

# Application to the Takeovers Panel

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<b>Date:</b>	22 November 2013
<b>Applicant:</b>	Stephen Mayne (Virgin Australia shareholder since at least 2008 demerger from Toll)
<b>In relation to the Affairs of:</b>	Virgin Australia Holdings Limited ACN 100 686 226 ( <b>VAH</b> )
<b>Other parties:</b>	Each of the following:  (a) Singapore Airlines Ltd ( <b>Singapore Airlines</b> );  (b) Etihad Airways P.J.S.C. ( <b>Etihad</b> ); and  (c) Air New Zealand Associated Companies (Australia) Ltd ( <b>Air NZ</b> ),  together, the <b>Benefited Group</b> .

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## 1. Overview of Application

<b>Aspect</b>	<b>Summary</b>
<b>Decision sought</b>	A declaration of unacceptable circumstances.
<b>Declaration basis</b>	Sections 657A(2)(a), 657A(2)(b) and 657A(2)(c) of the <i>Corporations Act 2001</i> (Cth) ( <b>Corporations Act</b> ).
<b>Circumstances</b>	<p>The circumstances outlined below have arisen in relation to the capital raising by VAH of approximately A\$350 million by way of a 5 for 14 fully underwritten, accelerated, non-renounceable entitlement offer at an offer price of \$0.38 per VAH share announced on 14 November 2013 (<b>Rights Issue</b>).</p> <p>On the basis of the information contained in VAH's and Air NZ's announcements regarding the Rights Issue (copies of which are enclosed as Annexures 1, 2, 3, 4 and 5):</p> <p>(a) the Rights Issue comprises an accelerated institutional component, which completed on 15 November 2013 (see Annexure 5) (<b>Institutional Offer</b>) and a retail component (<b>Retail Offer</b>);</p> <p>(b) under both the Institutional Offer and the Retail Offer, eligible VAH shareholders are entitled to subscribe for 5 new VAH shares for every 14 existing VAH shares held by the relevant shareholder on the record date of 7.00pm AEST on 19 November 2013 (<b>Pro-Rata Entitlement</b>);</p> <p>(c) the offer price discount for VAH shares offered under the Rights Issue is 5% to the pre-announcement share price (\$0.40) and</p>

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Aspect	Summary
	4.6% to the Theoretical Ex Rights Price;
(d)	under the Institutional Offer, eligible institutional shareholders were able to apply for additional VAH shares in excess of their Pro-Rata Entitlement to the extent that any VAH shares offered under the Institutional Offer were not taken up ( <b>Additional Institutional Shares</b> );
(e)	however applications for Additional Institutional Shares were subject to a cap of 40% of the applicant's Pro-Rata Entitlement, though there is no explanation provided as to why that cap was chosen or considered necessary; <sup>1</sup>
(f)	under the Retail Offer, which is scheduled to open on 25 November 2013, eligible shareholders will also be able to apply for additional VAH shares in excess of their Pro-Rata Entitlement to the extent that any VAH shares offered under the Retail Offer are not taken up ( <b>Additional Retail Shares</b> );
(g)	however applications for Additional Retail Shares will also be subject to a cap of 40% of the applicant's Pro-Rata Entitlement, though there is no explanation provided as to why that cap was chosen or considered necessary;
(h)	both the Institutional Offer and the Retail Offer are "fully underwritten", that is, any VAH Shares not taken up in applications for Additional Institutional Shares and/or Additional Retail Shares may be issued to the underwriters. While the announcements made by VAH in relation to the Rights Issue disclose that UBS AG, Australia Branch ( <b>UBS</b> ) and Goldman Sachs Australia Pty Ltd ( <b>Goldman Sachs</b> ) are the underwriters of the Rights Issue, they contain no details of terms of the underwriting arrangements;
(i)	the Benefited Group have each taken up their full Pro-Rata Entitlements under the Institutional Offer (see Annexure 5);
(j)	in addition to taking up its full Pro-Rata Entitlement, Air NZ will also "sub-underwrite" the Rights Issue for up to \$35.2 million, which will give Air NZ up to a further 92.5 million VAH shares (equal to approximately 2.64% of VAH enlarged share capital following the Rights Issue), and will be paid a "fee of 0.75% of their total sub-underwriting commitment";
(k)	none of the announcements made by VAH or Air NZ in relation to the Rights Issue disclose the terms of the sub-underwriting arrangement between the underwriters and Air NZ apart from the fee payable;
(l)	no other sub-underwriters are identified in the announcements made by VAH in relation to the Rights Issue, nor does VAH disclose:

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<sup>1</sup> As is common in these circumstances, the Institutional Offer was strongly supported with a 98.4% take-up of available shares and negligible 'overs' available to be allocated.

Aspect	Summary
	<ul style="list-style-type: none"> <li>(i) the steps it took (if any) to canvass interest in sub-underwriting the Rights Issue by persons other than the Benefited Group; or</li> <li>(ii) the reasons that it regarded as compelling to allow Air NZ to sub-underwrite the Rights Issue and receive a fee for the privilege given to Air NZ of doing so;</li> </ul>
(m)	in addition to taking up their respective full Pro-Rata Entitlements, each of Singapore Airlines and Etihad have committed to increase their "economic exposure" to VAH via "cash settled derivatives";
(n)	Etihad's "economic exposure" to VAH via the cash settled derivative will increase by \$30.5 million, whilst Singapore Airlines' "economic exposure" to VAH via the cash settled derivative will increase by \$30.4 million;
(o)	in return for their "commitment", each of Etihad Airways and Singapore Airlines " <i>will be paid a fee of 0.75% of their ... total cash settled derivative commitment</i> ";
(p)	none of the announcements made by VAH in relation to the Rights Issue disclose the terms of the cash settled derivatives, or the identity of the writer of those derivatives;
(q)	VAH does not disclose: <ul style="list-style-type: none"> <li>(i) the steps it took (if any) to canvass interest in obtaining guaranteed allocations from those Entitlements not taken-up under the Rights Issue of "economic exposure" to VAH shares by persons other than the Benefited Group; or</li> <li>(ii) the reasons that it regarded as compelling to structure the Rights Issue to accommodate that "economic exposure" solely for Etihad and Singapore Airlines and to allow Etihad and Singapore Airlines to receive a fee for the privilege given to Etihad and Singapore Airlines of obtaining that economic exposure;</li> </ul>
(r)	whilst the derivatives that give Etihad and Singapore Airlines increased economic exposure to VAH are described as being "cash settled", the Virgin Australia Entitlement Offer Presentation enclosed at Annexure 3 notes that the derivatives are being used for the following reason: <p><i>"Etihad Airways and Singapore Airlines have committed to increase their economic exposure to Virgin Australia through the cash settled derivatives referred to above while they seek to obtain any necessary regulatory approvals, including the Foreign Investment Review Board, to increase their shareholding in Virgin Australia."</i></p>
(s)	the scale-back to achieve the 40% cap for allocations of Additional Institutional Shares was structured to provide for allocations " <i>via a cash settled derivative arrangement</i> ";

Aspect	Summary
	<p>(t) as a result of the sub-underwriting of the Rights Issue by Air NZ and the 'synthetic' sub-underwriting by Singapore Airlines and Etihad, each of the Benefited Group will potentially be issued VAH shares under the Institutional Offer, or obtain an "economic exposure" to VAH shares, in excess of the 40% cap that applies to all other VAH shareholders under the Institutional Offer;</p> <p>(u) the announcements made by VAH in relation to the Rights Issue specify that Air NZ's maximum relevant interest in VAH following completion of the Rights Issue will be 25.5%;</p> <p>(v) the announcements made by VAH in relation to the Rights Issue do not specify the maximum relevant interests in VAH of each of Singapore Airlines and Etihad following completion of the Rights Issue. The announcements merely disclose that their relevant interests in VAH will be "no less than" 19.9% and 19.8%, respectively, and their aggregate "exposure" to VAH will not exceed 22.1% and 22.2% respectively; and</p> <p>(w) the Virgin Australia Entitlement Offer Presentation enclosed at Annexure 3 notes that:</p> <p><i>"Virgin Australia has a strong shareholder base, comprising four large strategic partners who collectively own approximately 73% of issued share capital."</i></p>
<p><b>Effect of circumstances on control/ substantial interest/ 602 principles</b></p>	<p>The Rights Issue is unacceptable because it is structured (including as to price) in a way that potentially affects control of VAH, and appears to have the purpose, and certainly the effect, of concentrating the control of the Benefited Group at the expense of other VAH shareholders.</p> <p>These circumstances mean that:</p> <p>(a) the control, or potential control, of VAH is likely to be affected otherwise than in an efficient, competitive and informed market; and</p> <p>(b) VAH shareholders have been denied a reasonable and equal opportunity to participate in the benefits of the Rights Issue.</p>
<p><b>What (if any) contravention of chapters 6-6C?</b></p>	<p>Applicant believes that Etihad may acquire a relevant interest in VAH shares as a result of the Rights Issue in excess of the 20% voting power threshold in section 606 of the Corporations Act in a manner not otherwise authorised by Chapter 6 of the Corporations Act.</p>
<p><b>Final orders sought</b></p>	<p>(a) An order that the terms of the Retail Offer be amended by VAH to contain a provision to the effect that eligible retail shareholders may apply for Additional Retail Shares in excess of their Pro Rata Entitlement without any limit, and that such applications may be scaled-back only if each of the following conditions is met:</p> <p>(i) the number of Additional Retail Shares applied for by eligible retail shareholders exceeds the number of shares not taken up by applications for Pro Rata Entitlements in the Retail Offer (<b>Retail Shortfall Shares</b>);</p>

Aspect	Summary
	<ul style="list-style-type: none"> <li>(ii) the applications are scaled-back reasonably and fairly having regard to: <ul style="list-style-type: none"> <li>(A) the number of Retail Shortfall Shares;</li> <li>(B) the number of eligible retail shareholders applying for Additional Retail Shares;</li> <li>(C) the number of shares held by each applicant for Additional Retail Shares; and</li> <li>(D) the number of Additional Retail Shares applied for by each applicant; and</li> </ul> </li> <li>(iii) the scaling back is applied as uniformly as possible to all applications.</li> </ul>
	<ul style="list-style-type: none"> <li>(b) An order that the scaling back policy applied pursuant to the order in paragraph (a), include provision that eligible retail shareholders who apply for Additional Retail Shares in excess of their Pro Rata Entitlement be guaranteed a minimum allocation of 37,500 Retail Shortfall Shares (\$15,000), should they apply for that number, or a higher number, of Retail Shortfall Shares.</li> <li>(c) An order that any shares issued to underwriters and/or sub-underwriters under the Rights Issue only be issued after all other shareholders' applications to acquire shortfall shares are satisfied to the maximum extent possible in accordance with the orders described in paragraphs (a) and (b) above.</li> <li>(d) An order that VAH make an announcement to the ASX as soon as possible confirming the variation to the terms of the Retail Offer under paragraphs (a) and (b) above and issue to eligible retail shareholders an amended Retail Offer booklet or a supplement to the Retail Offer booklet that confirms such variations.</li> <li>(e) An order that Etihad not be permitted to obtain any economic or relevant interest in any VAH shares pursuant to the cash settled derivatives that would result in its economic interest or voting power in VAH exceeding 20%.</li> </ul>

## 2. Details of Application

### 2.1 Background

- (a) VAH is an ASX listed Australian airline. Currently there are 2,589,840,317 VAH shares on issue.
- (b) VAH has four major shareholders who hold the following percentage interests in VAH shares:
  - (i) Air NZ – 22.9%;

- (ii) Etihad – 19.9%;
  - (iii) Singapore Airlines – 19.8%; and
  - (iv) Virgin Group – 10.0%.
- (c) On 14 November 2013, VAH announced the proposed Rights Issue, being a fully underwritten, accelerated, non-renounceable entitlement offer under which VAH shareholders have the right to take up 5 new VAH shares for every 14 VAH shares held as at the record date, at an issue price of \$0.38 per VAH share.
- (d) The announcement stated, among other things, that VAH “*intends to work with the airline shareholders [i.e. Air NZ, Etihad and Singapore Airlines] for future board representation with appropriate protocols*”.

## 2.2 Chronology

Date	Event
23 April 2013	Singapore Airlines acquires a relevant interest in VAH shares following which its voting power in VAH increased to 19.9%.
5 June 2013	Air NZ acquires a relevant interest in VAH shares following which its voting power in VAH increased to 22.99%.
8 October 2013	Etihad acquires VAH shares following which its voting power in VAH increased to 19.9%.
14 November 2013	VAH announces to ASX the Rights Issue.
15 November 2013	VAH announces to ASX the results of the Institutional Offer.

## 3. Submissions

### 3.1 Potential control impact of the Rights Issue

The Applicant submits that the Rights Issue is unacceptable because it is structured in a way that potentially affects control of VAH, by providing the Benefited Group with the opportunity to increase their shareholdings in VAH (thereby gaining further control of VAH) and to further dilute the collective shareholding of retail shareholders.

In short, the unusual structure of the Rights Issue cannot credibly be attributed as reasonably necessary for the fundraising purpose elucidated by VAH and, instead, can be explained only as an attempt to further entrench and enhance the control of VAH by the Benefited Group.

There are a number of factors which indicate this unacceptability, including the following, which we will refer to in these submissions together as the **Anti-Dispersion Features**.

#### *Cap on shortfall participation*

- (a) The 40% cap imposed on applications for Additional Institutional Shares and Additional Retail Shares is not consistent with a genuine dispersion strategy. A genuine dispersion strategy would not cap at all the shortfall facility, and would instead allow motivated shareholders to take up any relinquished entitlements from fellow retail shareholders. The Applicant does not consider that there is any merit in an argument that the cap

operates as a mechanism to provide some certainty to its underwriters that there will be sufficient VAH shares available to meet the demands of the underwriters' sub-underwriters and clients, given that an artificial structure was imposed to allow part of the 40% tranche to be delivered to the Benefited Group.

- (b) The Applicant submits that a pre-determined cap on applications for additional shares ('overs') is a very unusual feature of a shortfall facility in a retail entitlement offer. Annexure 10 lists approximately 70 entitlement offers in which the Applicant has participated as a retail shareholder since January 2009, only one of which featured such a cap (but set at a high level of \$40,000 or one times the shareholder's pro rata entitlement).
- (c) The Applicant contends that there has never been a non-renounceable retail entitlement offer in Australia with a pre-determined cap on "overs" which has been fully subscribed and that of the handful of caps that have been imposed in such circumstances, there has only ever been one lower than the 40% proposed by VAH, namely GPT's 25% cap in 2009 (see Annexure 10). The Applicant believes he is the single most active low net worth retail participant in Australian capital raisings and is only aware of two other equivalent caps being applied: Pacific Brands (2 times in 2009) and Australand (one times or \$40,000 worth of shares in 2009) (see Annexure 10).
- (d) In the heavily discounted VAH 2009 one for one accelerated non-renounceable entitlement offer, there was no such cap. Retail shortfall shares were oversubscribed, resulting in a scale-back to a maximum of 0.824 times the shareholder's pro rata entitlement (well in excess of the proposed pre-determined 40% cap for the Retail Offer) (see Annexures 11 and 12). This meant that VAH retail shareholders were not diluted as a class in the 2009 entitlement offer.
- (e) In spite of the strong take-up of heavily discounted 20c VAH shares in 2009 (the ineligible rights fetched an additional 16c in a bookbuild at the time), the Applicant contends a clear majority of the 43,416 VAH shareholders inherited their shares from Toll and may be disinterested in the fortunes of VAH and disinclined to participate in a \$68.6 million retail offer which is priced at a negligible discount to the current market price, thereby maximising the potential 6% strategic stake which could transfer to the Benefited Group. And with 17,892 shareholders (p157, 2012-13 VAH annual report) currently holding less than 1,000 shares and therefore not owning a "marketable parcel" of VAH shares worth more than \$500, the artificial 40% cap on "overs" prevents them from using the capital raising to acquire a more meaningful investment in the company from the foregone entitlements of non-participating members of the retail class.
- (f) Equivalent non-renounceable entitlement offers in the past have allocated a minimum dollar amount of "overs" to all retail investors, irrespective of the size of an applicant's holding. Annexure 10 makes reference to such precedents including Australand (\$40,000), Billabong (\$56,250), Santos (\$62,500), Onesteel (\$36,000), Fairfax Media (\$33,333) and Wesfarmers (\$13,500). Given the large number of unmarketable parcels, the Applicant believes the Panel should, in addition to ordering unlimited applications for overs, set a minimum allocation of \$15,000, equivalent to the maximum share purchase plan permitted in the Australian market, in the event of over-subscriptions.
- (g) Annexure 10 also details how market practice for the scale-back of "overs" far exceeds the proposed 0.4 times cap proposed by VAH. In an indication of the apathy of retail investors, the following significantly in-the-money entitlement offers were able to apply these scale-back formulas on "overs" applications within the overall pool of capital being sought from the retail class: Amcor (15 times), Hastie (3.76 times), DUET (3.5 times), Santos (3 times), Wesfarmers (3 times), Fairfax Media (3 times), Billabong (3 times), Bendigo & Adelaide Bank (3 times) Alumina (3 times), Asciano (2.1 times). Very few offers ever need to be scaled back to as little as 0.4 times, as VAH unfairly proposes.

*Sub-underwriting by major shareholders (the Benefited Group)*

- (h) The use of a major shareholder sub-underwriter in preference to sub-underwriting by other VAH shareholders or professional investors is, in the absence of any indication that VAH canvassed other shareholders or possible professional investors, not indicative of a reasonable attempt to mitigate the potential control effects of the Rights Issue. Further, as noted in paragraph 16 of the Panel's Guidance Note 17, the anti-dispersion impact of using a related party as a sub-underwriter is exacerbated by the Rights Issue being non-renounceable. The same applies to sub-underwriting by major shareholders who may not be related parties. It is also unacceptable that, in addition to effectively delivering the Benefited Group a portion of the shortfall facilities and thereby further entrenching their control of VAH, VAH has sought to reward the Benefited Group, in a way offered to no other VAH shareholder, by allowing them to receive a 0.75% fee for the commitment to take additional VAH shares. An entitlement offer motivated by a genuine dispersion strategy would have none of these characteristics.
- (i) The device of effectively delivering Etihad and Singapore Airlines VAH shares via a derivative instrument amounts, in truth, to additional sub-underwriting (with identical sub-underwriting fees), with the same effects as described in the preceding paragraph (c). The artifice of both Etihad and Singapore Airlines sub-underwriting the Rights Issue through the use of cash settled derivatives, pending regulatory approvals, to increase their actual VAH shareholdings, in preference to genuine sub-underwriting by other VAH shareholders or professional investors, brings into stark relief the gymnastics by which the interests of the Benefited Group are being advanced at the expense of all other VAH shareholders.
- (j) If the Benefited Group receive Additional Institutional Shares and/or Additional Retail Shares under the "official" and the "artificial" sub-underwriting arrangements *before* or *at the same time* (as opposed to after) all other VAH shareholders' applications to acquire such shortfall shares are satisfied, the 40% shortfall application cap for VAH shareholders will be significantly reduced (by as much as 25%). An entitlement offer motivated by a genuine dispersion strategy would ensure that the applications for shortfall VAH shares would be satisfied before any VAH shares were issued to the underwriter or sub-underwriters, whether genuine or contrived. Paradoxically, the fact that a cap has been imposed on applications for Additional Institutional Shares and/or Additional Retail Shares suggests that there is so much demand for the VAH shortfall shares that there was no commercial need to lock-in the Benefited Group as sub-underwriters.
- (k) The potential for Air NZ, as sub-underwriter, to be issued Additional Institutional Shares and/or Additional Retail Shares *before* or *at the same time* (as opposed to after) all other VAH shareholders' applications to acquire such shortfall shares are satisfied exacerbates the favouritism to the Benefited Group manifest in the Rights Issue.
- (l) As mentioned above and identified in paragraphs 15 – 18 of the Panel's Guidance Note 17, the fact that the Rights Issue is non-renounceable results – unsurprisingly - in greater flow-through of VAH shares to the Benefited Group as (official and artificial) sub-underwriters, and thereby increasing the potential control effect.
- (m) The Rights Issue is a relatively large one, a fact which (as noted in paragraphs 15 – 18 of the Panel's Guidance Note 17) increases the potential control effect, given the greater likelihood that (in this case) many retail shareholders may not have the capacity to pay for all the shares available to them.
- (n) This is coupled with the fact that the pricing of VAH shares under the Retail Offer is at a modest discount of 5% to the pre-announcement VAH share price (\$0.40) and 4.6% to the Theoretical Ex Rights Price. This modest discount provides little incentive for retail

shareholders to take up their entitlements, or apply for the limited amount of additional shares, thus increasing the likelihood of control becoming concentrated in the underwriters, sub-underwriters and other participating major shareholders (i.e. the Benefited Group).

#### *Effect on control of VAH*

The Anti-Dispersion Features exacerbate the control effects that would otherwise have resulted from the Rights Issue.

As a result of the Anti-Dispersion Features, each member of the Benefited Group could potentially increase their voting power in VAH by up to 2.6%, which would increase their combined voting power in VAH by up to 7.2%. This is a very material increase in voting power in VAH given that the 'free-float' outside of the four major shareholders is currently less than 30% of all VAH shares on issue, and would be less than 20% if the Benefited Group acquires the full 7.2%. If, due to the result of the Institutional Offer, the potential increase in the combined voting power of the Benefited Group is around 6%, rather than 7%, that is still a very significant potential control effect in the circumstances of the VAH shareholder base, in which the four major shareholders currently control around 73% and could move to around 79% in aggregate, with the structure of the Rights Issue assisting them due to the Anti-Dispersion Features. When this is considered together with the simultaneously announced proposal to provide board representation to all members of the Benefited Group, obviously negotiated as part of this capital raising, the Applicant submits that there are clear and significant changes to control associated with the Rights Issue.

#### *Cash-settled derivatives*

In particular, there are two important aspects of the cash-settled derivatives to be entered into by Etihad and Singapore Airlines, and the sub-underwriting to be provided by Air NZ, that impact the control effect of the Right Issue.

First, the derivative arrangements although described as "cash settled", are in fact better characterised as something else, such as placement arrangements. This is because there is a clear inference to be drawn that the VAH shares that underlie those cash settled derivatives will ultimately be transferred to Etihad and Singapore Airlines. That inference arises as a result of:

- (a) the statement in the Virgin Australia Entitlement Offer Presentation enclosed at Annexure 3 that the cash settled derivatives are being entered into pending regulatory approvals to allow each of Etihad and Singapore Airlines to "*increase their shareholding in Virgin Australia*";
- (b) the fact that the derivative arrangements are being entered into in order to give Etihad and Singapore Airlines the same exposure to VAH as Air NZ, which will receive VAH shares;
- (c) the fact that the disclosures made by VAH do not limit the maximum number of VAH shares to be acquired by Etihad and Singapore Airlines under the Rights Issue to the maximum number that would be the case if they only acquired VAH shares by taking up their respective Pro-Rata Entitlements;
- (d) the fact that the use of a cash settled derivative to allow major shareholders to participate in a rights issue is highly unusual and not an obvious characteristic of a pro-rata, accelerated offer structure; and
- (e) the background that each of the Benefited Group is seeking a VAH board seat, which in the circumstances of the Rights Issue suggests a likelihood that each is proposing to increase the size of its investment in VAH in equal measure with the others.

Second, there is a risk that Air NZ, as sub-underwriter, may be issued Additional Institutional Shares and/or Additional Retail Shares *before* or *at the same time* (as opposed to after) all other VAH shareholders' applications to acquire such shortfall shares are satisfied. Although VAH's disclosures do not detail the terms of the underwriting and sub-underwriting arrangements, the Applicant is concerned that this may be the case because the sub-underwriting and cash settled derivatives appear designed to give each member of the Benefited Group the same additional exposure to VAH at the same time. The modification of the pro-rata nature of the scale-back arising from the 40% cap in effect prioritises the cash settled derivatives in scaling-back applications for shortfall shares – it would follow that the sub-underwriter must receive the same preferential treatment to ensure that all three members of the Benefited Group ultimately have the same exposure to VAH.

This is inconsistent with the accepted position that an underwriter should only be issued shares *after* all other applications for shortfall shares have been satisfied.

### *Conclusions*

Given the above, the Applicant submits that:

- (a) the control effect of the Rights Issue exceeds what is reasonably necessary for the fundraising purpose; and
- (b) VAH has made no meaningful steps to mitigate the effect of the Rights Issue on control of VAH,

and that this results in unacceptable circumstances as:

- (c) the control, or potential control, of VAH is likely to be affected otherwise than in an efficient, competitive and informed market; and
- (d) VAH shareholders have been denied a reasonable and equal opportunity to participate in the benefits of a proposal under which a person would acquire a substantial interest in VAH.

### **Panel Guidance and Previous Panel Decisions**

Guidance Note 17 states (at [5]):

*"The Panel considers, among other things, whether the control effect exceeds what is reasonably necessary for the fundraising purpose."*

and at [23] that:

*"Features which may help a dispersion strategy mitigate potential control effects include:*

- (a) *an underwriter (sub-underwriter) receiving entitlements under the dispersion facility after all other requests have been satisfied*
- (b) *sufficient time and disclosure being offered to shareholders and other investors to assess the rights or shares being offered and*
- (c) *external investors being able to take up shares offered under the dispersion strategy."*

In *Bisalloy Steel Group Limited* [2008] ATP 29 at [22]–[23] the Panel stated:

*"If a company proposes to implement a rights issue, we would expect it to take reasonable steps to minimise the potential impact of the rights issue on the control of the company."*

### Panel Guidance and Previous Panel Decisions

*"Reasonable steps include (in appropriate cases):*

- (a) *seeking to share participation in any shortfall among existing shareholders (for example, by way of a shortfall facility or back end bookbuild) and*
- (b) *where the rights issue is to be underwritten or sub-underwritten, seeking to appoint a number of underwriters or sub-underwriters or approaching non-related persons (such as professional underwriters or institutional shareholders) to act as an underwriter or sub-underwriter."*

In *Rivkin Financial 02* [2005] ATP 1 at [67], the Panel stated:

*"The Panel accepts that a company or underwriter may, in many circumstances, properly and sensibly approach major shareholders to sub-underwrite an issue as a legitimate means of securing financial support for a capital raising. However, in such circumstances, where a board may expect any shareholder willing to sub-underwrite to retain any shortfall allocation they receive, the board must make every effort to ensure that the underwriting process provides as equal an opportunity as possible for shareholders to participate. Alternatively, it could obtain shareholder approval for the underwriting arrangements. To do otherwise is inconsistent with the equal opportunity principle in section 602(c)."*

In *Dromana Estate Limited 01R* [2006] ATP 8 at [42], the Panel stated:

*"If there is potential for a rights issue to affect control, the directors should carefully consider all reasonably available options to mitigate the control effects of the issue."*

and at [45] the Panel stated:

*"The Panel is also mindful of the desirability for shareholders to maintain their proportional interests if they wish. However, it has concerns that the cap in this case may interfere inappropriately with the acquisition of control of shares in Dromana in an efficient competitive and informed market."*

*"While there may be good reasons in a particular case to structure a shortfall differently, as a general rule any shareholder should be able to participate fully in the shortfall subject only to:*

- 1. the limits under the Corporations Act that might apply to that shareholder; and*
- 2. the number of shares available given the applications."*

In *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7 at [44], the Panel stated:

*"The Panel has previously raised concerns where a substantial holder has acted as underwriter (or sub-underwriter) but sought to participate in the shortfall at the same time as holders who apply for additional securities."*

### **3.2 Relevant interests in VAH shares subject of the derivatives – breach of 20% threshold**

The Applicant submits that the cash settled derivatives would confer a relevant interest on each of Etihad and Singapore Airlines, which in the case of Etihad would be in contravention of s606(1) of the Corporations Act given that Etihad cannot yet rely on the 3% creep exception that is currently available to Singapore Airlines.

Section 606(1) of the Corporations Act prohibits a person from acquiring a relevant interest in voting shares through a transaction where their voting power in the company increases from 20% or below to more than 20%, or increases from a starting point that is above 20% and below 90%.

Given that Etihad and Singapore Airlines have voting power in VAH of 19.9%, any increase in their VAH shareholdings would potentially give them voting power in VAH above the 20% limit. Singapore Airlines could currently acquire voting power in VAH of up to 22.8% in accordance with the creep exception, given that it acquired its 19.8% relevant interest in VAH more than 6 months ago. However, Etihad is not permitted to rely on the creep exception at this time.

Further, Etihad is not permitted to rely on the exception in item 10A of section 611 of the Corporations Act (as inserted by ASIC Class Order [CO 09/459]) because the cash settled derivative is not an underwriting or sub-underwriting to which that exception could extend.

As noted in ASIC Regulatory Guide 6 at [RG 6.144] (emphasis added):

*"That is, the sub-underwriter agrees with the underwriter to subscribe for or buy a certain portion of the shares that the underwriter is **obliged to take** in the case of a shortfall"*

Cash settled derivatives do not typically operate in that manner – i.e. they don't typically oblige the taker to take physical shares. If they did, there is no question that both Etihad and Singapore Airlines would be in breach of the Foreign Acquisitions and Takeovers Act 1975 by having an "interest" in VAH shares beyond that approved by the Foreign Investment Review Board.

The Applicant submits that both Etihad and Singapore Airlines have, through their contrived cash equity swap arrangement, a relevant interest in the VAH shares that will be delivered to them or otherwise made available to them through the market by the writer promptly after they obtain the envisaged regulatory approvals to *"increase their shareholding in Virgin Australia"*.

A person has a relevant interest in securities if (among other things) the person has power to dispose, or control the exercise of a power to dispose, of the securities (see section 608(1) of the Corporations Act). It does not matter how remote the power is or how it arises. It does not matter whether the power is indirect, informal or unenforceable. It may be express or implied. It extends to power or control that is, or can be, exercised as a result of, by means of, or by the revocation or breach of, a trust, agreement, practice or any combination (see section 608(2) of the Corporations Act).

To that end, as stated in Guidance Note 20 at [25], a taker of a cash-settled equity derivative may get a relevant interest in hedge securities if the taker:

- (a) acquires any right or obligation (formal or informal) to have them transferred (e.g. at settlement of the equity derivative or otherwise);
- (b) acquires any voting or disposal right in them; or
- (c) makes any agreement, arrangement or understanding restricting the writer's ability to deal with or vote them.

As noted in section 3.1 above, there is a clear inference to be drawn that the VAH shares that underlie the cash settled derivatives will ultimately be transferred to Etihad and Singapore Airlines, for the reasons stated in section 3.1 above. To effect this outcome, there must some level of understanding between the writer of the derivative and each of Etihad and Singapore Airlines that the physical shares will be delivered to them or otherwise made available to them through the market by the writer promptly after they obtain the envisaged regulatory approvals

to "increase their shareholding in Virgin Australia". Such an understanding is within the scope of a relevant interest as defined by section 608 of the Corporations Act.

The existence of a sub-underwriting fee of 0.75% for Etihad's and Singapore's commitment could only be commercially explained or justified if it was in fact a commitment to take VAH shares in the Rights Issue and alleviate the risk of shortfall. This again implies that the VAH shares that underlie the cash settled derivatives will ultimately be transferred to Etihad and Singapore Airlines.

If, as is likely to be the case, the writer of the derivatives is the underwriter of the Right Issue, the understanding that the physical shares will be delivered to Etihad and Singapore Airlines by the writer conveniently after the envisaged regulatory approvals are obtained is underpinned by the commercial reality that it is very likely that the writer of the derivative will continue to hold those shares from completion of the Rights Issue as a hedge (see paragraph 22 of the Panel's Guidance Note 20).

The Applicant submits that, based on the factors outlined in section 3.1 above (including, most relevantly that the derivatives are being entered into in order to give Etihad and Singapore Airlines the same increase in exposure to VAH as Air NZ), and the commercial realities underpinning the arrangement, the Panel should be prepared to conclude that there must be some level of understanding between the writer of the derivative and each of Etihad and Singapore Airlines that the physical shares will be delivered to them by the writer.

The Applicant submits that by entering into an understanding with the writer of the derivative, Etihad may acquire a relevant interest in VAH shares in excess of the 20% threshold. If it did so, it would be in contravention of s606(1).

### **3.3 Proximity to a "squeeze-out" by the Benefited Group**

The Applicant's submissions must also be assessed by the Panel in the context of the Benefited Group holding, at the conclusion of the Rights Issue, potentially between 69% and 70% of VAH's issued share capital (depending on the accuracy of the announcement by VAH that, following the result of the Institutional Offer, the maximum increase of any single Benefited Group member is 2.1% rather than 2.6%). The other major shareholder in VAH, Sir Richard Branson's Virgin Group, holds an additional 10%.

That combined holding of strategic aviation industry participants represents a bloc that within 6 months additional "creep" (under Item 9 of section 611 of the Corporations Act) will be on the verge of a position to move to "squeeze out" all other VAH shareholders, affrontingly without paying any premium for control.

The Applicant submits that the Panel should not permit the Benefited Group to use the Rights Issue as a clever front to facilitate and expedite their increasing control over and potential privatisation of VAH at the manifest expense of the rights and benefits of minority shareholders.

## **4. Orders**

### **4.1 Interim Orders**

The Applicant reserves its right to seek interim orders, if required to enable the final orders below to be implemented effectively.

## 4.2 Final Orders

The Applicant seeks the following final orders:

- (a) An order that the terms of the Retail Offer be amended by VAH to contain a provision to the effect that eligible retail shareholders may apply for Additional Retail Shares in excess of their Pro Rata Entitlement without any limit, and that such applications may be scaled-back only if each of the following conditions is met:
- (i) the number of Additional Retail Shares applied for by eligible retail shareholders exceeds the number of shares not taken up by applications for Pro Rata Entitlements in the Retail Offer (**Retail Shortfall Shares**);
  - (ii) the applications are scaled-back reasonably and fairly having regard to:
    - (A) the number of Retail Shortfall Shares;
    - (B) the number of eligible retail shareholders applying for Additional Retail Shares;
    - (C) the number of shares held by each applicant for Additional Retail Shares; and
    - (D) the number of Additional Retail Shares applied for by each applicant; and
  - (iii) the scaling back is applied as uniformly as possible to all applications.

**Comments:** (1) *This order is essentially the same as the order made in Dromana 01R where the Panel was addressing the consequences of a cap on shortfall participation.*

(2) *The Applicant does not wish to 'derail' the Rights Issue. The orders which are sought should be able to be accommodated by VAH and (if necessary) the underwriters within the current timetable for the remainder of the Rights Issue, or with minor modifications to the timetable.*

(3) *The Applicant seeks orders that will mitigate the potential control effect of the Anti-Dispersion Features and which may result in retail shareholders obtaining a fairer and more equal share of the benefits accruing from the likely acquisition of an increased substantial interest in VAH by each of the Benefited Group as a result of the Rights Issue.*

(3) *The above order to eliminate the cap on retail 'overs' is one measure that can reduce the flow-through to the underwriter and sub-underwriters and should be possible to implement by appropriate communication of a variation to the Right Issue terms, prior to the scheduled close of the Retail Offer on 9 December 2013.*

(4) *The Applicant notes that the effect of this order would be to replicate the uncapped participation by VAH retail shareholders in any available retail shortfall shares that was given effect to in the VAH 2009 ANREO, subject to a fair and reasonable pro rata scale-back, as in that offer, if the shortfall shares are oversubscribed. See Annexures 11 and 12.*

- (b) An order that the scaling back policy applied pursuant to the order in paragraph (a), include provision that eligible retail shareholders who apply for Additional Retail Shares in excess of their Pro Rata Entitlement be guaranteed a minimum allocation of 37,500 Retail Shortfall Shares (\$15,000), should they apply for that number, or a higher number, of Retail Shortfall Shares.

**Comments:** See the submissions above in section 3.1, paragraphs (e) and (f).

- (c) An order that any shares issued to underwriters and/or sub-underwriters under the Rights Issue only be issued after all other shareholders' applications to acquire shortfall shares are satisfied to the maximum extent possible in accordance with the orders described in paragraphs (a) and (b) above.

**Comments:** This order would reinforce the order in paragraph (a) above. It is consistent with the avoidance of the concerns expressed in the Panel's above-quoted statement in MacarthurCook.

- (d) An order that VAH make an announcement to the ASX as soon as possible confirming the variation to the terms of the Retail Offer under paragraphs (a) and (b) above and issue to eligible retail shareholders an amended Retail Offer booklet or a supplement to the Retail Offer booklet that confirms such variations.
- (e) An order that Etihad not be permitted to obtain any economic or relevant interest in any VAH shares pursuant to the cash settled derivatives that would result in its economic interest or voting power in VAH exceeding 20%.

**Comments:** This order is supported by the submissions in section 3.2 above.

## 5. Procedural

### 5.1 Fees

The Applicant undertakes to pay the prescribed Panel application fee of \$2,225.

### 5.2 Leave to be legally represented

Applicant requests leave to be legally represented by Landerer & Company.

### 5.3 Information about the Applicant

<b>Principal Shareholders</b>	N/A
<b>Directors</b>	N/A
<b>Controllers</b>	N/A
<b>Legal advisers</b>	Landerer & Company
<b>Financial advisers</b>	N/A
<b>Auditors</b>	N/A
<b>Principal financiers</b>	N/A
<b>Name of any person with whom, or on whose behalf, the Applicant is acting in relation to the application or the matters described in it.</b>	Stephen Mayne (VAH shareholder and Policy and Engagement Coordinator, Australian Shareholders' Association, but acting in a personal capacity.)

Paragraph 657C(2)(d) applies to the Applicant. The Applicant holds 29 ordinary shares in VAH as part of a portfolio with more than 600 holdings which has been assembled in order to monitor and oversight governance in ASX listed companies on behalf of retail investors. He has participated in almost 100 entitlement offers with overs facilities since 2009.

### 5.4 Information about other potentially interested parties

#### Virgin Australia Holdings Limited

**Principal Shareholders** Air New Zealand Associated Companies (Australia) Ltd

**Virgin Australia Holdings Limited**

	Etihad Airways P.J.S.C. Singapore Airlines Ltd Covina Holdings Limited (Virgin Group)
<b>Directors</b>	Mr David Baxby Mr Neil Gregory Chatfield Mr Robert Bain Thomas Hon Mark Vaile Mr Keith Roberts Mr John Borghetti Ms Samantha Mostyn Mr Joshua Bayliss
<b>Controllers</b>	Virgin Australia Holdings Limited is listed on the ASX
<b>Legal advisers</b>	Herbert Smith Freehills
<b>Financial advisers</b>	N/A
<b>Auditors</b>	KPMG
<b>Principal financiers</b>	N/A

**Singapore Airlines Limited**

<b>Principal Shareholders</b>	Temasek Holdings (Pte) Ltd
<b>Directors</b>	Mr Stephen Lee Ching Yen Mr Goh Choon Phong Dr William Fung Kwok Lun Mrs Christina Ong Mr Jackson Peter Tai Dr Helmut Gunter Wilhelm Panke Mr Lucien Wong Yuen Kuai Mr Hsieh Tsun-yan Mr Gautam Banerjee
<b>Controllers</b>	Singapore Airlines Limited is listed on the SGX
<b>Legal advisers</b>	N/A
<b>Financial advisers</b>	N/A
<b>Auditors</b>	Ernst & Young LLP
<b>Principal financiers</b>	N/A

**Etihad Airways**

<b>Principal Shareholders</b>	Government of the United Arab Emirates
<b>Directors</b>	HH Sheikh Hamed bin Zayed Al Nahyan HE Mohammed Mubarak Fadel Al Mazrouei HE Ahmed Ali Al Sayegh HE Mubarak Hamad Al Muhairi HE Hamad Abdullah Al Shamsi HE Khalifa Sultan Al Suwaidi
<b>Controllers</b>	Government of the United Arab Emirates
<b>Legal advisers</b>	N/A
<b>Financial advisers</b>	N/A
<b>Auditors</b>	N/A
<b>Principal financiers</b>	N/A

**Air New Zealand Associated Companies (Australia) Ltd**

<b>Principal Shareholders</b>	Air New Zealand Limited
<b>Directors</b>	Antony Carter Janice Dawson John Palmer Paul Bingham Dr James Fox Roger France Robert Jager
<b>Controllers</b>	Her Majesty the Queen in Right of New Zealand (the Crown) Air New Zealand is also listed on the NZX
<b>Legal advisers</b>	N/A
<b>Financial advisers</b>	N/A
<b>Auditors</b>	Deloitte (on behalf of the Auditor-General, New Zealand)
<b>Principal financiers</b>	N/A

**UBS AG, Australia Branch**

<b>Principal Shareholders</b>	N/A
<b>Directors</b>	
<b>Controllers</b>	N/A
<b>Legal advisers</b>	N/A
<b>Financial advisers</b>	N/A
<b>Auditors</b>	N/A
<b>Principal financiers</b>	N/A

**Goldman Sachs Australia Pty Ltd**

<b>Principal Shareholders</b>	N/A
<b>Directors</b>	
<b>Controllers</b>	N/A
<b>Legal advisers</b>	N/A
<b>Financial advisers</b>	N/A
<b>Auditors</b>	N/A
<b>Principal financiers</b>	N/A

**5.5 Service on other parties**

The Applicant confirms that ASIC and each of the potentially interested parties listed above have been, or will be given a copy of this application.

**5.7 In Time**

The Applicant submits that this application is well within the period set by section 657C(3)(a) of the Corporations Act, namely two months after the circumstances have occurred. The circumstances about which it complains are a result of the agreements entered into by VAH and the Benefited Group to effect the Rights Issue as announced by VAH on 14 November 2014.

### 5.8 Notice of Appearance and Undertaking

The Applicant's Notice of Appearance accompanies this document.

## 6. Annexures

Annexure	Description
1	ASX announcement by VAH titled "Virgin Australia announced a \$350 million pro rata accelerated non-renounceable entitlement offer", dated 14 November 2013.
2	ASX and NZX announcement by Air New Zealand titled "Air New Zealand to support Virgin Australia rights issue", dated 14 November 2013.
3	ASX announcement by VAH titled "Virgin Australia Entitlement Offer Presentation", dated 14 November 2013.
4	ASX announcement by VAH titled "Notice under section 708AA(2)(f) of the Corporations Act 2001 (Cth)", dated 14 November 2013.
5	ASX announcement by VAH titled "Virgin Australia Successfully Completes Institutional Component Of Entitlement Offer ", dated 15 November 2013.
6	ASX announcement by VAH titled "Virgin Australia Board to Continue with its Current Structure for its Pro Rata Accelerated Non-Renounceable Entitlement Offer ", dated 21 November 2013.
7	Form 604 – Notice of change of interest of substantial holders relating to Virgin Australia Holdings Limited provided by Singapore Airlines Limited, dated 24 April 2013.
8	Form 604 – Notice of change of interest of substantial holders relating to Virgin Australia Holdings Limited provided by Air New Zealand Associated Companies Limited, dated 6 June 2013.
9	Form 604 – Notice of change of interest of substantial holders relating to Virgin Australia Holdings Limited provided by Etihad Airway PJSC, dated 9 October 2013.
10	List of entitlement offers which Applicant has participated in since January 2009.
11	VAH 2009 ANREO retail offer booklet.
12	ASX announcement by VAH titled "Allotment of shares under the Retail Entitlement Offer", dated 8 September 2009..

Signed:  \_\_\_\_\_

Name and authority: Stephen Mayne, Applicant