In the matter of PowerTel Ltd (No. 2)
[2003] ATP 27

Catchwords: *– Takeover bid – consideration less than market price – attractive to only one shareholder – shareholder approval- whether bid should be subject to shareholder approval – efficient market – equal opportunity to share in benefits – disclosure in bidder's/target's statement – other material information - prospective financial information – misleading statement in bidder's statement – rights issue*
Panel procedure – standing to bring application – decline to commence proceedings

Corporations Act 2001 (Cth), sections 602(a) and (c), 606, 611 item 7, 621, 622, 623, 633, 650B, 651A, 657A(3)(a)(ii)
Australian Securities and Investments Commission Regulations 2001, reg 20

Corebell Pty Ltd v New Zealand Insurance Co Ltd (1988) 13 ACLR 349, 6 ACLC 618
Re Pivot Nutrition Pty Ltd (1997) 15 ACLC 369
AAPT v Cable & Wireless Optus Ltd (1999) 32 ACSR 63

These are our reasons for declining to make a declaration of unacceptable circumstances on an application (the Application) by Data Investments Pty Limited on behalf of a syndicate of Australian investors (Roslyndale) in relation to the off-market takeover bid made by TVG Consolidation Holdings SPRL (TVG) for all of the ordinary shares in PowerTel Limited (PowerTel). Roslyndale applied for a declaration of unacceptable circumstances under section 657A of the Corporations Act 2001 (Cth) (Act) and orders under section 657D of the Act. Instead of acceding to that application, we accepted the undertakings described below.

PRELIMINARY

1. The President of the Panel has appointed Alison Lansley (sitting President), Carol Buys (sitting Deputy President) and Chris Photakis as the sitting Panel for this matter.

2. We decided on Friday 11 July, under Regulation 20 of the ASIC Regulations, to conduct proceedings in relation to the Application.

3. We advised the parties of our decision in this matter on 24 July 2003.

Standing

4. We are prepared to accept that in the circumstances Roslyndale has standing to bring this application. In making this finding, we are not expressing any views on the interpretation of paragraph 657C(2)(d).

BACKGROUND

PowerTel's Major Shareholders

5. PowerTel is a listed company which has 2 major shareholders:

(a) Williams Communications Group, Inc through its controlled entity WilTel Communications Pty Ltd (**WilTel**); and

(b) Downtown Utilities Pty Limited (**DTU**), a consortium of 3 major electricity distribution companies (Energy Australia, Citipower and Energex).

6. WilTel's stake in PowerTel consists of :

(a) **Equity**: WilTel holds 34.61% of the ordinary shares in PowerTel. WilTel also holds a number of converting preference shares and accrued dividends rights, which convert into ordinary shares.

(b) **Debt**: $21.3 million of subordinated and intercompany debt and accrued interest owed by PowerTel to WilTel.

On a fully diluted basis, WilTel would be entitled to approximately 47.9% of the ordinary shares in PowerTel (the **WilTel Stake**).

7. DTU holds 34.99% of the ordinary shares in PowerTel. On a fully diluted basis ,DTU would hold 27.9% of the ordinary shares in PowerTel.

8. According to PowerTel's independent expert (see paragraph 12 below), having regard to the preferential rights attaching to the converting preference shares and the fact that PowerTel is unlikely to be in a position to pay dividends on the ordinary shares for an extended period, a significant majority of the assessed value of the issued capital of PowerTel is attributable to the converting preference shares, all of which are held by WilTel.

9. PowerTel's independent expert has also noted that PowerTel is cash constrained, relatively highly geared and has been forced to renegotiate its debt facility covenants. The independent expert is not of the opinion that there is an immediate threat to solvency. However ,it noted that the directors and management of PowerTel have been seeking a recapitalisation for more than a year.

Roslyndale Proposal

10. On 9 May 2003, PowerTel announced that Roslyndale intended to acquire the entire WilTel Stake (including the subordinated and intercompany debt for nominal consideration) and to finance and underwrite $A16.3 million of new equity for PowerTel (**Roslyndale Proposal**). The agreement was subject to PowerTel shareholder approval. On 2 July 2003, the general meeting to consider the Roslyndale Proposal was held and the resolutions were not passed.

11. On 3 June 2003, PowerTel lodged with the ASX a Notice of Meeting with an Explanatory Statement and Independent Expert's Report by PriceWaterhouse-Coopers (**PWC**). This notice provided the details of the Roslyndale Proposal including the terms of the proposed arrangements and the consideration payable to WilTel. It also set out other key conditions to be satisfied for the proposal to proceed which included PowerTel shareholder approval.

12. PowerTel provided an Independent Expert's Report, which considered the circumstances of the Roslyndale Proposal and concluded that the proposed transaction was fair and reasonable to the non-associated shareholders of PowerTel. The independent expert also advised that WilTel was not receiving a premium for control under the proposed acquisition.

13. On 10 June 2003, TVG publicly announced its intention to acquire a minimum of 47% of the shares in PowerTel Limited by way of a takeover offer to be followed by a recapitalisation of PowerTel through the injection of new funds via a $50 million pro rata rights offer (**Bid**). The bid is conditional on WilTel selling the intercompany and subordinated debt to TVG for $1 and waiving all interest on the debt.

14. The TVG Bid is at 3.85 cents cash per ordinary share in PowerTel. Market prices for PowerTel shares during 2003 have ranged from 5 to 14 cents, with most sales at 6 to 8 cents, but some large sales at higher prices. In their Independent Expert's Report on the Roslyndale Proposal, PriceWaterhouseCoopers valued all of the issued capital on a minority basis (without a control premium) of PowerTel (both ordinary shares and preference shares) to be in the order of $17.5 million to $41.5 million (i.e. 1.6 to 3.8 cents per ordinary share, if all of the preference shares are converted into ordinary shares), with the ordinary shares not having a value in excess of $21 million (i.e. not more than 2.42 cents per ordinary share) and that a significant majority of the $17.5 million to $41.5 million being attributable to the preference shares.

15. The Board of PowerTel said in a Supplementary Target's Statement on 9 July 2003:

> "The Board considers that it is likely that both WilTel and DTU will attempt to sell their shares and other securities in PowerTel in the short term, at the best available price. WilTel currently holds approximately 48% of PowerTel on a fully diluted basis, and DTU holds approximately 28% on a fully diluted basis.
>
> At present, the TVG Offer at 3.85 cents per ordinary share is the highest available offer to these shareholders, ignoring the market price of PowerTel's shares on the ASX as that market is almost certainly insufficiently liquid for either WilTel or DTU to sell all of their shares in the short term.
>
> However, it is also possible that another party (including the Roslyndale Syndicate) may make an alternative offer. No party has publicly proposed any such alternative offer at the date of this supplementary statement. If WilTel accepts the TVG Offer then the prospect of any alternative offer must be considered highly unlikely."

16. Roslyndale has made no submissions about DTU, and we make no findings or assumptions about DTU. Otherwise this assessment of the position appears to us to be a fair one.

17. On 1 July 2003, TVG announced that it had waived the remaining conditions of the Bid other than what it called the "WilTel Conditions" being the minimum acceptance condition (47%) and the condition requiring assignment of the subordinated debt

and conversion of the existing preference shares on the terms set out in the bidder's statement.

18. On 3 July 2003, Roslyndale made a further and new offer to acquire part of the WilTel stake (19.9% of the ordinary shares in PowerTel). To the best of our knowledge, that offer has not been withdrawn, refused or accepted.

THE APPLICATION

19. On 13 July Roslyndale applied for a declaration to the effect that:

    (a) it is unacceptable for TVG to acquire the WilTel Stake pursuant to the exception set out in item 1 of section 611;

    (b) shareholder approval is required for the proposed acquisition of the WilTel Stake;

    (c) non-disclosure of the PowerTel Forecasts amounts to a breach of paragraph 636(1)(m) of the Corporations Act; and

    (d) the TVG Bid is properly characterised as a package arrangement with the proposed recapitalisation being an integral part of the TVG proposal and/or TVG has made material misrepresentations regarding this point.

Final orders sought

20. Roslyndale sought final orders to the following effect:

    "That unless the Bid is amended to contain:

    (i) a non-waivable condition requiring shareholder approval of the Bid and the capital raising by PowerTel shareholders (with no votes cast in favour of the resolutions by WilTel and its associates); and

    (ii) further disclosure is made so that the Bid complies with the requirements of section 636(1)(m) of the Corporations Act 2001 and so that any misleading statements are adequately corrected; then

    all of the offers made to shareholders under the TVG Bid and all contracts made with PowerTel shareholders (if any) be cancelled and TVG be required to notify the ASX and PowerTel shareholders that the offers and contracts made under the Bid have been cancelled and to return all acceptances received in respect of the Bid."

21. In the alternative, Roslyndale submitted that an order requiring a non-waivable condition requiring acceptance of at least 50.1% of the PowerTel shareholders (excluding WilTel and its associates) may be effective at remedying the deficiencies of the current bid structure in relation to shareholder approval.

SHAREHOLDER APPROVAL SUBMISSION

22. The first limb of Roslyndale's application was for a declaration that it was unacceptable for the proposed acquisition of the WilTel Stake (comprising issued shares, presently unissued or unconverted shares and debt) to occur under item 1 of section 611 (a takeover bid) rather than item 7 (shareholder approval). Under regulation 20 of the *Australian Securities and Investments Commission Regulations*, we declined to conduct proceedings on this limb of the application, for the following reasons.

Roslyndale's Policy Submissions

23. Roslyndale developed the following arguments in several submissions, after we indicated in our brief under regulation 21 that we did not think Roslyndale had made an arguable case in its application that the bid was other than an offer to all of the shareholders in PowerTel.

24. Roslyndale argued that the TVG bid was in substance an offer for the WilTel Stake only, not a genuine offer for all of the shares in PowerTel, because:

    - TVG was aware from the history of the Roslyndale proposal that WilTel was willing to accept a price for the WilTel stake which was lower than the market price of PowerTel shares;

    - it pitched its bid price a little higher than the price WilTel agreed to accept under the Roslyndale proposal, but below a fair price for the shares;

    - the conditions of the TVG bid would be satisfied if WilTel's accepted the bid; and

    - TVG had designed and conducted the bid so as to secure the acceptance of WilTel, but not those of other shareholders.

25. Roslyndale argued that, the bid being designed to secure WilTel's acceptance, but not those of other shareholders, the acquisition of the WilTel Stake should only be allowed to proceed with the consent of other shareholders, preferably expressed by passing a resolution under item 7, although Roslyndale also contemplated an adjusted minimum acceptance condition (acceptances from 50.1% of non-associated shareholders), as a proxy for approval at a general meeting.

26. Roslyndale argued that shareholders have, in a case such as this, the right to approve a control acquisition or participate in the transaction by receiving a *bona fide* offer made to them for their shares, that unacceptable circumstances will result if neither of those rights is satisfied, and that the making of illusory offers, under the façade of a bid, does not satisfy either of those rights.

27. The argument is that shareholder approval is appropriate where the terms of a transaction with a majority shareholder would not be attractive to other shareholders, as well as in cases where the acquirer does not propose to extend an offer to minority shareholders. Minority shareholders can be effectively excluded

from taking part in a control transaction, without being given the right to veto it, by the device of making offers to all holders on terms known to be attractive to the majority shareholder, but unattractive to minority shareholders.

28. The exception from the 20% prohibition for acquisitions under a bid, the argument continues, is designed to apply in the ordinary case, in which a controlling shareholder can extract full value for their shares, or a premium. In that case, minority shareholders are protected by a bid, because they receive an opportunity to get a fair price for their shares (including a proportionate share of any premium for control). Where a controlling shareholder is forced to sell at a discount, a bid may lead to unacceptable circumstances, although it is made in technical compliance with the requirements for a takeover bid, because the sale is in essence a sale by private treaty, with no benefit being offered to shareholders other than the controller.

29. Roslyndale submitted that the adoption of the device of a bid at an undervalue would lead to unacceptable circumstances, because it would avoid the restrictions of the shareholder approval mechanism and limit the effectiveness of the Act in promoting the purposes of Chapter 6, in particular the promotion of an efficient and competitive market, and the overriding principle of fairness. For instance, a buyer could approach a distressed seller and agree a price, subsequently making a bid to erect a façade of compliance with the exception for a bid, but in truth acquiring control outside the competitive market.

30. Roslyndale further submitted that such an acquisition would be substantially like a bid under the mandatory bid regime which was proposed for inclusion in Chapter 6 in the *Corporate Law Economic Reform Program Bill 1999* but removed by amendments in Parliament.

Application of Policy Arguments to PowerTel

31. Roslyndale applies the policy arguments set out above to the present facts, saying that WilTel (in effect a majority shareholder) is a distressed seller and is prepared to accept a price for its stake which is below market and below the value of the shares. TVG's bid is at an undervalue, and is only feasible because TVG knows from the history of the Roslyndale Proposal that WilTel needs to sell its stake, without waiting for the market to improve, and is likely to accept the price TVG has offered, if not better offer is made. It concludes that if the TVG bid is allowed to proceed without approval by shareholders other than WilTel and its associates, the "minority" will be deprived of the protections of item 7 of section 611.

Applicable Policies

32. The relevant policies of Chapter 6 are that:

- control of shares should pass in an efficient, competitive and informed market (paragraph 602(a));

- all holders of bid class shares should have reasonable and equal opportunities to participate in benefits accruing to any holders of shares in that class in relation to the bid (paragraph 602(c)); and

- the exceptions to the prohibition in section 606 should not be abused by colourable compliance (paragraph 657A(3)(a)(ii)).

Whether Shares Removed from Market

33. The first issue is whether the structure of the TVG bid, or the way it has been conducted, or any collateral transaction, has led or may lead to TVG acquiring the WilTel Stake outside an efficient, competitive and fair market. In this regard, we specifically note that Roslyndale did not submit that:

    - TVG had offered WilTel a better price or better terms for the WilTel Stake than the price per share offered to all PowerTel shareholders, except that WilTel knows that its own acceptance would satisfy the defeating conditions of the bid;

    - holders other than WilTel faced legal or procedural obstacles in accepting the bid;

    - TVG had done or said anything (other than setting the price) calculated or intended to deter holders other than WilTel from accepting its bid; or

    - there was any agreement or association between TVG and WilTel under which WilTel has committed to accept the TVG bid.

34. Had TVG made a private agreement with WilTel to acquire its stake, contravening section 606, and then made a bid to cover up the breach, we agree that the bid would be in a relevant sense a façade, that the acquisition of the WilTel Stake would have taken place outside the market and that arguments comparing the transaction with a mandatory bid would have been relevant: compare *Corebell Pty Ltd v New Zealand Insurance Co. Ltd* (1988) 13 ACLR 349, 6 ACLC 618.

35. The information before us is capable of supporting an inference that WilTel will accept TVG's bid if no better bid is forthcoming. For the purposes of this decision, we assume that this is so. There is no evidence or submission, however, that WilTel has agreed to accept TVG's bid, or that it would not accept a better bid, by Roslyndale or anyone else, were one to be made before TVG's bid closed.

36. Accordingly, Roslyndale has not alleged (still less proven) facts which would justify the inference that the WilTel Stake has been acquired outside the market, and we see no basis for a finding that the making of the TVG bid has led (or will lead) to unacceptable circumstances by causing control of the WilTel stake (or other shares in PowerTel) to pass outside an efficient, competitive and informed market.

Whether Absence of Reasonable and Equal Opportunity

37. The second issue is whether the structure or conduct of the bid is such that shareholders other than WilTel will not have reasonable and equal opportunities to participate in the benefits that will accrue to WilTel in respect of the acquisition of the WilTel Stake.

38. This policy was partially explained in the policy paper introducing the takeovers Chapter of the *Corporate Law Economic Reform Program Bill 1999*, as follows:

> "The equal opportunity principle requires that, as far as practicable, each shareholder should have an equal opportunity to participate in the benefits offered under a bid. This means that minority shareholders have the opportunity to sell their shares to a buyer at the same price as the controlling shareholder. Any premium above the market price of the shares that the bidder is prepared to pay to gain control of the company ('the control premium') must be offered to all shareholders. The principle is based upon fairness and encouraging investor confidence in the capital market."

39. Roslyndale has not alleged that any hidden benefit has been offered to WilTel, which will not receive a higher effective price for its stake than other shareholders in PowerTel. On the contrary, although WilTel has been offered the same price for each of its ordinary shares as other holders, to satisfy TVG's conditions it must convert its existing preference shares into less valuable ordinary shares and give up the substantial debt owing to it by PowerTel for nominal consideration. On the face of it, WilTel will overall receive a lower effective price for its stake than other holders are offered for their shares. The consideration TVG offers is cash, which has no special value to one shareholder over another.

40. Roslyndale has not alleged that the TVG bid will not be conducted on the ordinary timetable in section 633, which is the benchmark for a reasonable opportunity to accept, or that WilTel will in any way have better access than other holders to the price being offered by TVG to all holders for their PowerTel shares.

41. Accordingly, we see no basis for concluding that shareholders other than WilTel will not have reasonable opportunities to participate in the benefits that TVG offers to WilTel, on terms which are equal or superior to those available to WilTel or that (with the exception of the nominal price for the debt, should WilTel accept it) any shareholder is offered worse terms than another.

Avoidance of Bid Requirements

42. The third issue is whether TVG's bid represents merely colourable compliance with the requirements of Part 6.5 for a takeover bid because, although it complies with the technical requirements for a bid, the economic substance of the transaction is quite different from the sort of transaction which is contemplated by Part 6.5, because there is no takeover premium. In dealing with this submission, we note again that it was put forward without any allegation that WilTel had made any commitment to accept the TVG bid.

43. There is no express requirement that a takeover bid be made at a full price or at a premium to the market price or the value of the shares. We see no basis for implying such a requirement, or that it is unacceptable to make a bid at an undervalue. On the contrary, the policy of Chapter 6, as set out in paragraph 602(a), is to require bids for control to be made in the market, which decides whether they succeed.

44. On the basis that the TVG bid is at an undervalue, Roslyndale argued that TVG is therefore offering no benefit to the minority shareholders, contrary to the policy that shareholders should have reasonable and equal access to benefits. We do not accept this submission: that policy requires a bidder to deal equally with all shareholders, not to offer them a price which is objectively beneficial to them. The measure of what must be offered to one shareholder is what has been offered to another shareholder, not a valuation of the shares.

45. In saying this, however, we note that a lack of reasonable and equal opportunities or a distortion of the market in which shares are acquired may result from a stratagem having the effect of artificially lowering the price at which a bid will succeed (*Re Pivot Nutrition Pty Ltd* (1997) 15 ACLC 369).

46. Roslyndale again submitted that a bid may be a façade for what is in essence a private transaction with the prospective vendor of a controlling parcel if, although that shareholder has not agreed to sell, the bidder knows with a degree of certainty which it would not otherwise have what price that shareholder will accept.

47. Assuming this to be the fact, that fact alone does not mean that the bid is a sham or façade in the sense that the ensuing sale of the controlling parcel takes place at a price below market, unless the parcel is not contestable. By way of analogy, once the reserve price at an auction is known, the character of competition may change, but competition between bidders continues for as long as the vendor is open to competing bids. On the evidence before us, any impression that the sale of the WilTel Stake may not take place in a competitive market is due less to any lack of willingness on WilTel's part to accept rival bids than to lack of rival bidders.

48. In our view, the "overriding policy of fairness" in Chapter 6 is not that a government-regulated fair price must be paid under a bid. The takeovers code ensures a degree of equality of treatment between one shareholder and another (sections 621, 622, 623, 650B and 651A), but it does not otherwise limit the price a bidder can offer for shares, and it affords no basis to prevent shareholders from making a free and informed decision to accept a bid.

Avoidance of Approval Requirements

49. The fourth issue is Roslyndale's submission that it would be unacceptable if minority shareholders did not have a veto under the shareholder approval mechanism over WilTel's acceptance of TVG's bid, because that acceptance would be an essentially private transaction between WilTel and TVG. We reject this submission. On the assumptions and for the reasons set out above, WilTel's acceptance would be no more and no less a private transaction between it and TVG than any other shareholder's acceptance of that bid. Each shareholder will decide whether or not to

accept the bid, according to their perception of value, their need for cash and their other personal circumstances.

50. The notion that a bidder must obtain shareholder approval of an acquisition under a bid, as well as making a bid which complies with Part 6.5, implies that shareholder approval has primacy as a policy of Chapter 6 over making a bid, at least in particular cases. The general perception is quite the reverse.

51. If either exception is preferable to the other from a policy perspective, which we do not conclude, it is arguable that a bid is preferable to shareholder consent to an acquisition. Purchases of shares by private treaty with shareholder consent do not fit naturally into the policy framework of section 602, since they occur off-market and since other shareholders do not participate in the benefits accruing to the selling shareholder. The exception for these purchases can be reconciled with the policy framework, on the basis that the approval mechanism enables non-associated shareholders to forgo the opportunity to participate in the benefits accruing to selling shareholders. On that basis, however, the shareholder approval exception would be secondary to the bid exception, which gives fuller effect to the policy of section 602.

Mandatory Bid

52. The fifth issue is the argument is that the TVG bid is contrary to the policy of Chapter 6, because it is in effect a mandatory bid, as provided for under the City Code or the provisions proposed to be included in the *Corporate Law Economic Reform Program Bill 1999*. Under those regimes, a bidder may purchase outright a major shareholder's stake (a **trigger parcel**) and cross the takeover threshold (relevantly 20%), without contravening the provision enforcing that threshold (relevantly section 606), if it promptly makes a full and unconditional bid, offering all other shareholders the same terms as apply to the purchase of the trigger parcel.

53. On the basis that WilTel has not already agreed to sell the WilTel Stake to TVG, under the bid or at all, the present facts are essentially different from those of a mandatory bid. Without such an agreement, there is no trigger parcel. We reject this submission.

Conclusion on the First Limb

54. In our view, Roslyndale has not made out an arguable case that the TVG bid gives rise to unacceptable circumstances under this limb of its application. That is, assuming for the purposes of this limb of the application that all of the facts that Roslyndale alleges are correct and taking full account of all of the arguments Roslyndale has developed to the effect that those facts give rise to unacceptable circumstances, we are satisfied that those facts would not give rise to unacceptable circumstances of the kind Roslyndale describes in this limb of its application, and we did not require other parties to make submissions on this limb.

THE FORECASTS

55. Roslyndale provided the Panel with spreadsheets prepared by PowerTel containing budgeted earnings for four years to come (the **Forecasts**). We infer that the Forecasts (or substantially similar information) have been available to a number of parties, including TVG, Roslyndale and DTU, and to PWC. Each of those parties has been able to use the information contained in the Forecasts to assist them in assessing the various proposals concerning PowerTel. Two of them have offers now open to acquire shares in PowerTel: TVG has made a general offer, and Roslyndale has made an offer to WilTel.

56. We consider that the information that has been disclosed to other PowerTel shareholders is deficient by comparison. Although it would be material to them in deciding whether to accept TVG's offer for their shares, nothing comparable with the Forecasts has been provided to other shareholders in PowerTel. All that other shareholders have received is a vague mention of the Forecasts in PWC's Independent Expert's Report, in the context of selecting a multiplier for capitalisation of earnings.

57. In the context of the TVG bid, comparable information should be made available to the other shareholders for use in deciding whether to accept TVG's bid or retain their shares. We agree, however, with PowerTel's submission that the Forecasts themselves should not be disclosed to shareholders, particularly without adequate explanation and qualifications. In the form in which they were provided to us they would be misleadingly speculative.

Policy Considerations regarding Prospective Financial Information

58. The Corporations Act requires a bidder and a target to provide to offerees the information available to them respectively which is material to the decision of an offeree whether to accept an offer under the bid.

59. A person deciding whether to accept a bid needs to decide whether the future benefits they expect to receive by retaining bid class securities are more or less than the future benefits they expect to receive by exchanging them for the bid consideration. To do so, they need to form some opinion as to the future financial performance of the target.

60. A target company assessing the merits of a bid should provide as much information as it responsibly can about its financial prospects, should the bid fail. Where historical information, such as accounts, is not a reliable guide to the levels and trends of future financial performance, it needs to be supplemented or explained. A failure by a bidder or target to provide prospective financial information to shareholders may bring about unacceptable circumstances if the bidder or target could have responsibly provided such information. On the other hand, information

is not material to investors if it is "speculative or based on mere matters of opinion or judgment"[1].

Limits on Prospective Financial Information

61. Prospective information must be limited to statements which the company believes, on reasonable grounds, fairly represent the likely future performance of the relevant issuer. Whether a company has reasonable grounds for a statement about its future depends on the whole of the statement. A prediction which is unsustainable if taken out of context may be well-founded, if presented with a balanced, specific and precise discussion of assumptions and risks.

62. A bidder or target should only provide numerical forecasts if it has reasonable grounds for doing so. It will not always be reasonable for a company to publish forecasts it has prepared for internal use, even if it is prepared to base its own decisions on them and provide them to other industry participants. Whether a bidder or target has reasonable grounds for publishing a forecast will depend on the volatility of the earnings of the relevant issuer and risk factors specific to the issuer and its industry.

63. If there is a material risk that the assumptions will be seriously wrong, it is better not to provide a forecast or projection.

64. Where a company does not have reasonable grounds for a numerical forecast, it should explain why it cannot provide a numerical forecast and provide the most precise qualitative statements about its prospects and the factors which influence them (for instance, that it expects to remain profitable or to maintain its level of profit) for which it does have reasonable grounds.

65. The period to which prospective information, particularly numerical forecasts, relate should be limited, with regard to the increase of uncertainty with time.

Risks and Assumptions

66. As part of any prospective financial information it provides (including numerical forecasts), a company should set out, precisely, specifically and without overstatement, the assumptions underlying the information, the degrees to which and the reasons why those assumptions are uncertain and the risks to which the company's business operations are subject.

67. A statement of risks should give due prominence to risks which are material, having regard to both the likelihood that they will eventuate and the magnitude and materiality of their effect if they do eventuate. It needs to be precise. For instance, vague references to 'government policy' are unsatisfactory, but it may be sufficient to refer to the risk that the ACCC will require particular operations to be sold, as a condition of allowing a merger.

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[1] *AAPT v Cable & Wireless Optus Ltd* (1999) 32 ACSR 63.

68. The discussion of risks and assumptions should include any relevant information about the intentions of the relevant management. This is particularly relevant where the company's performance depends on a proposed transaction, such as the rights issue proposed for PowerTel, which may affect the company's financial performance during the period to which the discussion relates.

Application to PowerTel

69. The Forecasts were provided to us as bare spreadsheets. In order to use them, the parties to whom they were provided must have had access to information (whether their own or from PowerTel) which qualifies and explains the spreadsheets, which would otherwise be mere projections. Without similar information, it would be plainly irresponsible to publish the Forecasts. PowerTel argued, and we agree, that projections of this nature and duration cannot be responsibly published at all, given the present uncertainties over the company's future financial performance.

70. Although Roslyndale has sought an order for a supplementary bidder's statement, it appears to us that PowerTel is best placed to provide suitable information to its shareholders on its prospects, because the Forecasts are based on PowerTel's proprietary information and because PowerTel is best placed to select, explain and qualify the information provided to shareholders.

71. Accordingly, we invited PowerTel to undertake that it would make further disclosure to shareholders in relation to the subject-matter of the Forecasts, in the context of a recommendation to shareholders focussed on the TVG proposal. That information need not include numerical forecasts or extend for 4 years. It could take the form of a supplementary target's statement, a further supplement to the Independent Expert's Report, or both. Whatever information is provided to shareholders should, however, be focussed on the choice that they now have to make, whether to accept TVG's offer or retain their shares. At present, the target's statement remains focussed on the choice between the Roslyndale proposal and the TVG bid, which is no longer helpful.

72. PowerTel provided the undertaking we sought. A copy of the undertaking is set out in the Appendix to these reasons.

MISLEADING STATEMENTS

73. As mentioned above, TVG proposes to recapitalize PowerTel by an underwritten rights issue, should it obtain control of PowerTel under its bid, without acquiring all of the shares in PowerTel. The bidder's statement describes the proposal in some detail and stated that rights issue would need the approval of PowerTel shareholders other than TVG under the Listing Rules.

74. Roslyndale submitted that this disclosure was confusing and capable of misleading offerees into thinking that the rights issue was sure to go ahead, if the bid succeeded, as it presented the bid and the rights issue as two aspects of one proposal. This might induce shareholders to hold their shares on the basis that PowerTel would be a more attractive investment if the bid was successful and PowerTel was recapitalized.

It proposed that TVG should be required to make its offer conditional on the rights issue being approved. Alternatively, if this proposal was rejected, Roslyndale submitted that TVG should be required to make further disclosure to clarify that the recapitalisation is conditional on shareholder approval.

75. If they are taken out of context, some of the statements in the bidder's statement can be read as giving undue assurance that the rights issue will go ahead if the takeover is successful. For example, there are a number of statements that prescriptively state that the recapitalisation will occur without qualifying that the recapitalisation is conditional on shareholder approval. We do not think that this is a fair reading of the bidder's statement and we do not agree that the bidder's statement give undue assurance that the rights issue will go ahead if the takeover is successful. On its face, the bidder's statement makes it quite clear in several places that the rights issue will be subject to shareholder approval.

76. In the circumstances of this bid, it would not be workable for TVG's offer to be conditional on the rights issue being approved. Each shareholder will be affected by one or other of the takeover offer and the rights issue, but not by both. Only those shareholders who reject the takeover offer will have the opportunity to participate in the rights issue. Those shareholders who accept the takeover offer will have no interest in the success or otherwise of the rights issue and should not be entitled to vote on whether or not it should proceed.

77. If the rights issue is rejected, it will be by a vote of the remaining minority shareholders. There is no demonstrable policy basis to suggest that these remaining minority shareholders are disadvantaged by the bid consisting of 2 separate transactions, and by one of those transactions being dependent on shareholder approval, when those minority shareholders are the very people who will decide whether or not to approve the rights issue.

78. Making the bid conditional on the rights issue would also not be workable. The shareholder meeting to approve the rights issue would need to be held before the offer became unconditional. However, as explained in paragraph #60 above, only those shareholders who rejected the takeover offer would be entitled to vote on whether or not the rights issue should proceed. The identification of these shareholders will not be possible until after the bid closes, because any shareholder can accept at any time until the bid closes.

79. Accordingly, we decided that this limb of the application was not made out, declined to make a declaration or orders, and did not request any undertakings.

CONCLUSION

80. In addition to obtaining an undertaking from PowerTel to provide additional information, as mentioned above, we asked TVG to undertake to extend its bid so that shareholders will have two weeks to consider its offer after the supplementary information is dispatched by PowerTel. TVG provided that undertaking, although it advised that it would prefer a shorter extension than two weeks.

81. For the reasons set out above, and having regard to the undertakings received from PowerTel and from TVG, we dismiss the application without making a declaration of unacceptable circumstances or any orders. We thank all parties for their assistance and consent to their being represented by their respective commercial solicitors. There will be no order for costs.

Alison Lansley
Sitting President
Decision dated 25 July 2003
Published 11 September 2003

Appendix
Undertaking by PowerTel Limited

Pursuant to s201A(1) of the Australian Securities and Investments Commission Act 2001, PowerTel Limited (ACN 001 760 103) (**PowerTel**) undertakes to:

(a) prepare a Supplementary Target's Statement to be lodged with the Australian Securities and Investments Commission and released to the Australian Stock Exchange on or before Tuesday 29 July 2003; and

(b) include in that Supplementary Target's Statement:

  (i) a new statement of the kind specified in s638(3) of the Corporations Act 2001 about the takeover offer made by TVG Consolidation Holdings SPRL (**TVG**);

  (ii) an update of PowerTel's recent financial performance;

  (iii) a discussion of PowerTel's prospects (including its prospective financial performance), including as a result of the recapitalisation of PowerTel which is proposed by TVG; and

  (iv) a discussion of the relevant risks.

Dated *23 July 2003*

[signed]