skywest during the period from the date of these orders until the Last Affirmation Date, until two business days after the end of that period;

## Takeovers Panel

### Reasons for Decision – Skywest 04

- (f) CaptiveVision must not participate in the rights offer set out in Skywest's prospectus dated 30 September 2004 (**Rights Issue**) in respect of any Skywest Shares which are the subject of a voided acceptance in accordance with Order (d) above. To give effect to this order, Skywest must not process any application by CaptiveVision under the Rights Issue in respect of such Skywest Shares unless and until Skywest receives a notice of affirmation in respect of those Skywest Shares in accordance with Order (e) above.
- (g) Skywest must, on or before 29 October 2004, send each 2005 Option Offeree written notification advising of the Panel's decision and informing them of the manner in which these Orders effect each of them. Skywest must submit a draft of this notification to the Panel for approval no less than 2 days prior to its intended dispatch date. Each notification must attach a copy of the Panel's media release dated 27 October 2004 regarding its decision;
- (h) CaptiveVision must not enter into, or discuss, any relevant agreements, making any offers or accepting any tenders in relation to 2005 Options, during the remainder of the Bid period and for a period of four months after the close of the Bid without the prior written approval of the Panel;
- (i) CaptiveVision refrain from entering into any communications regarding the Bid or offers for any other Skywest securities with persons who hold Skywest securities unless such communications are in writing;
- (j) CaptiveVision must:
  - (i) pay the reasonable costs and expenses of Skywest arising out of, or connected with, these proceedings as agreed between CaptiveVision 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 PricewaterhouseCoopers in relation to these proceedings to provide advice on the value of options issued by Skywest with an exercise price of \$0.30 and expire on 30 June 2005, using the following procedure:
    - (A) Skywest must provide CaptiveVision with an itemised bill of costs in relation to this proceeding;
    - (B) if CaptiveVision 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 CaptiveVision in respect of Skywest;

## Takeovers Panel

### Reasons for Decision – Skywest 04

- (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 CaptiveVision; and
  - (E) CaptiveVision 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. the sitting Panel 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 the operation of Order 1 or any part of Order 1.
3. in these Orders, the term “**associate**”, when used in reference to the 2005 Option Offeree named Fedas Pty Ltd, includes Mr Godwin Cattle.

#### SCHEDULE A

- (1) Savant Pty Ltd
- (2) Savant Pty Ltd as Trustee for Gray Family Super Account
- (3) Fedas Pty Ltd
- (4) Rojex Mining Services Pty Ltd
- (5) Maranka Pty Ltd
- (6) Tabland Pty Ltd
- (7) Ron Guest
- (8) FHC Wilson Pty Ltd
- (9) Mark Niutta Family Account

Braddon Jolley  
**President of the sitting Panel**  
Dated 27 October 2004

**Annexure C – Variation of Final Orders**

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

**In the matter of Skywest Limited 04**

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 27 October 2004, the Takeovers Panel HEREBY ORDERS that the orders (the **Orders**) made by the President of the Sitting Panel on 27 October 2004 in the matter of Skywest Limited 04 be varied in accordance with the following:

Insert the following additional Orders after paragraph (d):

- (da) *Notwithstanding anything in Order (d) above, the acceptance of the Bid by Mr Godwin Cattle (**Mr Cattle**) in relation to 1,000,000 Skywest Shares (**Cattle Acceptance**) is not void, or voided by these orders unless CaptiveVision receives a cheque for the full amount of the consideration paid to Mr Cattle in respect of the Cattle Acceptance by no later than 5.00pm (Western Standard Time) on Wednesday, 10 November 2004 (**Final Repayment Time**) and to give effect to this order;*
- (i) *the cheque is to be sent to CaptiveVision at the following address:*
- CaptiveVision Capital Ltd  
c/- Marshall Michael Corporate Consultants  
Stefan Saw - Director  
Level 2  
76 Kings Park Rd  
Perth WA 6005,*
- (ii) *If the cheque is not received by CaptiveVision by the Final Repayment Time in accordance with this order (da), then Skywest must process any valid application by CaptiveVision under the Rights Issue in respect of any shares the subject of the Cattle Acceptance;*
- (iii) *If the cheque is received by the Final Repayment Time in accordance with this order (da), then:*
- (A) *CaptiveVision must immediately notify Skywest once this cheque has been received; and*
- (B) *Skywest must register a transmission of the relevant Skywest Shares to Mr Cattle within 1 business day of receiving notification from CaptiveVision of the receipt of the cheque in accordance with this order (da);*
- (db) *Notwithstanding anything in Order (d) above, the acceptance of the Bid by Mr Ron Guest (**Mr Guest**) in relation to 416,667 Skywest Shares (**Guest Acceptance**) is not void, or voided by these orders unless CaptiveVision receives a cheque for the full amount of the consideration paid to Mr Guest in respect of the Guest Acceptance by no later than 5.00pm (Western Standard Time) on Wednesday, 10 November 2004 (**Final Repayment Time**) and to give effect to this order;*



## Takeovers Panel

### Reasons for Decision – Skywest 04

- (i) *the cheque is to be sent to CaptiveVision at the following address:*
- CaptiveVision Capital Ltd  
c/- Marshall Michael Corporate Consultants  
Stefan Saw - Director  
Level 2  
76 Kings Park Rd  
Perth WA 6005,*
- (ii) *If the cheque is not received by CaptiveVision by the Final Repayment Time in accordance with this order (db), then Skywest must process any valid application by CaptiveVision under the Rights Issue in respect of any shares the subject of the Guest Acceptance;*
- (iii) *If the cheque is received by the Final Repayment Time in accordance with this order (db), then:*
- (A) *CaptiveVision must immediately notify Skywest once this cheque has been received; and*
- (B) *Skywest must register a transmission of the relevant Skywest Shares to Mr Guest within 1 business day of receiving notification from CaptiveVision of the receipt of the cheque in accordance with this order (db);*
- (dc) *CaptiveVision must, on or before Saturday 6 November 2004, send each of Mr Cattle and Mr Guest written notification (in a form approved by the Panel Executive) of orders (da) and (db) and informing them of the manner in which those orders affect each of them;*

Dated 5 November 2004

Braddon Jolley  
President of the Sitting Panel

**Annexure D – Further Variation of Final Orders**

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

**In the matter of Skywest Limited 04**

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 27 October 2004, the Takeovers Panel HEREBY ORDERS that the orders (the **Orders**) made by the President of the Sitting Panel on 27 October 2004 and varied on 5 November 2004 in the matter of Skywest Limited 04 be varied in accordance with the following:

Insert the following additional Orders after paragraph 1(c):

- (ca) *all contracts entered into by CaptiveVision to acquire 2005 Options during period from the commencement of the offer period until 27 October 2004 are void and of no effect and without any need for a transfer, the legal title to and beneficial ownership in the relevant 2005 Options re-vest in the relevant selling party, and parties to any such contract and Skywest must do all such ancillary acts necessary to give effect to this order;*

Dated 15 December 2004

Braddon Jolley  
President of the Sitting Panel