



**In the matter of PowerTel Limited (No. 1)
[2003] ATP 25**

Catchwords: *Shareholder approval – adequacy of time available – adequacy of information available – further disclosure to market – advertising to bring information to attention – termination of agreement
Panel procedure– timeliness of application
Substantial holding notice – accompanying documents
Corporations Act 2001 (Cth), sections 609(7), 611 item 7*

These are our reasons for declining to make a declaration of unacceptable circumstances in response to an application by TVG Consolidation Holdings SPRL (TVG) under section 657C of the Corporations Act 2001 (Cth) (Act) dated 26 June 2003 (Application). TVG had applied to the Takeovers Panel (Panel) for a declaration of unacceptable circumstances and orders in relation to its takeover bid for PowerTel and a rival proposal by the Roslyndale Syndicate.

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

BACKGROUND

2. PowerTel is a public, listed company with a telecommunications business.
3. WilTel Communications Group (**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 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.
4. On a fully diluted basis, WilTel would be entitled to approximately 47.9% of the ordinary shares in PowerTel.

The Roslyndale Proposal

5. On 9 May 2003 PowerTel announced an in-principle agreement (the **Roslyndale Proposal**) between the Roslyndale syndicate operating through Data Investments Pty Limited (**Roslyndale**) and WilTel, under which Roslyndale would acquire all of WilTel's debt and equity in PowerTel, convert the debt into equity and underwrite a \$16.3 million rights issue. The consideration payable by Roslyndale to WilTel for the shares and the debt was to be the Australian Dollar equivalent of US\$8,333,000 (and a minimum of A\$14 million). On 15 May 2003 PowerTel announced that the relevant agreements had been signed.

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6. The Roslyndale proposal comprised a Share Sale Agreement and a Debt Assignment Agreement. The agreements were conditional on approval by PowerTel's and WilTel's banks and PowerTel's shareholders. Unless those approvals were obtained, the agreements were due to lapse on 31 July 2003, within the 3 months allowed by subsection 609(7).
7. On completion of the Roslyndale Proposal, Roslyndale would have relevant interests in 47.9% of the voting shares in PowerTel prior to conversion of the WilTel debt and 60.6% post conversion. This percentage could be increased as a result of the rights issue, if the other PowerTel shareholders do not take up all of their rights.
8. A general meeting of PowerTel to approve the Roslyndale Proposal (including the purchase of WilTel's equity in PowerTel and the conversion of the debt purchased by Roslyndale from WilTel into equity) under Item 7 of section 611 of the Act was convened for 2 July 2003 (**Item 7 Meeting**).
9. On 3 June 2003 PowerTel lodged with ASX the notice of meeting, explanatory statement and an independent expert's report by PricewaterhouseCoopers (**PWC**) in relation to the Item 7 Meeting.

Roslyndale's Substantial Shareholding Notice

10. On 3 June 2003 Roslyndale lodged an initial substantial shareholder notice disclosing a relevant interest in WilTel's shares under the Share Sale Agreement. Neither the Share Sale Agreement nor the Debt Assignment Agreement was attached to the notice.

The TVG Bid

11. On 10 June TVG announced an intention to launch a takeover bid to acquire a minimum of 47% of the ordinary shares in PowerTel followed by a \$50 million pro rata rights offering of redeemable convertible preference shares underwritten by TVG. The closing date of the bid was announced to be 21 July 2003.
12. In a letter to PowerTel dated 25 June 2003, TVG referred to the 31 July 2003 end date of the Share Sale Agreement and asked PowerTel for immediate clarification on whether WilTel would be free to deal with its shares if the Roslyndale Proposal was rejected.
13. On 25 June 2003 PowerTel announced that it had asked WilTel and Roslyndale what their current intentions would be if the Roslyndale proposal was not approved. WilTel advised that its intention was to make a decision at and not before 31 July 2003 whether to terminate the Assignment Agreement if the conditions were not satisfied or waived prior to that date. Roslyndale had not responded to PowerTel at the time of the announcement.
14. On 16 June TVG served its bidder's statement on PowerTel. On 23 June, TVG sent notice to PowerTel, ASIC and ASX that it had dispatched its offers.

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15. On 23 June PowerTel lodged and served its target's statement recommending that shareholders:

- vote in favour of the Roslyndale proposal; and
- not accept the TVG takeover offer before the Item 7 Meeting.

The reasons for the recommendation included the lower execution and completion risk and the more certain cash funding for the Roslyndale proposal.

The target's statement contained an updated independent expert's report which stated that the expert's opinion continued to be that the Roslyndale proposal was in the best interests of the non-associated shareholders.

16. When TVG lodged a supplementary bidder's statement on 25 June 2003, it waived all defeating conditions other than the conditions requiring:

(a) the following, which can be satisfied by WilTel:

- 47% minimum acceptance, and
- the assignment of the WilTel debt; and
- conversion of existing preference shares (owned by WilTel),

(b) senior banking syndicate approval to restructure the senior debt facility; and

(c) FIRB approval.

17. TVG also announced that the terms of the redeemable converting preference shares it proposed to underwrite would be adjusted to ensure that, if issued, they would be properly classified as equity securities for the purposes of PowerTel's balance sheet.

TVG's Application

18. On 26 June 2003 TVG applied for a declaration that, in relation to the Roslyndale Proposal, each of the following matters constituted unacceptable circumstances:

(a) the failure by PowerTel to describe the terms and conditions of the Assignment Agreement in full; and

(b) the 31 July 2003 end date condition in the Assignment Agreement (to the extent such a condition prevents WilTel from dealing with its PowerTel shares and the WilTel debt subsequent to PowerTel shareholders voting against the Roslyndale Proposal); and

(c) the recommendation of PowerTel directors that shareholders vote in favour of the Roslyndale Proposal (the effect of which will preclude shareholders from having an opportunity to consider the TVG Proposal).

19. TVG requested that the Panel make final orders to the following effect:

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- (a) that the meeting convened for 2 July 2003 be adjourned to enable the supplementary disclosure described below to be made and considered by PowerTel shareholders;
- (b) that a supplementary target's statement be published to the ASX and to the shareholders of PowerTel no later than 5 business days before the adjourned meeting which:
 - (i) includes all details of the Roslyndale Proposal, in a form allowing comparison with the TVG Bid; and
 - (ii) updates the recommendations made in the Target's Statement;
- (c) should shareholders vote against the Roslyndale Proposal, that Roslyndale be restrained after that vote from exercising any right to restrict WilTel's capacity to deal with its securities in PowerTel, under the Share Sale Agreement, the Assignment Agreement or otherwise;
- (d) that PowerTel announce the effect of these orders to ASX and all PowerTel shareholders; and
- (e) such further or other orders as the Panel considers appropriate.

Announcements After the Application

20. On 27 June 2003, Roslyndale:

- (a) lodged a substantial shareholder notice, to which it attached full copies of the Share Sale Agreement and the Debt Assignment Agreement and other documents;
- (b) announced to ASX that none of the conditions to the Share Sale Agreement had been breached to date, and that several conditions had been waived or satisfied; and
- (c) offered to the Panel to undertake to release WilTel from the Share Sale Agreement with effect from 10 July 2003 (this was later changed to 2 July 2003), if the resolution to approve the Agreement was voted on and rejected on 2 July.

21. Roslyndale's solicitors advised the Panel, and we accept, that:

- (a) Roslyndale had not intended the Share Sale Agreement to act as any form of lock-up after the Item 7 Meeting;
- (b) the end date had been set to ensure that negotiations and proceedings were not allowed to be unduly delayed, rather than as a device to affect competition in the market for PowerTel shares in any period after the Item 7 Meeting;

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- (c) the date and the terms of the agreement were not drafted in contemplation of a rival takeover bid being announced which might have been affected by the end date of the Roslyndale Proposal; and
 - (d) at the time the Share Sale Agreement was being drafted, Roslyndale and PowerTel did not know the dates of the TVG bid or that the 31 July date would extend beyond the closing date of the TVG bid.
22. On 27 June PowerTel released a further supplementary target's statement which addressed the most recent changes announced by TVG, affirmed and further explained the directors' recommendation (in light of the TVG changes), and advised that the independent expert also continued to recommend that it was in the best interests of the non-associated shareholders of PowerTel to vote in favour of the Roslyndale Proposal.

Whether Adequate Time

23. TVG asked us to consider whether there was a risk that PowerTel shareholders would be unable in the time available to assimilate the additional information and whether we should commence proceedings in order to consider making an interim order postponing the Item 7 Meeting convened for 2 July. In deciding not to commence proceedings, we considered:
- (a) the remaining time available until the Item 7 Meeting (and the cut-off time for lodging proxies for that meeting);
 - (b) the nature and availability of the information provided to PowerTel shareholders on 27 June, both in the supplementary target's statement and the Roslyndale further substantial shareholding notice (albeit that document contained 192 pages, that many PowerTel shareholders may have been deterred from downloading it by the size, and the fact that individual parts of it were not readily accessible as separate documents);
 - (c) the nature of the additional recommendations provided by the PowerTel directors and the independent expert;
 - (d) the nature, timing and content of information provided to PowerTel shareholders in the period leading up to the application by TVG (information provided by PowerTel, TVG and Roslyndale);
 - (e) the media coverage of the issues recently raised; and
 - (f) further steps open to PowerTel and others over the next few days to advise PowerTel shareholders of the nature and existence of the additional information.
24. On the basis of the further disclosures, the issues set out above, and the submissions of the parties, on balance we considered that there was not a sufficient basis for commencing proceedings or postponing the meeting.

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25. Both PowerTel and Roslyndale provided the supplementary information at a very early stage of the Panel process following TVG's application. The case for a postponement of the meeting may have been stronger if PowerTel and Roslyndale had not released the information as soon as they did.
26. Shareholders frequently must assess and deal with changing circumstances in many types of transactions before voting or deciding whether or not to accept a takeover offer. In the context of takeovers, the legislation provides for supplementary bidder's statements and target's statements as the process for informing shareholders of new information and material changes. The additional information provided prior to the Item 7 Meeting is comparable to the disclosure that may have been provided by a supplementary bidder's statement if the Roslyndale Proposal had been a takeover bid. On that basis, we considered that on balance PowerTel shareholders had received sufficient information and had sufficient time to be able to assess that additional information.
27. We advised PowerTel that it should, nevertheless:
 - (a) ensure that its website contained, as soon as possible, all of the recently disclosed information, in a prominent, and readily and conveniently accessible form, or links to other sites where the information is readily and conveniently accessible by PowerTel shareholders; and
 - (b) arrange prominent newspaper advertisements advising PowerTel shareholders of the existence of the 27 June supplementary target's statement and directing them to the PowerTel website.
28. It would have been desirable for TVG to have made its application more than 6 days before the Item 7 Meeting, although the market had been aware of the existence of the Share Sale Agreement and the Debt Assignment Agreement since their existence was disclosed in the 9 May announcement by PowerTel. Also, the fact of the agreements themselves not being disclosed had been clear from 15 May when PowerTel announced that they had been signed, but did not include them in the announcement and Roslyndale did not include them in its initial substantial shareholding notice on 3 June. TVG advised us that it had been seeking disclosure of the relevant documents from WilTel and PowerTel but had been told that the documents would not be disclosed to TVG because the arrangements were subject to confidentiality obligations.
29. The Share Sale Agreement should have been disclosed by Roslyndale on 3 June with its initial substantial shareholder notice. When Roslyndale lodged the notice, it should have ensured the notice was complete. It was clearly a very material document for the market and PowerTel shareholders. Roslyndale recognised this by its voluntary disclosure on 27 June. It would have been preferable, however if it had been released on 3 June instead.

The Panel's Decision

30. We decided that with the additional disclosures made by both PowerTel and Roslyndale on 27 June 2003, on balance, the shareholders of PowerTel had sufficient information on the Roslyndale Proposal to vote on the resolutions to approve the Roslyndale Proposal.
31. We also considered that the undertaking offered by Roslyndale to accelerate the termination of its Share Sale Agreement with WilTel resolved TVG's issue about that Agreement operating to prevent WilTel from dealing with its shares until after the Item 7 Meeting.
32. Accordingly, after obtaining certain additional information from the parties, on 28 June 2003 we declined to commence proceedings in relation to TVG's application.
33. We consented to the parties being represented by their commercial solicitors.

Future Conditional Share Sale Agreements

34. In order to avoid a recurrence of the tendency of the Share Sale Agreement to impede unnecessarily rival proposals for control of PowerTel, which Roslyndale has resolved in this matter by its undertaking, parties to such conditional share sale agreements should preferably specify the share sale agreement to terminate no later than the end of relevant shareholders' meeting to approve the relevant acquisition, with any necessary adjournment, but subject to the overall limit of 3 months set by subsection 609(7).

Result at shareholder meeting

35. The Roslyndale Proposal was not approved by shareholder at the Item 7 meeting on 2 July 2003.

Alison Lansley
President of the Sitting Panel
Decision dated 30 June 2003
Published 11 September 2003