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Tuesday, 20 March 2007

### **Qantas Airways Limited - Panel Decision**

The Takeovers Panel advises that it has made a final decision in relation to the application from the Australian and International Pilots Association (**AIPA**), concerning an off-market, cash takeover bid for Qantas Airways Limited by Airline Partners Australia Limited (**APA**).

The Panel considered that there were a number of statements in, and omissions from, the APA bidder's statement dated 2 February 2007 (**APA Bidder's Statement**) which were sufficiently misleading to give rise to unacceptable circumstances. On the basis of an undertaking by APA to dispatch a supplementary bidder's statement to Qantas shareholders (**APA Supplementary Bidder's Statement**) which addresses the Panel's concerns, the Panel determined not to make a declaration of unacceptable circumstances.

#### **Prominence of statements concerning TPG's experience**

The primary issue before the Panel was the adequacy of statements in the APA Bidder's Statement concerning the airline industry experience of Texas Pacific Group<sup>1</sup> (**TPG**), one of the members of the APA consortium. AIPA submitted that APA had made prominent statements in the front section of the APA Bidder's Statement that the airline experience of TPG was a reason for Qantas shareholders to be able to accept the APA offer. AIPA also submitted that APA had made further misleading statements describing TPG's experience investing in three airlines (Continental Airlines, America West Airlines and Ryanair). APA disputed that there were any statements in the Bidder's Statement in relation to its airline industry experience which were misleading.

On the basis of submissions from AIPA, the Panel considered that APA's statements concerning:

- the timing of TPG's investments in the three international airlines;
- the relative size of the three airlines now compared to the time of TPG's original investments; and
- the size of TPG's investments in the airlines.

were likely to mislead Qantas shareholders without additional disclosure, particularly given the prominence of those statements in the APA Bidder's Statement.

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<sup>1</sup> TPG Partners V, L.P. and Newbridge Asia IV, L.P.

The Panel asked the parties to seek to agree a form of disclosure which would provide a better view of TPG's airline investments. 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 and 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.

### **Statements concerning APA's committed investment in Qantas**

AIPA also submitted that a number of statements in the APA Bidder's Statement and other documents relating to the APA takeover offer, described APA as being a "responsible and committed" owner, and that APA represented "Patient capital".. AIPA submitted that these and similar statements, and the sections of the APA Bidder's Statement which related to TPG's investment in the airline industry, were likely to mislead Qantas shareholders as to the committed nature of TPG's investments in the three airlines and the future of TPG's investment in Qantas.

The Panel, on the other hand, was 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 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. In response, APA agreed to make additional disclosure to clarify TPG's current intentions as to its investment in the APA consortium. The Panel considered that APA's additional disclosure adequately addressed its concerns on this issue.

### **Non economic issues**

An issue raised within the proceedings was whether the issues which AIPA complained of in the APA Bidder's Statement did not relate to the value being offered under the APA takeover, especially given that the APA offer was for cash, and were therefore not relevant to Qantas shareholders' decisions whether or not to accept the APA offer. 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 committed investments, meant that the statements that APA made concerning TPG's experience in the airline industry, and information about its intentions, should not be misleading. 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 that APA chose, the Panel considered APA had a material obligation to ensure the disclosure was correct and not misleading.

### **Third supplementary bidder's statement**

On Friday 2 March 2007, before AIPA made its application, APA issued a third supplementary bidder's statement. APA submitted that the third supplementary bidder's statement adequately addressed the issues raised by AIPA. The Panel did

not consider that the third supplementary bidder's statement adequately addressed any of AIPA's complaints.

### **Standing**

The issue of whether or not AIPA was a person whose interests were affected by the circumstances of the APA Bidder's Statement, and therefore had standing to make the application, was briefly raised in the proceedings. The Panel adopted a preliminary decision that AIPA could be a person affected by the relevant circumstances and advised the parties that it proposed to proceed on that basis. However, the issue was not argued fully before the Panel. Therefore, the decision is unlikely to stand as any material precedent on this issue in future applications before the Panel.

### **Process**

The Panel will publish its reasons for its decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

The sitting Panel in these proceedings is Ian Ramsay, Jennifer Seabrook and Nerolie Withnall (sitting President).

Nigel Morris  
Director, Takeovers Panel  
Level 47, 80 Collins Street  
Melbourne, VIC 3000  
Ph: +61 3 9655 3501  
[nigel.morris@takeovers.gov.au](mailto:nigel.morris@takeovers.gov.au)