

## In the matter of Email Limited

An application under section 657E of the Corporations Law by Email limited for Interim orders.

### REASONS FOR DECISION

#### Background

1. These are reasons for the Panel's decision on interim applications made by Email Limited (*Email*) in respect of a takeover bid by Smorgon Distribution Limited (*Smorgon*) for all of the ordinary shares in Email.
2. Email has also applied for final orders on a number of matters, which overlap with the issues raised by the application for interim orders. They relate to whether the bid complies with section 621, the conversion of the CAPS into equity in the Appliance Company and whether the bidder's statement complies with the prospectus provisions. In these reasons they are referred to as the substantive issues. We propose to consider those applications shortly.
3. We have not considered the substantive issues any further than was necessary than to decide whether to make the interim orders.
4. In these reasons, we use a number of terms, as defined in the bidder's statement.

#### Interim Orders Sought

5. Email applied, *inter alia*, for the following interim orders:
  - a. An order under section 194 of the Australian Securities and Investments Commission Act 1989 (Cth) (*ASIC Act*) granting leave to Email to be legally represented in proceedings before the Panel.
  - b. An order under section 192 of the ASIC Act and Rule 7.5 of the Corporations and Securities Panel Draft Rules, for the issue of a number of summonses to produce documents contained in annexure "B" to Email's Application.
  - c. An order under section 659A of the Corporations Law and Rule 9.10 of the Corporations and Securities Panel Draft Rules that the questions of law stated in the Case Stated annexed to Email's Application be referred to a Court for decision before the final hearing of the Application before the Panel. (The questions of law are described below.)
  - d. An interim order under section 657E of the Corporations Law restraining Smorgon from sending the bidder's statement to holders of ordinary shares issued by Email and from acquiring ordinary shares in Email pursuant to the acceptance of offers proposed to be made in accordance with the takeover bid to which the bidder's statement relates pending the final outcome of the Application.
  - e. Such further or other orders or directions as to the conduct of the proceedings relating to the Application as the Panel sees fit.

## **Legal Representation**

6. Email sought legal representation "in relation to the immediate issues, as well as in relation to each of the issues which will arise on a final hearing". Smorgon opposed any order for legal representation.
7. The application for legal representation is refused at this stage, as the Panel did not need to resolve any issues of law to decide the preliminary issues. Questions of law were indeed raised, but it was unnecessary for us to determine those questions in order to decide the interim applications, because of the inclusion of additional information in the bidder's statement.
8. The parties are free to raise the issue of legal representation again in connection with proceedings to resolve the substantive issues.
9. Legal representation will then be permitted, as appropriate, in accordance with draft rule 11. That is, we will consider, on a case by case basis, applications for lawyers other than the commercial solicitors acting for the parties to be permitted to argue a specific point of law or examine a particular witness.

## **Summonses to Produce Documents**

10. Email submitted a number of draft summonses to produce documents, and asked for orders that summonses be issued to Smorgon, its bankers and its advisors. Smorgon opposed issue of the summonses, and indicated that some or all of the documents would be produced voluntarily. There was no need to decide this application at this stage.
11. Email's application compared the use of the summonses to discovery. A summons under section 192 is not comparable to discovery in civil proceedings, the purpose of which is to inform the parties, not the Court. A summons, by contrast, is a means by which the Panel obtains the information it requires to perform its functions.
12. While we understand the application for the issue of the summonses was pressed, there was no submission that the matter needed to be decided at this stage. The Panel will determine what information it requires, and what summonses to issue, if any, when it issues a brief under regulation 20 in relation to the substantive issues.
13. This matter may be raised again, when the Panel has formulated the substantive issues and the parties have had more time to agree on voluntary production of documents.

## **Referral to Court - Section 621**

14. The application to refer the construction of subsection 621(3) to the Court is refused at this stage. We will consider the question again, when we have received full submissions on the construction and application of the section.
15. The question of law proposed by Email is:

*On the assumption that the value of a CAP is as assessed by Hambros [i.e. Smorgon's financial advisor], does the Respondent's [i.e. Smorgon's] offer contravene section 621(3) of the Corporations Law, on its proper construction.*

16. Smorgon opposed referral of any question of law.
17. Despite having been invited to do so, Email's solicitors have not provided details of the argument they would put to the Court on the construction of section 621. Nor have we received submissions from Smorgon's solicitors on the arguments they would put to the Court, were a referral to be made.
18. In the absence of a finding on the value of the CAPS, the facts to which the section must be applied are indeterminate. Further, in the absence of submissions on the relevant law, the legal issues have not been clarified. Accordingly, any referral to the Court would be inappropriate at this stage. The Court would be asked to give a hypothetical advisory opinion on suppositious facts which might differ widely from the facts as eventually found by the Panel.
19. The Panel should not refer a question of law to the Court, if it already knows the answer to that question. If the Panel were to receive and adopt Email's argument on section 621, there would be no issue to put to the Court. If the Panel were to decide that Email's argument was without merit, it would not be justified in holding up the resolution of these proceedings by referring the question to the Court.
20. Whether an order should be made to rectify a contravention of section 621 depends on the Panel's view as to the value of the CAPS. Except in criminal proceedings, it is beside the point what Hambros and even Smorgon think the CAPS are worth. The Panel has made no decision on the value of the CAPS, or even on how they should be valued. Whether the Panel will eventually adopt a point valuation, and the nature of any uncertainty in the value or range of values it adopts, are entirely unknown.
21. In any case, the Panel may determine questions of law for itself, as Email acknowledged, though subject to the risk that its decision will be vitiated by an error of law.
22. The Panel is mindful of its mandate to be 'the main forum for resolving disputes about a takeover bid until the bid period has ended' (Corporations Law section 659AA) and of the policy that disputes be decided 'as quickly and efficiently as possible by a specialist body largely comprised of takeover experts' (paragraph 7.16 of the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998). For the Panel to refer any and all legal issues arising in a matter to the Court would defeat this mandate and policy.
23. Our preliminary view is that the Panel should consider the questions of law itself, and should do so in relation to the determination of the substantive issues. The parties have not addressed these issues fully to date, and we have not had a chance to do so. We believe that it is in the interests of the parties, shareholders in Email and the public, and consonant with the aims of the legislation, to decline to refer these issues to the Court at this stage. By doing so, we expect to expedite the consideration of these questions.

## **Referral to Court - Conversion of CAPS**

24. The other issue which Email asked to be referred to the Court was the efficacy of the mechanism proposed by Smorgon for the conversion of the CAPS into shares in the Appliance Company, if Smorgon is unable to compulsorily acquire the ordinary and preference shares. Briefly, Smorgon proposes to distribute shares in the Appliance Company to dissenting offerees by reduction of Email's capital, and there is room for doubt that a reduction alone enables the shares to be transferred to dissenting offerees.
25. Email did not submit, and it was not argued, that no effective mechanism existed, by which shares in the Appliance Company could be distributed. Similar transactions have repeatedly been carried out by scheme of arrangement coupled with a reduction of capital, and no reason was suggested why Smorgon could not distribute the CAPS and convert them into Appliance Company shares by scheme, or why the difference between this mechanism and the one proposed by Smorgon would matter to offerees. Absent any argument to this effect, the question had no material connection with the ability of Smorgon to complete a transaction similar in commercial substance to the one described in the bidder's statement.
26. The Panel will need to consider further whether to order Smorgon to mention to offerees in a supplementary bidder's statement that a scheme of arrangement may be required, as well as a reduction of capital. We do not expect that offerees will be seriously misled in their appraisal of the bid by a delay in receiving this information. That risk is too remote to justify holding up the bid.

## **Order restraining Dispatch**

27. Email sought interim and final orders restraining dispatch of Smorgon's offers and bidder's statement to Email shareholders. This application was founded principally on the illegality of the offers, if they do not comply with subsection 621(3), and on deficiencies in the disclosures in the bidder's statement, concerning the CAPS.

## *Compliance with Subsection 621(3)*

28. We will consider in the near future whether the offers comply with subsection 621(3). Email raised with us the possibility that the Panel would order Smorgon to increase its bid price, but that Smorgon would be unable to do so, and also to unwind any bid contracts which had become unconditional.
29. We have been offered, and have accepted, an undertaking that Smorgon Distribution will not declare its offers unconditional until:
  - a. the close of business on 7 June; or
  - b. the Panel disposes of the subsection 621(3) issue and Smorgon complies with any orders applicable to it,

whichever is the sooner.

30. In our view, this undertaking will ensure that the bid can be unwound, if need be, until we have had an opportunity to examine the subsection 621(3) issue and make any necessary interim or final orders. Accordingly, unacceptable circumstances will not result from the posting of the offers while this issue remains open.

#### *Disclosure in the Bidder's Statement*

31. When we first considered the bidder's statement, we directed the Panel executive to raise in a brief the issue whether the disclosure concerning the CAPS was sufficient, in particular whether the rights attached to the CAPS were sufficiently disclosed, and whether the statement complied with the prospectus standard.
32. In their response to that brief, Smorgon's solicitors provided a redraft of the terms of the bid concerning the CAPS and additional disclosure concerning the commercial significance of those rights and of their limitations. In their response, Smorgons' financial advisors provided additional information to support their valuation of the CAPS, using a methodology appropriate to quasi-debt securities (i.e. if they are neither converted into shares in the Appliance Company nor redeemed). Smorgon's solicitors offered, and we have accepted, undertakings to include those amendments in the document when posted.
33. In our view, the amended bidder's statement is fit to be dispatched. Additional information and clarifications may be necessary. Some of these will be appropriately made in the target's statement, and others we may require to be made by supplementary bidder's statement, when we have considered the substantive issues. However, the possible need for these additions and clarifications does not give rise to unacceptable circumstances.
34. In particular, the change in the terms of the CAPS largely deals with the issue over the optionality of the CAPS and the additional information in the Hambros report will allow holders and their advisors to assess the merits of the CAPS, using a methodology appropriate to continuing quasi-debt securities. In our view, the risk disclosure section of the bidder's statement should emphasise that the CAPS may continue as quasi-debt securities, if it is impracticable to convert them into equity in the Appliance Company and if the Appliance business is not sold.

#### *Final*

35. It should be emphasised that the substantive issues remain to be resolved, and that to date we have only considered them to the extent necessary to decide whether to make the interim orders. However, allowing offers to be posted while the substantive issues are open will not give rise to unacceptable circumstances, since those issues can be resolved before the offers become unconditional.
36. We have noted at several points that parties have not made submissions we would require to decide a number of these issues. In their own interests and those of shareholders in Email, we urge them to make those submissions as soon as they can.