In the matter of PowerTel Limited (No. 3)
[2003] ATP 28

Catchwords: *Takeover bid –unacceptable circumstances - declare free of defeating condition – collateral benefit - equal opportunity to share in benefits – valuation of asset – net benefit*

Corporations Act 2001 (Cth), sections 602(c), 618, 619, 623, 627, 649A to 650D, 650F, 657A
Acts Interpretation Act 1901 (Cth), section 18A
Advance Property Fund [2000] ATP 7
Alpha Healthcare [2001] ATP 13
Normandy Mining (No. 4) [2001] ATP 31
Normandy Mining (No. 6) [2001] ATP 32
SA Liquor Distributors [2002] ATP 22
Aberfoyle v Western Metals (1998) 28 ACSR 187
Ampolex v Mobil (1996) 65 FCR 503
Attorney-General (Vic) v Walsh's Holdings [1973] VR 137
Boral Energy v TU Australia (1998) 28 ACSR 1
Corebell v New Zealand Insurance Co (1988) 13 ACLR 349
Primac Holdings v IAMA (1997) 15 ACLC 208
***Sagasco Amadeus v Magellan Petroleum* (1993) 113 ALR 23**
***Savage Resources v Pasminco* (1999) 30 ACSR 1**

These are our reasons for declining to make a declaration of unacceptable circumstances in response to an application by Data Investments Pty Limited on behalf of a syndicate of Australian investors (Roslyndale) under sections 657A and 657D of the Corporations Act 2001 (Cth) (Act) dated 29 July 2003 (Application). Roslyndale had applied to the Takeovers Panel (Panel) for a declaration of unacceptable circumstances and orders 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).

1. The sitting Panel was made up of Teresa Handicott (sitting President), Chris Photakis (sitting Deputy President) and Carol Buys.

BACKGROUND

2. PowerTel is a public, listed company with a telecommunications business.

3. WilTel Communications LLC (**WilTel**) is PowerTel's largest shareholder. 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 unpaid accrued preference dividend rights, which will convert into ordinary shares in 2006, and which WilTel may convert into ordinary shares in the meantime. On the issue of ordinary shares on conversion of all of the preference shares and dividend rights (**Conversion Shares**), WilTel would hold 47.9% of the ordinary shares in PowerTel.

   (b) **Debt**: $21.3 million of subordinated and intercompany debt and $3 million accrued interest owed by PowerTel to WilTel and related companies (the

WilTel Debt). Of this amount, $18 million is subordinated to $78.5 million of senior bank debt which is due to be repaid in 2006, and the remaining $6.3 million is payable immediately.

4. PowerTel's other major shareholder is DownTown Utilities (**DTU**), a consortium of electricity supply companies, which holds 35% of the issued ordinary shares in PowerTel. Since our decision was made, DTU have sold some of those shares.

The Roslyndale Proposal

5. On 9 May 2003, PowerTel announced that Roslyndale had agreed with WilTel to acquire WilTel's shares in PowerTel and the WilTel Debt for $14 million (of which $8.8 million was expressed to be for the debt) and to finance and underwrite $A16.3 million of new equity for PowerTel (**Roslyndale Proposal**). The agreement was subject to PowerTel shareholder approval. The general meeting to consider the Roslyndale Proposal was held on 2 July and the resolutions were not passed. WilTel states that Roslyndale on 18 July offered it over $10 million for the WilTel Debt, and Roslyndale has not denied having done so.

6. With the notice of this meeting, PowerTel provided an independent expert's report by PricewaterhouseCoopers (PwC) which concluded that the preference and ordinary shares in PowerTel had some value, applying a capitalisation of earnings methodology.

The TVG Bid

7. On 10 June 2003, TVG announced that it intended to make a takeover offer (the **TVG Bid**) for all of the ordinary shares in PowerTel, including the Conversion Shares, subject to defeating conditions which included:

   (a) minimum acceptance of 47% of the ordinary shares (including the Conversion Shares) (the **Minimum Acceptance Condition**);

   (b) that WilTel convert all of the preference shares and unpaid accrued preference dividends into ordinary shares (the **Preference Condition**); and

   (c) that WilTel sell the WilTel Debt to TVG for $1 (the **Debt Condition**).

   WilTel could satisfy all of these conditions. Other defeating conditions were waived by 1 July. The bid was to be at 3 cents/share, but this was later increased to 3.85 cents/share.

8. TVG announced that after the Bid, it intended to underwrite a $50 million rights issue to recapitalise PowerTel. Out of the funds raised, $25 million would be used to pay down the senior bank debt and $10 million would be used to repay the WilTel Debt, which would by then be held by TVG itself.

9. TVG posted offers under the Bid on 20 June. Those offers are currently open and due to close on 25 August. On 18 June 2003, TVG made an irrevocable offer to acquire the WilTel Debt for $1.

The Waiver

10. Between 23 and 25 July, WilTel and TVG held discussions, in which WilTel indicated that it was not satisfied with the terms TVG had offered, specifically with the nominal consideration TVG had offered for the WilTel Debt, and that it was looking, and would continue to look, at an alternative offer. WilTel asked TVG to waive the Debt Condition, to enable it to negotiate an appropriate price for the debt. It said this would remove an obstacle to its possible acceptance of the Bid. TVG was unwilling to waive the condition, unless it knew the price at which it (or PowerTel) could acquire the WilTel Debt, and the parties discussed the terms of the offer WilTel made on 25 July.

11. On the afternoon of Friday 25 July 2003, WilTel made an offer to PowerTel to forgive the WilTel Debt for a payment of $10 million by PowerTel to WilTel. The offer was expressed to be irrevocable and capable of being accepted, at the latest, two weeks after the TVG Bid closed, but conditional on TVG, within 24 hours of that offer being made, waiving the Debt Condition and accelerating payment for acceptances of the Bid to three business days from receipt of the acceptances or the Bid becoming unconditional, whichever was later.

12. On the afternoon of Saturday 26 July, TVG issued a Supplementary Bidder's Statement declaring the Bid free of the Debt Condition and stating that TVG would pay accepting offerees within three business days of the Bid becoming unconditional or their acceptances being received. The TVG Bid was then subject only to the Preference Condition and the Minimum Acceptance Condition. PowerTel on 29 July issued a Supplementary Target's Statement in which it stated that it intended to accept the WilTel offer, subject to the Bid becoming unconditional, and pointed out that the effect on PowerTel was the same as the existing proposal for TVG to buy the WilTel Debt and to accept $10 million from PowerTel to forgive the debt.

THE APPLICATION

13. On 29 July 2003 Roslyndale applied for:

    (a) a declaration to the effect that it was unacceptable for TVG to vary its Bid to make it free from the Debt Condition, as the effect of this variation is to give a benefit to WilTel (and not other shareholders) which is likely to induce WilTel to accept the Bid; and

    (b) final orders to reinstate the Debt Condition as a defeating condition of the Bid.

Applicable Law and Policy

14. The question for the Panel is whether these events have led to the occurrence of unacceptable circumstances, whether or not they resulted from a contravention of section 623 (paragraph 657A(2)(b)).

15. Section 623 provides that:

> "A bidder, or an associate, must not, during the offer period for a takeover bid, give, offer to give or agree to give a benefit to a person if:
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> (a) the benefit is likely to induce the person or an associate to:
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> (i) accept an offer under the bid; or
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> (ii) dispose of securities in the bid class; and
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> (b) the benefit is not offered to all holders of securities in the bid class under the bid."

There are exclusions which are not presently relevant for on-market purchases, a variation of a bid under sections 649A to 650D and simultaneous takeover bids for different classes of securities in the same target. Roslyndale observe that the exception for variations of offers does not include waivers of conditions, which are under section 650F.

16. Whether or not the waiver gave rise to a contravention of section 623, unacceptable circumstances would have occurred if the waiver defeated the objective of Chapter 6 which is set out in paragraph 602(c), that:

> "as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders under any proposal under which a person would acquire a substantial interest in the company, body or scheme".

17. Relevantly that policy requires that all holders of ordinary shares in PowerTel should have reasonable and equal opportunities to participate in benefits which accrue to any of those holders through the TVG Bid. The relevant benefits include benefits which arose directly from the acquisition of the WilTel Debt, because that acquisition is linked to the Bid by the Debt Condition.[1]

18. These two sets of considerations are closely linked, because section 623 is one of the means chosen by the legislature to put into effect the equal opportunity policy of paragraph 602(c).

Roslyndale's Case

19. Roslyndale put its case on the basis that:

(a) TVG gave WilTel a benefit by declaring the Bid free of the Debt Condition, namely the freedom to accept the Bid and still negotiate a price for the WilTel Debt higher than $1;

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[1] In *Alpha Healthcare* [2001] ATP 13, the sitting Panel treated a benefit as arising through a bid for the purposes of paragraph 602(c), which was given under a contract to acquire debt which was tied to the bid by a condition of the sale of the debt. *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Pty Ltd* (1993) 113 ALR 23 was decided on the basis of a concession, not a finding, that a benefit was given to a shareholder in a company. The benefit was paid under a contract to buy shares in another company, which was conditional on a contract to buy shares in the target company.

(b) at the relevant time, TVG was the bidder under a bid for ordinary shares and WilTel was a holder of shares in that class; and

(c) the benefit was likely to induce WilTel to accept the Bid, because it took away an adverse consequence of that acceptance.

20. On Roslyndale's reading of section 623, all of the elements of a breach are present, and it isn't strictly necessary to show any agreement between TVG and WilTel. Roslyndale nonetheless argued that the events disclosed on the public record strongly indicate a pre-existing understanding broadly to the effect that WilTel would accept the Bid and that TVG would pay it $10 million for the WilTel Debt, through PowerTel. Nor is it necessary on this approach to show that the WilTel Debt is worth less than $10 million, and Roslyndale expressly declined an invitation to provide evidence that it was worth less than $10 million.

WHETHER CONTRAVENTION

21. Some elements of a contravention of section 623 exist in this matter. By declaring the bid free of the Debt Condition, TVG gave a benefit to all shareholders in TVG. The declaration was of particular advantage to WilTel, however, because in the context of the TVG Bid, the WilTel Debt is capable of being sold for a substantial sum, as is evident from the way it would be dealt with in both the Roslyndale and TVG proposals. That the declaration would influence WilTel's decision whether to accept the Bid is evident from the fact that WilTel stipulated for the Bid to be freed of the condition.

22. Roslyndale identified the benefit conferred on WilTel by declaring the Bid free of the Debt Condition as the freedom to deal with the WilTel Debt i.e. to accept the bid without losing the power to negotiate repayment or sale of the WilTel Debt. Until TVG waived the Debt Condition, WilTel's ability to accept the Bid was coupled with a detriment specific to WilTel, namely the requirement to sell the WilTel Debt to TVG for $1. If WilTel dealt with the WilTel Debt in any other way, the Debt Condition would be triggered and the Bid would no longer be available, unless TVG declared it free of the condition. No other ordinary shareholder in PowerTel was subject to any comparable detriment. The removal of that condition placed WilTel in the same position as all other shareholders in PowerTel, in that it can accept the TVG Bid for its shares in PowerTel without affecting its ability to deal with its other property. [2]

23. It is implicit in Roslyndale's view that whether a holder is given a benefit under section 623 is relevantly determined by comparing the terms available to that holder before and immediately after the act characterised as the giving of a benefit, and does not depend on a comparison between the terms the bidder offers to different holders, after that act. On this view, a bidder may never drop a condition of its bid which specifically and adversely affects one offeree without offending against section 623.

[2] Other than the fact that WilTel remained fettered by the Preference Condition in dealing with its preference shares.

24. The section, however, only prohibits a person from giving (or offering, or agreeing to give) a benefit to one offeree, if that benefit is not offered to all bid class holders. The benefit identified by Roslyndale (the ability to accept the bid without losing the freedom to deal with one's other assets) had already been extended to all other ordinary shareholders as an ordinary incident of the terms of the Bid when it was first made, but WilTel received it only when the Debt Condition was waived.

25. The policy which section 623 supports, that holders of bid class securities should have reasonable and equal opportunities to participate in benefits accruing under a bid, with its focus on the possibility of similar outcomes, is advanced by acts which remove obstacles to particular offerees participating in benefits accruing under bids. If there is a requirement that a benefit must have been offered to all bid class holders at the same time, it flows from sections 618, 619 and 627. The policy of those provisions militates against bidders including conditions which discriminate against some bid class holders, and lends no support to a reading which entrenches such conditions.[3]

26. Accordingly, we cannot accept the argument that TVG breached section 623 by declaring the Bid free of the Debt Condition. Even if every other element of the offence was present, the benefit then conferred on WilTel (the freedom to accept the bid and deal with other assets) was one which had already been given to all other holders of ordinary shares in PowerTel under the TVG Bid. Having decided this matter on this basis, we do not need to determine whether it is possible to contravene section 623 by declaring a bid free from a defeating condition.

27. Even measuring the value of this benefit to WilTel by the terms on which it offered to accept repayment of the WilTel Debt (although Roslyndale did not submit that we should do so), we would not find that WilTel had received a net benefit which was not offered to other ordinary shareholders, for the reasons set out in paragraphs 42 to 53.

28. TVG could have allowed the present Bid to fail, instead of waiving the Debt Condition. It could then have made a fresh offer to all PowerTel ordinary shareholders in the same terms, except with a condition which required WilTel to agree to release the WilTel Debt on payment of $10 million by PowerTel. Had it done so, the issue would not be whether the new bid was more favourable to WilTel than the old bid: it would be whether the new bid was more favourable to WilTel than to the other ordinary shareholders.

Whether Agreement to Acquire Shares

29. Roslyndale argued that the promptness with which TVG responded to the WilTel offer implied that agreement had already been reached between TVG and WilTel that WilTel would accept $10 million as repayment of the WilTel Debt and that TVG would cause PowerTel to repay the WilTel Debt for that amount, should the Bid succeed. It invited us to investigate that inferred agreement.

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[3] This policy issue is discussed at the end of these reasons.

30. WilTel and TVG provided witness statements to the effect that they had held discussions, in the course of which WilTel had indicated that it was not satisfied with the terms TVG had offered, and that it required the Debt Condition to be waived so that it could obtain an appropriate price for the debt, and that the terms of WilTel's offer had been discussed, but that no agreement had been made in the course of those discussions. It is common for a bidder and shareholder to hold such discussions. Properly advised parties know to stop short of entering a relevant agreement[4] in contravention of section 606, and the evidence did not suggest that WilTel and TVG had gone beyond exploring acceptable terms.[5]

Whether an Inducement

31. Section 623 is not breached, and the reasonable and equal opportunity principle is not defeated, unless the benefit is one which is likely to induce the shareholder to accept the bid or otherwise dispose of bid class shares.

32. We infer from its conduct that WilTel was attracted to the possibility of being able to negotiate the repayment of the debt and we consider this to be commercially reasonable. The amount of $10 million involved is substantial, in its own right, and relative to the Bid. The total consideration offered for shares under the Bid is just over $40 million, of which WilTel could receive $20 million for its shares. We infer that the incentive is a strong one, given that:

    (a) TVG is unlikely to provide PowerTel with the funds to repay the debt unless it has obtained control of PowerTel;

    (b) TVG is unlikely to advance PowerTel the money to pay off the WilTel Debt unless and until its offer succeeds; and

    (c) WilTel (and effectively only WilTel) can satisfy all of the remaining conditions of the Bid by converting its preference shares into ordinary shares and accepting the Bid.

Whether Agreement to give Benefit

33. The evidence suggests two ways in which we might find that TVG and WilTel entered into a relevant agreement[6] under which WilTel agreed to accept $10 million in repayment of the WilTel Debt. Roslyndale submitted that the existence of such an agreement was an available inference from the events of 25 and 26 July, which demonstrated that TVG was ready to respond quickly to WilTel's offer, and that WilTel knew that TVG would be ready. The evidence provided by TVG and WilTel, to which we have just referred, adequately rebuts this argument: the parties acknowledge that they discussed the terms which WilTel would be prepared to

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[4] An arrangement, agreement or understanding, oral or written, formal or informal and whether or not having legal or equitable force: sections 64 and 606, and the definition of "relevant agreement" in section 9.
[5] Compare the facts in *Corebell Pty Ltd v New Zealand Insurance Co. Ltd* (1988) 13 ACLR 349.
[6] "Agree" in section 623 means entering into a relevant agreement: section 18A of the *Acts Interpretation Act*.

accept, explaining TVG's readiness to respond to WilTel's offer, but state that they made no agreement.

34. An alternative analysis of the evidence (one which Roslyndale did not adopt) is that the announcements of 25 and 26 July themselves brought into existence a relevant agreement under which WilTel agreed to accept $10 million in repayment of the WilTel Debt, should the Bid succeed, and TVG agreed to those terms by declaring the Bid free of the Debt Condition. It is unnecessary for us to decide whether the announcements had that effect, because we have decided that for WilTel to accept $10 million in repayment of the WilTel Debt was not to receive a benefit for the purposes of subsection 623(1) or paragraph 602(c).

35. An agreement by TVG to give WilTel a benefit by waiving the Debt Condition would not contravene section 623, for the same reason that actually giving that benefit did not contravene the section. Assuming there was an agreement and it was an agreement to give a benefit to WilTel, the benefit was one which was offered to all ordinary shareholders in PowerTel.

36. Similarly, in *Savage Resources v Pasminco* (1998) 30 ACSR 1 the alleged benefit was the capacity for some of the sellers to terminate the sale agreements if a higher unmatched competing bid was made for the target before the bid became unconditional. This was held not to contravene previous section 698 because, although the termination right was an advantage, its purpose and effect was to ensure that the seller suffered no disadvantage from the consequence of having enabled the auction to start by entering those sale agreements and this is achieved by restoring those sellers to their position before entering the agreements.

Presentation of the Waiver

37. The manner in which WilTel and TVG sought to achieve the changes to TVG's offer so that it would be more acceptable to WilTel (the negotiations leading to a conditional offer by WilTel to PowerTel and the declaration of the Bid to be free of the Debt Condition to fulfil the conditions of the WilTel Offer) seem to the Panel to have been based on a misguided attempt by those parties to avoid entry into a relevant agreement. While, as our discussion of *Corebell* shows, this may be required to prevent a contravention of section 606, it will be rare that it will have any effect on a potential contravention of section 623 because of the other alternatives available (giving and offering to give) to satisfy that element of section 623.

38. Provided that no benefit is involved, or another required element for a breach of section 623 was not present, a straightforward agreement between TVG and WilTel that, should the Bid succeed, TVG would cause PowerTel to pay off the WilTel Debt for $10 million and WilTel would accept that amount would appear to have been an available alternative. By proceeding in the way they did, WilTel and TVG gave us the impression that they were consciously trying to follow *Corebell* and to prevent a breach of section 606 (such as an undertaking by WilTel to accept the Bid in the revised circumstances).

39. The Panel did not need to consider this matter further because Roslyndale eschewed any reliance on the facts as potentially disclosing such a breach. The Panel notes that where parties effect transactions in circuitous or convoluted ways when an acceptable straightforward alternative manner of proceeding is available, it can both suggest the possibility of other factors that may require Panel consideration and lead to the relevant shareholders and the market being confused as to what the parties conduct actually reveals, to the prejudice of the efficient competitive and informed market principle in paragraph 602(a).

WHETHER UNACCEPTABLE CIRCUMSTANCES

40. Whether the state of affairs resulting from the waiver led to unacceptable circumstances depends on whether it tended to defeat the reasonable and equal opportunity principle, and not simply on whether it was a breach of section 623. On its own (i.e. ignoring WilTel's offer to accept $10 million for the WilTel Debt) the waiver has no tendency to defeat that policy. On the contrary, standing alone, the waiver fulfils that policy, by removing the discrimination against WilTel, which, aside from the Preference Condition, was for the first time treated the same as the other holders, as regards the terms of the Bid itself.

41. It would be contrived to take the waiver alone. There is an offer by WilTel to release the Debt for $10 million. Assuming that there is at present no agreement to pay off the debt at that price, it is likely that such an agreement will be reached if the Bid closes with the Minimum Acceptance and Preference Conditions satisfied. WilTel must keep the offer open; otherwise it will have acted misleadingly in holding it out to be irrevocable. TVG must cause PowerTel to accept the offer, when and if the Bid closes with the conditions satisfied, because TVG will then have paid for control of PowerTel, but cannot have secure control over PowerTel while another person holds the WilTel Debt.

42. That requires us to consider whether WilTel's offer and TVG's waiver of the Debt Condition amount to a proposal, under which one ordinary shareholder would receive an inducement to accept the Bid, which has not been offered to other ordinary shareholders. Since TVG is unlikely to advance PowerTel $10 million to pay off the debt unless the TVG Bid succeeds and since the bid will not succeed without WilTel's acceptance, the prospect of securing the $10 million is likely to be an inducement to WilTel to accept the bid.

Net Benefit Approach

43. Roslyndale's approach to benefit is an extreme "atomistic"[7] one - requiring a simple and immediate "before and after" test to be applied without regard to context or to detriments which must be netted off to ascertain the overall effect of the transaction. We do not agree with that approach.

44. In ascertaining whether a benefit has been given (or offered or agreed to be given), the Courts and the Panel have made an assessment as to whether the total effect of

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[7] In the terminology used by Santow J in *Boral Energy v TU Australia* (1998) 28 ACSR 1.

the impugned transaction is to confer a benefit on a shareholder (or associate) rather than merely to isolate a beneficial factor without considering the context in which that arises.

45. The leading example of this is in *Sagasco v Magellan*. In that case, the existence of a benefit was in effect conceded by the appellant for the purposes of the proceedings (being the premium of the price paid for Magellan US shares over the prevailing market price). It was argued that the approach ultimately adopted by the Court would involve a breach of the prohibition whenever shares were acquired and paid for earlier under a private deal than would be the case under the proposed or actual bid. The majority's response to this argument is that early payment is not to be seen in isolation from the effect of early settlement as a whole (that the shares and their rights are ceded at the earlier date). Thus, the High Court's, strictly *obiter*, approach to this is to look at the net effect of the transaction – not necessarily in purely economic or valuation terms, but in commercial terms. For convenience we set out the passage in full (at 403):

> "It is argued that to construe s.698(2) as we have suggested would lead to difficulty because the mere acquisition of shares in a company, even at the same price as that later offered under a takeover scheme, would confer a benefit upon shareholders whose shares were acquired before the commencement of the takeover period in that they would receive the price at an earlier time. It is said that, as a result, s.698(2) may preclude the acquisition of shares otherwise than on the stockmarket ((6) See s.698(5)) for a period of four months before proposed takeover offers were made. For example, it is said that the sub-section may preclude a person proposing to make takeover offers from building up during that period a shareholding of the permitted percentage ((7) See s.615) by off-market acquisitions before launching the takeover scheme. We do not think that this argument can be sustained. The price paid for shares, whenever paid, is consideration for the shares and earlier payment means relinquishing the shares and the rights that go with them at an earlier date. Mere earlier payment would not, therefore, constitute a benefit for the purposes of s.698(2)."

46. The approaches of Dowsett J in *Primac*[8] (especially the concept of "profit", implying as it does the result of pluses and minuses), Sackville J in *Ampolex*[9] (by comparing the price offered against the prevailing market price), and Hely J in *Savage Resources v Pasminco* clearly support this approach. Santow J in *Boral Energy v TU Australia* also appears to prefer the "net benefit" approach. Although he analyses the situation on both an "atomistic" basis and a "holistic" basis (his words), he distinctly expresses a preference for the latter (at p34).

47. While the decisions in *Leviathan*[10] and *Aberfoyle v Western Metals*[11] do not clearly support the net benefit approach, the reasoning in each is entirely inconsistent with the "atomistic" analysis, as each decision is concerned with benefits at the margin.

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[8] *Primac Holdings v IAMA* (1997) 15 ACLC 208
[9] *Ampolex v Mobil* (1996) 65 FCR 503
[10] *Attorney-General (Vic) v Walsh's Holdings Ltd* [1973] VR 137
[11] *Aberfoyle Ltd v Western Metals Ltd* (1998) 28 ACSR 1

Neither case takes a clear "atomistic" approach, under which the whole of the consideration provided by the bidder (the purchase money in *Leviathan*, or the shares in *Aberfoyle*) would be treated as a benefit, without netting off the consideration received by the bidder. Accordingly, neither decision supports Roslyndale's approach.

48. The reasoning of the Panel in *Advance Property Fund,*[12] *Alpha Healthcare,*[13] *Normandy Mining (Nos. 4 and 6)*[14], and *SA Liquor Distributors*[15] supports this "net benefit" approach. In *Advance Property Fund* the Panel (at [43]-[45]) approached a pre-bid agreement on the basis that it put the seller in a potentially worse position to other investors, even though the seller did get some advantage from the transaction, and that other aspects of the pre-bid agreement were on arm's-length terms. Similarly in *Alpha Healthcare*, the Panel approached the purchase by the bidder of debts owed by the target to the seller shareholder as follows (at [61] – [62]):

> "61. In being able to sell the debt, Sun received a benefit which other shareholders did not. But Sun was not in the same position as other shareholders: it had made large loans to Alpha; subordinated, unsecured and due for repayment in over 10 years time. These terms might have been uncommercial, except that Sun Healthcare was the major shareholder in Alpha when it made the loans. …
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> "62. On the face of it, Sun Healthcare received this benefit as a creditor, not as a shareholder. It might be different, if Ramsay had paid more for the debt than it was worth, but we have decided that it did not.

49. Accordingly, the balance of judicial authority (including the reasoning of the majority of the High Court in *Sagasco*) and the basis of the Panel decisions which have considered the issue of benefits in CA s623 supports a "net benefits" approach looking at the commercial balance of advantages flowing to or from the non-bidder from a transaction which is sought to be impugned.

Whether a Benefit

50. On this basis, for the reasonable and equal access principle to have been defeated, WilTel must receive a net benefit: the value of the WilTel Debt must be less than the $10 million proposed to be given for it.[16] In our view, there is no net benefit to WilTel in accepting $10 million in repayment of the WilTel Debt.

51. On that approach, we must consider all advantages and disadvantages of the transaction for the shareholder to determine whether the advantages of the relevant

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[12] [2000] ATP 7
[13] [2001] ATP 13
[14] [2001] ATP 31 and [2001] ATP 32
[15] [2002] ATP 22
[16] We have not separately considered the value of the rights attached to the preference shares which WilTel must still give up to satisfy the Preference Condition. Much of the discussion of the WilTel Debt applies to those rights, *mutatis mutandis*, but the value of the rights was not fully argued in submissions, although the loss on conversion may be substantial: for instance, the accrued dividends must be converted at 47 cents.

transaction outweigh the detriments suffered in connection with the transaction so as to constitute a net benefit. This may require considering the transaction in the context of the bid as a whole and the consideration of the position of the shareholder at various points of time (which may include before the bid was made).

Value of the WilTel Debt

52. The parties did not argue that the WilTel Debt is worth materially less than $10 million. In particular, even when asked expressly, Roslyndale did not submit that the WilTel Debt is worth less than $10 million. Their own conduct mentioned above implies that in their view it is worth about that much.

53. PowerTel pointed out that each of the major parties had acted in a way which implied that they held the view that the WilTel Debt is worth not less than $10 million, in this transaction.[17] Roslyndale proposed that the debt be repaid at $8.8 million, but later offered not less than $10 million to buy it. TVG proposed that it be repaid at $10 million. PowerTel itself took the same view, when it stated that it would accept the WilTel offer, if it was in a position to do so. So did PowerTel's banks, when they agreed to the repayment of the WilTel Debt, as proposed by TVG. These views are supported by the valuation made by PwC in the independent expert's report and by a valuation of the WilTel Debt made by Macquarie Bank and provided by TVG.

54. Accordingly, we find that WilTel obtained no benefit in the relevant sense, regardless of whether TVG agreed to pay WilTel $10 million for the debt.

DEFEATING CONDITIONS AND EQUAL OPPORTUNITIES

55. It is arguable that the Debt Condition itself offended against the policy that all holders of ordinary shares should have reasonable and equal opportunities to participate in the benefits accruing to any of them. In *PowerTel (No. 2)*,[18] a matter involving the same parties and the same bid, the sitting Panel said:

> "we see no basis for concluding … that (with the exception of the nominal price for the debt, should WilTel accept it) any shareholder is offered worse terms than another."

56. Although the policy of sections 618, 619 and 627 militates against conditions which discriminate against some bid class holders, we do not suggest that a bidder may never include in a bid a defeating condition which specifically affects one bid class holder, and requires that holder to act in a certain way (dispose of certain property, say) if the bid is to proceed. Conditions of that kind are necessary for some bids to be

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[17] The limitation to a transaction of this nature is because, absent a takeover or reconstruction, it would be hard to sell the debt for anything approaching face value, as neither interest nor principal is likely to be paid until the senior debt is rolled over in 2006, and then what is done with it will depend on a negotiation.
[18] [2003] ATP 27 at [42]

viable. The present bid is an example, as the conduct of both TVG and Roslyndale illustrates.[19]

57. There may be occasions when the imposition or waiver of a condition would tend to create unequal opportunities to participate in benefits accruing through a bid, including causally linked transactions.

58. In each case, whether the imposition or waiver of a defeating condition in a bid has led to unacceptable circumstances by creating unequal opportunities to participate in benefits has to be answered by looking at the overall effect on each shareholder of the imposition or waiver of that condition, having regard to that shareholder's position and the effect on that position of the condition or waiver.

THE PANEL'S DECISION

59. For the reasons set out above 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. We adopted the Panel's Procedural Rules under section 195 for the purposes of these proceedings. There will be no order for costs.

Teresa Handicott
President of the Sitting Panel
Decision dated 8 August 2003
Published 11 September 2003

[19] See also *Alpha Healthcare* at [61] to [63].