



**In the matter of Qantas Airways Limited
2007 ATP 01**

Catchwords:

Prominent statements – bidder’s experience in airline industry – bid consortium partners – bidder’s intentions – bidder’s investment in target – ability to sell down investment – information deficiencies – material information – supplementary bidder’s statement – non economic issues – despatch to shareholders – standing – media canvassing – confidentiality

Corporations Act 2001 (Cth): sections 602, 636, 657C

Panel Guidance Note 16, Panel Procedural Rule 12

Australian & International Pilots Association, Airline Partners Australia Limited, Qantas Airways Limited

These are the Panel’s reasons for declining to make a declaration of unacceptable circumstances in relation to an application by Australian & International Pilots Association dated 5 March 2007 in relation to the off-market takeover bid for Qantas Airways Limited by Airline Partners Australia Limited. The Panel decided not to make a declaration of unacceptable circumstances having received an undertaking by Airline Partners Australia to provide additional disclosure in the form of a supplementary bidder’s statement.

THE PROCEEDINGS

1. These reasons relate to an application (the **Application**) to the Panel from Australian & International Pilots Association (**AIPA**) on 5 March 2007 in relation to an off-market takeover bid by Airline Partners Australia Limited (**APA**) for all the shares in Qantas Airways Limited (**Qantas**). The Application was made under section 657C of the *Corporations Act 2001 (Cth)* (**Act**)¹.

SUMMARY

2. APA lodged its original bidder’s statement in relation to an off-market takeover offer for all of the ordinary shares in Qantas (**APA Offer**) with ASIC on 2 February 2007 (**APA Bidder’s Statement**) and lodged a third supplementary bidder’ statement on 2 March 2007 (**Third Supplementary Bidder’s Statement**).
3. AIPA applied for a declaration of unacceptable circumstances and final orders on the basis that the APA Bidder’s Statement, read together with the Third Supplementary Bidder’s Statement, contained deficient and misleading disclosure about:
 - (a) the experience in the airline industry of one of the members of the APA consortium, Texas Pacific Group² (**TPG**); and
 - (b) the future of TPG’s investments in Qantas.

¹ Unless otherwise specified, statutory references are to provisions of the *Corporations Act (2001) Cth*.

² Texas Pacific Group is defined in the APA Bidder's Statement to consist of TPG Partners V, L.P. and Newbridge Asia IV, L.P. However, AIPA also submitted that investments in Continental Airlines were actually made before TPG was formed, by Airline Partners LP, an entity which shares some of the senior management and investors with TPG.

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4. AIPA submitted that statements in, and omissions from, the APA Bidder's Statement in relation to the airline industry experience of TPG, the committed nature of TPG's investment in the other airlines and the future of TPG's investment in APA (and thence Qantas) was misleading and deceptive such as to cause unacceptable circumstances to arise.
5. The Panel considered that the statements in the APA Bidder's Statement concerning:
 - (a) the timing of TPG's investments and exit from those investments in three international airlines;
 - (b) the relative size of the three airlines now compared to the time of TPG's original investments; and
 - (c) the size of TPG's investments in those airlines,were likely to mislead Qantas shareholders without additional disclosure, particularly given the prominence of those statements in the APA Bidder's Statement.
6. The Panel also considered that the statements in the APA Bidder's Statement concerning the "responsible and committed ownership" of Qantas in circumstances where:
 - (a) it did not disclose that TPG had sold out of most of its investment in the three airlines; and
 - (b) APA had no commitment from TPG to remain in the consortium while the consortium owns or controls Qantas, and there was no clear qualification in the APA Bidder's Statement that TPG retained the ability to sell down its entire investment in APA at any time from completion of the APA Offer,were likely to mislead Qantas shareholders without additional disclosure, particularly given the prominence of those statements in the APA Bidder's Statement.
7. The Panel did not consider that the Third Supplementary Bidder's Statement adequately addressed any of its concerns with the APA Bidder's Statement.
8. APA agreed to despatch to Qantas shareholders a further supplementary bidder's statement based on a form of wording agreed by the parties to address the issues on which the Panel had concerns.
9. Having regard to the further disclosures APA agreed to provide, the Panel decided not to make a declaration of unacceptable circumstances in relation to the Application.

THE PANEL & PROCESS

10. The President of the Panel appointed Ian Ramsay (sitting Deputy President), Jennifer Seabrook and Nerolie Withnall (sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
11. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

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12. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

APPLICATION

Background

13. The APA consortium consists of a number of parties, including TPG, Allco Finance Group Limited, Onex Partners II LP and Macquarie Bank Limited.
14. AIPA is an organisation of pilots employed by Qantas and its subsidiaries. AIPA submitted that its members are very likely to be adversely affected by the APA takeover of Qantas because if APA acquired Qantas AIPA's members would face increased pressure on their wages and conditions. AIPA submitted that in those circumstances, AIPA and its members had significant interest in preventing misleading and deceptive statements in, and material omissions from, the APA Bidder's Statement which were likely to make the APA Offer more attractive to Qantas shareholders than would otherwise be the case if the alleged unacceptable circumstances had not occurred.
15. APA lodged the APA Bidder's Statement with ASIC on 2 February 2007. On 2 March 2007, before AIPA lodged the Application with the Panel, APA issued the Third Supplementary Bidder's Statement which provided some further information in relation to the history of TPG's investment in Continental Airlines, America West Airlines and Ryanair (**TPG Investment Airlines**).
16. AIPA submitted that statements in, and omissions from, the APA Bidder's Statement in relation to the airline industry experience of TPG, the committed nature of TPG's investment in the TPG Investment Airlines and the future of TPG's investment in APA, and thence Qantas, were misleading and deceptive such as to cause unacceptable circumstances to arise.
17. AIPA submitted that the further disclosure APA made in the Third Supplementary Bidder's Statement did not adequately address the alleged deficiencies in the APA Bidder's Statement.

Declaration and orders sought in the Application

18. Under section 657A, AIPA sought a declaration of unacceptable circumstances in relation to the deficiencies it identified in the APA Bidder's Statement and final orders under section 657D that, in summary:
 - (a) APA not purchase any further shares in Qantas; or
 - (b) APA not purchase any further shares in Qantas until it:
 - (i) communicated to Qantas shareholders that the APA Bidder's Statement contained deficient disclosure;
 - (ii) provided to Qantas shareholders a revised bidder's statement correcting the deficient disclosure; and
 - (iii) engaged in corrective advertising identifying the alleged deficient disclosure.

DISCUSSION

Statements concerning TPG's experience

19. AIPA submitted that the APA Bidder's Statement placed considerable emphasis on the aviation experience of the participants in the APA consortium. AIPA submitted that the information provided about TPG in the APA Bidder's Statement was important to assess APA as a whole because TPG was the only participant who was said to have previous experience in operating airlines³.
20. AIPA submitted that the information provided in the APA Bidder's Statement about TPG conveyed the impression that TPG :
 - (a) had acquired full ownership of two of the TPG Investment Airlines; and
 - (b) presided over the growth of the TPG Investment Airlines to their current positions of strength.
21. To support its argument, AIPA referred to a number of statements in the APA Bidder's Statement that compared the position of the TPG Investment Airlines when TPG first invested in those airlines with the position of those airlines "now" or "today" (**TPG Experience Statements**).
22. AIPA also referred to statements that appeared to imply that TPG had acquired Continental and America West.
23. AIPA submitted that the APA Bidder's Statement omitted information relating to the time at which, and the extent to which, TPG sold its shareholdings or parts of its shareholdings in the TPG Investment Airlines.
24. AIPA submitted that the TPG Experience Statements were misleading because whilst they might be literally true, the context in which they appeared suggested that TPG had been responsible for the position of the TPG Investment Airlines "today", and that TPG had presided over their growth to their current position of strength. This was particularly so because APA had chosen to present the TPG Experience Statements in a prominent manner in the APA Bidder's Statement.
25. APA rejected the proposition that the TPG Experience Statements were misleading. APA submitted that there was no discrepancy between the facts and the positive statements in the APA Bidder's Statement concerning TPG's aviation industry experience.
26. APA made submissions in relation to the history of TPG's investments in each of the TPG Investment Airlines, noting that:
 - (a) the period between the TPG group's initial investment and the initial sell-down of its investment ranged from 11 months to more than 3 years;
 - (b) the period between the TPG group's initial investment and the final sell-down of its investment ranged from more than 4 years to more than 11 years; and

³ AIPA submitted that in the APA Bidder's Statement, Allco Finance and Macquarie are said to have experience in aircraft leasing and Onex Partners is said to have experience in the supply of assemblies and components and catering.

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- (c) the period between the TPG group's initial investment and the time at which persons who were also executives of TPG ceased to sit on the boards of the TPG Investment Airlines ranged from more than 7 years to 12 years.
27. The Panel considered that the statements in the APA Bidder's Statement concerning:
- (a) the timing of TPG's investments and exit from those investments in the TPG Investment Airlines;
 - (b) the relative size of the three airlines now compared to the time of TPG's original investments; and
 - (c) the size of TPG's investment in Continental and America West,
- were likely to mislead Qantas shareholders without additional disclosure, particularly given the prominence of those statements in the APA Bidder's Statement.
28. The Panel considered that the prominence given by APA to statements in the APA Bidder's Statement about the consortium's substantial aviation experience meant that the TPG Experience Statements should not be misleading.

Statements about APA's committed investment in Qantas

29. AIPA submitted that a number of statements in the APA Bidder's Statement and other documents relating to the APA Offer which described APA as being a "responsible and committed" owner, and that APA represented "patient capital", were misleading and deceptive. AIPA submitted that these statements as to the intention of APA were given credibility by the information in the APA Bidder's Statement as to the track record of TPG's ownership of the TPG Investment Airlines.
30. AIPA submitted that these statements, and the sections of the APA Bidder's Statement which related to TPG's investment history in the airline industry, were likely to mislead Qantas shareholders as to the committed nature of TPG's investments in the TPG Investment Airlines and the future of TPG's investment in APA and thence Qantas.
31. AIPA also submitted that the APA Bidder's Statement failed to disclose that there is no restriction on the ability of TPG to sell out of APA or sell down its interests in APA. AIPA submitted that this information was important to the assessment by Qantas shareholders as to whether APA is likely to provide "committed ownership" of Qantas. AIPA submitted that this was necessary because of TPG's pattern of disposal of its investments in the TPG Investment Airlines.
32. APA submitted that there was nothing misleading in the APA Bidder's Statement or the Third Supplementary Bidder's Statement. APA submitted that:
- (a) the disclosure of TPG's ability to sell down in certain circumstances had been made at section 5.4.5 in the APA Bidder's Statement;
 - (b) the fact that TPG had disposed of its investments in the TPG Investment Airlines had been disclosed in the Third Supplementary Bidder's Statement; and
 - (c) TPG had no intention as to when it would sell down its investment in APA.

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33. The Panel considered that the statements in the APA Bidder's Statement concerning APA's "responsible and committed ownership" of Qantas in circumstances where it did not disclose that TPG had sold out of most of its investment in the TPG Investment Airlines were likely to mislead Qantas shareholders without additional disclosure, particularly given the prominence of those statements in the APA Bidder's Statement.
34. The Panel considered that the prominence given by APA to the statements about the intended "responsible and committed ownership" of Qantas, meant that the information about TPG's investment in the TPG Investment Airlines should not be misleading.
35. The Panel was also concerned that if the APA ownership consortium had no commitment from TPG to remain in the consortium while the consortium owns or controls Qantas, reference to TPG's experience in the airline industry had the potential to mislead Qantas shareholders as to the future ownership of Qantas unless it was clearly qualified by disclosure that TPG retains the ability to sell down its entire investment in APA at any time from completion of the APA Offer.

Agreed further disclosures on experience and committed investments

36. The Panel asked the parties to seek to agree to a form of disclosure which would provide a better view of TPG's investments in the TPG Investment Airlines as well as to clarify statements about APA's committed investment in Qantas. The Panel was particularly pleased by the cooperative manner in which the factual issues were resolved by APA and AIPA. The parties prepared a form of wording to address the issues raised by AIPA with which the Panel had concerns. The Panel advised the parties that it was prepared to accept the facts agreed between APA and AIPA in the proposed wording as being an adequate description of TPG's airline experience.

Ability to sell down

37. The Panel considered that the disclosure in section 5.4.5 of the APA Bidder's Statement referred to by APA, related solely to the ability of consortium members to sell their rights and obligations to provide "Investor Group Funding" (as defined in the APA Bidder's Statement), during the period prior to the "Subscription Date". The disclosure also only referred to consortium members' rights to sell their funding obligations to certain affiliates.
38. APA agreed to make additional disclosure to clarify TPG's track record of investment in the TPG Investment Airlines. APA also agreed to make additional disclosure concerning:
 - (a) the ability of TPG to sell down its investment in APA once the APA Offer is successful; and
 - (b) TPG's current intentions as to its investment in the APA consortium.

The Panel considered that APA's additional disclosures adequately addressed its concerns on these issues.

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Non economic issues

39. An issue raised within the Proceedings was whether AIPA's complaints concerning the APA Bidder's Statement, which did not relate to the value being offered under the APA Offer, were relevant or material to Qantas shareholders' decisions as to whether or not to accept the APA Offer, especially given that the APA Offer was a cash offer.
40. AIPA submitted that the fact that APA had decided to address, in a prominent and persuasive manner, a range of non-economic considerations in the APA Bidder's Statement was a good indication that these considerations were likely to be relevant and material to Qantas shareholders. AIPA submitted that many of the issues raised by APA were given great prominence in the APA Bidder's Statement and appeared in the "marketing" section at the front of the APA Bidder's Statement.
41. Further, AIPA submitted that the fact that some non-economic considerations at least, are likely to be relevant to the consideration by a shareholder as to whether to sell accept into a takeover bid has been recognised by the legislature in section 636(1)(c) of the Act. This provision requires a bidder's statement to detail the bidder's intentions with regard to the continuation of the business of the target, any major changes to be made to the business of the target, and the future employment of the present employees of the target.⁴
42. APA accepted that it is possible that target shareholders may be influenced by non-economic considerations in the context of a full cash bid. However, APA submitted that the level of disclosure required in relation to such non-economic considerations needs to be commensurate to their likely relative significance. APA submitted that a bidder is not required under the Act to include in its bidder's statement all information known to it on a non-economic matter which might influence some target shareholders.
43. The Panel considered that it did not need to decide this issue, nor whether the issues were, would be, or may be, material to Qantas shareholders' decisions. The Panel considered that the prominence given by APA to the issues of airline experience and the committed nature of its investment meant that the TPG Experience Statements and statements about APA's intentions in the APA Bidder's Statement should not be misleading.
44. Therefore, the Panel did not need to address whether the information originally was or was not required to be disclosed by APA. Once disclosed, and once it was given the prominence chosen by APA, the Panel considered APA had an obligation to ensure the disclosure was correct and not misleading.
45. In any event, the Panel notes that in circumstances where APA has expressly reserved its right to waive the 90% minimum acceptance condition in the APA Bidder's Statement, any shareholders who may remain in Qantas after the APA Offer is closed may, in fact, have an economic interest in APA's experience in the airline

⁴ See also *Gantry Acquisition Corp v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 123 ALR 29 at 40 (Burchett J).

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industry and its commitment to investing in Qantas. However, as noted above, the Panel decided that it did not need to determine this issue.

Third Supplementary Bidder's Statement

46. The Third Supplementary Bidder's Statement refers to statements in the APA Bidder's Statement about the experience of the TPG in improving and growing airlines in which it has invested, including Continental Airlines, America West Airlines and Ryanair. It states:

"The Bidder's Statement, in several instances, refers to the experience of the TPG Group in improving and growing airlines in which it has invested, including Continental Airlines, America West Airlines and Ryanair.

Qantas shareholders should note that, after playing a significant role in those airlines, the TPG Group does not today retain any remaining investment interest in them (although some individuals associated with the TPG Group may retain personal investments in, or directorships of, them)."

47. APA submitted that the disclosure in the APA Bidder's Statement was not misleading and therefore, the disclosure in the Third Supplementary Bidder's Statement was not required. APA also submitted that the disclosure in the Third Supplementary Bidder's Statement was made, before the Application was made to the Panel, at a time when the only indications of AIPA's complaints that APA submitted it had become aware of were through media outlets and were accompanied by reports that AIPA would commence Panel proceedings. APA submitted that it had felt it may avert those proceedings if it voluntarily addressed what it understood to underlie AIPA's complaints.
48. The Third Supplementary Bidder's Statement commenced with advice about an announcement by the ACCC that it would not intervene in the proposed APA acquisition of Qantas. The Third Supplementary Bidder's Statement also attached two media releases by the ACCC and APA concerning the ACCC announcement. The Third Supplementary Bidder's Statement was not sent to Qantas shareholders.
49. The Panel did not consider that the Third Supplementary Bidder's Statement adequately addressed its concerns about statements in the APA Bidder's Statement regarding TPG's experience and APA's committed investment in Qantas.

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Despatch to Qantas shareholders

50. The Panel's Guidance Note 16 at paragraph 32 states:

"Where the target is listed, section 647 requires only that a copy of the supplementary statements be given to the other party, ASIC and the relevant stock exchange. It does not require that copies be sent to shareholders. In the Panel's view, where there are significant information defects the unacceptability caused by those defects may only be remedied where the correction is provided directly to the target shareholders (as the people most directly affected) by sending the supplementary statement to them. This will frequently be the case where the defect was in a document which was itself sent to shareholders, but may also arise in relation to any takeover-related document. The Panel does not assume that market mechanisms and the press can always be relied on to transmit all the relevant information to shareholders in a timely fashion."

51. APA submitted that it was not appropriate or warranted for the further supplementary bidder's statement agreed to be provided by APA to be required to be mailed to all Qantas shareholders. APA submitted that the statements in the APA Bidder's Statement, with which the Panel had concerns, did not represent significant information defects and were not so material as to warrant despatch to Qantas shareholders.

52. The Panel considered that the prominence given by APA to statements in the APA Bidder's Statement about the consortium's substantial aviation experience and the committed ownership of Qantas, and the misleading impression that those statements were likely to have caused in the minds of Qantas shareholders, meant that further supplementary disclosures agreed to be provided by APA to address the Panel's concerns should be mailed to Qantas shareholders to negate any misleading impression that may have been formed.

Standing

53. Under section 657C(2) of the Act, an application for a declaration of unacceptable circumstances or Panel orders may be made by the bidder, the target, ASIC or "any other person whose interests are affected by the relevant circumstances".

54. The question of whether AIPA was a person whose interests were affected in circumstances where the APA Bidder's Statement contained alleged deficiencies, and therefore had standing to make the Application, was briefly raised in the Proceedings. The Panel considered the submissions, and conducted a review of some of the case law in the area. The Panel adopted a preliminary decision that there were reasonable arguments that AIPA was a person whose interests were affected by the relevant circumstances and therefore had standing to make an application. The Panel advised the parties that it proposed to proceed on that basis but invited the parties to make submissions on the issue, if they wished.

55. The parties advised that they did not make wish to make submissions on the issue of standing. For its part, APA volunteered instead to make additional disclosures as the Panel considered appropriate in order to address its concerns rather than take issue with the Panel's preliminary decision (however, APA indicated that it did not concede that AIPA had standing).

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56. Given the particular circumstances which occurred during these Proceedings, the decision of the Panel in this matter in respect of the issue of standing is unlikely to set a material precedent in future applications before the Panel.

Media canvassing and possible breach of confidentiality undertaking

57. The Panel was concerned with the publication of a newspaper article during the course of the Panel's consideration of the Application. The article indicated that the newspaper had obtained a copy of the Application and contained the following details which had only appeared in confidential communications between the parties and the Panel:
- (a) specific allegations raised in the Application; and
 - (b) the orders sought by AIPA in the Application.
58. The Panel was concerned that the article appeared likely to be the result of one or more of the parties, their representatives or advisers breaching the enforceable undertaking which each had given to the Panel under section 201A of the *Australian Securities and Investments Act 2001* (Cth). The Panel considered that for any of the parties to provide a copy of the Application to the media would involve a breach of the undertaking.
59. Each party to the Proceedings provided to the Panel a statutory declaration confirming that it had not breached its confidentiality undertaken given to the Panel.
60. The Panel considers leaks and media canvassing of any issues raised in an application to the Panel to be highly objectionable. The Panel believes that its ability to resolve disputes as quickly and efficiently as possible will be adversely affected if parties seek to use publicity to influence a decision or to influence shareholders during Panel proceedings. The Panel disapproves of any attempt by a party to use publicity to influence a decision of the Panel or detract from its authority. Further, the Panel considers that any such conduct would be in clear breach of the Panel's requirement that Panel proceedings remain confidential and in breach of express undertakings given on behalf of each party that they and their advisers would respect the Panel's rules in relation to confidentiality.
61. The Panel is disappointed that it appears likely that one or more of the parties, their representatives or advisers were, for their own short term gain, prepared to breach undertakings which are designed to allow Panel proceedings to be timely and informal, and for other parties to be frank and open within proceedings.

DECISION

62. In the light of the further disclosure which APA undertook to dispatch in a further supplementary bidder's statement to Qantas shareholders, the Panel considered that it was not against the public interest to decline to make a declaration of unacceptable circumstances.
63. On that basis, the Panel declined to make a declaration of unacceptable circumstances.
64. As the Panel did not make a declaration of unacceptable circumstances, it made no order for costs.

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Nerolie Withnall

President of the Sitting Panel

Decision dated 20 March 2007

Reasons published 18 April 2007